

MICHIGAN APPEALS REPORTS

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CASES DECIDED

IN THE

MICHIGAN  
COURT OF APPEALS

FROM

March 3, 2022 through June 2, 2022

KATHRYN L. LOOMIS  
REPORTER OF DECISIONS

**VOLUME 341**

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2024

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CHIEF CLERK: JEROME W. ZIMMER, JR.  
RESEARCH DIRECTOR: JULIE ISOLA RUECKE

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<sup>1</sup> To March 31, 2022.

<sup>2</sup> From February 28, 2022.

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JUDGE

SIMA G. PATEL



The Honorable Judge Patel was appointed to the Michigan Court of Appeals in 2022.

Before joining the bench, she was an appellate attorney in private practice for more than 11 years, representing clients in complex litigation before the Michigan Supreme Court, the Michigan Court of Appeals, and the United States Court of Appeals for the Sixth Circuit.

Judge Patel began her legal career as a law clerk in the Michigan Supreme Court, serving three terms for Justice Elizabeth A. Weaver and three for Justice Diane Hathaway. Judge Patel was recognized as a 2021 Michigan Lawyers Weekly Leader in the Law. She won the Western Michigan University Thomas M. Cooley Law Review Distinguished Brief Award for writing one of the top scholarly appellate briefs submitted to the Michigan Supreme Court in 2020.

Judge Patel is a contributing author for the Institute for Continuing Legal Education publication *Torts: Michigan Law and Practice*. She received a bachelor's degree from the University of Colorado and a law degree from Thomas M. Cooley Law School.

JUDGE

NOAH P. HOOD



Judge Noah P. Hood was appointed by Governor Gretchen Whitmer in March 2022 and was elected to retain his position in November 2022.

Prior to Judge Hood's appointment to the Court of Appeals, he served on the Third Judicial Circuit of Michigan (commonly known as "Wayne County Circuit Court"). From 2019 to 2022, Judge Hood presided over a trial docket in the Criminal Division. From 2021 to 2022, Judge Hood also presided over the Veterans Treatment Court, a specialty court docket that supervised high-need probationers that previously served in uniform. Previously, he presided over the Swift and Sure Sanctions Probation Program, a specialty court docket that supervised high-risk probationers.

Previously, Judge Hood worked as an Assistant United States Attorney. As an AUSA in the Eastern District of Michigan, he prosecuted fraud and opioid-related offenses involving medical professionals. Previously, as an AUSA in the Northern District of Ohio, he specialized in prosecuting fraud, money laundering, public corruption, and so-called white-collar crime. In May 2018, he received the U.S. Treasury Department



FinCEN Director's Law Enforcement Award for effective use of Bank Secrecy Act data in safeguarding the financial system. In December 2018, he received a certificate of appreciation from the United States Secret Service Director for his superior efforts and contributions to the Secret Service's law enforcement responsibilities. He has also been recognized by the Health and Human Services-Office of Inspector General and U.S. Customs and Border Protection.

Prior to his federal service, Judge Hood was a litigation associate at Miller, Canfield, Paddock and Stone. During that time, Michigan Community Legal Resources recognized him for his pro bono work on nuisance abatement in Detroit.

He is a proud graduate of Cass Technical High School, Yale College, and Harvard Law School. He currently serves on the Plymouth United Church of Christ Board of Deacons, the Yale Club of Michigan Board of Directors, and the advisory board for Focus: HOPE's Generation of Promise, a program devoted to bridging the city/suburban divide for high school students in Metro Detroit. He is a member of the Wolverine Bar Association, Detroit Bar Association, and Association of Black Judges of Michigan.

Judge Hood is a native Detroiter. He, his wife, and their son live in Detroit.

## JUDGE

### KRISTINA ROBINSON GARRETT



Judge Kristina Robinson Garrett was appointed to the Michigan Court of Appeals in February 2022 and elected to a full term in November 2022.

Prior to Judge Garrett's appointment to the Court of Appeals, she served as a Judge of the 36th District Court in Detroit, where she presided over traffic and misdemeanor criminal cases, as well as a variety of specialty courts aimed at helping veterans, the homeless, and individuals struggling with mental health and substance abuse issues. Prior to her appointment to the 36th District Court, she served as General Counsel to the Wayne County Sheriff's Office, where she advised the office on a myriad of legal matters and helped protect the rights of employees, inmates, and the public.

Judge Garrett is deeply committed to public service and access to justice. She currently serves on the Commission on Diversity, Equity, and Inclusion in the Michigan Judiciary and is an active member of the Michigan Judges Association, Association of Black Judges of Michigan, Women Lawyers Association of Michigan (Wayne Region), Black Women Lawyers Association of Michigan, D. Augustus Straker Bar

Association, Wolverine Bar Association, Detroit Bar Association, State Bar of Michigan (Representative Assembly & Diversity and Inclusion Advisory Committee), National Bar Association, and American Bar Association. In addition, she is an active member of Delta Sigma Theta Sorority, Inc. (Detroit Alumnae Chapter), and she serves on the Board of Directors of Forgotten Harvest (an organization dedicated to relieving hunger and preventing nutritious food waste). Most recently, she served as the Michigan District Judges Association appointed commissioner on the Michigan Indigent Defense Commission, a member of the Judicial Education Board, and is a graduate of the Detroit Regional Chamber Leadership Detroit Class XL.

She is a proud graduate of the University of Michigan and the University of Detroit Mercy School of Law, where she served as Vice-President of the Association of Black Law Alumni and chaired the Mentoring Committee.

Judge Garrett and her husband, Judge Austin W. Garrett, live in Detroit. Term expires January 1, 2029.

JUDGE

CHRISTOPHER P. YATES



Judge Christopher P. Yates joined the Michigan Court of Appeals on April 18, 2022, after serving for 14 years as a trial judge on the Kent County Circuit Court in Grand Rapids.

Judge Yates received a BA from Kalamazoo College in 1983, and a JD and MBA from the University of Illinois in 1987.

As an attorney, Judge Yates served as a law clerk to Chief Judge James P. Churchill of the U.S. District Court for the Eastern District of Michigan and to Judge Ralph B. Guy, Jr., of the U.S. Court of Appeals for the Sixth Circuit. Judge Yates also has worked as a federal prosecutor in Detroit, as an attorney-advisor in the Office of Legal Counsel at the U.S. Department of Justice in Washington, D.C., as Chief Federal Public Defender for the Western District of Michigan, and as a partner in two private law firms in Grand Rapids.

Judge Yates is a past president of the Michigan Judges Association, the Grand Rapids Bar Association, and the Gerald Ford American Inns of Court chapter. He is the 2019 recipient of the Hilda Gage Judicial Excellence Award from the Michigan Judges Associa-

tion, the 2020 recipient of the Judicial Excellence Award from the Michigan Defense Trial Counsel, the 2022 recipient of the Judicial Lifetime Achievement Award from the American Board of Trial Advocates, a member of the Michigan Supreme Court Committee on Model Civil Jury Instructions, and a four-time inductee into the Kalamazoo College Athletic Hall of Fame as a tennis player.



## COURT OF APPEALS CASES





## JOHNSON v MICHIGAN MINORITY PURCHASING COUNCIL

Docket No. 357979. Submitted February 8, 2022, at Detroit. Decided March 3, 2022, at 9:00 a.m.

Vincent Johnson; Piston Group, LLC; Piston Automotive, LLC; Detroit Thermal Systems, LLC; Irvin Automotive Products LLC; and AIREA, Inc., filed a complaint in the Wayne Circuit Court against Michigan Minority Purchasing Council, doing business as Michigan Minority Supplier Development Council (MMSDC), and Michelle Robinson, the president and Chief Executive Officer (CEO) of MMSDC, alleging tortious interference with a business relationship, negligence, and defamation and seeking declaratory relief. Piston Automotive, Detroit Thermal Systems, Irvin Automotive, and AIREA (collectively, the Piston Companies) were subsidiaries of the Piston Group, of which Johnson was the sole owner and CEO. Each of the Piston Companies had been certified as a minority business enterprise (MBE) by the MMSDC, but in 2020, the MMSDC reviewed the Piston Companies' eligibility for continued MBE certification and determined that, although the Piston Companies were owned and controlled by Johnson, who was a minority-group member, none of the companies was managed on a day-to-day basis by one or more minority-group members. Plaintiffs filed an appeal with the MMSDC appeals committee, which was denied. Plaintiffs then filed their complaint in the circuit court and moved for a preliminary injunction. The court, David A. Groner, J., granted plaintiffs' motion for an injunction. The MMSDC appealed.

The Court of Appeals *held*:

1. Defendants argued that plaintiffs could not prevail on the merits of their claims because Johnson had signed a release of liability as part of his applications with the MMSDC for MBE certification. When determining whether to grant a preliminary injunction, the trial court should consider (1) the likelihood that the party seeking the injunction will prevail on the merits, (2) the danger that the party seeking the injunction will suffer irreparable harm if the injunction is not issued, (3) the risk that the party seeking the injunction would be harmed more by the absence of an injunction than the opposing party would be by the

granting of relief, and (4) the harm to the public interest if the injunction is issued. The circuit court ruled that the provisions did not constitute releases of liability but instead imposed indemnification obligations on the applicant if the MMSDC were to face liability to third parties arising out of the certification of the application. However, this reading rendered nugatory or surplusage the parts of the provision providing that the applicant agreed to hold the MMSDC harmless from any claims arising out of the presentation of the applications. That is, under the plain and ordinary meaning of the provision, plaintiffs agreed not only to absolve the MMSDC from any responsibility for liability arising from the presentation of the applications and certification of the information but also to indemnify the MMSDC for third-party liability arising out of that same conduct. This hold-harmless provision could have greatly inhibited plaintiffs' chances of establishing a substantial likelihood of success on the merits of their claims. Nevertheless, much deference is given to a circuit court's decision to grant or deny a preliminary injunction, and the circuit court in this case did not abuse its discretion in its analysis of this issue.

2. Plaintiffs claimed that defendants tortiously interfered with their business relationships by rescinding the Piston Companies' MBE certifications. The elements of this claim are: (1) the existence of a valid business relationship or expectancy, (2) knowledge of the relationship or expectancy by the defendant interferer, (3) an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and (4) resulting damage to the party whose relationship or expectancy was disrupted. With regard to the first and second elements, the evidence supported that plaintiffs had business relationships or expectancies that were impacted by the MBE-certification status of the Piston Companies and that defendants had knowledge of this fact. To establish the third element, the plaintiff must establish that the defendant acted intentionally and without justification and that the defendant did something illegal, unethical, or fraudulent. Although the evidence here was equivocal as to whether defendants acted with the intent to cause a breach or termination of plaintiffs' business relationships or expectancies, the limited record did not reveal that defendants' actions were illegal, unethical, or fraudulent. Because the evidence did not establish the third element, plaintiffs were unlikely to succeed on the merits of their claim of tortious interference with a business relationship.

3. To establish a prima facie case of negligence, a plaintiff must show: (1) the defendant owed the plaintiff a legal duty, (2) the defendant breached the legal duty, (3) the plaintiff suffered damages, and (4) the defendant's breach was a proximate cause of the plaintiff's damages. Defendants owed plaintiffs a duty to exercise due care in determining whether the Piston Companies qualified for MBE certification. The evidence suggested that defendants likely did not breach this duty. The record established that Johnson met with Robinson to discuss his role with the Piston Companies and why the departure of a minority-group member who had served as an executive with the Piston Group should not affect the MBE-certification status of the Piston Companies. The record further established that the MMSDC nevertheless concluded that the Piston Companies were not managed on a day-to-day basis by minority-group members and that their certifications should be rescinded. On the basis of this evidence, the MMSDC did not apparently breach its duty of care to plaintiffs, so plaintiffs were unlikely to succeed on the merits of their negligence claim.

4. Plaintiffs asserted that the rescission of the Piston Companies' MBE certifications and their removal from the online database of the MMSDC's national body constituted defamation. In order to establish a defamation claim, a plaintiff must prove (1) that a false and defamatory statement was made concerning the plaintiff, (2) that an unprivileged communication was made to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) actionability of the statement irrespective of special harm or the existence of special harm caused by publication. A qualified privilege, including that the publisher acted in good faith, the publisher had an interest to uphold, the statement was limited in scope to that purpose, and the statement was made on a proper occasion in a proper manner to proper parties, can be a defense to a defamation action. The limited record in this case established that any communications were made in good faith and in furtherance of the MMSDC's mission to facilitate and advance business opportunities for certified MBEs with corporate members. The record further showed that the communications were made to inform corporate members of the MBE statuses of the Piston Companies and that they were made after the certification and appellate processes were complete. Even if, following the completion of litigation, the MMSDC was determined to be incorrect, plaintiffs would have to prove that the MMSDC did not act in good faith, and on the basis of the limited record, plaintiffs did not have a substantial likelihood of success with respect to this issue.

5. Plaintiffs sought a declaratory judgment that the Piston Companies each qualified for MBE certification. The circuit court concluded that a preliminary injunction was necessary to preserve the status quo on the basis that there was reason in the record to doubt defendants' explanation as to why they rescinded plaintiffs' MBE certifications and because of the potential damage to the Piston Companies' bottom line and corporate goodwill. A party must make a particularized showing of irreparable harm in order to obtain a preliminary injunction, and loss of goodwill can constitute irreparable harm. Plaintiffs submitted evidence that supported the conclusion that they could suffer loss of goodwill in the absence of an injunction. Additionally, there was evidence to support that there was at least a risk that plaintiffs would suffer harm if no injunction were issued. By comparison, there was relatively minor harm to the MMSDC in issuing an injunction, and plaintiffs had agreed to indemnify the MMSDC for third-party liability arising out of the certification of information in the applications for MBE certification. Finally, there was no indication that a preliminary injunction against the MMSDC, a private entity, would significantly harm the public interest.

Affirmed.

SHAPIRO, J., concurring, agreed with the majority's result but disagreed with its reading of the indemnity clause. Rather, he agreed with the trial court's interpretation that the provision imposed clear indemnification obligations on the applicant in the event that the MMSDC faced liability to third parties arising out of the certification of the application, but it did not undermine plaintiffs' likelihood of success on the merits. Accordingly, Judge SHAPIRO would have held that the provision was not a bar to plaintiffs' claims.

*Zausmer, PC* (by *Mark J. Zausmer, Cinnamon A. Plonka*, and *Amanda P. Waske*) for Vincent Johnson; Piston Group, LLC; Piston Automotive, LLC; Detroit Thermal Systems, LLC; Irvin Automotive Products LLC; and AIREA, Inc.

*Honigman LLP* (by *Robert M. Riley, Khalilah V. Spencer, Raechel T. X. Conyers*, and *Benjamin J. VanderWerp*) for Michigan Minority Purchasing Council.

Before: RICK, P.J., and MURRAY and SHAPIRO, JJ.

MURRAY, J. Defendant, the Michigan Minority Purchasing Council, doing business as the Michigan Minority Supplier Development Council (MMSDC), appeals by leave granted<sup>1</sup> the circuit court's July 8, 2021 order granting the motion for a preliminary injunction filed by plaintiffs, Piston Automotive, LLC; Detroit Thermal Systems, LLC; Irvin Automotive Products LLC; and AIREA, Inc. (collectively, the Piston Companies); Piston Group, LLC; and Vincent Johnson. Because of the great discretion afforded the circuit court on these equity-based decisions and our concomitant circumscribed standard of review, we affirm.

#### I. FACTUAL BACKGROUND

Johnson, a black male, is the sole owner of the Piston Group and its Chief Executive Officer and Chairman of the Board of Directors. The Piston Companies are subsidiaries of the Piston Group. Johnson owns and controls 100% of the Piston Group, Piston Automotive, Irvin Automotive, and AIREA. Johnson has a 51% ownership and controlling interest in Detroit Thermal Systems.

The MMSDC is a regional affiliate of the National Minority Supplier Development Council (NMSDC), which is a nonprofit corporate membership organization that facilitates business dealings between minority business enterprises (MBEs) and a network of corporate members. Michelle Robinson is the MMSDC's president and Chief Executive Officer. MBE certification is the process by which a business is

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<sup>1</sup> *Johnson v Mich Minority Purchasing Council*, unpublished order of the Court of Appeals, entered September 29, 2021 (Docket No. 357979).

verified as being minority-owned, managed, and controlled according to the criteria set forth by the NMSDC. In order to receive or maintain MBE certification, the NMSDC requires that an entity must be a for-profit business located in the United States that is at least 51% owned, controlled, and managed on a day-to-day basis by minority-group members.

Each of the Piston Companies have for years been certified as MBEs by the MMSDC.<sup>2</sup> The Piston Group has never sought MBE certification. Until 2020, the MMSDC certified each of the renewal applications submitted on behalf of the Piston Companies. As part of the applications, Johnson executed affidavits attesting that each of the Piston Companies were “at least fifty-one percent (51%) owned by one or more minority individuals . . . and such individuals control, operate and manage the company.” Each of the affidavits contained the following provision:

The undersigned hereby agrees (agree) to hold [the MMSDC] free and harmless from any and all claims, demands, and damages whatsoever arising out of the presentation of this application and agrees to indemnify and hold [the MMSDC] harmless for any and all liability in connection with the certification of the information contained in this application.

In December 2019 and January 2020, the MMSDC was informed that Amit Singhi, the Asian-American Chief Organizational Officer and Chief Financial Officer of the Piston Group, would soon be leaving the company. In February 2020, Robinson requested a meeting with Singhi and Johnson to discuss the organizational structures of the Piston Companies. Before any meetings were held, the Piston Group announced

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<sup>2</sup> Piston Automotive was first certified as an MBE in 1995, AIREA in 2001, Detroit Thermal Systems in 2013, and Irvin Automotive in 2017.

that Gordon Fournier, a white male, had been named as its COO and CFO. Following multiple delays, in March 2020, Robinson and Johnson met to discuss the organizational structures of the Piston Companies. After the meeting, the MMSDC reviewed the Piston Companies' eligibility for continued MBE certification, and in May of that same year, the MMSDC determined that Irvin Automotive and AIREA did not qualify for MBE certification because they were not managed on a day-to-day basis by one or more minority-group members. The MMSDC also concluded that Piston Automotive and Detroit Thermal Systems qualified for MBE certification.

Six months later, Clarence Oliver, the head of certification and MBE services for the MMSDC, advised Johnson that the MMSDC would conduct an audit and recertification process for the Piston Companies. Then, in January 2021, the MMSDC informed Johnson that, although the Piston Companies were owned and controlled by a minority-group member, none of the companies were managed on a day-to-day basis by one or more minority-group members. The Piston Companies filed an appeal with the MMSDC appeals committee, and the appeals committee upheld the MMSDC's decision.

Plaintiffs then filed a complaint alleging tortious interference with a business relationship, negligence, declaratory relief, and defamation. Plaintiffs also sought a preliminary injunction reinstating each of the Piston Companies' MBE certifications and overruling the MMSDC's decertification decision pending the outcome of the case. Following a hearing, the circuit court

issued a written opinion and entered an order granting plaintiffs’ motion for a preliminary injunction. This appeal followed.<sup>3</sup>

## II. ANALYSIS

The MMSDC argument that the circuit court abused its discretion when it granted plaintiffs’ motion for a preliminary injunction attacks the court’s opinion on all fronts. Specifically, it challenges both the court’s legal conclusions and perceived legal omissions within the opinion, as well as the circuit court’s analysis of the relevant factors and its ultimate conclusion.

### A. STANDARDS OF REVIEW

“[A] trial court’s decision to grant injunctive relief is reviewed for an abuse of discretion.” *Dep’t of Environmental Quality v Gomez*, 318 Mich App 1, 32; 896 NW2d 39 (2016). “An abuse of discretion occurs when the court’s decision falls outside the range of reasonable and principled outcomes.” *Id.* at 33-34 (quotation marks and citation omitted). This Court reviews a trial court’s interpretation and application of a contract de novo. *Yoches v Dearborn*, 320 Mich App 461, 479; 904 NW2d 887 (2017).

### B. PRELIMINARY INJUNCTION

“[I]njunctive 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.” *Davis v Detroit Fin Review Team*, 296 Mich App 568, 613-614; 821 NW2d

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<sup>3</sup> We expedited the appeal. *Johnson v Mich Minority Purchasing Council*, unpublished order of the Court of Appeals, entered November 2, 2021 (Docket No. 357979).



896 (2012) (quotation marks and citation omitted). “The purpose of a preliminary injunction is to preserve the status quo pending a final hearing regarding the parties’ rights.” *Hammel v Speaker of House of Representatives*, 297 Mich App 641, 647; 825 NW2d 616 (2012) (quotation marks and citation omitted). The moving party has the burden of demonstrating that a preliminary injunction should be issued. MCR 3.310(A)(4); *Hammel*, 297 Mich App at 648. When determining whether to grant a preliminary injunction, the trial court should consider:

(1) the likelihood that the party seeking the injunction will prevail on the merits, (2) the danger that the party seeking the injunction will suffer irreparable harm if the injunction is not issued, (3) the risk that the party seeking the injunction would be harmed more by the absence of an injunction than the opposing party would be by the granting of the relief, and (4) the harm to the public interest if the injunction is issued. [*Id.* (quotation marks and citation omitted).]

“[A] preliminary injunction should not issue where an adequate legal remedy is available.” *Pontiac Fire Fighters Union Local 376 v Pontiac*, 482 Mich 1, 9; 753 NW2d 595 (2008). “The mere apprehension of future injury or damage cannot be the basis for injunctive relief.” *Id.*

#### 1. LIKELIHOOD OF SUCCESS ON THE MERITS

Before turning to an analysis of plaintiffs’ likelihood of success on the merits of their separate claims, we will first address the over-arching argument that plaintiffs cannot prevail—or at least are not likely to succeed on the merits—because plaintiffs signed a release with each application for MBE certification.

## a. RELEASE

The parties dispute whether plaintiffs' claims would be barred by the provision in the certified-minority-status affidavits executed by Johnson as part of the applications for MBE certification. The trial court determined that the provision did not constitute a release of liability but instead "impose[d] clear and unequivocal indemnification obligations on the applicant in the event that [d]efendants face liability to third-parties arising out of the certification of the application."

It is well settled that a cause of action may be barred under MCR 2.116(C)(7) where a valid release of liability exists between the parties. *Xu v Gay*, 257 Mich App 263, 266; 668 NW2d 166 (2003). "A release of liability is valid if it is fairly and knowingly made." *Wyrembelski v St. Clair Shores*, 218 Mich App 125, 127; 553 NW2d 651 (1996) (quotation marks and citation omitted). "The validity of a release turns on the intent of the parties." *Batshon v Mar-Que Gen Contractors, Inc*, 463 Mich 646, 649 n 4; 624 NW2d 903 (2001) (quotation marks and citation omitted). "If the text of the release is unambiguous, the parties' intentions must be ascertained from the plain, ordinary meaning of the language of the release," *Collucci v Eklund*, 240 Mich App 654, 658; 613 NW2d 402 (2000), with that plain language being enforced by the court, *Bayberry Group, Inc v Crystal Beach Condo Ass'n*, 334 Mich App 385, 393; 964 NW2d 846 (2020). We also must be careful to avoid "interpretations that would render any part of the document surplusage or nugatory." *Id.* (quotation marks and citation omitted).

We conclude that the circuit court read the provision too narrowly, and was not in accord with the plain language of the document. Specifically, the circuit court's interpretation limited the language to provide only an indemnity provision, which renders surplusage or nugatory the provisions providing that the applicant agreed "to hold [the MMSDC] free and harmless from any and all claims, demands, and damages whatsoever arising out of the presentation" of the applications. This agreement to hold MMSDC "free and harmless from any and all claims" is separate and apart from the agreement to "indemnify and hold [the MMSDC] harmless for any and all liability in connection with the certification of the information contained in" the applications. *Black's Law Dictionary* (11th ed) defines the term "hold harmless" as "[t]o absolve (another party) from any responsibility for damage or other liability arising from the transaction" and defines "indemnify" as to "reimburse (another) for a loss suffered because of a third party's or one's own act or default"; to "promise to reimburse (another) for such a loss"; or to "give (another) security against such a loss."

Thus, under the plain and ordinary meaning of the provisions, plaintiffs not only agreed to absolve the MMSDC from any and all responsibility for damage or other liability arising from the presentation of the applications and certification of the information, but also agreed to indemnify the MMSDC for third-party liability arising out of that same conduct. As such, the circuit court erred when it determined that the provision was limited to an indemnity clause, as the provision also contained unambiguous language providing that plaintiffs would hold defendants "free and harmless from any and all claims" associated with the applications. See *Yoches*, 320 Mich App at 479 ("A hold-harmless agreement is an indemnity contract,

which is, in essence, a release of liability.”); *Hecht v Nat’l Heritage Academies, Inc.*, 499 Mich 586, 627 n 88; 886 NW2d 135 (2016) (citing the *Black’s Law Dictionary* definition of “hold harmless” and recognizing that a hold-harmless provision could arguably preclude a plaintiff from any recovery against a defendant); *Hall v Small*, 267 Mich App 330, 332-333; 705 NW2d 741 (2005) (treating a hold-harmless provision in a real estate contract as a release). Although we come to no definitive conclusion as to the coverage of the agreement, the hold-harmless provision could greatly inhibit plaintiffs’ chances of establishing a substantial likelihood of success on the merits of their claims. Nevertheless, we turn to a brief examination of plaintiffs’ specific claims.<sup>4</sup>

b. TORTIOUS INTERFERENCE

In their complaint, plaintiffs first alleged that the MMSDC and Robinson tortiously interfered with plaintiffs’ business relationships by rescinding the Piston Companies’ MBE certifications.

The elements of tortious interference with a business relationship or expectancy are (1) the existence of a valid business relationship or expectancy that is not necessarily

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<sup>4</sup> A trial court is required to examine and evaluate four criteria before deciding whether to grant preliminary injunctive relief. *Thermatool Corp v Borzym*, 227 Mich App 366, 376; 575 NW2d 334 (1998) (indicating that the court “must” address the four injunction factors). The circuit court’s opinion did not address, for purposes of the likelihood-of-success factor, any of plaintiffs’ separate claims, but instead solely focused on the effect of the hold-harmless provision. The court should have also analyzed the likelihood of success on each of the claims, and the failure to have done so could, in some cases, result in an abuse of discretion. See *id.*; see also *Int’l Molders’ and Allied Workers’ Local Union No. 164 v Nelson*, 799 F2d 547, 550-551 (CA 9, 1986) (stating that a court abuses its discretion in issuing a preliminary injunction when it fails to consider the relevant factors).

predicated on an enforceable contract, (2) knowledge of the relationship or expectancy on the part of the defendant interferer, (3) an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and (4) resulting damage to the party whose relationship or expectancy was disrupted. [*Health Call of Detroit v Atrium Home & Health Care Servs, Inc.*, 268 Mich App 83, 90; 706 NW2d 843 (2005).]

“[T]o satisfy the third element, the plaintiff must establish that the defendant acted both intentionally and either improperly or without justification.” *Puetz v Spectrum Health Hosps*, 324 Mich App 51, 78; 919 NW2d 439 (2018) (quotation marks and citation omitted). The plaintiff must also establish that “the interferer did something illegal, unethical or fraudulent.” *Dalley v Dykema Gossett, PLLC*, 287 Mich App 296, 324; 788 NW2d 679 (2010) (quotation marks and citation omitted).

As noted, the circuit court failed to address the elements of plaintiffs’ tortious interference with a business relationship claim. In regard to the first element, the evidence indicated that plaintiffs had valid business relationships or expectancies that were impacted by the Piston Companies’ MBE statuses. Johnson attested that MBE certification and inclusion on the NMSDC’s corporate database allowed the Piston Companies to shift their business base to become less dependent on original equipment manufacturers (OEMs). Johnson also attested that Ford Motor Company and Stellantis Corporation account for 75% of the Piston Companies’ sales portfolio, and both companies advertise their commitment to utilizing diverse suppliers. Most notably, Johnson attested that the Piston Companies are in the process of renewing their contracts with Stellantis, which are contingent on MBE certification.

In regard to the second element, the evidence indicated that defendants had knowledge of the business relationships or expectancies that were impacted by the Piston Companies' MBE statuses. The MMSDC's stated mission is to advance business opportunities for certified MBEs and connect them to corporate members. Additionally, in April 2020, Robinson told Johnson in an e-mail that "[n]o one has an absolute right to certification as our board and your customers recently confirmed and unanimously supported." Robinson's statement regarding defendants' customers indicates that defendants had knowledge of the business relationships or expectancies that could be impacted by the Piston Companies' MBE statuses.

The evidence is equivocal as to whether defendants acted with the intent to cause a breach or termination of plaintiffs' business relationships or expectancies, but nothing in the limited record indicates that defendants did something illegal, unethical, or fraudulent. The MMSDC rescinded the Piston Companies' MBE certifications after Singhi, the Piston Group's COO and CFO, was replaced by Fournier, a white male. The MMSDC's certification letter provided that the Piston Companies' applications for certification listed Fournier as an officer of AIREA, Piston Automotive, and Irvin Automotive, although the organizational charts for each entity omitted Fournier. The MMSDC's certification letter also provided that three of the four officers for AIREA were nonminorities, three of the four officers for Piston Automotive were nonminorities, two of the four officers for Irvin Automotive were nonminorities, and the president and COO of Detroit Thermal Systems was a nonminority.

Although plaintiffs disagree with the MMSDC's termination regarding the day-to-day management of

the Piston Companies, even if the determination was incorrect, the evidence does not indicate that defendants acted with the intent to cause a breach or termination of plaintiffs' business relationships or expectancies, and nothing indicates that defendants did something illegal, unethical, or fraudulent. Johnson stated in his affidavit that the MMSDC actually decertified the Piston Companies because the Piston Group declined to contribute funds to the MMSDC in 2018, declined to participate in the MMSDC golf outing in 2019, and declined to pre-pay for a sponsorship of the MMSDC's 2020 gala. However, the documentary evidence indicates that a change in personnel prompted the decertification. Because the evidence does not indicate one way or the other that defendants acted with the intent to cause a breach or termination of plaintiffs' business relationships or expectancies, and nothing indicates that defendants did something illegal, unethical, or fraudulent, plaintiffs are unlikely to succeed on the merits of their tortious interference with a business relationship claim.

c. NEGLIGENCE

The circuit court also failed to address the elements of plaintiffs' negligence claim. To establish a prima facie case of negligence, a plaintiff must satisfy the following elements: "(1) the defendant owed the plaintiff a legal duty, (2) the defendant breached the legal duty, (3) the plaintiff suffered damages, and (4) the defendant's breach was a proximate cause of the plaintiff's damages." *Powell-Murphy v Revitalizing Auto Communities Environmental Response Trust*, 333 Mich App 234, 243; 964 NW2d 50 (2020) (citation omitted). "The common law imposes on every person engaged in the prosecution of any undertaking an obligation to use

due care, or to so govern his actions as not to unreasonably endanger the person or property of others.” *Id.* at 243-244 (quotation marks and citation omitted).

Here, defendants owed plaintiffs a duty to exercise due care in determining whether the Piston Companies qualified for MBE certification.<sup>5</sup> The evidence in the current record suggests that defendants likely did not breach this duty. In his affidavit, Johnson attested that he met with Robinson in April 2020 in order to address the Piston Companies’ MBE certifications. According to Johnson, he explained to Robinson that he made all major decisions for the Piston Group and the Piston Companies and that Singhi was not an executive officer for any of the Piston Companies, such that Singhi’s departure should not have affected the Piston Companies’ MBE-certification status. Notwithstanding this evidence, the MMSDC’s certification letter indicates that the MMSDC reviewed the Piston Companies’ applications for certification and determined that the Piston Companies were not managed on a day-to-day basis by minority-group members. The certification letter provided that the MMSDC reviewed the Piston Companies’ organizational structures, ownership and tax return documentation, board and shareholder documents, reporting structures, boards of directors and authority, company officers, and day-to-day management responsibilities. Based upon this information, the MMSDC determined that three of the four officers for AIREA were nonminorities, three of the four officers for Piston Automotive were nonminorities, two of the four officers for Irvin Automotive were nonmi-

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<sup>5</sup> If a party fails to perform a service contract in a skillful and workmanlike manner, then the other party may have a cause of action for negligence or breach of contract. See, e.g., *Clark v Dalman*, 379 Mich 251, 261; 150 NW2d 755 (1967).



norities, and the president and COO of Detroit Thermal Systems was a nonminority. Thus, the MMSDC concluded that the Piston Companies were not managed on a day-to-day basis by minority-group members. Following this determination, plaintiffs appealed, and the MMSDC appeals committee upheld the MMSDC's previous decision to rescind the MBE certifications for the Piston Companies. Based upon this evidence, the MMSDC does not appear to have breached its duty to exercise due care in determining whether the Piston Companies qualified for MBE certification. Thus, plaintiffs are unlikely to succeed on the merits of their negligence claim.

d. DEFAMATION

The circuit court also failed to address the elements of plaintiffs' defamation claim. In order to establish a defamation claim, a plaintiff must prove:

(1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by publication. [*Ghanam v Does*, 303 Mich App 522, 544; 845 NW2d 128 (2014) (quotation marks and citations omitted).]

"A communication is defamatory if, under all the circumstances, it tends to so harm the reputation of an individual that it lowers the individual's reputation in the community or deters others from associating or dealing with the individual." *Kefgen v Davidson*, 241 Mich App 611, 617; 617 NW2d 351 (2000). "Privilege can be used as a defense in a defamation action." *Bedford v Witte*, 318 Mich App 60, 65; 896 NW2d 69 (2016). "The elements of a qualified privilege are (1)

good faith, (2) an interest to be upheld, (3) a statement limited in its scope to this purpose, (4) a proper occasion, and (5) publication in a proper manner and to proper parties only.” *Prysak v RL Polk Co*, 193 Mich App 1, 15; 483 NW2d 629 (1992). “A plaintiff may overcome a qualified privilege only by showing that the statement was made with actual malice, i.e., with knowledge of its falsity or reckless disregard of the truth.” *Id.*

Plaintiffs are unlikely to succeed on their assertion that the rescission of the Piston Companies’ MBE certifications and removal of the Piston Companies from the NMSDC’s online database constitutes defamation. The MMSDC is a nonprofit corporate membership organization that facilitates business dealings between MBEs and a network of corporate members, with a mission to advance business opportunities for certified MBEs and connect them to corporate members. Thus, MBEs are included in the NMSDC’s corporate database, which attracts potential customers. The limited record establishes that any communications were made in good faith and in furtherance of the MMSDC’s mission or for the proper purpose of informing corporate members of the Piston Companies’ MBE statuses; the communications were made after the certification and appellate processes were complete; and the communications were published to the MMSDC’s corporate members on the NMSDC’s corporate database. Accordingly, the rescission of the Piston Companies’ MBE certifications and removal of the Piston Companies from the NMSDC’s online database were communications that conveyed accurate information, at least as far as can be determined at this juncture. Again, the MMSDC concluded that the Piston Companies did not qualify for MBE status after the certification and appellate processes were complete.

The MMSDC justified its findings in its certification letter, thereby indicating that communications regarding the findings were not made with actual knowledge of their falsity or reckless disregard for their truth. If it turns out at the end of litigation that the assessment of who runs the day-to-day operations of the Piston Companies is Johnson, i.e., that MMSDC was incorrect, plaintiff would still need to prove that the denials were not implemented in good faith, and the record is not sufficiently developed to show a substantial likelihood of success in that regard.<sup>6</sup>

e. DECLARATORY RELIEF

Finally, plaintiffs have not shown a substantial likelihood of success on the merits of their claim for declaratory relief, though it is more of a close call than it was on plaintiffs' other claims. "In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted." MCR 2.605(A)(1). "An actual controversy exists when declaratory relief is needed to guide a plaintiff's future conduct in order to preserve the plaintiff's legal rights." *Lansing Sch Ed Ass'n v Lansing Bd of Ed (On Remand)*, 293 Mich App 506, 515; 810 NW2d 95 (2011) (quotation marks and citation omitted).

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<sup>6</sup> This is not meant to discount the evidence plaintiffs presented about possible alternative bases for the denial of the MBE certifications, as plaintiffs did present some evidence that could cause a reasonable person to question whether the denials were for the reasons stated by MMSDC or for some retaliatory reason unrelated to the make-up of the corporate hierarchy.

Plaintiffs sought a declaratory judgment providing that the Piston Companies each qualified for MBE certification. Again, the MMSDC's certification letter indicates that the Piston Companies are not managed on a day-to-day basis by minority-group members and that in making the determination the MMSDC reviewed the Piston Companies' organizational structures, ownership and tax return documentation, board and shareholder documents, reporting structures, boards of directors and authority, company officers, and day-to-day management responsibilities. Notwithstanding this evidence, plaintiffs argue that each of the Piston Companies were managed on a day-to-day basis by Johnson. The extent of management involvement to satisfy MMSDC's criteria of "a day-to-day basis" is not clear from the evidence.

Nevertheless, in their affidavits, officers and presidents of the Piston Companies attested to Johnson's involvement in each of the Piston Companies. Most notably, Fournier attested that Johnson engages in strategy development, operational execution, financial- and business-planning process optimization, internal environmental control, and talent management. Such activities include approving budgets and capital expenditures in excess of \$1,000,000, participating in the board of directors' meetings, participating in certain customer meetings, conducting strategic reviews, and approving personnel decisions for employees who report directly to the officers and presidents of the Piston Companies. This evidence could indicate that Johnson does not manage the Piston Companies on a day-to-day basis because the decisions seem to be more high-level operational ones, yet depending on the definition used, the duties he performs could well meet that requirement. After all, whatever definition is used, one cannot expect a corporate officer

to be involved in lower management or nonmanagement decisions that are made on a daily basis to keep the company functioning. Whether plaintiffs can succeed on the merits of their claim for declaratory relief is a 50-50 proposition.

Aside from addressing the hold-harmless provision, the circuit court focused its attention on the equitable considerations, concluding that certain evidence “cast doubt upon Defendants’ explanation for their change in position regarding the member entities.” And combining that doubt about the ultimate certification decisions with the potential damage to the Piston Companies’ bottom line and corporate good will, the court concluded that the preservation of the status quo was required. We now turn to those considerations.

## 2. IRREPARABLE HARM

“[A] particularized showing of irreparable harm is an indispensable requirement to obtain a preliminary injunction.” *Pontiac Fire Fighters Union Local 376*, 482 Mich at 9 (quotation marks, citation, and ellipses omitted). “The mere apprehension of future injury or damage cannot be the basis for injunctive relief.” *Id.*

Johnson attested that MBE certification and inclusion on the NMSDC’s Corporate Plus database allowed the Piston Companies to shift their business base to become less dependent on OEMs. Johnson also attested that Ford and Stellantis account for 75% of the Piston Companies’ sales portfolio, and both companies advertise their commitment to utilizing diverse suppliers. Most notably, Johnson attested that the Piston Companies are in the process of renewing their contracts with Stellantis, which are contingent on MBE certification. Although plaintiffs failed to present any evidence that the Stellantis or Ford business opportu-

nities would be lost without MBE certification, Johnson's testimony that certification is a contingency to contracting with Stellantis supports the trial court's conclusion that plaintiffs could suffer losses, but financial losses are not irreparable damages. See *Pontiac Fire Fighters*, 482 Mich at 9.

However, as the circuit court recognized, loss of good will can constitute irreparable harm. *Slis v Michigan*, 332 Mich App 312, 362-363; 956 NW2d 569 (2020). Here, plaintiffs submitted evidence that 75% of the total sales amongst the Piston Companies resulted from two clients, Ford and Stellantis, and both preferred or required MBE certification. And the Piston Companies' negotiation of new contracts with Stellantis was imminent. These factors, and the reputation of the Piston Companies being held out as MBE certified for many years, were sufficient to support the conclusion that plaintiffs could suffer loss of goodwill in the absence of an injunction. *Id.*

### 3. BALANCE OF HARDSHIPS

On balance, and as the circuit court found, there is a risk that plaintiffs would suffer greater harm by the absence of an injunction than defendants would suffer if injunctive relief were granted. Again, Johnson's testimony establishes that there is at least a risk that plaintiffs would suffer harm by the absence of an injunction. In comparison, injunctive relief presents relatively minor harm to the MMSDC. While the MMSDC has an interest in advancing its mission of facilitating business dealings between what it construes to be legitimate MBEs and a network of corporate members, the MMSDC suffers only minor harm by certifying the Piston Companies as MBEs while this litigation continues. After all, in the right case, that is

the purpose of injunctive relief—to place the parties in the status quo and let the judicial process resolve the dispute without one party suffering harm that cannot later be remedied. And here the Piston Companies had attained MBE status for years prior to the revocation of MBE certification. Furthermore, plaintiffs agreed to indemnify the MMSDC for third-party liability arising out of the certification of information contained in the applications for MBE certification.

#### 4. PUBLIC INTEREST

The issuance of a preliminary injunction would not significantly harm the public interest. On appeal, the MMSDC contends that the preliminary injunction significantly harmed the public interest because it violated defendants’ constitutional rights to freedom of speech and freedom of association. While it is true that “it is always in the public interest to prevent the violation of a party’s constitutional rights,” *Liberty Coins, LLC v Goodman*, 748 F3d 682, 690 (CA 6, 2014) (quotation marks and citation omitted), as explained below, we do not take up these unpreserved arguments, and thus cannot conclude whether the injunction violates defendants’ First Amendment rights. As there is no other indication that a preliminary injunction affecting the MMSDC, a private entity, significantly harms the public interest, the circuit court’s findings on this factor cannot be disturbed.

#### C. FREEDOM OF SPEECH AND FREEDOM OF ASSOCIATION

The MMSDC argues for the first time on appeal that the preliminary injunction violated the MMSDC’s right to freedom of speech and freedom of association. For an issue to be preserved for appellate review, it must be raised in the trial court. See *Glasker-Davis v*

*Auvenshine*, 333 Mich App 222, 227; 964 NW2d 809 (2020). “[I]ssue preservation requirements only impose a general prohibition against raising an issue for the first time on appeal.” *Id.* This Court reviews unpreserved constitutional issues for plain error affecting a litigant’s substantial rights. *Bay Co Prosecutor v Nugent*, 276 Mich App 183, 193; 740 NW2d 678 (2007). “To avoid forfeiture under the plain error rule, three requirements must be met: 1) the error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights.” *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000) (quotation marks and citation omitted). Plain error affects a litigant’s substantial rights if the party is prejudiced by the error, meaning that the error affected the outcome of the lower court proceedings. *Duray Dev, LLC v Perrin*, 288 Mich App 143, 150; 792 NW2d 749 (2010).

“This Court will generally decline to address unpreserved issues unless a miscarriage of justice will result from a failure to pass on them, the question is one of law and all the facts necessary for its resolution have been presented, or it is necessary for a proper determination of the case.” *Autodie LLC v Grand Rapids*, 305 Mich App 423, 431; 852 NW2d 650 (2014) (quotation marks and citation omitted). Furthermore, this Court has stated that it “will not reach constitutional issues if cases may be resolved on other grounds.” *Pythagorean, Inc v Grand Rapids Twp*, 253 Mich App 525, 527; 656 NW2d 212 (2002) (citation omitted). Here, neither constitutional argument pressed on appeal was raised in the trial court.<sup>7</sup> We also do not see the necessity of addressing new arguments on appeal

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<sup>7</sup> We recognize that the injunction had not yet been entered when the arguments against its issuance were being made, but to preserve these



when there was no evidentiary hearing held and thus no findings of fact to review, and the injunction requires defendants to temporarily do what they had done for many years.

### III. CONCLUSION

We are not blind to the uniqueness of affirming a preliminary injunction when we have concluded that most of plaintiffs' claims will not likely succeed on the merits, or all may be barred by a hold-harmless provision. But we are also cognizant that much deference is given on appeal to a circuit court's decision to grant or deny the extraordinary equitable relief of a preliminary injunction. Importantly, the four factors governing consideration of injunctive relief are meant to "simply guide the discretion of the court; they are not meant to be rigid and unbending requirements." *McPherson v Mich High Sch Athletic Ass'n, Inc*, 119 F3d 453, 459 (CA 6, 1997) (en banc) (citation omitted). And, when we apply that deference and conclude that the court's discretion was not abused in its analysis of three of the four factors, we feel compelled to affirm this highly discretionary decision and trust that the circuit court will handle the case with the attention, efficiency, and timeliness required when a preliminary injunction has been issued. See MCR 3.310(A)(5) (except when two limited exceptions apply, a trial must be held within six months of the preliminary injunction).

Affirmed.

RICK, P.J., concurred with MURRAY, J.

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arguments defendants should have at least argued the potential impact the injunction would have on their rights.

SHAPIRO, J. (*concurring*). I concur in the result. However, I disagree with the majority's reading of the indemnity clause in the application for certification of minority status. I agree with the trial court's view, which reads as follows:

In considering this motion, the Court first rejects Defendants' interpretation of the "hold harmless" provisions of the Certification Applications. Those provisions impose clear and unequivocal indemnification obligations on the applicant in the event that Defendants face liability to third-parties arising out of the certification of the application. Very little of that language, however, supports the broad interpretation suggested by Defendants, i.e., that by applying for certification, the applicant essentially grants Defendants a license to tort[iously] interfere with the applicant's business relations. Furthermore, if such language could be interpreted as Defendants suggest, it stands to reason that there would be examples from case law where a tortfeasor was able to defeat its victim's claims on this basis. Defendants, however, do not cite such authority. Rather, Defendants rely exclusively on a case (*Miller-Davis*<sup>[1]</sup>) addressing whether an indemnitee had, in fact, incurred the liability it attributed to the indemnitor; and a case (*Hecht*<sup>[2]</sup>) interpreting the admissibility of evidence in light of the statutory requirements of MCL 380.1230b, neither of which suggest in any way that the indemnification provisions at issue here can be interpreted as Defendants suggest. Thus, the indemnification provisions of the Certification Application do little to undermine Plaintiffs' likelihood of success on the merits.<sup>[3]</sup>

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<sup>1</sup> *Miller-Davis Co v Ahrens Constr, Inc*, 495 Mich 161; 848 NW2d 95 (2014).

<sup>2</sup> *Hecht v Nat'l Heritage Academies, Inc*, 499 Mich 586; 886 NW2d 135 (2016).

<sup>3</sup> This is consistent with the *Black's Law Dictionary* (11th ed) definition of "hold-harmless agreement," which reads, "A contract in which one party agrees to indemnify the other."

The majority notes that the provision in question contains two clauses, one stating that the applicant agrees to “hold [the MMSDC] free and harmless from any and all claims, demands, and damages” and the other stating that the applicant “agrees to indemnify and hold [the MMSDC] harmless for any and all liability in connection with the certification . . . .” The majority concludes that these two phrases constitute separate contractual provisions and defines the former as a release of all claims by plaintiffs against the MMSDC. I do not agree. Whether and how these clauses are distinct is far from clear, particularly since neither the term “release” nor the phrase “covenant not to sue” appears in the agreement. Accordingly, I would hold that the provision is not a bar to plaintiffs’ suit or that at most there is an ambiguity that should be resolved in favor of the nondrafter. See *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 470; 663 NW2d 447 (2003).

## PEOPLE v OGILVIE

Docket No. 354355. Submitted February 1, 2022, at Detroit. Decided March 3, 2022, at 9:05 a.m.

Eric A. Ogilvie was convicted in the Wayne Circuit Court following a jury trial of felonious assault and possession of a firearm during the commission of a felony (felony-firearm). In 2009, defendant was doing yard work in front of his home when Eric Watson approached him and they got into an argument. Watson claimed that defendant put his hand near Watson's face and that Watson had pushed defendant's hand out of Watson's face and that Watson was backing away when defendant pulled out a gun and pointed it at Watson. Defendant claimed that Watson had threatened him and that he believed that Watson was reaching for a gun; so, fearing for his own safety and that of his son, who was also in front of the house, defendant had then reached for his own gun and pointed it at Watson. Defendant was convicted by the jury and sentenced by the court, Patricia S. Fresard, J., to three years' probation for felonious assault and two years' imprisonment for felony-firearm. Following an appeal in which defendant proceeded *in propria persona*, the Court of Appeals (CAVANAGH, P.J., and SAAD and RIORDAN, JJ.) affirmed defendant's convictions and sentences. Defendant pursued other challenges to his convictions, and eventually, the United States District Court for the Eastern District of Michigan conditionally granted defendant's petition for habeas corpus and concluded that defendant had been denied his right to the effective assistance of counsel in his appeal. The federal district court ordered that defendant was entitled to a new appeal in the state court and held his other claims in abeyance pending that appeal.

The Court of Appeals *held*:

1. Defendant argued that he had acted in self-defense when he pointed the loaded gun at Watson. Once a defendant has raised self-defense and has satisfied the initial burden of producing some evidence from which a jury could conclude that the elements necessary to establish a *prima facie* defense of self-defense exist, the prosecution must exclude the possibility of self-defense beyond a reasonable doubt. The core issue in this case was whether

defendant's act of pointing a loaded gun at Watson in self-defense constituted the use of deadly force or the use of nondeadly force. In relevant part, the Self-Defense Act, MCL 780.971 *et seq.*, provides that a person may use deadly force in self-defense if the person honestly and reasonably believed that doing so was necessary to prevent imminent death, imminent sexual assault, or imminent great bodily harm. It also provides that a person may use nondeadly force in self-defense if that person believes that doing so is necessary to defend against the imminent unlawful use of force by another person. Finally, it removes the traditional common-law duty to retreat so long as the person had a right to be where they were and was not engaged in the commission of a crime. Apparently, defendant's trial counsel, the prosecutor, and the trial court assumed that pointing a loaded gun at another person constituted the use of deadly force and agreed that the jury should be instructed regarding the use of deadly force in self-defense or in defense of others. Consequently, the trial court instructed the jury that defendant could only claim self-defense if he honestly and reasonably believed that the use of deadly force was necessary to prevent his own or another's imminent death or great bodily harm. The jury was also instructed that defendant was not required to retreat if he had an honest and reasonable belief that the use of deadly force was necessary to prevent his own or his child's imminent death, great bodily harm, or sexual assault. These instructions were erroneous because defendant merely *threatened* to use deadly force, and a threat of deadly force is not necessarily the *use* of deadly force. Instead, the jury should have been instructed regarding the use of nondeadly force. The instructions given to the jury regarding defendant's duty to retreat also held defendant to a higher standard than that specified by the Self-Defense Act, which imposes no duty to retreat if the defendant honestly and reasonably believed that the use of force was necessary to defend themselves or another person from the imminent unlawful use of force by another individual. This instruction increased the burden on the defense and lightened the burden on the prosecution. Therefore, these two instructional errors were not harmless.

2. During an evidentiary hearing, trial counsel testified that he did not consider objecting to the jury instructions, and he acknowledged that the act of pointing a gun was not the use of deadly force and that defendant had no duty to retreat under the facts of the case. Trial counsel further testified that no trial strategy motivated his failure to object to the jury instructions. The effect of counsel's failure was to make the defense more difficult than necessary and resulted in confusion of the issues

before the jury. Therefore, counsel's failure to object to the jury instructions or to seek correct instructions was objectively unreasonable.

3. While it would not have been futile for trial counsel to have objected to the jury instructions and to have sought correct instructions, a closer question was whether there was a reasonable probability that the outcome of the proceedings would have been different if the correct instructions had been given. Recently, our Supreme Court held that instructional error may be prejudicial when the instructions fail to provide the jury with adequately specific guidance, especially if the jury was not fully informed that the law supported the defendant's defense. Although the prosecutor in this case did not expressly argue that defendant had an obligation to retreat, which would have been improper, the prosecutor did comment that defendant could have gone back to his house during the altercation. There was a strong possibility that this comment, in combination with M Crim JI 7.16 (Duty to Retreat to Avoid Using Force or Deadly Force), which was read to the jury, caused the jury to infer that defendant violated an obligation to retreat because he did not reasonably anticipate death, great bodily harm, or sexual assault. More importantly, the trial was premised on the incorrect theory that defendant had used deadly force in response to a nondeadly threat. However, given the evidence, the proper inquiry was whether defendant reasonably believed he needed to use force to protect himself or his son from an imminent unlawful use of force by Watson and whether defendant used an appropriate level of force under the circumstances. Thus, the trial was fundamentally tainted by the application of wrong legal principles regarding self-defense and because the jury was improperly instructed. The jury was essentially asked to decide only whether defendant reasonably believed that Watson was reaching for a weapon. If the jury had been properly instructed, it would have been asked to resolve an issue much more favorable to the defense: whether defendant reasonably believed that pointing his gun at Watson was necessary to protect himself from the imminent unlawful use of nondeadly force by Watson. For this reason, there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

Convictions reversed and case remanded for a new trial.

## CRIMINAL LAW – SELF-DEFENSE – NONDEADLY FORCE – POINTING A FIREARM AT ANOTHER INDIVIDUAL.

When a defendant is entitled to have the trial court instruct the jury on a theory of self-defense under the Self-Defense Act, MCL 780.971 *et seq.*, the trial court must determine whether the defendant used deadly force or force other than deadly force against another individual when deciding which instructions to read the jury; under the Self-Defense Act, a defendant's act of pointing a loaded firearm at another individual does not constitute the use of deadly force if no shots were fired and no harm or injury occurred.

*Dana Nessel*, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, and *Jon P. Wojtala*, Chief of Research, Training and Appeals, for the people.

*Robert Tomak* for defendant.

Before: BOONSTRA, P.J., and RONAYNE KRAUSE and CAMERON, JJ.

RONAYNE KRAUSE, J. Defendant appeals as of right his jury trial convictions of felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, for which he was sentenced to three years' probation and two years' imprisonment, respectively.<sup>1</sup> This case returns to us after the United States District Court for the Eastern District of Michigan conditionally granted defendant's petition for a writ of habeas corpus on the basis of a denial of appellate counsel for his first appeal and directed us to reinstate defendant's right to appeal. We now reverse defendant's convictions and remand for a new trial.

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<sup>1</sup> Defendant has since served those sentences and is out of prison.

## I. BACKGROUND FACTS AND PROCEDURAL HISTORY

In defendant's previous appeal, this Court set forth the essential facts as follows:

Defendant was convicted of feloniously assaulting his neighbor, Eric Watson (the "victim"), by pointing a gun at him during an argument outside defendant's home on September 13, 2009. The victim and defendant gave different accounts of the circumstances that preceded defendant's act of pointing a gun at the victim, but both agreed that the victim approached defendant while defendant was outside working on his lawn in front of his home. The victim claimed that he approached defendant on the sidewalk to speak to him about grass clippings that he left on the sidewalk. According to the victim, defendant began arguing and placed his hand near the victim's face. The victim claimed that he pushed defendant's hand out of his face and backed away as defendant pulled out a gun and pointed it at the victim. According to defendant, the victim aggressively approached him in a threatening manner and stated, "Go ahead pull yours I'll pull mind [sic]." Defendant, who was licensed to carry a gun, testified that he pulled out his gun and pointed it in the general direction of the victim because he thought the victim was getting ready to pull something out from behind his back and he feared for his safety and the safety of his young son, who was also in front of the house. The jury convicted defendant of felonious assault and felony-firearm. [*People v Ogilvie*, unpublished per curiam opinion of the Court of Appeals, issued May 23, 2013 (Docket Nos. 298302 and 307897) (*Ogilvie I*), p 2.]

Defendant proceeded *in propria persona* in his first appeal, and this Court affirmed defendant's convictions and sentences. *Id.* at 3-14.<sup>2</sup>

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<sup>2</sup> Defendant's first appeal also concerned the trial court's revocation of his probation, which is not at issue in this appeal. See *Ogilvie I*, unpub op at 14-20.



Defendant pursued other challenges to his convictions, and eventually the Eastern District “conditionally” granted defendant’s petition for a writ of habeas corpus. As noted, the federal district court concluded that defendant had been denied his right to the assistance of counsel in his first appeal. *Ogilvie v Gidley*, unpublished order of the United States District Court for the Eastern District of Michigan, issued July 6, 2020 (Case No. 16-cv-11013) (*Ogilvie II*), p 2. The district court held a variety of other claims raised by defendant in abeyance and ordered that defendant was entitled to a new appeal of right. *Id.* at 2-3. This case is now before us again for plenary review,<sup>3</sup> with defendant now represented by counsel.

## II. INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

Defendant again raises a number of issues. However, because we find one of those issues dispositive, we deem the other issues moot and we will not address them. Specifically, we agree that the jury was improperly instructed regarding the principles applicable to his claim of self-defense, and defendant received ineffective assistance of counsel because counsel did not seek to correct that error.

### A. STANDARD OF REVIEW AND PRINCIPLES OF LAW

Defendant sought a *Ginther*<sup>4</sup> hearing in the trial court, so his claim of ineffective assistance of counsel is

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<sup>3</sup> Because this appeal is a consequence of defendant’s prior deprivation of a constitutional right to the assistance of counsel, we are not bound to apply the law of the case doctrine. See *People v Murphy*, 481 Mich 919, 919 (2008); *Locricchio v Evening News Ass’n*, 438 Mich 84, 108-110; 476 NW2d 112 (1991).

<sup>4</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

preserved for our review. See *People v Jackson (On Reconsideration)*, 313 Mich App 409, 431; 884 NW2d 297 (2015). Criminal defendants are entitled to receive effective assistance of counsel, and they are presumed to have received effective assistance. *People v Schrauben*, 314 Mich App 181, 189-190; 886 NW2d 173 (2016). “Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law.” *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). “To establish that a defendant’s trial counsel was ineffective, a defendant must show: (1) that counsel’s performance fell below an objective standard of reasonableness under prevailing professional norms and (2) that there is a reasonable probability that, but for counsel’s error, the result of the proceedings would have been different.” *Schrauben*, 314 Mich App at 190, citing *Strickland v Washington*, 466 US 668, 688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 US at 694.

This Court will not find trial counsel to be ineffective when an objection would have been futile; nor will it second-guess matters of trial strategy. *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004); *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). A trial court’s findings of fact are reviewed for clear error, and “whether those facts constitute a violation of the defendant’s constitutional right to effective assistance of counsel” is a question of law that we review de novo. *LeBlanc*, 465 Mich at 579.

“A criminal defendant has the right to have a properly instructed jury consider the evidence against him.” *People v Mills*, 450 Mich 61, 80-81; 537 NW2d 909 (1995). “The instruction to the jury must include all elements of the crime charged . . . and must not

exclude from jury consideration material issues, defenses or theories if there is evidence to support them.” *People v Reed*, 393 Mich 342, 349-350; 224 NW2d 867 (1975). Although the trial court is not obligated to sua sponte present instructions regarding a defendant’s theory, the trial court is obligated to give instructions on any theory or defense supported by the evidence upon request. *Mills*, 450 Mich at 81. Claims of instructional error are reviewed for harmlessness. See *People v Hawthorne*, 474 Mich 174; 713 NW2d 724 (2006). “Jurors are presumed to follow the court’s instructions, and instructions are presumed to cure most errors.” *People v Mullins*, 322 Mich App 151, 173; 911 NW2d 201 (2017).

#### B. CORRECTNESS OF JURY INSTRUCTIONS

In a nutshell, defendant drew a loaded handgun and pointed it at his neighbor, Eric Watson. Defendant’s theory of the case was that Watson approached defendant in an aggressive manner while defendant was on his front lawn with his son. According to defendant, he asked Watson to leave, but Watson instead escalated the altercation. Defendant contended that Watson touched and punched defendant, and Watson also physically and verbally threatened defendant. Defendant continued to ask Watson to leave, and he also tried to retreat but could not do so safely, in part because he was concerned for his son. Because Watson did not respond to any requests to leave or calm down, and because defendant was increasingly concerned for his and his son’s safety, defendant drew his handgun and pointed it at Watson. Defendant then asked Watson to walk away for the final time, and Watson complied. The altercation then ended.

“Once a defendant raises the issue of self-defense and satisfies the initial burden of producing some evidence from which a jury could conclude that the elements necessary to establish a prima facie defense of self-defense exist, the prosecution must exclude the possibility of self-defense beyond a reasonable doubt.” *People v Stevens*, 306 Mich App 620, 630; 858 NW2d 98 (2014) (quotation marks and citation omitted). “With the enactment of the Self-Defense Act (SDA), MCL 780.971 *et seq.*, the Legislature codified the circumstances in which a person may use deadly force in self-defense or in defense of another person without having the duty to retreat.” *People v Dupree*, 486 Mich 693, 708; 788 NW2d 399 (2010). The SDA also codified the law regarding self-defense using “force other than deadly force” and the duty to retreat. MCL 780.972(2). Specifically, in MCL 780.972, the SDA states:

(1) An individual who has not or is not engaged in the commission of a crime at the time he or she uses deadly force may use deadly force against another individual anywhere he or she has the legal right to be with no duty to retreat if either of the following applies:

(a) The individual honestly and reasonably believes that the use of deadly force is necessary to prevent the imminent death of or imminent great bodily harm to himself or herself or to another individual.

(b) The individual honestly and reasonably believes that the use of deadly force is necessary to prevent the imminent sexual assault of himself or herself or of another individual.

(2) An individual who has not or is not engaged in the commission of a crime at the time he or she uses force other than deadly force may use force other than deadly force against another individual anywhere he or she has the legal right to be with no duty to retreat if he or she honestly and reasonably believes that the use of that force

is necessary to defend himself or herself or another individual from the imminent unlawful use of force by another individual.

“Section 2 of the SDA removed the traditional common-law duty to retreat, so long as the individual engaging in self-defense or defense of others was not committing or had not committed a crime and had a legal right to be where they were when they used force.” *People v Leffew*, 508 Mich 625, 641; 975 NW2d 896 (2022). “[A]side from limiting one’s duty to retreat, the statute did not modify or abrogate the common-law defenses of self-defense or defense of others” or the right to use deadly or nondeadly force. *Id.*; see also MCL 780.973; MCL 780.974. The related jury instructions for the same topics follow the law as stated in the SDA. M Crim JI 7.15 (“Use of Deadly Force in Self-Defense”); M Crim JI 7.16 (“Duty to Retreat to Avoid Using Force or Deadly Force”); M Crim JI 7.21 (“Defense of Others—Deadly Force”); M Crim JI 7.22 (“Use of Nondeadly Force in Self-Defense or Defense of Others”).

The core issue is whether defendant’s act of pointing a loaded gun at Watson constituted the use of deadly force or the use of nondeadly force. Defendant’s trial counsel, the prosecution, and the trial court apparently assumed the act to constitute the use of deadly force, so they agreed the jury should be instructed regarding the use of deadly force in self-defense or in defense of others. The trial court read M Crim JI 7.15, 7.16, and 7.21, which correspond with MCL 780.792(1). The trial court did not read M Crim JI 7.22, which corresponds to MCL 780.972(2). Consequently, the jury was instructed that defendant could only successfully claim self-defense or defense of his son if he “honestly and

reasonably believe[d] that the use of deadly force is necessary to prevent the imminent death of or imminent great bodily harm to himself . . . or to” his son. MCL 780.972(1)(a). The jury was also instructed that it was permitted to consider whether defendant could have safely retreated. Defendant argues, and we agree, that the instructions were erroneous because he merely threatened to use deadly force, and a threat of deadly force is not the *use of* deadly force.

The SDA does not define the terms “deadly force” and “nondeadly force,” so it does not explain the difference between the two. MCL 780.972. This Court has long defined “deadly force” as “where the defendant’s acts are such that the natural, probable, and foreseeable consequence of said acts is death.” *People v Pace*, 102 Mich App 522, 534; 302 NW2d 216 (1980); see also *People v Anderson*, 322 Mich App 622, 629; 912 NW2d 607 (2018). In *Pace*, this Court specifically held that “[m]erely displaying a knife implies a threat of violence, but, without more, it does not constitute deadly force.” *Pace*, 102 Mich App at 534. Of course, a gun functions quite differently from a knife, and defendant did more than merely display his gun. Nevertheless, this Court has also held that pointing a gun at police officers who had illegally entered the defendant’s home, where no shots were fired and no harm or injury occurred, did not constitute use of deadly force.<sup>5</sup> *People v Dillard*, 115 Mich App 640, 642-643; 321 NW2d 757 (1982).

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<sup>5</sup> We note that the *Dillard* Court also made the pronouncement, without any supporting analysis, that the defendant’s act of pointing a loaded gun at the intruders into his home “involved the use of no force whatsoever.” *Dillard*, 115 Mich App at 642. Like the prosecution, we find that pronouncement “amazing” as well as legally incorrect. Although, as we discuss, we agree with the *Dillard* Court that pointing a loaded gun without actually shooting the gun does not constitute the use of *deadly*

Because *Dillard* and *Pace* predate MCR 7.215(J)(1),<sup>6</sup> we are not strictly bound to follow them. However, as published opinions, they nevertheless have “precedential effect under the rule of stare decisis.” MCR 7.215(C)(2). See also *People v Bensch*, 328 Mich App 1, 7 n 6; 935 NW2d 382 (2019). Furthermore, as noted, the SDA leaves intact the common law regarding the right to use deadly or nondeadly force. MCL 780.974. We conclude that *Pace* should be given precedential effect; to the extent *Dillard* held that pointing—without shooting—a loaded gun did not constitute the use of deadly force in self-defense, we conclude that *Dillard* should also be given precedential effect.

Two other considerations support that conclusion. Although dictionaries do not have the force of law—being guides rather than mandates—we note that *Black’s Law Dictionary* (11th ed) defines nondeadly force as “[f]orce that is neither intended nor likely to cause death or serious bodily harm; force intended to cause only minor bodily harm,” or “[a] threat of deadly force, such as displaying a knife.” To the extent *Dillard* held that a threat of deadly force is not the use of deadly force,<sup>7</sup> the *Dillard* holding is consistent with

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force, it would not be perceived by any reasonable person as the use of *no* force. Otherwise, although the facts of *Dillard* involved an invasion into the defendant’s home rather than an altercation outside a home, the “castle doctrine” would affect whether the defendant was obligated to retreat, not whether his acts constituted the use of deadly force. See *People v Riddle*, 467 Mich 116, 134-140; 649 NW2d 30 (2002).

<sup>6</sup> Sometimes referred to as “the first-out rule,” see, e.g., *Glasker-Davis v Auvenshine*, 333 Mich App 222, 232 n 4; 964 NW2d 809 (2020), MCR 7.215(J)(1) provides that we are required to “follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990,” so long as the decision has not been overturned or modified.

<sup>7</sup> See note 5 of this opinion.

this dictionary definition.<sup>8</sup> Finally, underpinning self-defense doctrine is the longstanding principle that a person should use no more force than reasonably appears necessary to repel a threat. *Pond v People*, 8 Mich 150, 173-177 (1860); see *People v Riddle*, 467 Mich 116, 127, 142; 649 NW2d 30 (2002). It would be inconsistent with that principle to treat a situation in which no one was actually put at direct risk of harm as indistinguishable from a situation in which bullets were actually fired or someone was actually shot. We do not believe it would encourage restraint to treat a threat of deadly force as a use of deadly force.

In consideration of the above cases and principles, we conclude that, under the circumstances, defendant did not use deadly force in self-defense.<sup>9</sup> The instructions given to the jury regarding the use of deadly force

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<sup>8</sup> The prosecution also describes the holding in *Dillard* as dicta. We disagree in part. “Dictum is a judicial comment that is not necessary to the decision in the case[,] . . . [b]ut if a court intentionally addresses and decides an issue that is germane to the controversy in the case, the statement is not dictum even if the issue was not decisive.” *Pew v Mich State Univ*, 307 Mich App 328, 334; 859 NW2d 246 (2014). The *Dillard* Court explained that the defendant had a right to use only “reasonably necessary” force to resist an unlawful arrest, and it explicitly emphasized that if the defendant had “actually used deadly force in the instant case, his response may have gone beyond the bounds of reasonableness.” *Dillard*, 115 Mich App at 641-642. Whether the defendant’s act of pointing a gun at the officers constituted deadly or nondeadly force was therefore directly necessary to the decision in the case, so it was not dicta. The pronouncement that pointing a loaded gun at the officers constituted *no* use of force, in contrast, was not necessary to the decision in the case, but as discussed in note 5, we reject that pronouncement as legally wrong in any event.

<sup>9</sup> We do not intend to foreclose, as a matter of law, the possibility that whether a defendant used deadly or nondeadly force could, in an appropriate case, be a question of fact for the jury to decide. See *Pace*, 102 Mich App at 534 n 7. This is not such a case.



were therefore incorrect. Instead, the jury should have been instructed on the law regarding the use of non-deadly force.

Defendant also argues that the jury was improperly instructed regarding his duty to retreat, or, more specifically, his lack of a duty to retreat. We agree in part. There was no assertion that defendant had no “legal right to be” in his yard or that he was “engaged in the commission of a crime at the time . . . .” MCL 780.972(2). Therefore, he had “no duty to retreat if he . . . honestly and reasonably believe[d] that the use of that force [was] necessary to defend himself . . . or [his son] from the imminent unlawful use of force by another individual.” *Id.* A duty to retreat applies to both the use of deadly force and the use of nondeadly force. However, M Crim JI 7.16(3)(c) subtly yet critically altered the conditions under which defendant had no duty to retreat before using nondeadly force. The jury was instructed that, in relevant part, defendant would not be required to retreat if he “ha[d] an honest and reasonable belief that the use of . . . deadly force [was] necessary to prevent eminent [sic] death, great bodily harm or a sexual assault . . . .” Thus, defendant was held to a higher standard than specified by MCL 780.972(2), because under the instructions as given, defendant must have anticipated death, great bodily harm, or sexual assault; the statute, however, only required defendant to have anticipated “the imminent unlawful use of force.” As a consequence, the instructions as given increased the burden upon the defense and lightened the burden upon the prosecution. We conclude that these two instructional errors were not harmless. See *People v Rodriguez*, 463 Mich 466, 474; 620 NW2d 13 (2000).

## C. REASONABLENESS OF COUNSEL'S PERFORMANCE

Having concluded that the jury was improperly instructed, we next consider whether trial counsel's failure to request correct jury instructions fell below an objective standard of reasonableness. During the *Ginther* hearing, trial counsel testified he did not consider objecting to the instructions regarding the duty to retreat or the use of deadly force in self-defense or defense of others, nor did he consider requesting the instruction for the use of nondeadly force in self-defense or defense of others. He acknowledged that the pointing of a gun was not the use of deadly force and that the facts of the case undisputedly showed no duty to retreat for defendant under the SDA. Trial counsel testified he did not have any trial strategy that caused him to act in such a manner. The effect of counsel's failure was to make the defense more difficult than necessary without any strategic reason for doing so and, at a minimum, resulted in confusing the issues for the jury to decide. Under the circumstances, we therefore conclude that it was objectively unreasonable for counsel to have refrained from objecting to the jury instructions and for failing to seek correct jury instructions.

## D. PROBABILITY OF A DIFFERENT OUTCOME

As an initial matter, it would not have been futile for trial counsel to have objected to the instructions given and to have sought correct instructions. As discussed, "when a jury instruction is requested on any theories or defenses and is supported by evidence, it must be given to the jury by the trial judge." *Mills*, 450 Mich at 81. The jury instructions given were incorrect, and an appropriate standard jury instruction was available. If

trial counsel had requested correct instructions, it would have been error for the trial court to refuse the request.

A slightly closer question is whether there is a reasonable probability that the outcome of the proceedings would have differed if the correct instructions had been given. In a case involving the use of deadly force inside the defendant's home (where the defendant had no duty to retreat), our Supreme Court held that it was not clear error to instruct the jury regarding the general duty to retreat, followed by the exception to that duty for persons attacked inside their own home. *People v Richardson*, 490 Mich 115, 118-120; 803 NW2d 302 (2011). However, our Supreme Court's holding was premised in part on the jury's apparent finding that the defendant's use of deadly force was unnecessary; the Court also concluded that it "might have been clearer" for the trial court to have omitted the general duty to retreat. *Id.* at 120-121. Importantly, *Richardson* involved the use of deadly force, unlike this case. The instructional error in *Richardson* involved merely giving an unnecessary instruction. In contrast, the instructional error in this matter fundamentally altered the nature of the questions given to the jury for its consideration. More recently, our Supreme Court has explained that instructional error may be prejudicial when the instructions as given fail to provide the jury with adequately specific guidance, especially if the jury was not fully informed that the law supported the defendant's defense. *Leffew*, 508 Mich at 650-654.

Although the gravamen of the prosecutor's argument in this case was that defendant unnecessarily escalated a relatively minor dispute, at one point the prosecutor commented that "there [was] nothing that

stopped [defendant] from turning around and going into the house.” The prosecutor never specifically argued to the jury—in so many words—that defendant had an obligation to retreat and such an argument would not have been entirely improper. Nevertheless, as discussed, M Crim JI 7.16 imposed a more-stringent duty to retreat upon defendant than required by law where defendant only used nondeadly force. Therefore, there is a strong possibility that the jury might have inferred from this comment and from M Crim JI 7.16 that defendant had an obligation to retreat because defendant did not reasonably anticipate death, great bodily harm, or sexual assault, and defendant failed to avail himself of the ability to retreat.

More importantly, the entirety of the trial was premised on the incorrect theory that defendant had used deadly force in response to a nondeadly threat. Notably, the evidence tended to show that Watson had started the altercation and that Watson posed a credible threat to defendant. Indeed, one of the prosecutor’s comments implied that it would have been appropriate for defendant to respond in *some* manner, implicitly conceding that *some* degree of nondeadly force would have been reasonable. The proper inquiry would have been whether defendant reasonably believed he needed to use force to protect himself or his son from the imminent unlawful use of force by Watson and whether defendant used an appropriate degree of force under the circumstances. Instead, the premise that defendant used *deadly* force resulted in an inappropriately narrow focus on the specific question of whether Watson was reaching for a weapon of his own or merely pulling up his pants. The prosecutor’s argument that defendant overreacted to a possible punch to the face or other physical violence with *deadly* force would have been seriously blunted, because, again, the correct

analysis would have focused on whether defendant feared an imminent threat of unlawful force and reacted proportionately.<sup>10</sup>

The trial was fundamentally tainted by applying the wrong legal principles regarding self-defense and by giving the wrong jury instructions. The jury was essentially asked to decide only whether defendant reasonably believed Watson was reaching for a weapon. Had the jury been properly instructed, it would have been asked to resolve an issue much more favorable to the defense: whether defendant reasonably believed that pointing his gun at Watson was necessary to protect himself or his son from the imminent unlawful use of nondeadly force by Watson. We conclude that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 US at 694.

We reverse defendant’s convictions and remand for a new trial. His remaining claims on appeal are therefore moot. Defendant’s remaining claims on appeal would, if successful, result in the same relief: the granting of a new trial. Consequently, any judgment as to those issues would have no further practical legal effect. See *People v Smith*, 502 Mich 624, 631; 918 NW2d 718 (2018). We decline to consider those issues. See *id.* at 631-632.

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<sup>10</sup> We emphasize that nothing in this opinion should be construed as a determination, one way or the other, of whether defendant’s conduct of pointing the gun at Watson was necessary and proportionate. We hold *only* that (1) because defendant never fired the gun or otherwise showed any intention of causing death or serious bodily harm, he did not use deadly force, (2) the misapprehension that defendant did use deadly force undermined the fairness of his trial, and (3) trial counsel was ineffective for failing to correct that misapprehension.

Reversed and remanded for a new trial. We do not retain jurisdiction.

BOONSTRA, P.J., and CAMERON, J., concurred with  
RONAYNE KRAUSE, J.

## KENNARD v LIBERTY MUTUAL INSURANCE COMPANY

Docket No. 355462. Submitted March 2, 2022, at Detroit. Decided March 3, 2022, at 9:10 a.m.

Doris Kennard brought an action in the Wayne Circuit Court against Liberty Mutual Insurance Company, alleging that defendant failed to pay plaintiff personal protection insurance (PIP) benefits in accordance with Michigan's no-fault act, MCL 500.3101 *et seq.*, after she was involved in a motor vehicle collision in November 2017. Before the accident, plaintiff had obtained an automobile insurance policy from defendant, and the policy reflected that plaintiff's mailing address was in Maryland and that she had a Maryland driver's license. According to plaintiff, she "moved from Maryland to Michigan on or about October 2, 2017," and informed defendant's representative "[a]round that same time" that she was "moving to Michigan . . ." After the collision, plaintiff filed a claim for benefits under her policy with defendant, and defendant paid plaintiff the \$2,500 policy limit. Plaintiff then brought this action to recover PIP benefits. Defendant moved for summary disposition, arguing that the Maryland insurance policy did not provide PIP benefits beyond the policy limit and that defendant was not required to comply with the Michigan no-fault act because plaintiff was not a Michigan resident. The trial court, Sheila A. Gibson, J., granted summary disposition in favor of defendant, concluding that plaintiff had "a Maryland policy" at the time of the accident. Plaintiff appealed, arguing that she was entitled to have the Maryland policy reformed to comply with the requirements of the no-fault act under MCL 500.3012.

The Court of Appeals *held*:

MCL 500.3012 provides, in relevant part, that a liability insurance policy *issued* in violation of MCL 500.3004 through MCL 500.3012 of the no-fault act shall, nevertheless, be held valid but be deemed to include the provisions required by such sections, and when any provision in such policy or rider is in conflict with the provisions required to be contained by such sections, the rights, duties, and obligations of the insured, the policyholder, and the injured person shall be governed by the

provisions of such sections. The basic purpose of MCL 500.3012 is to treat an insurance policy *that an insurer issues* purporting to be a Michigan policy that complies with Michigan law as such even if the written terms of the policy are inconsistent with Michigan law. Accordingly, if an insurer has knowledge that it is dealing with a Michigan resident but nevertheless issues an out-of-state policy to the Michigan resident, MCL 500.3012 permits a trial court to reform the out-of-state policy to include the missing Michigan PIP benefits. However, an out-of-state insurer is not required to provide Michigan no-fault coverage if the policy is issued to a person who provides no indication to the insurer of being a Michigan resident. If the out-of-state insurer does not know and has no reason to know that it is dealing with a Michigan resident, the policy will not be construed to contain the missing provisions of the no-fault act. In this case, there was no dispute that defendant properly issued a Maryland policy to plaintiff, who was a Maryland resident at the time the policy was issued. Although plaintiff presented an affidavit to support her assertion that she moved to Michigan and had informed defendant that she was planning to move to Michigan, there was no evidence that defendant issued another policy that purported to be a Michigan policy. Because there was no evidence that defendant knew or should have known that it was issuing a policy to a Michigan resident, the trial court did not err by granting summary disposition in favor of defendant.

Affirmed.

INSURANCE – NO-FAULT ACT – NONCOMPLYING LIABILITY INSURANCE POLICY –  
OUT-OF-STATE INSURERS.

MCL 500.3012 provides, in relevant part, that a liability insurance policy issued in violation of MCL 500.3004 through MCL 500.3012 of the no-fault act, MCL 500.3101 *et seq.*, shall, nevertheless, be held valid but be deemed to include the provisions required by such sections, and when any provision in such policy or rider is in conflict with the provisions required to be contained by such sections, the rights, duties, and obligations of the insured, the policyholder, and the injured person shall be governed by the provisions of such sections; when an insurer has issued a policy to an out-of-state resident, the insured's provision of notice to that insurer of an intent to move to Michigan does not trigger the protections afforded by MCL 500.3012.

*The Seva Law Firm* (by *Kathrine Ruttkofsky* and *Pratheep Sevanthinathan*) for plaintiff.



*Collins Einhorn Farrell PC* (by *Deborah A. Hebert* and *Trent B. Collier*) for defendant.

Before: JANSEN, P.J., and CAMERON and RICK, JJ.

CAMERON, J. Plaintiff, Doris Kennard, appeals the trial court's order granting summary disposition in favor of defendant, Liberty Mutual Insurance Company, under MCR 2.116(C)(10) (no genuine issue of material fact). We affirm.

#### I. BACKGROUND

This case arises from a November 2017 motor vehicle accident and subsequent dispute regarding plaintiff's automobile insurance coverage. Before the accident, plaintiff obtained an automobile insurance policy from defendant, and the policy reflected that plaintiff's mailing address was in Maryland and that she had a Maryland driver's license. According to plaintiff, she "moved from Maryland to Michigan on or about October 2, 2017," and informed defendant's representative "[a]round that same time" that she was "moving to Michigan . . . ." Plaintiff provided defendant with her mother's address in Van Buren Township.

In November 2017, plaintiff was involved in a motor vehicle accident in Ohio. Plaintiff filed a claim for benefits under her policy with defendant. In keeping with the policy, defendant paid plaintiff the \$2,500 policy limit. Plaintiff sued defendant, alleging that defendant had failed to pay plaintiff personal injury protection (PIP) insurance benefits under the policy and in accordance with the Michigan no-fault act, MCL 500.3101 *et seq.*

Defendant moved for summary disposition under MCR 2.116(C)(10), arguing, in relevant part, that the

Maryland insurance policy did not provide PIP benefits beyond the policy limit and that defendant was not required to comply with the Michigan no-fault act because plaintiff was not a Michigan resident. Plaintiff argued that she had informed defendant that she had moved to Michigan before the motor vehicle accident and that she believed that her Maryland policy was a Michigan no-fault policy at the time of the accident. The trial court granted summary disposition in favor of defendant, concluding that plaintiff had “a Maryland policy” at the time of the accident. This appeal followed.

## II. ANALYSIS

Plaintiff argues that the trial court erred by granting summary disposition in favor of defendant. We disagree.

A trial court’s decision regarding a motion for summary disposition is reviewed de novo. *Glasker-Davis v Auvenshine*, 333 Mich App 222, 229; 964 NW2d 809 (2020).

A motion under MCR 2.116(C)(10) . . . tests the factual sufficiency of a claim. When considering such a motion, a trial court must consider all evidence submitted by the parties in the light most favorable to the party opposing the motion. A motion under MCR 2.116(C)(10) may only be granted when there is no genuine issue of material fact. A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ. [*El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 160; 934 NW2d 665 (2019) (quotation marks, citations, and emphasis omitted).]

Plaintiff argues that she is entitled to have the Maryland policy reformed to comply with the requirements of Michigan’s no-fault act under MCL 500.3012,

which governs the issuance of a noncomplying insurance policy. MCL 500.3012 provides, in relevant part, as follows:

Such a liability insurance policy *issued* in violation of [MCL 500.3004 through MCL 500.3012 of the no-fault act] shall, nevertheless, be held valid but be deemed to include the provisions required by such sections, and when any provision in such policy or rider is in conflict with the provisions required to be contained by such sections, the rights, duties and obligations of the insured, the policyholder and the injured person shall be governed by the provisions of such sections[.] [Emphasis added.]

In *Farm Bureau Ins Co v Allstate Ins Co*, 233 Mich App 38, 41; 592 NW2d 395 (1998), this Court explained that “it is evident that the basic purpose of [MCL 500.3012] is to treat an insurance policy *that an insurer issues* purporting to be a Michigan policy that complies with Michigan law as such even if the written terms of the policy are inconsistent with Michigan law.” (Emphasis added; emphasis omitted.) However, an out-of-state insurer is not required to provide Michigan no-fault coverage if the policy is issued to a person “who provides no indication to the insurer of being a Michigan resident . . .” *Id.* at 42-43. If the out-of-state insurer does not know and has no reason to know that it is “dealing with a Michigan resident,” the policy will not be construed to contain the missing provisions of the no-fault act. See *id.* at 41-44.

In *Farm Bureau*, Allstate issued an Indiana automobile insurance policy to a person who provided the insurer with an Indiana address, even though she was actually domiciled in Michigan. *Id.* at 40, 43. This Court held that Allstate was not required to provide no-fault benefits under the policy pursuant to MCL 500.3012 because “Allstate could not reasonably have been expected to have known when the policy was

issued that its insured was actually a Michigan resident.” *Id.* at 43. The Court noted that the insured provided the insurance company with an Indiana address for the insurance transaction and that, at the time the policy was issued, there was no other evidence “from which one may reasonably determine that Allstate should have known that [the insured] was a Michigan resident.” *Id.* at 41, 43.

The question in *State Farm* was whether the insurer knew or had reason to know that it was “dealing with a Michigan resident” at the time the policy was issued. If an insurer had such knowledge but nevertheless issued an out-of-state policy to a Michigan resident, we construed MCL 500.3012 to permit a trial court to reform the out-of-state policy to include the missing Michigan PIP benefits.

The issue in this case is very different from the issue resolved by *State Farm*. In this case, there is no dispute that defendant properly issued a Maryland policy to plaintiff, who was a Maryland resident at the time the policy was issued. Plaintiff’s argument on appeal is that she informed defendant during the policy year that she was moving to Michigan and that she believed that the information she had provided converted her out-of-state policy to a Michigan policy. Although plaintiff presented an affidavit to support that she moved to Michigan “on or about October 2, 2017,” and that she informed defendant “[a]round that same time” that she “was moving to Michigan,”<sup>1</sup> there

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<sup>1</sup> A close reading of plaintiff’s affidavit reveals that she moved to Michigan “on or about October 2, 2017,” and that “[a]round that same time,” she informed defendant’s representative that she “was moving to Michigan . . . .” This language suggests that defendant was only aware that plaintiff intended to move to Michigan at some undisclosed point in the future. Indeed, at the time of the accident, plaintiff’s vehicle was

is no evidence that defendant issued another policy that purported to be a Michigan policy. Indeed, plaintiff provided the Maryland insurance policy to law enforcement after the November 2017 accident. Because there is no evidence that defendant knew or should have known that it was issuing a policy to a Michigan resident, neither MCL 500.3012 nor this Court's opinion in *Farm Bureau* supports that plaintiff is entitled to relief.<sup>2</sup> Consequently, even when viewing the evidence in a light most favorable to plaintiff, we conclude that the trial court did not err by granting summary disposition in favor of defendant.<sup>3</sup>

Affirmed.

JANSEN, P.J., and RICK, J., concurred with CAMERON, J.

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registered in Maryland and plaintiff had a Maryland driver's license. Evidence also supports that plaintiff had a home in Maryland.

<sup>2</sup> Plaintiff also cites *Gordon v Geico Gen Ins Co*, unpublished per curiam opinion of the Court of Appeals, issued March 20, 2012 (Docket No. 301431). However, unpublished opinions are not binding, and *Gordon* is not persuasive because the facts in *Gordon* are distinguishable from the facts in this case. See *Cox v Hartman*, 322 Mich App 292, 307; 911 NW2d 219 (2017) ("Although MCR 7.215(C)(1) provides that unpublished opinions are not binding under the rule of stare decisis, a court may nonetheless consider such opinions for their instructive or persuasive value.").

<sup>3</sup> Given this holding, we need not consider defendant's alternative argument that plaintiff is barred from recovering PIP benefits under MCL 500.3113.

## PEOPLE v WITKOSKI

Docket No. 355299. Submitted March 1, 2022, at Grand Rapids. Decided March 3, 2022, at 9:15 a.m. Leave to appeal sought.

Justin S. Witkoski was charged in the 60th district court with one count of assault with intent to do great bodily harm less than murder, MCL 750.84, and one count of possession of child sexually abusive material, MCL 750.145c(4)(a), while he was serving a sentence for an unrelated offense in a state prison facility. The prosecutor received notice on October 22, 2019, from the Department of Corrections that defendant was incarcerated, triggering the 180-day rule under MCL 780.131. On March 15, 2020, the Michigan Supreme Court issued a series of administrative orders related to the COVID-19 pandemic imposing emergency measures on the judiciary and ultimately adjourning jury trials until June 22, 2020, or as otherwise provided by local order, whichever was later. The 180-day period expired on April 19, 2020. A pretrial hearing was scheduled for October 19, 2020, the first day that the prosecutor believed that the circuit court would be permitted to hold a jury trial under the Supreme Court's administrative orders. On September 1, 2020, defendant moved to dismiss on the basis that the prosecutor had violated the 180-day rule. The circuit court, Annette R. Smedley, J., granted the motion and dismissed the charges against defendant.

The Court of Appeals *held*:

Under MCL 780.131(1), when the Department of Corrections receives notice of a pending criminal case against an inmate of a state correctional facility for which a prison sentence might be imposed upon conviction, the inmate must be brought to trial within 180 days after the department gives written notice to the prosecutor of the place where the inmate is imprisoned and a request for final disposition. When the prosecutor violates the 180-day rule, the trial court must enter an order dismissing the case with prejudice. The Michigan Supreme Court has concluded that the statute does not require that a trial take place within the 180-day period. Instead, the prosecutor must act in good faith and proceed promptly toward readying the case for trial within the 180-day period. The 180-day period begins when the prosecutor

receives notice from the department; therefore, the relevant question is not whether 180 days of delay following the date of the notice may be attributed to the prosecutor, but whether action was commenced within the 180 calendar days following the date that the prosecutor received notice. If so, the rule has been satisfied unless the prosecutor's initial steps are followed by an inexcusable delay beyond the 180-day period and an evident intent not to bring the case to trial promptly. In this case, the circuit court found that the prosecutor did not take any action for nearly three months after receiving notice from the department, and the prosecutor did not respond to defendant's request for discovery until the 180-day period had expired. A prosecutor does not necessarily violate the 180-day rule, however, solely because the prosecutor could have acted with more diligence. Rather, the 180-day rule requires that the prosecutor act in good faith and proceed promptly and move the case toward readiness for trial within the relevant time period. The record did not support that the prosecutor initially delayed proceedings in January 2020 in a bad-faith attempt to delay trial. Much of the delay in defendant's scheduled jury trial was attributable to the Supreme Court's decision to suspend jury trials in response to the COVID-19 pandemic. Notably, trial was eventually scheduled to begin on the first day that jury trials were permitted in the circuit court under the Supreme Court's administrative orders. Although defendant argued that the prosecutor could have done more to move the case toward trial in the weeks after the emergency measures were put in place, whether the prosecutor could have moved faster was not the standard under the statute. The prosecutor here took necessary steps to ready this case for trial within a practicable time frame given the circumstances and did not cause an inexcusable delay. Therefore, the circuit court abused its discretion when it concluded that the prosecutor violated the 180-day rule.

Reversed and remanded.

CRIMINAL LAW – TRIALS – 180-DAY RULE – DELAYS IN PROCEEDINGS AGAINST INMATES.

Under MCL 780.131, dismissal of a criminal case that is pending against a defendant who is an inmate of a state correctional facility is required if action is not commenced in the case within 180 days after the prosecutor receives the required notice from the Department of Corrections of the place of the defendant's imprisonment and a request for final disposition; the statute does not necessarily require that a trial take place within the 180 days, but rather requires the prosecutor to take good-faith action within the period to proceed promptly toward readying the case

for trial; when trial does not occur during the 180-day period, the prosecutor does not necessarily violate the 180-day rule solely because more diligence could have been employed so long as the prosecutor acted in good faith and proceeded promptly toward trial.

*Dana Nessel*, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *D. J. Hilson*, Prosecuting Attorney, and *Heather H. Bloomquist*, Assistant Prosecuting Attorney, for the people.

*Thomas G. Oatmen* for defendant.

Before: RIORDAN, P.J., and K. F. KELLY and SWARTZLE, JJ.

SWARTZLE, J. When a prosecutor brings a criminal charge against an inmate of a state penal institution, state law requires that, once the prosecutor has received written notice from the Department of Corrections, the prosecutor must proceed promptly and take good-faith action within 180 days to bring the case to the point of readiness for trial. The circuit court dismissed the criminal charges in this case based on this “180-day rule.” The circuit court abused its discretion in doing so, however, because a significant amount of the delay in bringing defendant’s case to trial was not the fault of the prosecutor, but rather resulted from our Supreme Court’s decision to suspend jury trials during the early days of the COVID-19 pandemic. Accordingly, we reverse the circuit court’s dismissal of the charges against defendant.

#### I. BACKGROUND

The prosecutor charged defendant with one count of assault with intent to do great bodily harm less than murder, MCL 750.84, and one count of possession of



child sexually abusive material, MCL 750.145c(4)(a). The allegations of the underlying incident are not relevant to this appeal. The prosecutor received written notice from the Department of Corrections on October 22, 2019, that defendant was incarcerated at a state prison serving a sentence for an unrelated conviction. The notice triggered MCL 780.131, also known as the 180-day rule. The 180-day period expired on April 19, 2020.

On January 10, 2020, the prosecutor notified the district court that the 180-day rule applied to this case. Defendant was arraigned on January 27, and a probable-cause conference was held on February 5. The matter was bound over to the circuit court on February 12, and the felony complaint was filed the same day. Defendant then sent discovery requests to the prosecutor. A pretrial conference was scheduled for March 3, but it had to be rescheduled to March 16 because the prosecutor did not file a writ for defendant's appearance from prison.

On March 15, the day before the pretrial hearing was scheduled to take place, the Michigan Supreme Court issued Administrative Order No. 2020-1. 505 Mich xcix (2020). Administrative Order 2020-1 imposed emergency measures on the Judiciary as a result of the COVID-19 pandemic. Administrative Order No. 2020-2 was entered three days later on March 18, 505 Mich cii (2020), and instructed trial courts to adjourn all criminal matters, including jury trials, until after April 3, 2020, with a few exceptions not relevant here. Administrative Orders 2020-1 and 2020-2 were later extended to April 14, see Administrative Order No. 2020-5, 505 Mich cxxx (2020), then April 30, see Administrative Order No. 2020-7, 505 Mich cxxxiv (2020), and finally for an indefinite period, Administrative

Order No. 2020-12, 505 Mich cxlii (2020). On April 23, all jury trials were delayed until the later of June 22 or further notice. Administrative Order No. 2020-10, 505 Mich cxxxix (2020).

April 19—the final day of the 180-day period—came and went without any further action in this case. Ten days later, the prosecutor responded to defendant’s discovery request. A pretrial hearing was held on July 29, and the jury trial was scheduled for October 19, 2020—the first day the prosecutor believed that the circuit court would be able to hold a jury trial under our Supreme Court’s administrative orders. On September 1, defendant moved to dismiss this case on the basis that the prosecutor had violated the 180-day rule. Following a hearing, the circuit court concluded that the prosecutor had not proceeded in good faith to set this matter for trial and dismissed this case.

This appeal followed. On appeal, the prosecutor asserted for the first time that the office took immediate action to alert the district court that defendant was an inmate with the Department. In support, the prosecutor pointed to the district court’s register of actions, which does have the following minute entry for October 22, 2019: “VIDEO ARRAIGNMENT FORM RECEIVED FROM PROSECUTOR’S OFFICE.” There is nothing else in the record, however, to indicate what the district court purportedly received from the prosecutor that day—the only letter in the record from the prosecutor to the district court referencing the 180-day rule is the one dated January 10, 2020. Moreover, defendant argued before the circuit court that the prosecutor had not alerted the district court about the 180-day rule until January 10, 2020, and the prosecutor did not challenge this factual assertion, either during the hearing or in the prosecutor’s supplemental

brief filed after the hearing. As part of its ruling in favor of defendant, the circuit court made the factual finding that the district court had not been alerted about the 180-day rule until January 10, 2020. In all other respects, the parties have argued on appeal consistently with their arguments before the circuit court.

## II. ANALYSIS

We review for an abuse of discretion a circuit court's decision on a motion to dismiss. *People v Herndon*, 246 Mich App 371, 389; 633 NW2d 376 (2001). We review de novo questions of law, including statutory interpretation. *People v Lown*, 488 Mich 242, 254; 794 NW2d 9 (2011). The circuit court's attributions of delay are reviewed for clear error. *People v Crawford*, 232 Mich App 608, 612; 591 NW2d 669 (1998).

The requirements of the 180-day rule are set forth in MCL 780.131(1), which provides in relevant part:

Whenever the department of corrections receives notice that there is pending in this state any untried warrant, indictment, information, or complaint setting forth against any inmate of a correctional facility of this state a criminal offense for which a prison sentence might be imposed upon conviction, the inmate shall be brought to trial within 180 days after the department of corrections causes to be delivered to the prosecuting attorney of the county in which the warrant, indictment, information, or complaint is pending written notice of the place of imprisonment of the inmate and a request for final disposition of the warrant, indictment, information, or complaint. The request shall be accompanied by a statement setting forth the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time or

disciplinary credits earned, the time of parole eligibility of the prisoner, and any decisions of the parole board relating to the prisoner.

When a prosecutor violates the 180-day rule, the following consequences apply:

In the event that, within the time limitation set forth in section 1 of this act, action is not commenced on the matter for which request for disposition was made, no court of this state shall any longer have jurisdiction thereof, nor shall the untried warrant, indictment, information or complaint be of any further force or effect, and the court shall enter an order dismissing the same with prejudice. [MCL 780.133.]

The 180-day rule is distinct from a criminal defendant's constitutional right to a speedy trial under our federal and state Constitutions, US Const, Am VI; Const 1963, art 1, § 20, and this latter right is not currently before us on appeal.

With respect to the 180-day rule, our Supreme Court has concluded that the Legislature did not intend to require that a trial necessarily take place within 180 days. *People v Hendershot*, 357 Mich 300, 303; 98 NW2d 568 (1959). As explained by the *Hendershot* Court, "The statute does not require the action to be commenced so early within the 180-day period as to insure trial or completion of trial within that period." *Id.* at 304. Rather, if "apparent good-faith action is taken well within the period and the people proceed promptly and with dispatch thereafter toward readying the case for trial, the condition of the statute for the court's retention of jurisdiction is met." *Id.*

Our Supreme Court revisited the 180-day rule in *Lown*, 488 Mich 242, just over a decade ago. The *Lown* Court explained, "The object of [the 180-day] rule is to dispose of new criminal charges against inmates in

Michigan correctional facilities; the rule requires dismissal of the case if the prosecutor fails to commence action on charges pending against an inmate within 180 days after the [Department] delivers notice of the inmate's imprisonment." *Id.* at 246. But "the rule does not require that a *trial* be commenced or completed within 180 days of the date notice was delivered." *Id.* Rather, "it is sufficient that the prosecutor proceed promptly and move the case to the point of readiness for trial within the 180-day period." *Id.* (cleaned up). "Significantly, although a prosecutor must proceed promptly and take action in good faith in order to satisfy the rule, there is no good-faith exception to the rule. Instead . . . good faith is an implicit component of proper action by the prosecutor, who may not satisfy the rule simply by taking preliminary steps toward trial but then delaying inexcusably." *Id.* at 246-247 (emphasis omitted). Stated differently, "the requirement that a prosecutor proceed in 'good faith' means simply that [the prosecutor] must in fact commence action and cannot satisfy the rule by taking preliminary steps without an ongoing, genuine intent to promptly proceed to trial, as might be evident from subsequent inexcusable delays." *Id.* at 273.

Additionally, "the statutory 180-day period is, by the plain terms of the statute, a fixed period of consecutive days beginning on the date when the prosecutor receives the required notice from the [Department]." *Id.* at 247. "Thus, the relevant question is not whether 180 days of delay since that date may be attributable to the prosecutor, but whether action was commenced within 180 calendar days following the date the prosecutor received the notice. If so, the rule has been satisfied unless the prosecutor's initial steps are followed by inexcusable delay beyond the 180-day period and an evident intent not to bring the case to trial promptly."

*Id.* (cleaned up). Given this, “a court should not calculate the 180-day period by apportioning to each party any periods of delay after the [Department] delivers notice.” *Id.*

On appeal, defendant places the blame for the delay squarely on the shoulders of the prosecutor. It certainly could be argued that the prosecutor did not follow “best practices” in bringing the matter to a rapid resolution. The Department notified the prosecutor in October 2019 that the 180-day rule applied. The circuit court found that the prosecutor did not take any action for nearly three months—about half of the 180 days. While the prosecutor challenges this factual finding on appeal, there is insufficient evidence in the record to show that the circuit court clearly erred, and so we accept the circuit court’s factual finding on this point. Then, the pretrial hearing had to be adjourned for several days because the prosecutor did not file a writ for defendant’s appearance from prison. It was not until several days after the 180-day period had expired that the prosecutor responded to defendant’s discovery request.

But a prosecutor does not necessarily violate the 180-day rule solely because more diligence could have been employed. Instead, the 180-day rule requires that the prosecutor act in good faith and “proceed promptly and move the case to the point of readiness for trial within the 180-day period.” *Id.* at 246 (cleaned up).

Nothing in the record suggests that the prosecutor initially delayed proceedings until January 2020 in a bad-faith attempt to delay trial. As for the March 3 pretrial hearing, although the prosecutor should have filed a writ for defendant’s appearance, that miscue resulted in only a brief delay. While the prosecutor similarly should have responded sooner to defendant’s

discovery request, the resulting delay had little-to-no practical impact on the proceedings because our Supreme Court had imposed emergency measures in the meantime. Moreover, we note that trial was eventually scheduled to begin on October 19, 2020, the first day a jury trial was again permitted in that circuit court under our Supreme Court's administrative orders.

Significantly, much of the delay in defendant's scheduled jury trial resulted from our Supreme Court's decision to suspend jury trials in response to the COVID-19 pandemic. This delay is somewhat analogous to the one encountered in *People v Schinzel (On Remand)*, 97 Mich App 508, 512; 296 NW2d 85 (1980), where the delay was caused by a wholesale change in docketing systems approved by our Supreme Court. The *Schinzel* Court concluded that the delay was excusable under the 180-day rule. *Id.* at 511, 513. Although we are not bound by the decision in *Schinzel* because it was issued prior to November 1, 1990, MCR 7.215(J)(1), we find its analysis on this question persuasive.

As a counterexample, this case does not present a situation in which trial courts remained open for jury trials, but subject to heightened COVID-19 safety measures. See, e.g., Administrative Order of the Western District of Michigan No. 20-MS-024; Administrative Order of the Western District of Michigan No. 20-MS-029; Administrative Order of the Western District of Michigan No. 20-MS-037. In such a circumstance, the prosecutor would have been expected to bring the case to trial promptly because a jury trial would have been permitted. But this was not an option here.

Defendant counters that the prosecutor could have done more in the ensuing weeks after the emergency

measures were put in place, but instead, the prosecutor delayed until July 2020 to hold a pretrial hearing. This might be the case, but again, the standard is not whether the prosecutor could have moved faster. Rather, the prosecutor must take good-faith actions within the 180-day period and move promptly and with dispatch toward readying the case for trial.

Our review of the record confirms that the prosecutor took necessary steps to get this case ready for trial within a practicable time-frame given the circumstances. While the case was not fully ready for trial when the 180-day period expired, our caselaw does not require that the trial actually take place within that time period and, in any event, criminal proceedings and jury trials in our state courts were suspended weeks before the time period had expired. The prosecutor's actions were sufficient to have trial ready for the first possible day the circuit court was permitted to resume jury trials. In fact, given the timing of our Supreme Court's orders, defendant's trial would have very likely begun on October 19 in any event, even if more diligence had been shown at the outset. The prosecutor did not cause an inexcusable delay in readying defendant's case for trial, and the circuit court abused its discretion in concluding that the prosecutor violated the 180-day rule.

### III. CONCLUSION

For the reasons stated in this opinion, we reverse the circuit court's order dismissing the charges against defendant. We remand for proceedings consistent with this opinion. We do not retain jurisdiction.

RIORDAN, P.J., and K. F. KELLY, J., concurred with SWARTZLE, J.



## MARION v GRAND TRUNK WESTERN RAILROAD COMPANY

Docket No. 352355. Submitted June 8, 2021, at Detroit. Decided March 10, 2022, at 9:00 a.m. Affirmed \_\_\_ Mich \_\_\_ (2024).

Jacob Marion, a minor, through his guardian and next friend Monica Marion, brought a negligence action in the Wayne Circuit Court against Grand Trunk Western Railroad Company and two of its employees, conductor Steven Golombeski and engineer Jessie Wilson, after one of its trains struck and injured Jacob as he was walking down the railroad tracks. Both Golombeski and Wilson saw Jacob walking with his back to the train about a mile away. Wilson sounded the horn as the train approached a street crossing, then sounded the horn in emergency mode when Jacob did not appear to respond, but he did not apply the brakes until less than a second before the train struck Jacob. Defendants moved for summary disposition under MCR 2.116(C)(10), arguing that the collision was not caused by any negligence on their part but rather by Jacob's failure to exercise ordinary care for his own safety. The trial court, Annette J. Berry, J., granted the motion on the basis of various early cases addressing duty in the context of pedestrians on railroad tracks, noting that defendants had attempted to alert Jacob of the train's approach and that Jacob was old enough to understand the dangers of trains. Plaintiff appealed.

The Court of Appeals *held*:

1. The trial court erred by concluding that a train crew has no duty to stop or slow a train until the crew determines that a collision is imminent. The doctrine of contributory negligence, which eliminated a plaintiff's ability to pursue a claim if the plaintiff bore any fault for their own injury, permeated tort law for most of Michigan's history, and it often operated to shield railroad companies from the accidents, deaths, and injuries caused by train collisions. This doctrine was abolished in 1979. The trial court in this case largely relied on *Piskowski v Detroit, GH & M R Co*, 121 Mich 498 (1899), which involved a deaf plaintiff who was struck by a handcar after the handcar operators shouted a warning but did not slow down. The plaintiff claimed that the handcar operators had been grossly negligent and that a

nearby flagman should have warned him of the handcar's approach, but the *Piskowski* Court held that defendants had not been grossly negligent given that they had attempted to warn the plaintiff and were unaware of his deafness. However, *Piskowski* was distinguishable: the duties of a handcar operator and a railroad flagman are not the same as those of a train engineer; a duty-to-warn claim is not the same as a claim for negligent failure to slow down; and a gross-negligence claim is not the same as a claim for ordinary negligence. Accordingly, the trial court erred by granting defendants summary disposition on the basis of *Piskowski*.

2. Abundant precedent contradicted the trial court's ruling and defendants' argument, including cases decided in the contributory-negligence era. Even during that time, train employees owed adults and children several duties of care, including to keep a "sharp lookout" for people on the tracks and to make reasonable efforts to avoid hitting them. In particular, if an engineer saw a child (or an adult who appeared unable or unwilling to avoid danger) on the tracks, the engineer could not presume that the person would get out of the way and was required to take means to stop the train in time. Post-*Piskowski*, the Supreme Court reaffirmed that there was a general duty for train personnel to run the train with reasonable care and watchfulness in order to avoid a collision with a child on the tracks. Further, while trespassers on train tracks were (and likely still are) owed a reduced standard of care, the Supreme Court has never proposed that a railroad has no duty to attempt to avoid striking a trespasser who apparently does not hear or heed a warning to get off the tracks by applying the emergency brakes, and several cases from the contributory-negligence era held that railway companies did have such a duty. Specifically, the duty of railway companies to trespassers was held to include exercising ordinary care to not injure a trespasser after discovering the trespasser's peril. Although this duty could be fairly described as minimal, it was far more stringent than the "no duty" rule proposed by defendants and the trial court.

3. The trial court erred by granting defendants summary disposition. Under modern tort law, a train engineer has a duty to stop or slow down when a person in the train's path fails to respond to a warning signal. The duty inquiry includes an evaluation of the relationship of the parties, the foreseeability of the harm, the burden on the defendant, and the nature of the risk presented. Generally, a possessor of land who knows or has reason to know that a trespasser is present is subject to liability

for physical harm thereafter caused to the trespasser by the possessor's failure to carry on their activities on the land with reasonable care for the trespasser's safety. When a land possessor's activities are likely to cause death or serious bodily harm unless they are done carefully, the possessor must exercise reasonable care not only when the possessor knows or is reasonably certain that a trespasser is in danger from the activities, but also when the possessor sees an object or hears a sound indicating that there is a substantial chance that the trespasser may be in such danger. These propositions reflect modern duty concepts consistent with the contours of the duty analysis embraced by the Supreme Court, and they align with Michigan's longstanding common law of the duty applicable to railroads in situations such as Jacob Marion's. They instruct that defendants had a duty to attempt to stop the train when it was apparent that Jacob did not hear the warning and was not going to step off the tracks. The common law imposes a general duty to exercise ordinary and reasonable care and caution, i.e., the care and caution an ordinarily careful and prudent person would use under the circumstances. At a minimum, defendants had an obligation to refrain from wanton and willful misconduct. Exactly when the train crew could and should have stopped the train, and whether it would have been possible for them to stop in time to avoid the collision, represented quintessential fact questions. But viewed in the light most favorable to plaintiff, the facts indicate that the train crew saw Jacob from almost a mile away and, despite numerous horn blasts and the train's lights, recognized that Jacob did not change his course in the slightest. Nevertheless, the train did not slow, and its emergency brake was not applied until it was too late. Given the testimony of record, a reasonable jury could have concluded that defendants had Jacob in plain sight and recognized his peril in time to react so as not to strike him.

Reversed and remanded for further proceedings.

LETICA, J., concurring, agreed with the majority's disposition because the trial court misconstrued critical facts and common-law legal principles before it concluded that there were no genuine issues of material fact.

NEGLIGENCE – RAILROADS – TRAIN OPERATORS – DUTY TO TRESPASSERS.

Under Michigan common law, possessors of land who know or should know that trespassers are common in a particular area may be subject to liability for carrying on an activity involving a risk of death or serious bodily harm without taking reasonable care for trespassers' safety; a train crew that is aware of a person

on the tracks who is not responding to audio or visual warnings has a duty to attempt to stop the train to avoid a collision.

*Michael S. Cafferty* for plaintiff.

*Gallagher Sharp LLP* (by *Mary C. O'Donnell* and *Adam P. Sadowski*) for defendants.

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

GLEICHER, P.J. Jacob Marion, age 14, was struck by a train as he walked down the tracks while listening to music on his earbuds. Through his guardian and next friend, he brought a negligence action against the train's conductor, its engineer, and Grand Trunk Western Railroad Company. According to plaintiff's expert witness, the train's engineer saw the teenager in time to have stopped the train. The circuit court acknowledged that a question of fact existed regarding when the train's engineer applied the brakes. Nevertheless, the court granted summary disposition in favor of defendants, ruling that the engineer had no legal duty to stop the train, or to even slow down, after spotting Jacob on the tracks and realizing that he was not responding to the train's horn.

The circuit court's opinion rested on cases decided by the Michigan Supreme Court between 1899 and 1933. The court incorrectly interpreted those cases, ignored more recent and relevant caselaw, and overlooked fundamental components of the concept of duty. We reverse and remand for further proceedings.

#### I. UNDERLYING FACTS AND PROCEEDINGS

Jacob Marion regularly walked on or near the railroad tracks between his home and his high school. Approximately three-quarters to one mile before the

train struck Jacob, the train's conductor and its engineer saw the young man walking "in the middle of the tracks" with his back to the train. The engineer, Jessie Wilson, routinely sounded the train's horn as the train approached the Oak Street crossing. At approximately the same time, Wilson and the conductor, Steven Golombeski,<sup>1</sup> spotted Jacob in the distance. Golombeski remarked: "The kid doesn't look like he's going to move." According to Wilson, both he and Golombeski realized Jacob's peril before the train reached the Oak Street crossing. Under questioning by his counsel, Wilson testified as follows:

Q. When you had the conversation with Mr. Gol[o]mbeski where he indicated that he didn't think maybe the pedestrian heard the—the horn, were you at the crossing or almost upon the crossing at that time?

A. We were—we were approaching the crossing.

Q. Were you very nearly on it?

A. Excuse me?

Q. Were you very nearly on the crossing?

A. Yes.

[*Plaintiff's counsel*]: The Oak Street crossing, is that—

Q. The Oak Street crossing.

A. It was before—that conversation was before the—the crossing.

Q. But it was after you had started blowing the horn.

A. Yes.

When the train "got over the crossing," Wilson again recounted that Jacob was "just not responding." Wilson then sounded the horn in emergency mode but still did

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<sup>1</sup> Steven Golombeski's name was misspelled in various places in the lower court record. We have employed the correct spelling in this opinion.

not apply the brakes. When asked whether he also applied the brakes at that point Wilson responded, “No, not until after I was giving him all of the warning that I could give him.” Wilson conceded that he could have applied the brakes at that point, but in his view, it would have been impossible to have stopped the train in time.

According to plaintiff’s expert’s interpretation of the train’s event recorder, Wilson did not activate the brakes until about three-quarters of a second before the train struck Jacob. Plaintiff’s expert testified that when the train crew spotted Jacob and observed that he was not reacting to the horn, they should have immediately activated the brakes. Once an emergency brake was finally applied, the train stopped in 719.5 feet. If the brake had been applied when Jacob was first observed to be nonresponsive to the horn, the expert opined, the accident would have been avoided.

The circuit court granted defendants summary disposition under MCR 2.116(C)(10), concluding that “children . . . are well aware of the dangers of trains” and that “no negligence can be imputed” to train operators if they attempted to alert Jacob and he did not respond. Relying largely on *Piskorowski v Detroit, GH & M R Co*, 121 Mich 498; 80 NW 241 (1899), a case involving a deaf plaintiff who was struck by a handcar, the court summarized that “unless . . . train operators are aware of [a] person’s deafness, no negligence can be imputed to them if they attempted to alert the person.”

## II. ANALYSIS

The central question presented in this appeal is whether a train operator has a duty to attempt to preserve the life of a trespasser in peril on the tracks. Defendants contend that a train crew has no duty to

stop or slow a train until the crew determines that a collision is “imminent.” The circuit court agreed. The caselaw does not support such a rule. We begin by setting the historical legal stage.

The doctrine of contributory negligence, which eliminated a plaintiff’s ability to pursue a claim if the plaintiff bore any fault at all for their own injury, permeated tort law for most of Michigan’s history. Our Supreme Court’s first description of the doctrine summarized: “It is a well settled principle of law, that where an injury, of which a plaintiff complains, has resulted from the fault or negligence of himself, or where it has resulted from the fault or negligence of both parties, without any intentional wrong on the part of the defendant, an action cannot be maintained.” *Williams v Michigan Central R Co*, 2 Mich 259, 265 (1851). *Williams* arose from a train accident. So did a subsequent case in which Justice CHRISTIANCY pointedly criticized the contributory-negligence rule:

The law is too well settled by the overwhelming weight of authority, both in England and in the United States, to be now disputed, that, in an action like this, to recover for an injury arising from negligence of the defendant in carrying on their lawful business without wanton or intentional wrong, the plaintiff cannot recover if his own negligence directly or proximately contributed to produce the injury, though the defendant’s negligence may also have concurred in producing the result. *This rule, it is true, often, and perhaps generally, fails to produce justice; and, upon abstract principles of right and wrong, may be said to be frequently unjust in its operation. Justice might seem to require that each should bear the loss in the proportion they had respectively contributed to the injury.* [*Lake Shore & M S R Co v Miller*, 25 Mich 274, 277 (1872) (emphasis added), overruled by *Bricker v Green*, 313 Mich 218 (1946).]

It is no coincidence that both *Williams* and *Lake Shore* involved trains. Before the automobile—and for many years after the first cars hit the roads—trains were the predominant form of transportation in Michigan. Like the cars that replaced them as instrumentalities of regular travel, locomotives caused countless accidents, deaths, and injuries. The contributory-negligence doctrine shielded railroad companies from liability for most of them.

In *Williams*, 2 Mich at 260, a train struck and killed the plaintiff's horses, which had been grazing on a track. The Supreme Court unhesitatingly applied the contributory-negligence rule. Justice CHRISTIANCY's misgivings about the doctrine arose in a far different context. In *Lake Shore*, 25 Mich at 275-276, a woman sitting in a wagon was hit by a train at a highway crossing. The "unjust" nature of contributory negligence was not lost on the Court. But any reservations about the equities were cast aside in favor of protecting the railroads:

If, however, he sees a child of tender years upon the track, or any person known to him to be, or from his appearance giving him good reason to believe that he is, insane, or badly intoxicated, or otherwise insensible of danger, or unable to avoid it, he has no right to presume that he will get out of the way, but should act upon the belief that he might not, or would not, and he should therefore take means to stop his train in time. A more stringent rule than this—a rule that would require the engineer to check his speed or stop his train, whenever he sees a team crossing the track or a man walking on it, far enough ahead to get out of the way in time, until he can send ahead to inquire why they do not; or which would require the engineer to know the deafness or blindness, or acuteness of hearing or sight, or habits of prudence or recklessness or other personal peculiarities of all those persons he may see approaching, or upon the track, and more especially of all



those who may be approaching a crossing upon the highway, though not seen,—any such rule, if enforced, must effectually put an end to all railroads, as a means of speedy travel or transportation, and reduce the speed of trains below that of canal-boats forty years ago; and would effectually defeat the object of the legislature in authorizing this mode of conveyance. [*Lake Shore*, 25 Mich at 279-280.]<sup>[2]</sup>

A review of train injury cases decided before 1979, when the Supreme Court replaced the doctrine of contributory negligence with comparative negligence in *Placek v Sterling Hts*, 405 Mich 638; 275 NW2d 511 (1979), reveals that most began and ended with the conclusion that the plaintiff's negligence, however slight, foreclosed recovery. Echoing Justice CHRISTIANCY, Justice WILLIAMS observed in *Placek*, 405 Mich at 652, "There is little dispute among legal commentators that the doctrine of contributory negligence has caused substantial injustice since it was first invoked in England in 1809."

It is against this backdrop that we turn to *Piskowski*, the case the circuit court found controlling under the facts presented here.

#### A. PISKOROWSKI

Anthony Piskorowski was 42 years old and deaf. While returning home from his job, he walked south on a train track used only by trains going north, which allowed him to see any approaching trains. When he turned to cross the tracks and "stepped across the rail," he "was struck by a hand-car" operated by the defen-

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<sup>2</sup> The first sentence of this quotation is directly relevant to the case at hand—a point discussed in greater detail below.

dant railroad company and was severely injured.<sup>3</sup> *Piskorowski*, 121 Mich at 499. “The hand-car was propelled by four men, with a foreman in charge of a hand-brake.” *Id.* The men on the handcar had shouted a warning of their approach, but Piskorowski, of course, did not hear it. “When between 12 and 15 feet away from the plaintiff they again shouted, and plaintiff again failed to pay any attention, and the men on the hand-car made no effort to slow up.” *Id.* A third shout was to no avail, and the handcar hit Piskorowski. *Id.* at 500.

Piskorowski’s negligence claim rested on two arguments. First, to avoid the application of contributory negligence, he contended that the defendant’s employees were grossly negligent. *Id.* “The term ‘gross negligence’ . . . has a definite meaning, when referred to as authorizing a recovery for a negligent injury, notwithstanding the contributory negligence of the plaintiff.” *Knickerbocker v Detroit, GH & M R Co*, 167 Mich 596, 602; 133 NW 504 (1911). The Supreme Court rejected that the handcar operators had been grossly negligent given that they shouted warnings and had no reason to know of Piskorowski’s deafness. *Piskorowski*, 121 Mich at 500.

Piskorowski’s second claim was that a flagman in the area should have warned him of the oncoming handcar.<sup>4</sup> *Id.* The Court rejected this argument, too, on

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<sup>3</sup> For a description of a handcar, see *Miller v Ann Arbor R Co*, 196 Mich 297, 298-299; 162 NW 1025 (1917) (involving a handcar that “was of the ordinary type, and was propelled by hand power. When being propelled, men stood upon the platform of said car, working two handles up and down, rods connected the handles with gearing beneath the platform, which caused the wheels to revolve”).

<sup>4</sup> “The flagman’s duty is to know of the approach of trains, and to give timely warning to all persons attempting to cross the railroad track, and the public have a right to rely upon a reasonable performance of that

contributory-negligence grounds: “It seems to us that this question is governed by the same considerations which rule the former.” *Id.* Like the handcar operators, the flagman had no reason to know of Piskorowski’s deafness. The Court concluded, “In this case, had [the flagman] known all the facts, he would not be required to assume that plaintiff would ignore the warning already given, or that he would change his course so as to come in contact with the car.” *Id.* at 501.

In a sense, the facts of *Piskorowski* are similar to those presented here, in that both plaintiffs were unable to hear a warning. *Piskorowski*, however, does not describe the duty of an engineer piloting a locomotive. A handcar is not a train,<sup>5</sup> a flagman is not an engineer, and a duty-to-warn claim is not a claim for the negligent failure to stop a moving train in time to prevent injury. Moreover, the Court’s holding in *Piskorowski* was compelled by the doctrine of contributory negligence. Once the Court determined that Piskorowski bore responsibility for his injury, the die was cast. Recognizing the legal dominance of the contributory-negligence doctrine, Piskorowski did not even try to bring a negligence claim against the handcar operators, eliminating the need for the Court to address their standard of care. That is why *Pisko-*

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duty.” *Richmond v Chicago & W M R Co*, 87 Mich 374, 382; 49 NW 621 (1891) (quotation marks and citation omitted).

<sup>5</sup> When analyzing duty, the difference between a handcar powered by four men and traveling at slow speed and a modern-day locomotive cannot be disregarded. The magnitude of the risk posed by an object or conduct is an integral aspect of every duty equation. See *Moning v Alfano*, 400 Mich 425, 433-434; 254 NW2d 759 (1977), and *Buczowski v McKay*, 441 Mich 96, 103; 490 NW2d 330 (1992).

*rowski* simply does not stand for the proposition for which the circuit court cited it.

B. SUPREME COURT PRECEDENT RELEVANT TO THIS CASE

Abundant precedent contradicts the circuit court's ruling and defendants' argument, including cases decided in the contributory-negligence era. While the doctrine of contributory negligence was in effect, adult plaintiffs hit by trains faced the almost insurmountable hurdle of proving freedom from fault. In cases involving children, however, the Supreme Court was free to describe the duties of care applicable to a train crew. Train employees owed adults and children several duties of care, including to keep a "sharp lookout" for people on the tracks and to make reasonable efforts to avoid hitting them. But because contributory negligence precluded an adult from pursuing virtually any claim arising from an injury by a moving train, a railroad defendant's duty to protect and preserve life was most clearly articulated in cases involving children.<sup>6</sup>

Fourteen years before *Piskorowski* was decided, the Supreme Court considered a case roughly analogous to the one now before us. In *Keyser v Chicago & Grand Trunk R Co*, 56 Mich 559, 560; 23 NW 311 (1885), a 2½-year-old child was struck and injured by a moving train where a private road crossed the tracks. The plaintiff alleged that the train personnel failed to keep a proper lookout and failed to sound the whistle. *Id.* The Supreme Court reversed a defense verdict, holding

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<sup>6</sup> In *Baker v Alt*, 374 Mich 492, 505; 132 NW2d 614 (1965), the Supreme Court reconciled several cases offering different age cutoffs for the application of contributory negligence, holding that "an infant under seven years of age is incapable of contributory negligence." (Quotation marks and citation omitted.)

that the trial court had incorrectly charged the jury that the railroad employees were not “required to keep a vigilant lookout in this locality” or to give danger signals. *Id.* at 561 (quotation marks and citation omitted). The evidence supported that the engineer had seen “something” on the track that “resembled a stick of wood” some 2,500 to 3,000 feet ahead of the train, but he apparently did not slow down at that point. *Id.* at 561. The “stick of wood” was the child, lying on the tracks. The Supreme Court held that the appearance of “something” on the track

was of a character to call for increased vigilance on the part of defendant’s train-men in determining the character of the apparent obstruction. It should have, at least, caused the engineer to slow down the speed of his engine to such a rate that, in approaching it, he could have stopped his train, if necessary, to prevent injury before reaching the object of danger. [*Id.* at 562.]

Injury could have been avoided, the Court explained, “by proper care and caution exercised by defendant’s engineer[.]” *Id.*

In 1888, the Supreme Court reiterated in another case involving a child that the railroad defendants had a duty to “look out for accident or danger to individuals upon the track,” and in that case, they negligently failed to do so. *Battishill v Humphreys*, 64 Mich 514, 520; 38 NW 581 (1888). Had “the persons in charge of that train perform[ed] their duty of keeping a lookout,” the Court asserted, “they would have seen the child in time to stop the train and avoid the accident. If they had seen it upon the track the same distance from it that [the eyewitnesses to the accident] saw it, they could have stopped the train, and avoided the injury to plaintiff.” *Id.* at 520-521. In 1890, the Court again confirmed that a train must reduce its speed when a

danger ahead is spotted: “Only when the engineer, in the exercise of due caution, sees danger, is he required to slacken the speed. He is then bound, from regard for the rights of all parties concerned, to take all proper steps to avoid the danger.” *Robinson v Flint & P M R Co*, 79 Mich 323, 329; 44 NW 779 (1890).

These cases involving children advance the same general duty principle described by Justice CHRISTIANCY in *Lake Shore*. If an engineer

sees a child of tender years upon the track, or any person known to him to be, or from his appearance giving him good reason to believe that he is, insane, or badly intoxicated, or otherwise insensible of danger, or unable to avoid it, *he has no right to presume that he will get out of the way, but should act upon the belief that he might not, or would not, and he should therefore take means to stop his train in time.* [*Lake Shore*, 25 Mich at 279-280 (emphasis added).]

*Piskorowski* did not silently overrule all this precedent. *Piskorowski* did not announce a new, radical rule abrogating a duty to preserve life and limb. Rather, the circuit court misinterpreted that case, failed to place it in a legally historical context, and neglected to consider the relevant cases implicating duty that followed.

Post-*Piskorowski*, in yet another case involving serious injury to a child struck by a train, the Supreme Court reversed a directed verdict for the defense. The Court held that the evidence supported that the train personnel had not been keeping a proper lookout and that “[i]t was their general duty to run the train with reasonable care and watchfulness.” *Huggett v Erb*, 182 Mich 524, 536; 148 NW 805 (1914). The Court continued, “Plaintiff’s evidence here clearly tends to show that her peril might have been known to the trainmen in time to avoid the injury, had they but exercised the

reasonable care, in the operation of their train, which their duties under the circumstances demanded.” *Id.* at 538.

In addition to the contributory-negligence bar, adults (and teenagers such as Jacob) faced a second barrier to recovery in cases arising from train injuries. As trespassers on tracks owned by the railroad companies, such plaintiffs were (and likely still are) owed a reduced standard of care. Yet the Supreme Court has never proposed that even as to trespassers, a railroad has *no* duty to attempt to avoid striking a person who apparently does not hear or heed a warning to get off the tracks. For example, in *Bloch v Detroit United R*, 211 Mich 252, 259; 178 NW 670 (1920), the Court approved the following instruction: “There was no duty incumbent upon the motorman to stop his car, or take measures so to do *until he saw that the plaintiff was not going to get off the track*, or was in such a position that he could not get off the track in time to avoid being struck.” (Emphasis added; quotation marks omitted.) And in *Johnson v New York Central R Co*, 357 Mich 40, 53; 97 NW2d 769 (1959), four members of our then eight-member Supreme Court characterized as a jury question whether an engineer had violated the standard of care by failing to stop sooner, despite the plaintiff’s contributory negligence:

Defendant’s engineer did not apply his emergency brakes until approximately 640 feet east of the crossing when, as he stated, it became obvious to him that the truck was not going to stop, even though when he rounded the curve 2,200 feet east of the tracks he testified he saw plaintiff’s long gasoline truck. He also saw and knew the switch engine standing on the south main tracks was activating the flasher signals. He also knew that highway US-12A crossed the tracks on an angle in a northwesterly direction, making it difficult for the driver to see to the east.

Despite all of this information, rather than applying the emergency brakes immediately, he simply applied the service brakes and then during the last few seconds switched to the emergency brakes. Since reasonable minds might differ as to whether his actions constituted reasonable care and caution under these circumstances, we feel a question of fact for the jury was created.

*Risbridger v Michigan Central R Co*, 188 Mich 672, 685; 152 NW 961 (1915), provides yet another example of a decision recognizing a railroad's duty of care, albeit a narrow one, applicable to adults negligently walking on a train track. The plaintiff's decedent in *Risbridger* worked for the defendant railroad and was struck by a locomotive between 5:00 and 6:00 a.m. He was walking to work on a path next to the railroad tracks that was used by other employees and citizens of the area. *Id.* at 674. The locomotive had no lights and did not sound a warning at the time it hit Mr. Risbridger. The train crew did not realize that a man had been hit by the train and did not stop. *Id.* at 675.

The Court's first opinion in *Risbridger* reversed a directed verdict, finding that Mr. Risbridger was a licensee rather than a trespasser, and that the railroad had arguably failed to use due care in running its train without lights. *Id.* at 677-679. On rehearing, the Court reversed itself, finding that Mr. Risbridger was a trespasser and affirming the directed verdict. *Risbridger v Michigan Central R Co (On Rehearing)*, 188 Mich 679, 688; 157 NW 279 (1916). Nevertheless, the "general doctrine affecting the duty of railway companies to trespassers" adopted by the Court includes a duty to "exercise ordinary care after discovering [a trespasser's] peril not to injure him":

Except at public crossings and a few other places, the right of way of a railroad company is its exclusive property and it owes a trespasser no greater duty than any other owner



of property would owe a trespasser under the same circumstances. The railroad company is not required to anticipate the presence of a trespasser on its track or property, and this rule applies to children as well as to grown persons. The railroad company owes no higher duty to a trespasser than not to wantonly or wilfully injure him. It is only required to exercise ordinary care after discovering his peril not to injure him. The railroad company owes no duty to such persons to employ competent operatives, nor to keep its tracks safe for pedestrians by the use of only sound ties. It is under no obligation to stop its trains at railroad junctions merely for the benefit of trespassers. [*Id.* at 685 (quotation marks and citation omitted).]

Although this duty can be fairly described as minimal, it is far more stringent than the “no duty” rule proposed by defendants and the circuit court. See also *Calvert v Detroit United R*, 202 Mich 311, 326; 168 NW 508 (1918) (involving a streetcar rather than a train, in which the Court approved an instruction consistent with the statement that “upon . . . the admitted discovery of plaintiff’s peril by the agents of defendant, it became the duty of those agents to seek to avert the threatened collision, neglect or refusal to perform the duty being subsequent negligence”).

This review of the post-1899 caselaw demonstrates that the circuit court’s interpretation and application of *Piskorowski* are unsupportable by the precedent of that era. An examination of modern tort law supplies additional grounds for reversing the circuit court’s grant of summary disposition.

#### C. MODERN TORT LAW

In a sense, the contributory-negligence doctrine relieved defendants of an obligation to exercise reasonable care toward negligent plaintiffs. Without ques-

tion, the doctrine truncated the development of the common law regarding duty, as in a vast number of cases the subject was not reached due to evidence of the plaintiff's fault.

With the abolition of contributory negligence and its replacement by comparative negligence, our Supreme Court has on several occasions explored the concept of duty and described its parameters.

“[T]he ultimate inquiry in determining whether a legal duty should be imposed is whether the social benefits of imposing a duty outweigh the social costs of imposing a duty.” *In re Certified Question from the Fourteenth Dist Court of Appeals of Texas*, 479 Mich 498, 505; 740 NW2d 206 (2007). Measured against this standard, there should be no debate that a train engineer has a duty to stop or slow down when a person in a train's path fails to respond to a warning signal. The duty inquiry includes an evaluation of several relevant factors: “the relationship of the parties, the foreseeability of the harm, the burden on the defendant, and the nature of the risk presented.” *Id.* (quotation marks and citations omitted). The Supreme Court has “recognized” that “[t]he most important factor to be considered [in this analysis] is the relationship of the parties . . . .” *Hill v Sears, Roebuck & Co*, 492 Mich 651, 661; 822 NW2d 190 (2012) (alterations in original).

The common law defines the relationship between Jacob and defendant as one of trespasser and landowner. Modern tort law establishes the boundaries of the duties owed to trespassers.

The common law categories are a shorthand, in well-established classes of cases, for the duty analysis; they, too, are based on the relationship of the parties, the nature of the risk, the ability to exercise care, and consid-

erations of public policy. The only difference is that, through the evolution of our common law, the duty analysis has already been performed in respect of invitees, licensees (social guests), and trespassers. [*Rowe v Mazel Thirty, LLC*, 209 NJ 35, 45; 34 A3d 1248 (2012).]

In *Lyshak v Detroit*, 351 Mich 230, 249; 88 NW2d 596 (1957), the Supreme Court considered the duties owed to children trespassing on a golf course. The Court adopted the analysis provided in the first Restatement of Torts:

Here we have injury from dangerous activities conducted in a limited area which trespassers in general are known to frequent. In this situation 2 Restatement, Torts, § 334, well states the preferable and modern principle of law, with which we are impelled to agree:

A possessor of land who knows, or from facts within his knowledge should know, that trespassers constantly intrude upon a limited area thereof, is subject to liability for bodily harm there caused to them by his failure to carry on an activity involving a risk of death or serious bodily harm with reasonable care for their safety.

The Supreme Court reaffirmed “[t]he cardinal rule stated in *Lyshak*” in *Nielsen v Henry H Stevens, Inc.*, 359 Mich 130, 132; 101 NW2d 284 (1960), a case arising from injuries sustained by a seven-year-old riding his bike on a trucking company’s property.

2 Restatement Torts, 2d, § 336, pp 190-191, reiterates these principles, almost verbatim:

A possessor of land who knows or has reason to know of the presence of another who is trespassing on the land is subject to liability for physical harm thereafter caused to the trespasser by the possessor’s failure to carry on his activities upon the land with reasonable care for the trespasser’s safety.

Comment *b* addresses the precautions required when a land possessor's activities are "highly dangerous," declaring:

[T]he gravity of the danger threatened by an activity which, unless carefully carried on, is likely to cause death or serious bodily harm, requires the possessor to exercise reasonable care not only when he knows that a trespasser is at some point made dangerous by it, or is reasonably certain or regards it as highly probable that he is at such a point, but also when he sees an object or hears a sound which causes him to realize that there is a substantial chance that the trespasser may be at such a point. This is in accordance with the tendency of the law not only to require a greater amount of care where life and limb are at stake, than where only some minor harm is likely to occur, but also to extend the duty of protection to persons to whom no duty would be owing if a less serious harm were threatened. [*Id.*, comment *b*, p 191.]

One of the illustrations offered in this section of the Restatement strongly resembles the facts of this case:

A is walking along the right of way of the X & Y Railroad Company. The engineer of an approaching train sees A while 200 yards away. The train is going so slowly that it could readily be stopped within 100 yards. The engineer blows the whistle. A, hearing it, turns around and apparently sees the train approaching. The engineer is entitled to assume that A knows of the approach of the train and will protect himself from harm by stepping off of the tracks before it reaches him. *If, however, the engineer, after blowing the whistle, sees that A does not hear the warning or is unable or obviously intends not to obey it, the Railroad Company is subject to liability for running down A if the engineer fails to take reasonable care, after reaching a point 100 yards from A, to stop the train so as to avoid running A down.* [*Id.*, comment *d*, illustration 3, p 193 (emphasis added).]

These Restatement provisions reflect modern duty concepts consistent with the contours of the duty analysis embraced by our Supreme Court. They align with Michigan's longstanding common law of the duty applicable to railroads in situations such as Jacob Marion's. They instruct that defendants had a duty to attempt to stop the train when it was apparent that Jacob did not hear the warning and was not going to step off the tracks.

The common law imposes a general duty to exercise ordinary and reasonable care and caution, i.e., the care and caution an ordinarily careful and prudent person would use under the circumstances. See, e.g., *Zarzecki v Hatch*, 347 Mich 138, 141; 79 NW2d 605 (1956). Similarly stated, the common law “imposes on every person engaged in the prosecution of any undertaking an obligation to use due care, or to so govern his actions as not to unreasonably endanger the person or property of others.” *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157, 165; 809 NW2d 553 (2011), quoting *Clark v Dalman*, 379 Mich 251, 261; 150 NW2d 755 (1967) (“This rule of the common law arises out of the concept that every person is under the general duty to so act, or to use that which he controls, as not to injure another.”). At a minimum, defendants had an obligation to refrain from wanton and willful misconduct. See, e.g., *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000).

Exactly when the train crew could and should have stopped the train represent quintessential fact questions. And whether stopping in time was possible is yet another question of fact. But viewed in the light most favorable to plaintiff, the facts indicate that the train crew saw Jacob from almost a mile away and, despite numerous horn blasts and the train's lights, recognized

that Jacob did not change his course in the slightest. Nevertheless, the train did not slow and its emergency brake was not applied until it was too late. This was not a sudden, unexpected trespasser who happened across the tracks. Rather, based on the testimony of record, a reasonable jury could conclude that defendants had Jacob in plain sight and recognized his peril for a period of time sufficient to react so as not to strike him.

We reverse and remand for further proceedings. We do not retain jurisdiction.

CAVANAGH, J., concurred with GLEICHER, P.J.

LETICA, J. (*concurring*). The trial court misconstrued critical facts and common-law legal principles before it concluded that there were no genuine issues of material fact. For this reason, I concur in the majority's disposition.<sup>1</sup>

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<sup>1</sup> Plaintiff does not challenge the trial court's order to the extent it granted defendants summary disposition regarding allegations pertaining to the train's excessive speed, the railroad's duty to fence, or attractive nuisance.

SCOTT v DEPARTMENT OF LABOR & ECONOMIC  
OPPORTUNITY/UNEMPLOYMENT INSURANCE AGENCY

Docket No. 350690. Submitted April 7, 2021, at Grand Rapids. Decided March 10, 2022, at 9:05 a.m. Reversed in part and remanded 511 Mich 864 (2023).

Lillian A. Scott brought an action in the Berrien Circuit Court against the Department of Labor and Economic Opportunity/Unemployment Insurance Agency, alleging, in part, that the agency had violated her due-process rights by depriving her of property without providing adequate notice and an opportunity to be heard. From November 10, 2012 to March 8, 2014, Scott received unemployment compensation benefits. In October 2013, the agency began using the fraud-detection software Michigan Integrated Data Automated System (MiDAS); the software program searched for discrepancies in the records of individuals who were receiving—or who had received in the six years before the software was first used—unemployment insurance benefits. When MiDAS detected a discrepancy, it initiated an automated process, which included sending multiple-choice questionnaires, to determine whether the individual had engaged in fraudulent behavior. In April 2014, the agency allegedly sent the fraud questionnaire to Scott. On May 9, 2014, the agency generated four notices: two “determinations” (case numbers ending in 913 and 775) and two “redeterminations” (case numbers ending in 915 and 916). With regard to the determination notices, the notice in Case No. 913 informed Scott that she was retroactively disqualified from receiving benefits because she had voluntarily quit her employment on May 30, 2013, and the notice in Case No. 775 informed Scott that her actions indicated that she had intentionally misled or concealed information to obtain benefits to which she was not entitled and that her benefits would be terminated on May 25, 2013. With regard to the redetermination notices, in Case No. 915, Scott was informed that she was ineligible for the benefits she collected from November 4, 2012 through June 1, 2013, because she was working full-time during that period, and in Case No. 916, Scott was informed that her actions indicated that she had intentionally misled or concealed information to obtain benefits to which she was not entitled and

that her benefits would be terminated on any claims active on November 3, 2012. With both the determination and redetermination notices, the agency included a statement of restitution owed, calculated by totaling the amounts of overpayments and penalties. In addition, each notice informed Scott how to protest a determination and how to appeal a redetermination. Scott claimed, however, that she never received any of the notices mailed on May 9, 2014. Eventually, the agency intercepted Scott's income tax refunds and garnished her wages to satisfy restitution and penalties owed. Scott requested a financial-hardship waiver from the agency in January 2016, which request the agency denied. In accordance with a settlement in another case involving automatic fraud determinations made under MiDAS, the agency reviewed misrepresentation determinations between certain years, including those involving Scott. In June 2017, the agency issued notices to Scott, stating that it had reviewed her claims and that there was no basis to reconsider the primary case associated with the intentional misrepresentation redetermination. In March 2018, Scott protested the 2014 determinations and redeterminations and requested to reopen the cases. The agency denied the request, concluding that it was time-barred. Scott appealed and requested an administrative hearing. At the hearing, Scott denied receiving the 2014 determinations and redeterminations; she claimed that she was unaware of the fraud allegations until she called the agency in 2016. A claims examiner for the agency testified that the address on the May 9, 2014 notices was the one provided by Scott and that this was the address to which the notices would have been sent; there was no evidence in the file that the notices were returned as undeliverable, but there was also no proof of service in the file either. The administrative law judge (ALJ) affirmed the agency's denial of Scott's request to reopen the case, reasoning that her protest was not timely and that she had failed to demonstrate good cause for the late protest. The Michigan Compensation Appellate Commission (MCAC) affirmed the decision of the ALJ, and Scott appealed in the circuit court. The court, Dennis M. Wiley, J., affirmed the ALJ's and MCAC's determinations and dismissed Scott's appeal. Scott appealed by leave granted.

The Court of Appeals *held*:

1. Under MCL 421.32a(2), as amended by 2011 PA 269, to be timely, a claimant must protest a determination within one year of the mailing of the notice. In *Dep't of Licensing & Regulatory Affairs/Unemployment Ins Agency v Lucente*, 508 Mich 209 (2021), the Supreme Court explained that MCL 421.62 authorizes



the agency to recover improperly paid unemployment insurance benefits and that the original determinations imposing restitution for an overpayment or penalties for fraud are not subject to the time requirements of MCL 421.32a. However, the agency must begin with a determination, rather than a redetermination, when it seeks to establish that a claimant received a benefit to which the claimant is not entitled and imposes restitution under MCL 421.62(a). Thus, considering the different protest and appeal processes for determinations and redeterminations, an agency's failure to begin with determinations is grounds for setting aside the redeterminations. The two redeterminations Scott received in this case—Case Nos. 915 and 916—were invalid because the agency failed to issue an original determination with respect to its decision that Scott committed fraud by claiming benefits after voluntarily quitting her job; in other words, by claiming that she was unemployed. Accordingly, because the redeterminations in those cases were invalid, the associated penalties and fines were invalid, and the circuit court erred by affirming the ALJ's and MCAC's conclusions to the contrary.

2. MCL 421.62(c) provides that any determination made by the agency under this section is final unless an application for a redetermination is filed in accordance with MCL 421.32a. Under MCL 421.32a(1), as amended by 2011 PA 269, an interested party has 30 days after the mailing or personal service of a notice of determination to apply for a redetermination. There must be some proof reflecting the fact that an individual was personally served with or sent a copy of the determination as required by MCL 421.32a(1); without such proof, a court is unable to conclude that the agency complied with the notice provisions of the statute. The burden is on the agency to prove that it paid disputed benefits to a claimant during a period of ineligibility because, otherwise, it would require the claimant to prove a negative, a near impossibility. Rather, it is the party who has rendered payment that possesses the particularized knowledge and control of information necessary to prove that it undertook the action of issuing a payment. Such reasoning also applies to the mailing of agency determinations. In Case Nos. 913 and 775, the agency issued original determinations in connection with its decision that Scott committed fraud by claiming benefits after voluntarily quitting her job. The agency failed to affirmatively establish that the determinations were ever mailed to her. The agency's file did not contain proofs of service or mailing for the determinations, and the agency did not offer written or firsthand oral testimony that the determinations were, in fact, mailed. Although the agency file did not contain evidence that the May 9, 2014 deter-

minations had been returned as undeliverable, the lack of returned mail in the file did not support a reasonable inference that Scott received the determinations given that there was no affirmative evidence that the notices were mailed in the first instance. Because MiDAS was deeply flawed, resulting in 93% of fraud adjudications being false positives, the Court declined to rely on the agency's practices and policies as proof that the determinations were sent. Finally, although the ALJ did not find credible Scott's testimony that she never received the determinations, the adverse credibility determination could not be used as competent affirmative evidence of a fact otherwise denied. Because there was no affirmative evidence in the record to support a finding that the agency sent the notices, the circuit court misapplied the substantial-evidence test to the ALJ's finding that Scott received the 2014 determinations. Accordingly, the circuit court erred by affirming the ALJ's and MCAC's decisions regarding the 2014 determinations.

Reversed and remanded for further proceedings.

REDFORD, J., concurring in part and dissenting in part, agreed with the majority that the circuit court order affirming the ALJ's and MCAC's orders in Case Nos. 915 and 916 must be reversed because the agency issued the redeterminations before issuing determinations in those cases but disagreed with the majority's conclusion that reversal was also required in Case Nos. 913 and 775. The ALJ in those cases found not credible (1) Scott's claim that she never received the notices of determinations and (2) Scott's claim that she was not aware, until 2015 or 2016, of any issue with her 2012 and 2013 claims for unemployment benefits. The lack of returned mail in Scott's agency file permitted a reasonable inference that the determination and redetermination letters were received by Scott. The fact Scott had engaged legal counsel by 2014 called into question her assertion that she knew nothing until her wages were garnished and her income tax refunds intercepted. Deference must be afforded administrative findings based on credibility determinations. There was affirmative evidence in the record to support the finding that the agency sent the notices. Relevant here, although the agency file did not contain proof of service, the record did not indicate that the agency had a policy, rule, or regulation that required it to file proof of service, and no statutory requirement appears to exist requiring such action. Judge REDFORD would have concluded that the circuit court did not misapply the substantial-evidence test to the ALJ's factual findings that Scott received the 2014 determi-

nation, and he would have affirmed the circuit court's order affirming the ALJ's and MCAC's decisions in Case Nos. 913 and 775.

Sugar Law Center for Economic & Social Justice (by *Tony D. Paris* and *John C. Philo*) for Lillian A. Scott.

*Dana Nessel*, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Rebecca M. Smith*, Assistant Attorney General, for the Department of Labor and Economic Opportunity/Unemployment Insurance Agency.

Amicus Curiae:

*Pitt McGehee Palmer Bonanni & Rivers* (by *Jennifer L. Lord* and *Michael L. Pitt*) for the Michigan League for Public Policy.

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

SHAPIRO, P.J. Claimant, Lillian A. Scott, appeals by leave granted<sup>1</sup> the trial court's order affirming a judgment of the Michigan Compensation Appellate Commission (MCAC) finding that Scott is time-barred from challenging the Unemployment Insurance Agency's determinations and redeterminations that required her to pay restitution and fraud penalties under the Michigan Employment Security Act, MCL 421.1 *et seq.* For the reasons discussed in this opinion, we reverse.

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<sup>1</sup> *Scott v Enterprise Synergy LLC*, unpublished order of the Court of Appeals, entered February 11, 2020 (Docket No. 350690).

## I. BACKGROUND

In October 2012, Scott successfully applied for unemployment benefits. Payment of the benefits commenced the week ending November 10, 2012, and ended on March 8, 2014.

Beginning in October 2013, the Agency began using the fraud-detection software Michigan Integrated Data Automated System (MiDAS). “MiDAS searched for discrepancies in the records of individuals who were receiving—or who, in the six years prior to the program’s introduction, had received—unemployment insurance benefits.” *Cahoo v SAS Analytics Inc*, 912 F3d 887, 892 (CA 6, 2019). When MiDAS detected a discrepancy, “it initiated an automated process to determine whether the individual had engaged in fraudulent behavior,” which included sending the claimant a multiple-choice questionnaire with the following questions: “‘Did you intentionally provide false information to obtain benefits you were not entitle[d] to receive?’” and “‘Why did you believe you were entitled to benefits?’” *Id.* at 892-893 (alteration in original). However, “MiDAS did not allow for a fact-based adjudication or give the claimant the opportunity to present evidence to prove that he or she did not engage in disqualifying conduct.” *Id.* at 893. And if the claimant answered either question affirmatively or did not respond to the questionnaire, a default determination of fraud was entered by MiDAS. *Id.*

The Agency claims to have sent the fraud questionnaire to Scott in April 2014.<sup>2</sup> On May 9, 2014, the Agency generated a series of four notices, retroactively finding Scott disqualified from receiving unemploy-

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<sup>2</sup> Scott was not asked at the administrative hearing whether she received the fraud questionnaire.

ment benefits. For reasons that are not clear, the notices each carry their own case number, even when referring to the same matter. Specifically, in LARA Case No. 0-002-333-913, the Agency generated a “Notice of Determination,” informing Scott that she was disqualified from benefits because she voluntarily quit her employment on May 30, 2013. In Case No. 0-001-824-775, the Agency issued an additional Notice of Determination informing Scott that her actions indicated that she intentionally misled or concealed information to obtain benefits she was not entitled to and that her benefits would be terminated on any claims active on May 25, 2013. The Agency also produced a separate document titled, “Restitution,” listing the amounts of overpayments and penalties that Scott was required to pay for benefits received from June 8, 2013 to March 8, 2014.

In addition to the Notices of Determination, the Agency issued two “Notice[s] of Redetermination.” In Case No. 0-002-333-915, the Notice of Redetermination found that Scott was ineligible for benefits collected from November 4, 2012 through June 1, 2013, because she was working full-time during that period. The second Notice of Redetermination, issued in Case No. 0-002-333-916, asserted that Scott’s actions indicated that she intentionally misled or concealed information to obtain benefits she was not entitled to and that her benefits would be terminated on any claims active on November 3, 2012. The Agency also produced a statement of restitution owed, totaling the amounts of overpayments and penalties assessed for November 10, 2012 through June 1, 2013.

Each notice informed Scott of how to protest a determination and how to appeal a redetermination. She claims, however, that she did not receive any of the May 9, 2014 notices.

At some point,<sup>3</sup> the Agency began intercepting Scott's income tax refunds and garnishing her wages in satisfaction of the outstanding restitution and penalty amounts. In January 2016, Scott requested a financial-hardship waiver from the Agency in order to reduce the financial burden imposed by the Agency's efforts to recoup overpayment of benefits and penalties. The Agency denied the request for the reason that overpayments generated by fraud are not subject to waiver.

The automatic fraud determinations issued pursuant to MiDAS have spawned multiple lawsuits by unemployment-benefit claimants alleging, in part, inadequate predeprivation notice. See *Bauserman v Unemployment Ins Agency (On Remand)*, 330 Mich App 545; 950 NW2d 446 (2019); *Cahoo*, 912 F3d 887; *Zynda v Arwood*, 175 F Supp 3d 791 (ED Mich, 2016). According to the Agency, as part of the settlement in *Zynda*, it voluntarily reviewed misrepresentation determinations made between 2013 and 2015 and issued certain notices upon completion of the review. In June 2017, the Agency issued notices to Scott, summarily concluding that after review of her case "there was no basis to reconsider the primary case associated with the intentional misrepresentation (re)determination."

On Scott's behalf, in March 2018, the University of Michigan Law School's Unemployment Insurance Clinic filed a protest of the 2014 determinations and redeterminations with the Agency. This protest included a request to reopen Scott's cases. The Agency denied the request, concluding that it was time-barred because it had not been filed within one year of the mailing of the May 9, 2014 notices. See MCL

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<sup>3</sup> Scott believed that her tax refunds were intercepted in 2014 and 2015. She estimated that the garnishments began in late 2015 or early 2016.

421.32a(2), as amended by 2011 PA 269. Scott then filed an appeal of the Agency's decision and requested an administrative hearing.

Scott testified before the administrative law judge (ALJ) and denied receiving the determinations and redeterminations that bore the mail date of May 9, 2014, and her address. She explained that it was not until she called the Agency in 2016 that she became aware of the fraud allegations against her.

Laura Glynn, a claims examiner with the Agency, testified that Scott elected to receive any correspondence from the Agency via mail and that the address on the May 9, 2014 notices was the address that Scott provided. Glynn stated that this was the address to which the notices would have been sent. Glynn further testified that she had reviewed the Agency's file in this matter and found no evidence that the notices were ever returned to the Agency as undeliverable. Glynn also testified, however, that she had no personal knowledge whether the notices were, in fact, mailed and that Scott's file contained no proof of service or other record of mailing for any of the notices.

The ALJ affirmed the Agency's denial to reopen Scott's case because the ALJ found that Scott did not establish a timely protest or good cause for her late protest of the 2014 determinations and redeterminations. The MCAC then affirmed the decision of the ALJ, and Scott filed a timely appellate challenge in the circuit court. In an opinion and order, the trial court rejected Scott's challenges to the rulings of the ALJ and the MCAC and dismissed her appeal. Scott now

appeals in this Court. The Michigan League for Public Policy filed an amicus brief in support of Scott's positions on appeal.<sup>4</sup>

## II. INVALID "REDETERMINATIONS"

After oral argument on Scott's appeal in this Court, the Michigan Supreme Court decided *Dep't of Licensing & Regulatory Affairs/Unemployment Ins Agency v Lucente*, 508 Mich 209; 973 NW2d 90 (2021). The underlying facts are substantially similar to the instant case. After the claimants-appellants in that case had received unemployment benefits, the Agency sent two "redeterminations" to each claimant. "One of the notices described the appellant's new employment and explained that it made the appellant ineligible to receive the already-paid benefits. The other notice alleged that the appellant had intentionally concealed their new employment from the Agency (on the basis of the answers provided while certifying)." *Id.* at 226. "The Agency also mailed each appellant a separate document that stated the appellants' repayment obli-

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<sup>4</sup> A circuit court conducting a direct review of an administrative decision must decide whether the action was authorized by law and whether the decision was supported by competent, material, and substantial evidence on the record. Const 1963, art 6, § 28; *Motycka v Gen Motors Corp*, 257 Mich App 578, 580-581; 669 NW2d 292 (2003). "This Court reviews a lower court's review of an administrative decision to determine whether the lower court applied correct legal principles and whether it misapprehended or misapplied the substantial evidence test to the agency's factual findings, which is essentially a clearly erroneous standard of review." *VanZandt v State Employees' Retirement Sys*, 266 Mich App 579, 585; 701 NW2d 214 (2005). "Substantial evidence is evidence that reasonable persons would accept as sufficient proof to support a decision." *Motycka*, 257 Mich App at 581. "The circuit court's legal conclusions are reviewed de novo and its findings of fact are reviewed for clear error." *Mericka v Dep't of Community Health*, 283 Mich App 29, 36; 770 NW2d 24 (2009).



gations: restitution for the overpayment and financial penalties for the fraud.” *Id.* at 227.

The claimants argued that if the notices sent by the Agency were in fact “redeterminations” of the earlier benefit determinations, they were untimely under MCL 421.32a(2).<sup>5</sup> The Supreme Court determined that MCL 421.62 authorizes the Agency “to make original *determinations* imposing restitution for an overpayment or penalties for fraud” that are not subject to the time requirements of MCL 421.32a. *Id.* at 233. However, the Agency must begin with a “determination,” rather than a “redetermination,” when it “seeks to establish that a claimant received a ‘benefit to which [the claimant] is not entitled’ and imposes restitution pursuant to MCL 421.62(a).” *Id.* at 242 (alteration in original). The Court then held that the Agency’s failure to begin with “determinations” was grounds for setting aside the “redeterminations,” considering the different protest and appeal processes for determinations and redeterminations. See *id.* at 242-246. For those reasons, the Court invalidated the “‘redetermination[s]’ finding fraud and imposing associated fines and penalties.” *Id.* at 218.

Following the Supreme Court’s decision, we ordered the parties to file supplemental briefs addressing the effect of that decision on this case.<sup>6</sup> Having reviewed

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<sup>5</sup> Scott similarly argues on appeal that under MCL 421.32a(2), the Agency had 30 days or one year with good cause to make any redeterminations concerning her eligibility for unemployment benefits. However, as explained in *Lucente*, the Agency was acting pursuant to the authority conferred by MCL 421.62 and therefore was not constrained by the time limits in MCL 421.32a(2). See *Lucente*, 508 Mich at 233.

<sup>6</sup> *Scott v Enterprise Synergy LLC*, unpublished order of the Court of Appeals, entered August 23, 2021 (Docket No. 350690).

the supplemental briefs, we now conclude that *Lucente* requires invalidation of the “redeterminations” issued to Scott.<sup>7</sup>

As in *Lucente*, there were two redeterminations issued in this case: one explaining that Scott was ineligible for already-received benefits because she was not unemployed during the relevant period, and one asserting that Scott had intentionally misrepresented or concealed information, i.e., that she had committed fraud. No original “determination” was issued with respect to this fraud determination. Because the Agency was required to “issue an original determination alleging fraud,” its “failure to do so is grounds for invalidating the ‘redeterminations’ in this case.” *Id.* at 246.<sup>8</sup> Accordingly, the “redeterminations” issued to Scott in Case Nos. 0-002-333-915 and 0-002-333-916 and the associated fines and penalties are invalid. See *id.* at 218.

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<sup>7</sup> Scott raised this issue before the ALJ, arguing that “there needs to have been a Determination before there was a Redetermination,” and the ALJ deemed that it, among other arguments, was “without merit.” Although Scott did not raise this issue on appeal, we have discretion to address an issue “if the failure to consider the issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented[.]” *Smith v Foerster-Bolser Constr, Inc*, 269 Mich App 424, 427; 711 NW2d 421 (2006). And certainly, the Supreme Court’s decision in *Lucente* must guide our review.

<sup>8</sup> A showing of discernable prejudice suffered by the claimant is not required. See *Lucente*, 508 Mich at 245. For the reasons discussed by the Supreme Court, a ruling to the contrary would effectively allow the Agency to “always begin at the ‘redetermination’ step, without consequence.” *Id.*

## III. THE REMAINING “DETERMINATIONS”

While the Agency improperly issued “redeterminations” regarding its decision that Scott was not unemployed, it correctly issued original “determinations” in connection with its decision that Scott committed fraud by claiming benefits after voluntarily quitting her job. Thus, *Lucente* does not resolve Scott’s entire appeal, and we turn to her arguments for why she is not time-barred from challenging the determinations.

Scott contends that her opportunity to appeal the Agency’s determinations was tolled because the administrative record is devoid of any evidence that the Agency mailed the May 9, 2014 determinations to her or that she ever received copies of those determinations. We agree.

MCL 421.62(c) provides that “[a]ny determination made by the unemployment agency under this section is final unless an application for a redetermination is filed in accordance with [MCL 421.32a].” Under § 32a, an interested party has 30 days “after the mailing or personal service of a notice of determination” to file a request for a redetermination. MCL 421.32a(1), as amended by 2011 PA 269.<sup>9</sup>

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<sup>9</sup> MCL 421.32a was amended by 2017 PA 232, effective July 1, 2018, to allow an aggrieved claimant to request a redetermination of an Agency finding of fraud “within 3 years after the date of mailing or personal service of the original determination.” MCL 421.32a(2). Additionally, MCL 421.32a, as amended, now requires the Agency to provide notice of a fraud determination to an interested party by mailing the notice to the “interested party’s address of record” as well as to the most recent address of the interested party as ascertained from the Department of State, the Department of Treasury, and the United States Postal Service. MCL 421.32a(5). The trial court found that the amended version of MCL 421.32a had no retroactive application in this matter. The court noted, however, that even if the amended version of the statute applied in this matter, the evidence still established that Scott’s

In *McBride v Americana Mobile Home Park, Inc.*, 173 Mich App 275, 282; 433 NW2d 336 (1988),<sup>10</sup> we held that there must be “some proof reflecting the fact that” an individual “was personally served with or sent a copy of the determination” as required by MCL 421.32a(1):

We believe that in order to reflect compliance with the statutory mandate relative to notice, the [Agency] file should contain some proof reflecting the fact that respondent was personally served with or sent a copy of the determination. [In the absence of such evidence, [w]e are simply unable to conclude that there was compliance with the notice provisions of the statute . . . . *[Id.]*

Accordingly, in *McBride*, we remanded to allow the employer 30 days to file an application for review of the determination on the merits when there was no evidence contradicting the employer’s testimony that he did not receive a copy of the determination. *Id.* at 281-283.

We have also held, in a case concerning whether the claimant received unemployment benefits during a period of ineligibility, that the burden of proof lies with the Agency. *Lawrence v Mich Unemployment Ins Agency*, 320 Mich App 422, 439-440; 906 NW2d 482 (2017). We reasoned that “[r]equiring [the claimant] to prove that she never received [unemployment-benefit] payments would be requiring her to prove a negative—a near impossibility.” *Id.* at 440. Rather, it is the “party who has rendered payment that possesses

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redetermination request was time-barred because it was filed 10 months after the expiration of the 3-year limitations period.

<sup>10</sup> Opinions of this Court issued before November 1, 1990, are not binding upon this Court but may be considered for their persuasive value. *Jackson v Dir of Dep’t of Corrections*, 329 Mich App 422, 428 n 5; 942 NW2d 635 (2019).

the particularized knowledge and control of information necessary to prove that it undertook the affirmative action of issuing a payment.” *Id.*<sup>11</sup> We conclude that this reasoning applies with equal force to the mailing of Agency determinations.

Turning to this case, we agree with Scott that the Agency failed to affirmatively establish that the determinations were ever mailed to her. The Agency’s representative, Laura Glynn, testified that she reviewed the Agency’s file and found no proofs of service or mailing for the May 9, 2014 determinations. Nor was there written or firsthand oral testimony that the determinations were, in fact, mailed. Glynn could not testify regarding whether the determinations were actually sent because she did not have personal knowledge of that matter; the ALJ also noted that he knew that Glynn was not the person who would have mailed the notices. And no computer records were admitted indicating that the determinations were sent. Glynn did testify that her review of Scott’s record revealed no evidence that the May 9, 2014 determinations had been returned to the Agency as undeliverable. But the lack of returned mail in Scott’s Agency file cannot support a reasonable inference that the determinations were received by Scott in the absence of affirmative evidence that the notices were mailed in the first instance.<sup>12</sup>

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<sup>11</sup> In that case, the Agency failed to offer any evidence that the claimant received benefit payments during a period of ineligibility such as “a cancelled check, a check stub, a notice of electronic funds transfer, or a bank statement.” *Lawrence*, 320 Mich App at 439.

<sup>12</sup> The partial dissent asserts that Scott testified that she engaged legal counsel in 2014 to assist in her dispute with the Agency and reasons that this supports the inference that she received the May 9, 2014 notices. When asked when she first contacted an attorney, Scott answered: “I’m not for sure. I think it was around in 2016.” After

Given the lack of affirmative evidence, the Agency essentially asks us to conclude that the determinations were sent pursuant to their practices and policies. However, even putting *McBride* aside, the Agency's track record regarding fraud adjudications made during this time strongly counsels against that conclusion. MiDAS "was deeply flawed; the Michigan Auditor General reviewed over 22,000 of MiDAS' fraud determinations and found that 93% of them did not actually involve fraud. In other words, 93% of MiDAS' fraud adjudications were false-positives." *Cahoo*, 912 F3d at 894. On top of this, the Auditor General found that numerous administrative practices of the Agency were deficient, including that the Agency did not process undeliverable mail in accordance with its written policy. During 2014, the Agency received about 451,000 undeliverable pieces of returned mail. Of 50 randomly selected returned mail items, the Auditor found that the Agency's mailroom personnel inappropriately discarded 28% of the items without processing them as required by the Agency's policy.<sup>13</sup> Thus, we are not inclined to rely on the Agency's practices and policies as proof that the determinations were sent.

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additional questioning about the two different attorneys that have represented her with respect to this dispute, Scott agreed with the Agency's attorney that she had counsel beginning in 2016. At one point, however, Scott testified that "this [has] been going on since 2014 when I contacted Legal Aid." Regardless, the point is that Scott's testimony indicates that she obtained counsel in response to the Agency either garnishing her wages or intercepting her tax refunds. Accordingly, even if Scott obtained counsel in 2014, this is weak circumstantial evidence that she did so in response to receiving the May 9, 2014 notices.

<sup>13</sup> See Office of the Auditor General, *Performance Audit Report, Claimant Services* <<https://audgen.michigan.gov/wp-content/uploads/2016/07/r641031814.pdf>> (accessed February 25, 2022) [<https://perma.cc/D2AN-LQ8S>]. Courts may take judicial notice of a public record. *Johnson v Dep't of Natural Resources*, 310 Mich App 635, 649; 873 NW2d 842 (2015), citing MRE 201.

The Agency also relies on the ALJ's finding that Scott's testimony that she never received the May 9, 2014 notices was not credible. Scott consistently testified that she did not receive the notices, but as to other matters, e.g., when she learned of the fraud allegations against her, she provided somewhat inconsistent and vague testimony. On this basis, the ALJ found her testimony, as a whole, not credible. The Agency is correct that we generally defer to administrative findings that are based on credibility determinations. *Dep't of Community Health v Risch*, 274 Mich App 365, 372; 733 NW2d 403 (2007). The Agency provides no authority, however, for the proposition that an adverse credibility determination may be used as competent affirmative evidence of a fact otherwise denied. As discussed, the Agency has the burden of proof to establish that the determinations were mailed. See *Lawrence*, 320 Mich App at 439-440; *McBride*, 173 Mich App at 282. Because there is no affirmative evidence in the record to support a finding of fact that the Agency sent the notices,<sup>14</sup> the trial court misapplied the substantial-evidence test to the ALJ's finding that Scott received the 2014 determinations.<sup>15</sup>

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<sup>14</sup> The partial dissent opines that we are creating a requirement that the Agency must "file proofs of service" in order "to establish unequivocally that a determination has been mailed and received by a claimant[.]" We are not certain precisely what the dissent believes must be filed and where. Our holding is that the Agency needs to be prepared to present affirmative proof of mailing in the event receipt is contested. Such proof may be offered through internal records of mailing or testimony from someone with knowledge of the mailing; this holding is fully consistent with the holding in *McBride*.

<sup>15</sup> We are particularly hesitant to conclude that the Agency's lack of affirmative evidence of mailing should be overlooked in light of the Supreme Court's decision in *Lucente*, which made clear that even the most technical requirements imposed on the Agency will be strictly enforced. The substantial civil (and possible criminal) penalties that accompany fraud determinations, see MCL 421.54, also support requiring affirmative proof of mailing.

We therefore reverse the trial court's order affirming the ALJ's and the MCAC's decisions and remand for further proceedings. Under *McBride*, the 30-day appeal period for Scott to contest the Agency's determinations in Case Nos. 0-002-333-913 and 0-001-824-775 will not set to run until the issuance of this opinion.<sup>16</sup>

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

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

REDFORD, J. (*concurring in part and dissenting in part*). For the reasons set forth below, I respectfully concur in part and dissent in part.

I concur with the majority in LARA Cases<sup>1</sup> 915 and 916. Because LARA issued a redetermination before issuing a determination in those matters, under *Dep't of Licensing & Regulatory Affairs/Unemployment Ins Agency v Lucente*, 508 Mich 209; 973 NW2d 90 (2021), reversal of the \$39,620 judgment against claimant, Lillian A. Scott, is appropriate.

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<sup>16</sup> Given our ruling that the Agency was obligated to offer affirmative evidence that the determinations were mailed and failed to do so, we need not address Scott's alternative argument that the content of the determinations did not provide adequate notice and so denied her due process. We also need not address Scott's argument that there is good cause to reopen her case and allow a late appeal. See MCL 421.32a(2); Mich Admin Code, R 421.270(1).

<sup>1</sup> For ease of reference, the cases will be referred to by the last three numbers of the LARA case numbers hereinafter, i.e., by 913, 775, 915, and 916.



I dissent from the majority in LARA Cases 913 and 775. I would affirm this portion of the circuit court decision because the Agency complied with the requirements of Michigan law and properly assessed the financial penalties at issue in those cases and correctly entered judgment in the amount of \$50,060.

#### I. FACTUAL AND PROCEDURAL BACKGROUND

In this matter, Scott had four separate case numbers from LARA that were the subject of her administrative hearing, the decision of which she appealed to the Michigan Compensation Appellate Commission (MCAC); she then appealed the MCAC's decision to the circuit court and now appeals the circuit court's decision in this Court.

| LARA Case Number | LARA Docket Number | Notice of Determination letter dated | Notice of Re-determination letter dated | Amount principal | Amount penalty | Total amount assessed |
|------------------|--------------------|--------------------------------------|-----------------------------------------|------------------|----------------|-----------------------|
| 0-002-333-913    | 18-008614          | 05/09/2014                           |                                         |                  |                |                       |
| 0-001-824-775    | 18-008735          | 05/09/2014                           |                                         | \$10, 012        | \$40, 048      | \$50, 060             |
| 0-002-333-915    | 18-008763          |                                      | 05/09/2014                              |                  |                |                       |
| 0-002-333-916    | 18-009016          |                                      | 05/09/2014                              | \$7, 924         | \$31, 696      | \$39, 620             |

Scott previously worked for Enterprise Synergy, LLC. After her employment ended with the company, she received unemployment benefits before May 2014. On February 10, 2014, Scott's previous employer sent a four-page document to the Agency, advising in detail that Scott voluntarily left her employment with the company in May 2013.

On April 24, 2014, LARA sent a letter addressed to Scott at her 856 Ogden address titled “Request for Information Relative to Possible Ineligibility or Disqualification.” The letter advised:

A question of eligibility and/or qualification has been raised on this claim. Please respond to the questions on the reverse side of this form. You should keep a copy for your records. The completed form must be received by UIA within 10 calendar days of the mail date shown. *Failure to respond to this request for information will result in issuance of a determination based on available information.*

The letter went on to explain possible sanctions, including fines and costs. There is no indication of a response from Scott.

On April 24, 2014, LARA also generated a similarly titled document that contained other questions regarding information she provided and asked whether Scott had voluntarily left employment because of “Quit/Personal Reasons.” There is no indication of a response from her.

On April 24, 2014, LARA also generated a letter to Enterprise Synergy, LLC, titled “Request for Information Relative to Possible Ineligibility or Disqualification.” On April 25, 2014, Synergy responded to the Agency by filling out the form it received. After more than 10 days elapsed, on May 9, 2014, LARA issued a Notice of Determination in Cases 913 and 775 and Notices of Redetermination in Cases 915 and 916. On May 9, 2014, LARA also issued letters to Scott to her home address, listing the unemployment-benefits overpayments made in relation to her claims and identifying the amount Scott owed, plus penalties, to be paid in restitution.

Scott testified during the administrative hearing, “Well, this is been going on since 2014 when I contacted Legal Aid”; Scott also testified that she had engaged legal counsel to assist her in her dispute with the Agency and worked with the attorney through 2016 regarding approximately \$80,000 to \$100,000 the Agency said she owed and because the Agency garnished Scott’s wages and intercepted her federal income tax refunds. Scott testified that she had numerous phone conversations with Agency representatives during 2015 and 2016, and otherwise contested the actions it had taken.

Eventually, an administrative hearing was conducted on August 2, 2018, presided over by an administrative law judge (ALJ). The ALJ’s opinions in all four cases included, among others, the following findings of fact:

The claimant’s address at the time of filing was 856 Ogden Ave Benton Harbor, MI 49022-5135. She has maintained the same address through the time of hearing.

On May 9, 2014, multiple Agency Determinations/Redeterminations were mailed to the claimant at 856 Ogden Ave Benton Harbor, MI 49022-5135 that held the claimant disqualified for benefits under Section 29(1)(a) of the Act ([18-008614], ineligible for benefits under Section 48 of the Act [18-008763], and that the claimant committed fraud [18-008735 and 18-009016]. Attached Restitution and fraud penalties totaled \$89,680.00 [Bracketed material in original.]

The Reasoning and Conclusions of Law section of the ALJ’s opinion stated, in relevant part:

I did not find the claimant’s testimony credible. The claimant rarely answered the actual question posed to her regardless of who posed it. The claimant’s testimony was all over the board as to what she received in the mail from

the Agency, what she didn't receive in the mail from the Agency, and what she might have received in the mail from the Agency. . . .

While I understand there is no proof of service on the May 9, 2014 Determinations, I did not find the claimant's testimony credible that she did not receive them. Further, I did not find the claimant's testimony credible that she was unaware of any issue with her 2012 and 2013 claims for benefits until the end of 2015.

Scott appealed the ALJ's decision to the MCAC, which affirmed the ALJ's decision, and then she appealed that decision in the circuit court. On June 11, 2019, the circuit court affirmed the decisions of the ALJ and the MCAC. From the circuit court's decision, Scott has appealed by leave granted.<sup>2</sup>

## II. STANDARDS OF REVIEW

We review de novo the circuit court's application of legal principles in reviewing an administrative decision, including matters of statutory interpretation. *Mericka v Dep't of Community Health*, 283 Mich App 29, 35-36; 770 NW2d 24 (2009). We review the circuit "court's review of an administrative decision to determine whether the lower court applied correct legal principles and whether it misapprehended or misapplied the substantial evidence test to the agency's factual findings, which is essentially a clear-error standard of review." *Braska v Challenge Mfg Co*, 307 Mich App 340, 351-352; 861 NW2d 289 (2014) (quotation marks and citation omitted). "A finding is clearly erroneous where, after reviewing the record, this Court is left with the definite and firm conviction that a

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<sup>2</sup> *Scott v Enterprise Synergy LLC*, order of the Court of Appeals, entered February 11, 2020 (Docket No. 350690).

mistake has been made.” *VanZandt v State Employees’ Retirement Sys*, 266 Mich App 579, 585; 701 NW2d 214 (2005).

When an ALJ serves as the trier of fact in an administrative proceeding, it is the ALJ who “heard testimony . . . , reviewed all the evidence in the record and made findings of fact based on the credibility of witnesses and weight of the evidence.” *Hodge v US Security Assoc, Inc*, 497 Mich 189, 195; 859 NW2d 683 (2015). The ALJ’s role requires that it, and not a circuit court on review, make determinations of credibility and resolve evidentiary conflicts. *Id.* at 194-195. The circuit court “must affirm a decision of the ALJ and the MCAC . . . if competent, material, and substantial evidence supports it. A reviewing court is not at liberty to substitute its own judgment for a decision of the MCAC that is supported with substantial evidence.” *Id.* at 193. “Substantial evidence is that which a reasonable mind would accept as adequate to support a decision, being more than a mere scintilla, but less than a preponderance of the evidence.” *VanZandt*, 266 Mich App at 584 (quotation marks and citation omitted). Although the MCAC’s factual findings are entitled to great deference, they are only conclusive if “any competent evidence” supports those findings. *Brackett v Focus Hope, Inc*, 482 Mich 269, 275; 753 NW2d 207 (2008). “Evidence is competent, material, and substantial if a reasoning mind would accept it as sufficient to support a conclusion.” *Romulus v Dep’t of Environmental Quality*, 260 Mich App 54, 63; 678 NW2d 444 (2003). Under the clear error standard, this Court will affirm if the lower court’s determination “is plausible

in light of the record viewed in its entirety[.]” *Beason v Beason*, 435 Mich 791, 803; 460 NW2d 207 (1990).

### III. ANALYSIS

The Legislature intended that the Michigan Employment Security Act (MESA), MCL 421.1 *et seq.*, be “for the benefit of persons unemployed through no fault of their own . . . for the public good, and the general welfare of the people of this state.” MCL 421.2(1). Courts should interpret MESA and its provisions liberally to give effect to this remedial legislation. *Laya v Cebal Constr Co*, 101 Mich App 26, 34; 300 NW2d 439 (1980). A decision that benefits are owed to an individual, or that an individual is disqualified from receiving benefits, is called a determination. See MCL 421.27(a)(1). If a claimant disagrees with a determination, a person may request a redetermination. MCL 421.32a(1). A redetermination request must be made within 30 days after the mailing of the determination notice. *Id.*

In its decision, the ALJ considered the testimony adduced during the hearing and the admissible documentary evidence submitted for its review. The ALJ performed its function as the trier of fact and ultimately determined that Scott lacked credibility regarding her assertion that she had not received the notices mailed to her home address on May 9, 2014, respecting LARA Cases 913 and 775, and her claim that she lacked awareness until 2015 or, perhaps, 2016 of any issue with her 2012 and 2013 claims for benefits. The MCAC reviewed the ALJ’s decision as well as all of the documentary evidence and testimony and concluded that the ALJ had correctly ruled. The circuit court found that a preponderance of the evidence supported the ALJ’s and MCAC’s decisions. This Court

is not to substitute its judgment for that of the circuit court because it believed the evidence warranted a different result. *VanZandt*, 266 Mich App at 584.

The record indicates that Scott admitted in her testimony that she received numerous mailings from the Agency. The lack of returned mail in Scott's Agency file permits a reasonable inference that the May 9, 2014 determination letters and the restitution letters regarding her claims were received by Scott. Although Scott asserted that she never received the determinations and only learned of the fraud and misrepresentation issue sometime in or after 2016, Scott's testimony that she engaged legal counsel in 2014 permits a reasonable inference that the determination notices and restitution letters were mailed to her and received by her, informing her that she had been disqualified from receiving unemployment benefits and had to repay the overpayments. The fact that she had engaged legal counsel already in 2014 calls into question her contention that she knew nothing until her wages were garnished and her income tax refunds were intercepted.

Reliance on the fact that Scott consistently testified that she did not receive the notices does not vitiate the deference that this Court must give to administrative findings based on credibility determinations. *Dep't of Community Health v Risch*, 274 Mich App 365, 372; 733 NW2d 403 (2007). I disagree with the majority's conclusion that there is no affirmative evidence in the record to support a finding of fact that the Agency sent

the notices. Notably, the record lacks evidence of any disruption of the mail service to Scott. She testified she received numerous documents from the Agency over the years. In fact, the only delivery issue Scott raises is in reference to the documents sent on May 9, 2014. Laura Glynn, the Agency's representative at the hearing, testified that all written communications were sent to Scott's mailing address and that no notices were returned as undeliverable. She explained that, if the mailings had been returned, they would have been in Scott's claim files. Although she acknowledged that no proofs of service were in the claims files, the record does not reflect that the Agency had a policy, rule, or regulation that required it to file proofs of service. Further, no statutory requirement appears to exist requiring the filing of proof-of-service documentation for mailings to claimants.<sup>3</sup> The record reflects that the Agency mailed numerous documents to Scott related to her claims and had copies in Scott's claims files of the documents sent on May 9, 2014, in the ordinary course of the Agency's business.

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<sup>3</sup> The majority's opinion intimates that the Agency must establish procedures that will enable it to establish, unequivocally, that a determination has been mailed and received by a claimant, such as filing proofs of service or by having a person appear and testify regarding personal knowledge in every instance that such determination was deposited in the mail. In essence, the majority imposes a heightened burden on the Agency and establishes an evidentiary standard that restrains ALJs and the MCAC from considering and being able to rely on record evidence such as in this case from which a reasonable inference may be drawn that the Agency actually mailed the claimant determinations. Had the Legislature deemed what the majority describes a necessary requirement, surely it would have directed that the Agency do so in the MESA in relation to the statutory notice mandate.



I conclude from the record that the circuit court did not misapply the substantial-evidence test to the ALJ's factual findings that Scott received the 2014 determinations. Accordingly, I would affirm the circuit court's affirmance of the ALJ's and MCAC's decisions respecting LARA Cases 913 and 775.

*In re* PETITION OF BERRIEN COUNTY TREASURER FOR  
FORECLOSURE

Docket No. 352954. Submitted January 11, 2022, at Detroit. Decided March 10, 2022, at 9:10 a.m. Leave to appeal denied 510 Mich 969 (2022).

The Berrien County Treasurer (the Treasurer) filed a petition in 2014 in the Berrien Circuit Court seeking the tax foreclosure of seven parcels of real property owned by New Products Corporation (NPC) for unpaid taxes. NPC objected to the foreclosure of six of the parcels and allowed foreclosure to proceed as to the remaining parcel. The circuit court granted a judgment of foreclosure in 2015, and NPC appealed in the Court of Appeals. The Court of Appeals vacated the circuit court's judgment in an unpublished order and remanded for entry of a new judgment requiring NPC to pay the full amount owed for all the parcels in order to perfect the appeal. In August 2015, NPC paid the Treasurer a total of \$35,436.87, which covered all amounts owed under the judgment of foreclosure with respect to five of the parcels. NPC did not pay the amount owed under the foreclosure judgment with respect to the sixth parcel. The Treasurer moved to dismiss NPC's appeal, and the Court of Appeals granted the motion in an unpublished order. NPC applied for leave to appeal in the Supreme Court, and in lieu of granting leave, the Supreme Court vacated the Court of Appeals' order and remanded the case to the Court of Appeals for consideration as on leave granted. 500 Mich 902 (2017). After remand, the Court of Appeals, HOEKSTRA, P.J., and STEPHENS and SHAPIRO, JJ., dismissed the appeal and declined to discuss the merits of the case because NPC had not perfected the appeal by paying the amounts owed for each parcel that was part of the appeal. 323 Mich App 600 (2018). NPC applied for leave to appeal in the Supreme Court, and the Supreme Court denied its application. 503 Mich 1032 (2019). In November 2019, the Treasurer moved to lift the 2015 stay on the case and to vest title in the parcels with Berrien County. The circuit court, Dennis M. Wiley, J., found that the Court of Appeals had functionally affirmed the circuit court's 2015 judgment when it issued a final ruling on the appeal and that NPC's payment of \$35,436.87 was paid to perfect the appeal pursuant to MCL

211.78k(7) and not to redeem the parcels from foreclosure. Therefore, the court ordered that the payment be refunded to NPC and granted the Treasurer's motion to lift the stay and vest title to the parcels with Berrien County. NPC's delayed application for leave to appeal was granted by the Court of Appeals.

The Court of Appeals *held*:

1. MCL 211.78k(7) authorizes an appeal of a tax-foreclosure judgment in the Court of Appeals and mandates entry of a stay of the judgment with respect to the property covered by the judgment if the property is the subject of the appeal. The statute further requires the stay to remain in place until the Court of Appeals has "reversed, modified, or affirmed" the foreclosure judgment and requires payment to the county treasurer of the amount owed under the judgment in order to perfect the appeal. NPC did not challenge the foreclosure of the five parcels in its brief on appeal. In the Court of Appeals' earlier opinion, the panel ruled that NPC had abandoned any argument regarding the five parcels because NPC's appeal had focused solely on a separate and distinct parcel. Moreover, under MCL 211.78k(7), a stay runs only until the appellate process is concluded, and the Supreme Court denied leave on NPC's application in May 2019. Following the Supreme Court's decision denying NPC's application, NPC did not attempt to redeem the parcels within 21 days, as required by the statute. Accordingly, while circumstances exist in which a party who holds an interest in real property can appeal a foreclosure judgment, lose the appeal, and then redeem the property, the facts in this case did not present such circumstances.

2. NPC asserted that the Court of Appeals previously concluded that NPC had timely redeemed the five parcels when it made the \$35,436.87 payment. Therefore, according to NPC, under the law-of-the-case doctrine, the trial court erred when it "rescinded" the redemption. However, the law-of-the-case doctrine requires an appellate court to have passed on a legal question before remanding the case for further proceedings. In those circumstances, the lower court is bound by the appellate court's decision under the doctrine. In this case, the earlier appeal did not pass on a legal question with respect to whether the \$35,436.87 payment was to redeem the five parcels or to perfect the appeal under MCL 211.78k(7). Accordingly, the law-of-the-case doctrine did not mandate that the trial court treat the payment as having redeemed the five parcels.

3. NPC argued that the circuit court erred when it ruled that its 2015 foreclosure judgment was affirmed when the Court of

Appeals dismissed NPC's earlier appeal for lack of jurisdiction. Accordingly, there was no basis to lift the stay or to refund the \$35,436.87 payment to NPC. But the circuit court correctly determined that the Court of Appeals' dismissal effectively affirmed the foreclosure judgment, triggering the refund and stay-lifting language of MCL 211.78k(7). Additionally, this argument failed because the stay of the foreclosure judgment with respect to the five parcels necessarily ended when NPC did not appeal the foreclosure of those parcels.

4. According to NPC, the Treasurer was equitably estopped from denying that NPC had redeemed the five parcels because the Treasurer had continued to accept tax payments made by NPC on the parcels for several years after NPC made the \$35,436.87 payment. Equitable estoppel may arise when (1) a party induces another to believe facts, (2) the other party justifiably relies and acts on that belief, and (3) the other party is prejudiced if the first party is allowed to deny the existence of those facts. The doctrine was not applicable here. NPC did not redeem the parcels, and the fact that the Treasurer accepted tax payments for the parcels during appellate litigation and before title had vested in any party did not justify NPC's conclusion that the Treasurer had conceded that NPC had, in fact, redeemed the parcels.

Affirmed.

TAXATION – FORECLOSURES – REDEMPTION – APPEALS.

Under MCL 211.78k(7), a party who redeems foreclosed property may not proceed to challenge the foreclosure judgment on appeal; however, pursuant to the statute, under certain circumstances, a party with an interest in real property can unsuccessfully appeal a foreclosure judgment pertaining to the property and still redeem the property.

*Dickinson Wright PLLC* (by *K. Scott Hamilton*) for the Berrien County Treasurer.

*Demorest Law Firm, PLLC* (by *Mark S. Demorest* and *Derek R. Mullins*) and *Clark Hill PLC* (by *Sean Fitzgerald*) for New Products Corporation.

Before: GADOLA, P.J., and MARKEY and MURRAY, JJ.

MARKEY, J. In this case involving a tax-foreclosure judgment encompassing multiple tax parcels of real property in which respondent, New Products Corporation (NPC), held a mortgage interest, NPC appeals by delayed leave granted<sup>1</sup> an opinion and order entered by the trial court in favor of petitioner, Berrien County Treasurer (the Treasurer). More specifically, the trial court's ruling lifted a stay that had been in place pending an earlier appeal by NPC, enforced a 2015 amended tax-foreclosure judgment, and vested title of five disputed parcels with the Treasurer. We affirm.

#### I. BACKGROUND

This case has a lengthy procedural and appellate background that was summarized in this Court's previous opinion in *In re Petition of Berrien Co Treasurer for Foreclosure*, 323 Mich App 600, 602-607; 919 NW2d 288 (2018). For our purposes, it is not necessary to delve into the entire history of the case. To give context to our discussion, we initially note the language in MCL 211.78k(7), which provided as follows at the time of the foreclosure proceedings:

The foreclosing governmental unit or a person claiming to have a property interest under section 78i in property foreclosed under this section may appeal the circuit court's order or the circuit court's judgment foreclosing property to the court of appeals. An appeal under this subsection is limited to the record of the proceedings in the circuit court under this section and shall not be de novo. The circuit

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<sup>1</sup> This Court initially denied NPC's delayed application for leave to appeal. *In re Petition of Berrien Co Treasurer for Foreclosure*, unpublished order of the Court of Appeals, entered June 22, 2020 (Docket No. 352954). Our Supreme Court, however, in lieu of granting NPC's application for leave to appeal, remanded the case to this Court for consideration as on leave granted. *In re Petition of Berrien Co Treasurer for Foreclosure*, 506 Mich 1024 (2020).

court's judgment foreclosing property shall be stayed until the court of appeals has reversed, modified, or affirmed that judgment. If an appeal under this subsection stays the circuit court's judgment foreclosing property, the circuit court's judgment is stayed only as to the property that is the subject of that appeal and the circuit court's judgment foreclosing other property that is not the subject of that appeal is not stayed. To appeal the circuit court's judgment foreclosing property, a person appealing the judgment shall pay to the county treasurer the amount determined to be due to the county treasurer under the judgment on or before the March 31 immediately succeeding the entry of a judgment foreclosing the property under this section, or in a contested case within 21 days of the entry of a judgment foreclosing the property under this section, together with a notice of appeal. If the circuit court's judgment foreclosing the property is affirmed on appeal, the amount determined to be due shall be refunded to the person who appealed the judgment. If the circuit court's judgment foreclosing the property is reversed or modified on appeal, the county treasurer shall refund the amount determined to be due to the person who appealed the judgment, if any, and retain the balance in accordance with the order of the court of appeals. [2006 PA 611.<sup>2</sup>]

The instant case concerned seven tax parcels of real property that comprised the site of a former plastics company. NPC held a mortgagee interest in the parcels. The seven parcels went into foreclosure for unpaid taxes. Following some initial trial and appellate court proceedings, and on cross-motions for summary disposition, the trial court entered an amended judgment of foreclosure on July 27, 2015, relative to the seven parcels. The amended foreclosure judgment also contained a stay of the judgment; the court used stay-

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<sup>2</sup> MCL 211.78k was amended by 2016 PA 433, but Subsection (7) was not altered. MCL 211.78k was again amended by 2020 PA 33 and only nonsubstantive changes were made to Subsection (7).

related language found in MCL 211.78k(7). On August 14, 2015, NPC delivered five certified checks to the Treasurer totaling \$35,436.87, which covered all amounts owed under the foreclosure judgment with respect to five of the parcels. The accompanying letter from NPC's counsel indicated that "[t]hese taxes, penalties, and interest are being paid under protest," that NPC reserved the right to file an appeal with the Michigan Court of Appeals, and that "[a]ny refund should be paid to" NPC. In this Court's earlier opinion, the panel stated that the payment of \$35,436.87 was made "to redeem five of the seven parcels," *Berrien Co Treasurer*, 323 Mich App at 605, and it later reiterated that NPC had "redeemed five parcels by paying the amount due under the amended judgment," *id.* at 611. One of the issues in dispute in this appeal is whether the payment of \$35,436.87 was a true unconditional redemption of the five parcels or whether the payment was simply made to perfect the appeal as required by MCL 211.78k(7).

On November 30, 2015, the trial court entered an order denying NPC's motion for reconsideration. On December 21, 2015, NPC filed a claim of appeal in this Court. NPC did not challenge the foreclosure relative to one of the seven parcels, and there is no dispute on that matter. See *Berrien Co Treasurer*, 323 Mich App at 603 n 1. It is also undisputed that NPC failed to pay the \$483,803.75 owed under the amended foreclosure judgment with respect to another parcel. *Id.* at 612. And in regard to that particular parcel, NPC raised issues on appeal challenging the foreclosure, with the panel noting that this parcel was the sole "subject of appeal," *id.*, even though NPC had indicated in its appellate docketing statement that it planned to challenge the foreclosure judgment in regard to six of the seven parcels. NPC's appeal was rejected and dis-

missed for lack of jurisdiction pursuant to MCL 211.78k(7) because NPC did not pay the foreclosure judgment in connection with the parcel upon which \$483,803.75 was owed as was necessary to perfect the appeal. *Id.*

With respect to the remaining five parcels for which NPC paid the amount owed under the amended judgment of foreclosure, \$35,436.87, this Court ruled:

[NPC] challenged the property descriptions for these parcels as overlapping, resulting in double taxation, gaps in the property, and erroneous assessments. [NPC] claims it paid the amounts due for the five parcels under protest. It abandoned any argument regarding these parcels on appeal, however, because its focus is only on Parcel 00-8<sup>[3]</sup>. [*Id.* at 611 n 6.]

This Court’s earlier opinion was issued on April 10, 2018. *Id.* at 600. On May 22, 2018, the panel denied NPC’s motion for reconsideration. *In re Petition of Berrien Co Treasurer for Foreclosure*, unpublished order of the Court of Appeals, entered May 22, 2018 (Docket No. 330795). A year later, on May 22, 2019, the Michigan Supreme Court denied NPC’s application for leave to appeal. *In re Petition of Berrien Co Treasurer for Foreclosure*, 503 Mich 1032 (2019).

On June 6, 2019, counsel for the Treasurer e-mailed NPC’s attorney asking whether further appellate relief would be pursued by NPC and, if not, indicating that the Treasurer, pursuant to MCL 211.78k(7), would immediately refund the amount that NPC had paid to the Treasurer in its attempt to perfect the appeal, \$35,436.87. Later that day, NPC’s counsel responded that NPC was “still reviewing its options.” In an e-mail

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<sup>3</sup> This is the parcel that had a tax liability of \$483,803.75 under the foreclosure judgment.



dated August 20, 2019, sent to the Treasurer’s attorney, NPC’s lawyer requested a meeting to discuss the proposed refund of the \$35,436.87, noted that NPC was still reviewing its options in regard to the parcel for which over \$400,000 in unpaid taxes was owed, and observed that NPC had continued paying the taxes on the group of five parcels during the years of litigation. On September 13, 2019, NPC’s counsel communicated to the Treasurer’s attorney NPC’s position that NPC had actually redeemed the five parcels in August 2015, that title thus never vested with the Treasurer, and that no refund was triggered under MCL 211.78k(7) because this Court did not “affirm[]” the amended judgment of foreclosure but instead had simply dismissed the appeal for lack of jurisdiction.

On November 4, 2019, the Treasurer moved for an order lifting the stay, enforcing the amended judgment of foreclosure, and vesting title in the Treasurer with respect to the five parcels. The Treasurer contended that NPC never unconditionally redeemed the five parcels, that title had vested with the Treasurer, and that the Treasurer was mandated to refund the \$35,436.87 to NPC under MCL 211.78k(7) because the payment had been made merely in an effort to perfect the appeal. NPC responded by arguing that it had redeemed the five parcels with the \$35,436.87 payment back in August of 2015 and that the payment had to be treated as a redemption of the five parcels for a variety of reasons. The trial court rejected the various arguments posed by NPC in support of its redemption position. Because NPC repeats those arguments on appeal, we will discuss them and the trial court’s reasons for rejecting the arguments. In its opinion and order, the trial court lifted the stay, enforced the 2015 amended tax-foreclosure judgment, and vested title of

the five disputed parcels with the Treasurer.<sup>4</sup> But the trial court stayed enforcement of its ruling pending this appeal.

## II. ANALYSIS

### A. NPC'S ARGUMENTS ON APPEAL

On appeal, NPC first argues that this Court concluded in the prior appeal that NPC had timely redeemed the five parcels; therefore, under the law-of-the-case doctrine, the trial court necessarily erred when it effectively rescinded the redemption.<sup>5</sup> Next, NPC contends that the trial court erred by effectively declaring for purposes of MCL 211.78k(7) that its amended judgment of foreclosure was “affirmed” in the earlier appeal when instead this Court actually dismissed the appeal for lack of jurisdiction. Consequently, there was no basis to lift the stay or for the Treasurer to refund the payment of \$35,436.87 to

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<sup>4</sup> The trial court also vested title in the Treasurer with regard to the other two parcels.

<sup>5</sup> With respect to this argument, the trial court found that this Court’s earlier opinion contained language suggesting both that the \$35,436.87 payment on the five parcels was simply to perfect the appeal and to redeem the five parcels. Therefore, the law-of-the-case doctrine did not provide any guidance. The trial court then concluded that a single payment made to a treasurer to perfect an appeal under MCL 211.78k cannot later be used as the payment to redeem the property at issue. In other words, the same payment cannot be used to perfect an appeal and to redeem property. On the basis of this determination, the trial court opined that it had to decide whether the \$35,436.87 payment made in August 2015 was a payment to perfect the appeal or a redemption payment because it could not be both. Examining the documentary evidence, the trial court found that the payment was made to perfect the appeal because NPC had fully intended to appeal the foreclosure judgment in regard to the five parcels. And once the appeal was finalized, the Treasurer was required to refund the \$35,436.87 to NPC.

NPC.<sup>6</sup> Further, NPC maintains that even if this Court's holding in the first appeal "affirmed" the trial court's foreclosure judgment, the General Property Tax Act (GPTA), MCL 211.1 *et seq.*, does not require a taxpayer to lose his or her property as a penalty for filing an appeal. Finally, NPC asserts that the Treasurer was equitably estopped from denying that NPC had redeemed the five parcels given that the Treasurer continued to accept tax payments on the parcels for several years after the \$35,436.87 payment was made.<sup>7</sup>

B. STANDARD OF REVIEW AND PRINCIPLES OF  
STATUTORY CONSTRUCTION

The crux of this appeal concerns the interpretation of the GPTA. We review *de novo* issues of statutory construction. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008). And with respect to the rules of statutory interpretation, this Court in *Slis v Michigan*, 332 Mich App 312, 335-336; 956 NW2d 569 (2020), observed:

This Court's role in construing statutory language is to discern and ascertain the intent of the Legislature, which may reasonably be inferred from the words in the statute. We must focus our analysis on the express language of the statute because it offers the most reliable evidence of legislative intent. When statutory language is clear and

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<sup>6</sup> With respect to this argument, the trial court concluded that the dismissal of the appeal for lack of jurisdiction *effectively* affirmed the amended judgment of foreclosure even if this Court's ruling did not reach the merits of NPC's arguments and the substance of the foreclosure judgment. Therefore, according to the trial court, the Treasurer was compelled to issue a refund, and the court now had the authority to lift the stay.

<sup>7</sup> The trial court ruled that the payment of taxes on land is not dispositive of ownership and that a party making tax payments on land owned by another cannot vest title to the land with the taxpayer.

unambiguous, we must apply the statute as written. A court is not permitted to read anything into an unambiguous statute that is not within the manifest intent of the Legislature. Furthermore, this Court may not rewrite the plain statutory language or substitute its own policy decisions for those decisions already made by the Legislature.

Judicial construction of a statute is only permitted when statutory language is ambiguous. A statute is ambiguous when an irreconcilable conflict exists between statutory provisions or when a statute is equally susceptible to more than one meaning. When faced with two alternative reasonable interpretations of a word in a statute, we should give effect to the interpretation that more faithfully advances the legislative purpose behind the statute. [Quotation marks and citations omitted.]

“As far as possible, effect should be given to every phrase, clause, and word in the statute.” *Bush v Shabahang*, 484 Mich 156, 167; 772 NW2d 272 (2009) (quotation marks and citation omitted). Statutory language is to be read and understood in its grammatical context, except when it is clear that something different was intended. *Id.* A statute must be read as a whole, and individual phrases and words, although important, should be construed within the context of the entire scheme enacted by our Legislature. *Id.* “While defining particular words in statutes, we must consider both the plain meaning of the critical word or phrase and its placement and purpose in the statutory scheme.” *Id.* A statutory provision must be read in conjunction with other pertinent statutes so as to correctly ascertain legislative intent. *Id.*

#### C. DISCUSSION

Under MCL 211.78k(5), “[a]ll redemption rights to . . . property expire on the March 31 immediately

succeeding the entry of a judgment foreclosing the property . . . , or in a contested case 21 days after the entry of a judgment foreclosing the property . . . .” The instant dispute constituted a contested case; therefore, the remainder of our discussion will focus on the 21-day redemption period. “A [tax foreclosure] judgment . . . is a final order with respect to the property affected by the judgment and except as provided in subsection (7)<sup>[8]</sup> shall not be modified, stayed, or held invalid after . . . 21 days [following] . . . the entry of [the] judgment foreclosing the property . . . .” MCL 211.78k(5)(g) (setting forth language that must be included in a foreclosure judgment).

MCL 211.78k(6) provides that fee simple title to property vests absolutely in the foreclosing governmental unit when delinquent taxes, interest, penalties, and fees on the property are not paid within 21 days of the entry of a foreclosure judgment.

MCL 211.78k(7) authorizes an appeal of a tax-foreclosure judgment in this Court, mandates entry of a stay of the judgment solely with respect to property covered by the judgment if the property is the subject of the appeal, requires the stay to remain in place until this Court “has reversed, modified, or affirmed” the foreclosure judgment, and necessitates the payment to a treasurer of the amount owed under the judgment to perfect the appeal. With respect to perfecting an appeal, the payment to the treasurer must be made “within 21 days of the entry of a judgment foreclosing the property . . . .” MCL 211.78k(7). If the foreclosure judgment “is affirmed on appeal,” the amount due under the judgment “shall” “be refunded to the person who appealed the judgment.” *Id.* On the other hand,

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<sup>8</sup> As quoted in full earlier in this opinion, MCL 211.78k(7) addresses appeals of tax-foreclosure judgments.

“[i]f the circuit court’s judgment foreclosing the property is reversed or modified on appeal, the county treasurer shall refund the amount determined to be due to the person who appealed the judgment, if any, and retain the balance in accordance with the order of the court of appeals.” *Id.*

In discussing the relationship between Subsections (5), (6), and (7) of MCL 211.78k, this Court explained that “[a] person claiming an interest in a foreclosed property may elect to redeem the property after entry of final judgment, MCL 211.78k(5), allow its foreclosure by the taxing unit, MCL 211.78k(6), or appeal the judgment in the Court of Appeals, MCL 211.78k(7).” *Berrien Co Treasurer*, 323 Mich App at 608. We do not believe that this Court meant to suggest that a person with an interest in a foreclosed property is precluded from seeking redemption after an unsuccessful appeal wherein the underlying foreclosure judgment was affirmed.

By way of a simplified hypothetical, we shall initially explain how MCL 211.78k(5), (6), and (7) work together under circumstances in which (1) a judgment of foreclosure is entered against a property owner in a contested case regarding a single parcel; (2) the owner appeals the foreclosure judgment, directly challenging the foreclosure of the subject parcel; (3) the owner perfects the appeal by making a payment to the treasurer in the amount owed on the judgment relative to the parcel; (4) the judgment is affirmed by this Court, and (5) the owner wishes to redeem the property. First, it is important to keep in mind that a foreclosure judgment that is appealed in this Court must be *stayed* until this Court “has reversed, modified, or affirmed that judgment.” MCL 211.78k(7). A “stay” is defined as “[t]he postponement or halting of a proceeding, judg-

ment, or the like[,]” or “[a]n order to suspend all or part of a judicial proceeding or a judgment resulting from that proceeding.” *Black’s Law Dictionary* (7th ed). Under the plain and unambiguous language of MCL 211.78k(7), the owner of an interest in property does not enjoy the benefit of a stay during an appeal unless the parcel covered by a foreclosure judgment is the “subject of that appeal.”

Returning to our hypothetical situation in which the property owner has complied with MCL 211.78k(7) and is entitled to a stay, we note that the stay has the effect of postponing or halting the running of the 21-day redemption period. Upon affirmance of the foreclosure judgment and the conclusion of the appellate process, the stay would end, and the 21-day redemption period would resume. The treasurer would be compelled to refund the amount paid to perfect the appeal, MCL 211.78k(7), and the property owner could use the funds to immediately redeem the property or do so within the resumed redemption period. Therefore, there are circumstances in which a person with an interest in a property can unsuccessfully appeal a foreclosure judgment pertaining to the property and still redeem the property. And to the extent that the trial court’s opinion and order can be construed as suggesting otherwise, it is in error.

Taking these principles and applying them to the case before us is somewhat difficult considering the muddled history of the case. If, for now, we were to assume that NPC did not redeem the property when it paid \$35,436.87 to the Treasurer in August 2015, it would appear at first glance that NPC was entitled to redeem the property when the stay was eventually lifted. The problem is that to satisfy the demands of MCL 211.78k(7), the stay of the judgment foreclosing

on the five parcels must be treated as having ended before this Court's prior opinion was even issued, meaning that the redemption period had long expired.

As quoted earlier, MCL 211.78k(7) provides that "[i]f an appeal . . . stays the circuit court's judgment foreclosing property, the circuit court's judgment is stayed only as to the property that is the subject of that appeal and the circuit court's judgment foreclosing other property that is not the subject of that appeal is not stayed." Although it is true that NPC indicated in its docketing statement that it was appealing the amended judgment of foreclosure with regard to six of the seven parcels, encompassing the five parcels at issue here, NPC ultimately did not challenge the foreclosure of the five parcels in its brief on appeal. In this Court's previous opinion, the panel ruled that NPC "abandoned any argument regarding the[] [five] parcels on appeal . . . because its focus is only on" a separate and distinct parcel. *Berrien Co Treasurer*, 323 Mich App at 611 n 6. Moreover, under MCL 211.78k(7), a stay is only to run until the appellate process is concluded, and the Supreme Court denied leave on NPC's application on May 22, 2019. Still, NPC made no attempt at redemption within 21 days. Accordingly, while there are circumstances in which a person holding an interest in property can appeal a foreclosure judgment, lose the appeal, and then redeem the property, the facts in the instant case do not present such circumstances. We must now address NPC's argument that it redeemed the five parcels when it made the \$35,436.87 payment to the Treasurer in August 2015.

We cannot conclude that the trial court erred by finding that the payment of \$35,436.87 to the Treasurer was solely to perfect the appeal and not to redeem the five parcels. Had it truly been a payment to



redeem the five parcels, in which case NPC would have taken fee ownership of the property and the matter would have ended, NPC would not have stated in its associated correspondence to the Treasurer that it reserved the right to appeal and that any refund would be payable to NPC. Furthermore, NPC indicated to this Court in its docketing statement, which was filed after the payment was made, that it was appealing the foreclosure judgment in regard to the five parcels. We do not construe MCL 211.78k to allow a party who redeems foreclosed property to then proceed to challenge the foreclosure judgment. There can be no reasonable dispute that at the time the \$35,436.87 payment was made to the Treasurer in August 2015, NPC was not redeeming the five parcels.

With respect to NPC's argument that the \$35,436.87 payment constituted a redemption of the five parcels under the law-of-the-case doctrine in light of this Court's previous opinion, we reject it. In *Grievance Administrator v Lopatin*, 462 Mich 235, 259-260; 612 NW2d 120 (2000), our Supreme Court explained the nature of the doctrine:

Under the law of the case doctrine, if an appellate court has *passed on a legal question* and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same. The appellate court's decision likewise binds lower tribunals because the tribunal may not take action on remand that is inconsistent with the judgment of the appellate court. Thus, as a general rule, an appellate court's *determination of an issue* in a case binds lower tribunals on remand and the appellate court in subsequent appeals. [Quotation marks and citations omitted; emphasis added.]

The earlier appeal simply did not address whether the \$35,436.87 payment was to redeem the five parcels. Rather, this Court merely characterized the payment as a redemption in reviewing the history of the case before focusing on the actual issue presented to the Court, which concerned a parcel that is not one of the five parcels in dispute in this case. The panel did not pass on a legal question with respect to perfection versus redemption in regard to the payment of \$35,436.87. Accordingly, the law-of-the-case doctrine did not mandate that the trial court treat the payment as one to redeem the five parcels.

With respect to NPC's contention that this Court did not "affirm" the amended judgment of foreclosure, we agree with the trial court's determination that the dismissal for lack of jurisdiction effectively affirmed the judgment, triggering the refund and stay-lifting language of MCL 211.78k(7). See 7A Michigan Pleading and Practice (2d ed), § 56:39, pp 451-452 ("Dismissal of an appeal leaves the judgment or other determination appealed from operative and conclusive, and in practical effect constitutes an affirmance of the determination appealed from, although it does not necessarily preclude a new appeal.") (citations omitted). To rule otherwise would require that the stay remain in effect in perpetuity, which plainly was not the intent of the Legislature. There is an additional reason to reject NPC's argument: NPC appears to argue that because there was no affirmance, the trial court could not lift the stay and the Treasurer could not refund the money; therefore, the funds had to be treated as a redemption payment for the five parcels. But this argument fails because of our earlier reasoning that the stay, relative to the five parcels, necessarily ended when NPC did not ultimately raise an appellate challenge to the foreclosure of those parcels.

Finally, with respect to NPC's equitable-estoppel argument, this Court in *West American Ins Co v Meridian Mut Ins Co*, 230 Mich App 305, 309-310; 583 NW2d 548 (1998), described the doctrine of equitable estoppel:

Equitable estoppel is not an independent cause of action, but rather a doctrine that may assist a party by preventing the opposing party from asserting or denying the existence of a particular fact. Equitable estoppel may arise where (1) a party, by representations, admissions, or silence intentionally or negligently induces another party to believe facts, (2) the other party justifiably relies and acts on that belief, and (3) the other party is prejudiced if the first party is allowed to deny the existence of those facts. Silence or inaction may form the basis for an equitable estoppel only where the silent party had a duty or obligation to speak or take action. [Citations omitted.]

The doctrine has no application in this case. NPC's theory is that the Treasurer's acceptance of tax payments for the five parcels during the litigation induced NPC to believe that the Treasurer had accepted the \$35,436.87 payment as having redeemed the five parcels; therefore, the Treasurer could not deny that redemption had occurred. We find this proposition lacking in merit. NPC did not redeem the five parcels. The mere fact that the Treasurer accepted tax payments for the parcels during the appellate litigation and before title vested with anyone in no way justified NPC's conclusion that the Treasurer had conceded that NPC had, in fact, redeemed the five parcels. Further, this conclusion assumes that the Treasurer even had the authority to reject NPC's tax payments, which NPC was clearly making in an effort to protect its mortgagee interest in the parcels.

We affirm. Having fully prevailed on appeal, the Treasurer may tax costs under MCR 7.219.

GADOLA, P.J., and MURRAY, J., concurred with MARKEY, J.

ER DRUGS v DEPARTMENT OF HEALTH AND  
HUMAN SERVICES

Docket No. 355108. Submitted March 8, 2022, at Lansing. Decided March 17, 2022, at 9:00 a.m. Leave to appeal denied 510 Mich 865 (2022).

ER Drugs appealed in the Ingham Circuit Court the decision of the Department of Health and Human Services (DHHS) upholding the result of an invoice/inventory reconciliation audit requiring ER Drugs to repay \$1,205,426.23 in Medicaid overpayments to DHHS. Following the audit, ER Drugs contested the assessed repayment in an evidentiary hearing before an administrative law judge (ALJ). The ALJ issued a proposal for decision (PFD) upholding the assessment. The director of DHHS adopted the PFD, and the circuit court, Clinton Canady III, J., affirmed the decision and findings of DHHS and the ALJ. The Court of Appeals granted ER Drugs' application for leave to appeal.

The Court of Appeals *held*:

1. ER Drugs argued that the circuit court erred when it concluded that by failing to file any exceptions to the PFD, ER Drugs waived those objections. According to ER Drugs, under MCL 24.281, no exceptions needed to be filed to preserve its objections because the purpose of filing exceptions is to provide adequate notice to the decisionmaker and to allow the agency the opportunity to correct any errors in the PFD before reaching a final administrative decision. ER Drugs argued that because the director of DHHS was required by the statute to read the record, the purpose that would be served by filing exceptions was satisfied in this case. MCL 24.281(1) refers to a future action and provides that when the official who is to make a final decision has not yet heard a contested case or read the record, no decision that is adverse to a party other than the agency shall be made until a PFD is served on the parties and the parties adversely affected have an opportunity to file exceptions. Reading MCL 24.281(1) together with MCL 24.281(2), which discusses requirements of the PFD, indicates that the statutory scheme addresses the situation in the present case, in which an ALJ performed the initial review by conducting the hearing and reading the record,

and the final decisionmaker (the director of DHHS) later made a final decision after reading the record. Therefore, ER Drugs' argument that it was not required to file exceptions to preserve its objections because the DHHS director would eventually read the record was not supported by the statutory language. Further, MCL 24.281(3) emphasizes the importance of filing exceptions by stipulating that when no exceptions are filed, the decision shall become the final decision of the agency. In addition, caselaw supported that the circuit court applied correct legal principles when it concluded that ER Drugs waived its arguments.

2. DHHS conducted an earlier audit of ER Drugs concerning prescriptions. ER Drugs argued that the previous audit should have barred part of the overpayment assessment in this case under the doctrine of *res judicata*. *Res judicata* bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first case. Even assuming that *res judicata* was applicable in this case, no error was apparent. The prescription audit reviewed whether prescriptions contained certain required information, while the invoice/inventory reconciliation audit reviewed, in part, whether drugs were paid for by Medicaid but were not dispensed, which was not relevant to the prescription audit. Additionally, whether prescriptions contained required information was a different question from whether wholesale purchases did not match with billings, which the invoice/inventory reconciliation audit also reviewed. Because different facts and different proofs were at issue in the two audits, no error was apparent with respect to the doctrine of *res judicata*.

3. ER Drugs alleged that the results of the invoice/inventory reconciliation audit were flawed because DHHS used average prices to reach a final overpayment amount for each drug. Although ER Drugs' argument was not entirely clear, to the extent it took issue with fluctuations in the prices that ER Drugs paid to wholesalers, such fluctuations were irrelevant to the audit because DHHS's concern was the average price paid by Medicaid, not by ER Drugs. Moreover, the average-price model spread the reimbursement amount throughout the entire audit period, so any fluctuations in Medicaid pricing were "evened out." Similarly, ER Drugs argued that DHHS's average-price methodology did not account for "seasonal variations" in inventory levels that occurred when ER Drugs would buy more of certain drugs at the end of the

year before prices increased. As noted, however, the price paid by ER Drugs for a medication was not relevant for purposes of the audit.

4. DHHS relied on a drug-utilization report for billing information, which ER Drugs argued was improper because that type of report is not the same as a billing report or a dispensing report. Therefore, according to ER Drugs, the results of the audit were not supported by competent, material, and substantial evidence. ER Drugs did not cite specific instances in which a drug-utilization report did not accurately represent billing, nor did ER Drugs ever produce a billing report for the ALJ or the court. Therefore, the circuit court did not misapply the substantial-evidence test to the agency's findings.

5. ER Drugs hired a consultant to review signature logs, which it presented to DHHS. A DHHS witness testified that DHHS did not consider the signature-log review because it was irrelevant to the audit. ER Drugs argued that the circuit court's decision not to consider the signature log was arbitrary and capricious. Although ER Drugs' consultant apparently compared the signature logs, which served as verification of the beneficiary receiving the prescription billed, against billings and computed an overpayment of \$71,529.58, this was not the type of audit that DHHS undertook. DHHS's witness testified that the signature logs were irrelevant to an invoice/inventory reconciliation audit because the signature logs did not contain financial information. Therefore, contrary to ER Drugs' argument, the circuit court's decision not to consider the signature logs was not arbitrary and capricious.

6. ER Drugs contended that DHHS improperly retroactively applied Subsection 19.2 of the Pharmacy chapter of the Michigan Medicaid Provider Manual to conduct the audit. The Court of Appeals recently addressed this issue in *Dearborn Hts Pharmacy v Dep't of Health & Human Servs*, 338 Mich App 555 (2021), and held that a number of authorities predated Subsection 19.2 and authorized DHHS to conduct audits and to investigate Medicaid providers. Therefore, because DHHS did not derive its authority to conduct the audit solely from Subsection 19.2, ER Drugs' argument that DHHS was required to conduct invoice/inventory reconciliation audits prospectively only lacked merit under *Dearborn Hts Pharmacy*. ER Drugs also challenged the statement in Subsection 19.2 that DHHS can assume that a pharmacy's beginning and ending inventory is the same in the absence of evidence to the contrary, but ER Drugs failed to show that this

assumption resulted in a higher repayment amount or otherwise affected DHHS's ultimate determination of the repayment amount.

Affirmed.

ADMINISTRATIVE LAW — HEARINGS — FILING EXCEPTIONS — PRESERVING  
OBJECTIONS FOR APPEAL.

Under MCL 24.281(1) of the Administrative Procedures Act, MCL 24.201 *et seq.*, when the official who is to make a final decision has not yet heard a contested case or read the record, no decision that is adverse to a party other than the agency shall be made until a proposal for decision is served on the parties and the parties adversely affected have an opportunity to file exceptions; the party adversely affected must file objections in order to preserve the objections for appeal, regardless of whether the administrative decisionmaker has heard the contested case or read the record at the time the proposal for decision is issued; the failure of the adversely affected party to file objections waives the issues not raised.

*Jim Kelly Law, PC* (by *James J. Kelly*) for ER Drugs.

*Dana Nessel*, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Katherine J. Bennett*, Assistant Attorney General, for the Department of Health and Human Services.

Before: CAVANAGH, P.J., and MARKEY and SERVITTO, JJ.

PER CURIAM. Appellant, ER Drugs, which is a pharmacy, appeals by leave granted<sup>1</sup> a circuit court order upholding a decision by the Department of Health and Human Services (DHHS) to require ER Drugs to repay \$1,205,426.23 in Medicaid overpayments. We affirm.

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<sup>1</sup> See *ER Drugs v Dep't of Health & Human Servs*, unpublished order of the Court of Appeals, entered December 18, 2020 (Docket No. 355108).



## I. BASIC FACTS

This case involves a fiscal audit of ER Drugs by DHHS's Office of Inspector General (OIG). The audit, encompassing transactions from January 2010 to July 2016, resulted in a finding by DHHS that ER Drugs owed \$1,205,426.23 for Medicaid fee-for-service overpayments.<sup>2</sup> The audit method DHHS employed is referred to as an invoice/inventory reconciliation audit (IR audit). It involves comparing wholesale quantities of drugs ordered to amounts billed; if fewer drugs were ordered than were billed, the apparent excess in Medicaid billing is to be recovered by DHHS. To arrive at a reimbursement amount, DHHS identified discrepancies between wholesale drugs supplied and total billings and then applied a factor to those discrepancies to account for how much of each type of drug is generally paid for by Medicaid fee-for-service (as opposed to private insurers or other payment sources).<sup>3</sup> The average price paid by Medicaid fee-for-service during the audit period for each particular drug was then applied.

ER Drugs contested the amount alleged to be owed, but after an evidentiary hearing, an administrative law judge (ALJ) upheld the assessment in a lengthy and detailed proposal for decision (PFD). The director of DHHS adopted the PFD without elaboration. The circuit court concluded that the appeal of the final administrative decision by ER Drugs in that court was subject to dismissal because ER Drugs had not filed any exceptions to the PFD before the director's final

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<sup>2</sup> DHHS has presented evidence that Raad Kouza, the owner of ER Drugs, is facing a criminal indictment for Medicaid fraud.

<sup>3</sup> In other words, if 68% of the billings for "drug X" are Medicaid fee-for-service billings, then the total of the inventory discrepancy for "drug X" would be multiplied by .68 to arrive at a repayment quantity.

decision. In any event, the court concluded, no errors requiring reversal were apparent.

## II. EXCEPTIONS REQUIREMENT

ER Drugs contends that the circuit court erred by concluding that the failure by ER Drugs to file any exceptions to the PFD resulted in a waiver of ER Drugs' objections. ER Drugs contends that a proper interpretation of MCL 24.281 indicates that no exceptions needed to be filed to preserve its objections in the present case because the director of DHHS had read, and was required to read, the record. We disagree.

In general, this Court reviews de novo issues of statutory construction. *Elba Twp v Gratiot Co Drain Comm'r*, 493 Mich 265, 278; 831 NW2d 204 (2013). Also, "[t]his Court reviews a lower court's review of an administrative decision to determine whether the lower court applied correct legal principles . . . ." *Van-Zandt v State Employees Retirement Sys*, 266 Mich App 579, 585; 701 NW2d 214 (2005).

The ALJ stated in its PFD, "Any party may, within ten (10) days from the date of mailing this decision, file exceptions . . . ." It is not disputed that ER Drugs did not file any such exceptions. The director of DHHS issued a final order after the ALJ submitted the PFD, which stated, "Having read and considered the entire record in this matter, I find that the Administrative Law Judge's Proposal for Decision is correct." The director explicitly adopted the PFD.

MCL 24.281 states:

(1) When the official or a majority of the officials of the agency who are to make a final decision have not heard a contested case or read the record, the decision, if adverse to a party to the proceeding other than the agency itself, shall not be made until a proposal for decision is served on

the parties, and an opportunity is given to each party adversely affected to file exceptions and present written arguments to the officials who are to make the decision. Oral argument may be permitted with consent of the agency.

(2) The proposal for decision shall contain a statement of the reasons therefor and of each issue of fact and law necessary to the proposed decision, prepared by a person who conducted the hearing or who has read the record.

(3) The decision, without further proceedings, shall become the final decision of the agency in the absence of the filing of exceptions or review by action of the agency within the time provided by rule. On appeal from or review of a proposal of decision the agency, except as it may limit the issue upon notice or by rule, shall have all the powers which it would have if it had presided at the hearing.

(4) The parties, by written stipulation or at the hearing, may waive compliance with this section.

“The primary goal of statutory interpretation is to give effect to the Legislature’s intent, focusing first on the statute’s plain language.” *Klooster v Charlevoix*, 488 Mich 289, 296; 795 NW2d 578 (2011). The words of a statute are the most reliable evidence of its intent, and statutes should be read as a whole. *Id.*

At the time the ALJ issued its PFD, the “official” who was to “make a final decision”—i.e., the director of DHHS—had not heard the contested case and had not yet read the record. While the director eventually did read the record, he had not done so at the time of the ALJ’s ruling. MCL 24.281(1) refers to an action to be undertaken in the future (providing that “officials of the agency . . . are to make a final decision”). And one must keep in mind the maxim that statutes are to be read as a whole. “[S]tatutes must be construed as a whole with the provisions read in the context of the

entire statute so as to produce a harmonious whole.” *Estate of Romig v Boulder Bluff Condos Units 73-123, 125-146, Inc*, 334 Mich App 188, 196; 964 NW2d 133 (2020). MCL 24.281(2) refers to the preparation *by the person who has conducted the hearing or read the record* of a detailed proposal. Reading MCL 24.281(1) and (2) together indicates that the statutory scheme is referring to exactly the type of situation that took place in the present case: an ALJ undertook the initial review (by conducting a hearing or reading the record), and the official who was to be the final decisionmaker and who had *not yet* read the record at the time of the ALJ’s initial review later made a final decision. This conclusion is reinforced by the fact that MCL 24.281(3) states that an agency, on review of a PFD, “shall have all the powers which it would have if it had presided at the hearing.”

In *Attorney General v Pub Serv Comm*, 136 Mich App 52, 56; 355 NW2d 640 (1984), the Court, citing MCL 24.281, indicated that the failure to file exceptions to a PFD constitutes a waiver of objections not raised. See also *Robertson v Local Div 26, Amalgamated Transit Union*, 91 Mich App 429, 432-433; 283 NW2d 766 (1979). ER Drugs states that these decisions are not binding because they predate November 1, 1990. See MCR 7.215(J)(1) (“A panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals as provided in this rule.”). We note, however, that published cases predating November 1, 1990, still hold value. *Woodring v Phoenix Ins Co*, 325 Mich App 108, 114; 923 NW2d 607 (2018) (“[T]his Court may not be strictly bound to follow older published cases, but traditionally regards

them as retaining some authority, at least if they were not disputed by some other contemporaneous case.”).

In addition, in a more recent case that has precedential value, *In re MCI Telecom Corp Complaint*, 240 Mich App 292, 310; 612 NW2d 826 (2000), the Court held that the failure to raise exceptions to a PFD constituted waiver of the issue:

Next, Ameritech argues that the [Michigan Public Service Commission] should have excluded [the witness’s] testimony because (1) it constituted hearsay and (2) [the witness] did not preserve his notes regarding the substance of the testimony. We conclude that Ameritech failed to preserve this issue for appeal, because it failed to raise the issue of the admissibility of [the witness’s] testimony in its exceptions to the hearing officer’s proposal for decision.

Given the statutory language and the existing caselaw, the circuit court did, in fact, apply correct legal principles by concluding that ER Drugs waived its arguments. See *VanZandt*, 266 Mich App at 585.

In light of the above analyses and in light of the language in MCL 24.281(3) that “[t]he decision, without further proceedings, shall become the final decision of the agency in the absence of the filing of exceptions”—language that emphasizes the importance of filing exceptions—we reaffirm the pertinent principle from the *Attorney General v Pub Serv Comm* case decided in 1984.<sup>4</sup> Although our affirmance of the circuit court’s dismissal of the case on the basis of the “exceptions”

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<sup>4</sup> The argument ER Drugs raises on appeal about the use of the word “may” in the PFD does not require an extended discussion. Clearly, no party was obligated by law to file any exceptions, and the use of the word “may” merely indicates as much. But the fact that no party was required to file exceptions does not obviate the consequences of choosing not to file exceptions.

issue technically renders unnecessary a resolution of the remainder of the issues on appeal, we nevertheless, for the sake of completeness, choose to address them.

### III. RES JUDICATA

ER Drugs contends that an earlier audit of ER Drugs by DHHS—referred to by the parties as “the Xerox audit”—covering the period from March 2, 2011 to April 9, 2012, should have barred certain of the present overpayment assessments on the basis of res judicata. We disagree.

In general, whether res judicata applies is a question of law reviewed de novo. *Ditmore v Michalik*, 244 Mich App 569, 574; 625 NW2d 462 (2001). Also, as previously noted, “[t]his Court reviews a lower court’s review of an administrative decision to determine whether the lower court applied correct legal principles . . . .” *VanZandt*, 266 Mich App at 585.

In *Adair v Michigan*, 470 Mich 105, 121; 680 NW2d 386 (2004), the Court stated:

The doctrine of res judicata is employed to prevent multiple suits litigating the same cause of action. The doctrine bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first. This Court has taken a broad approach to the doctrine of res judicata, holding that it bars not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not. [Citation omitted.]

In *William Beaumont Hosp v Wass*, 315 Mich App 392, 399; 889 NW2d 745 (2016), the Court stated that the preclusion doctrines (such as res judicata) “are appli-

cable to administrative decisions (1) that are adjudicatory in nature, (2) when a method of appeal is provided, and (3) when it is clear that the Legislature intended to make the decision final absent an appeal.” (Quotation marks and citations omitted.)

It is not necessary to get into detail regarding whether *res judicata* applies, in a general sense, to the present case under the rubric of *William Beaumont Hosp*, because even assuming that it does, no error would be apparent. Indeed, in *PT Today, Inc v Comm’r of Office of Fin & Ins Servs*, 270 Mich App 110, 146-147; 715 NW2d 398 (2006), this Court stated:

In this case, plaintiffs correctly argue that, while their causes of action have the same name in [*PT Today I, Inc v Blue Cross & Blue Shield of Mich*, unpublished per curiam opinion of the Court of Appeals, issued July 20, 2001 (Docket Nos. 211294, 211309, and 215795) (*PT Today I*)] and the instant case, they have distinct factual bases. Plaintiffs’ tortious interference claims in *PT Today I* were based on BCBSM’s differential reimbursement of hospital physical therapists and independent physical therapists. In the instant case, however, plaintiffs argue that BCBSM is violating its own reimbursement scheme . . . . These transactions and occurrences are removed from each other in time, subject matter, and legal basis. Moreover, they require different factual proofs. In *PT Today I*, plaintiffs would have to have proved that the [provider class plan] was discriminatory, that the [Nonprofit Health Care Corporation Reform Act, MCL 550.1101 *et seq.*] proscribed discriminatory reimbursements, and that this discrimination reduced plaintiffs’ market share; in the instant case, plaintiffs must prove that BCBSM knowingly promoted the mischaracterization of claims, that this mischaracterization was unlawful, and that this mischaracterization reduced plaintiffs’ market share. If different facts or proofs would be required, *res judicata* does not apply; consequently, *res judicata* does not apply to the instant case.

DHHS's auditing witness, Michael Melvin, testified that the Xerox audit reviewed whether prescriptions contained required information. He stated that prescription reviews were of a different character than fiscal reviews. He noted that whether drugs were paid for by Medicaid but not actually dispensed (i.e., a pertinent question for an IR audit) was an irrelevant question for a prescription review. Melvin indicated that a prescription could be in a proper form even if the associated drug was never dispensed. And, apparently, overpayment charges associated with the Xerox audit were credited to ER Drugs in connection with the present IR audit.

The testimony established that the Xerox audit was concerned with an entirely different issue than the fiscal IR audit. Whether prescriptions contained required information is a different question from whether wholesale purchases did not match with billings. Different facts and proofs were at issue, and therefore no error is apparent with regard to the doctrine of *res judicata*. See *id.*

#### IV. UNDERPINNINGS OF THE IR AUDIT

ER Drugs contends that the results of the IR audit were not supported by competent, material, and substantial evidence because of various errors made by DHHS in conducting the audit. We disagree.

“A final agency decision is subject to court review but it must generally be upheld if it is not contrary to law, is not arbitrary, capricious, or a clear abuse of discretion, and is supported by competent, material and substantial evidence on the whole record.” *VanZandt*, 266 Mich App at 583. “Substantial evidence is that which a reasonable mind would accept as adequate to support a decision, being more than a mere scintilla,



but less than a preponderance of the evidence.” *Id.* at 584 (quotation marks and citation omitted). “If there is sufficient evidence, the circuit court may not substitute its judgment for that of the agency, even if the court might have reached a different result.” *Id.*

“This Court reviews a lower court’s review of an administrative decision to determine whether the lower court applied correct legal principles and whether it misapprehended or misapplied the substantial evidence test to the agency’s factual findings, which is essentially a clearly erroneous standard of review.” *Id.* at 585. “A finding is clearly erroneous where, after reviewing the record, this Court is left with the definite and firm conviction that a mistake has been made.” *Id.* “Thus, the circuit court’s decision will only be overturned if this Court is left with a definite and firm conviction that a mistake was made.” *Id.*<sup>5</sup>

#### A. MISCELLANEOUS ARGUMENTS

ER Drugs alleges an error regarding DHHS’s use of average prices to reach a final overpayment amount for each drug. Melvin testified, “[O]ur pricing methodology just takes the Medicaid fee for service portion of that discrepancy during the time frame.” He said: “It’s an average price per unit for the audit period in question. And this is arrived at taking the total amount paid by fee for service Medicaid for that time period, dividing it by the total number of units, and you get the average price per unit as paid out.”

The argument being made by ER Drugs on appeal in connection with average pricing is not entirely clear. If

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<sup>5</sup> These standards of review are also applicable to Part V of this opinion.

it is taking issue with the fact that there were fluctuations in the prices paid by ER Drugs to wholesalers that were not accounted for by DHHS's methodology, such fluctuations were irrelevant to the IR audit because DHHS was concerned with the average price *paid by Medicaid*. Melvin explicitly stated that the price *paid by ER Drugs* was not pertinent to the audit. If ER Drugs is taking issue with fluctuations in Medicaid pricing that were not accounted for by DHHS, it cannot be said that the circuit court misapplied the substantial-evidence test to the agency's findings. See *VanZandt*, 266 Mich App at 585. The average-price model spread the reimbursement amount throughout the entire audit period, therefore "evening out" fluctuations in Medicaid pricing.

ER Drugs also takes issue with the fact that DHHS did not interview Medicaid beneficiaries who filled prescriptions at ER Drugs, but such interviews would not be pertinent for an IR audit. Beneficiary interviews, for example, would provide no insight regarding whether the subject of the audit may be trafficking in black-market drugs.

ER Drugs also states that DHHS's "starting premise that the inventory levels remained constant throughout the audit period was a faulty assumption. ER Drugs' owner testified that ER Drugs generally did not stock name brand medications after a generic equivalent became available." But ER Drugs utterly fails to indicate how this assumption regarding inventory levels affected the outcome of the IR audit and the assessed repayment amount.<sup>6</sup> "It is not sufficient for a party simply to announce a position or assert an error

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<sup>6</sup> Indeed, it seems that the wholesale orders would have reflected the different "stock" levels referred to by Kouza. He referred to not "stock[ing] the brand once it goes generic."

and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.” *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998) (quotation marks and citation omitted). ER Drugs is, in some respects, tying its “inventory” argument to its argument about average pricing. It states that DHHS’s “use of an average price ignored seasonal variations in inventory levels that were the result of ER Drugs’ legitimate efforts to reduce its tax liability at the end of each year and its desire to stock up on medications before prices increased, which tended to occur in January of each year.” As noted, however, the price *paid by ER Drugs* for a medication was not relevant for the IR audit.<sup>7</sup>

ER Drugs also makes an argument about a wholesaler referred to as “Cumberland.” Melvin stated that DHHS tried to reach Cumberland, but it had gone out of business. He said that Cumberland’s wholesaler license had expired in June 2010, so DHHS had no way to reach the company. He testified:

And again, this information was conveyed to the pharmacy. So if there were specific purchases that they had, they could’ve sent in paper documentation to substantiate this. And this goes for any wholesaler with which there could’ve been issues with contact. It is the pharmacy’s responsibility to furnish those invoices if they have them.

Melvin said that ER Drugs did not provide any invoices regarding Cumberland. The owner of ER Drugs, for his part, stated that he had had no luck reaching Cumberland.

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<sup>7</sup> ER Drugs’ argument related to its inventory is discussed further in Part VI of this opinion.

Melvin explained that it was unlikely that Cumberland had been supplying “substantial amounts of psychotic medications to ER Drugs” in 2010. He said:

So an expired license would generally mean that the entity has been out of business for quite some time. The renewal process associated with that you would want to keep that up to date and renew it far ahead of when it actually expired. And given that it lapsed in—on June 30th of 2010, Cumberland was likely out of business before 2010 and therefore, was out of business outside of the audit period in question.

In addition, MCL 400.111b(6) states:

A provider shall maintain records necessary to document fully the extent and cost of services, supplies, or equipment provided to a medically indigent individual and to substantiate each claim and, in accordance with professionally accepted standards, the medical necessity, appropriateness, and quality of service rendered for which a claim is made.

Also, Medicaid providers are advised that “fiscal records must be maintained,” including, among other records, “[c]opies of purchase invoices for items offered or supplied to the beneficiary.” DHHS, *Medicaid Provider Manual* (MPM), General Information for Providers, Subsection 14.6, Fiscal Records, p 46.

Given Melvin’s testimony and given the recordkeeping requirement that ER Drugs did not follow,<sup>8</sup> we cannot conclude that the circuit court misapplied the

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<sup>8</sup> Interestingly, ER Drugs does not mention any alleged fire or flood in the context of this issue. See note 11 of this opinion.

substantial-evidence test to the agency's findings with regard to the Cumberland issue. See *VanZandt*, 266 Mich App at 585.<sup>9</sup>

#### B. DRUG-UTILIZATION REPORT

ER Drugs takes issue with DHHS's reliance on a drug-utilization report (DUR) for billing information. Wayne Seiler, a pharmacy-software developer who testified for ER Drugs, stated that a DUR "is certainly not a billing report or a dispensing report." He stated that the DUR contains prescription requests that might not be billed, such as requests for prior authorizations or requests for drugs that might interact with other drugs a patient is taking. Seiler stated that he had become aware that OIG was using DURs improperly and had tried multiple times to get the office to understand that the methodology was improper, but he kept getting put off. Also, DHHS's own witness, Melvin, admitted that he did not know the difference between a DUR and a billing report. He also said that the DUR might contain drugs that needed prior authorizations but that were never actually billed.

However, the case of *Prechel v Dep't of Social Servs*, 186 Mich App 547; 465 NW2d 337 (1990), is instructive in considering DHHS's use of the DUR. In that case, the petitioner, a physician, appealed a circuit court opinion upholding a "final decision and order by the Department of Social Services [DSS, the predecessor to

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<sup>9</sup> The argument ER Drugs makes about the Xerox audit in the context of this issue is misplaced. ER Drugs apparently believes that it should be credited for every "clean" prescription found during the Xerox audit. Evidently, Medicaid overpayment charges associated with the Xerox audit and paid by ER Drugs were credited to ER Drugs in connection with the present IR audit, but there is no basis for crediting ER Drugs for every *proper* prescription found during the Xerox audit, which was not a fiscal audit.

DHHS] requiring petitioner to repay the department \$120,000 in medicaid overpayments.” *Id.* at 548. This Court stated:

The overpayment was computed through the use of a statistical random-sampling extrapolation formula wherein the DSS would examine a certain percentage of cases within the two-year period, make a determination of the percentage of those cases that were overcharged, and apply that percentage to the total number of cases during the two-year period. On appeal, petitioner alleges that the hearing referee incorrectly applied the burden of proof to petitioner[.] [*Id.*]

The *Prechel* Court resolved the issue as follows:

The hearing procedures involved in assessing overpayments to a medicaid provider have been upheld by this Court and were determined not to be a violation of due process where the provider is given an opportunity to rebut the initial determination of overpayment. *Quality Clinical Laboratories, Inc v Dep’t of Social Servs*, 141 Mich App 597, 601; 367 NW2d 390 (1985). The extrapolation process used by the DSS creates a rebuttable presumption placing the burden on the physician to demonstrate that the department’s calculations are inaccurate. At all times the burden is on the physician to prove entitlement to welfare monies. *Illinois Physicians Union v Miller*, 675 F2d 151, 154 (CA 7, 1982). On appeal, petitioner objects to the hearing referee’s imposing on him the burden of proof on the issue of his entitlement to the disputed payments by requiring that he demonstrate that the department’s calculations are inaccurate. The *Miller* court specifically allowed the state to place the burden on the physician to demonstrate that the department’s calculations were inaccurate. *Id.* Further, this Court in *Zenith Industrial Corp v Dep’t of Treasury*, 130 Mich App 464, 468; 343 NW2d 495 (1983), held that an administrative agency may allocate the burden of proof by ad hoc decision so long as the allocation is consistent with the legislative scheme being administered. Considering the legislative scheme under-

lying the joint federal-state medicaid program as announced in *Miller*, we find that the hearing referee did not err in placing the burden of proof on petitioner to establish his entitlement to payment. [*Id.* at 548-549.]

While ER Drugs contended that the DUR was not a billing report, it never pointed to specific instances in which the DUR was not an accurate representation of billing. The ALJ emphasized this point. The ALJ said, “[D]espite testimony . . . regarding work-product that could lead to a prescription being identified in the DUR despite never being dispensed or billed, Petitioner did not identify any specific examples of actual errors in the DUR.” The ALJ added, “The developer of the software Petitioner uses also expressly testified that it is not difficult to generate a billing report or a dispensing report, but Petitioner never provided such a report despite ample opportunity to do so.” And indeed, Seiler admitted that it was not difficult to generate a billing report with the software. In light of *Prechel* and in light of the failure of ER Drugs to produce an apparently easy-to-generate billing report, we cannot conclude that the circuit court misapplied the substantial-evidence test to the agency’s findings with regard to the DUR issue. See *VanZandt*, 266 Mich App at 585.

#### V. SIGNATURE LOGS

ER Drugs contends that DHHS’s decision was arbitrary and capricious because it refused to consider signature logs and an associated expert report presented by ER Drugs. We disagree.

In *VanZandt*, 266 Mich App at 584-585, this Court quoted *Romulus v Dep’t of Environmental Quality*, 260 Mich App 54, 63-64; 678 NW2d 444 (2003), regarding whether an agency’s decision was arbitrary and capricious:

“To determine whether an agency’s decision is “arbitrary,” the circuit court must determine if it is “ “without adequate determining principle[,] . . . fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance, . . . decisive but unreasoned.” ’ ” *St Louis v Michigan Underground Storage Tank Financial Assurance Policy Bd*, 215 Mich App 69, 75; 544 NW2d 705 (1996), quoting *Bundo v Walled Lake*, 395 Mich 679, 703 n 17; 238 NW2d 154 (1976), quoting *United States v Carmack*, 329 US 230, 243; 67 S Ct 252; 91 L Ed 209 (1946). “Capricious” has been defined as: “ “Apt to change suddenly; freakish; whimsical; humorsome.” ’ ” *St Louis, supra* at 75, quoting *Bundo, supra* at 703 n 17, quoting *Carmack, supra* at 243.”

It was elicited at the administrative hearing that ER Drugs sent DHHS a review of signature logs undertaken by a consultant, Dale Howe. Melvin explained that this review was not taken into account by DHHS because it was irrelevant to an IR audit. He said, “[S]ignature logs are not financial records and are irrelevant to an invoice reconciliation.” Melvin stated that signature logs do not contain financial information. Given this testimony by Melvin, the circuit court did not err by concluding that DHHS’s final decision was not arbitrary or capricious.

An IR audit involves comparing drugs purchased at wholesale with drugs billed. As for signature logs, the portion of the MPM specifically applicable to pharmacies states, in part:

Pharmacy providers must document receipt or delivery of new or refilled medications to the intended Medicaid beneficiary. This documentation serves as verification of the beneficiary receiving the prescription billed. The absence of the appropriate verification indicates the beneficiary did not receive the prescription, and funds will be recouped from the pharmacy. Documentation described



below must be retained for review by [DHHS] or the [DHHS] agent for seven years and is subject to audit. Any method of reproducing past signatures is not acceptable. [MPM, Pharmacy, Subsection 5.1, Signature Log, p 11.]

It continues:

Pharmacy providers must maintain a log containing the following information:

- Beneficiary's name;
- The signature of the beneficiary or that of his representative; and
- The date of receipt of the prescription.

The log must effectively differentiate between prescriptions received by a beneficiary for which counseling was accepted and provided, and those for which counseling was offered and was declined. [*Id.*, Subsection 5.1.A, Signature Log, p 11.]

It seems that signature logs could be one potential manner in which to audit Medicaid billings because billings could be compared against signature logs, which serve, according to the manual, as “verification of the beneficiary receiving the prescription billed.” Apparently, Howe undertook such a comparison and reached a recovery amount of \$71,529.58. But this is not the type of audit that DHHS undertook. It undertook an IR audit, and the agency was presented with testimony that signature logs are not relevant to an IR audit.<sup>10</sup>

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<sup>10</sup> It seems that an IR audit would encompass a situation in which “false” signatures had been employed to obtain Medicaid funds, in addition to situations involving drugs obtained on the black market.

Accordingly, ER Drugs has not established that it is entitled to reversal with respect to this issue.<sup>11</sup>

VI. RETROACTIVE APPLICATION OF SUBSECTION 19.2  
OF THE MPM

ER Drugs contends that DHHS, in conducting the IR audit, improperly retroactively applied Subsection 19.2 of the Pharmacy chapter of the MPM. We disagree.

This issue concerns a question of law, and questions of law are reviewed de novo. *Harbour v Correctional Med Servs, Inc*, 266 Mich App 452, 455; 702 NW2d 671 (2005). And again, “[t]his Court reviews a lower court’s review of an administrative decision to determine whether the lower court applied correct legal principles . . . .” *VanZandt*, 266 Mich App at 585.

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<sup>11</sup> ER Drugs states that Howe pointed out that a handful of Medicaid claims were paid at zero dollars. ER Drugs states that this “would ultimately inflate the amount that ER Drugs would have to repay if the Department’s audit was accepted without adjustment.” But Howe was issuing a report about his own signature-log audit and does not, in his report, explain how and to what degree DHHS’s repayment figure should have been adjusted on the basis of this alleged oversight. Again, “[i]t is not sufficient for a party simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.” *Wilson*, 457 Mich at 243 (quotation marks and citation omitted). In the context of the present issue, ER Drugs also argues about an alleged fire and flood at the pharmacy. The ALJ and DHHS acted within their rights in not relying on any information about the fire and flood, seeing as this information was not communicated to the auditors during the back-and-forth correspondence about the repayment amount but was only brought out at the administrative hearing. In addition, and more importantly, nobody testified that the billing figures derived from the DUR were somehow impacted by this alleged fire and flood, and DHHS obtained the wholesale/invoice information directly from the wholesalers.

In *Dearborn Hts Pharmacy v Dep't of Health & Human Servs*, 338 Mich App 555, 558-561; 980 NW2d 736 (2021), the petitioner argued that DHHS did not have the authority to conduct IR audits pertaining to the period before the implementation of Subsection 19.2 of the Pharmacy chapter of the MPM. This Court set forth the following background information:

On June 1, 2015, the DHHS issued a “bulletin” informing Medicaid pharmacies of its efforts to clarify the documentation requirements for pharmacy providers. Specifically, the bulletin notified the pharmacies that they must maintain particular documents “to support the size and quantity of the goods paid for by Medicaid . . . .” The bulletin stated the effective date was July 1, 2015, and it was later incorporated into the Pharmacy chapter of the Michigan Medicaid Provider Manual (MPM) at Subsection 19.2, Invoice and Inventory Records. [*Id.* at 557-558.]

The Court then stated, “Though petitioner disputes the applicability of Subsection 19.2 of the MPM to the audit at issue, there are a number of authorities that predate and authorize the performance of this audit.” *Id.* at 561. The Court set forth a substantial number of laws referring to DHHS’s investigative powers and to the recordkeeping obligations of Medicaid providers and indicated that these laws allowed for an IR audit to be conducted. *Id.* at 561-566. The Court said that “DHHS and the OIG clearly have long had broad authority to investigate possible fraud by the unambiguous terms of these provisions. Thus, the trial court failed to consider the plain language of other authority granting DHHS the authority to conduct investigations by focusing its conclusion on the effective date of Subsection 19.2.” *Id.* at 568. The Court stated, “[W]e reverse the holding of the trial court finding that the

OIG’s authority to conduct inventory reconciliation audits is derived from and limited to Subsection 19.2.” *Id.* at 568-569.

ER Drugs states that “[t]his Court should not [sic] remand with instructions that the Department must conduct its invoice reconciliation prospectively only,” but *Dearborn Hts Pharmacy* indicates that a prospective-only IR audit is not required.

The *Dearborn Hts Pharmacy* Court undertook a separate analysis regarding an argument the petitioner in that case made about specific document-retention requirements of Subsection 19.2 (as opposed to the general authority to conduct IR audits). *Id.* at 569. The Court stated:

The DHHS also argues that the enactment of Subsection 19.2 was within the scope of its statutory authority and that it acted within that authority when it demanded petitioner produce documentation to support its Medicaid billings. We agree in part, and disagree in part.

Initially, we must clarify the issue at hand. Rather than asking whether Subsection 19.2 exceeded the scope of the DHHS’s statutory authority, the more pertinent question is whether the trial court correctly applied its review authority over the administrative law judge’s opinion. The trial court held “that conducting an inventory audit and requiring all of the documents set forth in subsection 19.2 of the Pharmacy Chapter of the Michigan [MPM] be maintained or be subject to recoupment prior to July 1, 2015 is not authorized by law.” Again, the starting place for our limited review is to determine whether the lower court applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the agency’s factual findings. Indeed, this latter standard is indistinguishable from the clearly erroneous standard of review that has been widely adopted in Michigan jurisprudence.

Using the applicable standard, we find the trial court misapprehended . . . and misapplied the substantial evidence test to the agency’s factual findings. Absent from the administrative law judge’s factual findings was any determination that the OIG “require[d] all of the documents set forth in subsection 19.2 . . . .” In fact, the record from the administrative review shows that the OIG’s only requirement of petitioner was that the records it produced must be “reliable.” Because there is no evidence the administrative law judge’s factual findings required the use of Subsection 19.2 documents, and because the record shows that the OIG did not specifically require Subsection 19.2 documents, the trial court erred in reversing the DHHS’s decision. Consequently, we reverse the trial court. [*Id.* at 569-570 (some quotation marks, citations, and brackets omitted).]

In the present case, there is no indication that DHHS required *all* the documents mentioned in Subsection 19.2, which states:

In addition to all other documentation required under state law, federal law, and [DHHS] policy, pharmacy providers must maintain invoices, manufacturer and/or wholesaler sales records, distributor delivery records to the provider, inventory transfer records, provider payment records, and all other records necessary to support the size and quantity of the goods paid for by Medicaid during the audit/review period. Failure to do so will result in the recoupment of pharmacy funds related to unsupported Medicaid claims. In the event inventory for any such product cannot be substantiated through reliable documentation for the beginning of the audit/review period, [DHHS] may assume that the beginning and ending inventory quantities are the same for that product. For the purposes of this policy, the “audit/review period” shall be a period defined by [DHHS]. [MPM, Pharmacy, Subsection 19.2, Invoice and Inventory Records, pp 43-44.]

Also, while the ALJ in the present case did refer to Subsection 19.2 and its recordkeeping requirements,

the ALJ went on to spend considerable time setting forth how other portions of the MPM, as well as statutory law, allowed DHHS to require the documentation that was used in this case. The ALJ stated, for example:

Additionally, while not specifically cited in the notices sent to Petitioner, other statutes and policies similarly required that Petitioner maintain the applicable records in this case throughout the audit period. For example, MCL 400.111b(6) and MCL 400.111b(8) require that a pharmacy maintain the records necessary to both fully document the extent of costs of services, supplies, or equipment provided to beneficiaries and to substantiate each claim for a period of 7 years after the date of service. Likewise, Section 15.6 [sic, 14.6] of the General Information for Providers Chapter expressly stated at all times relevant to this matter that providers must maintain “[c]opies of purchase invoices for items offered or supplied to the beneficiary.”<sup>[12]</sup>

The ALJ added:

In only clarifying the requirements for pharmacy providers, the Department was not identifying new policy and, instead, was only making its past policy clearer. As discussed above, that past policy generally requires that providers maintain fiscal records, including fiscal records and copies of invoices for items supplied to beneficiaries, that fully disclose and document the extent of the services provided to beneficiaries, and, as such, the Department did not retroactively apply policy.

The ALJ properly noted that the IR audit and its conclusions in the present case were based on documentation requirements already in existence, and the

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<sup>12</sup> As noted, providers are advised that “fiscal records must be maintained,” including, among other records, “[c]opies of purchase invoices for items offered or supplied to the beneficiary.” MPM, General Information for Providers, Subsection 14.6, Fiscal Records, p 46.

circuit court did not err by making the general statement that the agency's decision was not arbitrary or capricious or otherwise infirm.<sup>13</sup> No retroactivity problem is apparent.

ER Drugs, at various points in its brief, takes issue with the statement in Subsection 19.2 that DHHS can assume that beginning and ending inventory is the same in the absence of evidence to the contrary. But ER Drugs fails to delineate how this assumption resulted in a higher repayment amount. It asserts that it tended to "stock up" on certain drugs in December. This is, apparently, an attempt to argue that there would be a higher-than-normal inventory level in January (the commencement month for the audit period), but ER Drugs provided no evidence regarding the extent of this stock-up. It only offered an extremely general allegation about "stock[ing] up," particularly on unspecified "fast-moving" drugs.<sup>14</sup> The upshot is that ER Drugs does not make a coherent argument, supported with concrete evidence, about how the inventory levels should have been used to alter the amount DHHS determined was owed in accordance with the IR audit. In other words, ER Drugs, despite having had the chance to do so, has not adequately

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<sup>13</sup> The circuit court did not expressly address the retroactivity argument.

<sup>14</sup> As noted, the audit period ended at the end of July 2016. ER Drugs did not indicate how quickly its December "stock up" of drugs tended to get depleted. ER Drugs also makes a general allegation that the inventory of certain drugs had decreased throughout the years because of a switch from brand-name to generic drugs. As stated earlier, however, it seems that the wholesale orders would have reflected the different "stock" levels referred to by Kouza.

demonstrated how DHHS's assumption about inventory levels affected the ultimate amount owed.<sup>15</sup>

In conclusion, the circuit court did not err by upholding the decision of DHHS that ER Drugs was required to repay \$1,205,426.23 in Medicaid overpayments.

Affirmed.

CAVANAGH, P.J., and MARKEY and SERVITTO, JJ., concurred.

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<sup>15</sup> As for the argument ER Drugs makes regarding the alleged impossibility of performing under an alleged "contract" because of a fire and a flood, the ALJ and DHHS acted within their rights by not relying on any information about the fire and flood, as noted above in footnote 11. And there was not, contrary to the argument by ER Drugs, substantial compliance of any "contract" as a result of the provision of signature logs, seeing as signature logs were not relevant to the IR audit (see, generally, Part V of this opinion).



CITIZENS FOR HIGGINS LAKE LEGAL LEVELS v ROSCOMMON  
COUNTY BOARD OF COMMISSIONERS

Docket No. 353969. Submitted March 9, 2022, at Lansing. Decided March 17, 2022, at 9:05 a.m. Leave to appeal denied 511 Mich 885 (2023).

Citizens for Higgins Lake Legal Levels and others filed an action in the Roscommon Circuit Court against the Roscommon County Board of Commissioners, seeking a writ of mandamus directing defendant to maintain the lake level of Higgins Lake at specific summer and winter levels as required by a 1982 court order. In relevant part, the 1982 court order established the normal lake levels of the lake to be 1,154.11 feet above mean sea level during the summer months and to be 1,153.61 feet above mean sea level during the winter months. The order further provided that in adjusting the lake levels, the person or persons responsible for such operations must make every reasonable effort to consider stream flows into the lake and projected snow melt runoff within the water shed, as well as providing a minimum release during refill operations. In 2007, the Department of Environmental Quality, now the Department of Environment, Great Lakes, & Energy (the department), issued a permit for the Higgins Lake Level Control Structure (LCS), which regulated flow leaving Higgins Lake to the Cut River. The permit provided that it did not eliminate managing Higgins Lake and the Cut River in accordance with the 1982 court-ordered lake level; the permit stated that the minimum and maximum flows must be maintained in the Cut River as necessary to prevent harm to the aquatic ecosystem. Plaintiffs filed their mandamus action, asserting, and submitting proof, that lake levels in the summer months had been below the court-ordered levels for certain percentages of time for 2016 through 2018; that fact was undisputed. Plaintiffs alleged that defendant intentionally caused the reduced lake levels by not utilizing all known reasonable practices and available technology and that each plaintiff had suffered adverse effects from the low levels, including the inability to enjoy the full extent of recreational and water-based activities. Plaintiffs argued that defendant had a clear legal duty to maintain the lake levels at the court-ordered levels and that defendant should adopt

as a guideline the recommendations made by Spicer Group, Inc., in a 2010 report. The department moved to intervene, arguing that it was designated by statute as an interested party under the Natural Resources and Environmental Protection Act (NREPA), MCL 324.101 *et seq.* The court, Robert W. Bennett, J., granted the motion, reasoning that the department had an interest in all lake levels, as well as in previous courts orders establishing lake levels, and that those interests were not adequately represented by defendant. Plaintiffs subsequently moved to dismiss the department for lack of subject-matter jurisdiction because plaintiffs' claims were against defendant, not the department, and because only the Court of Claims had jurisdiction over a claim involving the department; the trial court denied the motion. Thereafter, defendant moved to dismiss the action, arguing that plaintiffs failed to establish that they were entitled to mandamus. Specifically, defendant argued that it was not required under Michigan law to maintain lake levels at a minimum or maximum level; that it did not have a duty to maintain an exact level on a daily basis; that there was no breach for the slight variations in lake level; that the Spicer Group's recommendations involved discretionary maintenance practices and were not ministerial; and that plaintiffs had alternative remedies available, e.g., petitioning the court for a higher lake level. The trial court granted defendant's motion to dismiss, concluding that there was a discretionary component to the 1982 order—i.e., regarding the method used to maintain the lake levels—and rejecting plaintiffs' argument that defendant had breached its clear legal duty whenever the lake's levels went below the legal level. Plaintiffs appealed.

The Court of Appeals *held*:

1. Mandamus is an extraordinary remedy, and it will not lie to review or control the exercise of discretion vested in a public official or administrative body. To obtain mandamus, the plaintiff must show that (1) the plaintiff has a clear, legal right to performance of the specific duty sought, (2) the defendant has a clear legal duty to perform, (3) the act is ministerial, and (4) no other adequate legal or equitable remedy exists that might achieve the same result. In relation to a request for mandamus, a clear legal right is one clearly founded in, or granted by, law; it is a right that is inferable as a matter of law from uncontroverted facts regardless of the difficulty of the legal question to be decided.

2. MCL 324.30708(1) and MCL 324.30702(3) provide that if a court-determined normal level is established pursuant to Part 307 of NREPA, the delegated authority of the county or counties

in which the lake is located shall maintain that normal level. These statutes are clear: once a court has established the “normal level” of an inland lake, that level shall be maintained at that level by the responsible authority—in this case, by defendant. A court order establishing the normal level of an inland lake remains in effect and must be enforced as written unless the proper proceedings are conducted and there is a determination that a departure from the established normal level is necessary considering the welfare and benefit of the public; the focus of the court in determining the normal level is on environmental and recreational factors. Plaintiffs demonstrated in this case that they were entitled to mandamus relief, such that summary disposition was inappropriate. Relevant here, the 1982 order established the normal lake levels, and under MCL 324.30707(5), the trial court continued to have jurisdiction over the matter. The 1,154.11-foot level established by the 1982 order was the lake level defendant was required to maintain in the summer months. Thus, defendant had a clear legal duty to maintain that level, and it violated that duty by failing to maintain that level over a period of years. The court order did not contain a discretionary component with regard to the required lake levels. The applicable legal duty in this case, that which plaintiffs sought to compel by mandamus, was the court-ordered duty to *maintain* the lake level in the summer; while the *method* of maintaining the lake level is discretionary, the duty to *maintain* the level is ministerial. Finally, no other adequate legal remedy existed for plaintiffs to achieve the same result. Accordingly, because plaintiffs stated a claim upon which relief could be granted, and because defendant failed to establish that it was entitled to judgment as a matter of law, the trial court erred by granting summary disposition in favor of defendant under MCR 2.116(C)(8) and (10).

3. The circuit court is presumed to have subject-matter jurisdiction over a civil action unless Michigan’s Constitution or a statute expressly prohibits it from exercising jurisdiction or gives to another court exclusive jurisdiction over the subject matter of the suit. MCL 600.6419(1) provides that the Court of Claims has authority to hear and determine any claim or demand, statutory or constitutional, liquidated or unliquidated, *ex contractu* or *ex delicto*, or any demand for monetary, equitable, or declaratory relief or any demand for an extraordinary writ against the state or any of its departments or officers notwithstanding another law that confers jurisdiction of the case in the circuit court; this authority is exclusive and includes writs of mandamus against the state and its departments or officers. Subject-matter jurisdiction is determined only by referring to the allegations listed in the

complaint. Under MCL 14.101, the attorney general has the power to intervene in any action commenced in any court of the state whenever such intervention is necessary in order to protect any right or interest of the state, or of the people of the state. First, the action in this case did not involve an action for an extraordinary writ against the department but, rather, an action for a writ of mandamus against defendant. Thus, the department's intervention was not governed by the Court of Claims Act and jurisdiction did not lie in the Court of Claims with regard to the department. Second, the department is defined as an "interested person" under MCL 324.30701(g) of NREPA, and it clearly had an interest in this case given that the case involved an inland lake and the permit the department had issued for the LCS could be affected by the trial court's decision. Therefore, plaintiffs failed to show that the trial court erred by refusing to dismiss the department for lack of subject-matter jurisdiction.

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

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

*Rosati, Schultz, Joppich & Amtsbuechler, PC* (by *Matthew J. Zalewski*) for defendant.

*Dana Nessel*, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Daniel P. Bock*, Assistant Attorney General, for intervening defendant.

Before: CAVANAGH, P.J., and MARKEY and SERVITTO, JJ.

CAVANAGH, P.J. In this dispute involving the water levels of Higgins Lake, plaintiffs appeal by right an order granting summary disposition in favor of defendant Roscommon County Board of Commissioners (defendant) and denying plaintiffs' motion to dismiss intervening defendant Department of Environment, Great Lakes, and Energy (EGLE) as a party for lack of subject-matter jurisdiction over any claims against

EGLE. We affirm in part, reverse in part, and remand for further proceedings.

#### I. FACTUAL BACKGROUND

Plaintiff Citizens for Higgins Lake Legal Levels “is a domestic nonprofit corporation whose purpose and existence are to promote and defend the legal lake levels on Higgins Lake.” The remaining plaintiffs are those who own, inhabit, use, or have access to land that abuts Higgins Lake. For ease of reference, we will refer to the entity and various individual plaintiffs collectively as “plaintiffs.” In 1982, the Roscommon Circuit Court established the legal lake levels for Higgins Lake to be 1,154.11 feet above mean sea level in the summer months and to be 1,153.61 feet above mean sea level during the winter months. The parties do not dispute this. The 1982 order also provided:

[I]n adjusting the lake levels as herein provided, the person or persons responsible for such operations shall make every reasonable effort to take into consideration stream flows into the lake and projected snow melt runoff within the water shed, as well as providing a minimum release during refill operations.

Plaintiffs alleged that, for several years, defendant failed to “employ known best practices and available technology” to maintain Higgins Lake at its court-mandated levels for “each and every day of the summer time period.” Plaintiffs relied on data from the United States Geological Survey for support; that data showed that lake levels in the summer months were below the court-ordered levels “two-thirds ( $\frac{2}{3}$ ) of the time in 2016, over one quarter ( $\frac{1}{4}$ ) of the time in 2017, and nearly ninety percent (90%) of the time in 2018.” Plaintiffs claimed that defendant was intentionally causing the reduced lake levels by not “utilizing all

known reasonable practices and available technology[.]” Plaintiffs alleged that each of them had “suffered adverse, negative, and loss-causing effects,” which plaintiffs described as the inability “to enjoy the full extent of recreational and water-based activities” because of defendant’s failure to maintain the proper lake levels.

Plaintiffs sought a writ of mandamus based on defendant’s “clear legal duty . . . to maintain or have its delegated authority maintain the lake level of Higgins Lake during the summer months at 1154.11 feet above mean sea level” and on defendant’s alleged breach of that duty. As the basis for defendant’s clear legal duty and violation of that duty, plaintiffs cited two statutory sections under the Natural Resources and Environmental Protection Act (NREPA), MCL 324.101 *et seq.*: first, MCL 324.30702(3), which provides that, “[i]f a court-determined normal level is established pursuant to this part, the delegated authority of the county or counties in which the lake is located shall maintain that normal level”; and second, MCL 324.30708(1), which provides that, “[a]fter the court determines the normal level of an inland lake in a proceeding initiated by the county, the delegated authority of any county or counties in which the inland lake is located shall provide for and maintain that normal level.”<sup>1</sup>

Attached to plaintiffs’ complaint and petition was a “Higgins Lake Level Control Structure 2010 Engineering Report” from “Spicer Group, Inc.” Spicer Group was commissioned by defendant to analyze the “Higgins

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<sup>1</sup> The Inland Lake Level Act, MCL 281.61 *et seq.*, “was repealed by 1994 PA 451, § 90103, and reenacted as Part 307 of the NREPA by 1995 PA 59, § 1, without substantive change.” *Yee v Shiawassee Co Bd of Comm’rs*, 251 Mich App 379, 386 n 7; 651 NW2d 756 (2002).

Lake Level Control Structure (LCS)” and recommended that its “report should be adopted as a guideline for the County related to needed improvements, maintenance and operational changes for the Higgins Lake LCS.” The LCS was described as a structure that “regulates flow leaving Higgins Lake to the Cut River.”

A permit from the then Department of Environmental Quality, now EGLE, was issued in 2007 for the LCS. The permit provided that it did “not eliminate managing Higgins Lake and the Cut River in accordance with the Court Ordered Lake Level. Minimum and maximum flows must be maintained in the Cut River as necessary to prevent harm to the aquatic ecosystem.”

The Spicer Group’s overall conclusion was

that the Higgins Lake LCS has adequate hydraulic capacity during large runoff events. However, discharge from the lake is limited by the capacity of the Cut River. Additionally, this study has found that the level of Higgins Lake has averaged below the court established legal lake level during the summer months in typical years. Factors such as water loss due to evaporation, wave action and flow through an unregulated low flow channel contribute to the low summer levels. Losses due to evaporation have been calculated to be the most substantial factor followed by flow through the unregulated span and then by losses due to wave action.

The Spicer Group examined data on lake levels and found that, between “1986 to 2009, the lake level has averaged 0.1 feet above the legal level to 0.3 feet below the legal level during summer months.” The Spicer Group found that, in 2007, the LCS

was altered to include two additional tilting weir gates (also referred to as “flop gates”) totaling 33 feet in length and an unregulated low-flow channel measuring roughly 4.75 feet in width. Through comparison of historical data, the average lake level was found to have been lower in the

period following these alterations than the period prior. This does not appear to be attributable to a drought as precipitation in the years immediately following the structure's alteration has been well above average. Therefore, if legal levels are to be maintained annually, water levels must exceed the legal level in the early summer months to conserve an adequate volume to maintain the legal level through the later summer months.

This process of raising water levels in the early summer months is apparently referred to as water banking. The Spicer Group examined data on lake levels and found that, after the 2007 modification of the LCS, "the average lake level has decreased by 0.1 to 0.4 feet relative with the periods prior to the modification." The Spicer Group recommended that

[a]lterations are needed to improve LCS operation to enable lake levels to be maintained closer to the legal level. Specifically, a restrictor should be placed in the low flow channel to reduce the amount of flow to the Cut River in late summer. Also, scour protection should be added to the low flow channel, improvements should be made to the sheet piling portions and improvements should be made to the stop logs. Also, the staff gage should be replaced.

According to the Spicer Group, the LCS modification in 2007 caused "the amount of water leaving the LCS during summer months . . . to increase by roughly 30 percent over the losses due to evaporation and wave action alone." Moreover, in the prior three years, the levels of the lake had decreased annually by an average of 0.20 feet.

Relevant to this appeal, plaintiffs requested that the trial court issue a writ of mandamus, directing defendant "to meet its legal obligation to keep and maintain" Higgins Lake water levels in accordance with the 1982 order and ordering defendant "to implement . . . the Spicer Group's recommendations and/or establish



guidance and operational practices for the devices used to control the lake level of Higgins Lake[.]”

A joint ecohydrological evaluation of Higgins Lake in the mid-2010s evaluated the effect that removing the LCS would have on the ecosystems of Higgins Lake and the Cut River. The evaluation concluded “that lake level management does not have significant effects on fishery habitat in Higgins Lake but does have significant effects on shoreline erosion. Lake-level manipulations have significant effects on fisheries habitat in the Cut River.” The evaluation provided that

[t]he probability of achieving the established summer lake level (1154.11 feet) is 15% under current operation and 0% for the unmanaged dam scenarios (Table 2). The probability of achieving an established summer lake level 100% of the time under current operation would occur at 1153.28 feet (SLL-10), and at lower levels (1152.92, SLL-14.3) for the unmanaged dam scenarios.

Additionally, the evaluation provided

that flows of 100-150 cfs are necessary to provide optimal habitat for fish in the Cut River (Figure 5). Flows of 50 cfs are a target flow rate to protect Cut River fisheries and cannot be achieved when all dam gates are closed (Figure 6). Flows of 50 cfs during summer have a much greater likelihood of occurring in the unmanaged dam scenarios (No dam and Gates 4-6 open, Table 2). A summer flow of 33cfs [sic] is likely to be exceeded 95% of the time under natural conditions, 90% of the time with Gates 4-6 open, and 63% of the time under current operation. Note that with the 4.75 ft low flow opening in the dam, Cut River flows are lower than recommended under current operation. Presently, the low flow opening is not large enough to consistently provide even 33cfs [sic] (the 95% natural flow).

Alisha Pastell had served as “Board Secretary for the Roscommon County Board of Commissioners and

as the Accounts Payable Clerk for Roscommon County.” Part of her duties was to “compile and keep the records of a daily log of the Higgins Lake Level Control Structure . . . .” These logs were attached to her affidavit, and their dates were from April to November in the years of 2016, 2017, 2018, and 2019. The logs showed either a “C” or “O” to represent that a gate was either “closed” or “opened,” respectively. These logs demonstrate that for the vast majority of the time between April and November, the gates were closed.

A. EGLE’S MOTION TO INTERVENE

EGLE moved to intervene, arguing that it had “a right to intervene . . . because it is designated by statute as an interested party who must be given notice and an opportunity to intervene in any inland lake level proceedings under” the NREPA. Although EGLE conceded that plaintiffs’ action was not “a proceeding to establish a normal lake level,” it contended that its “statutory right to participate should apply” because plaintiffs’ action “is an action brought to enforce the order resulting from” a proceeding to establish a lake level. Alternatively, EGLE argued that “permissive intervention” was appropriate because it was the state agency “charged with administering Michigan’s inland lake levels statute” and had “an interest in ensuring that normal lake levels . . . are maintained appropriately, and that court orders [establishing lake levels] . . . are enforced appropriately.” Further, EGLE contended that part of plaintiffs’ requested relief, the alteration of the LCS, was “expressly forbidden by an EGLE permit” and that “any new lake level control measures that the Court might order as a result of this litigation would likely require EGLE permits prior to implementation.”

At the motion hearing, plaintiffs argued against EGLE's intervention, reasoning that plaintiffs had no claim against EGLE; instead, plaintiffs' claim was against defendant. The trial court granted EGLE's motion to intervene. The trial court reasoned that intervention was proper because EGLE had an interest in any lake level and in prior court orders establishing lake levels that were not adequately represented by defendant. Although similar, the trial court stated that EGLE's interest was "a little bit different than Roscommon County's position," especially "as it impacts on the Cut River Dam and the channel and banking of water."

#### B. PLAINTIFFS' MOTION TO DISMISS EGLE

Subsequently, plaintiffs moved to dismiss EGLE for lack of subject-matter jurisdiction. Plaintiffs argued that EGLE was "mis-joined" and must be dismissed because plaintiffs' claims were against defendant and not EGLE. Additionally, plaintiffs contended that the trial court lacked subject-matter jurisdiction with respect to EGLE because only the Court of Claims could exercise jurisdiction over a claim involving EGLE. The trial court denied the motion, holding that EGLE had an interest in this case and that the Court of Claims Act was not applicable under the facts of this case.

#### C. DEFENDANT'S MOTION FOR SUMMARY DISPOSITION

Relevant to this appeal, defendant moved for summary disposition under MCR 2.116(C)(8) and (10). Defendant first contended that the primary question was its duty owed to plaintiffs and the answer to this question was to be found in the 1982 order. Defendant argued that Michigan law did not require it to maintain lake levels at a minimum or maximum level;

rather, defendant was to maintain the legal lake level in accordance with seasonal changes and the weather. Accordingly, defendant contended, plaintiffs' position necessarily failed because there was no duty to maintain the exact legal level on a daily basis and, by extension, no breach for slight variations in the lake level on a daily basis.

Defendant also argued that the Spicer Group's recommendations addressed discretionary maintenance practices and were not ministerial; therefore, the writ of mandamus was precluded. Further, defendant contended that it did not have to comply with a lake-level order if that meant noncompliance with state permit requirements. Defendant believed that, if it "has any duty regarding the [LCS], it is to leave the low-flow channel undisturbed." And, defendant argued, plaintiffs had alternative remedies available, which further precluded the writ of mandamus. Moreover, plaintiffs' request for water banking "effectively seeks a determination of a new higher seasonal level," and the proper course of action for plaintiffs was to petition defendant for this new level. Finally, defendant contended that the logs showed that it had complied with the 1982 order and relevant Michigan law.

Plaintiffs opposed defendant's motion for summary disposition. Regarding MCR 2.116(C)(8), plaintiffs argued that "[a]ll the elements of the mandamus claim have been pled and support [sic] by facts." Regarding MCR 2.116(C)(10), plaintiffs contended that the issue was not defendant's duty because that was clear and undisputed: defendant had a duty to maintain the court-mandated legal level. Instead, plaintiffs argued that the issue was whether defendant had breached this duty, which was a question of fact for the trier of

fact to decide. Plaintiffs contended that defendant's duty to maintain the legal level was ministerial, not discretionary.

The trial court granted defendant's motion under both MCR 2.116(C)(8) and (10). The trial court's ruling was primarily focused on MCR 2.116(C)(8). The trial court referred to the 1982 order and noted that "there is a discretionary component built . . . into the court order" via the language "shall make every reasonable effort to take into consideration stream flows into the lake and projected snow melts, runoff in the watershed as well as providing a minimum release during refill operations." The trial court referred to the ecohydrological evaluation and found that it "suggests that the normal legal level at least during the summer months . . . is potentially not realistic under the current dam limitations no matter who is responsible for its operation. It also suggests that the legal level . . . if anything is potentially too high without modification to the dam to maintain that level."

The trial court stated that it needed to determine the scope of defendant's legal duty and whether plaintiffs had a clear legal right to performance of such duty. To this end, the trial court stated that it needed to examine defendant's actions regarding the "gate of the dam" and whether it was closed or opened; this could be examined via the logs. The trial court stated that these logs showed, "as an example, that all gates and boards at the dam had been closed as of June 4, 2018 and remained closed through October 31, 2018." The trial court stated that, despite doing this, the lake levels during this period were below the legal limit. According to the trial court, plaintiffs had failed both in their complaint "or any of the other information the

Court read in the documents to suggest [defendant] did anything to cause that as an intentional act.”

The trial court discussed the legal principles and stated:

The Act says that . . . they shall provide for and maintain that normal level, that they need to inspect the dam and make repairs as necessary. The Inland Lake Act does not define normal lake level to include a minimum or a maximum. Also, there is no legal authority to support the notion that any deviation from a normal lake level is illegal and a breach of duty per se. If that . . . is spelled out in the statute, I couldn’t find it.

The trial court cited caselaw in which this Court held that a “lake level order establishes a normal level subject to seasonal variation and precipitation” and that fluctuations were not a breach. The trial court rejected plaintiffs’ argument that defendant breached its clear legal duty whenever the lake’s levels went below the legal level:

[A]s the reports the Court has studied as part of this action and as the studies themselves suggest, that is all but impossible task [sic] given the current . . . state of the dam and accounting for evaporation, precipitation, wave action . . . and water action on the shoreline. The 1982 lake level order does not require this heightened duty for daily compliance with that level. If it does, I . . . didn’t find it in the order and I don’t find it in the Inland Lakes Act either.

The trial court summarized defendant’s duty as maintaining the legal level “subject to the laws of nature and the limitations of the dam.” The legal level was “not a minimum or a maximum level nor is it a level that can be expected to be hit on exactly on a daily basis due to the laws of nature and the limitations and functioning of the current dam structure.” Moreover,

the trial court stated, defendant had “a duty to maintain the dam and comply with the state permitting requirements.”

The trial court further stated that neither the 1982 order nor applicable law required defendant to adopt “suggestions as to managerial approaches” or else be in breach of its duty. With no contrary authority presented, the trial court held that defendant had “no legal obligation to adopt the findings of the Spicer Report while ignoring the findings of the . . . ecohydrological evaluation . . . .” Instead, the trial court concluded that both studies addressed “discretionary practices and not ministerial as mandamus actions require.” The trial court pointed to the 1982 order, which included no language requiring defendant to bank water or do anything else recommended by the Spicer Group. Given that these were discretionary actions, plaintiffs could not compel defendant with a writ of mandamus. Moreover, the trial court summarily mentioned that to force defendant to adopt the Spicer Group’s recommendations would be “a clear violation of the separation of powers clause . . . .”

Additionally, the trial court noted that banking water would raise lake levels above the legal level; accordingly, the trial court was concerned with “why is it the case that if the level of the lake is below the legal level, a breach automatically occurs” but, if banking water was above the legal level, no breach would occur. Moreover, restricting the LCS would lead “to a possible misdemeanor and fine[.]” The trial court noted that the 1982 order required defendant to maintain the water levels both above and below the legal level. The trial court further stated that plaintiffs’ alleged harm, if taken as true, was not “contemplated by the Inland Lake Act or the 1982 order” because it was merely

recreational harm. The trial court stated that plaintiffs had other remedies available, such as petitioning for a change in the lake level. Therefore, the trial court ruled that plaintiffs had failed to state a claim under MCR 2.116(C)(8).

Plaintiffs' attorney asked for clarification because "you also utilized records that would be outside the pleadings as part of your fact recitation." Plaintiffs' attorney stated that, if the trial court "has a rational [sic] under (C)(10) as well it sounds like it would be helpful." The trial court agreed and stated, similar to its ruling under MCR 2.116(C)(8), that, due to the "impossibility" of maintaining the exact legal level, there was no genuine issue of material fact regarding defendant's duty and the alleged breach of that duty. The trial court noted that the Spicer Group's conclusions and recommendations, which plaintiffs asked the trial court to adopt, were not in dispute. Accordingly, the trial court ruled that there was no "need for further discovery on those points." Finally, the trial court stated that the other motions and issues were moot and declined to address them. This appeal followed.

## II. ANALYSIS

### A. DEFENDANT'S MOTION TO DISMISS

Plaintiffs argue that the trial court erred by granting defendant's motion for summary disposition under MCR 2.116(C)(8) and (10). We agree.

"This Court reviews de novo a trial court's decision on a motion for summary disposition, as well as questions of statutory interpretation and the construction and application of court rules." *Dextrom v Wexford Co*, 287 Mich App 406, 416; 789 NW2d 211 (2010) (citations omitted). A motion is properly granted under MCR



2.116(C)(8) when the opposing party fails to state a claim upon which relief can be granted. Such a motion “tests the legal sufficiency of the claim on the basis of the pleadings alone . . . .” *Bailey v Schaaf*, 494 Mich 595, 603; 835 NW2d 413 (2013). When reviewing the motion, “the court must accept as true all factual allegations contained in the complaint.” *Id.* The trial court must grant the motion “if no factual development could justify the plaintiff’s claim for relief.” *Id.* (quotation marks and citation omitted).

A motion is properly granted under MCR 2.116(C)(10) when “there is no genuine issue with respect to any material fact and the moving party is entitled to judgment as a matter of law.” *Dextrom*, 287 Mich App at 415. This Court “must examine the documentary evidence presented and, drawing all reasonable inferences in favor of the nonmoving party, determine whether a genuine issue of material fact exists. A question of fact exists when reasonable minds could differ as to the conclusions to be drawn from the evidence.” *Id.* at 415-416 (citations omitted). “This Court is liberal in finding genuine issues of material fact.” *Jimkoski v Shupe*, 282 Mich App 1, 5; 763 NW2d 1 (2008). Questions of statutory interpretation are reviewed de novo. *Dextrom*, 287 Mich App at 416. “Interpreting the meaning of a court order involves questions of law that we review de novo on appeal.” *Silberstein v Pro-Golf of America, Inc.*, 278 Mich App 446, 460; 750 NW2d 615 (2008).

Questions of law are reviewed de novo. *Christenson v Secretary of State*, 336 Mich App 411, 417; 970 NW2d 417 (2021). Similarly, a decision “whether defendants have a clear legal duty to perform and whether plaintiff has a clear legal right to performance of any such duty” is reviewed de novo. *Id.* In contrast, the trial

court's decision whether to issue a writ of mandamus is reviewed for an abuse of discretion. *Younkin v Zimmer*, 497 Mich 7, 9; 857 NW2d 244 (2014); *Berry v Garrett*, 316 Mich App 37, 41; 890 NW2d 882 (2016). A court abuses its discretion when its decision "is outside the range of reasonable and principled outcomes." *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007).

The arguments on appeal are relatively straightforward. Plaintiffs contend that defendant has a clear legal duty to maintain the lake levels during the summer months at the legally set level of 1,154.11 feet. According to plaintiffs, defendant cannot deviate from this level and must work to maintain it at that specific level. Given that defendant failed to do so for a number of years, it was in violation of its clear legal duty, which warranted the writ of mandamus. Summary disposition was, therefore, improper. On the other hand, defendant argues that it does not have a clear legal duty to strictly maintain the 1,154.11-foot level and that deviations are permissible. Accordingly, there was no clear legal duty or breach of that duty. Additionally, defendant argues that plaintiffs failed to show a ministerial duty because the method of maintaining the lake level is left to defendant's discretion. Therefore, according to defendant, the writ of mandamus failed, and summary disposition was proper. We agree with plaintiffs.

"[M]andamus is an extraordinary remedy and it will not lie to review or control the exercise of discretion vested in a public official or administrative body." *Morales v Parole Bd*, 260 Mich App 29, 41-42; 676 NW2d 221 (2003). Recently, this Court provided the relevant legal framework for writs of mandamus:

"To obtain the extraordinary remedy of a writ of mandamus, the plaintiff must show that (1) the plaintiff has a

clear, legal right to performance of the specific duty sought, (2) the defendant has a clear legal duty to perform, (3) the act is ministerial, and (4) no other adequate legal or equitable remedy exists that might achieve the same result. In relation to a request for mandamus, a clear, legal right is one clearly founded in, or granted by, law; a right which is inferable as a matter of law from uncontroverted facts regardless of the difficulty of the legal question to be decided.” [Christenson, 336 Mich App at 419, quoting *Rental Props Owners Ass’n of Kent Co v Kent Co Treasurer*, 308 Mich App 498, 518; 866 NW2d 817 (2014).]

“A ministerial act is one in which the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment.” *Berry*, 316 Mich App at 42 (quotation marks and citation omitted).

MCL 324.30708(1) provides, “After the court determines the normal level of an inland lake in a proceeding initiated by the county, the delegated authority of any county or counties in which the inland lake is located shall provide for and maintain that normal level.” Similarly, MCL 324.30702(3) provides, “If a court-determined normal level is established pursuant to this part, the delegated authority of the county or counties in which the lake is located shall maintain that normal level.” MCL 324.30701(h) defines “normal level” as follows:

“Normal level” means the level or levels of the water of an inland lake that provide the most benefit to the public; that best protect the public health, safety, and welfare; that best preserve the natural resources of the state; and that best preserve and protect the value of property around the lake. A normal level shall be measured and described as an elevation based on national geodetic vertical datum.

Relevant here, in 1982 the circuit court entered an order establishing the normal lake levels for Higgins Lake to be 1,154.11 feet during the summer months and to be 1,153.61 feet during the winter months. The parties do not dispute this. Specifically, the 1982 order stated, in relevant part:

This cause having come on to be heard on the Petition to Establish Water Level of Houghton Lake, Higgins Lake and Lake St. Helen, heretofore filed in this cause on behalf of the Roscommon County Board of Commissioners; it appearing that proper notice was given to interested parties; this having heard testimony of [sic] behalf of the Michigan Department of Natural Resources and interested persons appearing at the public hearing on said petition; it appearing that the following order will provide the most benefit to the public and best protect the natural resources of the state, and preserve and protect the values of property developed around said lakes; and the Court being fully advised in the premises:

IT IS HEREBY ORDERED AND ADJUDGED that the legal level of Higgins Lake, Roscommon County, Michigan, heretofore established at 1154.11 feet above mean sea level, be continued; provided, however, that said level be lowered to a level not less than 1153.61 feet, commencing on or about November 1 of each year, and restored to its legal level, commencing on or about April 15, or ice-out, which ever shall first occur, in each year.

\* \* \*

IT IS FURTHER ORDERED AND ADJUDGED that, in adjusting the lake levels as herein provided, the person or persons responsible for such operations shall make every reasonable effort to take into consideration stream flows into the lake and projected snow melt runoff within the water shed, as well as providing a minimum release during refill operations.

Plaintiffs filed this case, seeking enforcement of the normal lake levels already established by the circuit court and memorialized in a court order, and in doing so, invoked the circuit court's continuing jurisdiction over the matter. See MCL 324.30707(5); see also *Glen Lake-Crystal River Watershed Riparians v Glen Lake Ass'n*, 264 Mich App 523, 531; 695 NW2d 508 (2004). This is not a case challenging or objecting to the normal lake levels as already determined by the circuit court; this is a case seeking enforcement of the court's order. Accordingly, defendant's reliance on the case of *In re Van Ettan Lake*, 149 Mich App 517; 386 NW2d 572 (1986), in support of its arguments, is misplaced. That case involved a court's determination of an inland lake's normal level, and not the enforcement of the normal level that has already been established by court order. *Id.* at 519-520.

The rules of statutory construction are well established. "When interpreting a statute, [this Court] must ascertain the Legislature's intent," which is accomplished "by giving the words selected by the Legislature their plain and ordinary meanings, and by enforcing the statute as written." *Griffin v Griffin*, 323 Mich App 110, 120; 916 NW2d 292 (2018) (quotation marks and citation omitted). If a statute is unambiguous, it must be applied as plainly written. *McQueer v Perfect Fence Co*, 502 Mich 276, 286; 917 NW2d 584 (2018). This Court may not read something into the statute "that is not within the manifest intent of the Legislature as derived from the words of the statute itself." *Id.* (quotation marks and citation omitted). And it has long been understood that the use of the word "shall" means mandatory. *Browder v Int'l Fidelity Ins Co*, 413 Mich 603, 612; 321 NW2d 668 (1982); *State Hwy Comm v Vanderkloot*, 392 Mich 159, 180; 220 NW2d 416 (1974).

MCL 324.30708(1) and MCL 324.30702(3) are clear and unambiguous: once a court has determined the “normal level” of an inland lake, it “shall” be maintained at that “normal level” by the responsible authority—here, defendant. This meets the requirement for a clear legal duty to support a mandamus action in that it is clearly established by a statute. See *Christenson*, 336 Mich App at 419. And this conclusion is consistent with this Court’s holding in *Anson v Barry Co Drain Comm’r*, 210 Mich App 322; 533 NW2d 19 (1995). In that case, this Court held that a court order establishing the normal level of an inland lake remains in effect and must be enforced as written unless the proper proceedings are conducted and there is a determination that a departure from the established normal level is necessary considering the welfare and benefit of the public. *Id.* at 325-327; see also MCL 324.30707(5). As made clear in *Glen Lake-Crystal River Watershed Riparians*, 264 Mich App at 537, the focus of the court in determining the normal lake level is “environmental and recreational.” And thus, in establishing the normal level, a court “may determine that the normal level shall vary seasonally,” MCL 324.30707(5). In the case before us, the court accounted for seasonal fluctuations by setting the normal level at 1,154.11 feet in the summer months and at 1,153.61 feet during the winter months.

We conclude, then, that the 1,154.11-foot level established in the 1982 court order was the lake level that defendant was required to maintain in the summer months. This, by extension, supports plaintiffs’ position that defendant has a clear legal duty to maintain the 1,154.11-foot level and that, by failing to do so for several years, it has violated that duty. If this level is impossible to maintain or is no longer beneficial to the public, the proper course of action was for defendant to

petition the circuit court for a departure from the 1,154.11-foot level. See *Glen Lake-Crystal River Watershed Riparians*, 264 Mich App at 537; *Anson*, 210 Mich App at 325-327. But deviations from the court-established level must be explicitly permitted by the court only after proper proceedings.

We disagree with the trial court that the 1982 court order had “a discretionary component built . . . into” it. The order language that the trial court referred to states:

[I]n adjusting the lake levels as herein provided, the person or persons responsible for such operations shall make every reasonable effort to take into consideration stream flows into the lake and projected snow melt runoff within the water shed, as well as providing a minimum release during refill operations.

This language does not explicitly allow for deviations. The 1982 court order merely refers to stream flows and snow melt runoff and mandates that defendant take these into consideration. The 1982 court order sets the legal levels and no explicit deviation or fluctuation was permitted. The trial court summarized defendant’s duty as maintaining the legal level “subject to the laws of nature and the limitations of the dam.” But this holding—and defendant’s claim that it is not required to maintain the level at 1,154.11 feet in the summer—renders the 1982 court order meaningless and reads in language that is not present in that order. Caselaw, as well as the mandatory statutory language, does not support reading in these limitations. And plaintiffs did not claim that a single deviation occurred; rather, plaintiffs alleged, and the Spicer Group’s report demonstrates, that the deviation has been perpetual and consistent across many years. The first two elements

for a writ of mandamus are, therefore, met. See *Christenson*, 336 Mich App at 419.

Defendant also contends that plaintiffs have failed to satisfy the third requirement for a writ of mandamus because there is no ministerial duty. Although MCL 324.30708(1) uses mandatory language to describe the duty to maintain the lake levels, the remaining part of the statute uses permissive language when describing *how* to maintain the lake levels. See MCL 324.30708(2) and (3) (using the word “may” instead of “shall” to describe the various ways of maintaining the lake level). This suggests that the method of maintaining the lake level is left to the applicable authority’s discretion. Accordingly, it appears that plaintiffs have no say in how to bring the lake levels in compliance with the 1982 court order. According to defendant, this is left to defendant’s discretion, and plaintiffs, therefore, cannot compel defendant, through a writ of mandamus, to adopt the recommendations of the Spicer Group, which was one of the requested remedies in plaintiffs’ petition. See *Berry*, 316 Mich App at 42 (describing a ministerial act as one that leaves nothing to discretion or judgment).

However, this does not, as defendant argues, defeat the writ of mandamus. Defendant and the trial court mistakenly confused what duty to examine. Plaintiffs asked the trial court to compel defendant to comply with its legal duty of maintaining the legal lake level at 1,154.11 feet. Accordingly, the applicable duty was not how defendant had chosen to maintain this level; rather, the applicable duty was the duty to *maintain* the lake at this level. The method of maintaining the lake level is discretionary, but defendant has a ministerial duty to maintain the lake level. To accept the position of defendant and the trial court would leave



plaintiffs, and other similarly situated parties, without any way to obtain a writ of mandamus. A defendant could essentially always defeat petitions for such writs on the basis that the method is discretionary and not ministerial. This would have the effect of rendering MCL 324.30708(1)'s mandatory language meaningless because a defendant would be free to ignore court-established lake levels.

Finally, plaintiffs met the fourth element for a writ of mandamus: no other adequate legal remedy exists to achieve the same result. See *Christenson*, 336 Mich App at 419. Defendant argues, and the trial court agreed, that the proper remedy and course of action was for plaintiffs to petition the trial court to change the lake level. We do not agree. A writ of mandamus to compel compliance with a previously established lake level is the proper course of action. Most importantly, plaintiffs are clearly not attempting to *change* the level; rather, they are attempting to compel defendant to *maintain* the level at 1,154.11 feet, which has been the court-ordered legal level since 1982.

Therefore, summary disposition under MCR 2.116(C)(8) was improper because plaintiffs successfully stated a claim upon which relief could be granted. Taken as true, plaintiffs' complaint and petition adequately pleaded the elements for a writ of mandamus. Defendant had a clear, legal duty to maintain the lake level at 1,154.11 feet; plaintiffs had a right to performance of this duty; this duty was ministerial and not discretionary; and no adequate, alternative remedy exists.

For the same reasons, summary disposition was improper under MCR 2.116(C)(10). The Spicer Group concluded that the lake levels over the course of several years had been below 1,154.11 feet, and defen-

dant did not dispute this or provide evidence to the contrary. Rather, defendant's position was that it was not required to maintain the 1,154.11-foot level and could freely deviate from this court-ordered level. Defendant has provided no legal authority to support its claim that it was not bound to strictly follow the dictates of the court order. Defendant also contended that it was impossible to maintain this level and that to do so would violate the LCS permit and affect the Cut River. However, the EGLE permit expressly states, "This permit does not eliminate managing Higgins Lake and the Cut River in accordance with the Court Ordered Lake Level." If defendant claims that it cannot maintain 1,154.11 feet reliably, that to do so is no longer beneficial to the public, or that it would violate the permit from EGLE, then defendant must raise any such issue in a proper legal proceeding. Defendant may not, however, ignore or disregard the established court-determined normal level set forth in the 1982 order. As in *Anson*, "the statute does not grant courts the authority to simply abolish a prior determination of the normal lake level," nor does it "authorize a departure from the established lake level without a showing that that level is no longer beneficial." *Anson*, 210 Mich App at 326.

Accordingly, the trial court erred by granting summary disposition in favor of defendant under MCR 2.116(C)(8) and (10).

#### B. DISMISSAL OF EGLE

Plaintiffs also argue that the trial court erred by refusing to dismiss EGLE for lack of subject-matter jurisdiction. We disagree.

"Whether a court has subject-matter jurisdiction presents a question of law that this Court reviews de

novo.” *Reynolds v Robert Hasbany MD PLLC*, 323 Mich App 426, 431; 917 NW2d 715 (2018). Questions of statutory interpretation are reviewed de novo. *Dextrom*, 287 Mich App at 416.

“[T]he circuit court is presumed to have subject-matter jurisdiction over a civil action unless Michigan’s Constitution or a statute expressly prohibits it from exercising jurisdiction or gives to another court exclusive jurisdiction over the subject matter of the suit.” *O’Connell v Dir of Elections*, 316 Mich App 91, 101; 891 NW2d 240 (2016) (quotation marks and citation omitted). Relevant to this appeal, the Court of Claims has authority

[t]o hear and determine any claim or demand, statutory or constitutional, liquidated or unliquidated, ex contractu or ex delicto, or any demand for monetary, equitable, or declaratory relief or any demand for an extraordinary writ against the state or any of its departments or officers notwithstanding another law that confers jurisdiction of the case in the circuit court. [MCL 600.6419(1)(a).]

This authority includes writs of mandamus against the state and its departments or officers. *O’Connell*, 316 Mich App at 103-104. The Court of Claims’ jurisdiction, given by statute, “is exclusive.” MCL 600.6419(1). “A court’s subject-matter jurisdiction is determined only by reference to the allegations listed in the complaint. If it is apparent from the allegations that the matter alleged is within the class of cases with regard to which the court has the power to act, then subject-matter jurisdiction exists.” *Reynolds*, 323 Mich App at 431 (quotation marks and citation omitted).

Plaintiffs’ sole argument is based on MCL 600.6419(1)(a); however, by its plain language, this statutory section applies only to an action for an “extraordinary writ *against* the state or any of its

departments or officers . . . .” The present case does not involve an action for an extraordinary writ against EGLE; rather, plaintiffs seek a writ of mandamus against defendant. EGLE merely intervened. Although plaintiffs cite *O’Connell* in support, it offers none. The plaintiff in *O’Connell* petitioned for a writ of mandamus *against* the state, a department, or officer, because his application to run for reelection was rejected. See *O’Connell*, 316 Mich App at 94-96. Therefore, *O’Connell* is dissimilar to the present case. Plaintiffs provide no authority to support their proposition that EGLE is consenting to be sued by intervening in this matter and that the action for writ of mandamus is therefore *against* it. “An appellant may not merely announce his or her position and leave it to this Court to discover and rationalize the basis for his or her claims.” *Bill & Dena Brown Trust v Garcia*, 312 Mich App 684, 695; 880 NW2d 269 (2015) (quotation marks and citation omitted). When “a party fails to cite any supporting legal authority for its position, the issue is deemed abandoned.” *Id.* (quotation marks and citation omitted).

Regardless, MCL 14.101 gives the attorney general the power “to intervene in any action heretofore or hereafter commenced in any court of the state whenever such intervention is necessary in order to protect any right or interest of the state, or of the people of the state.” EGLE clearly has an interest at stake in this case. Moreover, MCL 324.30701(g) explicitly defines an “interested person” to include EGLE. And, as previously discussed, this case involves a permit issued by EGLE for the LCS that could be affected by the trial court’s decision. Finally, such interventions have occurred in the past in cases involving lake levels and lake structures. See, e.g., *Yee v Shiawassee Co Bd of Comm’rs*, 251 Mich App 379, 385 n 5; 651 NW2d 756 (2002).

Accordingly, plaintiffs have failed to show that the trial court erred by refusing to dismiss EGLE for lack of subject-matter jurisdiction.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

MARKEY and SERVITTO, JJ., concurred with CAVANAGH, P.J.

## ASTEMBORSKI v MANETTA

Docket No. 352066. Submitted October 13, 2021, at Grand Rapids. Decided February 1, 2022. Approved for publication March 17, 2022, at 9:10 a.m. Leave to appeal denied 510 Mich 943 (2022).

Robert and Mary Ann Russom brought an action in 2015 in the Roscommon Circuit Court against Cheryl Manetta and Melissa Scott, as cotrustees of the Lyle D. Scott Trust and the Yvonne Elaine Scott Trust, and Jon E. and Bonnie A. Unruh, alleging that defendants were impermissibly using an easement they had been granted over the Russoms' property for access to Higgins Lake. In 2016, the Russoms sold their property to Leonard and Deborah Astemborski, who were substituted as plaintiffs. All the property at issue was originally owned by Harry Groak, who had partitioned it into three parcels in the 1960s. Groak retained the only parcel that abuts Higgins Lake, and he sold the other two parcels to Howard and Mabel Diehl and Lyle and Yvonne Scott, respectively. A dock that extended from the easement was thereafter installed, and it was used by the Diehls and the Scotts, as well as their family and guests. The Diehls and the Scotts also moored boats, installed boat hoists, and used the easement for other recreational activities, although there was no evidence that Groak or his son had given the Diehls or the Scotts permission to do so. In 1980, the Russoms entered into a land contract to purchase the servient estate. Robert Russom stated that he made a verbal agreement with Howard Diehl in 1981 that Howard could put his boat on the easement, but Robert denied that he had made such an agreement with the Scotts, who later transferred their interests in the property to their respective trusts. After a series of transactions, the Diehls' property was ultimately sold to the Unruhs in 2014. In September 2015, the Russoms informed defendants that the language of the easement only allowed access to Higgins Lake and that no other uses of the easement or the area extending from the easement would be permitted. After defendants failed to remove the easement dock, the Russoms filed suit, requesting declaratory relief and damages in relation to claims for trespass and nuisance. Defendants countersued, arguing that the grant of access to Higgins Lake included a full range of riparian or littoral rights, along with use of the easement's

beach area for recreational activities. In the alternative, defendants argued that they had acquired prescriptive rights to continue the challenged uses. The court, Robert W. Bennett, J., granted plaintiffs partial summary disposition, ruling as a matter of law that the easement only contemplated access to Higgins Lake. However, the court also ruled that defendants had a prescriptive easement for the seasonal installation and removal of the easement dock, to moor boats, and to engage in certain recreational activities on the easement. As a result, the trial court entered a judgment of no cause of action on plaintiffs' claims for nuisance and trespass. Plaintiffs appealed this ruling, and defendants cross-appealed the grant of partial summary disposition to plaintiffs.

The Court of Appeals *held*:

1. The trial court did not err by concluding that defendants had established the elements of a prescriptive easement. An easement by prescription results from use of another's property that is open, notorious, adverse, and continuous for a period of 15 years. If no single period of adverse use amounts to the 15-year statutory period, a party claiming a prescriptive interest may tack the possessory periods of their predecessors in interest to aggregate the 15-year period of prescription if the claimant can show privity of estate. The party claiming a prescriptive easement has the burden to show by clear and cogent evidence that the use of the defendant's property was of such a character and continued for such a length of time that it ripened into a prescriptive easement. Adverse or hostile use is use inconsistent with the right of the owner, without permission asked or given, that would entitle the owner to bring an action for trespass or nuisance. Mere permissive use of another's property will not create a prescriptive easement. The evidence established that, in the 1970s, the Diehls and the Scotts stored a dock, moored boats, and engaged in recreational activities on the easement. There was no evidence that Groak or his son had given them permission to do so. According to Robert Russom, he had told Howard Diehl in 1981 that he could put his boat on the easement, but the evidence established that the Russoms had not given the Scotts permission to use the property in any manner other than to access Higgins Lake. Consequently, the trial court did not clearly err by finding that the permission granted to Howard by the Russoms did not extend to the Scotts and that the Scotts' subsequent use of the easement was adverse or hostile. The trial court correctly ruled that the agreement between Robert Russom and Howard Diehl was an oral license that expired when the

Diehls' property was transferred in 1993, and there was no evidence that the Russoms provided any of the subsequent owners permission to use the easement in any manner apart from accessing Higgins Lake. Consequently, the evidence did not support the proposition that use of the easement by the Unruhs or their predecessors in interest was permissive from 1993 through 2015, which more than satisfied the 15-year requirement of adversity.

2. Plaintiffs' argument that the mere overuse of an express easement cannot give rise to a prescriptive easement was without legal merit. Plaintiffs' reliance on *Thies v Howland*, 424 Mich 282 (1986), to support their argument was misplaced, given that *Thies* did not concern a prescriptive easement but rather the plain language of a written easement agreement. The unpublished cases plaintiffs cited to support their argument were neither binding nor persuasive, given that they involved public dedications of land as opposed to private easements.

3. In light of the holding that the trial court had properly granted defendants a prescriptive easement, it was unnecessary to reach defendants' argument on cross-appeal.

Affirmed.

EASEMENTS – PRESCRIPTIVE EASEMENTS – REQUIREMENT OF ADVERSITY OR HOSTILITY – OVERUSE.

An easement by prescription results from use of another's property that is open, notorious, adverse, and continuous for a period of 15 years; exceeding the scope of a private easement for the requisite period may satisfy the requirement that the use be hostile or adverse.

*Kuhn Rogers* (by *W. Dane Carey*) and *Carey & Jaskowski PLLC* (by *Richard J. Jaskowski*) for plaintiffs.

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

Before: RONAYNE KRAUSE, P.J., and CAMERON and RICK, JJ.

CAMERON, J. Plaintiffs appeal a November 14, 2019 judgment of no cause of action that was entered



by the trial court on the basis of the court's conclusion that defendants were not liable for trespass or nuisance because defendants held a prescriptive easement. Defendants cross-appeal the trial court's November 6, 2017 order, which granted plaintiffs' partial motion for summary disposition. We affirm the trial court's November 14, 2019 judgment and, consequently, do not need to consider defendants' arguments concerning the November 6, 2017 order.

#### I. BACKGROUND

This case arises from a dispute over defendants' rights to use a portion of plaintiffs' lakefront property. Harry Groak originally owned all the property underlying the dispute in this case. In the mid-1960s, Groak partitioned the property into three parcels. Groak retained one of the parcels (the servient estate), which is the only parcel that abuts Higgins Lake. Groak sold the other two parcels to Howard and Mabel Diehl in 1964 and to Lyle and Yvonne Scott (the Scotts) in 1965. Groak granted a 20-foot-wide easement across his parcel "for access to Higgins Lake[.]"

A dock that extended from the easement was thereafter installed, and it was used by the Diehls and the Scotts, as well as their family and guests. The easement dock was stored on the easement during the months that it was not in Higgins Lake. The Diehls and the Scotts moored boats and installed boat hoists. They also used the easement for other recreational activities, such as sunbathing and picnicking. There is no evidence that Groak or his son gave the Diehls or the Scotts permission to engage in these activities.<sup>1</sup>

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<sup>1</sup> Groak died in the 1970s. Thereafter, the servient property was owned by Groak's son.

In 1980, Robert and Mary Ann Russom, who were the original plaintiffs in this matter, entered into a land contract to purchase the servient estate. According to Robert, he made a verbal agreement with Howard Diehl in 1981 that Howard could “put his boat and stuff out there.” When asked if he had a similar deal with the Scotts, Robert responded that Howard was “kind of the spokesman.” However, Robert denied that he had made “any deals verbally with” the Scotts, who later transferred interests in the property to their respective trusts, defendants the Lyle D. Scott Trust and the Yvonne Elaine Scott Trust. In 1993, the Diehls sold their property to Linda Cauzillo, who later sold the property to Carl and Lucy Scott in 2001. After Carl died, Lucy transferred her property to defendants Jon and Bonnie Unruh in 2014.

In September 2015, the Russoms informed defendants that the language of the easement only allowed access to Higgins Lake and that no other uses of the easement or the area extending from the easement would be permitted. Defendants did not remove the easement dock. In November 2015, the Russoms filed suit, alleging that defendants had impermissibly used the easement for purposes beyond mere lake access. The Russoms requested declaratory relief and damages in relation to claims for trespass and nuisance. Defendants argued that the grant of access to Higgins Lake included a full range of riparian or littoral rights,<sup>2</sup> along with use of the easement’s beach area for recreational activities. In the alternative, defendants argued that they had acquired prescriptive rights to

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<sup>2</sup> While “littoral” rights involve land that abuts a lake, the term “riparian,” which involves land that abuts a river, is often used to refer to both types of waterfront property. See *Holton v Ward*, 303 Mich App 718, 721 n 1; 847 NW2d 1 (2014).

continue the challenged uses. In 2016, the Russoms sold the property to plaintiffs, and plaintiffs were substituted as the named plaintiffs in this case.

The trial court ruled as a matter of law that the easement only contemplated access to Higgins Lake. The case then proceeded to trial. At the conclusion of the bench trial, the trial court held that defendants had a prescriptive easement for the seasonal installation and removal of the easement dock, to moor boats, and to engage in certain recreational activities on the easement. As a result, the trial court entered a judgment of no cause of action on plaintiffs' claims for nuisance and trespass. These appeals followed.

## II. PRESCRIPTIVE EASEMENT

Plaintiffs argue that the trial court erred by concluding that defendants "had proven by clear and cogent evidence that they or their predecessors had continuously used the easement [for purposes outside of the scope of the express easement] for longer than the statutory period in a manner that was hostile and adverse to the rights of" the owners of the servient estate. We disagree.

### A. STANDARDS OF REVIEW

"A trial court's factual findings in a bench trial are reviewed for clear error." *Prentis Family Foundation v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 59; 698 NW2d 900 (2005). "A finding is clearly erroneous where, after reviewing the entire record, this Court is left with a definite and firm conviction that a mistake has been made. This Court is especially deferential to the trial court's superior ability to judge of the relative credibility of witnesses[.]" *Smith v*

*Straughn*, 331 Mich App 209, 215; 952 NW2d 521 (2020) (alteration in original; quotation marks and citations omitted). We review a trial court’s conclusions of law in a bench trial de novo. *Chelsea Inv Group, LLC v Chelsea*, 288 Mich App 239, 250; 792 NW2d 781 (2010).

#### B. ANALYSIS

“Land which includes or is bounded by a natural watercourse is defined as riparian.” *Thies v Howland*, 424 Mich 282, 287-288; 380 NW2d 463 (1986). It is well established that a riparian owner enjoys “certain exclusive rights,” which include “the right to erect and maintain docks along the owner’s shore, and the right to anchor boats permanently off the owner’s shore.” *Id.* at 288 (citations omitted). A nonriparian owner, on the other hand, has “a right to use the surface of the water in a reasonable manner for such activities as boating, fishing and swimming,” as well as “the right to anchor boats temporarily.” *Id.* However, “a riparian owner may grant nonriparian owners the right to access and enjoy a lake by easement or license.” *Little v Kin*, 249 Mich App 502, 510; 644 NW2d 375 (2002).

“An easement is a limited property interest; it is the right to use the land burdened by the easement for a specific purpose.” *Smith*, 331 Mich App at 215. “[A]n easement may be created by express grant, by reservation or exception, or by covenant or agreement[.]” *Bayberry Group, Inc v Crystal Beach Condo Ass’n*, 334 Mich App 385, 399; 964 NW2d 846 (2020) (quotation marks and citation omitted). Easements may also be acquired by prescription. *Marlette Auto Wash, LLC v Van Dyke SC Props, LLC*, 501 Mich 192, 202; 912 NW2d 161 (2018).

The land burdened by [an] easement is the servient estate, and the land benefited by the easement is the dominant estate. An easement holder's use of the easement is limited to the purposes for which the easement was granted and must impose as little burden as possible to the fee owner of the land, but the easement holder nevertheless enjoys all such rights as are incident or necessary to the reasonable and proper enjoyment of the easement. The necessity of an easement holder's conduct can be informed by the purpose and scope of the easement in addition to the easement holder's accustomed use of the easement.

A fee owner may use his or her land on a servient estate for any purpose not unreasonably inconsistent with the rights of the easement holder. . . . Where the language of a legal instrument is plain and unambiguous, it is to be enforced as written and no further inquiry is permitted. The scope of an easement may only be determined by reference to extrinsic evidence if the text of the instrument is ambiguous. [*Smith*, 331 Mich App at 215-216 (quotation marks and citations omitted).]

Before trial, the trial court concluded as a matter of law that the plain language of the easement established that Groak only intended for the owners of the dominant estates to have access to Higgins Lake and that Groak did not intend for those owners to have unlimited use of the easement or riparian rights. Following trial, the trial court held that defendants had an easement by prescription.

"An easement by prescription is based upon the legal fiction of a lost grant, and results from action or inaction leading to a presumption that the true owner of the land, by his acquiescence, has granted the interest adversely held." *Slatterly v Madiol*, 257 Mich App 242, 260; 668 NW2d 154 (2003) (quotation marks and citations omitted). "An easement by prescription results from use of another's property that is open,

notorious, adverse, and continuous for a period of fifteen years.” *Plymouth Canton Community Crier, Inc v Prose*, 242 Mich App 676, 679; 619 NW2d 725 (2000).

To establish an easement by prescription there must be: *First*, continued and uninterrupted use or enjoyment; *second*, identity of the thing enjoyed; *third*, a claim of right adverse to the owner of the soil known to and acquiesced in by him. The accepted rule is that the user must be exercised by the owner of the dominant tenement, and must be open, peaceable, continuous, and as of right. It is sometimes declared that it must also be exclusive, but the term “exclusive use” does not mean that no one may use the way except the claimant of the easement. It means no more than that his right to do so does not depend on a like right in others. [*Plymouth Canton Community Crier*, 242 Mich App at 679-680 (quotation marks, citations, and comma omitted).]

Thus, a prescriptive easement is “no more than an unopposed, continuous trespass [on another’s property] for 15 years.” *McDonald v Sargent*, 308 Mich 341, 344-345; 13 NW2d 843 (1944). “If no single period of adverse use amounts to the 15-year statutory period, a party claiming a prescriptive interest may tack the possessory periods of their predecessors in interest to aggregate the 15-year period of prescription if the claimant can show privity of estate.” *Marlette Auto Wash, LLC*, 501 Mich at 203 (quotation marks and citation omitted).<sup>3</sup>

“The burden is on the party claiming a prescriptive easement to show by satisfactory proof that the use of the defendant’s property was of such a character and continued for such a length of time that it ripened into a prescriptive easement.” *Mulcahy v Verhines*, 276

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<sup>3</sup> Plaintiffs do not challenge the trial court’s conclusion that privity of estate existed.

Mich App 693, 699; 742 NW2d 393 (2007). In fact, a plaintiff claiming “entitlement to a prescriptive easement” must do so by “clear and cogent evidence.” *Matthews v Natural Resources Dep’t*, 288 Mich App 23, 37; 792 NW2d 40 (2010). This is an exacting standard:

“[C]lear and cogent evidence” is more than a preponderance of evidence, approaching the level of proof beyond a reasonable doubt. That is to say, the standard is much like “clear and convincing evidence.” . . . Thus, in an adverse possession case, for a party to establish possession by “clear and cogent evidence,” the evidence must clearly establish the fact of possession and there must be little doubt left in the mind of the trier of fact as to the proper resolution of the issue. Thus, where there is any reasonable dispute, in light of the evidence, over the question of possession, the party has failed to meet his burden of proof. [*McQueen v Black*, 168 Mich App 641, 645 n 2; 425 NW2d 203 (1988) (quotation marks omitted).]

In this case, plaintiffs argue that defendants failed to establish by clear and cogent evidence that the challenged uses were adverse and hostile. We disagree.

The element of hostility or adversity “as employed in the law of adverse possession is a term of art and does not imply ill will. Nor is the claimant required to make express declarations of adverse intent during the prescriptive period.” *Plymouth Canton Community Crier*, 242 Mich App at 681 (quotation marks and citations omitted). Instead, the “[u]se of another’s property qualifies as adverse when made under a claim of right when no right exists.” *Id.* Simply put, “[a]dverse or hostile use is use inconsistent with the right of the owner, without permission asked or given,” which would entitle the owner to bring an action for trespass or nuisance. *Id.* (quotation marks and citations omit-

ted). Hence, “[m]ere permissive use of another’s property . . . will not create a prescriptive easement.” *Id.* at 679.

Evidence in this case establishes that, in the 1970s, the Diehls and the Scotts placed the easement dock in Higgins Lake, stored the easement dock on the easement, moored boats, and engaged in other recreational activities on the easement. There is no evidence that Groak or his son provided them with permission to do so. When the Russoms purchased the servient property in 1980, the easement dock was on the easement. According to Robert Russom, he had made a verbal agreement with Howard Diehl in 1981 that Howard could “put his boat and stuff out there.” When asked if he had a similar deal with the Scotts, Robert responded that Howard was “kind of the spokesman.” However, Robert denied that he had made “any deals verbally with Lyle and Yvonne Scott.” Robert also acknowledged that Howard did not provide any sort of documentation to establish that he was permitted to act on behalf of Lyle and Yvonne. The following line of questioning then occurred:

Q. [W]ould it be fair to say that you presumed it was on behalf of [Lyle and Yvonne]?

A. Well, I would guess.

Q. If [Yvonne] was to testify, and this is a hypothetical, was to testify today that she had no such agreement with you or [Mary Ann], would she be inaccurate?

A. No.

Mary Ann testified that she was present when Robert and Howard discussed the easement. According to Mary Ann, Howard approached Robert and asked, “[C]an we keep our boats there?” Mary Ann testified that Howard pointed to the easement and to the boats



that belonged to Howard and Lyle. Mary Ann indicated that Robert responded, “Yes.” In exchange, Howard permitted the Russoms to put certain property in the Diehls’ backyard. Neither Lyle nor Yvonne was present during this conversation. However, according to Mary Ann, Howard was “the glue,” “the big brother,” and “the spokesperson” of the group.

The evidence establishes that the Russoms did not provide the Scotts with permission to use the property in any manner other than to access Higgins Lake. Although there is evidence that the Russoms believed that Howard represented the Scotts’ interests, there is no evidence that Howard had authority to negotiate on their behalf. Rather, as noted by the trial court, it was merely the Russoms’ impression that this was the case. Moreover, there is no indication that Howard had informed them of the “deal” that he had made with Robert. Indeed, Howard, Lyle, and Yvonne did not testify.<sup>4</sup> Even more importantly, Robert and Mary Ann clarified that they did not have an explicit verbal agreement with either Lyle or Yvonne. Consequently, the trial court did not clearly err by finding that the permission granted to Howard by the Russoms did not extend to the Scotts and that the Scotts therefore continued to use the easement in an adverse or hostile manner after Robert and Howard discussed the use of the easement in 1981.

Although the evidence indicated that Robert provided Howard with permission to place a dock and moor boats in the area extending from the easement and to store the dock on the easement, the trial court found that this amounted to an oral license and that

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<sup>4</sup> Howard and Lyle died before the lawsuit was filed. Testimony indicated that Yvonne was in poor health at all relevant times.

Howard's permission was revoked when the Diehls' property was transferred to Cauzillo in 1993. This was not in error.

"[A] license is a permission to do some act or series of acts on the land of the licensor without having any permanent interest in it[.]" *Kitchen v Kitchen*, 465 Mich 654, 658; 641 NW2d 245 (2002) (quotation marks and citations omitted). While "a license may be granted orally," an "oral license is necessarily revocable at the will of the licensor without regard for any promised duration." *Id.* at 661. Furthermore, "a license is [generally] revocable at will and is automatically revoked upon transfer of title by either the licensor or licensee." *Id.* at 658-659.

In this case, there is no indication that the Russoms provided the Diehls with any written permission to use the easement in a manner other than to access Higgins Lake. Indeed, the Russoms' testimony established that Robert and Howard had a conversation in which Robert verbally agreed that Howard could "put his boat and stuff" on the easement. This agreement was made in 1981. The Diehls sold their property in 1993, thereby resulting in an automatic revocation of permission. See *id.* Furthermore, the agreement was made in exchange for Howard permitting Robert to place items in the Diehls' backyard, so it was personal to Howard and the Diehls, and it would have lapsed when the Diehls moved in any event. Importantly, there is no evidence that the Russoms provided Cauzillo, Carl, Lucy, or the Unruhs permission to use the easement in any manner apart from accessing Higgins Lake. Consequently, the evidence does not support the proposition that use of the easement by Cauzillo, Carl, Lucy, or the Unruhs was permissive from 1993 through 2015, which more than satisfies the 15-year requirement of adversity.

Although plaintiffs argue that the trial court erred as a matter of law because the “mere overuse of an express easement cannot give rise to a prescriptive easement,” we disagree. To support this argument, plaintiffs cite *Thies*, 424 Mich at 297, which generally noted that “[a] person entitled to the use of an easement cannot materially increase the burden upon the servient estate beyond what was originally contemplated.” Importantly, however, *Thies* did not concern a prescriptive easement. *Thies* concerned whether the defendants were permitted to construct a dock under the plain language of an easement agreement. *Id.* Therefore, plaintiffs’ reliance on *Thies* to support the proposition that defendants’ purported “overuse” of the easement cannot create a prescriptive easement is without legal merit.

Plaintiffs also cite several unpublished opinions to support their argument. However, unpublished opinions are not binding authority. *Cox v Hartman*, 322 Mich App 292, 307; 911 NW2d 219 (2017). Moreover, the cases plaintiffs cite are not persuasive because they involve dedications of land, as opposed to private easements. See *2000 Baum Family Trust v Babel*, 488 Mich 136, 144; 793 NW2d 633 (2010) (“A ‘dedication’ of land is an ‘appropriation of land to some public use, accepted for such use by or in behalf of the public. The essence of a dedication is that the covered land will be for the use of the public at large.’”) (quotation marks and citation omitted). Consequently, we conclude that plaintiffs have failed to establish that defendants could not acquire a prescriptive easement through their alleged “mere overuse of the express shared access easement over the subject property.”<sup>5</sup>

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<sup>5</sup> We acknowledge that defendants argue that this argument is not preserved and therefore not properly before this Court. Assuming

In sum, we conclude that the trial court properly concluded that defendants established by clear and cogent evidence that they had a prescriptive easement. In so holding, we note that defendants argue on cross-appeal that the trial court erred by granting plaintiffs' motion for partial summary disposition. However, we need not consider this argument because defendants indicate that "[i]f this Court affirms the trial court's November 14, 2019 bench decision, the need for this cross appeal is rendered moot and the panel may pass on the same."

Affirmed.

RONAYNE KRAUSE, P.J., and RICK, J., concurred with CAMERON, J.

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without deciding that defendants are correct, we conclude that it would nonetheless be proper to consider plaintiffs' argument. See *In re Conservatorship of Murray*, 336 Mich App 234, 240-241; 970 NW2d 372 (2021) (acknowledging that "this Court may overlook preservation requirements if . . . the issue involves a question of law and the facts necessary for its resolution have been presented") (quotation marks and citation omitted).

## PEOPLE v MURRAY

Docket Nos. 355736 and 355737. Submitted March 8, 2022, at Lansing. Decided March 24, 2022, at 9:00 a.m. Vacated in part and leave to appeal denied 510 Mich 946 (2022).

Kirk A. Murray was convicted by a jury in the Wexford Circuit Court, William M. Fagerman, J., of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(a) and (2)(b) (sexual penetration of a person under 13 years of age by an individual 17 years of age or older); second-degree criminal sexual conduct (CSC-II), MCL 750.520c(1)(a) and (2)(a) and (b) (sexual contact with a person under 13 years of age by an individual 17 years of age or older); and third-degree criminal sexual conduct (CSC-III), MCL 750.520d(1)(b) (sexual penetration accomplished by force or coercion). Defendant committed sexual assaults against his daughter, LM, and his then-wife, MM. During trial, MM testified about previous domestic violence defendant had committed, including an incident in which defendant drove MM and her friend, AV, to a mall and left the two stranded on a back road. The trial court allowed AV to testify about her recollection of the event, overruling a defense objection that the prosecution had failed to give pretrial notice of AV's testimony pursuant to MCL 768.27b(2). At sentencing, the trial court was required to impose a prison sentence of not less than 25 years for the CSC-I conviction pursuant to MCL 750.520b(2)(b). The trial court sentenced defendant to concurrent terms of 25 to 40 years' imprisonment for the CSC-I conviction, 2 to 15 years' imprisonment for the CSC-II conviction, and 20 to 180 months' imprisonment for the CSC-III conviction. Defendant appealed, arguing that the trial court erred by admitting AV's testimony in violation of MCL 768.27b(2) and that the 25-year minimum sentence for his CSC-I conviction had to be vacated because MCL 750.520b(2)(b) violates the separation-of-powers doctrine under Const 1963, art 3, § 2.

The Court of Appeals *held*:

1. MCL 768.27b governs the admissibility of other-acts evidence regarding domestic violence or sexual assault committed by a defendant when that defendant is charged with domestic violence or sexual assault. MCL 768.27b(2) provides that if the

prosecuting attorney intends to offer evidence under this section, the prosecuting attorney shall disclose the evidence, including the statements of witnesses or a summary of the substance of any testimony that is expected to be offered, to the defendant not less than 15 days before the scheduled date of trial or at a later time as allowed by the court for good cause shown. In this case, defendant argued that the prosecution violated MCL 768.27b(2) by failing to provide notice before trial that it intended to introduce AV's testimony about the mall incident. Although the prosecution did not specifically provide notice of its intent to offer AV's testimony under MCL 768.27b, the prosecution gave notice that AV might testify at trial when it included her on its witness list filed approximately four months before trial. The prosecution also produced, about eight months before trial, a police report that memorialized AV's interview concerning the mall incident. Additionally, the prosecution gave notice under MCL 768.27b(2) of its intent to offer MM's testimony about the matter. Considered together, defendant had ample notice that the prosecution might introduce AV's testimony about the mall incident. Additionally, AV's testimony was completely unrelated to LM's allegations that resulted in defendant's CSC-I and CSC-II convictions. AV's testimony provided no new facts to the jury, was extremely brief, and did not relate to the sexual abuse of MM underlying the CSC-III conviction. There was corroborative evidence—testimony by LM—that was far more probative in relation to MM's account of her sexual abuse at the hands of defendant than AV's wholly unrelated testimony. Furthermore, defendant did not *substantively* challenge the admissibility of the other-acts evidence and did not explain how the asserted lack of notice impacted any cross-examination of AV or would have otherwise altered the defense's approach to the case. Accordingly, even assuming that the trial court erred by allowing AV's testimony, defendant did not establish that any error in the admission of AV's testimony was outcome-determinative or constituted a miscarriage of justice.

2. With respect to a conviction of CSC-I, MCL 750.520b(2)(b) provides that when the offense is committed by an individual 17 years of age or older against an individual less than 13 years of age, the penalty is imprisonment for life or any term of years, but not less than 25 years. Const 1963, art 3, § 2 provides that the powers of government are divided into three branches—legislative, executive, and judicial—and that no person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in the Constitution. Const 1963, art 4, § 45 provides that the Legislature may provide for indeterminate sentences as punishment for crime and for the

detention and release of persons imprisoned or detained under such sentences. Although the judicial power includes the authority to exercise discretion in imposing sentences, the Legislature may limit this sentencing discretion by establishing a specific penalty for a crime. The Legislature properly exercised the authority vested in it by Const 1963, art 4, § 45 to provide penalties for criminal offenses when it enacted MCL 750.520b(2)(b); accordingly, MCL 750.520b(2)(b) did not violate the separation-of-powers doctrine.

Affirmed.

*Dana Nessel*, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Corey J. Wiggins*, Prosecuting Attorney, and *Geofrey C. M. Bilabaye* and *John S. Pallas*, Assistant Attorneys General, for the people.

*Grabel & Associates* (by *Scott A. Grabel* and *Timothy A. Doman*) for defendant.

Before: CAVANAGH, P.J., and MARKEY and SERVITTO, JJ.

MARKEY, J. A jury convicted defendant of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(a) and (2)(b) (sexual penetration of a person under 13 years of age by an individual 17 years of age or older), second-degree criminal sexual conduct (CSC-II), MCL 750.520c(1)(a) and (2)(a) and (b) (sexual contact with a person under 13 years of age by an individual 17 years of age or older), and third-degree criminal sexual conduct (CSC-III), MCL 750.520d(1)(b) (sexual penetration accomplished by force or coercion).<sup>1</sup> The trial court sentenced defendant to concurrent terms of 25 to 40 years' imprisonment for the CSC-I conviction, 2 to 15 years' imprisonment for the CSC-II conviction, and

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<sup>1</sup> Defendant's CSC-I and CSC-II convictions were entered in lower court file number 19-012458-FC, and his CSC-III conviction was entered in lower court file number 19-012639-FC.

20 to 180 months’ imprisonment for the CSC-III conviction. In these consolidated appeals, defendant argues that the trial court erred by admitting a witness’s testimony regarding other-acts evidence in violation of the notice provision in MCL 768.27b(2). Defendant also contends that his 25-year minimum sentence for the CSC-I conviction must be vacated because MCL 750.520b(2)(b), which mandates a prison sentence of not less than 25 years when a victim is under 13 years of age and the perpetrator is 17 years of age or older, violates the separation-of-powers doctrine under Const 1963, art 3, § 2. We reject both arguments and affirm.

#### I. BASIC FACTS AND PROCEDURAL HISTORY

These cases arise from sexual assaults committed by defendant against his daughter, LM, and his then-wife, MM, during the summer of 2018. At trial, LM testified about an incident in which defendant sat LM on his lap, began touching her inner thigh, and then digitally penetrated LM’s vagina. LM claimed that defendant warned her not to tell anyone about the sexual assault. LM was under 13 years of age at the time of the sexual contact and penetration, and defendant was 31 years old. A jury convicted defendant of CSC-I and CSC-II for the conduct involving LM.

Additionally, MM testified that after she admitted to having an affair in 2018, defendant told her that she needed to be his “sex slave” or else he would take their children<sup>2</sup> and end the marriage. Over the next month and a half, defendant repeatedly forced MM to engage in nonconsensual anal intercourse. MM testified that she begged defendant to stop his behavior, but he

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<sup>2</sup> Defendant and MM had one biological child together, and LM was MM’s stepdaughter.



refused. MM was afraid that defendant would follow through on his threat to take the children if she did not comply with his sexual demands. MM also testified about previous domestic violence defendant had committed, including an incident in which defendant drove MM and her friend, AV, to a mall in Traverse City. On the way home from the mall and after an argument ensued between defendant and MM, defendant pulled MM out of the car and left MM and her friend stranded on a back road needing to make their own way home. The trial court also allowed AV to testify about her recollection of this event, overruling a defense objection that the prosecution had failed to give pretrial notice of AV's testimony pursuant to MCL 768.27b(2). A jury convicted defendant of CSC-III for the conduct involving MM.

At sentencing, the trial court was required to impose a prison sentence of not less than 25 years for the CSC-I conviction pursuant to MCL 750.520b(2)(b). Defendant argued that the mandatory-minimum-sentence provision of MCL 750.520b(2)(b) violated the separation-of-powers doctrine because the legislation encroaches on the judiciary's sentencing discretion and authority. The trial court, while somewhat sympathetic to the argument, applied the statute as written and imposed a sentence of 25 to 40 years' imprisonment for the CSC-I conviction. This appeal followed.

## II. ANALYSIS

### A. NOTICE OF WITNESS TESTIMONY

Defendant first argues that the trial court erred by concluding that the prosecution gave sufficient notice of AV's testimony under MCL 768.27b(2) and by allowing AV to testify.

We review for an abuse of discretion a trial court's decision to admit evidence. *People v Cameron*, 291 Mich App 599, 608; 806 NW2d 371 (2011). A trial court abuses its discretion when it chooses an outcome that is outside the range of principled or reasonable outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). Preliminary questions of law, such as "whether a rule of evidence or statute precludes admissibility of the evidence," are reviewed de novo on appeal. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). Allowing testimony that is inadmissible as a matter of law constitutes an abuse of discretion. *People v McFarlane*, 325 Mich App 507, 517; 926 NW2d 339 (2018).

MCL 768.27b governs the admissibility of other-acts evidence regarding domestic violence or sexual assault committed by a defendant when that defendant is charged with domestic violence or sexual assault. As relevant to this appeal, MCL 768.27b imposes the following notice requirement on the prosecution when offering other-acts evidence under the statute:

(2) If the prosecuting attorney intends to offer evidence under this section, the prosecuting attorney shall disclose the evidence, including the statements of witnesses or a summary of the substance of any testimony that is expected to be offered, to the defendant not less than 15 days before the scheduled date of trial or at a later time as allowed by the court for good cause shown.

MCL 768.27b does not define "good cause." When a statute does not define a term, this Court may consult a dictionary and caselaw for guidance. *In re Utrera*, 281 Mich App 1, 10; 761 NW2d 253 (2008). This Court has previously defined "good cause" as "a legally sufficient reason." *Id.* (quotation marks, citation, and brackets omitted). "Good cause" has also been defined

as “a substantial reason amounting in law to a legal excuse for failing to perform an act required by law.” *Franchise Mgt Unlimited, Inc v America’s Favorite Chicken*, 221 Mich App 239, 246; 561 NW2d 123 (1997) (quotation marks omitted), quoting *Black’s Law Dictionary* (6th ed).

In this case, defendant argues that the prosecution violated MCL 768.27b(2) by failing to provide notice before trial that it intended to introduce AV’s testimony about the mall incident. Although the prosecution did not provide notice of its intent to offer AV’s testimony under MCL 768.27b, the prosecution gave notice that AV might testify at trial when it included her on its witness list filed approximately four months before trial. The prosecution also produced, about eight months before trial, a police report that memorialized AV’s interview concerning the mall incident. Additionally, the prosecution gave notice under MCL 768.27b(2) of its intent to offer MM’s testimony about the matter. Considered together, defendant had ample notice that the prosecution might introduce AV’s testimony about the mall incident. Defendant had a witness list naming AV, possessed AV’s police statement, and received notice under MCL 768.27b(2) that the prosecution intended to present MM’s testimony about the mall incident. To the extent and assuming that the prosecution did not, in fact, comply with the statutory notice requirement, these circumstances establish that the prosecution had a “legally sufficient reason” for not providing notice that it was specifically going to offer AV’s testimony pursuant to MCL 768.27b. Accordingly, we conclude that the prosecution had “good cause” for its failure to strictly comply with MCL 768.27b(2) and that the trial court did not abuse its discretion or otherwise err by allowing AV to testify.

Moreover, even were we to conclude that the trial court erred, reversal would not be warranted because any error in the admission of AV's testimony was not outcome-determinative, see *Lukity*, 460 Mich at 495-496, and did not constitute a miscarriage of justice, MCL 769.26. In *People v Jackson*, 498 Mich 246, 278-279; 869 NW2d 253 (2015), our Supreme Court addressed a notice failure under MRE 404(b)(2), stating:

[The witness's] testimony was substantively admissible under MRE 404(b), notwithstanding the trial court's failure to properly analyze it under that rule. And while it was error for the prosecution not to provide, and the trial court not to require, "reasonable notice" of [the] testimony under MRE 404(b)(2), the defendant has not demonstrated that this error more probably than not was outcome determinative. As discussed above, the lack of proper pretrial notice did not result in the admission of substantively improper other-acts evidence. Thus, although the defendant was not afforded his due opportunity to marshal arguments against its admission before it was introduced at trial, he has not shown that any such arguments would have been availing, or would have affected the scope of testimony ultimately presented to the jury. Furthermore, while the defendant suffered "unfair surprise" from the unexpected introduction of this testimony at trial, he was admittedly aware of [the witness's] general version of events before trial, including her and [a friend's] prior relationships with the defendant, and he has not demonstrated how he would have approached trial or presented his defense differently had he known in advance that [the witness] would be permitted to testify as she did. For instance, the defendant has not suggested that he would have chosen to explore these prior relationships in greater depth with [the witness], nor has he identified or presented offers of proof from any witnesses he might have called in response to her testimony. He also has not suggested that he would have altered or abandoned his theory of fabrication so as to prevent [the

witness] from offering this testimony to counter it. We therefore cannot conclude that the defendant suffered outcome-determinative prejudice from the prosecution's failure to follow, and the trial court's failure to apply, MRE 404(b)(2). [Citations, quotation marks, and ellipsis omitted.]

In this case, AV's testimony was completely unrelated to LM's allegations that resulted in defendant's CSC-I and CSC-II convictions. Additionally, AV's testimony provided no new facts to the jury, was extremely brief,<sup>3</sup> and did not relate to the sexual abuse of MM underlying the CSC-III conviction. There was corroborative evidence—testimony by LM—that was far more probative in relation to MM's account of her sexual abuse at the hands of defendant than AV's wholly unrelated testimony. Furthermore, defendant did not *substantively* challenge the admissibility of the other-acts evidence and has not explained how the asserted lack of notice impacted any cross-examination of AV or would have otherwise altered the defense's approach to the case. Accordingly, assuming that the trial court erred by allowing AV's testimony, we conclude that defendant has not established the requisite prejudice and hold that reversal is unwarranted.

#### B. SEPARATION OF POWERS

Defendant next argues that MCL 750.520b(2)(b) violates the separation-of-powers doctrine by depriving a sentencing judge of the discretion to impose an appropriate punishment. With respect to a conviction of CSC-I, MCL 750.520b(2)(b) provides that when the

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<sup>3</sup> AV's testimony regarding the mall incident was cursory as compared to MM's more-detailed testimony on the subject. Indeed, AV's testimony did not even specifically mention that defendant committed an assault, while MM's testimony clearly revealed an assault.

offense “is committed by an individual 17 years of age or older against an individual less than 13 years of age,” as was the situation in this case, the penalty is “imprisonment for life or any term of years, but not less than 25 years.”

Whether a statute violates the separation-of-powers doctrine presents a question of constitutional law that we review de novo. *People v Garza*, 469 Mich 431, 433; 670 NW2d 662 (2003). “Statutes are presumed to be constitutional, and the courts have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent.” *People v Benton*, 294 Mich App 191, 203; 817 NW2d 599 (2011) (quotation marks and citation omitted). The party challenging a statute has the burden of proving its unconstitutionality. *People v Sadows*, 283 Mich App 65, 67; 768 NW2d 93 (2009).

Article 3, Section 2 of the 1963 Michigan Constitution provides for the separation of powers, stating as follows:

The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.

In *Makowski v Governor*, 495 Mich 465, 482-483; 852 NW2d 61 (2014), our Supreme Court provided an overview of the separation-of-powers doctrine:

While the Constitution provides for three separate branches of government, the boundaries between these branches need not be “airtight.” In fact, in designing the structure of our Government and dividing and allocating the sovereign power among three co-equal branches, the Framers of the Constitution sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence. The true

meaning of the separation-of-powers doctrine is that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments; and that such exercise of the whole would subvert the principles of a free Constitution. [Quotation marks, citations, and brackets omitted.]

“[T]he ultimate authority to provide for penalties for criminal offenses is constitutionally vested in the Legislature.” *People v Hegwood*, 465 Mich 432, 436 & n 8; 636 NW2d 127 (2001), citing Const 1963, art 4, § 45 (“The legislature may provide for indeterminate sentences as punishment for crime and for the detention and release of persons imprisoned or detained under such sentences.”).<sup>4</sup> Although the judicial power includes the authority to exercise discretion in imposing sentences, the Legislature may limit this sentencing discretion by establishing a specific penalty for a crime. *People v Conat*, 238 Mich App 134, 147; 605 NW2d 49 (1999). “For example, the Legislature may set a minimum and a maximum sentence for a particular offense,” and “[c]ourts have no sentencing discretion unless it be conferred upon them by law.” *Id.* (quotation marks and citation omitted). “[T]here are offenses with regard to which the judiciary has no sentencing discretion, offenses about which discretion is sharply limited, and offenses regarding which discretion may be exercised under the terms set forth in the sentencing guidelines legislation.” *Garza*, 469 Mich at 434 (cita-

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<sup>4</sup> We note that this Court has held that Const 1963, art 4, § 45 does not prohibit the Legislature from enacting statutes that provide for determinate sentencing. See *People v Snider*, 239 Mich App 393, 426-428; 608 NW2d 502 (2000) (addressing the penalty of life imprisonment without parole for first-degree murder); *People v Cooper*, 236 Mich App 643, 660-664; 601 NW2d 409 (1999) (addressing the penalty of two years’ imprisonment for carrying or possessing a firearm when committing or attempting to commit a felony, MCL 750.227b).

tions omitted). Ultimately, “the Legislature has the exclusive power to determine the sentence prescribed by law for a crime, and the function of the court is only to impose [a] sentence under and in accord with the statute.” *Conat*, 238 Mich App at 147 (quotation marks and citation omitted; alteration in original).

Defendant argues that MCL 750.520b(2)(b) violates the separation-of-powers doctrine because the statute deprives a sentencing court of its discretion to consider individualized, mitigating circumstances by mandating a sentence of not less than 25 years. Under the principles and authorities cited in the preceding paragraph, defendant’s argument plainly lacks merit because MCL 750.520b(2)(b) represents a permissible exercise of legislative authority to prescribe a mandatory minimum sentence. We hold that in enacting MCL 750.520b(2)(b), the Legislature properly exercised the authority vested in it by Const 1963, art 4, § 45 to provide penalties for criminal offenses; consequently, there was no violation of the separation-of-powers doctrine.

We affirm.

CAVANAGH, P.J., and SERVITTO, J., concurred with MARKEY, J.



## PEOPLE v KROLL

Docket No. 357538. Submitted March 1, 2022, at Lansing. Decided March 31, 2022, at 9:00 a.m.

Christopher M. Kroll was charged in the Charlevoix Circuit Court with false report of a felony, MCL 750.411a(1)(b). Defendant had been in the Charlevoix County Jail when three corrections officers went into his cell and shackled him. Defendant claimed that he was sexually assaulted as he was being shackled. The next day, the jail's administrator informed Detective Cody Wheat that defendant had filed a complaint under the Prison Rape Elimination Act (PREA), 34 USC 30301 *et seq.* Wheat was unfamiliar with any requirements under PREA and treated the investigation like a normal sexual-assault complaint instead of following PREA's requirements. Accordingly, because defendant was incarcerated, Wheat read defendant the *Miranda*<sup>1</sup> warnings before interviewing him about the reported assault. Defendant never expressly waived his right to remain silent or to wait for an attorney, but he continued speaking with Wheat and, eventually, related the facts surrounding the alleged assault. Wheat reviewed the jail-cell and body-camera videos, determined the alleged assault had not occurred, and submitted the information to the prosecutor, resulting in the instant charge. Following a jury trial, the court, Roy C. Hayes III, J., declared a mistrial when the jury could not reach a verdict. After a retrial was scheduled, defendant moved to dismiss the charge and to exclude the video of his statement to Wheat, arguing that PREA applies to a county jail, that the interview was made relative to a PREA complaint, and that statements made during the interview were therefore confidential and could not be used as a basis for the false-report charge. Defendant further argued that his statement to Wheat was coerced, contrary to the First and Fifth Amendments of the United States Constitution, because Wheat misrepresented to defendant that the interview was being conducted relative to his PREA report. The trial court denied the motions. Defendant sought to leave to appeal, which the Court of Appeals granted.

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<sup>1</sup> *Miranda v Arizona*, 384 US 436 (1966).

The Court of Appeals *held*:

1. Because Congress found that prison rape often goes unreported and inmate victims often receive inadequate treatment for the severe physical and psychological effects of sexual assault, it enacted PREA with the purpose of, among other things, making the prevention of prison rape a top priority in each prison system. Under 34 USC 30309(7)(A), the term “prison” means any confinement facility of a federal, state, or local government, whether administered by such government or by a private organization on behalf of such a government, and the term includes any local jail or police lockup. In turn, an “inmate” is defined under 28 CFR 115.5 (2021) as any person incarcerated or detained in a prison or jail, and “jail” is a confinement facility of a federal, state, or local law enforcement agency whose primary use is to hold persons pending adjudication of criminal charges, persons committed to confinement after adjudication of criminal charges for sentences of one year or less, or persons adjudicated guilty who are awaiting transfer to a correctional facility. 28 CFR 115.51 (2021) requires that prisoners be provided multiple ways to privately report sexual abuse and sexual harassment, including the ability to anonymously report a sexual assault. Importantly, 28 CFR 115.61(b) (2021) provides that apart from reporting to designated supervisors or officials, staff shall not reveal any information related to a sexual abuse report to anyone other than to the extent necessary to make treatment, investigation, and other security and management decisions. Under 28 CFR 115.73(a) (2021), once an investigation into the allegation is complete, the inmate must be informed whether the allegation was substantiated, unsubstantiated, or unfounded. Material to this action, 28 CFR 115.78(f) (2021) provides that for the purpose of disciplinary action, a report of sexual abuse made in good faith based upon a reasonable belief that the alleged conduct occurred shall not constitute falsely reporting an incident or lying, even if an investigation does not establish evidence sufficient to substantiate the allegation. PREA regulations therefore anticipate that disciplinary action may occur if an inmate falsely reports an incident. Indeed, PREA standards clearly anticipate disciplinary sanctions against an inmate who makes a false allegation of sexual abuse against a staff member of a facility covered by PREA. Further, nothing in PREA suggests that the availability of disciplinary sanctions following an administrative investigation precludes the agency from reporting the false allegation of sexual abuse to the prosecutor, that false claims of sexual assault may not be prosecuted, or that false claims of sexual assault are privileged or otherwise protected from admission into evidence.

2. Under the definitions in PREA and the Code of Federal Regulations, a county jail in Michigan is subject to the requirements of PREA. In this case, the Charlevoix County Jail was operated by a local law enforcement agency whose primary purpose is to hold persons pending adjudication of criminal charges, persons committed to confinement after adjudication of criminal charges for sentences of one year or less, or persons adjudicated guilty who are awaiting transfer to a correctional facility. In addition, defendant was an inmate as defined by federal rule given that he was incarcerated in the jail while waiting to be adjudicated on pending charges. Accordingly, the requirements of PREA applied to the county jail where defendant was temporarily housed.

3. MRE 402 provides that all relevant evidence is admissible, except as otherwise provided by the United States and Michigan Constitutions, the Michigan Rules of Evidence, or other rules adopted by the Supreme Court. Although PREA provides for some forms of confidentiality of information during an investigation to protect both the inmate and the alleged perpetrator, including the option for an inmate to anonymously report sexual abuse, the act does not provide immunity or grant a privilege that precludes the admission of statements made by an inmate who makes a false allegation of sexual abuse during the investigation; thus, statements made by an inmate during a PREA investigation are admissible at trial. Therefore, the trial court correctly rejected defendant's claim that his statements were inadmissible.

4. Because he failed to adequately brief the issue, defendant abandoned his claim that his statements to Wheat were involuntary. Regardless, defendant was unable to explain how the statements were involuntary, and the record indicated that defendant continued to speak with Wheat after being informed that Wheat was a detective and after being given his *Miranda* warnings. Accordingly, the trial court correctly denied defendant's motions to dismiss the charge and to suppress his statement.

Affirmed.

1. STATUTES – FEDERAL – PRISON RAPE ELIMINATION ACT – APPLICABLE TO COUNTY JAILS.

The Prison Rape Elimination Act was enacted with the purpose of, among other things, making the prevention of prison rape a top priority in each prison system; the requirements of the act apply to Michigan county jails (34 USC 30301 *et seq.*).

2. EVIDENCE – STATEMENTS MADE UNDER THE PRISON RAPE ELIMINATION ACT –  
ADMISSIBILITY OF STATEMENTS IN CRIMINAL PROSECUTIONS.

Although the Prison Rape Elimination Act (PREA) provides for some forms of confidentiality of information during an investigation to protect both the inmate and the alleged perpetrator, including the option for an inmate to anonymously report sexual abuse, the act does not provide immunity or grant a privilege that precludes the admission of statements made by an inmate who makes a false allegation of sexual abuse during the investigation; thus, statements made by an inmate during a PREA investigation are admissible at trial when the defendant has been charged with making a false report of a felony (34 USC 30301 *et seq.*; MRE 402).

*Dana Nessel*, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Allen Telgenhof*, Prosecuting Attorney, for the people.

*Duane J. Beach* for defendant.

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

MURRAY, J. In this interlocutory<sup>1</sup> appeal, the primary issue concerns the admissibility of defendant’s videotaped statement made during an interview arising from defendant’s report of a sexual assault pursuant to the Prison Rape Elimination Act (PREA), 34 USC 30301 *et seq.*, with the answer to that question resolving whether the trial court erred in denying defendant’s motion to dismiss the charge of making a false report of a felony, MCL 750.411a(1)(b). We hold that the statement was admissible and that the trial court did not err in denying defendant’s motion to dismiss; we therefore affirm.

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<sup>1</sup> *People v Kroll*, unpublished order of the Court of Appeals, entered October 11, 2021 (Docket No. 357538).

## I. BACKGROUND

In July 2019, defendant was a prisoner in a Michigan Department of Corrections (MDOC) facility, serving sentences for first-degree retail fraud and possession of methamphetamine. MDOC transferred defendant on a writ to the Charlevoix County Jail on July 23, 2019, for proceedings related to pending criminal charges. After court proceedings on July 23, defendant was placed into a temporary holding cell, and the next morning, he was put into a cell with nine other inmates.

On the morning of July 24, 2019, the jail administrator went to the detective's office in the sheriff's department and advised Detective Cody Wheat that there was a PREA complaint about a sexual assault in the jail. Detective Wheat, who was unfamiliar with PREA, treated the investigation as a normal sexual-assault complaint and arranged to interview defendant that same morning. The interview was recorded by Detective Wheat's body camera.<sup>2</sup>

Because defendant was incarcerated, at the start of the interview, Detective Wheat read defendant his *Miranda* warnings<sup>3</sup> and, after defendant indicated

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<sup>2</sup> The interview was played for the jury during defendant's first trial, which resulted in a hung jury. The order on appeal was entered prior to the start of defendant's second trial.

<sup>3</sup> *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966). It is important to remember that despite courts routinely referring to "*Miranda* rights," *Miranda* only declared the use of warnings that are "not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected." *Michigan v Tucker*, 417 US 433, 444; 94 S Ct 2357; 41 L Ed 2d 182 (1974). See also *Oregon v Elstad*, 470 US 298, 305; 105 S Ct 1285; 84 L Ed 2d 222 (1985), quoting *Tucker*, 417 US at 444. "Rules designed to safeguard a constitutional right, however, do not extend the scope of the constitutional right itself, just as violations of judicially

that he understood his rights, Detective Wheat asked defendant whether he agreed to speak with him. Defendant never expressly agreed to waive his constitutional rights to remain silent or to wait for an attorney, but he continued to talk to Detective Wheat, essentially without Detective Wheat asking any questions pertaining to what occurred in his jail cell.<sup>4</sup> Defendant continued his colloquy with Detective Wheat, setting forth his general concerns about jail safety and harassment. After Detective Wheat informed defendant that he was there in response to his PREA complaint, the following exchange occurred:

A. Okay. That's what I'm explaining to you.

Q. Yep. And then—but at the same time, I mean, if you don't want to speak to me, you know,—

A. I think I just did.

Q. Right. But at the same time, like, I need—I'm here to try to help you,—

A. Yeah.

Q. If something happened—

A. Yeah.

Q. —I'm genuinely here to help you,—

A. Yeah.

Q. —okay. That's why I'm here. I'm not here to cover stuff up. When we got the report back in my office,—

A. Yeah.

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crafted prophylactic rules do not violate the constitutional rights of any person.” *Chavez v Martinez*, 538 US 760, 772; 123 S Ct 1994; 155 L Ed 2d 984 (2003) (opinion by Thomas, J.). In other words, the right against self-incrimination comes from the Constitution, not the Supreme Court.

<sup>4</sup> Detective Wheat testified at trial that if defendant had indicated that he did not want to talk to him and that he wanted to speak with a counselor, he would have ended the interview.

Q. —that you wanted to speak to somebody reference PREA, I was—I'm up here—

A. Yeah.

Q. —like ready to go and talk to you, okay?

\* \* \*

A. I asked to be put in isolation this morning when they took my mat and stuff for no reason. I mean, they didn't even come and say, "Hey, don't do that. That's one of our rules."

Q. Right.

A. It was, they rushed in, three people, tied—you know, shackled me, told me to get on my knees, shackled me, one person behind me. I don't know if—there's something that was in the vicinity of my anal region that shouldn't have been there when he shackled me. I feel like—and this is—and whether it was to get a reaction out of me, a jerking motion or anything, but I'm conscience [sic] of this. I'm conscience [sic] of what's going on, so I'm very careful what I say, what I do. I've been on my P's and Q's. You know what I mean?

Detective Wheat eventually summarized to defendant what defendant had told him about what led to the officers coming into his jail cell. Defendant then elaborated to Detective Wheat that when the jail officers "put the restraints on . . . my knees are up against the thing, he spreads my—this leg more and somethings in—you know what I'm saying, it's inside of my ass crack." Defendant said that he was wearing clothing and that it "felt like something oblong like a finger or—I'd hate to say it, but a penis or—you know what I mean, it could have been something on his belt. I don't know."

As noted, until this point, Detective Wheat had not asked defendant any questions, and only tried to

explain the process. However, toward the end of the interview, the following exchange took place:

Q. . . . How long—when that officer was behind you and they were putting the chains on, you felt that object behind you,—

A. Uh-huh.

Q. —how long do you think that was actually touching you for?

A. It wasn't—it was seconds. It wasn't minutes. I mean, it was probably 20 to 30 seconds time.

Q. Okay.

A. You know. And it was continuous. It was like a—

Q. It was just there?

A. Yeah, it was there.

Q. Okay.

A. And then it backed up—when I got uncomfortable and kind of moved my leg, he pulled my leg out more and it was like deliberately there, you know. It was a—it was almost like a deliberate—you know,—

Q. Now, you were kneeling. Now, when you say you were kneeling, were you kneeling on like on one of the benches in the cell?

A. Yeah. There's a nitch—

Q. Okay.

A. —probably about this high.

Q. Okay.

A. So, they told me—you know, which I complied, they said put your knees up against that—

Q. Yep.

A. —and face the wall.

Q. And you said the officer actually took your one leg and actually—

A. Yes



*Q.* —pushed it further out?

*A.* Yeah.

Defendant confirmed that this was the only “PREA related incident” and that it was a sexual contact that had occurred.

Immediately after completing the interview, Detective Wheat contacted the jail administrator and requested that he pull the body-camera footage and retrieve the jail-cell footage of the alleged incident. After watching the three videos that same day, Detective Wheat determined that no contact occurred between defendant and the officers<sup>5</sup> and, in fact, that none of the officers came anywhere close to defendant’s buttocks area. He also did not see any of the officers spread defendant’s legs further apart. The information was submitted to the prosecutor the same day, which led to the charge at issue.

A jury trial was held over two days in March and August 2020.<sup>6</sup> The jury viewed the videorecording of the interview, heard the voicemail of defendant’s PREA report, and listened to testimony from various witnesses. The jury was unable to reach a verdict as to whether defendant had made a false report of a sexual assault, so the trial court declared a mistrial.

The trial court scheduled a retrial on the false-report charge. Defendant’s new counsel filed a motion to dismiss the charge and a motion to exclude the video of defendant’s statement to Detective Wheat. In both

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<sup>5</sup> Detective Wheat also contacted the sheriff and requested written statements from the corrections officers involved and the road deputy who had been in the detective’s office.

<sup>6</sup> The jury trial began on March 11, 2020, but because of the declared state of emergency due to the Covid-19 virus, trial resumed on August 5, 2020.

motions, defendant asked the court to dismiss the case or, alternatively, to preclude the prosecution from introducing: (1) defendant's recorded statement at trial; (2) any evidence of statements made by defendant for purposes of filing and pursuing his request for a PREA investigation; and (3) any allegations that defendant was reporting a crime at the time of his statements. Defendant supported his motion with the argument that PREA applies to a county jail, that the interview was made relative to a PREA complaint, and that the statements made during the interview were confidential and could not be used as a basis for the charge. He also asserted that Detective Wheat coerced his statement in violation of the First and Fifth Amendments of the United States Constitution by misrepresenting to defendant that the interview was being conducted relative to defendant's PREA report.

The prosecution posited several arguments in response, including that no authority was cited for the proposition that PREA applies to a county jail system, or that prosecuting defendant for making a false report was a violation of his First Amendment rights. The prosecution also argued that defendant was not coerced into making the statements and that defendant's statements were not confidential because PREA provides that an inmate can be disciplined for filing a false PREA report.

The trial court denied defendant's motions, articulating from the bench the following:

The whole confidentiality issue involves protecting the inmate from, you know, retribution within the—within the administrative operation of the prison or the jail, and keeping the allegation, you know, separate and quiet from the target of the investigation so that the—the—the

reporter's not harmed. There's nothing about somehow giving, you know, an exemption from admissibility in a criminal prosecution.

I did not find in any way the argument to be persuasive that the defendant has First Amendment rights that were violated, or the First Amendment would somehow—would—there's no First Amendment right to make a false allegation of rape to a law enforcement officer. So the First Amendment does not apply.

[Defendant's] Fifth Amendment rights were not violated in any way that—that was argued in the—the—the motions before the Court. And I finally don't find that the defendant's statements to Detective Wheat were confidential and are therefore inadmissible in this criminal case.

\* \* \*

I find that the defense is mis-applying the administrative procedures of the Prison Rape Elimination Act. And so the—the—the motions on grounds presented are—are denied.

. . . I actually went through and read all these statutes and case law and I . . . found . . . the arguments are taken out of context and the . . . cases don't support the . . . arguments made in the motion and the brief. So the—the motions of the defendant are denied.

## II. ANALYSIS

Defendant preserved his arguments on appeal by raising them in a pretrial motion to suppress his statement. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). When a motion to suppress evidence involves application of statutory law to undisputed facts, this Court's review is de novo. *People v Tanner*, 496 Mich 199, 206; 853 NW2d 653 (2014); *People v Attebury*, 463 Mich 662, 668; 624 NW2d 912

(2001).<sup>7</sup> “The decision whether to admit evidence is within a trial court’s discretion. This Court reverses it only where there has been an abuse of discretion.” *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). A trial court abuses its discretion when it selects an outcome that falls outside the range of reasonable and principled outcomes. *People v Johnson*, 502 Mich 541, 564; 918 NW2d 676 (2018).

#### A. GENERAL PREA STANDARDS

Congress enacted PREA with several purposes in mind, including:

- (1) establish a zero-tolerance standard for the incidence of prison rape in prisons in the United States;
- (2) make the prevention of prison rape a top priority in each prison system;
- (3) develop and implement national standards for the detection, prevention, reduction, and punishment of prison rape;
- (4) increase the available data and information on the incidence of prison rape, consequently improving the management and administration of correctional facilities;
- (5) standardize the definitions used for collecting data on the incidence of prison rape;
- (6) increase the accountability of prison officials who fail to detect, prevent, reduce, and punish prison rape;
- (7) protect the Eighth Amendment rights<sup>8</sup> of Federal, State, and local prisoners;

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<sup>7</sup> This standard also applies, of course, to the construction and application of federal statutes. *Johnson v Johnson*, 329 Mich App 110, 118; 940 NW2d 807 (2019).

<sup>8</sup> The Eighth Amendment provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” US Const, Am VIII.

(8) increase the efficiency and effectiveness of Federal expenditures through grant programs such as those dealing with health care; mental health care; disease prevention; crime prevention, investigation, and prosecution; prison construction, maintenance, and operation; race relations; poverty; unemployment; and homelessness; and

(9) reduce the costs that prison rape imposes on interstate commerce. [34 USC 30302; see also *Does 8–10 v Snyder*, 945 F3d 951, 955–956 (CA 6, 2019), quoting 34 USC 30302(7).]

Congress found that “[p]rison rape often goes unreported, and inmate victims often receive inadequate treatment for the severe physical and psychological effects of sexual assault—if they receive treatment at all.” 34 USC 30301(6). Following the commands of PREA, in 2012, the United States Attorney General published a final rule adopting national standards for the detection, prevention, reduction, and punishment of prison rape. 34 USC 30307(a)(1); 28 CFR 115.5 *et seq.*

#### B. PREA INVESTIGATION STANDARDS

PREA regulations contain standards to provide “[p]olicies to ensure referrals of allegations for investigation,” 28 CFR 115.22, section heading (2021) (bold formatting omitted), with the goal of ensuring that an administrative or criminal investigation is completed for “all allegations of sexual abuse and sexual harassment,” 28 CFR 115.22(a) (2021). Among other things, the agency is required to provide employee training for those employees who may have contact with inmates. 28 CFR 115.31(a)(1) through (10) (2021).

PREA regulations contain standards on inmate reporting, including the ability to anonymously report a sexual assault. 28 CFR 115.51 (2021) states:

(a) The agency shall provide multiple internal ways for inmates to privately report sexual abuse and sexual harassment, retaliation by other inmates or staff for reporting sexual abuse and sexual harassment, and staff neglect or violation of responsibilities that may have contributed to such incidents.

(b) The agency shall also provide at least one way for inmates to report abuse or harassment to a public or private entity or office that is not part of the agency, and that is able to receive and immediately forward inmate reports of sexual abuse and sexual harassment to agency officials, allowing the inmate to remain anonymous upon request. Inmates detained solely for civil immigration purposes shall be provided information on how to contact relevant consular officials and relevant officials at the Department of Homeland Security.

(c) Staff shall accept reports made verbally, in writing, anonymously, and from third parties and shall promptly document any verbal reports.

(d) The agency shall provide a method for staff to privately report sexual abuse and sexual harassment of inmates.

Inmates are also to have access to support services, with the communications between the inmate and service provider being as confidential “as possible.” 28 CFR 115.53(a) and (b) (2021).

Following an inmate report, “[t]he agency shall require all staff to report immediately and according to agency policy any knowledge, suspicion, or information regarding an incident of sexual abuse or sexual harassment that occurred in a facility, whether or not it is part of the agency; retaliation against inmates or staff who reported such an incident; and any staff neglect or violation of responsibilities that may have contributed to an incident or retaliation.” 28 CFR 115.61(a) (2021). Importantly, “[a]part from reporting to designated supervisors or officials, staff shall not reveal any infor-

mation related to a sexual abuse report to anyone other than to the extent necessary, as specified in agency policy, to make treatment, investigation, and other security and management decisions.” 28 CFR 115.61(b) (2021). “The facility shall report all allegations of sexual abuse and sexual harassment, including third-party and anonymous reports, to the facility’s designated investigators.” 28 CFR 115.61(e) (2021).<sup>9</sup>

Once an investigation into an inmate’s sexual abuse allegation is complete, the agency is required to inform the inmate as to whether the allegation has been determined to be “substantiated, unsubstantiated, or unfounded.” 28 CFR 115.73(a) (2021). Substantiated allegations of conduct that appear to be criminal must be referred for prosecution. 28 CFR 115.71(h) (2021). Relevant to defendant’s situation, PREA regulations address “[d]isciplinary sanctions for inmates,” 28 CFR 115.78, section heading (2021) (bold formatting omitted), providing in part that, “[f]or the purpose of disciplinary action, a report of sexual abuse made in good faith based upon a reasonable belief that the alleged conduct occurred shall not constitute falsely reporting an incident or lying, even if an investigation does not establish evidence sufficient to substantiate the allegation,”<sup>10</sup> 28 CFR 115.78(f) (2021).

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<sup>9</sup> The regulations also require that an agency “establish a policy to protect all inmates and staff who report sexual abuse or sexual harassment or cooperate with sexual abuse or sexual harassment investigations from retaliation by other inmates or staff, and shall designate which staff members or departments are charged with monitoring retaliation.” 28 CFR 115.67(a) (2021).

<sup>10</sup> The regulations also provide that an inmate “shall be subject to disciplinary sanctions pursuant to a formal disciplinary process following an administrative finding that the inmate engaged in inmate-on-inmate sexual abuse or following a criminal finding of guilt for inmate-on-inmate sexual abuse.” 28 CFR 115.78(a) (2021).

With this general framework in mind, we now turn to defendant’s specific PREA arguments.

C. WHETHER PREA APPLIES TO THE CHARLEVOIX COUNTY JAIL

In its ruling, the trial court assumed that PREA applied to a county jail. Defendant continues to argue on appeal that PREA applies to the county jail because the statutory definition of “prison” in 34 USC 30309(7)(a) includes “any local jail or police lockup[.]” Citing *Does 8–10*, 945 F3d 951, and 28 CFR 115.5, defendant also contends that Michigan adopted PREA “for money offered as a grant by the Federal Government.”<sup>11</sup>

We hold that PREA applies to the county jail. PREA defines the term “prison” as “any confinement facility of a Federal, State, or local government, whether administered by such government or by a private organization on behalf of such a government,” and includes “any local jail or police lockup[.]” 34 USC 30309(7)(A). Consistently with this congressional definition, the regulations provide that PREA standards apply to an “agency,” which is defined as “the unit of a State, local, corporate, or nonprofit authority, or of the Department of Justice, with direct responsibility for the operation of any facility that confines inmates, detainees, or residents . . . .” 28 CFR 115.5 (2021). An “inmate” is “any person incarcerated or detained in a prison or jail.” *Id.* “Jail,” in turn, is defined as “a confinement facility of a Federal, State, or local law enforcement agency whose primary use is to hold persons pending adjudication of criminal charges, persons committed to confinement after adjudication of

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<sup>11</sup> The prosecution’s brief on appeal does not address the applicability of PREA to the county jail.



criminal charges for sentences of one year or less, or persons adjudicated guilty who are awaiting transfer to a correctional facility.” *Id.*

Applying these definitions, it is easy to conclude that the county jail is subject to PREA, a fact the county sheriff acknowledged at trial. The jail is operated by a local law enforcement agency whose primary purpose is to hold persons pending adjudication of criminal charges, persons committed to confinement after adjudication of criminal charges for sentences of one year or less, or persons adjudicated guilty who are awaiting transfer to a correctional facility. Defendant was also an inmate as defined by federal rule as he was incarcerated in a jail while awaiting adjudication of charges.<sup>12</sup> PREA applied to the county jail where defendant was temporarily housed.

D. CAN DEFENDANT’S PREA STATEMENT BE USED TO  
SUPPORT A CRIMINAL CHARGE OF MAKING A  
FALSE REPORT OF A FELONY?

The crux of defendant’s case is his argument that his report of a sexual assault and his statement given during the investigation of his report were confidential under PREA and, therefore, could not be used by the prosecution to support a criminal charge of making a false report of a felony. As the prosecution argues, however, defendant presented no authority that a statement under PREA is subject to a privilege or

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<sup>12</sup> A “detainee” is “any person detained in a lockup, regardless of adjudication status.” 28 CFR 115.5 (2021). A “lockup” is “a facility that contains holding cells, cell blocks, or other secure enclosures that are: (1) Under the control of a law enforcement, court, or custodial officer; and (2) Primarily used for the temporary confinement of individuals who have recently been arrested, detained, or are being transferred to or from a court, jail, prison, or other agency.” *Id.* Under these definitions, PREA standards would also apply to this county jail.

immunity that would preclude its introduction into evidence in support of a charge of making a false report of a felony.

Nothing in PREA directly addresses whether an inmate's PREA statement can be used to support a criminal charge of making a false report of a felony. Defendant's arguments instead focus on the assertion that his report and the resultant investigation were confidential under PREA.

As a starting point, it is important to recognize that “‘all relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of Michigan, these rules, or other rules adopted by the Supreme Court.’” *Waknin v Chamberlain*, 467 Mich 329, 333; 653 NW2d 176 (2002) (brackets omitted), quoting MRE 402. Statutes can also address the admissibility of evidence. See, e.g., *People v Watkins*, 491 Mich 450; 818 NW2d 296 (2012) (discussing MCL 768.27a and its limitation on admissible evidence). In the next section, we address defendant's argument that the Fifth Amendment precludes the admission of his statements; right now, however, we address the alleged statutory basis to preclude admission of his statements. In doing so, we flatly reject defendant's argument.<sup>13</sup>

A review of PREA and its regulations demonstrates that PREA provides for some forms of confidentiality of information during an investigation to protect both the

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<sup>13</sup> Defendant's references to the administrative remedy of a grievance and to a “First Amendment right to file nonfrivolous grievances against prison officials” are misplaced as there is no evidence that defendant submitted a grievance under 28 CFR 115.52. (Quotation marks and citation omitted.) Although defendant reported an incident of sexual assault under PREA and his allegation was immediately investigated, there is no evidence of a grievance being filed.

inmate and the alleged perpetrator, including an option for an inmate to anonymously report sexual abuse—which defendant did not do. However, there is nothing in PREA to suggest that the confidentiality provisions provide an immunity or a privilege precluding the admission of statements made by an inmate who makes a false allegation of sexual abuse during an investigation. Absent an explicit provision barring the use in court of all or some statements made by a prisoner during a PREA investigation, such statements cannot be deemed inadmissible as a matter of law.

Moreover, by providing, for the purpose of disciplinary action, that “a report of sexual abuse made in good faith based upon a reasonable belief that the alleged conduct occurred shall not constitute falsely reporting an incident or lying, even if an investigation does not establish evidence sufficient to substantiate the allegation,” 28 CFR 115.78(f) (2021), PREA regulations anticipate that disciplinary action may occur if an inmate falsely reports an incident. PREA does not protect from disciplinary action inmates who report sexual abuse and whose report is deemed false. PREA standards clearly anticipate disciplinary sanctions against an inmate who makes a false allegation of sexual abuse against a staff member of a facility covered by PREA. Likewise, there is nothing in PREA to suggest that the availability of disciplinary sanctions following an administrative investigation precludes the agency from reporting the false allegation of sexual abuse to the prosecutor, that false claims of sexual assault may not be prosecuted, or that false claims of sexual assault are privileged or otherwise

protected from admission into evidence.<sup>14</sup> Defendant's contention that his statement is inadmissible is simply without merit.

#### E. INVOLUNTARY STATEMENT

In a cursory fashion, defendant challenges the admissibility of his statement to Detective Wheat on the basis that it was involuntarily given. Although there is nothing in the record to suggest that Detective Wheat had reason to believe that defendant had committed a crime or that he was lying about the sexual assault, Detective Wheat gave defendant *Miranda* warnings because he was incarcerated.

Defendant's one-page argument contains general principles of law, but he does not apply the facts of his case to the law and offers cursory analysis at best.<sup>15</sup> He announces that he is "aware that failure to give a meaningful *Miranda* warning may not violate the United States Constitution, Fifth Amendment," and cites *United States v Patane*, 542 US 630, 631; 124 S Ct 2620; 159 L Ed 2d 667 (2004), but then asserts that "Palane [sic] also opined that an insufficient *Miranda*

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<sup>14</sup> To the extent that defendant's arguments are based on the county jail's alleged failure to follow PREA standards and violations of PREA training standards, nothing in the statute indicates an intent to give specific rights to prisoners. In the context of prisoners who have sued for failure to comply with PREA's requirements, courts have held that no private cause of action under PREA exists and that violations of PREA cannot be adjudicated in court. See, e.g., *Fisher v Fed Bureau of Prisons*, 484 F Supp 3d 521, 537-538 (ND OH, 2020), and *McCloud v Prack*, 55 F Supp 3d 478, 482 n 2 (WD NY, 2014).

<sup>15</sup> "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Therefore, defendant has abandoned this issue by failing to adequately brief it.

coupled with deception can violate the Fifth Amendment.” He does not otherwise discuss *Patane* or apply it to the controlling facts.

Nonetheless, because defendant was given *Miranda* warnings, *Patane* is immediately distinguishable. Additionally, defendant’s underlying premise—that he was entitled to *Miranda* warnings in the first place—is simply baseless. The fact that he was in jail on another matter does not, in and of itself, require that he be provided with *Miranda* warnings before being spoken with by an officer, and nor do any of the other relevant criteria garner support for his argument. After all, defendant requested the investigation, he was not under suspicion when interviewed, and when he made his initial report—he did not choose the available option of anonymous reporting and was otherwise treated appropriately given the setting. See *People v Cortez (On Remand)*, 299 Mich App 679, 695-699; 832 NW2d 1 (2013) (opinion by METER, J.), citing *Howes v Fields*, 565 US 499, 509-514; 132 S Ct 1181; 182 L Ed 2d 17 (2012). And, even if *Miranda* applied, defendant does not explain how the statements were involuntary, and the record evidence indicates that defendant continued to talk to Detective Wheat after being informed that he was a detective and after being given *Miranda* warnings.

Affirmed.

REDFORD, P.J., and SAWYER, J., concurred with MURRAY, J.

## THE GYM 24/7 FITNESS LLC v STATE OF MICHIGAN

Docket No. 355148. Submitted March 9, 2022, at Lansing. Decided March 31, 2022, at 9:05 a.m. Leave to appeal sought.

The Gym 24/7 Fitness LLC filed a complaint in the Court of Claims, individually and as the representative of a putative class, against the state of Michigan, alleging inverse-condemnation and takings claims under the state and federal Constitutions. The Gym argued that when the Governor issued executive orders in response to the COVID-19 pandemic ordering the closure of gyms and fitness centers, the closures resulted in a substantial loss of value in the Gym's property interests and in the interests of other gym owners. Accordingly, the state had "taken" constitutionally protected property interests from the Gym and other gym owners without payment of just compensation as required by the state and federal Constitutions. The state moved for summary disposition, arguing, in part, that its exercise of police powers to protect the public health and safety did not give rise to a takings claim. The Court of Claims, MICHAEL J. KELLY, J., denied the state's motion. The state applied for leave to appeal in the Court of Appeals, and the Court of Appeals granted the application.

The Court of Appeals *held*:

In *In re Certified Questions from the US Dist Court, Western Dist of Mich, Southern Div*, 506 Mich 332 (2020), the Michigan Supreme Court held that after April 30, 2020, the Governor lacked the authority under the Emergency Management Act of 1976, MCL 30.401 *et seq.*, to declare a state of emergency or a state of disaster on the basis of the COVID-19 pandemic and that she lacked authority to exercise emergency powers under the Emergency Powers of the Governor Act of 1945, MCL 10.31 *et seq.*, because that statute was unconstitutional. Therefore, the Court concluded that the executive orders issued by the Governor in response to the pandemic after April 30, 2020, lacked any basis under Michigan law. Regardless, the Gym accepted that the Governor had acted properly for a public purpose, but it argued that it was entitled to just compensation for the taking of its private property. Both the United States and the Michigan Constitutions provide that private property shall

not be taken for public use without just compensation. There are physical takings and regulatory takings. A physical taking of private property by the government is a categorical taking that requires the payment of just compensation. A regulatory taking occurs when the government, rather than appropriating private property for itself or a third party, imposes regulations that restrict an owner's ability to use their property. A regulatory taking may be categorical, in which the owner is deprived of all economically productive or beneficial use of the property, or noncategorical, which is determined through the application of the balancing test set forth in *Penn Central Transp Co v New York City*, 438 US 104 (1978), which considers factors such as the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the government action. Unless there has been a complete elimination of value, the *Penn Central* balancing test is applicable. Inverse condemnation arises when the government takes property, either physically or through regulations, absent formal condemnation proceedings. In this case, the Gym contended that the executive orders deprived it of all economically productive or beneficial use of its property, which entitled it to just compensation. The Gym was not deprived of *all* economically productive or beneficial use of its property as a result of the executive orders, so there was no regulatory categorical taking of the Gym's property. The executive orders closed gyms and fitness centers in the state for six months, and there was no evidence that the Gym suffered a total loss or the complete elimination of value by operation of the executive orders. The property clearly still had value, even if no revenue or income was generated during the closure. There was also no regulatory taking under the *Penn Central* test. Although the first two factors of the test, the economic impact of the executive orders and their interference with reasonable investment-backed expectations, weighed in favor of the Gym, these factors did not deserve much weight given that the economic impact and interference with business expectations arising from the closures were short-lived. Additionally, the third factor, the character of the government's action, was compelling in that the government's aim was to stop the spread of COVID-19, a potentially deadly infectious disease. Thus, this factor strongly favored the state. Further, precedent from the United States Supreme Court holds that all property in this country is held with the implied obligation that the owner's use of it shall not be injurious to the community. The United States Supreme Court has further recognized that the Takings Clauses of the state and federal Constitutions did not transform that principle such that

compensation is required whenever the government asserts its power to enforce that obligation. Therefore, the Gym did not have a viable takings claim under the *Penn Central* balancing test.

Reversed and remanded.

*Outside Legal Counsel PLC* (by *Philip L. Ellison*) and *Matthew E. Gronda* for plaintiffs.

*Dana Nessel*, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *B. Eric Restuccia*, Deputy Solicitor General, *Christopher Allen*, Assistant Solicitor General, and *Darrin F. Fowler*, *Daniel J. Ping*, *Kyla L. Barranco*, and *Andrea Moua*, Assistant Attorneys General, for defendant.

Before: CAVANAGH, P.J., and MARKEY and SERVITTO, JJ.

MARKEY, J. Defendant, the state of Michigan (the State), appeals by leave granted the opinion and order of the Court of Claims that denied the State’s motion for summary disposition with respect to an action brought by plaintiff, The Gym 24/7 Fitness LLC (the Gym),<sup>1</sup> alleging an unconstitutional taking of its business property by operation of executive orders issued by the Governor that temporarily shuttered the business in response to the COVID-19 pandemic. The Gym demanded “just compensation” for the taking of its private property that resulted from the closure. The

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<sup>1</sup> The Gym filed suit in an individual capacity and as a representative of a putative class of plaintiffs comprised of gyms, fitness centers, recreation centers, sports facilities, exercise facilities, exercise studios, and other similarly situated businesses in Oscoda, Alcona, Ogemaw, Iosco, Gladwin, Arenac, Midland, Bay, Saginaw, Tuscola, Sanilac, Huron, Gratiot, Clinton, Shiawassee, Eaton, and Ingham Counties. At this stage of the proceedings, the class had not been certified by the Court of Claims. Therefore, for purposes of this opinion, we shall simply refer to the Gym as the party pursuing the litigation.



Gym cross appeals, arguing that the Court of Claims properly denied the State’s motion for summary disposition but applied the wrong analytical framework.<sup>2</sup> This appeal concerns the interplay between the constitutional principles applicable to the taking of private property for public use and the principles applicable to the state’s authority to exercise its police powers to protect the health, safety, and welfare of its citizens. We reverse and remand for entry of judgment in favor of the State.

#### I. BACKGROUND

##### A. RULING BY THE MICHIGAN SUPREME COURT— COVID-19 LITIGATION

The Gym filed suit about three months before our Supreme Court issued its opinion in *In re Certified Questions from the US Dist Court, Western Dist of Mich, Southern Div*, 506 Mich 332; 958 NW2d 1 (2020). The decision provided background information that is helpful in understanding and giving context to the instant litigation. The Michigan Supreme Court observed and ruled:

This case concerns the nature and scope of our state’s public response to one of the most threatening public-health crises of modern times. In response to a global, national, and state outbreak of the severe acute respiratory disease named COVID-19, Michigan’s Governor has issued a succession of executive orders over the past six months limiting public and private gatherings, *closing and imposing restrictions upon certain businesses*, and regulating a broad variety of other aspects of the day-to-

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<sup>2</sup> We note that a cross-appeal is unnecessary when simply urging an alternative basis for affirmance. *Middlebrooks v Wayne Co*, 446 Mich 151, 166 n 41; 521 NW2d 774 (1994).

day lives of our state’s citizens in an effort to contain the spread of this contagious and sometimes deadly disease.

The ongoing validity of these executive orders has been the subject of much public debate as well as litigation in both state and federal courts. In the interest of comity, the United States District Court for the Western District of Michigan has asked this Court to resolve critical questions concerning the constitutional and legal authority of the Governor to issue such orders. We hereby respond to the federal court in the affirmative by choosing to answer the questions the federal court has certified, concluding as follows: first, the Governor did not possess the authority under the Emergency Management Act of 1976 (the EMA), MCL 30.401 *et seq.*, to declare a “state of emergency” or “state of disaster” based on the COVID-19 pandemic after April 30, 2020; and second, the Governor does not possess the authority to exercise emergency powers under the Emergency Powers of the Governor Act of 1945 (the EPGA), MCL 10.31 *et seq.*, because that act is an unlawful delegation of legislative power to the executive branch in violation of the Michigan Constitution. Accordingly, the executive orders issued by the Governor in response to the COVID-19 pandemic now lack any basis under Michigan law.

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The coronavirus . . . is a respiratory disease that can result, and has resulted, in significant numbers of persons suffering serious illness or death. In response to COVID-19, on March 10, 2020, one day before it was declared a pandemic by the World Health Organization, the Governor issued Executive Order (EO) No. 2020-04, declaring a “state of emergency” under the EPGA and the EMA. On March 20, 2020, the Governor issued EO 2020-17, which prohibited medical providers from performing nonessential procedures. On March 23, 2020, she issued EO 2020-21, which ordered all residents to stay at home with limited exceptions. On April 1, 2020, she issued EO 2020-33, which declared a “state of emergency” under the EPGA

and a “state of emergency” and “state of disaster” under the EMA. She then requested that the Legislature extend the state of emergency and state of disaster by 70 days, and a resolution was adopted, extending the state of emergency and state of disaster, but only through April 30, 2020. Senate Concurrent Resolution No. 2020-24.

On April 30, 2020, the Governor issued EO 2020-66, which terminated the declaration of a state of emergency and state of disaster under the EMA. But, immediately thereafter, she issued EO 2020-67, which provided that a state of emergency remained declared under the EPGA. [*In re Certified Questions from the US Dist Court*, 506 Mich at 337-339 (opinion by MARKMAN, J.) (emphasis added).]

#### B. THE COMPLAINT

The Gym’s complaint set forth various allegations that touched on many of the events and circumstances discussed by the Supreme Court in *In re Certified Questions from the US Dist Court*. The Gym alleged that throughout the period during which the Governor issued the EOs, the one constant among the various EOs was the closure of fitness centers for the public purpose of halting or minimizing the spread of COVID-19.<sup>3</sup> The Gym further contended that the Governor had placed the cost of the EOs “squarely upon the shoulders of private businesses and ha[d] failed to

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<sup>3</sup> The Gym did not specifically identify any particular EO in its complaint. We note that in March 2020, the Governor issued EO 2020-9, which temporarily closed, among other places of public accommodation, “[g]ymnasiums, fitness centers, recreation centers, indoor sports facilities, indoor exercise facilities, exercise studios, and spas[.]” EO 2020-9(1)(f). Multiple EOs on the subject were subsequently issued. Eventually, pursuant to EO 2020-176(3)(b), the Gym and other fitness centers were permitted to reopen their doors on September 9, 2020. Thus, the closure lasted approximately six months.

justly compensate affected parties for these takings undertaken for the benefit to the general public.” The Gym maintained that many fitness centers were on the verge of economic collapse as a direct result of the Governor’s actions. The Gym also indicated in its complaint that the lawsuit did not seek to contest whether the Governor’s EOs were prudent or whether they were within her authority to issue. Indeed, the Gym asserted that it accepted that the Governor had taken her actions regarding fitness centers “solely for a public purpose.” And, according to the Gym, when the government takes property for a public purpose the state and federal Constitutions “require the payment of just compensation if eminent domain proceedings are not first commenced.”

The Gym further alleged that notwithstanding the legitimate governmental purpose in issuing the EOs, they “halted all economic activity for . . . [fitness centers] and made it impracticable to benefit from the property interests belonging to the [fitness centers] for any economically beneficial purpose, and inflicted very nearly the same effect for constitutional purposes as appropriating or destroying the property as a whole.” The Gym claimed that although the EOs were issued “for a readily-apparent public purpose,” the Governor failed to compensate fitness centers for the closures ordered by the EOs, causing them to suffer “substantial—and perhaps total—diminution of value in their property interests as a result.” The Gym contended that fitness centers should not have been forced to bear a burden that in all fairness should have been borne by the public as a whole through the government’s payment of just compensation.

In Count I of the complaint, the Gym alleged a cause of action for inverse condemnation. In Count II, the

Gym asserted a takings claim under Const 1963, art 10, § 2. And in Count III, the Gym alleged a takings claim under US Const, Am V. With respect to each of the three counts, the Gym maintained that the State had taken “constitutionally-protected property interests” from fitness centers “in the form of the on-going operations of their business[es] . . . and the resulting revenues and profits therefrom, and have appropriated or ‘took’ said property interests for public use without the payment of just compensation and have failed to commence appropriate condemnation proceedings.” The Gym demanded the payment of “just compensation” as damages.

#### C. THE STATE’S MOTION FOR SUMMARY DISPOSITION

In lieu of filing an answer to the Gym’s complaint, the State moved for summary disposition under MCR 2.116(C)(7), (8), and (10). The State first argued that under precedent from the United States Supreme Court, the government has broad authority to implement emergency measures to address an epidemic that threatens society. The State contended that the exercise of police powers to protect the public health and safety does not give rise to inverse-condemnation and takings claims. Therefore, the government “need not pay compensation to businesses subjected to reasonable, temporary public health and safety measures imposed during a pandemic.” The State additionally maintained that the Gym failed to sufficiently plead a claim for inverse condemnation, as there was no assertion of actions that permanently harmed the value of the Gym’s property, no allegation of facts suggesting that the State had abused its power, and no contention that the Gym had suffered a unique or special injury. Further, the State argued that the takings claims were

facially meritless “because the challenged regulation is directed toward public health and safety, removing it from the ambit of relevant takings precedent.” The State also noted that the Gym had not properly pleaded a viable takings claim. The State explained that the Gym had not alleged a taking at all, considering that the EOs constituted health and safety regulations. Finally, the State argued that there had been no regulatory taking because such a taking requires more than a decidedly proper use of a government’s police powers.

In response to the State’s motion for summary disposition, the Gym provided the following overview of its position:

This case is unlike any other case that has come before. This suit does not seek to contest whether Governor Whitmer’s decision to issue the Executive Orders that have perpetually closed gymnasiums [and] fitness centers . . . since March 10, 2020[,] were prudent or were . . . within her authority to issue. Moreover, this suit accepts as fact that Governor Whitmer took the action she did . . . solely for a public purpose. When the government takes property for a public purpose, the US and Michigan Constitutions require the payment of just compensation if eminent domain proceedings are not first commenced. . . . The Gym . . . alleges (and it is not disputed) that the State . . . failed to commence appropriate condemnation proceedings and failed to pay just compensation. The question is whether that failure is in violation of the US and Michigan’s constitutional obligations to do or pay the same. Valid takings claims have been pled and there remains substantial material questions that need to be resolved by this case. Summary disposition at this stage must be denied. [Quotation marks, record citations, and brackets omitted.]

D. COURT OF CLAIMS' RULING ON MOTION FOR  
SUMMARY DISPOSITION

In September 2020, the Court of Claims issued a written opinion and order denying the State's motion for summary disposition. The Court of Claims initially noted that this case did not involve a classic taking in which there was a direct appropriation or physical invasion of private property.<sup>4</sup> Instead, the case concerned "regulations effectuated by various Executive Orders and whether those regulations amount[ed] to a 'regulatory taking.'" The Court of Claims explained that there are two types of regulatory takings—a categorical taking and a partial taking—the latter of which is evaluated under the test described in *Penn Central Transp Co v New York City*, 438 US 104; 98 S Ct 2646; 57 L Ed 2d 631 (1978). It then discussed the theory of inverse condemnation.

The Court of Claims next pointed out that the case entailed the exercise of police power to curb a public-health emergency and that the constitutional rights regarding takings and inverse condemnation, like all constitutional rights, can be reasonably restricted in

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<sup>4</sup> The Court of Claims indicated that fitness centers and gyms were allowed to reopen pursuant to a new EO issued after briefs on the motion for summary disposition had been submitted. But the Court of Claims found that the issues presented in the case were not moot. No party is claiming mootness on appeal. And given that a temporary taking can be compensable, the issues raised in this case are plainly not moot. See *First English Evangelical Lutheran Church of Glendale v Los Angeles Co*, 482 US 304, 321; 107 S Ct 2378; 96 L Ed 2d 250 (1987) ("[W]here the government's activities have already worked a taking . . . , no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective."); see also *Cummins v Robinson Twp*, 283 Mich App 677, 704; 770 NW2d 421 (2009) (the temporary taking of private property for public use absent just compensation comes within the protection of the Fifth Amendment).

order to combat a public-health emergency. The Court of Claims recognized that states have broad authority to fight the spread of dangerous communicable diseases and that the police power retained by the states to protect the lives, health, and general welfare of the people empowers them to confront pandemics largely absent court interference. But the Court of Claims also emphasized that a “state’s ability to act pursuant to the police power, even during a pandemic, is not absolute.” The Court of Claims, citing *Jacobson v Massachusetts*, 197 US 11; 25 S Ct 358; 49 L Ed 643 (1905), observed that court interference in the face of the exercise of police power is appropriate when a closure of a facility is arbitrary and oppressive, when the closure has no substantial relation to the public health, or when the closure is a plain and palpable invasion of rights.

With this backdrop, the Court of Claims ruled:

On the briefing and documentary evidence presented in the parties’ briefing, the Court concludes that summary disposition is not warranted at this time. In that regard, [the State] appears to take the position that any measure taken under the name of public health is permissible and that the Court must conclude that the restrictions at issue were reasonable and not arbitrary because [the State] has declared them as such. Indeed, [the State’s] briefing makes many factual assertions without any documentary evidence to support those assertions. Caselaw, while giving leeway to the state’s public health measures, does not give that much leeway . . . . [The State] has produced no evidence in support of its initial decision to close fitness facilities, nor has it provided evidence that informed its decision to continue to prohibit use of the facilities, even in a reduced or limited capacity. Nor has [the State] produced evidence suggesting why other indoor activities were permitted to resume—such as casinos in August 2020—but gyms and fitness centers remained closed at that time.



And while [the State] cursorily cites after-the-fact internet materials as justifications for its decisions, there is no documentary evidence suggesting whether the state relied on these materials, or any other evidence, in its decision-making.<sup>[5]</sup> [The State's] citation to these materials, with no indicia of whether this information ever informed the pertinent decisions in this case, does not satisfy [the State's] burden as the moving party on a motion for summary disposition under MCR 2.116(C)(10). Even with the deferential manner of review that applies, the documentary evidence is not sufficient for the Court to make an informed decision on the pertinent inquiry demanded by *Jacobson* and its progeny. As a result, summary disposition will not issue at this time. [Citation omitted.]

The Court of Claims denied the motion for summary disposition without prejudice. The State applied for leave to appeal in this Court, and the Court of Claims entered a stay while the application was pending. This Court subsequently granted leave to appeal. *The Gym 24/7 Fitness LLC v Michigan*, unpublished order of the Court of Appeals, entered March 16, 2021 (Docket No. 355148). The Gym then filed a cross-appeal.

## II. ANALYSIS

### A. OVERVIEW OF ARGUMENTS ON APPEAL

The State argues that the Gym's complaint failed as a matter of law to plead a valid takings claim. The State contends that when the government properly exercises its police power, which the Gym had conceded, the Takings Clauses of our state and federal Constitutions are simply not implicated. The State also maintains that, regardless, there was no categorical taking because the Governor's actions were only tem-

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<sup>5</sup> We note that the Court of Claims' discussion regarding the documentary evidence was consistent with the record.

porary and partial in nature. The State further asserts that there was no noncategorical taking of private property upon analysis of economic impact, consideration of interference with investment-backed expectations, and contemplation of the character of the government's actions. The State additionally argues that the Gym's inverse-condemnation claim failed as a matter of law because this claim requires a showing of abusive governmental action, which the Gym admitted did not occur, and the infliction of a unique injury, which the Gym did not allege.

As it maintained below, the Gym continues to argue that for purposes of this lawsuit, it does not contest whether the closure of fitness centers was prudent or within the Governor's authority, and it accepts that the Governor closed the private fitness centers solely for a public purpose.<sup>6</sup> The Gym contends that under those circumstances—when the government takes private property for a public purpose—the United States and Michigan Constitutions mandate the payment of “just compensation.” The State, however, did not commence any form of condemnation proceedings and had not paid just compensation to the Gym or any fitness center. With respect to the ruling by the Court of Claims, the Gym asserts that the court reached the right result but for the wrong reason because it applied an incorrect legal standard. The Gym argues that “[u]nder takings jurisprudence, whether the taking by

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<sup>6</sup> Even with the decision by our Supreme Court in *In re Certified Questions from the US Dist Court*, 506 Mich 332, that the EPGA is unconstitutional and that the EMA did not give the Governor authority to issue EOs regarding the pandemic after April 30, 2020, the Gym has made no attempt to alter its position and theory of the case. We do note that EO 2020-9 was the first EO closing fitness centers and that it was issued in March 2020, meaning that the Governor did have the authority to issue EO 2020-9 at the time under the EMA.

the government was reasonable or unreasonable is legally irrelevant.” The Gym explains that “[g]overnments can, almost always, take private property; [but] they commit an actionable wrong when they fail to pay just compensation.” Therefore, according to the Gym, this Court should affirm the ruling by the Court of Claims, albeit on different grounds.

In reply, the State argues that the government’s exercise of police power to place temporary limits on the use of property in order to halt the spread of a deadly pandemic does not constitute a taking as a matter of law. And the State contends that the caselaw that the Gym relies on to argue the contrary is easily distinguishable and provides no support for the Gym’s stance.

B. STANDARD OF REVIEW AND PRINCIPLES OF  
SUMMARY DISPOSITION

We review de novo a trial court’s decision on a motion for summary disposition. *Hoffner v Lanctoe*, 492 Mich 450, 459; 821 NW2d 88 (2012). This Court also reviews de novo issues of constitutional law. *Adair v Michigan*, 497 Mich 89, 101; 860 NW2d 93 (2014). And the question whether an unconstitutional taking occurred is likewise reviewed de novo on appeal. *Cove Creek Condo Ass’n, Inc v Vistal Land & Home Dev, LLC*, 330 Mich App 679, 696; 950 NW2d 502 (2019).

The Court of Claims ultimately analyzed the motion for summary disposition under MCR 2.116(C)(10), examining the documentary evidence, or lack thereof, in making its ruling. In *Batista v Office of Retirement Servs*, 338 Mich App 340, 355-356; 980 NW2d 107 (2021), this Court recited the principles governing review of a motion brought under MCR 2.116(C)(10):

MCR 2.116(C)(10) provides that summary disposition is appropriate when, “[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law.” A motion brought pursuant to MCR 2.116(C)(10) tests the factual support for a party’s action. “Affidavits, depositions, admissions, or other documentary evidence in support of the grounds asserted in the motion are required . . . when judgment is sought based on subrule (C)(10),” MCR 2.116(G)(3)(b), and such evidence, along with the pleadings, must be considered by the court when ruling on the (C)(10) motion, MCR 2.116(G)(5). “When a motion under subrule (C)(10) is made and supported . . . , an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial.” MCR 2.116(G)(4). A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact. 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. The trial court is not permitted to assess credibility, weigh the evidence, or resolve factual disputes, and if material evidence conflicts, it is not appropriate to grant a motion for summary disposition under MCR 2.116(C)(10). Like the trial court’s inquiry, when an appellate court reviews a motion for summary disposition, it makes all legitimate inferences in favor of the nonmoving party. A court may only consider substantively admissible evidence actually proffered by the parties when ruling on the motion. [Quotation marks and citations omitted; ellipses in original.]

The issues raised on appeal also implicate MCR 2.116(C)(8), which provides for summary disposition when a “party has failed to state a claim on which relief

can be granted.” MCR 2.116(C)(8) tests the legal sufficiency of a complaint. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). In rendering its decision under MCR 2.116(C)(8), a trial court may only consider the pleadings. *Id.* The trial court must accept as true all of the factual allegations in the complaint. *Dolan v Continental Airlines/Continental Express*, 454 Mich 373, 380-381; 563 NW2d 23 (1997). “The motion should be granted if no factual development could possibly justify recovery.” *Beaudrie*, 465 Mich at 130.

#### C. CONSTITUTIONAL CONSTRUCTION PRINCIPLES

In *AFSCME Council 25 v State Employees’ Retirement Sys*, 294 Mich App 1, 8-9; 818 NW2d 337 (2011), this Court articulated the governing principles of construction with respect to the Michigan Constitution:

When interpreting a constitutional provision, the primary goal is to determine the initial meaning of the provision to the ratifiers, the people, at the time of ratification. The primary objective of constitutional interpretation, not dissimilar to any other exercise in judicial interpretation, is to faithfully give meaning to the intent of those who enacted the law. To effectuate this intent, the appellate courts apply the plain meaning of the terms used in the constitution. When technical terms are employed, the meaning understood by those sophisticated in the law at the time of enactment will be given unless it is clear that some other meaning was intended. To clarify the meaning of the constitutional provision, the court may examine the circumstances surrounding the adoption of the provision and the purpose sought to be achieved. An interpretation resulting in a holding that the provision is constitutionally valid is preferred to one that finds the provision constitutionally invalid, and a construction that renders a clause inoperative should be rejected. Constitutional convention debates are relevant, albeit not controlling. Every provision in our constitution must be interpreted in light of the

document as a whole, and no provision should be construed to nullify or impair another. [Quotation marks, citations, and brackets omitted.]

When construing the Michigan Constitution, we are not bound by the United States Supreme Court's interpretation of the United States Constitution, even when the language in both documents is identical. See *Harvey v Michigan*, 469 Mich 1, 6 & n 3; 664 NW2d 767 (2003). When, however, we are engaged in the construction of the United States Constitution, we are bound by the decisions of the United States Supreme Court interpreting the United States Constitution. See *People v Lechner*, 307 Mich 358, 361; 11 NW2d 918 (1943); *Easley v John Hancock Mut Life Ins Co*, 70 Mich App 451, 455; 245 NW2d 785 (1976), rev'd on other grounds 403 Mich 521 (1978).

#### D. DISCUSSION

In light of the theory pursued by the Gym, the primary question presented in this appeal is whether the business owner of private property is entitled to just compensation under either the state or federal Takings Clause when the government properly exercises its police power to protect the health, safety, and welfare of its citizens during a pandemic by temporarily closing the owner's business operations.

We first note that the Gym is correct in its assessment that the Court of Claims did not properly analyze the motion for summary disposition and misconstrued the nature of the Gym's argument. The Court of Claims determined that the closure of fitness centers had to be reasonable and not arbitrary and oppressive and that the State failed to provide any documentary evidence to establish reasonableness and the absence of arbitrariness and oppressiveness. The Gym, however, from

the commencement of this case through the motion for summary disposition, conceded that the closure of fitness centers reflected the proper exercise of police power. In other words, the Gym *effectively* took the position that the Governor’s EOs were reasonable and not arbitrary and oppressive.<sup>7</sup> Accordingly, the Court of Claims erred in its reasoning for denying the State’s motion for summary disposition.

#### 1. POLICE POWER OF THE STATE

We now examine the police power of the states. In *Jacobson*, 197 US at 12, the United States Supreme Court addressed and upheld the constitutionality of a Massachusetts statute giving local boards of health—when necessary for the public health or safety—the authority to require and enforce the vaccination and revaccination of residents. The case arose when the board of health for the city of Cambridge mandated smallpox vaccinations. *Id.* at 12-13. The Court observed:

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<sup>7</sup> To be clear, the Gym does not believe that the closure of fitness centers was reasonable. But the Gym’s theory of the case is that it is entitled to just compensation regardless of the reasonableness of the EOs. In its brief on appeal, the Gym notes that it provided documentary evidence in the form of a study that demonstrated that shuttering gyms and fitness centers was unnecessary and that the risk of transmitting COVID-19 at such facilities was no greater than at other businesses involved in indoor activities. The Gym contends that the State’s argument to the contrary was not supported by any proper documentary evidence and that even if the hearsay references cobbled together by the State and obtained from the Internet can be considered, it minimally created a genuine issue of material fact on the matter. Nevertheless, the Gym indicates that this underlying factual dispute “misses the pertinent point” and is irrelevant. And the Gym emphasizes that “[t]his suit does not seek to contest whether Governor Whitmer’s decision to issue the [EOs] . . . were [sic] prudent.”

The authority of the state to enact this statute [comes from] what is commonly called the police power—a power which the State did not surrender when becoming a member of the Union under the Constitution. Although this court has refrained from any attempt to define the limits of that power, . . . it has distinctly recognized the authority of a State to enact quarantine laws and health laws of every description; indeed, all laws that relate to matters completely within its territory and which do not by their necessary operation affect the people of other States. According to settled principles the police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety. [*Id.* at 24-25 (quotation marks and citations omitted).]

The *Jacobson* Court indicated that “[t]he possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community.” *Id.* at 26 (quotation marks and citation omitted). The United States Supreme Court “has more than once recognized it as a fundamental principle that persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the State[.]” *Id.* (quotation marks and citations omitted). The Supreme Court cautioned that “[e]ven liberty itself, the greatest of all rights, is not unrestricted license to act according to one’s own will.” *Id.* at 26-27.

In *People ex rel Hill v Lansing Bd of Ed*, 224 Mich 388, 390; 195 NW 95 (1923), the Michigan Supreme Court addressed a comparable smallpox-vaccination mandate, ruling as follows:

We are plowing no virgin field in considering the questions here involved. Numerous decisions, both Federal and State, have considered the questions now before



us. They are not all in accord and in some instances are not reconcilable. There is, however, a very marked trend in them in one direction, that which upholds the right of the State in the exercise of its police power and in the interest of the public health, to enact such laws, such rules and regulations, as will prevent the spread of this dread disease. The power of the State to require vaccination in case the disease was present in a community was upheld in *Jacobson* . . . .

“The Constitution guarantees to citizens the general right to engage in any business which does not harm the public,” but “[t]his constitutional right to engage in business is subject to the sovereign police power of the State to preserve public health, safety, morals and public welfare.” *Grocers Dairy Co v Dep’t of Agriculture Dir*, 377 Mich 71, 76; 138 NW2d 767 (1966). In general, “[i]t has been long recognized that the state, pursuant to its inherent police power, may enact regulations to promote the public health, safety, and welfare.” *Blue Cross & Blue Shield of Mich v Governor*, 422 Mich 1, 73; 367 NW2d 1 (1985). “The test to determine whether legislation enacted pursuant to the police power comports with due process is whether the legislation bears a reasonable relation to a permissible legislative objective.” *Id.* at 74 (quotation marks and citation omitted). In this case, the Gym’s theory of liability does not hinge on any alleged due-process violation or other claimed frailty with the Governor’s exercise of police power in issuing the EOs; rather, the Gym accepts for the sake of argument that the Governor properly acted for a

public purpose, but nevertheless demands “just compensation” for a taking of private property.<sup>8</sup>

## 2. THE TAKINGS CLAUSES AND INVERSE CONDEMNATION

We now examine takings jurisprudence. Under the United States Constitution, private property shall not be taken “for public use, without just compensation.” US Const, Am V. “The Takings Clause of the Fifth Amendment . . . [is] applicable to the States through the Fourteenth Amendment[.]” *Cedar Point Nursery v Hassid*, 594 US 139, 147; 141 S Ct 2063; 210 L Ed 2d 369 (2021). And under the Michigan Constitution, “[p]rivate property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law.” Const 1963, art 10, § 2. “While we draw on authority discussing and interpreting both clauses, we must keep in mind that Michigan’s Takings Clause has been interpreted to afford property owners greater protection than its federal counterpart when it comes to the state’s ability to take private property for a public use under the power of eminent domain.” *Rafaeli, LLC v Oakland Co*, 505 Mich 429, 454; 952 NW2d 434 (2020).

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<sup>8</sup> We note that “the police power is *legislative* in nature.” *In re Certified Questions from the US Dist Court*, 506 Mich at 364 (opinion by MARKMAN, J.) (emphasis added). And we are addressing EOs that were issued by the Governor. The Governor, however, relied on legislative enactments—the EMA and the EPGA—as the source of her authority to issue the EOs; therefore, police powers are indeed implicated. Our Supreme Court stated:

Concerning the subject matter of the emergency powers conferred by the EPGA, it is remarkably broad, authorizing the Governor to enter orders “to protect life and property or to bring the emergency situation within the affected area under control.” MCL 10.31(1). It is indisputable that such orders “to protect life and property” encompass a substantial part of the entire police power of the state. [*Id.* at 363 (citation omitted).]

With respect to the analysis regarding an alleged taking under the Fifth Amendment, the United States Supreme Court in *Cedar Point Nursery*, 594 US at 147-148, recently set forth the following analytical framework:

When the government physically acquires private property for a public use, the Takings Clause imposes a clear and categorical obligation to provide the owner with just compensation. The Court's physical takings jurisprudence is as old as the Republic. The government commits a physical taking when it uses its power of eminent domain to formally condemn property. The same is true when the government physically takes possession of property without acquiring title to it. And the government likewise effects a physical taking when it occupies property—say, by recurring flooding as a result of building a dam. These sorts of physical appropriations constitute the clearest sort of taking, and we assess them using a simple, *per se* rule: The government must pay for what it takes.

When the government, rather than appropriating private property for itself or a third party, instead imposes regulations that restrict an owner's ability to use his own property, a different standard applies. Our jurisprudence governing such use restrictions has developed more recently. Before the 20th century, the Takings Clause was understood to be limited to physical appropriations of property. In *Pennsylvania Coal Co v Mahon*, 260 US 393; 43 S Ct 158; 67 L Ed 322 (1922), however, the Court established the proposition that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. This framework now applies to use restrictions as varied as zoning ordinances, orders barring the mining of gold, and regulations prohibiting the sale of eagle feathers. To determine whether a use restriction effects a taking, this Court has generally applied the flexible test developed in *Penn Central*, balancing factors such as the economic impact of the regulation, its interference with reasonable investment-backed

expectations, and the character of the government action.  
[Quotation marks and citations omitted.]<sup>9</sup>

The Takings Clauses of the Michigan and United States Constitutions both “prohibit the taking of private property for public use without just compensation.” *Chelsea Investment Group LLC v City of Chelsea*, 288 Mich App 239, 261; 792 NW2d 781 (2010). “The Taking Clauses do not prohibit the government’s interference with a private individual’s property, but require that interferences amounting to a taking be compensated.” *Id.* Generally speaking, the government takes private property from the owner by way of formal condemnation proceedings, but regulations issued by the government that overburden property can also result in a compensable taking. *Id.* A “categorical” taking occurs “when there has been a physical invasion of a landowner’s property *or* when a regulatory taking has deprived an owner of *all* economically and beneficial use of the land.” *Id.* at 261 n 5 (emphasis added). “Regulatory taking claims that do not rise to the level of a categorical taking are governed by the standard

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<sup>9</sup> In *Yee v Escondido*, 503 US 519, 522-523; 112 S Ct 1522; 118 L Ed 2d 153 (1992), the United States Supreme Court similarly stated:

Most of our cases interpreting the [Takings] Clause fall within two distinct classes. Where the government authorizes a physical occupation of property (or actually takes title), the Takings Clause generally requires compensation. But where the government merely regulates the use of property, compensation is required only if considerations such as the purpose of the regulation or the extent to which it deprives the owner of the economic use of the property suggest that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole. The first category of cases requires courts to apply a clear rule; the second necessarily entails complex factual assessments of the purposes and economic effects of government actions. [Citations omitted.]

set out in *Penn Central* . . . .” *Id.* at 261.<sup>10</sup> “[A] mere reduction in the value of regulated property is insufficient by itself to establish that a compensable taking has occurred.” *Id.* at 262.

The Michigan Supreme Court in *K & K Constr, Inc v Dep’t of Natural Resources*, 456 Mich 570, 576; 575 NW2d 531 (1998), similarly observed that a person’s property may effectively be taken when it is overburdened by regulations. Taking actions require a case-specific inquiry, and land-use regulations can effectuate a taking when they deny a landowner economically viable use of his or her property. *Id.* As indicated, a “categorical” taking occurs when a regulation deprives an owner of *all* economically productive or beneficial use of property. *Id.* at 576-577.<sup>11</sup> And a noncategorical regulatory taking can occur upon application of the *Penn Central* balancing test. *Id.* at 577.

Inverse condemnation is a de facto taking in which the government effectively takes property absent formal condemnation proceedings. *Merkur Steel Supply, Inc v Detroit*, 261 Mich App 116, 125; 680 NW2d 485 (2004). “An inverse condemnation claim may be based upon the government’s ‘regulatory taking’ of private property.” *Dorman v Clinton Twp*, 269 Mich App 638,

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<sup>10</sup> “When a taking is noncategorical, the court will undertake the fact-based inquiry enumerated in *Penn Central* to evaluate whether the governmental action constituted a compensable taking of the property interest.” *American Pelagic Fishing Co, LP v United States*, 379 F3d 1363, 1372 (CA Fed, 2004).

<sup>11</sup> The United States Supreme Court in *Lucas v South Carolina Coastal Council*, 505 US 1003, 1019; 112 S Ct 2886; 120 L Ed 2d 798 (1992), stated “that there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.”

646; 714 NW2d 350 (2006). Inverse condemnation concerns the taking of private property, and pursuant to the Takings Clauses, “a victim of such a taking is entitled to just compensation for the value of the property taken.” *Hart v Detroit*, 416 Mich 488, 494; 331 NW2d 438 (1982).<sup>12</sup>

Finally, as noted earlier in this opinion, a temporary taking can be compensable under the Takings Clauses. *First English Evangelical Lutheran Church of Glendale v Los Angeles Co*, 482 US 304, 321; 107 S Ct 2378; 96 L Ed 2d 250 (1987); *Cummins v Robinson Twp*, 283 Mich App 677, 704; 770 NW2d 421 (2009). To summarize, there are physical takings and regulatory takings. A physical taking of private property is a categorical taking that requires the payment of just compensation. A regulatory taking involving the deprivation of *all* economically productive or beneficial use of property is also a categorical taking, requiring the payment of just

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<sup>12</sup> In *Hinojosa v Dep’t of Natural Resources*, 263 Mich App 537, 548; 688 NW2d 550 (2004), this Court discussed inverse condemnation:

What governmental action constitutes a “taking” is not narrowly construed, nor does it require an actual physical invasion of the property. No precise formula exists. Pertinent factors include whether the governmental entity abused its exercise of legitimate eminent domain power to plaintiff’s detriment. Further, a plaintiff alleging inverse condemnation must prove a causal connection between the government’s action and the alleged damages. A plaintiff alleging a de facto taking or inverse condemnation must prove that the government’s actions were a *substantial* cause of the decline of his property’s value and also establish the government abused its legitimate powers in affirmative actions directly aimed at the plaintiff’s property. While there is no exact formula to establish a de facto taking, there must be some action by the government specifically directed toward the plaintiff’s property that has the effect of limiting the use of the property. [Quotation marks, citations, and parentheses omitted.]

Inaction or omissions cannot support a claim of inverse condemnation. See *id.* at 549.

compensation. The second type of regulatory taking—a noncategorical taking—is one that is determined upon application of the *Penn Central* balancing test. Additionally, inverse condemnation arises when the government takes property, either by physical invasion or regulation, absent formal condemnation proceedings. Finally, a taking can be either temporary or permanent.

### 3. RESOLUTION

We begin by noting that to the best of our knowledge, every federal court and state appellate court that has addressed a takings claim stemming from the government's closure of a business as a safeguard against the spread of COVID-19 has rejected the claim. See *Bojicic v DeWine*, 569 F Supp 3d 669, 689-691 (ND Ohio, 2021); *Case v Ivey*, 542 F Supp 3d 1245, 1281-1283 (MD Ala, 2021); *Underwood v Starkville*, 538 F Supp 3d 667, 678-681 (ND Miss, 2021); *Amato v Elicker*, 534 F Supp 3d 196, 212-215 (D Conn, 2021); *Metroflex Oceanside LLC v Newsom*, 532 F Supp 3d 976, 981-982 (SD Cal, 2021); *Northland Baptist Church of St Paul v Walz*, 530 F Supp 3d 790, 815-817 (D Minn, 2021); *TJM 64, Inc v Harris*, 526 F Supp 3d 331, 335-339 (WD Tenn, 2021); *Flint v Kauai Co*, 521 F Supp 3d 978, 988-993 (D Hawaii, 2021); *Daugherty Speedway, Inc v Freeland*, 520 F Supp 3d 1070, 1075-1078 (ND Ind, 2021); *Antietam Battlefield KOA v Hogan*, 501 F Supp 3d 339, 347 (D Md, 2020); *Bimber's Delwood, Inc v James*, 496 F Supp 3d 760, 782-785 (WD NY, 2020); *Lebanon Valley Auto Racing Corp v Cuomo*, 478 F Supp 3d 389, 400-402 (ND NY, 2020); *Savage v Mills*, 478 F Supp 3d 16, 30-32 (D Me, 2020); *Oregon Restaurant & Lodging Ass'n v Brown*, \_\_\_ F Supp 3d \_\_\_, \_\_\_ (D Or, 2020); slip op at 12-14; *JWC*

*Fitness, LLC v Murphy*, 469 NJ Super 414, 432-437; 265 A3d 164 (App Div, 2021); *State v Wilson*, \_\_\_ NM \_\_\_, \_\_\_; 2021-NMSC-022; 489 P3d 925, 940-942 (2021); *Friends of Danny DeVito v Wolf*, 658 Pa 165, 199-204; 227 A3d 872 (2020). We now join those courts and reject the Gym’s claim that its property was taken absent just compensation in violation of the Takings Clauses of the state and federal Constitutions.

Initially, we conclude that the Gym’s claims do not involve a physical taking of its property. There is no allegation or evidence that the State physically acquired, took possession of, occupied, or appropriated the Gym’s private property. Accordingly, this case solely concerns an alleged regulatory taking through the operation of the EOs. The Gym contends that the EOs deprived it of *all* economically productive or beneficial use of its property by completely shuttering the business, thereby resulting in a categorical or “*per se*” taking that mandated the payment of just compensation. In the alternative, the Gym argues that issuance and enforcement of the EOs gave rise to a noncategorical regulatory taking, as determined upon application of the *Penn Central* balancing test.

We hold as a matter of law that the Gym was not deprived of *all* economically productive or beneficial use of its property as a result of the Governor’s EOs; there was no regulatory categorical taking of the Gym’s property. In *Tahoe-Sierra Preservation Council, Inc v Tahoe Regional Planning Agency*, 535 US 302, 306; 122 S Ct 1465; 152 L Ed 2d 517 (2002), the United States Supreme Court introduced its opinion as follows:

The question presented is whether a moratorium on development imposed during the process of devising a comprehensive land-use plan constitutes a *per se* taking of property requiring compensation under the Takings



Clause of the United States Constitution. This case actually involves two moratoria ordered by respondent Tahoe Regional Planning Agency (TRPA) to maintain the status quo while studying the impact of development on Lake Tahoe and designing a strategy for environmentally sound growth. The first, Ordinance 81-5, was effective from August 24, 1981, until August 26, 1983, whereas the second more restrictive Resolution 83-21 was in effect from August 27, 1983, until April 25, 1984. As a result of these two directives, virtually all development on a substantial portion of the property subject to TRPA's jurisdiction was prohibited for a period of 32 months.

The Supreme Court first noted that it is "inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking[.]'" *Id.* at 323. The Court also observed that when "an owner possesses a full bundle of property rights, the destruction of one strand of the bundle is not a taking." *Id.* at 327 (quotation marks and citation omitted).

Citing language from *Lucas v South Carolina Coastal Council*, 505 US 1003, 1017-1020; 112 S Ct 2886; 120 L Ed 2d 798 (1992), the Court in *Tahoe-Sierra Preservation Council* emphasized that a categorical regulatory taking is limited to extraordinary circumstances in which no productive or economically beneficial use of land is allowed and when there has been a "100%," complete elimination or obliteration of value, i.e., a total loss; otherwise, the *Penn Central* analysis applies. *Tahoe-Sierra Preservation Council*, 535 US at 330. The Court indicated that a permanent deprivation of an owner's use of an entire parcel of property constitutes a taking of the whole parcel, whereas the imposition of a temporary restriction that merely causes a diminution in value is not a taking of

the whole parcel. *Id.* at 332.<sup>13</sup> And according to the Court, a fee simple estate is not “rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted.” *Id.*<sup>14</sup>

The Supreme Court clarified that it was not holding “that the temporary nature of a land-use restriction precludes finding that it effects a taking”; rather, the Court “simply recognize[d] that it should not be given exclusive significance one way or the other.” *Id.* at 337. The Court determined “that the interest in ‘fairness and justice’ will be best served by relying on the familiar *Penn Central* approach when deciding cases like this, rather than by attempting to craft a new categorical rule.” *Id.* at 342.

In this case, the closure of fitness centers for six months was temporary and considerably shorter in duration than the 32-month period involved in *Tahoe-Sierra Preservation Council*. Furthermore, there is no allegation or evidence that the Gym suffered a total loss or the complete elimination or obliteration of value

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<sup>13</sup> The Court explained that “[a]n interest in real property is defined by the metes and bounds that describe its geographic dimensions and the term of years that describes the temporal aspect of the owner’s interest,” and “[b]oth dimensions must be considered if the interest is to be viewed in its entirety.” *Id.* at 331-332.

<sup>14</sup> We note that the Supreme Court distinguished the case from its earlier decision in *Lucas* in which the petitioner had purchased two residential beachfront lots for \$975,000 upon which he intended to build single-family homes, but subsequent to his purchase a state statute was enacted that had the direct effect of barring the petitioner from ever erecting any habitable structure on the lots. *Tahoe-Sierra Preservation Council*, 535 US at 329-330; *Lucas*, 505 US at 1006-1007. The *Lucas* Court stated that the taking had been “unconditional and permanent,” even though the statute was subsequently amended. *Id.* at 1012. No such permanency existed in *Tahoe-Sierra Preservation Council* or in the instant case.

by operation of the EOs. Indeed, the Gym asserted in the complaint that the EOs had “very nearly” destroyed the property as a whole. The property clearly still had value, even if no revenue or profit was generated during the closure.<sup>15</sup> And any lost value relative to the real and personal property was likely recovered as soon as the temporary prohibition was lifted.<sup>16</sup> In sum, we hold that as a matter of law there was no categorical regulatory taking.

Next, we hold as a matter of law that there was no regulatory taking under *Penn Central*. With respect to the *Penn Central* balancing test,<sup>17</sup> the first two factors—economic impact of the EOs and their interference with reasonable investment-backed expectations—weigh in favor of the Gym because its business was in fact shuttered under the EOs, but we do not give those factors all that much weight because the economic impact and the interference with business expectations arising from the closure orders were short-lived. Moreover, the third factor—the character of the government’s action—was compelling in that the aim of the EOs was to stop the spread of COVID-19, which our Supreme Court described as “one of the most

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<sup>15</sup> Furthermore, lost profits and other consequential damages are generally not recoverable as just compensation in condemnation proceedings; just compensation focuses on lost market value. *United States v Petty Motor Co*, 327 US 372, 377-378; 66 S Ct 596; 90 L Ed 729 (1946).

<sup>16</sup> We find validity in the following argument presented by the State in its brief on appeal:

The [EOs] . . . did not preclude employees of fitness centers from accessing the centers’ indoor facilities, nor did it preclude those businesses from using their facilities to engage in other, lower-risk commercial activity, fitness-related or otherwise (such as the provision of remote fitness services through recorded or live online classes, or the sale of products . . .).

<sup>17</sup> See *Penn Central*, 438 US at 124.

threatening public-health crises of modern times,” resulting in “significant numbers of persons suffering serious illness or death.” *In re Certified Questions from the US Dist Court*, 506 Mich at 337-338 (opinion by MARKMAN, J.). And, once again, the Gym accepted that the Governor’s EOs were issued solely for a public purpose and did not contest the prudence of the Governor’s actions or her authority to issue the EOs.<sup>18</sup> Lending further support for our stance that the character of the Governor’s actions strongly favors the State, or perhaps actually demands that we find no taking, is language in precedent from the United States Supreme Court.

In *Lucas*, 505 US at 1029, the Supreme Court indicated that just compensation is not owed to a property owner for an alleged taking that arises from a law or decree that does nothing more “than duplicate the result that could have been achieved in the courts . . . by the State under its . . . power to abate nuisances that affect the public generally, or otherwise.” (Emphasis added.) The Supreme Court then noted, “The principal ‘otherwise’ that we have in mind is litigation absolving the State . . . of liability for the destruction of real and personal property, in cases of actual necessity, to prevent the spreading of a fire or to forestall other grave threats to the lives . . . of others.” *Id.* at 1029 n 16 (quotation marks and citations omitted; emphasis added). In this case, the purpose of the

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<sup>18</sup> On the issue of reasonableness, for purposes of analyzing an alleged violation of “substantive due process” and not a taking, we note regulations must be reasonably necessary to preserve the public’s health and safety and cannot be arbitrary and capricious. *Bonner v City of Brighton*, 495 Mich 209, 227-228; 848 NW2d 380 (2014) (referring to the “test of reasonableness” in regard to zoning ordinances and substantive-due-process challenges). The Gym states in its brief on appeal that it “did not make and will not be making a substantive due process claim.”

EOs was to forestall the spread of COVID-19 that had hospitalized and killed thousands of Michiganders.

Along those same lines, in *Penn Central*, 438 US at 125, the United States Supreme Court explained:

[I]n instances in which a state tribunal reasonably concluded that “the health, safety, morals, or general welfare” would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land-use regulations that destroyed or adversely affected recognized real property interests. See *Nectow v Cambridge*, 277 US 183, 188[; 48 S Ct 447; 72 L Ed 842] (1928). Zoning laws are, of course, the classic example, see *Euclid v Ambler Realty Co.*, 272 US 365[; 47 S Ct 114; 71 L Ed 303] (1926) (prohibition of industrial use); *Gorieb v Fox*, 274 US 603, 608[; 47 S Ct 675; 71 L Ed 1228] (1927) (requirement that portions of parcels be left unbuilt); *Welch v Swasey*, 214 US 91[; 29 S Ct 567; 53 L Ed 923] (1909) (height restriction), which have been viewed as permissible governmental action even when prohibiting the most beneficial use of the property.

Similarly to this quoted passage, in *Keystone Bituminous Coal Ass’n v DeBenedictis*, 480 US 470, 491-492; 107 S Ct 1232; 94 L Ed 2d 472 (1987), the United States Supreme Court expressed:

The Court’s hesitance to find a taking when the State merely restrains uses of property that are tantamount to public nuisances is consistent with the notion of “reciprocity of advantage” . . . . Under our system of government, one of the State’s primary ways of preserving the public weal is restricting the uses individuals can make of their property. While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others. These restrictions are properly treated as part of the burden of common citizenship. Long ago it was recognized that all property in this country is held under the implied obligation that the owner’s use of it shall not be injurious to the community, and the Takings Clause did not transform that principle to

one that requires compensation whenever the State asserts its power to enforce it. [Quotation marks and citations omitted.]

In light of this precedent, we cannot conclude that the Gym has a viable takings case under the *Penn Central* balancing test. We will, however, briefly examine a couple of cases cited by the Gym. The Gym attempts to support its position by citing *Cedar Point Nursery*, 594 US 139. But in that case, the United States Supreme Court faced the following set of circumstances:

A California regulation grants labor organizations a “right to take access” to an agricultural employer’s property in order to solicit support for unionization. Agricultural employers must allow union organizers onto their property for up to three hours per day, 120 days per year. The question presented is whether the access regulation constitutes a *per se physical* taking under the Fifth and Fourteenth Amendments. [*Id.* at 143-144 (citation omitted; second emphasis added).]

Because *Cedar Point Nursery* addressed an alleged physical taking, it has no relevance to the instant case. See *Tahoe-Sierra Preservation Council*, 535 US at 323 (it is not proper to treat cases involving a physical taking as controlling precedent when evaluating an alleged regulatory taking).

The Gym’s reliance on *Cebe Farms, Inc v United States*, 116 Fed Cl 179 (2014), is also misplaced. In *Cebe Farms*, the plaintiffs sought, in part, just compensation following the destruction by the United States Department of Agriculture of their breeder chickens and eggs as part of the government’s effort to eradicate a serious poultry disease that had broken out in Southern California. *Id.* at 184. Again, *Cebe Farms*

was a case involving the physical destruction or taking of property, distinguishing it from the instant case.

We reverse and remand for entry of judgment in favor of the State. We do not retain jurisdiction. Having fully prevailed on appeal, the State may tax costs under MCR 7.219.

CAVANAGH, P.J., and SERVITTO, J., concurred with MARKEY, J.

## PEOPLE v ANDERSON

Docket No. 354860. Submitted March 1, 2022, at Lansing. Decided March 31, 2022, at 9:10 a.m. Leave to appeal sought.

Dion D. Anderson appeals as of right his bench trial conviction and subsequent sentence for possessing a weapon in a prison, MCL 800.283(4), after a piece of sharpened black plastic with a cloth handle was discovered in a room where he had been strip-searched. The trial court sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to 25 months to 15 years' incarceration. Defendant appealed, arguing that the trial court erred by convicting him against the great weight of the evidence and that the trial court erred by sentencing him when he was not physically present but instead appeared remotely by video.

The Court of Appeals *held*:

1. The trial court's verdict was not against the great weight of the evidence. Defendant's conviction was supported by the uncontroverted testimony of an officer who testified that no weapon was in the room before defendant entered, that had one been there he would have seen it, that he searched each article of defendant's clothing, and that he saw defendant try to kick a weapon that had appeared on the floor. Those facts strongly supported the conclusion that defendant brought the weapon into the room and that it fell out of its hiding place during the search before its discovery on the floor. The testimony and the trial court's conclusions were also corroborated by the video of the incident. Notwithstanding defendant's claim that other scenarios could have explained the weapon's presence, defendant failed to show that such speculative possibilities preponderated against the conclusion that he possessed the weapon.

2. Defendant was not entitled to resentencing on the ground that he was not physically present at the hearing. To prevail on this unpreserved claim of constitutional error, defendant was required to show that a plain error occurred, that it affected his substantial rights, and that it seriously affected the fairness, integrity, or public reputation of the judicial proceedings independent of defendant's innocence. In cases involving forfeited structural errors, it is the prosecutor who must demonstrate, by



presenting specific facts, that the error did not seriously affect the fairness, integrity, or public reputation of the judicial proceeding. In this case, the trial court committed a plain error by sentencing defendant by videoconference for a felony for which he had the right to appear in court. However, this error was not structural. Defendant's physical absence from the courtroom did not restrict his ability to put in evidence or argument in favor of a low sentence, and it did not affect the composition of the record or otherwise undermine the fairness of the criminal proceeding as a whole. Additionally, any effect this error had on the sentencing was not difficult to discern, and it had no effect on what was contained in the record. That this error was not a structural one did not detract from the importance of this constitutional right, and the impact of defendant appearing remotely required a separate analysis. In this case, defendant did not suggest any irregularities with the sentencing other than that he was not present in the courtroom at the time of sentencing. Defendant and his counsel were active participants, and they were able to make any necessary arguments or statements in support of defendant's position. The trial court appeared to have no difficulty listening to defendant, who was familiar to the court given that it had conducted his bench trial. The court imposed a minimum sentence that was shorter than the prosecution sought and recommended in the PSIR, and the court gave defendant encouragement, counsel, and advice. There was no evidence, inference, or indication that defendant's treatment likely would have been different had he been face-to-face with the sentencing judge. Accordingly, there was no reasonable probability that, but for the error, the outcome of the proceeding would have been different, and the error therefore did not require resentencing.

Affirmed.

CONSTITUTIONAL LAW – RIGHT TO BE PRESENT AT SENTENCING – APPEALS – ISSUE  
PRESERVATION – STRUCTURAL ERRORS.

A criminal defendant has a constitutional right to be physically present in the courtroom when being sentenced for a felony conviction; allowing a defendant to appear by videoconference at sentencing for a felony is a plain error; this error is not structural in nature but does require the reviewing court to separately analyze the effect of the defendant's appearing remotely instead of in person; to merit resentencing on the basis of this error, a defendant must establish that, had they been physically present in the courtroom, there is a reasonable probability that their

sentence would have been different and that the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings.

*Dana Nessel*, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Geofrey C. M. Bilabaye*, Assistant Attorney General, for the people.

State Appellate Defender Office (by *Lindsay Ponce*) for defendant.

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

PER CURIAM. Defendant, Dion Delando Anderson, appeals as of right his bench trial conviction and subsequent sentence for possessing a weapon in a prison, MCL 800.283(4). The trial court sentenced defendant, as a fourth-offense habitual offender, MCL 769.12, to 25 months to 15 years' incarceration. On appeal, defendant argues that (1) the trial court erred by convicting him against the great weight of the evidence, and (2) the trial court erred by sentencing him when he was not physically present but instead appeared remotely by video. We affirm defendant's conviction and sentence.

#### I. FACTUAL AND PROCEDURAL BACKGROUND

Roy Valdez, a corrections officer at Bellamy Creek Correctional Facility, testified that on October 7, 2019, a fight occurred in the yard of the correctional facility which resulted in a lockdown and issuance of an order to perform strip searches of the inmates in housing unit five. Officer Valdez testified that he placed a plastic trash can lid for prisoners to stand on in a small, concrete vestibule before conducting the searches. He performed approximately five strip searches on other prisoners in the vestibule before he

searched defendant in the same vestibule. No other prisoner entered the area during defendant's search. Defendant stood on the plastic trash can lid during the search. Defendant disrobed entirely, one article of clothing at a time, and handed each article of clothing to Officer Valdez who checked each for contraband and found none. Officer Valdez then searched defendant's body for contraband and found none. Officer Valdez testified that nothing could have been hidden under the trash can lid because he would have seen defendant lift up the lid. Officer Valdez testified that he did not see anything on the floor of the room before defendant entered. As defendant began leaving the room, he made a deliberate motion with his leg as if trying to kick something out of the way. That motion drew Officer Valdez's attention to the floor, where he discovered a piece of black plastic with a cloth handle and a sharpened end. A video of the defendant's search depicted defendant kicking a small black object away from Officer Valdez after the strip search.

Brad Hetherington, a prison investigator for the Michigan State Police, testified that he interviewed defendant about the weapon and defendant denied possessing it. Trooper Hetherington also testified regarding his familiarity with weapons and explained that this particular item could be used as a weapon to injure another person.

Defendant testified that he was sleeping in his room when called out for a strip search. Defendant described his strip search, which generally conformed to the description given by Officer Valdez. Defendant, however, testified that he never possessed the weapon and had never seen it before its discovery. Defendant admitted that he did try to kick the weapon away as he was leaving the room, but asserted that he did so

because he wanted to get the weapon away from himself. Defendant confirmed that Trooper Hetherington interviewed him and that he denied ever possessing the weapon at that interview.

The trial court concluded that the only reasonable explanation for the presence of the weapon was that defendant had been concealing the weapon on his person since it had not been in the room before defendant entered with it. The trial court stated that the surveillance video made what transpired very clear. The trial court, therefore, found defendant guilty of being a prisoner possessing a weapon.

Defendant attended his sentencing by videoconference via Zoom. The trial court established that defendant and his counsel had reviewed the presentence investigation report (PSIR), and defendant affirmed that he could see and hear the trial judge, but he stated that he could not see his defense counsel during the proceeding. The trial court provided defendant an opportunity to deliver a brief allocution before the trial court imposed its sentence. Defendant now appeals.

## II. ANALYSIS

### A. GREAT WEIGHT OF THE EVIDENCE

Defendant first argues that he is entitled to a new trial because the trial court's verdict was against the great weight of the evidence.

A defendant does not need to take any special steps to preserve a claim that a trial court's, as opposed to a jury's, findings or verdict was contrary to the great weight of the evidence. See MCR 2.517(A)(7); MCR 7.211(C)(1)(c). We review a great-weight challenge by deciding whether "the evidence preponderates so heavily against the verdict that it would be a miscarriage of

justice to allow the verdict to stand.” *People v Cameron*, 291 Mich App 599, 616-617; 806 NW2d 371 (2011) (quotation marks and citation omitted). The trial court’s factual findings in a bench trial are reviewed for clear error. *People v Lanzo Constr Co*, 272 Mich App 470, 473; 726 NW2d 746 (2006). “A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made.” *Id.* “Conflicting testimony and questions of witness credibility are generally insufficient grounds for granting a new trial. Absent exceptional circumstances, issues of witness credibility are for the trier of fact.” *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008) (citation omitted). Generally, a verdict is against the great weight of the evidence only when the evidence does not reasonably support it and “it was more likely the result of causes outside the record, such as passion, prejudice, sympathy, or some other extraneous influence.” *People v Lacalamita*, 286 Mich App 467, 469; 780 NW2d 311 (2009).

The trial court convicted defendant of possession of a weapon in prison in violation of MCL 800.283(4), which provides:

Unless authorized by the chief administrator of the correctional facility, a prisoner shall not have in his or her possession or under his or her control a weapon or other implement which may be used to injure a prisoner or other person, or to assist a prisoner to escape from imprisonment.

Defendant concedes his lawful imprisonment at Bel-lamy Creek Correctional Facility when the corrections officer found the weapon. He also concedes that the weapon could be used to injure a person. Defendant asserts that he never possessed the weapon and argues

that other explanations for how the weapon entered the room were not excluded. Specifically, defendant contends that the weapon was already in the room before he entered, either under the trash can lid or hidden behind the door, and likely came from one of the other prisoners who were searched in the room before defendant. Defendant claims that the evidence preponderates against the conclusion that he possessed the weapon. We disagree.

Defendant's conviction is well supported by Officer Valdez's uncontroverted testimony. Officer Valdez testified that no weapon was in the vestibule before defendant entered. He testified that had one been in the vestibule he would have seen it. Officer Valdez described searching each article of defendant's clothing, which involved taking each article and searching until he was satisfied that it did not contain contraband. Officer Valdez then saw defendant try to kick the weapon that had appeared on the floor. Those facts strongly support the conclusion that defendant brought the weapon into the room, concealed somewhere in his clothes or body, and that the weapon fell out of its hiding place during the search before its discovery on the floor. The testimony and the trial court's conclusions are also corroborated by the video of the incident.<sup>1</sup>

Notwithstanding defendant's claim that other scenarios could explain the weapon's presence, defendant has failed to show that such speculative possibilities preponderate against the conclusion that defendant possessed the weapon. The record reflects that the prosecution presented sufficient evidence from which the trier of fact could conclude beyond a reasonable

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<sup>1</sup> This Court can review a video "as easily as the trial court . . . ." *People v White*, 294 Mich App 622, 633; 823 NW2d 118 (2011).

doubt that defendant committed the charged offense. Therefore, defendant has not shown that the great weight of the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. See *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998). Accordingly, defendant is not entitled to a new trial.

#### B. PHYSICAL PRESENCE DURING SENTENCING

Defendant next argues that he is entitled to resentencing because he was not physically present during his sentencing hearing. We disagree.

“For an issue to be preserved for appellate review, it must be raised, addressed, and decided by the lower court.” *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007) (citation omitted). To preserve claims of error, a party must object before the lower court. See *People v Pipes*, 475 Mich 267, 277; 715 NW2d 290 (2006). To preserve for review by this Court a constitutional-error claim that implicates a defendant’s due-process rights, the issue must be raised in the trial court. *People v Williams*, 245 Mich App 427, 430-431; 628 NW2d 80 (2001). In this case, defendant did not raise the issue of his physical presence at his sentencing and made no objection to appearing remotely via Zoom. Therefore, he failed to preserve the issue for appellate review.

We review defendant’s unpreserved constitutional claim for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Under the plain-error rule, defendant bears the burden to prove (1) an error occurred, (2) the error “was plain, i.e., clear or obvious,” and (3) the plain error affected substantial rights, i.e., prejudiced defendant by affecting the outcome of the proceedings.

*Id.* at 763. If defendant satisfies those three requirements, we must make a fourth determination: whether the plain error seriously affected the fairness, integrity, or public reputation of the judicial proceedings independent of defendant's innocence. *Id.*

Plain-error review applies with equal force to all constitutional errors, even those limited and rare constitutional errors deemed structural. *People v Cain*, 498 Mich 108, 116; 869 NW2d 829 (2015). In *People v Davis*, 509 Mich 52; 983 NW2d 325 (2022), our Supreme Court explained that forfeited constitutional errors deemed structural errors "are particularly ill-suited to an analysis of whether the error affected the outcome of the trial court proceedings," *id.* at 72, and that "the existence of a forfeited structural error alone satisfies the third prong of the plain-error standard, and a defendant need not also show the occurrence of outcome-determinative prejudice," *id.* at 74. The Court held that "a forfeited structural error creates a formal presumption that [the fourth] prong of the plain-error standard has been satisfied." *Id.* at 75. The Court explained that the third and fourth prongs conceptually overlap so that "a forfeited structural error is very likely to also satisfy the fourth prong of the plain-error test." *Id.* at 75-76. The Court clarified that in cases involving forfeited structural errors, a formal rebuttable presumption exists that will "shift the burden to the prosecutor to demonstrate that the error did not seriously affect the fairness, integrity, or public reputation of the judicial proceeding." *Id.* at 76. In such instances, the prosecutor must present specific facts that "affirmatively demonstrate that, despite the error, the overall fairness, integrity, and reputation of the trial court proceedings were preserved." *Id.*



Generally, a defendant should “raise objections at a time when the trial court has an opportunity to correct the error, which could thereby obviate the necessity of further legal proceedings and would be by far the best time to address a defendant’s constitutional and non-constitutional rights.” *People v Grant*, 445 Mich 535, 551; 520 NW2d 123 (1994). Had defendant objected to his lack of physical presence during sentencing, the trial court could have immediately adjourned the proceedings, and this issue on appeal would likely have been avoided.

Nevertheless, a criminal defendant has a constitutional right to be present at any stage of a trial during which substantial rights might be adversely affected, including during sentencing. *Illinois v Allen*, 397 US 337, 338; 90 S Ct 1057; 25 L Ed 2d 353 (1970); see also *People v Mallory*, 421 Mich 229, 247; 365 NW2d 673 (1984) (stating that a defendant has the “right to be present” during “imposition of sentence”).<sup>2</sup> MCR 6.006(A) addresses when a defendant may be at a separate location as follows:

District and circuit courts may use two-way interactive video technology to conduct the following proceedings

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<sup>2</sup> The *Mallory* Court did not state it was the Constitution that afforded defendant that right; nevertheless, it is safe to say that this right at least in part emanates from the Due Process Clause of the Fourteenth Amendment because of the importance of sentencing in the criminal process, which includes a defendant’s ability to address the court before the sentence is imposed. See *United States v Diggles*, 957 F3d 551, 558 (CA 5, 2020); *United States v Williams*, 641 F3d 758, 764 (CA 6, 2011); *United States v Jacques*, 321 F3d 255, 262-263 (CA 2, 2003); *United States v Agostino*, 132 F3d 1183, 1199 n 7 (CA 7, 1997), and *United States v Jackson*, 923 F2d 1494, 1496 (CA 11, 1991). This Court is bound by the United States Supreme Court’s decisions but not by decisions of any lower federal courts. *Bienenstock & Assoc, Inc v Lowry*, 314 Mich App 508, 515; 887 NW2d 237 (2016). Lower federal court decisions may be persuasive, but they are not binding on state courts. *Id.*

between a courtroom and a prison, jail, or other location: initial arraignments on the warrant or complaint, probable cause conferences, arraignments on the information, pretrial conferences, pleas, *sentencings for misdemeanor offenses*, show cause hearings, waivers and adjournments of extradition, referrals for forensic determination of competency, waivers and adjournments of preliminary examinations, and hearings on postjudgment motions to amend restitution. [Emphasis added.]

A felony, as opposed to a misdemeanor, is defined by statute as an offense for which the offender may be imprisoned in state prison or punished by death. See MCL 750.7. Under MCL 777.17g, possession of a weapon by a prisoner is a felony. Defendant’s sentencing occurred during the COVID-19 pandemic. At the time of defendant’s sentencing, the Supreme Court had issued Administrative Order No. 2020-6, which required trial courts to make good-faith efforts to hold all proceedings remotely in light of the precautions instituted during the early phases of the COVID-19 pandemic. See AO 2020-6, 505 Mich cxxxi (2020). While that order essentially required remote proceedings, it also cautioned trial courts to employ remote proceedings “consistent with a party’s constitutional rights[.]” *Id.* at cxxxii. Thus, to the extent defendant argues that the remote sentencing violated MCR 6.006(A), he is wrong because AO 2020-6 superseded that rule while it remained in effect.

That the court rule was not violated is of no moment, for in *People v Heller*, 316 Mich App 314, 318; 891 NW2d 541 (2016), this Court recognized that defendants have a constitutional right to appear physically at their felony sentencings and that virtual appearance is not a suitable substitute. This Court explained:

Sentencing by video dehumanizes the defendant who participates from a jail location, unable to privately com-

municate with his or her counsel and likely unable to visualize all the participants in the courtroom. Moreover, a courtroom is more than a location with seats for a judge, jury, witnesses, defendant, prosecutor, defense counsel and public observers. The courtroom setting provides a dignity essential to the process of criminal adjudication. Isolating a defendant from that setting during what may be the most decisive moment of his or her life clashes with the judge's duty to acknowledge the humanity of even a convicted felon. [*Id.* at 319 (quotation marks and citations omitted).]

In this case, defendant appeared remotely for his sentencing hearing because the trial court conducted the proceeding pursuant to AO 2020-6 during the COVID-19 pandemic. There is no indication on the record that defendant or his counsel either waived his right to appear in person or objected to proceeding by Zoom. The trial court sentenced defendant for a felony for which he had the right to appear in court at sentencing. See *Mallory*, 421 Mich at 247; *Heller*, 316 Mich App at 319; MCR 6.006(A). Although defendant failed to preserve his constitutional claim of error, he has established that the trial court committed a constitutional error, i.e., plain error.

Because, as discussed later, we are addressing an unpreserved nonstructural error, to obtain relief defendant must also prove that the error affected his substantial rights—i.e., he must establish “a reasonable probability that, but for the error, the outcome of the proceeding would have been different.” *Rosales-Mireles v United States*, 585 US 129, 134-135; 138 S Ct 1897; 201 L Ed 2d 376 (2018) (quotation marks and citation omitted). Thus, defendant must successfully establish that, had he been physically present in the courtroom, there is a reasonable probability that his sentence would have been different. And, if he does

that, it must be determined whether reversal is required because “the plain, forfeited error resulted in the conviction of an actually innocent defendant or seriously affect[ed] the fairness, integrity or public reputation of [the] judicial proceeding . . . .” *Cain*, 498 Mich at 116 (quotation marks and citation omitted; alterations and ellipsis in original). Accordingly, we must determine whether the plain error affected defendant’s sentencing and, if it did so, whether it also seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *Carines*, 460 Mich at 763-764; *Cain*, 498 Mich at 116.

Defendant does not assert that the plain error affected the outcome of the trial court’s determination of his sentence for the offense for which he had been found guilty. Instead, he challenges the fairness and integrity of the sentencing proceedings because he was not physically present. Although we are dealing with a constitutional right, as explained below, we are not dealing with a structural error, as (1) the right to be physically present at sentencing is designed to protect the defendant from an erroneous sentence, and not necessarily to protect some other interest, (2) the effects of sentencing a defendant remotely are not too difficult to measure, and (3) the error will not always result in fundamental unfairness. See *Weaver v Massachusetts*, 582 US 286, 295-296; 137 S Ct 1899; 198 L Ed 2d 420 (2017). To this point, “[t]he list of structural errors that the Supreme Court has recognized is short and limited,” and the “Supreme Court has never held that the exclusion of a defendant from a critical stage of his criminal proceedings constitutes a structural error.” *Campbell v Rice*, 408 F3d 1166, 1172 (CA 9, 2005) (en banc). “[I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have

occurred are subject to harmless-error analysis.” *Rose v Clark*, 478 US 570, 579; 106 S Ct 3101; 92 L Ed 2d 460 (1986).

Defendant’s remote participation in the sentencing was not a structural error. His physical absence from the courtroom—but actual participation in the sentencing—did not restrict defendant’s ability to put in evidence or argument in favor of a low sentence. *Rose*, 478 US at 579. See also *Sullivan v Louisiana*, 508 US 275, 283; 113 S Ct 2078; 124 L Ed 2d 182 (1993) (Rehnquist, C.J., concurring). Nor did defendant’s remote participation affect the composition of the record or otherwise undermine the fairness of the criminal proceeding as a whole. *Washington v Recuenco*, 548 US 212, 218-219; 126 S Ct 2546; 165 L Ed 2d 466 (2006); *Neder v United States*, 527 US 1, 7-8; 119 S Ct 1827; 144 L Ed 2d 35 (1999) (defining structural error). Additionally, any effect this type of error had on the sentencing is not difficult to discern, and it had no effect on what was contained in the record. *Rose*, 478 US at 579 n 7. Instead, if it were necessary, all that would be required to determine whether defendant’s physical presence affected the sentence would be to remand for the trial court to indicate whether it did. And, as noted, defendant has not asserted that he lost an opportunity to present any additional evidence because of his physical absence.

Except for defendant’s physical absence from the courtroom, his case was handled throughout in a constitutional manner. The record shows that at no time whatsoever did defendant or his counsel interpose any objections to the manner in which the sentencing proceeding took place. The record establishes that the trial court dealt with defendant in a thoughtful, humane,

and respectful way. Further, defendant offers no argument challenging the accuracy or validity of his sentence.

That this error was not a structural one does not detract from the importance of this constitutional right, and the impact of defendant appearing remotely must be separately analyzed. As our Court recognized, and numerous other courts have held, in-person, face-to-face hearings can be critical to sentencing decisions.<sup>3</sup> Not only do in-person proceedings allow the court to gauge the veracity of a defendant during the hearing (including, perhaps most importantly, while listening to and watching defendant's allocution), but the formality of the courtroom and the presence of the attorneys, judge, and staff provide a solemn stage for such important decisions. Remote proceedings, despite the greatly improved and available technologies, simply do not compare to face-to-face interaction. See, e.g., *Heller*, 316 Mich App at 319-320; *United States v Williams*, 641 F3d 758, 764 (CA 6, 2011) ("As our sister circuits have recognized, and anyone who has used video conferencing software is aware, 'virtual reality is rarely a substitute for actual presence.'" (citation omitted); *United States v Lawrence*, 248 F3d 300, 304 (CA 4, 2001) (stating that the federal rule governing a criminal defendant's presence reflects the policy that "virtual reality is rarely a substitute for actual presence and that, even in an age of advancing technology, watching an event on the screen remains less than the complete equivalent of actually attending it"), and *United States v Fagan*, 464 F Supp 3d 427, 430 (D Me,

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<sup>3</sup> Defendant places great reliance on *Heller*, 316 Mich App 314. Because *Heller* did not address the issue under the plain-error standard that applies to defendant's unpreserved claim of error, it is not controlling.

2020) (“From thirty years of federal sentencing, I can attest to the importance of seeing the defendant in the same room at sentencing. Physical presence makes unavoidable the recognition that—in sentencing—one human being sits in judgment of another, with a dramatic impact on the future of a living, breathing person, not just a face on a screen.”).

Defendant does not suggest any irregularities with the sentencing other than that he was not present in the courtroom at the time of sentencing. As noted, he and his counsel were active participants, and they were able to make any necessary arguments or statements in support of defendant’s position. Defendant allocuted (both orally and in writing), his counsel (who was in the courtroom) addressed inaccuracies in the PSIR, and the court fully explained its sentence, which landed in the middle of the guidelines minimum sentence range. Further, the trial court appeared to have no difficulty listening to defendant, and it was familiar with him given that a bench trial had been conducted. The record reflects that defense counsel appeared well prepared and able to fully represent defendant’s interests. Additionally, the prosecution sought a sentence of not less than 36 months, and the PSIR recommended a sentence of not less than 48 months. The trial court, in a careful and considered pronouncement of sentence, which even included encouragement, counsel, and advice for defendant, imposed a sentence of not less than 25 months.

There is no evidence, inference, or indication that defendant’s treatment likely would have been different had he been face-to-face with the sentencing judge. Accordingly, we conclude that there was not “a reasonable probability that, but for the error, the outcome of the proceeding would have been different.” *Rosales-*

*Mireles*, 585 US at 134-135 (quotation marks and citation omitted). Because defendant has failed to meet the third prong of the *Carines* test, his assignment of error regarding his sentence being conducted remotely fails.<sup>4</sup>

For the foregoing reasons, we affirm defendant's conviction and sentence.

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

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<sup>4</sup> Moreover, even if the error is deemed a forfeited structural error and the first three prongs of the plain-error standard are presumed met as explained in *Davis*, the prosecution has demonstrated that the plain forfeited error did not seriously affect the fairness, integrity, or public reputation of the judicial proceedings. The prosecution has overcome the formal presumption by articulating the multiple aspects in which the trial court conducted the sentencing proceedings that establish the overall fairness and integrity of the proceedings and demonstrate that, despite defendant's physical absence from the courtroom, the overall propriety of the proceedings and the trial court's reputation were preserved. The prosecution points out that the trial court ensured the fairness and integrity of defendant's sentencing proceeding particularly in light of the circumstances of the global pandemic. See *State v Williams*, 174 NH 635, 647; 273 A3d 394 (2021) ("Considering the extensive process the defendant received and the State's important interest in protecting public health during a global pandemic, and keeping in mind that 'the requirements of due process are flexible,' we cannot conclude that her due process rights were violated because the April 6 [suspended sentence] hearing was conducted by telephone, instead of in person.") (citation omitted). Although decisions from other states are not binding, we may consider them as persuasive authority. *People v Jackson*, 292 Mich App 583, 595 n 3; 808 NW2d 541 (2011). Accordingly, we conclude that the prosecution met its burden under *Davis*, and defendant is not entitled to relief.



MACOMB COUNTY PROSECUTOR v MACOMB COUNTY  
EXECUTIVE

Docket No. 359887. Decided March 31, 2022, at 9:15 a.m. Leave to appeal denied 509 Mich 1098 (2022).

Plaintiff, the Macomb County Prosecutor, brought an original action in the Court of Appeals against the Macomb County Executive (the Executive) and Macomb County, seeking to invoke jurisdiction under MCL 141.438(7) of the Uniform Budgeting and Accounting Act (the UBAA), MCL 141.421 *et seq.*, and to obtain an order directing the Executive to disburse certain funds appropriated by the Macomb County Board of Commissioners (the Board). In January 2021, plaintiff requested approximately \$900,000 from the Executive to fund several new employees within the prosecutor's office. The Executive denied plaintiff's request. In September 2021, the Executive proposed a recommended budget for 2022 that included funding for nine new employees within the prosecutor's office. Plaintiff, however, wanted more. The dispute regarded \$299,300 appropriated by the Board for four additional positions within the prosecutor's office—a communications director, an executive assistant, an intern coordinator, and a part-time file clerk. According to the minutes of the Board's November 16, 2021 meeting, the Board voted to amend the Executive's recommended budget to include funding for these four new positions. The approved budget ultimately reflected a line item of \$11,828,100 for personnel within the prosecutor's office, which was \$299,300 more than the \$11,528,800 that the Executive had proposed. Six days after the Board approved the 2022 budget, the Executive sent a letter to the Board stating that under § 6.6.4 of the Macomb County Charter (the County Charter), any approved budget was subject to the recommendation of the Executive. Thus, the Executive implied that because he had not recommended funding for a communications director, executive assistant, intern coordinator, and part-time file clerk in the prosecutor's office, he would not disburse any funds for those positions. Plaintiff brought this action, seeking a declaratory judgment, a writ of mandamus, and an injunction stating that under the County Charter and state law, plaintiff had the power to expend funds appropriated by the Board without interference from the

Executive. Plaintiff also moved for immediate consideration and summary disposition. Defendants moved to dismiss the case, arguing that the Court of Appeals did not have original jurisdiction under MCL 141.438(7) and, relatedly, that plaintiff did not have standing. Defendants further argued that the County Charter did not authorize the Board to adopt a budget different from that which the Executive recommended. Alternatively, defendants argued that the Executive had the discretionary authority to impound the appropriated funds at issue. The Court of Appeals granted the motion for immediate consideration, imposed an expedited briefing schedule, and ordered the matter to be submitted for decision on the briefs filed without oral argument.

The Court of Appeals *held*:

1. The jurisdiction of the Court of Appeals is entirely statutory. A litigant has standing whenever there is a legal cause of action. MCL 141.438(5) of the UBAA provides that the enforcement of a general appropriations act approved by the legislative body of a county is a power vested in the chief administrative officer of that county. MCL 141.438(6) provides, in relevant part, that an elected official who heads a branch of county government or the chief judge of a court funded by a county has standing to bring suit against the chief administrative officer of that county concerning an action relating to the enforcement of a general appropriations act for that branch of county government or that court. MCL 141.438(7)(a) provides that except as otherwise provided in MCL 141.438(8) and notwithstanding any provision of law to the contrary, any suit brought under MCL 141.438(6) or MCL 141.436(9) shall only be brought in the Michigan Court of Appeals within 60 days after the adoption of a general appropriations act. MCL 141.438(10) provides, in relevant part, that the jurisdiction of the Court of Appeals over a suit brought under MCL 141.436(6) or MCL 141.436(9) is exclusive and that jurisdiction or any judicial duties inherent in that jurisdiction shall not be transferred to any other court. In this case, there was no dispute that plaintiff satisfied the 60-day requirement set forth in MCL 141.438(7)(a) and that MCL 141.438(8) and MCL 141.436(9) did not otherwise govern this action. The issue was whether plaintiff was an elected official who heads a branch of county government under MCL 141.438(6). The three-branch system of state government (executive, legislative, and judicial) does not apply to municipal government; accordingly, “a branch of county government” in MCL 141.438(6) did not contemplate those three branches. Instead, “a branch of county government” was defined as an offshoot, lateral extension, or division of county govern-

ment. The prosecutor's office, which is a department of Macomb County, unquestionably is a division of county government, and plaintiff was the "elected official who heads a branch of county government" for purposes of MCL 141.438(6). Because plaintiff was the elected official who heads a branch of county government under MCL 141.438(6), the Court of Appeals had original jurisdiction under MCL 141.438(7). With regard to the standing question, plaintiff had standing because the Michigan Legislature created a legal cause of action for a municipal official in his position; in other words, by enacting MCL 141.438, the Legislature created a cause of action for an elected official who heads a branch of county government to pursue judicial enforcement of a general appropriations act for that branch of county government. The Court of Appeals had original jurisdiction over the instant action, and plaintiff had standing to bring the action.

2. County Charter, § 3.5(j) provides, in pertinent part, that the Executive has the authority to submit to the Board a proposed annual budget. Section 3.9 specifically provides the Executive with a line-item veto over appropriations and states that if the Executive fails to exercise the veto within 10 business days after receipt of the ordinance by the Executive, the action of the Board takes effect. Sections 4.4(a) and (c) provide that the Board has the authority to, respectively, adopt, amend, or repeal ordinances or resolutions and appropriate funds, levy taxes, fees, and other charges. However, § 6.6.4(c) provides, in relevant part, that the existence, organization, qualifications, powers, and duties of the countywide elected officials and certain departments shall be subject to all personnel, budgeting, and expenditure recommendations of the Executive as approved by the Board. Section 8.6.1 provides that the Executive shall prepare and administer a comprehensive balanced budget in a manner which assures coordination among agencies; the Executive shall transmit the comprehensive balanced budget for the next fiscal year to the Board at least 90 days before the next fiscal year begins; and the comprehensive balanced budget prepared and recommended by the Executive shall contain, at a minimum, the budget message, budget document, the proposed appropriations ordinance containing the information required by law, and any information required by the Board, law, or ordinance. Finally, § 8.7 provides that before the beginning of each fiscal year of the county, the Board shall adopt a balanced line-item operating budget and an appropriations ordinance in accordance with the requirements of law. Together, these provisions of the County Charter allow the Board to appropriate more funds for a line item than the amount reflected in the recommended budget itself. If the Board were not

permitted to appropriate more funds for a line item than the amount specified in the recommended budget itself, then the authority to exercise a line-item veto would be completely redundant. Moreover, the County Charter includes at least two provisions indicating that the Board bears primary responsibility for the final budget. Section 4.4(c) provides that the Board has the authority to appropriate funds, and § 8.7 provides that the Board shall adopt a balanced line-item operating budget and an appropriations ordinance each fiscal year. In contrast to the authority of the Board, the County Charter only confers the authority upon the Executive to submit a *proposed* annual budget under § 3.5(j) and submit a budget *recommended* by the Executive under § 8.6.1. Section 8.6.1 also refers to a *proposed* appropriations ordinance. The use of such tentative language as “proposed” and “recommended” indicated that the Executive does not have unilateral power to impose a final budget. Therefore, the County Charter created a scheme whereby the budgetary process is initiated by the Executive through issuance of a recommended budget, and then the Board has the final authority to appropriate funds—subject to the veto power of the Executive. Section 6.6.4 was not a limitation on the Board’s discretion to appropriate funds in a different manner than that recommended by the Executive. Accordingly, the County Charter allowed the Board to appropriate more funds for a line item than those reflected in the recommended budget itself, and the Board did not exceed its authority by appropriating \$11,828,100 for personnel to the prosecutor’s office.

3. County Charter, § 8.9 provides that transfers among appropriations and impoundments of appropriations may only be made in accordance with the appropriations ordinance as adopted or amended. County Charter, §§ 8.11.1 and 8.11.2 provide that in the event of a budget deficit, the remedial action first begins with the Executive certifying the problem to the Board, which must then decide to either remedy the problem itself or allow the Executive to do so on their own accord. Accordingly, the County Charter generally prohibits the Executive from impounding appropriated funds unless doing so would achieve economic efficiencies and without some corresponding action by the Board. The issue in this case, therefore, was whether the Executive was permitted to unilaterally impound the appropriated funds at issue. Section 5 of the appropriations ordinance provides that the appropriations within this ordinance and budget proposed by the Executive as modified by this ordinance, including all appendices, are the maximum authorized expenditures, but are not a mandate to spend. The phrase “mandate to spend” was a general

recognition of the rule in Michigan that an appropriation is not a mandate to spend. But this rule applies only to achieving economic efficiencies and is not a blanket authorization for a municipal executive official to impound appropriated funds at their discretion. Further, interpreting § 5 of the appropriations ordinance as allowing the Executive to unilaterally impound appropriated funds would run afoul of MCL 141.437, which prohibits a municipal executive official from doing so. Accordingly, the County Charter and the appropriations ordinance allowed the Executive limited authority to impound appropriated funds, and that authority was limited to situations in which doing so would achieve economic efficiencies, but it did not give the Executive the authority to do so when impoundment of funds would frustrate the stated purpose of the appropriation. In this case, the November 16, 2021 minutes of the Board's meeting established that the stated purpose of the \$11,828,100 appropriation to the prosecutor's office was to fund the personnel requested by the Executive in the amount of \$11,528,800, plus a communications director, executive assistant, intern coordinator, and part-time file clerk for that office. The four respective Board motions for each of these positions refer to "amend[ing] the 2022 proposed" budget offered by the Executive. Therefore, by impounding the additional \$299,300 appropriated by the Board, the Executive frustrated the "stated purpose" of the line-item appropriation and exceeded his authority under the County Charter.

4. In this case, given that the county's fiscal year ended December 31, 2022, it was appropriate to afford plaintiff the expedient remedy of a declaratory judgment. The declaratory judgment was granted, insofar as the Board was permitted to adopt an independent budget under the County Charter. A writ of mandamus was issued directing the Executive to either disburse the impounded \$299,300 to plaintiff or seek an amendment of the appropriations ordinance from the Board. Plaintiff's request for injunctive relief ordering the Executive to disburse the appropriated funds at issue was moot given the resolution of this case. Plaintiff failed to state a claim for relief when he alleged that the Executive violated MCL 141.438(5), the appropriations ordinance, and the County Charter. Finally, because the Court of Appeals already ordered an expedited briefing schedule, plaintiff's request for an order to show cause why the matter should not be expedited was moot.

Plaintiff's request for declaratory judgment granted; writ of mandamus issued.

STATUTES – UNIFORM BUDGETING AND ACCOUNTING ACT – WORDS AND PHRASES  
– “BRANCH OF COUNTY GOVERNMENT.”

MCL 141.438(6) of the Uniform Budgeting and Accounting Act, MCL 141.421 *et seq.*, provides, in relevant part, that an elected official who heads a branch of county government or the chief judge of a court funded by a county has standing to bring suit against the chief administrative officer of that county concerning an action relating to the enforcement of a general appropriations act for that branch of county government or that court; “a branch of county government” in MCL 141.438(6) does not contemplate the three-branch system of state government (executive, legislative, and judicial); instead, “a branch of county government” in MCL 141.438(6) is an offshoot, lateral extension, or division of county government; the prosecutor’s office, which is a department of a county, is a division of county government.

*Todd Russell Perkins* for plaintiff.

*Dykema Gossett, PLLC* (by *Gary P. Gordon, Theodore W. Seitz, Jason T. Hanselman, and Olivia R.C.A. Flower*) for defendants.

Amicus Curiae:

*Dickinson Wright PLLC* (by *Peter H. Webster and Thomas H. Forshee*) for the Macomb County Board of Commissioners.

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

PER CURIAM. In this case, plaintiff, Macomb County Prosecutor Peter Lucido, seeks to invoke our original jurisdiction under MCL 141.438(7) of the Uniform Budgeting and Accounting Act (the UBAA), MCL 141.421 *et seq.*, and obtain an order directing defendant Macomb County Executive Mark Hackel to disburse certain appropriated funds by the Board of Commissioners of defendant Macomb County (the Board).

Plaintiff argues that the Board is permitted to adopt a budget that differs from the one recommended by Hackel and that defendants do not have the authority to impound the funds plaintiff seeks. Defendants argue that this Court does not have original jurisdiction under MCL 141.438(7) and, relatedly, that plaintiff does not have standing to bring the instant action. Predictably, defendants also argue that Hackel has the authority to impound the funds plaintiff seeks. For the reasons set forth, we conclude, first, that this Court has original jurisdiction over the instant action and that plaintiff has standing. We further conclude that although Hackel has limited authority to impound appropriated funds, he exceeded the scope of that authority here. Accordingly, we grant plaintiff's request for declaratory relief and a writ of mandamus.

#### I. BACKGROUND

The relevant facts are undisputed. In January 2021, plaintiff requested approximately \$900,000 from Hackel to fund several new employees within the prosecutor's office. Hackel denied plaintiff's request. Then, in September 2021, Hackel proposed a recommended budget for 2022 that included funding for nine new employees within the prosecutor's office. Plaintiff, however, wanted more. He requested that the Board bypass Hackel's proposed budget and approve funding for the six additional positions he wanted.

The parties' funding disagreement stems from their differing interpretations of the Macomb County Charter (the County Charter) and related statutes. This lawsuit involves a dispute over \$299,300 appropriated by the Board for four additional positions within the

prosecutor's office—a communications director, an executive assistant, an intern coordinator, and a part-time file clerk.

According to the minutes of the Board's November 16, 2021 meeting, the Board voted to amend Hackel's recommended budget to include funding for these four new positions in the prosecutor's office:

**Motion to amend the 2022 proposed Prosecutor's Office budget to increase the Personnel line item by \$127,200 (Add Communications Director).**

**THE MOTION PASSED.**

\* \* \*

**Motion to amend the 2022 proposed Prosecutor's Office budget to increase the Personnel line item by approximately \$127,200 (Add Executive Assistant).**

**THE MOTION PASSED.**

\* \* \*

**Motion to amend the 2022 proposed budget to increase the Prosecutor's Office Personnel line item by approximately \$23,100 (Add Intern Coordinator).**

**THE MOTION PASSED.**

\* \* \*

**Motion to amend the 2022 proposed budget to increase the Prosecutor's Office Personnel line item by approximately \$21,800 (Part Time File Clerk).**

**THE MOTION PASSED.**

In other words, while Hackel's recommended budget included funding for a total of nine additional employees within the prosecutor's office, the budget approved by the Board through the county's appropriations



ordinance<sup>1</sup> included funding for a total of 13 additional employees within that office, four more than included in Hackel's proposed budget. The approved budget ultimately reflected a line item of \$11,828,100 for personnel within the prosecutor's office, which was \$299,300 more than the \$11,528,800 that Hackel proposed. Even so, Hackel did not exercise his line-item veto over the appropriation.

Six days after the Board approved the 2022 budget, Hackel sent a letter to the Board stating that under § 6.6.4 of the County Charter, any approved budget was subject to the recommendation of the county executive (the Executive). Thus, Hackel clearly implied that because he did not recommend funding for a communications director, executive assistant, intern coordinator, and part-time file clerk in the prosecutor's office, he would not disburse any funds for those positions.<sup>2</sup>

On January 11, 2022, plaintiff filed his original action in this Court against defendants under MCL 141.438(7) of the UBAA. Plaintiff alleges in his complaint that "[u]nder the terms and provisions of the Macomb County Charter and State Law, Plaintiff has the power and discretion to expend funds appropriated by the Board of Commissioners for the Prosecuting Attorney, without interference by Defendant Executive." Plaintiff seeks a declaratory judgment, a writ of

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<sup>1</sup> An appropriations ordinance generally grants a governmental entity the authority to allocate money for specific spending activities.

<sup>2</sup> When an executive official declines to disburse funds appropriated by the legislative body, an "impoundment of appropriated funds" has occurred. See, e.g., Church, *Impoundment of Appropriated Funds: The Decline of Congressional Control Over Executive Discretion*, 22 Stan L Rev 1240, 1241 (1970).

mandamus, and an injunction to that effect. Plaintiff also moved for immediate consideration and summary disposition.

In response, defendants moved to dismiss this case, arguing that this Court does not have original jurisdiction under MCL 141.438(7) and, relatedly, that plaintiff does not have standing. Defendants further argued that the County Charter does not authorize the Board to adopt a budget different from that which the Executive recommended. Alternatively, defendants argue that Hackel has the discretionary authority to impound the appropriated funds at issue.

On February 14, 2022, we granted the motion for immediate consideration, imposed an expedited briefing schedule, and ordered that “[p]ursuant to MCR 7.206(D)(4), this matter will be submitted for decision on the briefs filed without oral argument.” *Macomb Co Prosecutor v Macomb Co Executive*, unpublished order of the Court of Appeals, entered February 14, 2022 (Docket No. 359887).

Having carefully considered the materials filed by the parties, as well as the amicus brief filed by the Board in support of plaintiff, we now render this decision.

## II. DISCUSSION

### A. JURISDICTION AND STANDING

Defendants first argue that this Court does not have original jurisdiction over the instant action pursuant to MCL 141.438(7) and, relatedly, that plaintiff does not have standing under that statutory provision. We disagree.

“Jurisdiction, when applied to courts, is the power to hear and determine a cause or matter.” *Bowie v Arder*,

441 Mich 23, 36; 490 NW2d 568 (1992) (quotation marks and citation omitted). “[T]he jurisdiction of the Court of Appeals is entirely statutory.” *People v Milton*, 393 Mich 234, 245; 244 NW2d 266 (1974). On the other hand, “the standing inquiry focuses on whether a litigant is a proper party to request adjudication of a particular issue and not whether the issue itself is justiciable.” *Lansing Sch Ed Ass’n v Lansing Bd of Ed*, 487 Mich 349, 355; 792 NW2d 686 (2010) (*LSEA*) (quotation marks and citation omitted). “[A] litigant has standing whenever there is a legal cause of action.” *Id.* at 372.

“Charter counties are subject to restrictions that are imposed by general law.” *Hackel v Macomb Co Comm*, 298 Mich App 311, 328; 826 NW2d 753 (2012). Some of those restrictions are imposed by the UBAA. See *id.* at 328-329. MCL 141.438 of the UBAA provides, in relevant part, as follows:

(5) The enforcement of a general appropriations act approved by the legislative body of a county is a power vested in the chief administrative officer of that county.

(6) An elected official who heads a branch of county government or the chief judge of a court funded by a county has standing to bring suit against the chief administrative officer of that county concerning an action relating to the enforcement of a general appropriations act for that branch of county government or that court. . . .

(7) Except as otherwise provided in subsection (8) and notwithstanding any provision of law to the contrary, any suit brought under subsection (6) or [MCL 141.436(9)] shall only be brought in the Michigan court of appeals within 60 days after 1 of the following:

(a) The adoption of a general appropriations act.

\* \* \*

(10) The jurisdiction of the court of appeals over a suit brought under subsection (6) or [MCL 141.436(9)] is exclusive and that jurisdiction or any judicial duties inherent in that jurisdiction shall not be transferred to any other court. . . .

In this case, plaintiff alleges that Hackel failed to “enforce” the general appropriations act<sup>3</sup> adopted by the Board by impounding funds appropriated to the prosecutor’s office, thereby violating MCL 141.438(5). Plaintiff is seeking to compel Hackel to “enforce” the general appropriations act pursuant to MCL 141.438(6).

There is no dispute that plaintiff satisfied the 60-day requirement set forth in MCL 141.438(7)(a) and that MCL 141.438(8) and MCL 141.436(9) do not otherwise govern this action. Thus, the issue before us concerns the first sentence of MCL 141.438(6), specifically, whether plaintiff is “[a]n elected official who heads a branch of county government . . . .” According to defendants, plaintiff is an “elected official” but not the head of “a branch of county government” because the word “branch” only contemplates the legislative, executive, and judicial branches of county government and the “department of prosecuting attorney” is not one of those three commonly recognized branches. Thus, defendants argue, this Court lacks original jurisdiction under MCL 141.438(7) to entertain the instant action because the action was not maintained by “[a]n elected official who heads a branch of county government” under MCL 141.438(6). Relatedly, defendants argue that plaintiff lacks standing because MCL 141.438(6)

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<sup>3</sup> MCL 141.422c(2) defines “general appropriations act” as “the budget as adopted by the legislative body or as otherwise given legal effect pursuant to a charter provision in effect on the effective date of this section.” The appropriations ordinance here is the “general appropriations act.”

only confers standing upon “[a]n elected official who heads a branch of county government . . . .”

Plaintiff responds that the word “branch” does not refer to the three commonly recognized branches of government in our state’s separation-of-powers system but instead refers more broadly to any discrete division of county government. See *Black’s Law Dictionary* (deluxe 10th ed) (defining “branch,” in relevant part, as “[a]n offshoot, lateral extension, or division of an institution”). We agree with plaintiff.

We acknowledge, of course, that the separation of powers of our state’s Constitution provides that “[t]he powers of government are divided into three branches: legislative, executive and judicial.” Const 1963, art 3, § 2. However, in contrast, as our Supreme Court recognizes, “[m]unicipal government in Michigan typically has not been divided among three branches of government.” *Rental Prop Owners Ass’n of Kent Co v Grand Rapids*, 455 Mich 246, 267; 566 NW2d 514 (1997).<sup>4</sup> Thus, for example, “legislative bodies of local governments may also exercise executive powers.” *Id.* at 268. In addition, although municipalities may exercise quasi-judicial functions such as those exercised by administrative tribunals, see *id.*, “the judicial power of the state is vested exclusively in one court of justice,” Const 1963, art 6, § 1. Defendants cite no authority for the proposition that a municipality in Michigan may establish its own judicial branch of government, and we would find such a suggestion quite unusual.<sup>5</sup>

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<sup>4</sup> We previously have recognized that the constitutional separation-of-powers doctrine does not apply to county government, but only to state government. *Hackel*, 298 Mich App at 327. It is county charters that dictate the separation of powers in county government. *Id.*

<sup>5</sup> Defendants argue that the Macomb Circuit Court is the judicial branch of Macomb County. This is incorrect. “[T]he judicial power of the

Accordingly, given that the three-branch system of state government does not apply to municipal government, we decline to interpret “a branch of county government” as contemplating those three branches, as defendants would like us to do. Instead, we give the word “branch” in this context its particular legal meaning<sup>6</sup>—namely, that a “branch” is “[a]n offshoot, lateral extension, or division of an institution.” *Black’s Law Dictionary* (deluxe 10th ed).

We emphasize that accepting defendants’ interpretation of “a branch of county government” in MCL 141.438(6) would lead to a strained outcome. To illustrate the point, consider the meaning of the language at issue if it referred only to municipal analogues of the three branches of state government. With regard to the judicial branch, as noted, Michigan counties, to the best of our knowledge, have not established such branches. Nor does there appear to be any legal authority for them to do so. Thus, “a branch of county government” cannot refer to a judicial branch of county government. With regard to the executive branch, “[a]n elected official who heads [the executive branch] of county government” would necessarily be the “chief administrative officer.” See MCL 141.422b(3)(f) (defining “chief administrative officer” as including “[t]he elected county executive”). If “a branch of county

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state is vested exclusively in one court of justice which shall be divided into one supreme court, one court of appeals, [and] one trial court of general jurisdiction known as the circuit court . . .” Const 1963, art 6, § 1. Thus, the Macomb Circuit Court is part of the state judiciary. Although theoretically a county might be allowed to establish its own shadow judicial system, we cannot easily recall an instance in which that occurred.

<sup>6</sup> See MCL 8.3a (“[T]echnical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning.”).

government” referred to the executive branch, then MCL 141.438(6) would authorize the county executive to sue himself or herself. This is a nonsensical outcome. Thus “a branch of county government” cannot refer to the executive branch.

With regard to the legislative branch, we question whether that branch has a singular “head” as opposed to being a collective policymaking body. Regardless, the UBAA elsewhere refers to “the legislative body” of a municipality, see, e.g., MCL 141.438(1), so it would be inconsistent with ordinary principles of statutory interpretation to conclude that “a branch of county government” exclusively means the legislative body of that county. See *Denton v Dep’t of Treasury*, 317 Mich App 303, 312; 894 NW2d 694 (2016) (“When the Legislature uses different words, the words are generally intended to connote different meanings.”) (quotation marks and citation omitted).

For these reasons, we conclude that “a branch of county government” refers to an offshoot, lateral extension, or division of county government. The prosecutor’s office, which is a department of Macomb County, unquestionably is a division of county government. Therefore, we further conclude that plaintiff is the “elected official who heads a branch of county government” for purposes of MCL 141.438(6).

In light of this conclusion, our resolution of the jurisdictional and standing questions is straightforward. With regard to the jurisdictional question, because plaintiff is the “elected official who heads a branch of county government” under MCL 141.438(6), and because we can identify no other respect in which that statutory provision might not have been satisfied, we conclude that this Court has original jurisdiction under MCL 141.438(7). With regard to the standing

question, plaintiff has standing because our Legislature has created a legal cause of action for a municipal official in his position. See *LSEA*, 487 Mich at 355.<sup>7</sup> In other words, by enacting MCL 141.438, the Legislature created a cause of action for “[a]n elected official who heads a branch of county government” to pursue judicial “enforcement of a general appropriations act for that branch of county government . . . .”<sup>8</sup>

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<sup>7</sup> We note, by analogy, that in *Train v City of New York*, 420 US 35; 95 S Ct 839; 43 L Ed 2d 1 (1975), the United States Supreme Court affirmed an order of the lower court directing the administrator of the United States Environmental Protection Agency to disburse funds appropriated by Congress for municipal sewage treatment. Although standing was not discussed in that decision, the fact that the city of New York, a municipal executive branch, was not questioned as a proper litigant in a federal action suggests that the putative recipient of appropriated funds has standing to compel their disbursement. Thus, if the city of New York had Article III standing, it follows that plaintiff has standing here, given that the state Constitution is typically irrelevant in determining whether a litigant has standing in the type of action before us. See *LSEA*, 487 Mich at 372.

<sup>8</sup> Defendants argue that plaintiff does not “head[] a branch of county government” under MCL 141.438(6) because the County Charter only refers to the Board and the Executive as respective branches. This argument misses the mark for multiple reasons, one of which is the fact that we are unaware of any authority indicating that a municipal charter can rewrite statutory language. In other words, our task is to determine the meaning of MCL 141.438(6) as written by the Legislature, not determine the meaning of MCL 141.438(6) as written by the Legislature *and* as modified by the County Charter. To illustrate, we would have little difficulty concluding that Hackel is the true “elected county executive” and “chief administrative officer” for the purposes of the UBAA, see MCL 141.422b(3)(f), even if the County Charter decided to give those titles to any temporary intern working for the county rather than the person occupying the position that performs the duties of the office, such as Hackel.



Therefore, this Court has original jurisdiction over the instant action, and plaintiff has standing to bring this action.<sup>9</sup>

#### B. AUTHORITY TO ADOPT AN INDEPENDENT BUDGET

We next turn to the merits of the case. Defendants argue that the County Charter provides that any approved budget is subject to the disbursement amounts contained in the proposed recommended budget of the Executive. Accordingly, defendants reason that the Board is without authority to appropriate more funds for a line item than those contained in the Executive's proposed budget.<sup>10</sup> Therefore, defendants argue, the Board simply lacked the authority to increase the line-item appropriation for personnel within the prosecutor's office beyond the amount reflected in the Executive's proposed budget.<sup>11</sup> We disagree with defendants.

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<sup>9</sup> Having so concluded, we need not reach plaintiff's alternative argument that this Court has jurisdiction under MCL 600.4401(1). Further, for the reasons explained herein, defendants' motion to dismiss for lack of jurisdiction and standing is denied. We note that defendants do not argue that Macomb County should be dismissed as a party even if this Court has original jurisdiction over the instant action and plaintiff has standing.

<sup>10</sup> It is unclear whether defendants' position is that the Board is required to essentially perform a ministerial task and approve whatever budget is recommended by the Executive, whether the Board is able to appropriate fewer funds for a line item than reflected in the recommended budget itself, or whether the Board merely has the authority to approve or disapprove line items within the recommended budget.

<sup>11</sup> Defendants briefly suggest that under the UBAA, the Board is not authorized to adopt a budget that is different from the proposed budget. However, defendants do not elaborate on this argument, and we therefore consider it waived. See *People v Cameron*, 319 Mich App 215, 232; 900 NW2d 658 (2017).

County Charter, § 3.5(j) provides that the Executive<sup>12</sup> has the authority to “[s]ubmit to the Commission a proposed annual budget[.]” In addition, § 3.9 specifically provides the Executive with a line-item veto over appropriations:

Unless prohibited by law, the Executive may veto an ordinance, a line item of an ordinance appropriating money, or a resolution having the effect of law or approving a contract, by transmitting to the Commission notice of the veto and reasons for the veto. If the Executive fails to exercise the veto within 10 business days after receipt of the ordinance by the Executive . . . , the action of the Commission takes effect.

Sections 4.4(a) and (c) provide that the Board has the authority to, respectively, “[a]dopt, amend, or repeal ordinances or resolutions” and “[a]ppropriate funds, levy taxes, fees, and other charges . . . .” However, § 6.6.4(c) provides that “[t]he existence, organization, qualifications, powers, and duties of the County-wide Elected Officials and [certain] departments . . . shall be subject to . . . [a]ll personnel, budgeting, and expenditure recommendations of the Executive as approved by the Commission.”

Article VIII of the County Charter governs the financial management of the county. Section 8.6.1 provides as follows:

The Executive shall prepare and administer a comprehensive balanced budget in a manner which assures coordination among Agencies. The Executive shall transmit the comprehensive balanced budget for the next fiscal year to the Commission at least 90 days before the next fiscal year begins. The comprehensive balanced budget prepared and recommended by the Executive shall con-

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<sup>12</sup> County Charter, § 1.4(*l*) defines “Executive” as “the person holding the office of County Executive created by this Charter.”

tain, at a minimum, the budget message, budget document, the proposed appropriations ordinance containing the information required by law, and any information required by the Commission, law, or ordinance.

Section 8.7, which is titled “Adoption of Line Item Operating Budget,” provides as follows:

Before the beginning of each fiscal year of the County, the Commission shall adopt a balanced line item operating budget and an appropriations ordinance in accordance with the requirements of law.

We conclude that these provisions of the County Charter allow the Board to appropriate more funds for a line item than the amount reflected in the recommended budget itself. Specifically, § 3.9 gives the authority to the Executive to veto “a line item of an ordinance appropriating money . . . .” If the Board were not permitted to appropriate more funds for a line item than the amount specified in the recommended budget itself, then the authority to exercise a line-item veto would be completely redundant. A line-item veto never would be exercised because the Board would never be able to appropriate the undesired funds, from the perspective of the Executive, because it would be solely within the Executive’s discretion as to the exact amount of funds allocated.

Moreover, the County Charter includes at least two provisions indicating that the Board bears primary responsibility for the final budget. Section 4.4(c) provides that the Board has the authority to “[a]ppropriate funds,” and § 8.7 provides that the Board “shall adopt a balanced line item operating budget and an appropriations ordinance” each fiscal year. In contrast to the authority of the Board, the County Charter only confers the authority upon the Executive to submit “a *proposed* annual budget,” § 3.5(j), and submit a budget

“*recommended* by the Executive,” § 8.6.1. The latter section also refers to a “*proposed* appropriations ordinance.” The use of such tentative language as “proposed” and “recommended” indicates that the Executive does not have unilateral power to impose a final budget. Simply put, the County Charter creates a scheme whereby the budgetary process is initiated by the Executive through issuance of a recommended budget, and then the Board has the final authority to appropriate funds—subject, of course, to the veto power of the Executive.

We acknowledge that § 6.6.4(c) provides that “[t]he existence, organization, qualifications, powers, and duties of the Countywide Elected Officials and departments created by this Article,” including plaintiff himself and the Macomb County Prosecutor’s Office, “shall be subject to . . . [a]ll personnel, budgeting, and expenditure recommendations of the Executive as approved by the Commission.” We do not believe, however, that this provision is a limitation on the Board’s discretion to appropriate funds in a different manner than that recommended by the Executive. Rather, it reflects the fact that budgets in Macomb County are initiated by the Executive in the first instance, see §§ 3.5(j) and 8.6.1, and then ultimately approved, modified, or disapproved by the Board, see §§ 4.4(c) and 8.7.

For these reasons, we conclude that the County Charter allows the Board to appropriate more funds for a line item than those reflected in the recommended budget itself. Therefore, the Board did not exceed its authority by appropriating \$11,828,100 for personnel to the prosecutor’s office.

## C. AUTHORITY TO IMPOUND APPROPRIATED FUNDS

Plaintiff argues that the County Charter does not authorize Hackel to impound appropriated funds, while defendants argue that such authority is found in the County Charter and the appropriations ordinance. We conclude that Hackel has limited authority to impound appropriated funds but that he has exceeded that authority in this instance.

In *Detroit Fire Fighters Ass’n v Detroit*, 449 Mich 629; 537 NW2d 436 (1995), our Supreme Court considered whether the mayor of Detroit had the authority under the UBAA or the Detroit City Charter to impound funds appropriated by the Detroit City Council for an additional fire squad. Justice CAVANAGH concurred in part with and dissented in part from that decision. In Section IV of the portion of the opinion he authored, which is binding on this Court,<sup>13</sup> he concluded that the mayor “exceeded his executive discretionary power when he refused to spend any of the appropriated funds.” *Id.* at 661 (CAVANAGH, J., concurring in part and dissenting in part). Section IV first noted that it cannot be “seriously dispute[d] that an appropriation is not a mandate to the executive branch

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<sup>13</sup> Section IV is binding precedent. See *People v Ackley (On Remand)*, 336 Mich App 586, 591 n 2; 970 NW2d 917 (2021) (“In cases where there is no majority opinion, any proposition or reasoning agreed to by a majority of the justices, in any combination, is binding precedent as to that narrow point of agreement.”). The issue that was the subject of Section IV was the authority of the mayor to impound the appropriated funds at issue, and the reasoning reflected therein had the support of Justice BOYLE, who signed his separate opinion in its entirety, as well as Justice RILEY and Chief Justice BRICKLEY, who expressly agreed with its reasoning. See *Detroit Fire Fighters Ass’n*, 449 Mich at 649 (RILEY, J., concurring) (“For the reasons articulated in the opinions of Justices WEAVER and CAVANAGH, I would find that the mayor cannot unilaterally impound an appropriation if to do so would frustrate the intent of the appropriation.”).

to spend the full appropriation. Additionally, the executive branch certainly has inherent discretion, if not a duty, to seek economic savings.” *Id.* at 658. However, Section IV noted that “this executive discretion may not extend so far as to usurp legislative authority. Adopting a budget is a legislative function.” *Id.* Section IV then set forth the following test for determining whether the municipal executive official has exceeded his executive discretion to impound appropriated funds:

The UBAA provides:

“Appropriation” means an authorization granted by a legislative body to incur obligations and to expend public funds for a stated purpose. [MCL 141.422a(3).]

I think our solution lies with the “stated purpose” objective of an appropriation. If the executive branch has substantially accomplished the stated purpose, then it has legally operated within executive discretionary authority when it economically saved money by not spending the full amount. In other words, the mayor secured a “better deal,” or the project did not cost as much as expected. However, if the effect of the “not spending” frustrated or thwarted the stated purpose, then the executive branch has not executed or implemented a legislative authorization. Instead, it has unilaterally adopted its own budget by deviating from, if not ignoring, the council’s budget. This it cannot do. [*Id.* at 659-660.]

Lastly, Section IV concluded that the mayor’s impoundment of the appropriated funds at issue violated both MCL 141.437 of the UBAA<sup>14</sup> and Detroit Charter

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<sup>14</sup> MCL 141.437(1) provides that “a deviation from the original general appropriations act shall not be made without amending the general appropriations act” and that such an amendment is performed by “the legislative body of the local unit . . . .” MCL 141.437(2) provides that “[i]f, during a fiscal year, it appears to the chief administrative officer . . . that the actual and probable revenues from taxes and other

§§ 8-210 and 8-211 because both the statute and the charter “require[] joint action of the mayor and of the city council” for “a postadoption amendment of the budget . . .” *Id.* at 660.

Here, plaintiff does not explicitly argue that Hackel violated MCL 141.437 of the UBAA by impounding the appropriated funds at issue without there being an amendment of the Board’s act appropriating the funds. We therefore consider this argument waived to the extent that plaintiff intended to raise it. See *People v Cameron*, 319 Mich App 215, 232; 900 NW2d 658 (2017). Specifically, plaintiff only argues that Hackel violated the County Charter by impounding the appropriated funds at issue. Even so, to resolve that argument, we must consider the pertinent provisions of the County Charter within the framework of *Detroit Fire Fighters Ass’n*, outlined above, as guidance.

There, Section IV concluded that the mayor’s impoundment of appropriated funds violated Detroit Charter, §§ 8-210 and 8-211, which provided as follows:

Sec. 8-210. Amendments after adoption.

1. If during the fiscal year the mayor advises the city council that there are available for appropriation revenues in excess of those estimated in the budget, the city council may make supplemental appropriations for the year up to the amount of the excess.

2. To meet a public emergency affecting life, health, property or the public peace, the city council may make emergency appropriations. To the extent that there are no available unappropriated revenues to meet those appro-

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sources in a fund are less than the estimated revenues, . . . the chief administrative officer or fiscal officer shall present to the legislative body recommendations which, if adopted, would prevent expenditures from exceeding available revenues for that current fiscal year.”

priations, the city council may authorize the issuance of emergency notes as provided by law, this charter or ordinance.

Sec. 8-211. Transfer of appropriations.

At any time during the fiscal year upon written request by the mayor, the city council may, by resolution, transfer all or part of any unencumbered appropriation balance among the programs, services or activities within an agency or from one agency to another. [*Detroit Fire Fighters Ass'n*, 449 Mich at 654 n 4 (CAVANAGH, J., concurring in part and dissenting in part) (quotation marks omitted).]

Here, County Charter, § 8.9 governs the transfer and impoundment of appropriations:

Transfers among appropriations and impoundments of appropriations may only be made in accordance with the appropriation ordinance as adopted or amended.

In addition, §§ 8.11.1 and 8.11.2 govern budget deficits during the fiscal year:

8. 11.1 If the Executive certifies to the Commission a reduction in estimated revenue of any type that would cause an expenditure of an approved appropriation to exceed the available revenue and submits a proposed appropriation reduction, the Commission shall reduce appropriations to avoid the deficit. If the Commission fails to amend the appropriation ordinance within 45 days after the certification of the reduced revenue, the requested appropriation reduction submitted by the Executive becomes effective.

8. 11.2 If the Executive certifies to the Commission that expenditures have exceeded appropriated levels and submits a proposed appropriation amendment, the Commission shall amend appropriations to avoid the deficit. If the Commission fails to amend the appropriation ordinance within 45 days after the certification of the excess expenditures, the requested appropriation amendment submitted by the Executive becomes effective.



On the basis of these sections, we conclude that the joint action between the Board and the Executive set forth in County Charter, §§ 8.11.1 and 8.11.2 is at least as significant as the joint action required by Detroit Charter, §§ 8-210 and 8-211 in *Detroit Fire Fighters Ass’n*. Specifically, County Charter, §§ 8.11.1 and 8.11.2 provide that in the event of a budget deficit, the remedial action first begins with the Executive certifying the problem to the Board, which must then decide to either remedy the problem itself or allow the Executive to do so on his or her own accord. Similarly, the Detroit Charter’s §§ 8-210 and 8-211 provide that unexpected budget deviations are first identified by the mayor and then addressed by the city council. Thus, with *Detroit Fire Fighters Ass’n* as our guide, we conclude that the County Charter generally prohibits the Executive from impounding appropriated funds unless doing so would achieve economic efficiencies and without some corresponding action by the Board.

The only remaining question, therefore, is whether, under County Charter, § 8.9, Hackel may unilaterally impound the appropriated funds at issue. Section 5 of the appropriations ordinance provides that “[t]he appropriations within this ordinance and budget proposed by the Executive as modified by this ordinance, including all appendices, are the maximum authorized expenditures, but are not a mandate to spend.” In our view, the reference to “mandate to spend” is a general recognition of the rule in Michigan that “an appropriation is not a mandate to spend.” *Detroit City Council v Mayor of Detroit*, 449 Mich 670, 680; 537 NW2d 177 (1995).<sup>15</sup> But this rule, as explained previously, applies

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<sup>15</sup> A March 17, 2022 Westlaw search for the phrase “mandate to spend” indicates that the phrase appears in 35 opinions, 18 of which were issued by Michigan courts and 17 of which were issued by every

only to achieving economic efficiencies and is not a blanket authorization for a municipal executive official to impound appropriated funds at his or her discretion. Further, if we interpreted § 5 of the appropriations ordinance as allowing Hackel to unilaterally impound appropriated funds, it would run afoul of MCL 141.437, which prohibits a municipal executive official from doing so. See *Detroit Fire Fighters Ass’n*, 449 Mich at 660 (CAVANAGH, J., concurring in part and dissenting in part).

Consequently, we conclude that the County Charter and the appropriations ordinance allow the Executive limited authority to impound appropriated funds, and that authority is limited to situations in which doing so would achieve economic efficiencies, but it does not give him the authority to do so when impoundment of funds would frustrate the “stated purpose” of the appropriation. As applied to this case, the November 16, 2021 minutes of the Board’s meeting establish that the “stated purpose” of the \$11,828,100 appropriation to the prosecutor’s office was to fund the personnel Hackel requested in the amount of \$11,528,800, plus a communications director, executive assistant, intern coordinator, and part-time file clerk for that office. The four respective Board motions for each of these positions refer to “amend[ing] the 2022 proposed” budget offered by Hackel. Therefore, by impounding the addi-

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other state and federal court combined. This, in our view, suggests that the phrase has acquired a somewhat unique meaning in Michigan law, presumably because Const 1963, art 5, § 20 provides that “[n]o appropriation shall be a mandate to spend.” We have explained that this constitutional provision, which applies to the state executive, “is intended to cover situations in which unforeseen efficiencies and economies might become possible.” *Int’l Union, United Auto, Aerospace & Agricultural Implement Workers of America, UAW, Local 6000 v Michigan*, 194 Mich App 489, 502; 491 NW2d 855 (1992) (quotation marks and citation omitted).

tional \$299,300 appropriated by the Board, Hackel frustrated the “stated purpose” of the line-item appropriation and exceeded his authority under the County Charter.

#### D. APPLICATION

In light of the above conclusions, resolution of this matter is straightforward. In Count I, plaintiff requests a declaratory judgment that (1) “[t]he Macomb County Board of Commissioners [may] adopt an annual budget for Departments, headed by County Wide Elected Officials, (such as Plaintiff), that differs from the budget as recommended by the County Executive” and (2) “[t]he elected Prosecuting Attorney (Plaintiff) [has] exclusive discretion to expend those general funds appropriated by the Macomb County Board of Commissioners for the benefit of the Prosecutor’s Office, without interference by the Macomb County Executive (Defendant).” Under MCR 2.605(A)(1), “a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted.” One purpose of a declaratory judgment is “to avoid multiplicity of actions by affording a remedy for declaring in expedient action the rights and obligations of all litigants.” *Rose v State Farm Mut Auto Ins Co*, 274 Mich App 291, 294; 732 NW2d 160 (2007).

In this case, given that the county’s fiscal year ends December 31, 2022, we find that it is appropriate to afford plaintiff the “expedient” remedy of a declaratory judgment. Therefore, with regard to the first request, the declaratory judgment is granted, insofar as the Board is permitted to adopt an independent budget

under the County Charter.<sup>16</sup> With regard to the second request, the declaratory judgment is granted because Hackel exceeded his authority as granted by the County Charter by impounding the funds at issue.

In Count II, plaintiff requests a writ of mandamus ordering Hackel “[t]o allow Plaintiff full discretion to expend funds appropriated by the Macomb County Board of Commissioners to the Prosecuting Attorney’s office, without interference by Defendant Executive or those Departments he controls[.]”

To obtain the extraordinary remedy of a writ of mandamus, the plaintiff must show that (1) the plaintiff has a clear, legal right to performance of the specific duty sought, (2) the defendant has a clear legal duty to perform, (3) the act is ministerial, and (4) no other adequate legal or equitable remedy exists that might achieve the same result. [*Berry v Garrett*, 316 Mich App 37, 41; 890 NW2d 882 (2016) (quotation marks and citation omitted).]

In *Detroit Fire Fighters Ass’n*, Justice CAVANAGH explained that when a municipal executive official impounds appropriated funds, a writ of mandamus is appropriate with the following scope:

[A] trial court, faced with this issue during the fiscal year, should have the authority to issue a writ of mandamus to the mayor to do one of two things: implement the program or seek a formal amendment of the budget through joint action with the council. If the council believes that continued implementation of the program would be unwise, it, along with the mayor, can freely amend the appropriation. If, on the other hand, the council continues to support the appropriated program, the mayor has no authority to thwart the council’s stated purpose of the appropriation.

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<sup>16</sup> Again, we do not decide whether the Board is permitted to do so under the UBAA because the Board is seeking its relief only pursuant to the County Charter, and defendants do not litigate the UBAA in this context.

[*Detroit Fire Fighters Ass’n*, 449 Mich at 661 (CAVANAGH, J., concurring in part and dissenting in part).]

In keeping with this persuasive guidance,<sup>17</sup> plaintiff’s request for a writ of mandamus is granted as follows: Hackel is directed to either disburse the appropriated funds at issue to plaintiff or seek an amendment of the appropriations ordinance from the Board. If the Board declines to amend the appropriations ordinance, Hackel must disburse the appropriated funds.<sup>18</sup>

In Count III, plaintiff requests injunctive relief ordering Hackel to disburse the appropriated funds at issue. Given our resolution of Count II, the request for injunctive relief is moot.

In Count IV, plaintiff alleges that Hackel violated MCL 141.438(5), the appropriations ordinance, and the County Charter. Plaintiff fails to state a claim for relief.

In Count V, plaintiff requests that this Court “enter an Order to Show Cause why this matter should not be expedited . . . .” Given that we have already ordered an expedited briefing schedule, this request is moot.

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<sup>17</sup> The remedy discussed by Justice CAVANAGH was found in Section V of his separate opinion and did not have majority support. Thus, it is not binding precedent. See *Ackley (On Remand)*, 336 Mich App at 591 n 2. But we find it to be persuasive.

<sup>18</sup> As defendants note, “[a] writ of mandamus is not appropriate when the act that the plaintiff seeks to compel the defendant to perform is a discretionary one.” *Carter v Ann Arbor City Attorney*, 271 Mich App 425, 441; 722 NW2d 243 (2006). Arguably, because a municipal executive official has the limited authority to impound appropriated funds for economic efficiencies, he or she has “discretion” to impound those funds and, as a result, mandamus is not appropriate. However, we find defendants’ economic-efficiencies argument lacking here in light of the on-point, persuasive guidance of *Detroit Fire Fighters Ass’n* in this instance.

## III. CONCLUSION

We conclude that this Court has original jurisdiction under MCL 141.438(7) and that plaintiff has standing to maintain the instant action. We also conclude that under the County Charter, the Board may appropriate funds for a line item in excess of the recommendation of the Executive. We further conclude that Hackel has the limited authority to impound appropriated funds to achieve economic efficiencies but that he exceeded the scope of that authority in this instance by impounding funds that had the “stated purpose” of creating four new employment positions within the prosecutor’s office.

Accordingly, pursuant to MCR 7.206(F)(3), we grant plaintiff’s request for a declaratory judgment to that effect and declare that the Board may adopt an independent budget and that Hackel exceeded his authority by impounding the \$299,300 of appropriated funds at issue.

Further, we issue a writ of mandamus directing him to either disburse those funds to plaintiff or seek an amendment of the appropriations ordinance from the Board. This resolves the last pending claim and closes the case.

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

ZUG ISLAND FUELS COMPANY, LLC v DEPARTMENT  
OF TREASURY

Docket No. 356419. Submitted April 5, 2022, at Detroit. Decided April 14, 2022, at 9:00 a.m. Leave to appeal denied 510 Mich 877 (2022).

Zug Island Fuels Company, LLC, filed an action in the Court of Claims against the Department of Treasury, challenging the department's disallowance of Zug Island Fuels' claimed inventory deduction under MCL 208.1113(6)(a) of the Michigan Business Tax Act (the MBTA), MCL 208.1101 *et seq.* In 2009 through 2010, Zug Island Fuels made several coal purchases from various suppliers; it was undisputed that the purchased coal itself qualified for the inventory deduction under MCL 208.1202(3) and MCL 208.1113(6)(a). In filing its taxes, Zug Island Fuels included in the inventory deduction the freight/shipping/delivery charges (hereinafter, delivery charges) in connection with its purchases of the coal and the delivery of the product, reasoning that MCL 208.1113(6)(a) only required engineering charges, and not freight, shipping, and delivery charges, to be included in the original contract price for the inventory for the deduction to apply. The department audited Zug Island Fuels' taxes and concluded that delivery charges could not be included in the inventory deduction. On that basis, the department issued a tax bill to Zug Island Fuels for an additional \$150,000. Zug Island Fuels requested an informal conference, and the referee concluded that delivery charges did not have to be included in the original contract price for purchased inventory and that only engineering charges had to be included for the inventory deduction to apply. An administrator with the department's hearing division rejected the referee's conclusions and affirmed the department's initial assessment. Zug Island Fuels appealed that decision in the Court of Claims, and the department moved for summary disposition. The Court, COLLEEN A. O'BRIEN, J., granted the department's motion, holding that there was no genuine issue of material fact that the delivery charges could not be deducted because the charges had to be included in the original contract price for the coal to be deductible under MCL 208.1113(6)(a) and, in this case, the evidence estab-

lished that the delivery charges were incurred under separate contracts with various transportation entities. Zug Island Fuels appealed.

The Court of Appeals *held*:

Under MCL 208.1202, the MBTA imposes a business income tax on taxpayers conducting business in Michigan; in turn, MCL 208.1203 imposes a modified-gross-receipts tax on that same group. Specifically, a modified-gross-receipts tax is levied and imposed on the privilege of doing business, not on income or property. MCL 208.1203(2) and (3) provide that the modified-gross-receipts tax is imposed on the modified-gross-receipts tax base, after allocation or apportionment to the state of Michigan at a rate of 0.80%, which means a taxpayer's gross receipts, less purchases from other firms before apportionment. Stated differently, a taxpayer may claim a deduction from the taxpayer's gross receipts for "purchases from other firms" for purposes of calculating the taxpayer's modified-gross receipts tax base. Relevant here, MCL 208.1113(6)(a) defines the phrase "purchases from other firms" to mean inventory acquired during the tax year, including freight, shipping, delivery, or engineering charges included in the original contract price for that inventory. The terms "freight," "shipping," "delivery," and "engineering" are adjectives that separately modify or describe the plural noun "charges." And the phrase "included in the original contract price" applies to or modifies each of the four types of charges described in MCL 208.1113(6)(a). Thus, under MCL 208.1113(6)(a), delivery charges on inventory may be included within the inventory deduction when (1) the charges were included in the same contract covering the acquisition of the inventory and (2) the price paid under that contract was for the inventory itself *and* for the cost of delivering that inventory to the purchaser or acquirer. In this case, the relevant contracts Zug Island Fuels had with its suppliers did not cover the delivery of the coal being purchased under the contracts, i.e., Zug Island Fuels had separate contracts with third-party rail and shipping companies that specified the prices charged to Zug Island Fuels for the coal it had purchased from coal suppliers to be delivered to its facility. Accordingly, the Court of Claims did not err by holding that the delivery costs were not included in the original contract prices for the coal and that, therefore, the delivery charges could not be claimed under the MBTA inventory deduction. In addition, the Court of Claims did not err by concluding that MCL 208.1113(6)(a) requires delivery charges (that is, the freight, shipping, and delivery charges) to be



included in the original contract for the purchased inventory for the inventory deduction to include those charges.

Affirmed.

*Foley & Lardner LLP* (by *Lynn A. Gandhi, Maxwell A. Czerniawski, and Christopher R. Struble*) for Zug Island Fuels Company, LLC.

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

Before: BORRELLO, P.J., and MARKEY and SERVITTO, JJ.

MARKEY, J. Plaintiff, Zug Island Fuels Company, LLC (ZIFC), appeals by right the order of the Court of Claims granting summary disposition in favor of defendant, Department of Treasury (the Department), under MCR 2.116(C)(10). This action arose out of an audit initiated by the Department with respect to taxes paid by ZIFC under the Michigan Business Tax Act (MBTA), MCL 208.1101 *et seq.* The appeal concerns the proper interpretation and application of MCL 208.1113(6)(a) in relation to ZIFC's claimed "inventory" deduction for delivery charges associated with its purchases of coal. We agree with the Court of Claims that the deduction was not available to ZIFC under the MBTA. Accordingly, we affirm.

#### I. STATUTORY FRAMEWORK

To give context to the litigation between the parties, we begin with a discussion of the pertinent provisions of the MBTA. We first note that "[t]he MBTA was repealed by 2011 PA 39, and replaced with the Corporate Income Tax Act, MCL 206.601 *et seq.*, effective

January 1, 2012.” *Comerica, Inc v Dep’t of Treasury*, 332 Mich App 155, 158 n 2; 955 NW2d 593 (2020). Even though the MBTA was “repealed in 2011 subject to certain conditions being satisfied, the MBTA still applies under certain circumstances.” *Id.* In the instant case, the tax period at issue ran from June 25, 2009 to December 31, 2010. Therefore, there is no dispute that the MBTA was applicable.

The MBTA levies and imposes a business income tax, MCL 208.1201, and a modified-gross-receipts tax, MCL 208.1203, on taxpayers conducting business in Michigan. See *Total Armored Car Serv, Inc v Dep’t of Treasury*, 325 Mich App 403, 407; 926 NW2d 276 (2018). The Department’s audit in this case concerned plaintiff’s liability relative to the modified-gross-receipts tax. The modified-gross-receipts tax is “levied and imposed . . . upon the privilege of doing business and not upon income or property.” MCL 208.1203(2). “The modified gross receipts tax is imposed on the modified gross receipts tax base, after allocation or apportionment to this state at a rate of 0.80%.” MCL 208.1203(1). And “[t]he modified gross receipts tax base means a taxpayer’s gross receipts . . . less purchases from other firms before apportionment . . . .” MCL 208.1203(3) (emphasis added). Stated otherwise, a taxpayer may claim a deduction from the taxpayer’s gross receipts for “purchases from other firms” for purposes of calculating the taxpayer’s modified-gross-receipts tax base. Relevant to the dispute, MCL 208.1113(6)(a) defines “[p]urchases from other firms” as “[i]nventory acquired during the tax year, including freight, shipping, delivery, or engineering charges included in the original contract price for that inventory.” We shall refer to this deduction for “purchases from other firms” as the “inventory” deduction.

## II. BACKGROUND

In resolving this appeal, it is unnecessary for us to go into any great detail regarding the underlying facts and procedural history. As part of its business operations in Michigan, ZIFC made several coal purchases from various suppliers during the relevant tax period in 2009–2010. There is no dispute that the purchased coal itself, at the contract prices thereon, qualified for the inventory deduction under MCL 208.1203(3) and MCL 208.1113(6)(a). ZIFC also incurred freight/shipping/delivery charges<sup>1</sup> in connection with its purchases of coal and the delivery of the product. ZIFC took the position that delivery charges associated with the coal purchases could be included in the inventory deduction even if those charges were not included in the original contract prices for the coal purchases. Again, the deduction pertains to “[i]nventory acquired during the tax year, including freight, shipping, delivery, or engineering charges *included in the original contract price for that inventory*.” MCL 208.1113(6)(a) (emphasis added). For a variety of reasons, including application of the last-antecedent rule,<sup>2</sup> ZIFC construed this language as solely requiring engineering charges—and not freight, shipping, and delivery charges—to be included in the original contract price for the inventory in order for the deduction to

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<sup>1</sup> For ease of reference, when discussing charges for freight, shipping, and delivery that were incurred by ZIFC in having its purchased coal transported from supplier facilities to ZIFC, we shall simply refer to them as “delivery” charges.

<sup>2</sup> “[T]he last antecedent rule [is] a rule of statutory construction that provides that a modifying or restrictive word or clause contained in a statute is confined solely to the immediately preceding clause or last antecedent, unless something in the statute requires a different interpretation.” *Hardaway v Wayne Co*, 494 Mich 423, 427; 835 NW2d 336 (2013) (quotation marks and citation omitted).

apply. In other words, ZIFC interpreted the phrase, “included in the original contract price,” as modifying only “engineering charges,” absent any connection to the terms “freight,” “shipping,” and “delivery.” The Department, on the other hand, took the stance that the terms “freight,” “shipping,” “delivery,” and “engineering” describe the types of “charges” that can be deducted, with the phrase, “included in the original contract price,” modifying every one of those types of charges.

For the tax period at issue, ZIFC paid taxes under the MBTA in an amount that was calculated by applying an inventory deduction covering the price of purchased coal, along with the price of delivery charges incurred in transporting and obtaining the coal from suppliers. The Department subsequently conducted an audit, concluding that the delivery charges could not be included in ZIFC’s inventory deduction. The Department, therefore, adjusted ZIFC’s tax liability and issued a bill to ZIFC for an additional \$150,000 in MBTA taxes. ZIFC then requested an informal conference to challenge the Department’s audit assessment. ZIFC raised an additional argument that delivery obligations and charges were, in fact, referenced in the original coal contracts; therefore, ZIFC was entitled to the full inventory deduction that it had sought even if the Department’s construction of MCL 208.1113(6)(a) was legally sound. The referee did not reach that particular argument because the referee concluded that delivery charges do not have to be included in the original contract price for purchased inventory and that only engineering charges have to be so included for the inventory deduction to apply.

Subsequently, an administrator with the Department’s Hearings Division issued a decision rejecting

the referee's recommendation and affirming the initial assessment that disallowed the inventory deduction with respect to the delivery charges involved in transporting the coal from supplier facilities to ZIFC. ZIFC then pursued litigation in the Court of Claims, arguing in favor of its interpretation of MCL 208.1113(6)(a), along with contending that even if the Department's construction of MCL 208.1113(6)(a) were correct, ZIFC's contracts for coal purchases referenced the subject of payment for delivery charges associated with the coal. On the Department's motion for summary disposition under MCR 2.116(C)(10), the Court of Claims rejected ZIFC's arguments as a matter of law. The Court of Claims instead ruled that there was no genuine issue of material fact that the delivery charges could not be deducted because the charges had to be included in the original contract prices for the coal and because the evidence established that the delivery charges were incurred under separate contracts with various transportation entities. ZIFC appeals by right.

### III. ANALYSIS

#### A. STANDARD OF REVIEW AND SUMMARY-DISPOSITION PRINCIPLES

We review de novo a ruling by the Court of Claims on a motion for summary disposition. *Int'l Business Machines Corp v Dep't of Treasury*, 496 Mich 642, 647; 852 NW2d 865 (2014). This Court also reviews de novo issues of statutory construction. *Id.*

In *Batista v Office of Retirement Servs*, 338 Mich App 340, 356; 980 NW2d 107 (2021), this Court recited the principles applicable to analyzing a motion for summary disposition brought under MCR 2.116(C)(10):

MCR 2.116(C)(10) provides that summary disposition is appropriate when, “[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law.” A motion brought pursuant to MCR 2.116(C)(10) tests the factual support for a party’s action. “Affidavits, depositions, admissions, or other documentary evidence in support of the grounds asserted in the motion are required . . . when judgment is sought based on subrule (C)(10),” MCR 2.116(G)(3)(b), and such evidence, along with the pleadings, must be considered by the court when ruling on the (C)(10) motion, MCR 2.116(G)(5). “When a motion under subrule (C)(10) is made and supported . . . , an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial.” MCR 2.116(G)(4). A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact. 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. The trial court is not permitted to assess credibility, weigh the evidence, or resolve factual disputes, and if material evidence conflicts, it is not appropriate to grant a motion for summary disposition under MCR 2.116(C)(10). Like the trial court’s inquiry, when an appellate court reviews a motion for summary disposition, it makes all legitimate inferences in favor of the nonmoving party. A court may only consider substantively admissible evidence actually proffered by the parties when ruling on the motion. [Quotation marks and citations omitted; alteration in original.]

## B. RULES OF STATUTORY CONSTRUCTION

In *Slis v Michigan*, 332 Mich App 312, 335-336; 956 NW2d 569 (2020), this Court discussed the principles governing statutory interpretation, observing as follows:

This Court's role in construing statutory language is to discern and ascertain the intent of the Legislature, which may reasonably be inferred from the words in the statute. We must focus our analysis on the express language of the statute because it offers the most reliable evidence of legislative intent. When statutory language is clear and unambiguous, we must apply the statute as written. A court is not permitted to read anything into an unambiguous statute that is not within the manifest intent of the Legislature. Furthermore, this Court may not rewrite the plain statutory language or substitute its own policy decisions for those decisions already made by the Legislature.

Judicial construction of a statute is only permitted when statutory language is ambiguous. A statute is ambiguous when an irreconcilable conflict exists between statutory provisions or when a statute is equally susceptible to more than one meaning. When faced with two alternative reasonable interpretations of a word in a statute, we should give effect to the interpretation that more faithfully advances the legislative purpose behind the statute. [Quotation marks and citations omitted.]

"Only when ambiguity exists does the Court turn to common canons of construction for aid in construing a statute's meaning." *D'Agostini Land Co, LLC v Dep't of Treasury*, 322 Mich App 545, 554-555; 912 NW2d 593 (2018).

The construction of a statute by the agency charged with executing the statute is entitled to respectful consideration. *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 103; 754 NW2d 259 (2008). Thus,

there must be cogent reasons for overruling the agency's interpretation of the statute. *Id.* "Furthermore, when the law is 'doubtful or obscure,' the agency's interpretation is an aid for discerning the Legislature's intent." *Id.* An agency's construction of a statute, however, is not binding on the courts. *Id.* And the agency's interpretation cannot conflict with the intent of the Legislature as expressed in the plain language of the statute. *Id.*

#### C. DISCUSSION AND RESOLUTION

##### 1. DOCUMENTARY EVIDENCE REGARDING DELIVERY PRICING AND CHARGES AND ZIFC'S COAL CONTRACTS

We take ZIFC's appellate arguments out of order by first addressing its contention that even if the delivery charges had to be included in the original contract prices for the coal, the delivery costs had indeed been included by reference in the pertinent coal contracts.<sup>3</sup> ZIFC maintains that the language within the four corners of the coal contracts encompassed coal delivery costs and that delivery costs were included in the price of coal, even if the coal and delivery services were separately purchased. We conclude that this argument is wholly lacking in merit.

The language of MCL 208.1113(6)(a) is plain and unambiguous and must be applied as written; there is no need to resort to common canons of construction to aid in the interpretation. We conclude that for delivery charges on inventory to be encompassed by the inventory deduction, (1) the charges must be included in the

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<sup>3</sup> We address this issue first because if, as a matter of law, the delivery charges at issue were included in the original contract prices for the coal purchased by ZIFC, there would be no need to resolve the issue regarding the proper interpretation of MCL 208.1113(6)(a).



same contract covering the acquisition of the inventory and (2) the price paid under that contract must be for the inventory itself *and* for the cost of delivering that inventory to the purchaser or acquirer.

In the context of this case, for ZIFC to succeed on its arguments, the pertinent coal contracts reflecting ZIFC's purchases of coal needed to include specific pricing that covered the cost of the coal itself and the cost of having the coal delivered to ZIFC. Simply put, the price paid by ZIFC pursuant to the contracts with coal suppliers had to have covered the delivery of the coal being purchased under the contracts. And the coal contracts presented to the trial court did not fit within that framework for purposes of MCL 208.1113(6)(a). We decline to address ZIFC's arguments to the contrary, especially considering that there is no dispute that ZIFC entered into separate contracts with third-party rail and shipping companies that specified the prices charged to ZIFC to have the coal it purchased from coal suppliers delivered to its facility. We hold that the Court of Claims did not err by ruling, as a matter of law, that ZIFC's delivery costs were not included in the original contract prices for the coal and that, therefore, the delivery charges could not be claimed under the MBTA's inventory deduction.

## 2. PROPER INTERPRETATION OF MCL 208.1113(6)(a)

ZIFC argues that MCL 208.1113(6)(a), when properly construed, does not require that delivery charges be included in the original contract price for the purchased inventory in order for the inventory deduction to cover those delivery charges. ZIFC contends that freight, shipping, and delivery charges are not the same as engineering charges and must be treated differently, that engineering charges are not normally

incurred in purchasing inventory, that the last-antecedent rule was not properly applied by the Court of Claims, and that the comma placement, or lack thereof, in MCL 208.1113(6)(a) supports its interpretation.

Once again, ZIFC's arguments lack merit, and it is not necessary for us to delve into canons of construction to aid in interpreting MCL 208.1113(6)(a) because the statutory language is not ambiguous; rather, we conclude that the language plainly and unambiguously supports the Department's position and the ruling of the Court of Claims. For the last time, we note the language of MCL 208.1113(6)(a), which provides that the inventory deduction applies to "[i]nventory acquired during the tax year, including freight, shipping, delivery, or engineering charges included in the original contract price for that inventory." The terms "freight," "shipping," "delivery," and "engineering" are quite clearly used as separate adjectives modifying or describing the plural noun "charges"; they cannot logically stand on their own and make sense in the context of the statutory definition. And the phrase, "included in the original contract price," plainly modifies the term "charges" *and all that it entails*. Accordingly, the phrase, "included in the original contract price," applies to or modifies each and every one of the four types of charges described in MCL 208.1113(6)(a). No further construction is necessary or allowed. See *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999) ("If the language of the statute is unambiguous, the . . . statute must be enforced as written," and "[n]o further judicial construction is required or permitted."). Therefore, we hold that the Court of Claims did not err in its interpretation of MCL 208.1113(6)(a).

We affirm. Having fully prevailed on appeal, the Department may tax costs under MCR 7.219.

BORRELLO, P.J., and SERVITTO, J., concurred with MARKEY, J.

*In re* ATCHLEY

Docket Nos. 358502 and 358503. Submitted April 13, 2022, at Lansing.  
Decided April 21, 2022, at 9:00 a.m.

In March 2020, the Department of Health and Human Services petitioned the Eaton Circuit Court, Family Division, to assume jurisdiction over the minor child and remove the child from respondents' care. In May 2020, respondents each admitted to testing positive for amphetamines and methamphetamines. In addition, respondents each pleaded no contest to several allegations in the petition, including that they had physical altercations in the child's presence, that the child was not attending school, that the child was not clean, that the home was dirty, that they had left the child unsupervised in the bathtub, and that they had left the child with the brother of respondent-father, who was also a drug user. The court, Thomas K. Byerley, J., found that statutory grounds for jurisdiction existed and entered an order assuming jurisdiction over the child. Petitioner developed case services plans, requiring respondents to address their issues with substance abuse, domestic violence, and emotional instability. In March 2021, after allegedly complying only minimally with their case services plans, petitioner filed a supplemental petition, seeking to terminate respondents' parental rights to the child. Following a termination hearing, the trial court terminated respondents' parental rights under MCL 712A.19b(3)(c)(i) and (j). Respondent-father (Docket No. 358502) and respondent-mother (Docket No. 358503) appealed, and the Court of Appeals consolidated the cases.

The Court of Appeals *held*:

1. To preserve an argument that the petitioner failed to provide adequate services, the respondent must object or indicate that the services provided to them were somehow inadequate. In general, the time for asserting the need for accommodation in services is when the court adopts a service plan or soon afterward. However, even if a parent does not object or otherwise indicate that the services provided were inadequate when the initial case services plan is adopted, an objection may still be timely if raised later during the proceedings given that services that are

adequate at the beginning of a case may become inadequate as the case proceeds. In this case, respondents did not object to or otherwise indicate that the initial case services plans were inadequate. However, at later dispositional-review/permanency-planning hearings, respondents both challenged the adequacy of the services being provided: respondent-father claimed that he did not have consistent access to a cellular telephone with Internet capabilities even though a number of the services were provided virtually, and respondent-mother asserted that additional time was necessary given the issues caused by the COVID-19 pandemic. Respondents' challenges were sufficient to otherwise indicate that the services were inadequate, and as a result, respondents preserved for appeal their challenges to the reasonableness of the reunification efforts provided by petitioner.

2. Under MCL 71A.19a(2), unless aggravating circumstances are present, the petitioner has a statutory duty to make reasonable efforts to reunify the child and family; thus, the petitioner must create a case services plan outlining the steps that both it and the parent will take to rectify the issues that led to court involvement and to achieve reunification. In tandem with that duty, the respondent has a commensurate responsibility to participate in the services that are offered. Accordingly, a respondent must both participate in services and demonstrate that they sufficiently benefited from the services provided. Relevant here, petitioner presented evidence that it provided or offered to provide each respondent with services to address the barriers to reunification, and respondents failed to present evidence that they had complied with or profited from those services. With regard to respondent-father: (1) although petitioner did not assist respondent-father with ensuring that he had continuous access to a working phone with an Internet connection, it accounted for the phone issues when providing services, (2) he did not attend scheduled substance-abuse counseling and continued to miss drug screens and to test positive for certain drugs when he did submit to tests, and (3) he failed to engage with the service provider he was referred to for domestic-relations issues. Although respondent-mother asserted that additional efforts and time for reunification were required because of the pandemic, she failed to identify which additional services should have been provided or detail how the services provided were inadequate. While respondent-mother missed only a few parenting-time appointments, she failed to follow through with the substance-abuse treatment recommendations, did not attend mental health counseling, and missed drug screens or tested positive for drugs. Under these circumstances, the trial court did not clearly err by

finding that petitioner made reasonable efforts to reunify respondent-father and respondent-mother with their child.

3. Termination of parental rights is warranted under MCL 712A.19b(3)(c)(i) if the parent was a respondent in a proceeding brought under this section, 182 or more days have elapsed since the issuance of an initial dispositional order, and the court, by clear and convincing evidence, finds that the conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age. Relevant here, neither condition that led to adjudication with regard to respondent-father—e.g., domestic violence and substance abuse—had been rectified at the time the termination hearing was held. Similarly, with regard to respondent-mother, the conditions that led to adjudication—e.g., substance abuse and emotional instability—had not been rectified; in particular, even though respondent-mother was provided with services that specifically accounted for the pandemic, she made virtually no progress toward reunification. Given these facts, the trial court did not clearly err by finding that termination of respondents' parental rights was warranted under Subsection (3)(c)(i). The Court did not address whether termination was also warranted under MCL 712A.19b(3)(j) because only one statutory ground for termination of a respondent's parental rights needed to be established.

4. The focus at the best-interest stage is on the child, not the parent. The trial court should weigh all evidence available to it when determining whether termination of a respondent's parental rights is in the child's best interests. In doing so, the trial court may consider the child's bond to the parent, the parent's parenting ability, the child's need for permanency, stability, and finality, and the advantages of a foster home over the parent's home. Other considerations include the length of time the child was in care, the likelihood that the child could be returned to her parents' home within the foreseeable future, if at all, and compliance with the case services plan. Placement with a relative weighs against termination, but that fact is not dispositive because a trial court may terminate parental rights in lieu of placement with relatives if it finds that termination is in the child's best interests. In this case, respondent-mother showed a consistent lack of progress toward reunification; therefore, even though the child was placed with a relative, termination was nevertheless in the child's best interests. In particular, the child was doing better in foster care and her need for stability weighed in favor of termination. Under these circumstances, the trial

court did not clearly err by finding that termination of respondent-mother's parental rights was in the child's best interests.

Affirmed.

*ABMD Law* (by *Robert K. Ochodnický*) for respondent-father.

*Sharon Jones* for respondent-mother.

*The Kronzek Firm PLC* (by *Joshua M. Pease*), guardian ad litem, for the minor child.

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

PER CURIAM. In these consolidated appeals<sup>1</sup> respondent-father and respondent-mother appeal as of right the order terminating their parental rights to their minor child under MCL 712A.19b(3)(c)(i) and MCL 712A.19b(3)(j). We affirm for the reasons stated in this opinion.

#### I. BASIC FACTS

In March 2020, petitioner, the Department of Health and Human Services, filed a petition seeking removal of respondents' child from their care. In May 2020, respondents entered a plea of admission to testing positive for amphetamines and methamphetamines. Additionally, respondents pleaded no contest to several allegations in the petition, including that they had physical altercations in the child's presence, that the child was not attending school, that the child was not clean, that the home was dirty, that they had

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<sup>1</sup> *In re Atchley Minor*, unpublished order of the Court of Appeals, entered September 28, 2021 (Docket Nos. 358502 and 358503).

left the child unsupervised in the bathtub, and that they had left the child with respondent-father's brother, who is a drug user. On the basis of the admissions and testimony from a caseworker detailing the history of the case, the trial court found that statutory grounds for jurisdiction existed and entered an order taking jurisdiction over the child.

A case services plan was developed that required respondents to address their issues with substance abuse, domestic violence, and emotional instability. Respondents only minimally complied with the services offered, and they did not demonstrate any progress toward reunification. As a result, in March 2021, petitioner filed a supplemental petition, seeking termination of respondents' parental rights to the child. Following a termination hearing, the trial court entered an order terminating their parental rights.

## II. REASONABLE REUNIFICATION EFFORTS

### A. PRESERVATION AND STANDARD OF REVIEW

Respondents argue that the order terminating their parental rights must be reversed because petitioner failed to make reasonable efforts at reunification. In order to preserve an argument that petitioner failed to provide "adequate services," the respondent must "object or indicate that the services provided to them were somehow inadequate . . . ." *In re Frey*, 297 Mich App 242, 247; 824 NW2d 569 (2012). "The time for asserting the need for accommodation in services is when the court adopts a service plan . . . ." *Id.*, quoting *In re Terry*, 240 Mich App 14, 27; 610 NW2d 563 (2000). The *In re Terry* Court stated that a parent challenging the adequacy of an accommodation must raise an objection "either when a service plan is adopted or soon after-



ward.” *In re Terry*, 240 Mich App at 26. Consequently, under *Frey* and *Terry*, the earliest point at which a respondent can object to or indicate inadequacy with the case services plan is when the initial case services plan is adopted.

However, even if a parent does not object or otherwise indicate that the services provided were inadequate when the initial case services plan is adopted, such an objection or challenge may also be timely if raised later during the proceedings. Child protective proceedings constitute a single continuous proceeding that begins with a petition and continues until either reunification of the family occurs or the court terminates the respondent’s parental rights, *In re Ferranti*, 504 Mich 1, 23; 934 NW2d 610 (2019) (quotation marks and citations omitted). Moreover, in cases where the child is placed outside the home, the case services plan must “be updated and revised at 90-day intervals . . . .” MCL 712A.18f(5).<sup>2</sup> *In re Ferranti* and MCL 712A.18f(5) recognize what common sense dictates: services that are adequate at the beginning of the case may become inadequate as the case proceeds. For example, a parent with insurance that covers his or her mental health services may lose that coverage. As a result, in order to satisfy its statutory duty to make reasonable efforts to reunify the child with his or her family, petitioner may have to take steps to ensure that the respondent-parent continues to have access to counseling that it deems necessary to reunify the child with the family. It is because of the constantly changing dynamic in a child protective case that a respondent has multiple

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<sup>2</sup> In this case, the trial court ordered respondents to comply with the initial case services plan but then added that, “[s]hould additional services be necessary,” the case services plan would be “adapted and changed, and we will move forward.”

opportunities to, as the circumstances change, object to the adequacy of the services being provided.

In this case, respondents did not object to or otherwise indicate that the initial case services plan was inadequate. However, at later dispositional-review and permanency-planning hearings, both respondents challenged the adequacy of the services being provided. Specifically, respondent-father stated that a number of services were provided virtually, but that he did not have consistent access to a phone with Internet capabilities. In turn, respondent-mother contended that additional time was necessary given the general turmoil caused by the COVID-19 pandemic. Although the challenges to the adequacy of the services were not in the form of a traditional objection, we conclude that respondents' arguments were sufficient to "otherwise indicate" that the services provided were inadequate, thereby preserving for appeal their challenge to the reasonableness of the reunification efforts provided by petitioner. Consequently, we review for clear error the trial court's factual finding that petitioner made reasonable efforts to reunify respondents with the child. See *In re Smith*, 324 Mich App 28, 43; 919 NW2d 427 (2018). "A finding is clearly erroneous if, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake has been made." *Id.* (citation omitted).

#### B. ANALYSIS

Except under aggravating circumstances not present in this case, petitioner has a statutory duty to make "reasonable efforts to reunify the child and family . . ." See MCL 712A.19a(2). This means petitioner "must create a service plan outlining the steps that both it and the parent will take to rectify the

issues that led to court involvement and to achieve reunification.” *In re Hicks*, 500 Mich 79, 85-86; 893 NW2d 637 (2017). “While the [petitioner] has a responsibility to expend reasonable efforts to provide services to secure reunification, there exists a commensurate responsibility on the part of respondents to participate in the services that are offered.” *Frey*, 297 Mich App at 248. This means a respondent-parent must both participate in services and “demonstrate that they sufficiently benefited from the services provided.” *Id.*

#### 1. RESPONDENT-FATHER

On appeal, respondent-father argues that he should have been provided with a phone and gas cards so that he could better participate in the services offered. There is no evidence respondent-father needed transportation assistance. Indeed, at the termination hearing, respondent-father agreed he had “adequate transportation throughout” this case. And, although issues with his phone persisted, petitioner took steps to reunify him with the child despite those issues. Specifically, the caseworker testified that, although respondent-father frequently complained about his telephone, he never asked for assistance in obtaining a phone. Instead, he told her that he would find a working phone on his own. She indicated that she nevertheless communicated frequently with him, both in person and via text messages. Further, the record reflects that respondent-father’s phone issues were not so significant as to prevent him from frequently participating in court proceedings using Zoom, a videoconferencing platform.

Moreover, although petitioner did not provide respondent-father with assistance in ensuring that he had continuous access to a working phone with an

Internet connection, it nevertheless accounted for the phone issues when providing services. First, parenting-time visits were both in person and over Zoom. Respondent-father missed multiple visits, seemingly without regard to whether they were in person or over Zoom. And, although some visits were missed because of purported issues with his phone, he never provided any documentation to allow for the times to be rescheduled.

Next, to address respondent-father's substance-abuse issue, petitioner provided him with random drug screens and referrals for substance-abuse counseling. Citing issues with his phone, respondent-father requested that petitioner switch from a mobile screener to ADAM<sup>3</sup> for the drug screens.<sup>4</sup> Despite petitioner accommodating respondent-father's request for a new provider, the call log for ADAM indicates that he never placed a call to see if he had to submit to a drug screen. Similarly, although petitioner provided respondent-father with a referral for substance-abuse treatment, he did not complete the service and, instead, asked petitioner to refer him to a different provider. Again, petitioner accommodated his request, but, even after receiving the referral to a second provider, respondent-father continued to not participate in substance-abuse treatment. Finally, throughout the case, he continued

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<sup>3</sup> "ADAM" is the acronym for Alcohol Drug Administrative Monitoring, Inc.

<sup>4</sup> It appears that the mobile screener refers to an application on respondent-father's phone that would tell him whether he had to submit to a drug screen on any given day. In contrast, respondent-father had to call a number at ADAM to determine whether he was scheduled for a drug screen. Although both services required him to have access to a phone, the service through ADAM did not require Internet access or for respondent-father to use his own phone to make the call.

to miss drug screens and to test positive for amphetamines, methamphetamines, and THC when he did submit to tests.

To address respondent-father's domestic-relations barrier, petitioner referred him to Prevention and Treatment Services. But respondent-father did not engage with that service provider. Instead, in response to the provider reaching out to him, respondent-father asked via e-mail why the provider was contacting him. Although the provider responded to his e-mail, respondent-father did not offer any further reply. Given that services were never established, it is unclear how respondent-father's purported phone issues could have even affected his ability to complete this service.

In light of the foregoing, we conclude that the trial court did not clearly err in finding that petitioner made reasonable efforts to reunify respondent-father with his child.

## 2. RESPONDENT-MOTHER

Respondent-mother argues that because of the COVID-19 pandemic, "reasonable efforts" means something more extensive than what might normally be required. She also contends that the "standard amount of time" was inadequate to provide her with a "true opportunity for reunification." However, she does not identify the additional services that should have been provided or detail how the services provided throughout the case were inadequate. Moreover, although she contends that more time is needed in her case, she has not provided any evidence indicating that the trial court erred by finding that she would be unable to

rectify the conditions leading to adjudication within a reasonable time considering the age of her child. See MCL 712A.19b(3)(c)(i).<sup>5</sup>

The services provided to respondent-mother included parenting time, both in person and via Zoom, substance-abuse counseling, mental health counseling, and drug screens. With regard to the parenting-time visits, respondent-mother missed only a few sessions and, at times, when she was unable to attend in person, she was offered parenting time over Zoom instead. Respondent-mother completed a substance-abuse assessment but did not follow through with the recommendations. She did not follow through with referrals for mental health counseling. At one point, she requested permission to locate her own providers because she did not want the providers offered by petitioner. Although she was given leeway to locate such a provider, she did not actually engage with the provider she located. The caseworker indicated that, although respondent-mother had scheduled multiple sessions with the therapist she had chosen, she did not attend any of them. Nor did respondent-mother comply with the required drug screening. Throughout the proceedings, she tested positive, missed drug screens, or refused to submit to the screens. Although her caseworker noted that the COVID-19 pandemic caused a gap in drug screens between March 2020 and May 2020, even after the screenings resumed, respondent-mother continued to test positive, refused screens, or did not show up for scheduled screens. Communication with respondent-mother was both in person and via text message. Given the record before this Court and, even in light of the pandemic, we

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<sup>5</sup> The trial court's finding that statutory grounds to terminate her parental rights existed will be discussed later in this opinion.

discern no clear error in the trial court's finding that petitioner made reasonable efforts to reunify respondent-mother with the child.

### III. STATUTORY GROUNDS

#### A. STANDARD OF REVIEW

Respondents argue that the trial court erred by finding statutory grounds to terminate their parental rights. We review for clear error the trial court's finding that there are statutory grounds for termination of a respondent's parental rights. *In re Frey*, 297 Mich App at 244.

#### B. ANALYSIS

The trial court first found statutory grounds for termination under MCL 712A.19b(3)(c)(i) and (j). Termination is warranted under Subdivision (c)(i) if:

(c) The parent was a respondent in a proceeding brought under this chapter, 182 or more days have elapsed since the issuance of an initial dispositional order, and the court, by clear and convincing evidence, finds either of the following:

(i) The conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.

Here, it is undisputed that more than 182 days have elapsed since the initial dispositional order was issued. We, therefore, turn to a consideration of whether the conditions that led to adjudication continued to exist and, if so, whether there was a reasonable likelihood that they could be rectified within a reasonable time considering the young child's age.

As to respondent-father, the conditions that led to adjudication included both domestic violence and substance abuse. Neither condition had been rectified at the time the termination hearing was held. At the termination hearing, respondent-father admitted that he used methamphetamines throughout this case. That admission was supported by the objective evidence, which showed that on multiple occasions he tested positive for amphetamines and methamphetamines or he was presumed positive because he did not submit to the random drug screen. The positive and presumed-positive tests persisted from the time the child was removed until just before the termination hearing was held. The trial court, therefore, did not clearly err by finding that respondent-father's substance-abuse issues had not been rectified. Moreover, given that respondent-father regularly did not submit to random drug screens and given that he had yet to participate in any substance-abuse treatments, there was nothing on the record to support a finding that there was a reasonable likelihood that he would be able to rectify his substance-abuse issues within a reasonable time considering the child's young age. Respondent-father made no progress toward rectifying his issues with domestic violence. Indeed, respondent-father never followed through on petitioner's referral for a domestic-violence assessment and treatment. And, at the time of the termination hearing, he continued to have an unresolved bench warrant for his arrest in relation to a domestic-violence incident that had occurred in March 2020. In light of this record, the trial court did not clearly err by finding that termination of respondent-father's parental rights was warranted under MCL 712A.19b(3)(c)(i).

As to respondent-mother, the conditions that led to adjudication included substance abuse and the lack of



emotional stability. Like respondent-father, she was provided with random drug screens and referrals for substance-abuse counseling. She continued to test positive for amphetamines, methamphetamines, and THC throughout the case, and she missed multiple drug screens, each of which was presumed to be positive. Respondent-mother admitted at the termination hearing that she had consistently used methamphetamines throughout the case. She attributed her ongoing use to the fact that she had “slipped” and “made a mistake” because it was hard to have the child taken from her a second time. On appeal, she contends that she needed additional time to get sober because of the difficulties inherent in living through a global pandemic. But the record reflects that despite being provided with services that specifically accounted for the pandemic—including mobile drug screening and telehealth visits—respondent-mother had made virtually no progress toward reunification. Given that no progress was made after more than a year of services, the trial court did not clearly err by finding that respondent-mother’s substance-abuse issues had not been rectified and that there was no reasonable likelihood that they would be rectified within a reasonable time considering the child’s age. Additionally, the court did not clearly err by finding that respondent had not rectified her issue with emotional stability. Indeed, the record reflects that despite selecting her own service provider, respondent-mother had yet to engage in any counseling services. On this record, therefore, the trial court did not clearly err by concluding that termination

of respondent-mother's parental rights was appropriate under MCL 712A.19b(3)(c)(i).<sup>6</sup>

#### IV. BEST INTERESTS

##### A. STANDARD OF REVIEW

Respondent-mother argues the trial court erred by finding that termination of her parental rights was in the child's best interests because (1) respondent-mother had a strong bond with the child and (2) the child was placed with a relative. We review for clear error a trial court's factual finding that termination of a parent's parental rights is in the child's best interests. *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000).

##### B. ANALYSIS

"The focus at the best-interest stage has always been on the child, not the parent." *In re Payne/Pumphrey/Fortson*, 311 Mich App 49, 63; 874 NW2d 205 (2015) (quotation marks, citation, and brackets omitted). When determining whether termination of a respondent-parent's parental rights is in the child's best interests, the trial court "should weigh all evidence available to it" and may consider

the child's bond to the parent, the parent's parenting ability, the child's need for permanency, stability, and finality, and the advantages of a foster home over the parent's home. Other considerations include the length of time the child was in care, the likelihood that the child could be returned to her parents' home within the foresee-

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<sup>6</sup> Because only one statutory ground for termination of a respondent's parental rights need be established, *In re Ellis*, 294 Mich App 30, 32; 817 NW2d 111 (2011), we need not address whether termination was also warranted under MCL 712A.19b(3)(j).

able future, if at all, and compliance with the case service plan. [*Id.* at 63-64 (quotation marks and citations omitted).]

“A child’s placement with relatives is a factor that the trial court is required to consider.” *In re Gonzales/Martinez*, 310 Mich App 426, 434; 871 NW2d 868 (2015). Placement with a relative weighs against termination, but that fact is not dispositive given that a trial court “may terminate parental rights in lieu of placement with relatives if it finds that termination is in the child’s best interests,” *In re Olive/Metts*, 297 Mich App 35, 43; 823 NW2d 144 (2012).

Respondent-mother argues the trial court erred in terminating her parental rights because she shared a strong bond with the child. According to respondent-mother, the trial court should have afforded her more time to work on her issues so she could maintain this bond with the child. The trial court, however, considered respondent-mother’s strong bond with the child but found that the bond was “waning very quickly[.]” The testimony showed that the child had been in foster care for a significant portion of her life, and she was at the point where she did not want to speak about respondents. As a result, the court found that the bond did not weigh for or against termination in this case. That finding is not clearly erroneous. Moreover, although the child was placed with a relative, the court considered that fact as well and concluded that, given respondent-mother’s consistent lack of progress toward reunification—including her ongoing and unrectified substance-abuse issues—termination was nevertheless in the child’s best interests. The child was doing better in foster care and her need for stability and permanency weighed in favor of termination. The trial court, therefore, did not clearly err by finding that

termination of respondent-mother's parental rights  
was in the child's best interests.

Affirmed.

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

## RODRIGUEZ v HIRSHBERG ACCEPTANCE CORP

Docket No. 356368. Submitted April 5, 2022, at Lansing. Decided April 21, 2022, at 9:05 a.m. Leave to appeal sought. Oral argument ordered on the application 510 Mich 953 (2022).

Kathryn M. Rodriguez filed a putative class action in the Ionia Circuit Court against Hirshberg Acceptance Corp. (HAC) and Modern Financial Services Corp. (MFSC), alleging unfair debt-collection practices out of a miscalculation of postjudgment interest. In 1995, plaintiff made a credit card purchase for approximately \$900. She stopped making payments on the purchase in 2002 and did not fully repay her obligation to First National Bank of Omaha, the nonparty issuer of the credit card. First National assigned the debt to nonparty LHR, Inc., who in turn assigned the debt to HAC. In 2007, HAC sued plaintiff in the 64th District Court, seeking to recover the unpaid balance of plaintiff's debt of \$6,241.20, plus interest, fees, and costs. HAC obtained a default judgment against plaintiff and obtained writs of garnishment to collect the amount owed. In 2018, plaintiff filed in the United States District Court for the Western District of Michigan a putative class action against HAC, alleging that HAC had violated the Fair Debt Collection Practices Act (FDCPA), 15 USC 1692 *et seq.*, and the Michigan regulation of collection practices act (RCPA), MCL 445.251 *et seq.*, by overstating how much plaintiff owed and by impermissibly inflating HAC's costs and the amount of interest charged. The federal action was dismissed with prejudice because of procedural error. Plaintiff then filed the instant action in the circuit court, adding MFSC as a defendant. In addition to asserting substantively identical claims under the FDCPA and the RCPA, plaintiff also asserted that defendants violated the Occupational Code, MCL 339.101 *et seq.*, and requested declaratory and injunctive relief. Defendants removed the case to federal court, which dismissed the FDCPA claim, declined to exercise supplemental jurisdiction over the state-law claims, and remanded the case back to the circuit court. Defendants moved for summary judgment of plaintiff's class-action claims under MCR 2.116(C)(8), arguing that her claims were precluded under MCR 3.501(A)(5) because the RCPA and the Occupational Code permitted recovery of statutory damages in

lieu of actual damages and neither act contained a provision explicitly permitting class actions. Defendants asserted that plaintiff's remaining individual claims should then be dismissed under MCR 2.116(C)(4) for lack of subject-matter jurisdiction because those claims did not meet the circuit court's minimum jurisdictional amount of \$25,000. Plaintiff opposed the motion, arguing that plaintiff's motion was procedurally improper, that MCR 3.501(A)(5) was inapplicable because she was not seeking statutory damages exclusively, that MCR 3.501(A)(5) violated the Separation of Powers Clause, and that the circuit court was required to maintain jurisdiction over her individual claims either under MCR 3.501(B)(3)(e) if it refused to certify her class action or because she could prove individual damages over the jurisdictional amount. The court, Suzanne Hoseth Kreeger, J., granted defendants' motion, dismissing plaintiff's class-action allegations with prejudice and dismissing plaintiff's individual claims for lack of subject-matter jurisdiction. Plaintiff appealed.

The Court of Appeals *held*:

1. MCR 3.501(A)(5) provides that an action for a penalty or minimum amount of recovery without regard to actual damages imposed or authorized by statute may not be maintained as a class action unless the statute specifically authorizes its recovery in a class action. The court rule applies to the action, not to particular claims, other than the divide between individual and class-action claims. Taken in context, the undefined term "an action" in MCR 3.501(A)(5) means "a *class* action." Thus, when a statute provides for a minimum penalty irrespective of actual damages, no class action may be maintained on the basis of that statute. However, in crafting the subrule, the Supreme Court clearly did not intend for MCR 3.501(A)(5) to forbid *any* lawsuit whatsoever based on such a statute. Accordingly, while claims based on violations of statutes that provide minimum damages in lieu of actual damages may not be brought as class actions unless language in the statute expressly permits such class actions, individual claims premised on such statutes are not precluded.

2. Article 3, § 2 of Michigan's Constitution divides the powers of the government into three branches: legislative, executive, and judicial. Under this clause, no person exercising powers of one branch shall exercise powers belonging to another branch except as expressly provided in the Constitution. While the Legislature has the power to make laws, the Supreme Court has authority to create general rules to establish, modify, amend, and simplify the practice and procedure in all Michigan courts. The Supreme Court may not enact court rules that establish, abrogate, or

modify the substantive law; thus, when assessing the constitutionality of a court rule, the court must consider whether the court rule addresses purely procedural matters or substantive law. MCR 3.501(A)(5) does not restrict the right of individuals to bring their own claims under statutes that provide minimum damages in lieu of actual damages; instead, it only precludes a plaintiff from bringing such claims in a class action. Accordingly, MCR 3.501(A)(5) does not abrogate any substantive right granted by the Legislature and does not violate the separation-of-powers doctrine.

3. Relevant here, MCL 445.257(2) of the RCPA and MCL 339.916(2) of the Occupational Code similarly provide that a prevailing plaintiff is entitled to the amount of actual damages or \$50, whichever is greater. In this way, both statutes provide for a penalty or a minimum amount of recovery without regard to actual damages. In addition, neither statute contains a provision specifically permitting class actions. Consequently, MCR 3.501(A)(5) prohibits a plaintiff from bringing a class action premised on a violation of the RCPA or the Occupational Code. Even though plaintiff also sought actual damages, declaratory relief, and a permanent injunction, her class action was barred under MCR 3.501(A)(5) because the court rule applied to the entire class action, not just to her individual claims. Plaintiff could, however, bring individual claims under the RCPA or the Occupational Code. Procedurally, defendants did not have to wait for plaintiff to move to certify the class before moving for summary disposition under MCR 2.116(C)(8). The trial court properly concluded that MCR 3.501(A)(5) barred plaintiff from maintaining a class action and on that basis correctly dismissed all class-action claims in the lawsuit.

4. Michigan circuit courts are courts of general jurisdiction; they lack jurisdiction over actions in which the amount in controversy could not exceed \$25,000 as determined at the outset of the proceedings on the basis of the allegations in the complaint. When deciding a motion for summary disposition under MCR 2.116(C)(4), which requires a court to consider evidence in the record, a circuit court must go beyond the pleadings to determine whether the amount in controversy could not exceed \$25,000. Although an award of attorney fees provided by statute or by contract may be considered part of the amount in controversy, a reasonable estimate of the probable value of those fees should be provided by the party seeking those fees. Relevant here, plaintiff failed to plead individual claims in excess of the circuit court's jurisdictional amount; indeed, she at most pleaded individual

damages of \$6,000. Plaintiff's assertion that she could prove additional damages and that her projected attorney fees under both statutes would exceed the jurisdictional amount failed because those assertions were unsupported by any evidence.

5. MCR 3.501(B)(3)(e) provides that if class certification is denied or revoked, the action shall continue by or against the named parties alone. In other words, a court's dismissal of a plaintiff's class-action claims does not, by itself, require or permit dismissal of the plaintiff's individual claims; however, the court rule does not preclude the individual claims from being dismissed for other reasons, such as a lack of subject-matter jurisdiction. In this case, the circuit court did not dismiss plaintiff's individual claims because it had dismissed her class-action claims. Instead, the circuit court properly dismissed plaintiff's individual claims in their entirety because it lacked subject-matter jurisdiction over the claims.

Affirmed.

1. COURT RULES – CLASS ACTIONS PREMISED ON STATUTORY VIOLATIONS – PRECLUSION OF CLASS-ACTION CLAIMS.

MCR 3.501(A)(5) provides that an action for a penalty or minimum amount of recovery without regard to actual damages imposed or authorized by statute may not be maintained as a class action unless the statute specifically authorizes its recovery in a class action; the court rule applies to the action, meaning a class action, not to particular claims; when a statute provides for a minimum penalty irrespective of actual damages, no class action may be maintained on the basis of that statute unless language in the statute expressly permits such class actions; while claims based on violations of statutes that provide minimum damages in lieu of actual damages may not be brought as class actions absent express statutory authorization to do so, individual claims premised on such statutes are not precluded; the court rule does not violate the separation-of-powers doctrine.

2. COURT RULES – CLASS ACTIONS – DENIAL OF CLASS-ACTION CLAIMS – EFFECT ON INDIVIDUAL CLAIMS.

MCR 3.501(B)(3)(e) provides that if class certification is denied or revoked, the action shall continue by or against the named parties alone; a court's dismissal of a plaintiff's class-action claims does not, by itself, require or permit dismissal of the plaintiff's individual claims; however, the court rule does not preclude the individual claims from being dismissed for other reasons, such as a lack of subject-matter jurisdiction.



*Curtis C. Warner* for plaintiff.

*Maddin Hauser Roth & Heller, PC* (by *Kathleen H. Klaus* and *Jesse L. Roth*) for defendants.

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

RONAYNE KRAUSE, P.J. In this putative class action involving allegations of unfair debt-collection practices arising out of a miscalculation of postjudgment interest, plaintiff, Kathryn M. Rodriguez, appeals as of right the trial court's order granting summary disposition in favor of defendants, Hirshberg Acceptance Corp. (HAC) and Modern Financial Services Corp. (MFSC), under MCR 2.116(C)(4) (lack of subject-matter jurisdiction) and (C)(8) (failure to state a claim upon which relief could be granted). We affirm.

#### I. BACKGROUND FACTS AND PROCEDURAL HISTORY

In 1995, plaintiff used a credit card issued by non-party First National Bank of Omaha (FNBO) to make a purchase, incurring a financial obligation of approximately \$900. She did not fully repay her financial obligation for that purchase. She stopped making payments entirely in 2002. At some point, FNBO assigned the debt to nonparty LHR, Inc. On February 2, 2007, LHR assigned the debt to HAC. On September 7, 2007, HAC sued plaintiff in the 64th District Court, in Ionia County. HAC contended that the written contract was in plaintiff's possession or lost, so it did not attach a copy of any written contract. Instead, it attached an affidavit from its vice president, who calculated the unpaid balance of plaintiff's debt to be \$6,241.20. HAC sought a judgment against plaintiff in that amount, plus interest, fees, and costs. Plaintiff did not respond

to the complaint, and HAC obtained a default judgment against plaintiff. Thereafter, HAC obtained numerous writs of garnishment to collect the amount owed under the default judgment. Each writ of garnishment indicated that postjudgment interest was being added to the debt.

In 2018, plaintiff filed a putative class action against HAC in the United States District Court for the Western District of Michigan. Plaintiff alleged that HAC violated the Fair Debt Collection Practices Act (FDCPA), 15 USC 1692 *et seq.*, and the Michigan regulation of collection practices act (RCPA), MCL 445.251 *et seq.*, by overstating how much plaintiff owed and by impermissibly inflating HAC's costs and the amount of interest it charged. Following a procedural error, the federal action was dismissed with prejudice. Plaintiff thereafter filed a putative class action in the Ionia Circuit Court, much of which was substantively identical to her prior federal complaint. However, plaintiff added MFSC as a defendant on the general theory that HAC and MFSC were inextricably intertwined entities; a claim that defendants also violated the Occupational Code, MCL 339.101 *et seq.*; and claims seeking declaratory and injunctive relief. Defendants responded by removing the case to federal court. The federal court dismissed the FDCPA claims under the doctrine of res judicata, declined to exercise supplemental jurisdiction over the state-law claims, and remanded the case back to the state trial court.

Defendants then moved for summary disposition of plaintiff's class-action claims. Pursuant to MCR 2.116(C)(8) (failure to state a claim), defendants argued that MCR 3.501(A)(5) precluded "actions" based on claimed violations of statutes that permitted recovery of statutory damages in lieu of actual damages, and

“actions” were defined by MCR 2.101 as being synonymous with lawsuits. Defendants further argued that because the RCPA and the Occupational Code both permit recovery of statutory damages and neither contains a provision explicitly permitting class actions, plaintiff’s class-action claims had to be dismissed irrespective of the fact that she also sought injunctive relief, declaratory relief, and actual damages. Defendants reasoned that plaintiff’s remaining claims were for, at the most, less than \$3,000 and therefore far below the circuit court’s jurisdictional minimum amount of \$25,000.<sup>1</sup> Defendants therefore concluded that plaintiff’s individual claims should be dismissed pursuant to MCR 2.116(C)(4) (lack of subject-matter jurisdiction). Plaintiff contended that defendants’ motion was procedurally improper, that MCR 3.501(A)(5) was inapplicable because she was not seeking statutory damages exclusively, and that MCR 3.501(A)(5) was an unconstitutional violation of the separation of powers. Lastly, plaintiff argued the trial court was required to maintain jurisdiction over her individual claims, either under MCR 3.501(B)(3)(e) if it refused to certify her class action or because she could prove individual damages over \$25,000.

After hearing the parties’ oral arguments and considering their briefs, the trial court agreed with defendants. The trial court entered an order dismissing plaintiff’s class-action allegations with prejudice and dismissing plaintiff’s individual claims for lack of subject-matter jurisdiction. This appeal followed.

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<sup>1</sup> In her brief on appeal, plaintiff makes several statements about how much she was allegedly overcharged, possibly indicating claimed actual damages of close to \$6,000.

## II. STANDARDS OF REVIEW

A grant or denial of summary disposition is reviewed de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion brought under MCR 2.116(C)(8) should be granted only when the complaint is so legally deficient that recovery would be impossible even if all well-pleaded facts were true and construed in the light most favorable to the nonmoving party. *Id.* at 119. Only the pleadings may be considered when deciding a motion under MCR 2.116(C)(8). *Id.* at 119-120. “A motion for summary disposition under MCR 2.116(C)(4) tests the trial court’s subject-matter jurisdiction.” *Mays v Governor*, 506 Mich 157, 180; 954 NW2d 139 (2020) (opinion by BERNSTEIN, J.). Questions of jurisdiction are reviewed de novo as questions of law, and in deciding a motion under MCR 2.116(C)(4), the court should consider the documentary evidence submitted by the parties. *Henry v Laborers’ Local 1191*, 495 Mich 260, 273; 848 NW2d 130 (2014).

The interpretation and application of statutes, constitutional provisions, rules, and legal doctrines are reviewed de novo. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008); *Toll Northville LTD v Northville Twp*, 480 Mich 6, 10-11; 743 NW2d 902 (2008). “When interpreting statutes, our obligation is to discern and give effect to the Legislature’s intent as expressed in the statutory language,” with the presumption that unambiguous language should be enforced as written. *Gladych v New Family Homes, Inc*, 468 Mich 594, 597; 664 NW2d 705 (2003). Although “statutes must be construed to prevent absurd results, injustice, or prejudice to the public interest,” *Rafferty v Markovitz*, 461 Mich 265, 270; 602 NW2d 367 (1999), the “‘absurd

result’ rule” may only be applied when statutory language is already found to be ambiguous, *Gilbert v Second Injury Fund*, 463 Mich 866, 867 (2000), or possibly when it is “quite impossible that the Legislature could have intended the result,” *Johnson v Recca*, 492 Mich 169, 192-194; 821 NW2d 520 (2012) (quotation marks, citation, and brackets omitted). Interpretation of a court rule follows the general principles of statutory construction. *Grievance Administrator v Underwood*, 462 Mich 188, 193-194; 612 NW2d 116 (2000). This Court has “a duty to interpret . . . court rules as being constitutional whenever possible . . . .” *In re Sanders*, 495 Mich 394, 414; 852 NW2d 524 (2014).

### III. DISMISSAL OF CLASS-ACTION CLAIMS

Plaintiff argues the trial court erred by summarily disposing of her class-action claims on the basis of MCR 3.501(A)(5). In full, MCR 3.501(A)(5) provides:

An action for a penalty or minimum amount of recovery without regard to actual damages imposed or authorized by statute may not be maintained as a class action unless the statute specifically authorizes its recovery in a class action.

We conclude that the trial court properly granted summary disposition as to plaintiff’s class-action claims.

#### A. SCOPE OF COURT RULE

The Michigan Court Rules do not clearly define “an action.” However, MCR 2.101 provides that “there is one form of action known as a ‘civil action’” and that “[a] civil action is commenced by filing a complaint with a court.” By implication, an “action” means an

entire lawsuit. Furthermore, our Supreme Court has construed the terms “claim” and “action” while analyzing MCR 2.403(M)(1), concluding that “a claim consists of facts giving rise to a right asserted in a judicial proceeding, which is an action.” *CAM Constr v Lake Edgewood Condo Ass’n*, 465 Mich 549, 554-555; 640 NW2d 256 (2002). “In other words, the action encompasses the claims asserted.” *Id.* at 555. This Court has similarly concluded that “civil action” and “civil case” were interchangeable terms, both of which described “a broad category of legal actions, each of which can consist of one or more claims.” *Wilcoxon v Wayne Co Neighborhood Legal Servs*, 252 Mich App 549, 554-555; 652 NW2d 851 (2002). The apparent conclusion is that the preclusionary effect of MCR 3.501(A)(5) applies to entire lawsuits, not merely to individual claims within a lawsuit.

We note, however, that the parties appear to have tacitly agreed that the above apparent conclusion is not literally true: at no time did defendants argue that plaintiff’s individual claims were precluded. We agree. Importantly, MCR 3.501(A)(5) appears within a rule expressly addressing class actions. By necessary implication, “an action,” when read in context, means “a class action.” In other words, when a statute provides for a minimum penalty irrespective of actual damages, no class action may be maintained on the basis of that statute. It is, in contrast, “quite impossible” that our Supreme Court intended MCR 3.501(A)(5) to forbid any lawsuit whatsoever based on such a statute. See *Johnson*, 492 Mich at 193. Furthermore, our conclusion is supported by the staff comment to GCR 1963, 208.1(E), the similar predecessor statute:

This section is modeled on provisions such as N.Y. C.P.L.R. § 901(b) and Or.R.Civ.P. 32(L). Minimum mea-

tures of recovery, unrelated to actual damages, found in some regulatory statutes (see, e.g. M.C.L.A § 445.360[2]; M.S.A. 19.853[20][2], M.C.L.A. § 445.243[2]; M.S.A. 19.655[53][2]) are designed to reduce the disincentive to bring actions challenging violations that results from the relatively small damages suffered by any individual. The class action device for bringing together many such claims achieves the same purpose, making the minimum damages provisions unnecessary. In addition, allowing recovery of the minimum damage as to each of a large number of class members might often impose an unreasonable and unintended penalty on a defendant.

Staff comments are not authoritative, but they nevertheless offer valuable insight. *Law Offices of Jeffrey Sherbow, PC v Feiger & Feiger, PC*, 507 Mich 272, 293 n 39; 968 NW2d 367 (2021). The genesis of the court rule was clearly a concern regarding unintended consequences of certain kinds of *class* actions only. In conclusion, claims based on violations of statutes that provide minimum damages in lieu of actual damages may not be brought as class actions, absent language in the statute expressly permitting such class actions.

#### B. CONSTITUTIONALITY OF COURT RULE

Plaintiff contends that MCR 3.501(A)(5) violates the separation-of-powers doctrine by impermissibly infringing the Legislature's domain of passing substantive laws and deciding whether to cap statutory damages. We disagree.

Pursuant to Const 1963, art 3, § 2, “[t]he powers of government are divided into three branches: legislative, executive and judicial” and “[n]o person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.” Our Constitution provides that “[t]he supreme court shall by general rules estab-

lish, modify, amend and simplify the practice and procedure in all courts of this state.” Const 1963, art 6, § 5. The Legislature, on the other hand, has “the power to make laws.” *Slis v Michigan*, 332 Mich App 312, 344; 956 NW2d 569 (2020) (quotation marks and citation omitted). “[T]he boundaries between [the branches of government] need not be airtight,” and “the separate powers were not intended to operate with absolute independence.” *Makowski v Governor*, 495 Mich 465, 482; 852 NW2d 61 (2014) (quotation marks and citation omitted). Nevertheless, our Supreme Court “is not authorized to enact court rules that establish, abrogate, or modify the substantive law.” *McDougall v Schanz*, 461 Mich 15, 27; 597 NW2d 148 (1999). Therefore, deciding the constitutionality of a court rule requires consideration of “whether the [court rule] addresses purely procedural matters or substantive law.” *Id.*

Plaintiff contends MCR 3.501(A)(5) went beyond the Court’s constitutional authority to create rules regarding practice and procedure and amounted to an amendment of substantive law in all statutes that allow for statutory minimum damages, do not cap those damages, and do not contain a specific statutory clause allowing or barring a class action to collect those damages. In particular, plaintiff claims the rule “strip[ped] away a substantive right of each putative class member to recover statutory monies under the plain language of” such statutes. However, the court rule does no such thing.

As discussed, the court rule in no way restricts the right of individuals to bring their own claims under such statutes. Class actions are, in part, a way for plaintiffs to recover despite having individually suffered harms too small to make a lawsuit economically



viable. See *Eisen v Carlisle & Jacquelin*, 417 US 156, 161; 94 S Ct 2140; 40 L Ed 2d 732 (1974). However, we note that under the RCPA and the Occupational Code, such individual claims, if successful, may entitle plaintiffs to reasonable attorney fees and court costs if the defendant's violation was willful. MCL 445.257(2); MCL 339.916(2). At least as applied to this matter, the availability of attorney fees and court costs in addition to statutory damages obviates the problem of individual lawsuits being intrinsically unviable. Furthermore, the court rule expressly states that it does not apply when the Legislature has specifically authorized class-action recovery in a statute. We presume the Legislature is aware of the language of the court rule, see *Waterford Sch Dist v State Bd of Ed*, 98 Mich App 658, 666; 296 NW2d 328 (1980), especially because the Legislature did, in fact, specifically authorize class-action recoveries in other statutes in which minimum damages are available. See MCL 445.1681 (Mortgage Brokers, Lenders, and Servicers Licensing Act, MCL 445.1651 *et seq.*); MCL 445.911 (Michigan Consumer Protection Act, MCL 445.901 *et seq.*); MCL 445.815 (act regulating certain advertisements, MCL 445.811 *et seq.*).

We conclude that MCR 3.501(A)(5) does not abrogate any substantive right granted by the Legislature, and it does not violate the separation-of-powers doctrine.

#### C. APPLICABILITY OF COURT RULE

A plaintiff who prevails in an action brought under the RCPA is entitled to "the amount of actual damages or \$50.00, whichever is greater." MCL 445.257(2). A plaintiff who prevails in an action under the Occupational Code is similarly entitled to "the amount of actual damages or \$50.00, whichever is greater." MCL

339.916(2). Both statutes therefore provide for “a penalty or minimum amount of recovery without regard to actual damages,” MCR 3.501(A)(5), and the parties agree neither the RCPA nor the Occupational Code contain provisions specifically permitting class actions.

Plaintiff argues that MCR 3.501(A)(5) does not apply to her lawsuit because she and the other class members can prove they suffered actual damages. Plaintiff’s argument is generally that MCR 3.501(A)(5) limits its applicability to cases *exclusively* seeking a penalty or statutory minimum damages. For example, she claims because she is also seeking actual damages, declaratory relief, and a permanent injunction, her class action is not barred under MCR 3.501(A)(5). However, as discussed, the court rule applies to the *action*, not to particular claims, other than the divide between individual and class claims. Furthermore, the count in plaintiff’s complaint for violations of the RCPA and the Occupational Code sought relief in favor of both her and the putative class in the form of, among other things, “statutory and actual damages allowed under the RCPA and/or [the Occupational Code.]” Plaintiff clearly sought statutory minimum damages, where available, so she necessarily brought “[a]n action for a penalty or minimum amount of recovery without regard to actual damages imposed or authorized by” the RCPA and Occupational Code, which do not “specifically authorize[] recovery in a class action.” MCR 3.501(A)(5).

Plaintiff argues that her separate claims for injunctive and declaratory relief should not be barred by MCR 3.501(A)(5). As discussed, the court rule does not preclude plaintiff from pursuing individual claims premised on violations of the RCPA and the Occupational Code, whether for injunctive relief, declaratory relief,

or money damages. Plaintiff did present a separate “declaratory judgment” count and a separate “permanent injunction” count in her complaint. However, the nature of a claim is not determined by the form or manner of presentation of a complaint but, rather, by considering the underlying substance of the complaint. *Hurtford v Holmes*, 3 Mich 460, 463 (1855); *Norris v Lincoln Park Police Officers*, 292 Mich App 574, 582; 808 NW2d 578 (2011). Furthermore, a claim for equitable relief is not an independent, standalone cause of action; rather, it is a remedy that must be supported by a cause of action. *Henry v Dow Chem Co*, 473 Mich 63, 96-97; 701 NW2d 684 (2005). Plaintiff’s requests for equitable relief premised on violations of the RCPA and the Occupational Code are not practically severable from her action for statutory minimum damages under the same statutes.<sup>2</sup>

#### D. PROCEDURAL MATTERS

Plaintiff finally argues that defendants were not permitted to move for summary disposition of her class-action claims under MCR 2.116(C)(8) until she first moved to certify the class under MCR 3.501(B)(1). However, MCR 2.116(D)(4) provides that a motion for summary disposition under MCR 2.116(C)(8) “may be raised at any time, unless a period in which to file dispositive motions is established under a scheduling order entered pursuant to MCR 2.401.” Furthermore, the only timing restriction on putative class-action

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<sup>2</sup> The jurisdiction of the circuit courts to hear claims for equitable relief is therefore irrelevant to the disposition of plaintiff’s class-action claims under the circumstances of this case. Therefore, we need not address plaintiff’s arguments regarding the jurisdiction of the circuit court to hear claims for injunctive or declaratory relief because those arguments pertain to her class-action claims.

defendants pertains to when those defendants may file notice regarding a plaintiff's failure to certify a class. MCR 3.501(B)(2). Otherwise, the court rules contain no such limitation on when a party can move for summary disposition under MCR 2.116(C)(8). MCR 2.116(D)(4).

In sum, the trial court properly concluded that MCR 3.501(A)(5) applied to plaintiff's complaint and that she was barred from maintaining a class action, and the trial court then properly disposed of all class-action claims found in the lawsuit because they failed to state a claim upon which relief could be granted.<sup>3</sup>

#### IV. PLAINTIFF'S INDIVIDUAL CLAIMS

Plaintiff argues the trial court erred by summarily disposing of her individual claims under MCR 2.116(C)(4), arguing that the trial court erred for several distinct reasons<sup>4</sup> in determining that it lacked subject-matter jurisdiction over those claims. We disagree.

##### A. JURISDICTIONAL AMOUNT OF DAMAGES

Plaintiff argues that she pleaded individual actual damages in excess of the circuit court's jurisdictional threshold of \$25,000. Circuit courts in Michigan are courts of general jurisdiction by default, except when a constitutional provision or a statute confers exclusive jurisdiction upon another court. *Meisner Law Group*,

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<sup>3</sup> At oral argument, plaintiff suggested that consumers may be confused and disadvantaged by the application of MCR 3.501(A)(5), but that public-policy argument must be addressed by the Legislature, which, as discussed, could have authorized class actions under the RCPA or the Occupational Code but chose not to do so.

<sup>4</sup> One of the reasons asserted by plaintiff is that the motion for summary disposition was procedurally improper. We have already discussed why we disagree with this argument.

*PC v Weston Downs Condo Ass'n*, 321 Mich App 702, 715-716; 909 NW2d 890 (2017). The circuit courts lack jurisdiction over actions in which the amount in controversy could not exceed \$25,000, as determined at the outset of the proceedings on the basis of the allegations in the complaint. *Id.* at 714-716. Generally, “in its subject-matter jurisdiction inquiry [a court] determines the amount in controversy using the prayer for relief set forth in the plaintiff’s pleadings, calculated exclusive of fees, costs, and interest.” *Hodge v State Farm Mut Auto Ins Co*, 499 Mich 211, 223-224; 884 NW2d 238 (2016). However, when deciding a motion for summary disposition under MCR 2.116(C)(4), which requires a court to consider evidence in the record, a circuit court must go beyond the pleadings to determine whether the amount in controversy could not exceed \$25,000. *Meisner Law Group, PC*, 321 Mich App at 717-718. Furthermore, although an award of attorney fees provided by statute or by contract may be considered part of the amount in controversy, a reasonable estimate of the probable value of those fees should be provided by the party seeking those fees.<sup>5</sup> See *ABCS Troy LLC v Loancraft*

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<sup>5</sup> Defendant argues that this is contrary to our Supreme Court’s holding in *Hodge*, but that conclusion is not obvious. In *Hodge*, the plaintiff had affirmatively asserted that she sought damages of less than \$25,000 but ultimately presented proof at trial of damages considerably in excess of that amount, and our Supreme Court held that the district court’s jurisdiction should be assessed on the basis of the pleadings rather than the proofs. *Hodge*, 499 Mich at 213-214, 219-220, 223-224. In this case, plaintiff requested *statutory* attorney fees on the face of her complaint. We think that *Hodge* does not preclude the inclusion of such attorney fees within the amount in controversy, so long as plaintiff provided a reasonable estimate of those fees, and so long as the estimate is made in good faith. See *Krolczyk v Hyundai Motor America*, 507 Mich 966, 966-967 (2021). In any event, we are required to follow *Meisner Law*

*LLC*, 337 Mich App 125, 133-141; 972 NW2d 317 (2021); *Peters v Gunnell, Inc*, 253 Mich App 211, 224 n 10; 655 NW2d 582 (2002).

Affording the maximum possible generosity to plaintiff's complaint, plaintiff has arguably claimed that she individually suffered actual damages of, at most, \$6,000. As a result, plaintiff simply has not pleaded individual claims in excess of the jurisdictional amount to avoid the exclusive jurisdiction of the district court. MCL 600.8301(1).

In responding to defendants' motion for summary disposition, plaintiff contended she could prove damages above the jurisdictional amount. She alleged she suffered special damages in the form of clearing the public record of misinformation about the amount of debt she owed defendants. Although plausible, plaintiff never offered any kind of estimate of those special damages, nor did she offer any specific evidence of those special damages. A party opposing summary disposition need not be able to immediately prove their case. *Durant v Stahlin*, 375 Mich 628, 645-647; 135 NW2d 392 (1965) (SOURIS, J., concurring); *Morales v Auto-Owners Ins Co*, 458 Mich 288, 304; 582 NW2d 776 (1998). However, a party opposing summary disposition must provide more than speculation or possibility. *Meisner Law Group, PC*, 321 Mich App at 723. Plaintiff has not provided more than a mere possibility.

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*Group, PC* and *ABCS Troy LLC* pursuant to MCR 7.215(J)(1). Plaintiff suggested at oral argument that *ABCS Troy LLC* has been overruled in part by *Silverman v Korn (On Remand)*, 339 Mich App 384; 984 NW2d 536 (2021). However, *Silverman* did not address statutory attorney fees in the context of the amount in controversy but, rather, only addressed whether a corporation and individual could recover attorney fees when representing themselves under a contract fee provision. We are unpersuaded that *Silverman* is relevant to this matter.

Plaintiff also argued that the attorney fees to which she could be entitled under the RCPA or Occupational Code would exceed the circuit court's jurisdictional minimum amount. However, plaintiff never provided the trial court with a reasonable estimate of what her probable fees would be to pursue her individual claims. See *ABCS Troy LLC*, 337 Mich App at 140-141. On appeal, plaintiff asserts that, considering the entirety of the case, from drafting the complaint through a projected appeal in our Supreme Court, she could reasonably expect to incur attorney fees in excess of \$25,000. We presume attorney fees would include those incurred in appellate proceedings, absent statutory language to the contrary. *Bloemsma v Auto Club Ins Ass'n (After Remand)*, 190 Mich App 686, 690; 476 NW2d 487 (1991). Nevertheless, MCL 445.257(2) and MCL 339.916(2) both provide for "reasonable attorney's fees and court costs incurred in connection with the action." Under the circumstances of this case, "the action" would mean only plaintiff's individual claims, and "reasonable" fees and costs do not necessarily include all expenses incurred. Plaintiff would therefore clearly not be entitled to all of the attorney fees she may incur. In any event, plaintiff has merely offered a conclusory statement about what might be possible, without any supporting evidence and essentially conjectural reasoning. *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). We are unable to find support in the record or in plaintiff's arguments for the proposition that the amount in controversy, as to plaintiff's individual claims, exceeded \$25,000.

#### B. CONTINUING JURISDICTION

Plaintiff also relies on MCR 3.501(B)(3)(e), which provides that "[i]f [class] certification is denied or

revoked, the action shall continue by or against the named parties alone.” The plain import of this court rule is that dismissal of plaintiff’s class-action claims does not, by itself, require or permit dismissal of plaintiff’s individual claims. However, nothing in this court rule specifies that the action cannot subsequently be dismissed for other reasons, such as a lack of subject-matter jurisdiction. Indeed, unlike plaintiff’s previously discussed separation-of-powers argument, to construe MCR 3.501(B)(3)(e) as granting a circuit court subject-matter jurisdiction over claims that would not otherwise be within the circuit court’s jurisdiction, merely because the complaint sought class certification, *would* violate the principle of separation of powers. See *In re Gordon Estate*, 222 Mich App 148, 153-154; 564 NW2d 497 (1997). Furthermore, such a construction would invite the kind of artful pleading and elevation of form over substance that courts in Michigan have long condemned. See *Hurtford*, 3 Mich at 463. The trial court properly did not dismiss plaintiff’s individual claims on the basis of its dismissal of plaintiff’s class-action claims, and it recognized that plaintiff’s individual claims likely would continue, albeit in district court. MCR 3.501(B)(3)(e) required nothing more of the trial court.

#### C. EQUITABLE JURISDICTION

We note that plaintiff has raised various arguments generally asserting that the circuit court has exclusive jurisdiction over actions for declaratory or injunctive relief. For the reasons discussed, those arguments are irrelevant as to plaintiff’s class-action claims. Plaintiff’s request for relief does include remanding “her individual claims,” including her claims for declaratory and injunctive relief, to the trial court. However, we



are unable to discern any substantive argument seeking to maintain any individual claims for injunctive or declaratory relief, and as discussed, we are not persuaded that plaintiff's requests for equitable relief can stand alone from her legal claims under the RCPA and the Occupational Code. We are therefore unpersuaded that the trial court erred by dismissing plaintiff's individual claims in their entirety for lack of subject-matter jurisdiction.

In any event, the *general* rule is that the district court lacks any jurisdiction over injunctive or equitable matters. MCL 600.8315. Nevertheless, the district court is not totally without equitable powers. The district court is a court of record, MCL 600.8101(1), and therefore it may declare the rights of parties to a controversy otherwise within its jurisdiction, MCR 2.605(A). Furthermore, "the district court has equitable jurisdiction and authority concurrent with that of the circuit court in," MCL 600.8302 (1), among other matters, "cases brought under chapter 84," which governs small claims, MCL 600.8302(2). When plaintiff's complaint was filed, the small-claims division had jurisdiction of up to \$6,000. MCL 600.8401(c). Notably, plaintiff's complaint did not seek attorney fees for her equitable claims, and as discussed, \$6,000 is the most that otherwise appears to potentially be in controversy. We are therefore equally unpersuaded by plaintiff's argument that she had no other venue in which to pursue her claims for equitable relief.

Affirmed.

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

*In re CADP*

Docket Nos. 358271 and 358383. Submitted April 13, 2022, at Grand Rapids. Decided April 21, 2022, at 9:10 a.m.

David and Donna Prevo, the paternal grandparents of CADP, a minor, petitioned the Kalkaska Probate Court to adopt the child. Petitioners' daughter and son-in-law, Daena and Jason Thibodeau, and the child's maternal grandmother, Yvonne Robinson, also sought to adopt the child. The Michigan Children's Institute (MCI) recommended Robinson for the adoption. Petitioners filed a motion in the court under MCL 710.45, alleging that MCI's decision to withhold consent for petitioners to adopt the child was arbitrary and capricious. Petitioners sent subpoenas to MCI, seeking the complete MCI file regarding the child, including documents, reports, case notes, interview notes, or any other information that was gathered in the investigation regarding the child; MCI requested an extension to gather information. Petitioners also sent subpoenas to the Department of Health and Human Services (DHHS) and Bethany Christian Services (BCS), seeking any and all documents related to the child, including documents, memorandums, case notes, interview notes, or any other information related to the child. DHHS and BCS denied the request for records, but BCS did agree to provide records pertaining specifically to petitioners. Petitioners moved for discovery, arguing that they were entitled to the requested information. BCS and DHHS, acting on behalf of MCI, opposed the motion. BCS argued that the subpoena should be quashed or modified to avoid its statutory obligation to maintain all records as confidential or, in the alternative, that the court should enter a protective order under MCR 2.302(C) to limit discovery to that allowed under statutes and to maintain confidentiality. DHHS argued that the discovery rules did not apply in proceedings brought under MCL 710.45 because the proceeding involved a motion, not a complaint or civil action; that the records sought were statutorily confidential; and that the discovery request was overbroad. In the alternative, DHHS argued that if the court allowed discovery, a protective order under MCR 2.302(C) was necessary. Following a hearing, the court, Lynne M. Buday, J., denied petitioners' request for discovery and quashed the subpoenas issued to DHHS

and BCS, reasoning that petitioners were not entitled to discovery because (1) the general discovery rules did not apply to proceedings under MCL 710.45, (2) the information sought was confidential, and (3) regardless, petitioners' subpoenas were overbroad. Petitioners appealed.

The Court of Appeals *held*:

1. The MCI superintendent represents the state as guardian of each child committed to DHHS, and consistently with that responsibility, the MCI superintendent has authority under MCL 400.209(1) to consent to an adoption request. MCL 710.45(2) provides that when the MCI superintendent does not consent to a petitioner's request to adopt, the petitioner may challenge that decision by filing a motion setting forth specific reasons why the decision to withhold consent was arbitrary and capricious. Under MCL 710.45(7), the court must deny the motion and dismiss the petition to adopt if the petitioner fails to establish by clear and convincing evidence that the decision to withhold consent was arbitrary and capricious. It is the absence of any good reason to withhold consent, rather than the presence of good reasons to grant it, that indicates that the decision-maker has acted arbitrarily and capriciously.

2. Michigan is committed to a far-reaching and open discovery practice, and the rules of discovery should be liberally construed to further the ends of justice. MCR 3.800(A) provides that, except as modified by the rules in Chapter 2, adoption proceedings are governed by the Michigan Court Rules. Under MCR 2.301(A)(1), a party may seek discovery after commencement of the action when authorized by the court rules, by stipulation, or by court order. MCR 2.101(A) and (B) provide that there is one form of action known as a civil action and that a civil action is commenced by filing a complaint with a court. MCR 2.302(B)(1) provides that parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claims or defenses and proportional to the needs of the case, taking into account all pertinent factors, including whether the burden or expense of the proposed discovery outweighs its likely benefit, the complexity of the case, the importance of the issues at stake in the action, the amount in controversy, and the parties' resources and access to relevant information. Before 2002, adoption proceedings were within the jurisdiction of the probate court, and the court rules stated that adoption proceedings, with certain exceptions not pertaining to discovery, were governed by the rules applicable to probate proceedings; thus, discovery was available in adoption proceedings before the Supreme Court moved the applicable court rules

from Subchapter 5.750 to Subchapter 3.800. The statutory provisions governing the family division of the circuit court do not suggest that when jurisdiction of adoption proceedings was moved from the probate court to the family division of the circuit court, the opportunity for discovery was to be eliminated. Reorganizing legislation should not be understood as intentionally eliminating an established right unless the language of the legislation makes such a change clear and unambiguous. MCR 3.800(A) provides that adoption proceedings are governed by the Michigan Court Rules, and no provision in Chapter 3 limits the right of discovery in adoption proceedings. In a hearing brought under MCL 710.45, petitioners are entitled to set forth pertinent evidence; because discovery rules apply to hearings brought under that section, the evidence petitioners seek to introduce will often be obtained through the discovery process. Further, because at a hearing brought under MCL 710.45 it is the petitioners' burden to establish by clear and convincing evidence that the decision to withhold consent was arbitrary and capricious, petitioners must be afforded the means to carry that burden. In this case, the trial court erred by concluding that the general discovery rules did not apply to proceedings under MCL 710.45. Further, the subpoenas were not necessarily overbroad. The case files related to the child were relevant under MCR 2.302(B)(1), and the trial court could address any objections to requested discovery, including through a protective order under MCR 2.302(C) or through a request for an *in camera* review. The burden was on petitioners to establish by clear and convincing evidence that the decision to withhold consent was arbitrary and capricious, and they had to be afforded the means to attempt to carry that burden.

3. The arguments by DHHS and BCS that the requested discovery was prohibited by certain statutes was without merit. Under MCL 400.211, all MCI records must be filed as confidential, and may not be made public except as authorized by DHHS. However, with regard to proceedings brought under MCL 710.45, the records can remain "filed as confidential" but still be subject to inspection through discovery, specifically through a protective order. Thus, MCI records may be inspected only under a protective order, to comply with the confidentiality requirements of MCL 400.211. MCL 710.67(1) provides that, with certain exceptions, records of proceedings in adoption cases, and the papers and books related to the proceedings, must be kept in separate locked files and are not open to inspection or copy except by court order for good cause shown expressly permitting inspection or copy. A petition brought under MCL 710.45 constitutes "good

cause shown” for purposes of MCL 710.67(1). Accordingly, petitioners’ desire in this case to present evidence in support of their motion brought under MCL 710.45 constituted good cause for purposes of MCL 710.67(1). MCL 722.120, which applies to DHHS’s authority to investigate, inspect, and examine conditions of a childcare organization, including child-placing agencies like BCS, applies to investigations by DHHS of childcare organizations. Licensees are required by the provision to maintain records and compile certain information regarding children, and those records and information are confidential. However, the statute does not create an evidentiary privilege for information sought at a hearing under MCL 710.45, and therefore, MCL 722.120(3) does not preclude discovery from a child-placing agency. In this case, MCL 722.120(3) did not preclude petitioners from obtaining discovery from BCS. The Child Protection Law (CPL), MCL 722.621 *et seq.*, addresses cases of neglect or abuse, which are maintained in a central registry. Under MCL 710.627, except under certain circumstances not relevant in this case, a confidential record compiled under the CPL is a confidential record that is available, in part, to a court when determining the suitability of a person as a guardian of a minor or that otherwise determines that the information is necessary to decide an issue before the court. In this case, any records compiled by BCS regarding reports of abuse by the child’s mother before her death were confidential and were, therefore, not available to petitioners through the discovery process. However, those reports could be used by the trial court on remand if the court deemed them necessary.

Reversed and remanded for further proceedings.

ADOPTION – DENIAL OF PETITION TO CONSENT TO ADOPTION – CHALLENGES TO DENIAL – COURT RULES – DISCOVERY ALLOWED.

When the superintendent of the Michigan Children’s Institute does not consent to an adoption request, MCL 710.45 allows the petitioner to challenge that decision by filing a motion setting forth specific reasons why the decision to withhold consent was arbitrary and capricious; the petitioner has the burden to establish by clear and convincing evidence that the decision to withhold consent was arbitrary and capricious; adoption proceedings are governed by the Michigan Court Rules, and because it is the petitioner’s burden to establish by clear and convincing evidence that the decision to withhold consent was arbitrary and capricious, petitioners are entitled to discovery during the hearing brought under MCL 710.45, subject to a protective order under MCR 2.302(B)(1).

*Phelps Legal Group, PLC* (by *Eric W. Phelps* and *Morgan G. Shier*) for David and Donna Prevo.

*Dana Nessel*, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Erin E. Harrington*, Assistant Attorney General, for the Department of Health and Human Services.

*Warner Norcross + Judd LLP* (by *Paul D. Bratt*) for Bethany Christian Services.

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

CAVANAGH, J. In these interlocutory, consolidated appeals involving an adoption matter, petitioners, David and Donna Prevo, appeal by leave granted<sup>1</sup> orders that denied their motion for discovery and quashed subpoenas issued to the Department of Health and Human Services (DHHS) and Bethany Christian Services (BCS). We reverse and remand for further proceedings.

#### I. BACKGROUND FACTS

The parents of CADP, who was born in 2018, are deceased. Petitioners are the paternal grandparents who filed a petition seeking to adopt CADP. Petitioners' daughter and son-in-law, Daena and Jason Thibodeau, also wished to adopt CADP, as did CADP's maternal grandmother, Yvonne Robinson (Yvonne).

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<sup>1</sup> See *In re CADP*, unpublished order of the Court of Appeals, entered November 4, 2021 (Docket No. 358271), and *In re CADP*, unpublished order of the Court of Appeals, entered November 4, 2021 (Docket No. 358383).

The Michigan Children's Institute (MCI)<sup>2</sup> recommended Yvonne for the adoption. Petitioners then filed a motion under MCL 710.45, alleging that MCI's decision to withhold consent for petitioners to adopt CADP was arbitrary and capricious.

Under MCL 710.43(1)(b), a person seeking to adopt a child placed with a state agency must obtain consent from that agency. MCL 710.45 states, in part:

(1) A court shall not allow the filing of a petition to adopt a child if the consent of a representative or court is required by [MCL 710.43(1)(b), (c), or (d)] unless the petition is accompanied by the required consent or a motion as provided in subsection (2).

(2) If an adoption petitioner has been unable to obtain the consent required by [MCL 710.43(1)(b), (c), or (d)], the petitioner may file a motion with the court alleging that the decision to withhold consent was arbitrary and capricious. A motion under this subsection shall contain information regarding both of the following:

(a) The specific steps taken by the petitioner to obtain the consent required and the results, if any.

(b) The specific reasons why the petitioner believes the decision to withhold consent was arbitrary and capricious.

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(8) If the court finds by clear and convincing evidence that the decision to withhold consent was arbitrary and capricious, the court shall issue a written decision and may terminate the rights of the appropriate court, child placing agency, or department and may enter further orders in accordance with this chapter or [MCL 712A.18] as the court considers appropriate.

Petitioners were proceeding under § 45.

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<sup>2</sup> DHHS states the following on appeal: "The MCI falls under the umbrella of MDHHS and should therefore be treated as the same party in all the proceedings."

The court scheduled a § 45 hearing. Petitioners moved for discovery, alleging that they had “requested discovery from [MCI] by issuing a Subpoena” seeking the following:

The complete MCI file regarding [CADP]. This includes documents, reports, memorandums, case notes, interview notes or any other information that was gathered in the investigation relating to the minor child. It also includes all email communication, and case conference notes documenting communication with any person.

Petitioners stated that MCI had requested an extension to gather information. Petitioners alleged that they had also sent subpoenas to DHHS and BCS seeking:

Any and all documents relating to [CADP]. This includes documents, reports, memorandums, case notes, interview notes or any other information that was gathered in the course of your assessment or case assignment relating to the minor child.

Petitioners noted that DHHS and BCS had denied the request for records, although BCS agreed to provide records pertaining specifically to petitioners. Petitioners alleged that they were entitled to the requested information pursuant to caselaw and the court rules.

BCS filed a response that stated, in part:

[T]he subpoena should either be quashed or modified to avoid . . . statutory obligations to maintain “all records” as confidential. In the alternative, [BCS] respectfully requests that the [c]ourt enter a protective order under MCR 2.302(C) to limit the discovery pursuant to the relevant statutes and to maintain the requisite confidentiality.

DHHS argued that the discovery rules were not applicable to a § 45 proceeding because such a proceeding



involves a motion, not a complaint or “civil action.” It also argued that the records sought were confidential under statutory law. DHHS further argued that petitioners’ request was overbroad and that the subpoena should be quashed. But, DHHS noted, if the court did allow for discovery, a protective order under MCR 2.302(C) should be entered and an *in camera* review should take place.

At the hearing on the motion for discovery, petitioners agreed that a protective order would be appropriate. However, the court concluded that petitioners were not entitled to discovery because the general discovery rules do not apply to § 45 proceedings; the information sought was confidential, in any event; and petitioners’ subpoenas were overbroad. Specifically, the court held:

It is not a civil action. They’ve only filed a motion. It’s a motion pursuant to MCLA 710.45, which is—does not constitute a complaint, in my opinion, creating a civil action. And, therefore, they’re not entitled to any kind of discovery on that. It’s not a pleading as defined by the Court Rule. The general rules regarding discovery would not apply to this Section 45 motion. And, even if it were allowed, it would be, as the Department is arguing, limited to matters that are not privileged. And it’s pretty clear, you know, when you look at the statutes, that all of these records that you’re seeking, you know, that are being requested by Petitioners, are confidential records. And that is established by statute. . . . I mean, there’s several different statutes that apply. I mean, primarily MCLA 400.211, all records pertaining to any child committed to the institute, to MCI, shall be filed as confidential and shall not be made public excepting as the said commission shall authorize when deemed necessary for the best interest of the child. And that has not been done or deemed necessary.

In addition, there are additional statutes for which the Petitioners do not fall under any of the exceptions. I guess I'm in agreement with the Department on that argument, as well, under 722.627 and then 722.120.

And then there's [the] additional statute, 710.67, that all records and proceedings in adoption cases are basically to . . . be kept confidential, shall not be open for inspection or copy, except upon the order of the [c]ourt of record for good cause shown.

I'm in agreement that discovery does not apply to the underlying Section 45 motion.

The court then went on to address the scope of petitioners' subpoenas, holding that the subpoenas were unreasonable and overbroad because they requested all records. The court stated that a § 45 hearing served the limited purpose of providing petitioners an opportunity to show that the MCI representative acted arbitrarily and capriciously and discovery was not allowed. The court issued a pretrial conference summary that stated, in part, "Discovery is not ordered." It then issued an additional order, stating that the motion for discovery was denied and that the subpoenas issued to DHHS<sup>3</sup> and BCS were quashed. Proceedings have been stayed pending appeal.

## II. ANALYSIS

Petitioners argue that they were entitled to the requested discovery because the discovery rules apply to a § 45 hearing initiated by motion, their subpoenas were not overbroad, and the confidential nature of the information would have been adequately protected by

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<sup>3</sup> The order did not mention MCI; presumably, MCI was encompassed by the reference to DHHS.

a protective order and *in camera* inspection while allowing for a meaningful § 45 review to occur. We agree.

#### A. STANDARD OF REVIEW

A trial court's decision to grant or deny discovery is reviewed for an abuse of discretion. *Mercy Mt Clemens Corp v Auto Club Ins Ass'n*, 219 Mich App 46, 50-51; 555 NW2d 871 (1996). An abuse of discretion occurs when "the trial court's decision was outside the range of reasonable and principled outcomes." *People v Norfleet*, 317 Mich App 649, 654; 897 NW2d 195 (2016). This Court reviews "de novo as a question of law the applicability of a privilege," *Oesterle v Wallace*, 272 Mich App 260, 263; 725 NW2d 470 (2006), and also reviews de novo issues of statutory construction, *Elba Twp v Gratiot Co Drain Comm'r*, 493 Mich 265, 278; 831 NW2d 204 (2013).

#### B. PROCEEDINGS UNDER MCL 710.45

"A child under 17 years of age, provision for whose support and education has been made under regulations of the department, may be admitted to the Michigan children's institute by commitment to the department." MCL 400.203(1). The MCI superintendent represents "the state as guardian of each child committed beginning with the day the child is admitted and continuing until the child is 19, unless the superintendent or the department discharges the child sooner . . . ." *Id.* Consistently with that responsibility, the MCI superintendent is empowered to consent to an adoption request. MCL 400.209(1).

MCL 710.45(2) provides that when the MCI superintendent does not consent to an adoption, the peti-

tioner seeking the adoption may challenge the denial by filing a motion setting forth specific reasons why the decision to withhold consent was arbitrary and capricious. Thus, the motion is a required, not a discretionary, part of the petition process. A court must deny the motion and dismiss the petition to adopt if the petitioner fails to establish “by clear and convincing evidence that the decision to withhold consent was arbitrary and capricious[.]” MCL 710.45(7). A decision is arbitrary if, although decisive, it is reached by “whim or caprice” rather than being reasoned and driven by reference to “principles, circumstances, or significance[.]” *In re Keast*, 278 Mich App 415, 424; 750 NW2d 643 (2008) (some quotation marks and citation omitted). A decision is capricious if it is whimsical, freakish, or humorous, or apt to being suddenly changed. *Id.* at 424-425. Regarding the withholding of consent to adopt, “[i]t is the absence of any good reason to withhold consent, rather than the presence of good reasons to grant it, that indicates that the decision maker has acted arbitrarily and capriciously.” *Id.* at 425.

#### C. DISCOVERY

“Michigan has long supported a policy of far-reaching, open, and effective discovery practice.” *Shinkle v Shinkle (On Rehearing)*, 255 Mich App 221, 225; 663 NW2d 481 (2003). “Discovery rules must be liberally construed to further the ends of justice.” *Id.* As a general proposition,

[p]arties may obtain discovery regarding any non-privileged matter that is relevant to any party’s claims or defenses and proportional to the needs of the case, taking into account all pertinent factors, including whether the burden or expense of the proposed discovery outweighs its likely benefit, the complexity of the case, the importance of the issues at stake in the action, the amount in contro-

versy, and the parties' resources and access to relevant information. Information within the scope of discovery need not be admissible in evidence to be discoverable. [MCR 2.302(B)(1).]

MCR 3.800(A) states, "Except as modified by the rules in this chapter, adoption proceedings . . . are governed by [the] Michigan Court Rules." MCR 2.001 states, "The rules in this chapter [i.e., Chapter 2, governing civil procedure] govern procedure in all civil proceedings in all courts established by the constitution and laws of the State of Michigan, except where the limited jurisdiction of a court makes a rule inherently inapplicable or where a rule applicable to a specific court or a specific type of proceeding provides a different procedure." MCR 2.301(A)(1) provides, in part, that "a party may seek discovery after commencement of the action when authorized by these rules, by stipulation, or by court order." MCR 2.101(A) states that "[t]here is one form of action known as a 'civil action.'" And MCR 2.101(B) states that "[a] civil action is commenced by filing a complaint with a court."

DHHS and BCS contend that a motion, not a complaint, is at issue in this case and, therefore, the discovery rules do not apply.

Legislative and court-rule history is illuminative in considering this argument. 1996 PA 388, effective January 1, 1998, created the family division of the circuit court. See MCL 600.1001 and MCL 600.1003. The Legislature gave the family division exclusive jurisdiction over cases brought under the adoption code, which were previously under the jurisdiction of the probate court. MCL 600.1021(1)(b). Accordingly, the Supreme Court moved the rules governing adoptions from Subchapter 5.750 of Chapter 5 of the court rules (governing probate court proceedings) to Sub-

chapter 3.800 of Chapter 3 (governing special proceedings and actions).<sup>4</sup> As stated in the 2002 staff comment to MCR 3.805:

The amendment and renumbering of MCR 5.750-5.756 and 5.781-5.783 as MCR 3.800-3.806 and 3.613-3.615, effective May 1, 2002, were proposed by the Family Division Joint Rules Committee. The statute creating the family division of circuit court gave it jurisdiction of a number of types of proceedings formerly heard in the probate court. See MCL 600.1021. The amendments move the rules governing adoptions, change of name, Parental Rights Restoration Act proceedings, and proceedings regarding persons who pose health threats to others, from Chapter 5, which contains probate court provisions, to Chapter 3. In addition, there are several modifications of the rules. [MCR 3.805, 465 Mich cixviii-cixix (staff comment).]

Before this changeover, the court rules stated that adoption proceedings were (aside from specific provisions not pertaining to discovery) governed by the rules generally applicable to probate proceedings. See *In re Sanchez*, 422 Mich 758, 769-770; 375 NW2d 353 (1985). MCR 5.101(A) and (B) provide (and did so before the changeover, as well) that there are two forms of action, a “proceeding” and a “civil action,” and that a proceeding can be commenced by way of petition. See, generally, *In re Gordon Estate*, 222 Mich App 148, 155 n 5; 564 NW2d 497 (1997), and *In re Brown*, 229 Mich App 496, 501; 582 NW2d 530 (1998). In addition, the court rules provide (and did so before the changeover, as well) that the general discovery rules

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<sup>4</sup> MCL 600.401(2)(c) states that, under a particular plan of concurrent jurisdiction, “[t]he probate court and 1 or more probate judges may exercise the power and jurisdiction of the circuit court.” See also MCL 600.841(2) and MCL 600.1021(3). Presumably, the probate court in the present case is operating under one of the statutes allowing for a probate court to hear circuit court matters.

apply to probate court proceedings. See MCR 5.131 and *In re Brown*, 229 Mich App at 502-503.

Accordingly, discovery was available in adoption proceedings before the Supreme Court moved the applicable court rules from Subchapter 5.750 to Subchapter 3.800. There is nothing in the statutory provisions governing the family division of the circuit court suggesting that when jurisdiction of adoption proceedings was moved from the probate court, the opportunity for discovery was to be eliminated. The creation of the family court and the movement of family-related matters, like adoption, to the jurisdiction of the circuit court was designed to make the courts more comprehensible to Michigan citizens, especially those who are involved in family litigation interweaving different legal issues previously heard in different court divisions. Reorganizing legislation should not be understood as intentionally eliminating an established right unless the language of the legislation makes such a change clear and unambiguous. And, again, as previously noted, MCR 3.800(A) states that adoption proceedings are governed by the Michigan Court Rules except as modified by rules in Chapter 3. No provision in Chapter 3 limits the right of discovery in adoption proceedings.

DHHS and BCS rely on *In re Cotton*, 208 Mich App 180; 526 NW2d 601 (1994), in arguing that the scope of a § 45 review is limited and that, therefore, discovery need not be required. In that case, the Court stated:

The fact that the Legislature in drafting [§ 45] limited judicial review to a determination whether consent was withheld arbitrarily and capriciously, and further required that such a finding be based upon clear and convincing evidence, clearly indicates that it did not intend to allow the probate court to decide the adoption issue de novo and substitute its judgment for that of the

representative of the agency that must consent to the adoption. Rather, the clear and unambiguous language terms of the statute indicate that the decision of the representative of the agency to withhold consent to an adoption must be upheld unless there is clear and convincing evidence that the representative acted arbitrarily and capriciously. Thus, the focus is not whether the representative made the “correct” decision or whether the probate judge would have decided the issue differently than the representative, but whether the representative acted arbitrarily and capriciously in making the decision. Accordingly, the hearing under § 45 is not, as petitioners seem to suggest, an opportunity for a petitioner to make a case relative to why the consent should have been granted, but rather is an opportunity to show that the representative acted arbitrarily and capriciously in withholding that consent. It is only after the petitioner has sustained the burden of showing by clear and convincing evidence that the representative acted arbitrarily and capriciously that the proceedings may then proceed to convincing the probate court that it should go ahead and enter a final order of adoption. [*Id.* at 184.]

But the mere fact that a deferential scope of review applies does not mean that discovery should be withheld. *In re Cotton* provides no basis to refute the discovery analysis in this opinion.

Petitioners in a § 45 hearing are entitled to set forth pertinent evidence, and the manner of obtaining such evidence will often be through the discovery process. That discovery is available in adoption proceedings has been recognized in decisions of this court, albeit in unpublished decisions. For example, in the case of *In re COH, ERH, JRG, & KBH (On Remand)*, unpublished per curiam opinion of the Court of Appeals, issued December 4, 2014 (Docket Nos. 309161 and 312691), the appellant challenged the MCI superintendent’s decision to deny her consent to adopt. *Id.* at 2. The decision was ultimately upheld, but this Court also



addressed the appellant's argument "that the trial court erred in partially denying her motion to compel discovery, thereby rubber-stamping the superintendent's decision without having access to complete and accurate information about the children's individual circumstances." *Id.* at 9. This Court stated:

Michigan is strongly committed to a far-reaching and open discovery practice. The rules of discovery should be liberally construed in order to further the ends of justice. As a general rule, a party may obtain discovery of any non-privileged matter that is relevant to the subject matter of the pending case. MCR 2.302(B)(1). MCR 3.800(A) provides that adoption proceedings are governed by the general court rules, except as modified by MCR 3.801 through MCR 3.807. *Logically, then, the court rules governing discovery typically apply to adoption proceedings.*

We hold that [appellant] has not established that the trial court abused its discretion by ruling as it did. [Appellant] *acknowledges that the court ordered the MCI superintendent to make available to [her] counsel for inspection the MCI's entire file on the children.* She complains, however, that had she had access to all of the information sought, such as additional facts about the foster family and various policies, she might have been able to present more compelling arguments or impeach witnesses. We conclude that [appellant's] argument is ultimately based on speculation and seeks to engage in a fishing expedition. [*Id.* at 9 (some citations omitted; emphasis added.)]

Similarly, in the case of *In re Greenwood*, unpublished per curiam opinion of the Court of Appeals, issued August 26, 2008 (Docket No. 277366), p 4, the appellants challenged the trial court's refusal to allow discovery to prepare for the hearing under MCL 710.45. This Court quoted MCR 2.302(B)(1) and noted that the "scope of discovery is broad." *Id.* at 4-5. Thus,

this Court presumed that the general discovery rules applied to adoption proceedings, vacated the trial court's order denying discovery, and directed the trial court to provide an adequate explanation if it denied or limited discovery in the remand proceedings. While we acknowledge that unpublished decisions are not binding precedent, they can be viewed as instructive and persuasive. *Paris Meadows, LLC v Kentwood*, 287 Mich App 136, 145 n 3; 783 NW2d 133 (2010). Again, MCR 3.800(A) provides that adoption proceedings are governed by Michigan Court Rules and no provision in Chapter 3 limits the right of discovery in adoption proceedings. Accordingly, we conclude that the discovery rules do, in fact, apply to a § 45 hearing.

And contrary to the trial court's conclusion, petitioners' subpoenas were not necessarily overbroad. Petitioners sought the case files relating to CADP, which is relevant evidence under MCR 2.302(B)(1) for the purpose of determining whether MCI's decision to withhold consent to adopt the minor child was arbitrary and capricious. In other words, the reasons supporting MCI's decision to withhold consent may be determined to be invalid if, for example, the information relied upon was inaccurate, the child's circumstances were not properly considered, or certain facts were not considered. Any such evidence may only be obtained through appropriate discovery, and specific objections to requested discovery information may be addressed by the trial court, including through a motion for a protective order under MCR 2.302(C) or a request for an *in camera* review. Because it is petitioners' burden in a § 45 hearing to establish "by clear and convincing evidence that the decision to withhold consent was arbitrary and capricious," MCL 710.45(7), petitioners must be afforded the means to attempt to carry that burden.

## D. STATUTORY CONSIDERATIONS

DHHS and BCS also argue that various statutory confidentiality provisions applied, precluding the requested discovery.<sup>5</sup> They rely on MCL 400.211, MCL 710.67(1), MCL 722.120(3) and (4), and MCL 722.627(2).

First, we consider MCL 400.211, which states:

The commission<sup>[6]</sup> shall preserve in said institute [i.e., MCI] all legal and other papers of importance including reports of investigation of parentage, of family conditions of the children committed to said institute, and also a brief history of each child, showing its name, age, county, former residence, occupations, habits and character, so far as can be ascertained, and the name and residence and occupation of the person who has taken the child by agreement, or for adoption. In any report of any officer of the institute, or any agent of the state department of social welfare or any state or county officer, no names of such children, wards of the state, shall be published. Act No. 142 of the Public Acts of 1909, as amended, and Act No. 115 of the Public Acts of 1925, being sections 6733 to 6736, inclusive, of the Compiled Laws of 1929 shall not apply to said institute. All records pertaining to any child committed to said institute shall be filed as confidential and shall not be made public thereafter, excepting as the said commission shall authorize, when deemed necessary for the best interest of the child.

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<sup>5</sup> MCR 2.302(B)(1) states that “[p]arties may obtain discovery regarding any non-privileged matter . . . .” Privileges relate to confidential matters. See generally *McCartney v Attorney General*, 231 Mich App 722, 731; 587 NW2d 824 (1998) (discussing the attorney-client privilege). See also *Reed Dairy Farm v Consumers Power Co*, 227 Mich App 614, 620; 576 NW2d 709 (1998) (concluding that the non-confidential information at issue in that case was subject to discovery).

<sup>6</sup> This is a reference to an earlier iteration of DHHS. See MCL 16.553.

MCL 400.211 plainly states that MCI records are to be “*filed* as confidential” (emphasis added) and are not to be made public except as authorized by DHHS. But petitioners are not arguing for any records to be made *public*. The records in this case can remain “filed as confidential,” yet still be subject to inspection for discovery purposes. Significantly, petitioners freely acknowledge that a protective order is appropriate. It does not appear to us that MCL 400.211 mandates that no records of MCI be disclosed, particularly when a protective order would satisfy the confidentiality requirement as worded in the statute.

Second, we consider MCL 710.67(1), which states:

Except as otherwise provided in subsection (4) or in [MCL 710.68], *records of proceedings in adoption cases*, including a notice filed under section [MCL 710.33(1)], and a petition filed under [MCL 710.34(1)], *and the papers and books relating to the proceedings shall be kept in separate locked files and shall not be open to inspection or copy except upon order of a court of record for good cause shown expressly permitting inspection or copy*. Except as otherwise provided in subsection (4) or in [MCL 710.68], the court, after 21 days following entry of the final order of adoption, shall not permit copy or inspection of the adoption proceedings, except upon a sworn petition setting forth the purpose of the inspection or copy. The court may order notice and a hearing on the petition. The court shall grant or deny the petition in writing within 63 days after the petition is filed, except that for good cause the court may grant or deny the petition after the 63-day period but not later than 182 days after the petition is filed. [Emphasis added.]

Petitioners seem to be suggesting that this statute applies only to records of completed adoptions. “The primary goal of statutory interpretation is to give effect to the Legislature’s intent, focusing first on the statute’s plain language.” *Klooster v Charlevoix*, 488 Mich

289, 296; 795 NW2d 578 (2011). The words of a statute are the most reliable evidence of its intent, and statutes should be read as a whole. *Id.* And this statute speaks plainly to keeping from inspection “records of proceedings in adoption cases” and “the papers and books relating to the proceedings . . .” MCL 710.67(1). The statute does not employ the phrase “completed adoption cases.” The records sought by petitioners were “papers” related to an adoption proceeding. However, the statute also speaks to allowing “inspection or copy” “upon order of a court of record for good cause shown . . .” MCL 710.67(1). Given petitioners’ history of caring for CADP, it seems that petitioners’ desire to present evidence in support of their § 45 motion should, indeed, be deemed “good cause shown” subject to the issuance of a protective order as already discussed.

Third, we consider MCL 722.120, which states, in part:

(1) The department may investigate, inspect, and examine conditions of a child care organization and may investigate and examine the books and records of the licensee. . . .

\* \* \*

(3) A licensee shall keep the records the department prescribes regarding each child in its control and care and shall report to the department, if requested, the facts the department requires with reference to the children upon forms furnished by the department. Except as otherwise provided in this subsection and subsection (4), records regarding children and facts compiled about children and their parents and relatives are confidential and disclosure of this information must be properly safeguarded by the child care organization, the department, and any other

entity in possession of the information. Records that are confidential under this section are available to 1 or more of the following:

(a) A standing or select committee or appropriations subcommittee of either house of the legislature having jurisdiction over protective services matters for children, according to section 7 of the child protection law, 1975 PA 238, MCL 722.627.

(b) The children's ombudsman established in section 3 of the children's ombudsman act, 1994 PA 204, MCL 722.923.

(c) An employee of an agency, bureau, division, or other entity within the department, or an employee of a child caring institution, or a child placing agency contracted with the department, but only to the extent necessary for the administration of child welfare services in each case. The director of the agency responsible for child welfare services, or his or her designee, is responsible for authorizing an employee to have access to the records according to this subdivision and for ensuring that access is given only to the extent necessary.

(d) A national accreditation program, only while on-site, for the purpose of review and accreditation of a child welfare program, agency, or organization.

(4) Notwithstanding subsection (3) and sections 5 and 7(2) of the child protection law, 1975 PA 238, MCL 722.625 and 722.627, information or records in the possession of the department or the department of licensing and regulatory affairs may be shared to the extent necessary for the proper functioning of the department or the department of licensing and regulatory affairs in administering child welfare or child care licensing under this act or in an investigation conducted under section 43b of the social welfare act, 1939 PA 280, MCL 400.43b. Information or records shared under this subsection shall not be released by the department or the department of licensing and regulatory affairs unless otherwise permitted under this act or other state or federal law. Neither the department nor the department of licensing and regulatory affairs

shall release or open for inspection any document, report, or record authored by or obtained from another agency or organization unless 1 of the conditions of section 7(10) of the child protection law, 1975 PA 238, MCL 722.627, applies.

\* \* \*

(6) The department may suspend, deny, revoke, or refuse to renew a license of the child care organization if the licensee does not cooperate with an investigation, inspection, or examination under this section.

“Child care organization”

means a governmental or nongovernmental organization having as its principal function receiving minor children for care, maintenance, training, and supervision, notwithstanding that educational instruction may be given. *Child care organization includes organizations commonly described as child caring institutions, child placing agencies, children’s camps, children’s campsites, children’s therapeutic group homes, child care centers, day care centers, nursery schools, parent cooperative preschools, foster homes, group homes, or child care homes.* [MCL 722.111(b) (emphasis added).]

It appears that BCS, as a nonprofit adoption agency, is a child-placing agency as described under MCL 722.111(e), which states:

“Child placing agency” means a governmental organization or an agency organized under the nonprofit corporation act, 1982 PA 162, MCL 450.2101 to 450.3192, for the purpose of receiving children for placement in private family homes for foster care or for adoption. The function of a child placing agency may include investigating applicants for adoption and investigating and certifying foster family homes and foster family group homes as provided in this act.

Petitioners argue that MCL 722.120 is not applicable because it applies to investigations by DHHS of childcare organizations. We tend to agree with petitioners. DHHS, for its part, cites the portion of MCL 722.120(4) that refers to releasing records as “permitted under this act or other state or federal law” and claims that no such state or federal law applies. But the language cited by DHHS must be read in context. Petitioners were not seeking from DHHS information that *DHHS had previously shared* “to the extent necessary for the proper functioning of the department or the department of licensing and regulatory affairs in administering child welfare or child care licensing under this act or in an investigation conducted under section 43b of the social welfare act, 1939 PA 280, MCL 400.43b.” MCL 722.120(4). Accordingly, DHHS’s argument about “other state or federal law[s]” is without merit.

BCS cites and relies on MCL 722.120(3), which states that “records regarding children and facts compiled about children and their parents and relatives are confidential and disclosure of this information must be properly safeguarded by the child care organization, the department, and any other entity in possession of the information.” But, again, MCL 722.120 applies to investigations by DHHS of childcare organizations and does not expressly create an evidentiary privilege in the circumstances at issue in this matter, particularly when a protective order can be entered to properly safeguard the information. Further, BCS has provided a cursory argument without significant rationale or supporting legal authority, and therefore, we need not further address this argument. See *Bank of America, NA v Fidelity Nat’l Title Ins Co*, 316 Mich App 480, 517; 892 NW2d 467 (2016).



Fourth and finally, MCL 722.627 states, in part:

(1) The department shall maintain a statewide, electronic central registry to carry out the intent of this act.

(2) Unless made public as specified information released under [MCL 722.627d], a written report, document, or photograph filed with the department as provided in this act is a confidential record available only to 1 or more of the following:

\* \* \*

(g) *A court for the purposes of determining the suitability of a person as a guardian of a minor or that otherwise determines that the information is necessary to decide an issue before the court, or in the event of a child's death, a court that had jurisdiction over that child under section 2(b) of chapter XIII of the probate code of 1939, 1939 PA 288, MCL 712A.2.*

\* \* \*

(k) A child placing agency licensed under 1973 PA 116, MCL 722.111 to 722.128, for the purpose of investigating an applicant for adoption, a foster care applicant or licensee or an employee of a foster care applicant or licensee, an adult member of an applicant's or licensee's household, or other persons in a foster care or adoptive home who are directly responsible for the care and welfare of children, to determine suitability of a home for adoption or foster care. *The child placing agency shall disclose the information to a foster care applicant or licensee under 1973 PA 116, MCL 722.111 to 722.128, or to an applicant for adoption.*

\* \* \*

(10) Documents, reports, or records authored by or obtained from another agency or organization shall not be released or open for inspection under subsection (2) unless required by other state or federal law, in response to an

order issued by a judge, magistrate, or other authorized judicial officer, or unless the documents, reports, or records are requested for a child abuse or child neglect case or for a criminal investigation of a child abuse or child neglect case conducted by law enforcement. [Emphasis added.]

MCL 722.627(2)(g) states that filed information is available to “[a] court for the purposes of determining the suitability of a person as a guardian of a minor or that otherwise determines that the information is necessary to decide an issue before the court[.]” The lower court has, at least implicitly, determined that it needs no information under this statute. But one must delve into what information, precisely, this statute deals with. MCL 722.627(1) states, “The department shall maintain a statewide, electronic central registry to carry out the intent of *this act*.” (Emphasis added.) MCL 722.627(2) states, “Unless made public as specified information released under [MCL 722.627d], a written report, document, or photograph filed with the department [i.e., DHHS] as provided in *this act* is a confidential record available only to” the specified people or entities. (Emphasis added.) The referenced act is the Child Protection Law (CPL), MCL 722.621 *et seq.* The CPL deals with cases of neglect or abuse. See, e.g., *Becker-Witt v Bd of Examiners of Social Workers*, 256 Mich App 359, 364; 663 NW2d 514 (2003); see also *Doe v Doe (On Remand)*, 289 Mich App 211, 217; 809 NW2d 163 (2010).<sup>7</sup> As stated in MCL 722.622(c), “central registry” means “the system maintained at the department that is used to keep a record of all reports filed with the department under this act in which

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<sup>7</sup> In *People v Beardsley*, 263 Mich App 408, 413-414; 688 NW2d 304 (2014), the Court stated, “This act [i.e., the CPL] is designed to protect children when the persons who normally do the reporting are actually the persons responsible for the abuse, and thus unlikely to report it.”

relevant and accurate evidence of child abuse or child neglect is found to exist.” But petitioners have explicitly stated the following:

There was only a one month period of time from when the [c]ourt took jurisdiction over [CADP] and when his mother died, and to the extent any of the case file contained information relating to the abuse and neglect case against her, that information could have been excluded and still can be.

In other words, petitioners agree that information pertaining to abuse and neglect can be excluded from discovery. While petitioners did not explicitly state this in their motion for discovery, the court, in exercising its discretion, could have recognized this limitation on otherwise allowable discovery.<sup>8</sup>

### III. CONCLUSION

In summary, we conclude that (1) the discovery rules apply to petitioners’ § 45 motion; (2) petitioners’ subpoenas were not necessarily overbroad; (3) the MCI records can be inspected only under a protective order, to comply with the confidentiality requirements of MCL 400.211; (4) petitioners’ desire to present evidence in support of their § 45 motion was “good cause shown” under MCL 710.67(1); (5) the confidentiality requirement mentioned in MCL 722.120(3) does not preclude discovery from BCS; and (6) records that

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<sup>8</sup> The parties also cite MCL 722.627(2)(k), which speaks to a child-placing agency’s provision of information obtained from DHHS to “an applicant for adoption.” BCS is a child-placing agency. For context, however, see *Romig Estate v Boulder Bluff Condos Units 73-123, 125-146, Inc*, 334 Mich App 188, 196; 964 NW2d 133 (2020) (noting that statutes are to be read in context), it seems that the information to be provided by the agency to the applicant for adoption is the information *pertaining to that applicant*. Petitioners noted below that BCS had, indeed, agreed to provide records pertaining specifically to petitioners.

pertain to the CPL are not available to petitioners but can be used by the court under MCL 722.627(2)(g) if the court deems it necessary.<sup>9</sup>

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

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

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<sup>9</sup> In their statement of questions presented for appeal, petitioners mention that the court quashed the subpoenas sua sponte and claim that the court should not have done so in the absence of a motion to quash. Petitioners, however, do not address this issue in the argument portion of their brief and have therefore abandoned it. See *Peterson Novelties, Inc v Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003). Note, too, that DHHS and BCS both argued that the subpoenas should be quashed.

## PEOPLE v HORTON

Docket Nos. 359012 and 359218. Submitted April 12, 2022, at Grand Rapids. Decided April 21, 2022, at 9:15 a.m. Leave to appeal sought. Oral argument ordered on the application 510 Mich 953 (2022).

Defendant was charged with two counts of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(f), and was bound over to the Chippewa Circuit Court. The complaining witness testified at defendant's preliminary examination, but before trial, she died from her injuries following a car accident. The prosecution elected to proceed with the case by presenting the complaining witness's preliminary-examination testimony, but defendant moved to preclude admission of the videotaped testimony because he could be seen wearing jail clothes in the video. He also moved to preclude the prosecution from informing the jury that the complaining witness had died on the ground that this information would generate sympathy for the witness and her family. The trial court, James P. Lambros, J., denied both motions, and defendant applied for interlocutory relief in the Court of Appeals.

The Court of Appeals *held*:

1. Defendant argued that allowing the jury to view the video in which defendant was seen in jail garb would so undermine the presumption of innocence that his constitutional guarantee of due process would be violated. Caselaw from the United States Supreme Court and the Michigan Supreme Court was limited to situations in which the defendant was forced to appear before the jury at trial while wearing jail garb and addressed concerns that the clothing would be a continuing influence throughout trial. This would be substantially more damaging than in this case, in which the jury would briefly see defendant wearing jail garb in the preliminary-examination video but would see him wearing only civilian clothing when he appeared in person at trial. Therefore, playing the preliminary-examination video would not undermine the presumption of innocence and so would not violate defendant's due-process rights.

2. Defendant also argued that even if the video did not violate his due-process rights, it should have been excluded under MRE

403 and that only the audio or the transcript of the video were admissible. The probative value of playing the video of the testimony was substantial, given that this case, like most criminal sexual conduct cases, was a credibility contest with no nonparticipant witnesses to the offense. The jury's ability to see the witness while she testified would enable it to observe the witness's demeanor and body language and thereby assist it in assessing her credibility. The risk of unfair prejudice posed by the video was less significant than its probative value, given that defendant would appear at trial dressed in civilian clothing, so the risk of an ongoing taint in the jury's perception of him because of the jail clothing was diminished. Additionally, because of the seriousness of the charged offenses, the jury would be aware that at some point defendant had been arrested and in police custody. Further, the court would presumably provide instructions to the jury regarding the presumption of innocence and defendant's clothing in the video, and jurors are presumed to follow their instructions.

3. Defendant argued that the court should have ruled that the death of the complaining witness was inadmissible because it was not relevant under MRE 403, but the court properly determined that the reason for the witness's absence was relevant. If the jury was not informed why the witness was absent, it could speculate that the reason pertained to the truthfulness of her initial statement or that she was afraid of defendant. Given that defendant had threatened to kill the witness in videos posted to social media, which the court ruled were admissible at trial, her unexplained absence could wrongly lead the jury to infer that defendant had killed her. By informing the jury that the complaining witness died in an unrelated incident, the jury would know that her absence was due to circumstances that had no bearing on her credibility and that it was not attributable to defendant. Further, defendant argued that even if evidence of the complaining witness's death was relevant, it should be excluded under MRE 403 because its probative value was substantially outweighed by the risk of unfair prejudice. According to defendant, the complaining witness's youth and untimely death could generate sympathy for her and her family and negatively affect the defense, which involved impeaching the witness's credibility. Although the evidence could give rise to unfair prejudice due to its potential for generating sympathy from the jury, the risk of such unfair prejudice would be tempered by the fact that the complaining witness's death was completely unrelated to the issues to be adjudicated at trial. Therefore, the evidence would be less likely to unfairly bolster the witness's credibility or generate anger

toward defendant. The trial court thus did not abuse its discretion by concluding that the probative value of the evidence was not substantially outweighed by the risk of unfair prejudice.

Affirmed.

CONSTITUTIONAL LAW – DUE PROCESS – PRESUMPTION OF INNOCENCE – JURY TRIALS – INCRIMINATING CLOTHING.

Although a criminal defendant cannot be forced to appear before the jury in jail garb, a defendant's due-process rights are not necessarily violated when the jury is shown a video in which the defendant appears in jail garb because there is no risk that the jail clothing will be a continuing influence throughout the trial.

*Dana Nessel*, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Robert L. Stratton III*, Prosecuting Attorney, and *Jillian Sadler*, Chief Assistant Prosecuting Attorney, for the people.

*Grabel & Associates* (by *Scott A. Grabel* and *Timothy A. Doman*) for defendant.

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

PER CURIAM. In these consolidated appeals,<sup>1</sup> defendant stands charged with two counts of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(f) (sexual penetration accomplished through force or coercion and causing personal injury). Both appeals arise from the untimely death of the complaining witness. In Docket No. 359012, defendant appeals as on leave granted<sup>2</sup> the trial court's order denying his motion to suppress evidence of the complaining witness's death.

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<sup>1</sup> This Court consolidated these appeals on its own motion "to advance the efficient administration of the appellate process." *People v Horton*, unpublished order of the Court of Appeals, entered December 15, 2021 (Docket Nos. 359012 and 359218).

<sup>2</sup> *People v Horton*, 508 Mich 1001 (2021).

In Docket No. 359218, defendant appeals by leave granted<sup>3</sup> the trial court's order denying his motion to suppress the video of the complaining witness's preliminary-examination testimony. We affirm.

#### I. BACKGROUND

The complaining witness accused defendant of sexually assaulting her, and defendant was charged with two counts of CSC-I. On October 16, 2019, the complaining witness testified at defendant's preliminary examination, and defendant was bound over to the circuit court on both CSC-I charges. On June 17, 2021, the complaining witness was involved in a car accident, and she died as a result of her injuries. The prosecution elected to proceed with this case by using her preliminary-examination testimony, and defendant does not dispute that this is permissible. However, defendant moved to preclude the prosecution from informing the jury of her death, arguing that this information would generate sympathy for the complaining witness and her family. The prosecution argued that failing to inform the jury that the complaining witness was absent from the trial because she had died would unfairly undermine her credibility. Defendant filed a separate motion to preclude admission of the video of the preliminary examination because he could be seen wearing jail garb, and he argued that this clothing would undermine the presumption of innocence. The trial court denied both motions, and defendant sought interlocutory relief.

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<sup>3</sup> *People v Horton*, unpublished order of the Court of Appeals, entered November 15, 2021 (Docket No. 359218).



## II. DUE PROCESS

Defendant argues that playing the video of the complaining witness's preliminary-examination testimony would violate his due-process rights because he was dressed in jail garb. We disagree.

## A. STANDARD OF REVIEW AND GOVERNING LAW

An alleged violation of a criminal defendant's due-process rights presents a constitutional question and is reviewed de novo. *People v Wilder*, 485 Mich 35, 40; 780 NW2d 265 (2010). The United States Constitution and the Michigan Constitution each guarantee that a criminal defendant receives due process of law. US Const, Am XIV; Const 1963, art 1, § 17. Implicit in this guarantee is that each criminal defendant enjoys the right to a fair trial, and essential to a fair trial is the defendant's right to be presumed innocent. *People v Johnson*, 315 Mich App 163, 179; 889 NW2d 513 (2016) (citation omitted). "Under the presumption of innocence, guilt must be determined solely on the basis of the evidence introduced at trial rather than on official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial." *People v Rose*, 289 Mich App 499, 517; 808 NW2d 301 (2010) (quotation marks and citation omitted).

The idea that criminal defendants cannot be forced to appear before the jury in jail garb was first recognized in Michigan when our Supreme Court decided *People v Shaw*, 381 Mich 467; 164 NW2d 7 (1969). The Court stated that defendants are "entitled to wear civilian clothes rather than prison clothing" because it is important that a defendant "be brought before the court with the appearance, dignity, and self-respect of a free and innocent man . . . ." *Id.* at 474 (quotation

marks and citation omitted). The United States Supreme Court subsequently recognized the right of criminal defendants to be tried in civilian clothing in *Estelle v Williams*, 425 US 501; 96 S Ct 1691; 48 L Ed 2d 126 (1976). “This is a recognition that the constant reminder of the accused’s condition implicit in such distinctive, identifiable attire may affect a juror’s judgment. The defendant’s clothing is so likely to be a continuing influence throughout the trial that . . . an unacceptable risk is presented of impermissible factors coming into play.” *Id.* at 504-505.

#### B. APPLICATION

Defendant’s argument that admission of the preliminary-examination video would undermine the presumption of innocence in violation of his due-process rights is without merit. In both *Shaw* and *Estelle*, the opinions were limited to those cases in which the defendant is forced to appear *before the jury at trial* while wearing jail garb. There is no authority in support of defendant’s argument that viewing a video in which the defendant is seen in jail garb would so undermine the presumption of innocence as to violate the constitutional guarantees of due process. Indeed, the concerns that guided the Michigan and United States Supreme Courts in holding that a defendant cannot be forced to wear jail garb at trial are not present in this case. For example, in *Estelle*, the United States Supreme Court emphasized the high probability that the clothing would “be a continuing influence throughout the trial,” *id.* at 505, and that risk is simply not present here. If a defendant wore jail garb for the entirety of the trial, then the only image the jury would have of the defendant would be of him dressed in incriminating clothing. This would be substantially

more damaging than a scenario, such as this, in which the jury briefly saw a video of the defendant wearing jail garb but only saw him wearing civilian clothing when in person at trial. Further, jailhouse-interrogation videos, in which the defendants frequently appear in jail garb, are routinely admitted at trial, and this is not a significantly different situation. Because playing the video of the complaining witness's preliminary-examination testimony—where defendant appears in jail garb—would not undermine the presumption of innocence, it does not violate his due-process rights.

### III. RELEVANCE AND MRE 403

Defendant argues that even if showing the jury the video from the preliminary examination does not violate his due-process rights, it nonetheless should be excluded pursuant to MRE 403. Defendant further argues that any evidence of the complaining witness's death is not relevant and, to the extent that it is relevant, is likewise inadmissible pursuant to MRE 403. We disagree.

#### A. STANDARD OF REVIEW AND GOVERNING LAW

Preserved evidentiary challenges are reviewed for an abuse of discretion. *People v Thorpe*, 504 Mich 230, 251; 934 NW2d 693 (2019). “The decision to admit evidence is within the trial court’s discretion and will not be disturbed unless that decision falls outside the range of principled outcomes. A decision on a close evidentiary question ordinarily cannot be an abuse of discretion.” *Id.* at 251-252 (quotation marks and citation omitted). Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more

probable or less probable than it would be without the evidence.” MRE 401. MRE 403 provides that relevant “evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” “Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury.” *People v Schaw*, 288 Mich App 231, 237; 791 NW2d 743 (2010) (quotation marks, citation, and alteration omitted).

B. APPLICATION OF MRE 403 TO THE  
PRELIMINARY-EXAMINATION VIDEO

The trial court did not abuse its discretion by concluding that the probative value of the preliminary-examination video was not substantially outweighed by the risk of unfair prejudice.

It is undisputed that the complaining witness’s testimony from the preliminary examination is admissible under MRE 804(b)(1). However, defendant argues that the prosecution ought to be required to either play only the audio or read the transcript, while the prosecution argues that a fair assessment of credibility would require the jury to actually see the witness. Therefore, when undertaking the balancing test articulated in MRE 403, we will assess the value gained from seeing the complaining witness rather than just hearing her and weigh this against the risk of unfair prejudice stemming from defendant’s clothing.

The probative value added by playing the video of the testimony instead of playing only the audio or reading the transcript is substantial. “In most criminal sexual conduct cases there are no nonparticipant wit-

nesses to the crime, which reduces the cases to weighing the defendant's credibility against that of the victim[]." *People v Beckley*, 434 Mich 691, 717; 456 NW2d 391 (1990). Indeed, the Supreme Court has "recognized that the principle [sic] issue in cases involving criminal sexual conduct is the credibility of the complainant." *Id.* at 717 n 39. Seeing the witness is an important component of assessing the witness's credibility because it enables jurors to observe factors such as demeanor and body language, and the jurors can obtain a better understanding of the witness's mood and nonverbal cues. Anything that can assist the jury in assessing the credibility of the complaining witness in a credibility contest has significant probative value. The risk of unfair prejudice posed by the video, however, is less significant. For the entirety of the trial, defendant will be dressed in civilian clothes, so the risk of an ongoing taint of the jury's perception of him would be diminished. Moreover, because defendant will be on trial for a serious crime, the jury will already be aware that defendant at some point was arrested and in police custody. Finally, the court will presumably provide appropriate instructions regarding the presumption of innocence and defendant's clothing in the video. Jurors are presumed to follow their instructions. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008).

#### C. RELEVANCE OF THE DEATH OF THE COMPLAINING WITNESS

The trial court properly determined that evidence that the complaining witness is unavailable to testify because she died in a car accident is relevant.

The explanation for why a witness is unavailable to testify may be probative of the witness's credibility. For example, if a complaining witness did not appear at

trial because the witness recanted and did not want the prosecution to proceed, this fact would clearly reduce the likelihood that the witness's initial testimony was true, while if a complaining witness did not appear at trial because the witness was threatened by the defendant, this could suggest consciousness of guilt on the part of the defendant. There also are instances in which the explanation for a witness's absence may not be relevant. For example, if an uninterested witness did not testify because the witness moved and the parties were unable to reach the witness, the explanation for the witness's absence may not be particularly relevant to any issue of consequence.

In the present case, the knowledge that the complaining witness did not appear because she is dead would assist the jury in assessing her credibility. If the jury is not informed why she is unavailable, it would be left to speculate about her absence, and it is likely to assume that her absence was caused by a reason that impacts the truthfulness of her initial statement. On the one hand, the jury could speculate that her absence was caused by a recantation or a desire not to see defendant prosecuted. On the other hand, the jury could speculate that her absence was caused by fear of the person who assaulted her. If the jury were aware that the complaining witness died in an unrelated accident, then it would know that her absence was caused by circumstances that have no bearing on her credibility, and this would negate the risk that the jury might erroneously allow her absence to impact its assessment of her credibility.

Further, an explanation as to why the complaining witness is unavailable to testify is also relevant because Snapchat videos in which defendant threatened to kill the witness have been deemed by the trial court

to be admissible evidence at trial. Thus, the unexplained absence of the complaining witness at the trial could wrongly lead the jury to infer that her absence is attributable to defendant, i.e., that he killed her.

D. APPLICATION OF MRE 403 TO THE DEATH OF  
THE COMPLAINING WITNESS

The trial court did not abuse its discretion by concluding that the probative value of this evidence was not substantially outweighed by the risk of unfair prejudice.

Defendant argues that if evidence of the complaining witness's death is relevant it should nonetheless be excluded under MRE 403 because the probative value is substantially outweighed by the risk of unfair prejudice. Defendant argues that the untimely death would cause "[a]ny decent person" to "feel sympathy for her and her family" and that this "sympathy could incline the jurors to convict." Defendant argues that "as a society, we valorize the deceased" and that the "human impulse to venerate those who die young would imbue [her] with added credibility." Finally, defendant argues that there is a "societal taboo against maligning someone after death"; that defendant's "defense will involve impeaching [the complaining witness's] credibility and painting her as a liar"; and that knowledge of her death "will incite opprobrium for speaking ill of the dead." The dispositive issue is whether the trial court abused its discretion by concluding that these concerns do not substantially outweigh the probative value of the evidence.

While the credibility of the complaining witness is always important, it is well established that it is especially important when the complaining witness has accused the defendant of sexual assault. As our

Supreme Court has observed, “[i]n most criminal sexual conduct cases there are no nonparticipant witnesses to the crime, which reduces the cases to weighing the defendant’s credibility against that of the victim[].” *Beckley*, 434 Mich at 717. In this case, only the complaining witness and defendant were present for the incident giving rise to the charges; therefore, this is a credibility contest. Accordingly, it would not take much to “tip the scales” in favor of either party.<sup>4</sup> As discussed above, allowing the complaining witness’s absence to go unexplained would likely, and unfairly, undermine her credibility, and this could tip the scales in favor of defendant.

Any unfair prejudice arising from the admission of this evidence could likewise tip the scales in favor of the prosecution. As noted above, defendant argues that knowledge of the complaining witness’s death could cause sympathy to influence the jury’s decision. Michigan caselaw has recognized that unfair prejudice results when evidence generates sympathy for an alleged victim. Indeed, this Court has stated that “‘unfair prejudice’ refers to the tendency of the proposed evidence to adversely affect the objecting party’s position by injecting considerations extraneous to the merits of the lawsuit, e.g., the jury’s bias, *sympathy*, anger, or shock.” *People v Parrott*, 335 Mich App 648, 681; 968 NW2d 548 (2021) (quotation marks and citation omitted; emphasis added). Evidence of the untimely death

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<sup>4</sup> See *People v Douglas*, 496 Mich 557, 580; 852 NW2d 587 (2014) (noting that in “credibility contests,” which are common in CSC cases, “the wrongful admission of corroborating testimony on either side could tip the scales and result in harmful error”) (quotation marks and citations omitted); see also *People v Martinez*, 507 Mich 855, 855 (2021) (noting that in “a one-on-one credibility contest,” admitting an “additional attack on the complainant’s credibility would have tipped the scales”) (quotation marks and citation omitted).



of the complaining witness, a 21-year-old woman, would likely invoke the jury's sympathy for her, her friends, and her family. However, the risk of unfair prejudice stemming from this sympathy would be tempered by the fact that her death was completely unrelated to the issues to be adjudicated at trial. Indeed, the analysis of this issue would likely be different if the witness had committed suicide or suffered an overdose, as this could suggest that her death resulted from the trauma she had suffered at the hands of defendant. However, the fact that her death was caused by a car accident does not have this tendency to unfairly bolster her credibility or generate anger toward defendant. And evidence that the complaining witness's death was not caused by defendant would eliminate the risk that the jury could infer that defendant played a role in her death, in light of the evidence that defendant threatened to kill her in Snapchat videos. Because the witness's death was wholly unconnected to the merits of this case, we are unconvinced that the jury's sympathy would motivate it to find defendant guilty.

Defendant also argues that the complaining witness's credibility would be unfairly bolstered because people "valorize" the dead and that the jury would look unfavorably upon defendant for attacking the credibility of a person who is dead. While we know of no authority that supports these positions, experience and intuition suggest that these concerns could have some validity. However, simply put, the trial court in this case was placed in a lose-lose situation in determining whether to admit evidence of the complaining witness's death. One option ran the risk of injecting sympathy for the complaining witness in the jury room, a place where sympathy does not belong. The other option ran the risk of unfairly undermining the

credibility of the complaining witness. The trial court was presented with a close call, and the trial court's decision on a close call cannot be an abuse of discretion. See *Thorpe*, 504 Mich at 252. Therefore, the trial court's conclusion that the probative value of this evidence was not substantially outweighed by the risk of unfair prejudice was not an abuse of discretion.

Affirmed.

CAMERON, P.J., and CAVANAGH and GADOLA, JJ., concurred.

## BAILEY v ANTRIM COUNTY

Docket No. 357838. Submitted April 12, 2022, at Grand Rapids. Decided April 21, 2022, at 9:20 a.m. Leave to appeal denied 510 Mich 1100 (2022).

William Bailey filed an action in Antrim Circuit Court against Antrim County in connection with the 2020 general election results in that county. Plaintiff asserted numerous constitutional and statutory claims against Antrim County, including a right to conduct an independent audit of the election results under Const 1963, art 2, § 4(1)(h), and violations of MCL 600.4545(2), MCL 168.861, and other statutes. Plaintiff sought a protective order and preliminary injunction to preserve and protect evidence relevant to the case and also sought discovery of records related to the election. The court, Kevin A. Elsenheimer, J., granted plaintiff's motion and later granted, over plaintiff's objection, the Secretary of State's motion to intervene in the action. Thereafter, the Michigan Bureau of Elections conducted a statewide audit of the November 2020 general election, and there was also a hand count in Antrim County of the votes cast in the presidential election. After the close of discovery, Antrim County and the Secretary of State (collectively, defendants) jointly moved for summary disposition, arguing that plaintiff's claims were moot, that plaintiff lacked standing to bring several of the claims, and that plaintiff's claims failed as a matter of law. Plaintiff opposed the motion, moved to amend his complaint, and argued that the trial court should allow further discovery before ruling on the motion for summary disposition. The court granted the motion for summary disposition under MCR 2.116(C)(8) (failure to state a claim) and dismissed plaintiff's claims, but it declined to rule on plaintiff's motion to amend the complaint. In granting the motion for summary disposition, the court concluded that plaintiff's claims were moot because the court had already granted plaintiff the relief he sought in the complaint and that neither Article 2, § 4(1)(h) of the Michigan Constitution nor MCL 168.31a granted plaintiff the right to conduct an independent audit. The court further reasoned that audits could only be conducted according to the law and that an audit had already been conducted. Plaintiff appealed.

The Court of Appeals *held*:

1. The trial court's order granting summary disposition in favor of defendants was a "final order" for purposes of MCR 7.202(6)(a)(i) because there was nothing left for the trial court to decide after it granted defendants' joint motion; therefore, the order was appealable by right.

2. A matter is moot if a court's ruling cannot for any reason have a practical legal effect on the existing controversy. While the trial court granted plaintiff some of his requested relief, he did not receive *all* the relief he had requested. In particular, he sought to perform an independent and nonpartisan audit of the general election. Even if the claim were determined to be without merit, it did not render the issue moot because a ruling to that effect would have had a practical legal effect. Accordingly, the trial court erred by determining that plaintiff's claims were moot.

3. In his complaint, plaintiff sought to conduct his own independent audit of the election. Article 2, § 4(1)(h) of Michigan's 1963 Constitution provides that every citizen of the United States who is an elector qualified to vote in Michigan has the right to have the results of statewide elections audited, in such manner as prescribed by law, to ensure the accuracy and integrity of elections. All rights under the section are self-executing. The subsection must be liberally construed in favor of voters' rights in order to effectuate its purposes, and nothing contained in § 4 prevents the Legislature from expanding voters' rights beyond what is provided in the section. In turn, MCL 168.31a authorizes the Secretary of State to audit election precincts after each election; the Secretary of State must prescribe the procedures for election audits, and the Secretary of State and county clerks are required to conduct the election audits. The clear language of MCL 168.31a does not allow private citizens to conduct independent audits of elections. Under Const 1963, art 2, § 4(2), the Legislature is required to enact law to regulate the time, place, and manner of all nominations and elections, to preserve the purity of elections, to preserve the secrecy of the ballot, to guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting. This constitutional provision serves as a directive to the Legislature to create laws to preserve the purity of elections; it does not provide a private individual with a cause of action. Relevant here, because plaintiff was not entitled to conduct an independent audit of the election, his claim under Const 1963, art 2, § 4(1)(h) failed as a matter of law. Further, § 4(2) did not provide plaintiff with the right to take forensic images of tabulators, thumb drives, or related software,

and the provision did not provide plaintiff the right to investigate those images. In addition, plaintiff's complaint did not allege that the Legislature enacted laws that adversely affected the purity of elections. Therefore, plaintiff's claim under Const 1963, art 2, § 4(2) also failed as a matter of law. Finally, because plaintiff failed to assert the claims in his complaint, the Court of Appeals declined to address plaintiff's arguments on appeal concerning the constitutionality of MCL 168.31a and the constitutional sufficiency of the audit performed by the Secretary of State.

4. In his complaint, plaintiff asserted that he could bring an action under MCL 168.861 to remedy fraudulent or illegal voting or tampering with ballots or ballot boxes before a recount. MCL 168.861 provides that for fraudulent or illegal voting, or tampering with the ballots or ballot boxes before a recount by the board of county canvassers, the remedy by quo warranto shall remain in full force, together with any other remedies now existing. This statutory provision was intended as a saving clause, not an independent cause of action. Quo warranto is a common-law writ used to inquire into the authority by which a public office is held or a franchise is claimed. Generally, such actions are brought under MCL 600.4505 (challenging the right of a person in public office to hold that office, with no assertions made of fraud or error) or under MCL 600.4545(1) (challenging the validity of the election itself on the basis that material fraud or error was committed). For a quo warranto claim under MCL 600.4545(1) to be successful, evidence must be presented that the fraud or error might have affected the outcome of the election. Relevant here, because plaintiff did not have an independent cause of action under MCL 168.861, the trial court properly dismissed his quo warranto claim brought under that statutory provision. With regard to his quo warranto claim brought under MCL 600.4545(1), plaintiff did not allege in the complaint that the purported irregularities in Antrim County might have affected the outcome of the presidential election. To the extent plaintiff challenged the results of the state, county, or township election, the trial court properly dismissed those claims because plaintiff failed to sufficiently plead the claim. Specifically, plaintiff made generalized assertions that he should be provided with discovery to determine the extent of the fraud and failed to allege any clear and positive factual allegations to make out a clear case of right.

5. The trial court correctly dismissed plaintiff's equal-protection claim because he (1) failed to plead allegations to support his claim that he was intentionally and arbitrarily discriminated against because of Antrim County's execution of a

statute through its duly constituted agents, (2) failed to allege that Antrim County failed to implement the minimum procedures necessary to protect the fundamental right of each voter, and (3) failed to allege that he was treated differently than similarly situated individuals. Instead, plaintiff made generalized assertions of election fraud and that he should be allowed discovery to determine the extent of the fraud.

6. Because summary disposition was appropriate under MCR 2.116(C)(8), which tests the legal sufficiency of a claim based only on the factual allegations in the complaint, the Court of Appeals did not address plaintiff's claim that the trial court improperly considered documentary evidence and inadmissible hearsay. Although several depositions had not yet been conducted, summary disposition was not premature because it was granted under MCR 2.116(C)(8), and it would have been futile to complete the scheduled depositions. In addition, because summary disposition was appropriate under (C)(8), it was unnecessary to consider plaintiff's argument that the trial court abused its discretion when it denied plaintiff's motion to adjourn oral argument on the summary-disposition motion.

7. MCR 2.116(I)(5) provides that a trial court must give the parties an opportunity to amend their pleadings as provided in MCR 2.118 if the grounds for summary disposition are based on MCR 2.116(C)(8) unless the evidence then before the court shows that amendment would not be justified. A court may deny a motion to amend for particularized reasons, such as undue delay, bad faith or dilatory motive, repeated failures to cure by amendments previously allowed, or futility. With respect to undue delay, delay alone does not warrant denial of a motion to amend. However, a court may deny a motion to amend if the delay was in bad faith or if the opposing party suffered actual prejudice as a result. Prejudice to a defendant that will justify denial of leave to amend arises when the amendment would prevent the defendant from having a fair trial. Importantly, the prejudice must stem from the fact that the new allegations are offered late and not from the fact that they might cause the defendant to lose on the merits. In this case, plaintiff sought to add significant factual allegations and theories of liability against new parties after the close of discovery and after defendants had already moved for summary disposition. In addition, a bench trial had already been scheduled for the month after plaintiff moved to amend, and the trial court had indicated that it would not grant adjournments. Further, the record demonstrated that plaintiff was aware of the potential defendants and facts contained in the proposed

amended complaint long before he filed the motion to amend. The trial court did not address plaintiff's motion to amend. Regardless, the proposed defendants would have been prejudiced had the court granted the motion because they would not have been able to have a fair trial at that late date. In addition, it would have been futile to have permitted amendment of some of the claims. Accordingly, even if the trial court had considered the motion, it would have been improper for the trial court to permit amendment of the complaint.

Affirmed.

*DePerno Law Office, PLLC* (by *Matthew S. DePerno*)  
for William Bailey.

*Cummings, McClorey, Davis & Acho, PLC* (by *Allan C. Vander Laan* and *Douglas J. Curlew*) for Antrim County.

*Dana Nessel*, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Heather S. Meingast* and *Erik A. Grill*, Assistant Attorneys General, for the Secretary of State.

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

PER CURIAM. Plaintiff, William Bailey, appeals the trial court's order granting the joint motion for summary disposition of defendant, Antrim County, and intervening defendant, Secretary of State. We affirm.

#### I. BACKGROUND

Plaintiff is a resident of Central Lake, Michigan, which is located in Antrim County. On November 3, 2020, plaintiff voted in person in the 2020 election at a polling location in Central Lake Township. On November 6, 2020, the Antrim County Board of Canvassers certified the Antrim County general election results.

On November 23, 2020, the Board of State Canvassers certified the election results for the state of Michigan.

On November 23, 2020, plaintiff filed suit against Antrim County. Plaintiff alleged multiple constitutional claims, including a right to conduct an audit under Const 1963, art 2, § 4(1)(h), and violations of MCL 600.4545(2), MCL 168.765(5), and MCL 168.861. Plaintiff requested that the trial court do the following:

A. issue an order . . . allowing Plaintiff to take a forensic image of the 22 precinct tabulators, thumb drives, related software, the Clerk's "master tabulator," and conduct an investigation of those images.

B. issue an order allowing Plaintiff to conduct an independent and non-partisan audit to determine the accuracy and integrity of the November 3, 2020 election[.]

Plaintiff also requested that the trial court issue a protective order and preliminary injunction to "preserve and protect all evidence relevant to th[e] case," including "all 'documents' and 'computer records' used to tabulate votes in Antrim County." Plaintiff also requested that he be permitted to "conduct immediate discovery through a full investigation of the 22 precinct Dominion tabulators" and that he be permitted to "immediately take a forensic image of the 22 precinct tabulators" and conduct an investigation of those images, "thumb drives, related software, and the Clerk's 'master tabulator[.]'" Plaintiff also requested that the trial court order Antrim County not to "turn on the Dominion voting machines" or "connect any of the Dominion voting machines . . . to the internet."

Antrim County did "not object to an order requiring it to (a) preserve and protect all records in its possession used to tabulate votes in Antrim County; and (b) not turn on or connect the one (1) Dominion Voting machine (tabulator) in its possession to the internet."



According to Antrim County, it was not in possession of the remaining 21 precinct tabulators because they were controlled and owned by “the individual townships.” Antrim County argued that plaintiff had failed to provide “any support for his argument that in order to conduct an audit of the November 3, 2020 elections, he must be permitted to take forensic image[s] of the precinct tabulators, thumb drives, related software, and the ‘master tabulator.’” Antrim County indicated that plaintiff could request “a manual recount of the paper ballots in Antrim County” and that he would not need “the requested forensic imaging” to do so. The trial court granted plaintiff’s motion and issued an order requiring Antrim County to

maintain, preserve and protect all records in its possession used to tabulate votes in Antrim County, to not turn on the Dominion tabulator in its possession and to not connect the Dominion tabulator in its possession to the internet.

On December 6, 2020, plaintiff’s “forensic team collected forensic images of certain equipment in Antrim County’s office, including CF cards, thumb drives, and [a] master tabulator.” A hand recount of the results of the presidential election in Antrim County was conducted on December 17, 2020. The Michigan Bureau of Elections also conducted statewide audits to confirm the overall accuracy of the November 2020 general election.

The Secretary of State was permitted to intervene over the objection of plaintiff. The parties thereafter engaged in discovery and motion practice. After the close of discovery, defendants jointly moved for summary disposition under MCR 2.116(C)(4) (lack of subject-matter jurisdiction) and (8) (failure to state a claim). Defendants argued that plaintiff’s claims were

moot, that plaintiff lacked standing to bring several of the claims, and that plaintiff's claims failed as a matter of law. Plaintiff opposed the motion and moved to amend the complaint. Plaintiff also argued that the trial court should permit further discovery before ruling on the motion for summary disposition.

After hearing oral argument, the trial court concluded that plaintiff's claims were moot because plaintiff had already been granted the relief that he sought in the complaint. The trial court further concluded that "[t]here is no right, either in [Const 1963, art 2, § 4(1)(h)] or [MCL 168.31a], for the independent audit that [plaintiff] seeks. A petitioner under Article II, Section 4 does not get to choose his own audit criteria." Rather, the trial court concluded that audits are to be conducted "according to the law" and that an audit had already been conducted. The trial court dismissed plaintiff's claims in a May 2021 order and declined to rule on plaintiff's motion to amend the complaint. This appeal followed.

## II. JURISDICTIONAL ISSUE

At the outset, we must address a jurisdictional issue. Antrim County argues that this Court lacks jurisdiction because the trial court's May 2021 order was not a final order. We disagree.

MCR 7.202(6)(a)(i) defines "final order" as "the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties[.]" In this case, the trial court's May 2021 order granted summary disposition in favor of defendants. "[B]ecause there was nothing left for the trial court to decide" after it granted summary disposition, we conclude that the court's May 2021 order was a final order appealable by right. *Rooyakker & Sitz, PLLC v Plante*

& *Moran, PLLC*, 276 Mich App 146, 148 n 1; 742 NW2d 409 (2007). The fact that the trial court might have continued to rule on motions after the May 2021 order was entered does not change the fact that the May 2021 order was a final order.

### III. MOOTNESS

Plaintiff argues that the trial court erred by concluding that his claims were moot. We agree.

“Whether an issue is moot is a question of law that this Court reviews de novo.” *In re Tchakarova*, 328 Mich App 172, 178; 936 NW2d 863 (2019). “Michigan Courts exist to decide actual cases and controversies . . . . A matter is moot if [a] Court’s ruling cannot for any reason have a practical legal effect on the existing controversy.” *Id.* (quotation marks and citations omitted).

In this case, plaintiff requested that the trial court do the following:

A. issue an order . . . allowing Plaintiff to take a forensic image of the 22 precinct tabulators, thumb drives, related software, the Clerk’s “master tabulator,” and conduct an investigation of those images.

B. issue an order allowing Plaintiff to conduct an independent and non-partisan audit to determine the accuracy and integrity of the November 3, 2020 election[.]

While the trial court granted plaintiff some of this relief, it is undisputed that plaintiff did not receive *all* the relief requested in the complaint. Indeed, plaintiff argued that he was personally entitled to perform “an independent and non-partisan audit to determine the accuracy and integrity of the November 3, 2020 election[.]” While plaintiff is not entitled to this relief for the reasons discussed later in this opinion, the fact

that plaintiff did not have viable claims does not render them moot. Indeed, a ruling that plaintiff was not permitted under the law to conduct his own independent audit would have had a practical legal effect. Consequently, the trial court erred by determining that plaintiff's claims were moot.<sup>1</sup> Nonetheless, we will not reverse a trial court's decision when it reaches the right result, even if it was for the wrong reason. *Gleason v Dep't of Transp*, 256 Mich App 1, 3; 662 NW2d 822 (2003) ("A trial court's ruling may be upheld on appeal where the right result issued, albeit for the wrong reason."). For the following reasons, we conclude that summary disposition was proper under MCR 2.116(C)(8).<sup>2</sup>

#### IV. SUMMARY DISPOSITION UNDER MCR 2.116(C)(8)

##### A. STANDARDS OF REVIEW AND GENERAL PRINCIPLES OF LAW

"This Court . . . reviews de novo questions of constitutional law." *Promote the Vote v Secretary of State*, 333 Mich App 93, 117; 958 NW2d 861 (2020). In interpreting constitutional provisions, the primary duty of the judiciary "is to ascertain the purpose and intent as expressed in the constitutional . . . provision in question." *Adair v Michigan*, 486 Mich 468, 477; 785 NW2d 119 (2010) (quotation marks and citation omitted). In doing so, "we are mindful that the interpretation given the provision should be the sense most obvious to the common understanding and one that reasonable

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<sup>1</sup> Because the mootness doctrine does not apply, we need not consider whether the trial court improperly analyzed whether summary disposition under that doctrine was proper under MCR 2.116(C)(4).

<sup>2</sup> We question whether the relief requested by plaintiff is meaningful because the evidence that plaintiff seeks to gather would only be useful if an avenue remained open for him to challenge the election results.

minds, the great mass of the people themselves, would give it.” *Id.* (quotation marks and citations omitted). “When the language of a constitutional provision is unambiguous, resort to extrinsic evidence is prohibited . . . .” *Nat’l Pride at Work, Inc v Governor*, 481 Mich 56, 80; 748 NW2d 524 (2008).

“We . . . review de novo a trial court’s interpretation and application of a statute.” *Grand Rapids v Brookstone Capital, LLC*, 334 Mich App 452, 457; 965 NW2d 232 (2020). “The primary goal of statutory interpretation is to give effect to the intent of the Legislature. If the language of a statute is clear and unambiguous, the statute must be enforced as written and no further judicial construction is permitted.” *Mich Head & Spine Institute, PC v Mich Assigned Claims Plan*, 331 Mich App 262, 272; 951 NW2d 731 (2020) (quotation marks and citations omitted). “The use of the word ‘shall’ denotes mandatory action.” *Wolfenbarger v Wright*, 336 Mich App 1, 30; 969 NW2d 518 (2021).

We also review de novo “a trial court’s decision on a motion for summary disposition.” *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159; 934 NW2d 665 (2019).

A motion under MCR 2.116(C)(8) tests the *legal sufficiency* of a claim based on the factual allegations in the complaint. When considering such a motion, a trial court must accept all factual allegations as true, deciding the motion on the pleadings alone. A motion under MCR 2.116(C)(8) may only be granted when a claim is so clearly unenforceable that no factual development could possibly justify recovery. [*Id.* at 159-160 (citations omitted).]

## B. ANALYSIS

## 1. CONSTITUTIONAL CLAIMS UNDER CONST 1963, ART 2, § 4

Const 1963, art 2, § 4(1)(h) provides that “[e]very citizen of the United States who is an elector qualified to vote in Michigan shall have” “[t]he right to have the results of statewide elections audited, in such a manner as prescribed by law, to ensure the accuracy and integrity of elections.” (Paragraph structure omitted.) Const 1963, art 2, § 4(1)(h) further provides:

All rights set forth in this subsection shall be self-executing. This subsection shall be liberally construed in favor of voters’ rights in order to effectuate its purposes. Nothing contained in this subsection shall prevent the legislature from expanding voters’ rights beyond what is provided herein.

Plaintiff argues that § 4(1)(h) permits him to have “[a] full [and independent] forensic audit . . . .” While § 4(1)(h) is self-executing and is to be liberally construed in favor of voters’ rights, the provision is not unlimited. Indeed, § 4(1)(h) provides that an audit is to be performed “in such manner as prescribed by law . . . .” It does not permit an audit to be performed in the manner dictated by an individual voter, and it clearly provides that *the Legislature* may expand the rights provided in § 4(1)(h). But the Legislature did not do so.

MCL 168.31a, which was amended by 2018 PA 603 after the adoption of the aforementioned audit language, provides:

(1) In order to ensure compliance with the provisions of this act, after each election the secretary of state may audit election precincts.

(2) The secretary of state shall prescribe the procedures for election audits that include reviewing the documents,

ballots, and procedures used during an election as required in section 4 of article II of the state constitution of 1963. The secretary of state and county clerks shall conduct election audits, including statewide election audits, as set forth in the prescribed procedures. The secretary of state shall train and certify county clerks and their staffs for the purpose of conducting election audits of precincts randomly selected by the secretary of state in their counties. An election audit must include an audit of the results of at least 1 race in each precinct selected for an audit. A statewide election audit must include an audit of the results of at least 1 statewide race or statewide ballot question in a precinct selected for an audit. An audit conducted under this section is not a recount and does not change any certified election results. The secretary of state shall supervise each county clerk in the performance of election audits conducted under this section.

(3) Each county clerk who conducts an election audit under this section shall provide the results of the election audit to the secretary of state within 20 days after the election audit.

Thus, the Legislature required the Secretary of State to “prescribe the procedures for election audits” and required the Secretary of State and county clerks to conduct the election audits. See MCL 168.31a(2). The statutory language does not allow private citizens to conduct independent audits, and we are not permitted to read words into the plain language of a statute. *Byker v Mannes*, 465 Mich 637, 646-647; 641 NW2d 210 (2002) (“It is a well-established rule of statutory construction that this Court will not read words into a statute.”). Because plaintiff is not entitled to conduct his own independent audit, plaintiff’s claim under Const 1963, art 2, § 4(1)(h) fails as a matter of law.

We note that, on appeal, plaintiff challenges the constitutionality of MCL 168.31a and argues that a constitutionally sufficient audit was not performed by

the Secretary of State. However, plaintiff failed to plead these claims in his complaint,<sup>3</sup> so we will not address plaintiff's arguments on appeal concerning the constitutionality of MCL 168.31a and whether the audit was "constitutionally sufficient . . . ." See *Lenawee Co v Wagley*, 301 Mich App 134, 160; 836 NW2d 193 (2013) ("A party is bound by [their] pleadings, and it is not permissible to litigate issues or claims that were not raised in the complaint[.]") (quotation marks and citations omitted).

Plaintiff's claim under Const 1963, art 2, § 4(2) also fails. That provision provides, in part, as follows:

Except as otherwise provided in this constitution or in the constitution or laws of the United States the legislature shall enact laws to regulate the time, place and manner of all nominations and elections, to preserve the purity of elections, to preserve the secrecy of the ballot, to guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting.

In plaintiff's complaint, he alleged that § 4(2) provided him with the right to "immediately take a forensic image of the 22 precinct tabulators[,] thumb drives, related software, and the Clerk's 'master tabulator,' and conduct an investigation of these images . . . ." Plaintiff alleged that this relief was proper in order to "ensure the accuracy and integrity of the election." While § 4(2) is certainly aimed at preserving the "purity of elections," it does not provide plaintiff with a cause of action. Rather, it serves as a directive to the Legislature to create laws to preserve "the purity of elections . . . ." See *Taylor v Currie*, 277 Mich App 85,

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<sup>3</sup> Although plaintiff later sought to add this claim, it would not have been proper for the trial court to permit plaintiff to amend the complaint for the reasons discussed later in this opinion.



96; 743 NW2d 571 (2007) (“The Michigan Supreme Court has interpreted ‘the purity of elections’ clause to embody two concepts: first, that the constitutional authority to enact laws to preserve the purity of elections resides in the Legislature; and second, that any law enacted by the Legislature which adversely affects the purity of elections is constitutionally infirm.”) (quotation marks and citations omitted). Because plaintiff’s complaint does not allege that the Legislature enacted laws that adversely affect the purity of elections and because Const 1963, art 2, § 4(2) does not create an individual right to conduct an audit, plaintiff’s claim under Const 1963, art 2, § 4(2) fails as a matter of law.

## 2. QUO WARRANTO

Plaintiff next argues that the trial court erred by dismissing his quo warranto claims.<sup>4</sup> We disagree. The Court in *Hanlin v Saugatuck Twp*, 299 Mich App 233, 240-241; 829 NW2d 335 (2013), explained:

Quo warranto is a “‘common-law writ used to inquire into the authority by which a public office is held or a franchise is claimed.’” *Davis v Chatman*, 292 Mich App 603, 612; 808 NW2d 555 (2011), quoting Black’s Law Dictionary (9th ed). . . . Generally such actions are brought pursuant to MCL 600.4505—which echoes the procedure of MCR 3.306(B)(2)—and are pursued against a person in public office by one who seeks to challenge that person’s right to hold office, but no assertions are made of fraud or error. [*Barrow v Detroit Mayor*, 290 Mich App 530, 541; 802 NW2d 658 (2010).] MCL 600.4545(1), on the

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<sup>4</sup> We note that a citizen must obtain leave of the trial court before proceeding with a claim for quo warranto. MCR 3.306(B)(3)(b). In this case, rather than determining whether plaintiff should be granted leave to proceed by quo warranto, the trial court decided plaintiff’s claims for quo warranto under summary disposition standards.

other hand, provides for an action in the nature of quo warranto “whenever it appears that material fraud or error has been committed at any election in such county at which there has been submitted any constitutional amendment, question, or proposition to the electors of the state or any county, township, or municipality thereof.” This type of action is brought to challenge the validity of the election itself. *Barrow*, 290 Mich App at 543. Thus, to pursue an action for quo warranto to challenge the validity of the election, [a] plaintiff[] must establish that a material fraud or error was committed at the election.

Turning to the allegations in plaintiff’s complaint, plaintiff alleged a violation of MCL 168.861 and asserted that an “action may be brought to remedy fraudulent or illegal voting or tampering with ballots or ballot boxes before a recount pursuant to MCL 168.861 . . . .”<sup>5</sup> However, MCL 168.861 does not provide plaintiff with an independent cause of action. See *Hanlin*, 299 Mich App at 242 (“MCL 168.861 was intended as a saving clause rather than an independent cause of action.”). Thus, the trial court properly dismissed plaintiff’s quo warranto claim brought under MCL 168.861.

With respect to plaintiff’s quo warranto claim that was brought under MCL 600.4545, MCL 600.4545(1) provides for an action in the nature of quo warranto “whenever it appears that material fraud or error has been committed at any election in such county at which there has been submitted any constitutional amendment, question, or proposition to the electors of the state or any county, township, or municipality thereof.”

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<sup>5</sup> MCL 168.861 provides that, “[f]or fraudulent or illegal voting, or tampering with the ballots or ballot boxes before a recount by the board of county canvassers, the remedy by quo warranto shall remain in full force, together with any other remedies now existing.”

The phrase “material fraud or error” in MCL 600.4545(1) “means fraud or error that ‘might have affected the outcome of the election.’” *Barrow*, 290 Mich App at 542, quoting *St Joseph Twp v City of St Joseph*, 373 Mich 1, 6; 127 NW2d 858 (1964). While a “but for” showing is not necessary, the plaintiff’s “proofs must be sufficient to support a fact finding that enough votes were tainted by the alleged fraud to affect the outcome.” *Barrow*, 290 Mich App at 542. See also *Rosenbrock v Sch Dist No. 3, Fractional*, 344 Mich 335, 339; 74 NW2d 32 (1955) (“It has been repeatedly held by this Court that irregularities in the conducting of an election will not invalidate the action taken unless it appears that the result was, or may have been, affected thereby.”). [*Hanlin*, 299 Mich App at 243.]

In this case, plaintiff’s complaint repeatedly cites the votes that were tallied in Antrim County in relation to the presidential election. As already stated, MCL 600.4545(1) provides for an action in the nature of quo warranto “whenever it appears that material fraud or error has been committed at any election in such county at which there has been submitted any constitutional amendment, question, or proposition to the electors of the state or any county, township, or municipality thereof.” There are no allegations in the complaint to support that the purported irregularities in Antrim County “might have affected the outcome” of the presidential election, as the cited caselaw clearly requires. See *Barrow*, 290 Mich App at 542 (stating that in order to establish a quo warranto claim, a plaintiff must establish that the purported fraud or error “might have affected the outcome of the election”) (quotation marks and citation omitted).

To the extent that plaintiff is challenging the results of the state, county, or township election, we agree with defendants that summary disposition was proper on those claims as well because plaintiff failed to sufficiently plead the claim.

MCR 3.301(A)(1)(d) and (2) “govern the procedure for seeking the writs or relief formerly obtained by the writs,” including a writ of quo warranto. In that regard, MCR 3.301(A)(3) provides that “[t]he general rules of procedure apply except as otherwise provided in this subchapter.” MCR 2.111(A)(1) requires that allegations made in a pleading be clear, concise, and direct. MCR 2.112(B)(1) requires that fraud and mistake be pleaded with particularity. Other matters, including malice, intent, and knowledge, can be pleaded generally under MCR 2.112(B)(2). MCR 3.301 does not otherwise contain pleading requirements for a petition for leave to proceed by quo warranto. Nonetheless, our Supreme Court has held that an application for leave to file an action for quo warranto “should be so clear and positive in its statement of facts as to make out a clear case of right; and should be so framed as to sustain a charge of perjury if any material allegation is false.” *Boucha v Alger Circuit Judge*, 159 Mich 610, 611; 124 NW 532 (1910), citing *Cain v Brown*, 111 Mich 657, 660; 70 NW 337 (1897); see also *Vrooman v Michie*, 69 Mich 42, 46; 36 NW 749 (1888). [*Barrow*, 290 Mich App at 543-544 (alteration in original).]

In this case, plaintiff alleged in his complaint, in relevant part:

29. *There are many other questions that remain unanswered*, including but not limited to (1) whether the Dominion tabulators in Antrim County were tampered with, (2) whether they have the capacity to connect to the internet, (3) whether they had any open VPN ports during the election, (4) if connected to the internet, was the connection secure, (5) whether the machines were accessed via the use of removable media to transfer voting information, (6) whether the ballot images were preserved in every precinct per federal and state election law, (7) whether the audit logs were preserved and synchronized, (8) whether the audit logs were altered or edited by any person operating the system, (9) whether Dominion pre-loaded any algorithms and configurations on the machines that alter the results, and if so, what algorithms and

configurations were pre-loaded, and (10) whether the “purge option” that is built into Dominion [was] utilized to cancel, switch, or manipulate votes, in the same way it has historically been utilized in Venezuela and Cuba.

30. *Plaintiff and others seek to learn the answers to these questions*, including why Defendant [Antrim County] initially registered “phantom voters” for Presidential Candidate Joe Biden and why the Dominion machines altered and switched votes for him.

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49. Based upon the *allegations* contained herein, material fraud or error occurred in this election so that the outcome of the election was affected.

50. Based upon the above *allegations* of fraud, statutory violations, and other misconduct, as stated herein, it is necessary to permit Plaintiff to immediately take a forensic image of the 22 precinct tabulators[,] thumb drives, related software, and the Clerk’s “master tabulator,” and *conduct an investigation of those images*, after which a manual recount of the election results and an independent audit of the November 3, 2020 election may be ordered to ensure the accuracy and integrity of the election. [Emphasis added.]

We conclude that plaintiff failed to allege any “clear and positive” factual allegations that “make out a clear case of right[.]” *Barrow*, 290 Mich App at 543-544 (quotation marks and citations omitted). Instead, plaintiff merely raised a series of questions about the election without making any specific factual allegations as required. Because plaintiff “failed to disclose sufficient facts and grounds and sufficient apparent merit to justify further inquiry by quo warranto proceedings,” the trial court properly granted summary disposition. *Id.* at 550.

## 3. EQUAL-PROTECTION CLAIM

Plaintiff next argues that the trial court erred by granting summary disposition on his equal-protection claim. We disagree.

“The equal protection clauses of the Michigan and United States constitutions provide that no person shall be denied the equal protection of the law.” *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 486 Mich 311, 318; 783 NW2d 695 (2010). The purpose of the equal-protection guarantee is to secure every person “against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.” *Village of Willowbrook v Olech*, 528 US 562, 564; 120 S Ct 1073; 145 L Ed 2d 1060 (2000) (quotation marks and citations omitted).

Plaintiff alleged in the complaint that he was deprived of his constitutional right to vote in the November 2020 election by Antrim County’s “rampant and systematic fraud,” which resulted in his vote not being “valued.” However, plaintiff failed to plead allegations to support that he was intentionally and arbitrarily discriminated against as a result of Antrim County’s “improper execution” of a statute through its “duly constituted agents,” *id.*, or that Antrim County failed to implement “the minimum procedures necessary to protect the fundamental right of each voter,” *Bush v Gore*, 531 US 98, 109; 121 S Ct 525; 148 L Ed 2d 388 (2000). Rather, as already stated, plaintiff made generalized assertions in the trial court that election fraud occurred and that he should be provided with discovery in order to determine the extent of the fraud. Additionally, plaintiff did not allege that he was treated differently than similarly situated individuals, which is necessary to establish an equal-protection claim. See

*Nordlinger v Hahn*, 505 US 1, 10; 112 S Ct 2326; 120 L Ed 2d 1 (1992) (The Equal Protection Clause “keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike.”). Consequently, plaintiff’s equal-protection claim fails as a matter of law.<sup>6</sup>

V. THE TRIAL COURT’S CONSIDERATION OF DOCUMENTARY EVIDENCE AND INADMISSIBLE HEARSAY

Plaintiff argues that the trial court improperly considered documentary evidence and inadmissible hearsay evidence when deciding the motion for summary disposition.<sup>7</sup> We need not consider this argument, however, given that summary disposition was proper under MCR 2.116(C)(8) for the reasons already discussed. See *El-Khalil*, 504 Mich at 159 (“A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim based [only] on the factual allegations in the complaint.”) (emphasis omitted).

VI. THE TRIAL COURT’S ALLEGED PREMATURE GRANT OF SUMMARY DISPOSITION

Plaintiff next argues that summary disposition was premature because several depositions had not yet been conducted.<sup>8</sup> While it is true that a trial court is

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<sup>6</sup> Plaintiff’s complaint also contained an allegation that Antrim County violated MCL 168.765(5). Plaintiff does not argue on appeal that the trial court erred by dismissing this claim. Therefore, we will not address it.

<sup>7</sup> Although the trial court referred to the Secretary of State’s press releases concerning the election, the trial court did so when evaluating whether plaintiff’s claims were moot under MCR 2.116(C)(4).

<sup>8</sup> Although discovery had already closed at the time the trial court decided defendants’ joint motion for summary disposition, plaintiff had yet to take several depositions. The trial court permitted the depositions to be conducted after the close of discovery.

not permitted to grant summary disposition under MCR 2.116(C)(10) when the opposing party establishes that “further discovery stands a fair chance of uncovering factual support for the opposing party’s position,” *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 292; 769 NW2d 234 (2009), summary disposition in this case was proper under MCR 2.116(C)(8). Thus, permitting plaintiff to complete the scheduled depositions would have been futile. In light of this conclusion, it is not necessary to consider plaintiff’s argument that the trial court abused its discretion when it denied plaintiff’s motion to adjourn oral argument on defendants’ motion for summary disposition.

#### VII. PLAINTIFF’S MOTION TO AMEND THE COMPLAINT

Finally, plaintiff argues that the trial court improperly failed to consider his motion to amend the complaint. We conclude that it would have been improper for the trial court to grant leave to amend the complaint.

MCR 2.116(I)(5) requires a trial court to “give the parties an opportunity to amend their pleadings as provided by MCR 2.118” if the grounds for summary disposition are based on MCR 2.116(C)(8) “unless the evidence then before the court shows that amendment would not be justified.” “[L]eave [to amend] should ordinarily be denied only for particularized reasons such as undue delay, bad faith or dilatory motive, repeated failures to cure by amendments previously allowed, or futility.” *Decker v Rochowiak*, 287 Mich App 666, 682; 791 NW2d 507 (2010) (quotation marks and citation omitted). With respect “to undue delay, delay, alone, does not warrant denial of a motion to amend. However, a court may deny a motion to amend if the



delay was in bad faith or if the opposing party suffered actual prejudice as a result.” *Id.* (brackets, quotation marks, and citation omitted). “Prejudice to a defendant that will justify denial of leave to amend arises when the amendment would prevent the defendant from having a fair trial.” *Knauff v Oscoda Co Drain Comm’r*, 240 Mich App 485, 493; 618 NW2d 1 (2000). Importantly, “[t]he prejudice must stem from the fact that the new allegations are offered late and not from the fact that they might cause the defendant to lose on the merits.” *Id.*

We conclude that prejudice would have resulted if the trial court had permitted plaintiff to amend the complaint. On November 23, 2020, plaintiff filed the original six-count complaint against Antrim County. Shortly thereafter, the trial court entered the protective order and preliminary injunction. The Secretary of State was permitted to intervene over the objection of plaintiff, and the parties thereafter engaged in discovery and motion practice.

On April 9, 2021, defendants jointly moved for summary disposition. Plaintiff responded to this motion on May 3, 2021. On that same date, plaintiff moved the trial court for leave to file a first-amended complaint. The proposed first-amended complaint was 81 pages and lists the following defendants: (1) Antrim County, (2) Jocelyn Benson, in her individual capacity and her official capacity as Secretary of State, (3) Jonathan Brater, in his individual capacity and official capacity as Michigan’s Director of Elections, (4) Sheryl Guy, in her individual capacity and official capacity as the Antrim County Clerk, (5) Miller Consultations & Elections, Inc., doing business as Election Source, and (6) Central Lake Township. The proposed first-amended complaint contains 13 counts, including a count that

challenges the constitutionality of MCL 168.31a. The proposed first-amended complaint also alleges that the proposed defendants engaged in multiple constitutional and statutory violations and that they engaged in fraud and civil conspiracy. Plaintiff also sought to challenge certain election results and to obtain injunctive relief, declaratory relief, monetary damages, fees, and costs.

Thus, plaintiff sought to add significant factual allegations and theories of liability against new parties. Not only did plaintiff seek to add new parties and new claims, plaintiff moved to amend the complaint after the close of discovery and after defendants had moved for summary disposition. Also, a bench trial had been scheduled for June 2021, and the trial court had indicated that it would not grant adjournments. The record also supports that plaintiff was aware of the above-named potential defendants and the facts contained in the proposed amended complaint long before the May 2021 motion to amend was filed. Because the proposed defendants would be unable to have a fair trial, we conclude that prejudice would have resulted if plaintiff had been permitted to amend the complaint. See *Weymers v Khera*, 454 Mich 639, 659-660; 563 NW2d 647 (1997) (holding that factors like whether the plaintiff is seeking “to add a new claim or a new theory of recovery on the basis of the same set of facts, after discovery is closed, just before trial,” support a finding of prejudice). Additionally, review of the proposed first-amended complaint supports that permitting amendment of some of the claims would have been futile.

Consequently, even if the trial court had considered the motion, it would have been improper for the trial court to permit amendment of the complaint.

Affirmed.

CAMERON, P.J., and CAVANAGH and GADOLA, JJ., concurred.

## 13400 MOUNT ELLIOTT, LLC v STATE TAX COMMISSION

Docket No. 355110. Submitted April 5, 2022, at Detroit. Decided April 28, 2022, at 9:00 a.m.

13400 Mount Elliott, LLC, filed a petition in the Oakland Circuit Court challenging the State Tax Commission's use of the 2019 taxable value of property owned by Mount Elliott when issuing an industrial facilities exemption certificate (IFEC) for the property under the plant rehabilitation and industrial development districts act (PRIDDA), MCL 207.551 *et seq.* In 2018, the city of Detroit granted Mount Elliott's application for the establishment of a plant rehabilitation district where the property was located. After Detroit approved the application, Mount Elliott applied for an IFEC for the property, using the 2018 taxable value of the property for calculating the industrial facilities tax. Ultimately, the 2018 taxable value was crossed out and replaced with the 2019 taxable value. Detroit and the commission approved the application and granted the IFEC, which was based on the property's 2019 taxable value; the IFEC became effective on December 31, 2019, for a period of 12 years. After the application was approved, Mount Elliott filed the instant action, arguing that under MCL 207.564(1), the commission was required to use the property's 2018 taxable value for the IFEC, not the 2019 taxable value. The court, Hala Jarbou, J., upheld the commission's use of the 2019 taxable value. Relying on language from other provisions of PRIDDA and the General Property Tax Act (GPTA), MCL 211.1 *et seq.*, the court reasoned that under MCL 207.564(1), the tax year immediately preceding the December 31, 2019 effective date of the IFEC was the tax year in which the certificate was issued and that, therefore, the 2019 taxable value should be used to calculate the industrial facility tax, not the 2018 taxable value. Mount Elliott appealed by leave granted.

The Court of Appeals *held*:

MCL 207.558 provides that when a plant rehabilitation district or industrial development district is established by a local governmental unit, the owner or lessee of a facility within the district may apply for an IFEC that exempts the property from ad valorem taxes; an industrial facilities tax freezes the amount of

yearly taxes for a period up to 12 years. Under PRIDDA, both the commission and the local governmental unit that established the district must approve an IFEC application. MCL 207.557(1), in turn, provides that an approved IFEC is effective the immediately succeeding December 31 following the date the certificate is issued. MCL 207.564 sets forth the formula by which the industrial facilities tax is calculated. Specifically, MCL 207.564(1) provides that the industrial facility tax is calculated by multiplying the total mills levied as ad valorem taxes for that year by all taxing units within which the facility is situated by the taxable value of the real and personal property of the obsolete industrial property for the tax year immediately preceding the effective date of the IFEC after deducting the taxable value of the land and of the inventory. Given the Legislature's use of the clear and unambiguous language "for the tax year immediately preceding the effective date of the [IFEC]," an industrial facility tax is calculated by using the facility's taxable value as of the tax year immediately preceding the IFEC's effective date. Had the Legislature intended to calculate the industrial facilities tax by using the "current" tax year, "December 31," or the "tax day"—as used in other provisions of PRIDDA or the GPTA—it would have used that language. In this case, the effective date of Mount Elliott's IFEC was December 31, 2019, and the "tax year immediately preceding" the effective date was January 1, 2018 to December 31, 2018. Accordingly, the IFEC should have been calculated based on the 2018 taxable value of the property, and the trial court erred by reading language into MCL 207.564(1) to conclude otherwise.

Reversed.

TAXATION – PLANT REHABILITATION AND INDUSTRIAL DEVELOPMENT DISTRICTS ACT – INDUSTRIAL FACILITIES EXEMPTION CERTIFICATES – "IMMEDIATELY PRECEDING THE EFFECTIVE DATE" – CALCULATION OF TAXABLE VALUE.

The plant rehabilitation and industrial development districts act allows for the establishment of a plant rehabilitation district or industrial development district; the industrial facility tax for an industrial facilities exemption certificate (IFEC) issued under the act is calculated by multiplying the total mills levied as ad valorem taxes for that year by all taxing units within which the facility is situated by the taxable value of the real and personal property of the obsolete industrial property for the tax year immediately preceding the effective date of the IFEC after deducting the taxable value of the land and of the inventory; the industrial facility tax is calculated by using the facility's taxable

value as of the tax year immediately preceding the IFEC's effective date (MCL 207.551 *et seq.*; MCL 207.564(1)).

*Howard & Howard Attorneys PLLC* (by *H. William Burdett, Jr.*, and *Michelle D. Champagne*) for 13400 Mount Elliott, LLC.

*Dana Nessel*, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Michael R. Bell*, Assistant Attorney General, for the State Tax Commission.

Before: GLEICHER, C.J., and K. F. KELLY and PATEL, JJ.

PER CURIAM. The plant rehabilitation and industrial development districts act (PRIDDA), MCL 207.551 *et seq.*, authorizes local governments to establish districts and grant industrial facilities tax exemption certificates (IFECs). An IFEC, if approved by the State Tax Commission (STC), provides a significant tax advantage by essentially freezing the taxable value of the property for up to 12 years. The limited liability company that purchased the property located at 13400 Mount Elliott Street in Detroit, Michigan, argues that the trial court erred by affirming the STC's use of the 2019 taxable value for the subject property's IFEC instead of the 2018 taxable value. Because we agree that the "tax year immediately preceding" the December 31, 2019 effective date of the IFEC was 2018, we reverse the trial court's decision.

#### I. BACKGROUND

In 2018, 13400 Mount Elliott, LLC (Mount Elliott), purchased the property located at that address to "transform [the property] from an obsolete, under-utilized structure into a state of the art [sic] World

Class Steel Fabrication Center of Excellence.” Mount Elliott then applied to the city of Detroit for the establishment of a “plant rehabilitation district” under PRIDDA.

After the city approved the plant rehabilitation district, Mount Elliott applied for an IFEC. Mount Elliott’s IFEC application included the 2018 taxable value of the property. At some point after submission, the 2018 taxable value was crossed out and replaced with the 2019 taxable value.<sup>1</sup> The IFEC application was approved by the city and the STC. The IFEC became effective on December 31, 2019, for a period of 12 years and was based on the property’s 2019 taxable value.

Mount Elliott filed a petition in the circuit court, arguing that MCL 207.564(1) required the STC to use the property’s 2018 taxable value for the IFEC. The trial court upheld the STC’s application of the 2019 taxable value, stating that “the tax year immediately preceding the effective date of the [IFEC] is the tax year in which the certificate is issued.” Mount Elliott sought leave to appeal in this Court, which we denied.<sup>2</sup> In lieu of granting leave to appeal, the Supreme Court remanded the matter to this Court for consideration as on leave granted.<sup>3</sup>

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<sup>1</sup> The 2019 taxable value was modified several times after the IFEC was issued in December 2019. It was originally assessed at \$1,257,300, but it was eventually modified to \$689,260 pursuant to a consent judgment between Mount Elliott and the city of Detroit.

<sup>2</sup> *13400 Mount Elliott LLC v State Tax Comm*, unpublished order of the Court of Appeals, entered December 17, 2020 (Docket No. 355110).

<sup>3</sup> *13400 Mount Elliott, LLC v State Tax Comm*, 507 Mich 953 (2021).

## II. STANDARD OF REVIEW

Under the Administrative Procedures Act, MCL 24.201 *et seq.*, the trial 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.” *Delta Business Ctr, LLC v Delta Charter Twp*, 328 Mich App 684, 689; 939 NW2d 460 (2019).

This matter involves the STC’s interpretation of MCL 207.564(1). The STC’s interpretation of the statute is a question of law that we review de novo. *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 102; 754 NW2d 259 (2008).

## III. ANALYSIS

Mount Elliott argues that the trial court erred by concluding that 2019 was “the tax year immediately preceding the [December 31, 2019] effective date of the [IFEC] . . . .” We agree.

When a plant rehabilitation district or industrial development district is established under PRIDDA, the owner or lessee of a facility within the district may apply for an IFEC that exempts the property from ad valorem taxes. MCL 207.558. The IFEC application must be approved by the local governmental unit that established the district as well as the STC. MCL 207.556; MCL 207.557(1). The IFEC, if approved, is effective “the immediately succeeding December 31 following the date the certificate is issued.” MCL 207.557(1). An industrial facility tax is then levied on the exempt facility, MCL 207.561, calculated as follows:

The amount of the industrial facility tax, in each year for a replacement facility, shall be determined by multi-



plying the total mills levied as ad valorem taxes for that year by all taxing units within which the facility is situated by the taxable value of the real and personal property of the obsolete industrial property for the tax year immediately preceding the effective date of the industrial facilities exemption certificate after deducting the taxable value of the land and of the inventory . . . . [MCL 207.564(1).]

An industrial facility tax is beneficial to facility owners and lessees because the amount of yearly taxes levied against a property is frozen for a period of up to 12 years. MCL 207.566(1). Like an algebra equation, the statute recites several variables that must be multiplied to calculate a facility's tax obligation under an IFEC: total mills, taxing units, and taxable value. MCL 207.564(1). At issue in this case is the third variable—taxable value. Mount Elliott argues that the tax year immediately preceding the December 31, 2019 effective date of the IFEC was 2018 and thus the 2018 taxable value should be used to calculate the industrial facility tax. But the STC concluded, and the trial court agreed, that the 2019 taxable value should be used.

“The principal goal of statutory interpretation is to give effect to the Legislature’s intent, and the most reliable evidence of that intent is the plain language of the statute.” *South Dearborn Environmental Improvement Ass’n, Inc v Dep’t of Environmental Quality*, 502 Mich 349, 360-361; 917 NW2d 603 (2018). “Where the statutory language is unambiguous, the plain meaning reflects the Legislature’s intent and the statute must be applied as written.” *Honigman Miller Schwartz & Cohn LLP v Detroit*, 505 Mich 284, 294-295; 952 NW2d 358 (2020) (quotation marks and citations omitted). “Courts cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute, and then, on the basis of that

assumption, apply what is not there.” *Farrington v Total Petroleum, Inc*, 442 Mich 201, 210; 501 NW2d 76 (1993). “An administrative agency’s interpretation of a statute that it is obligated to execute is entitled to respectful consideration, but it cannot conflict with the plain meaning of the statute.” *Honigman*, 505 Mich at 295 (quotation marks and citations omitted).

It is undisputed that the effective date of Mount Elliott’s IFEC was December 31, 2019. It is further undisputed that a “tax year” runs from January 1 to December 31. The only remaining issue is to identify the tax year “immediately preceding” the December 31, 2019 effective date.

Rather than apply the plain meaning of the unambiguous statutory language, the STC and the trial court have read language into the statute that is simply not there. The STC maintains that the term “tax year” in MCL 207.564(1) actually means “tax day” when read in the context of PRIDDA and the General Property Tax Act (GPTA).<sup>4</sup> Specifically, the STC and the trial court relied on MCL 211.2(2) of the GPTA, which provides that the taxable status of a property “for a tax year shall be determined as of each December 31 of the immediately preceding year, which is considered the tax day[.]” The STC asserted that December 31, 2018 was “tax day” for “tax year” 2019 and December 31, 2019 was “tax day” for “tax year” 2020, so December 31, 2018 was the “tax year immediately preceding” the certificate’s December 31, 2019 effective date. Using this same analysis, the trial court held, in pertinent part, as follows:

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<sup>4</sup> MCL 211.1 *et seq.*

[T]he “tax day” referenced in MCL 211.2(2), is the same as the effective date for the certificate, and encompasses the following tax year.

... Both the certificate’s effective date and the yearly tax day apply to the following tax year. Therefore, the tax year immediately preceding the effective date of the certificate is the tax year in which the certificate is issued.

Mount Elliott, on the other hand, argues that the Legislature was well aware of the distinction between “tax year,” “December 31,” and “tax day” when it drafted MCL 207.564(1) and could have used “December 31” or “tax day” if that was what it meant instead of “tax year.” We agree.

As reflected in the following examples, the Legislature has specified “December 31” as a triggering date in multiple sections of PRIDDA: MCL 207.557(1) (providing that an IFEC’s effective date “is the immediately succeeding *December 31*”) (emphasis added); MCL 207.560(1) (stating that the local assessor must determine the value and taxable value of each facility covered by an IFEC “annually as of *December 31*”) (emphasis added); MCL 207.567(2) (providing that the local assessor shall annually notify the necessary entities and the holder of an IFEC of the real and personal property assessments “based upon valuations as of the preceding *December 31*”) (emphasis added). But the Legislature did not use “December 31” in MCL 207.564(1).

The Legislature used clear and unambiguous terms in other tax-exemption statutes similar to PRIDDA when it intended to apply the taxable value from the preceding December 31 to calculate taxes. See, e.g., MCL 125.2790(2)(a) (stating that the amount of the obsolete properties tax is determined, in part, by “[m]ultiplying the total mills levied as ad valorem

taxes for that year by all taxing units within which the rehabilitated facility is located by the taxable value of the . . . property of the obsolete property *on the December 31 immediately preceding the effective date* of the . . . exemption certificate”) (emphasis added); MCL 207.850(2)(a) (providing that the amount of the commercial rehabilitation tax is determined, in part, by “[m]ultiplying the total mills levied as ad valorem taxes for that year by all taxing units within which the qualified facility is located by the taxable value of the . . . property of the qualified facility *on the December 31 immediately preceding the effective date* of the . . . exemption certificate”) (emphasis added). However, the Legislature chose not to use “December 31” in MCL 207.564(1) when providing the method by which to calculate the industrial facility tax.

And when the Legislature intended “tax day” to be the triggering date, it has expressly stated so, as reflected in the following examples: MCL 211.34d(1)(b)(iii) (stating that “‘new construction’ means property not in existence on the immediately *preceding tax day*”) (emphasis added); MCL 211.34d(1)(b)(iv) (providing that “‘previously exempt property’ means property that was exempt from ad valorem taxation under this act on the immediately *preceding tax day* but is subject to ad valorem taxation on the *current tax day*”) (emphasis added). But the Legislature did not use “tax day” in MCL 207.564(1).

Additionally, the Legislature could have simply stated that the “current” tax year’s taxable value should be used to calculate the industrial facilities tax if that is the value that it intended to be used. For example, § 154 of the GPTA confers administrative jurisdiction on the STC to correct property tax assessments, including properties with IFECs, that were

“incorrectly reported or omitted for any previous year, but not to exceed the *current* assessment year and 2 years *immediately preceding* the date the incorrect reporting or omission was discovered and disclosed to” the STC. MCL 211.154(1) (emphasis added).<sup>5</sup>

These examples illustrate the Legislature’s consistent use of plain language to distinguish between a “current” tax year, “immediately preceding” tax year, “December 31,” and “tax day.” If the Legislature intended an industrial facility tax to be calculated by using the facility’s taxable value for the same tax year as the IFEC’s effective date (i.e., the current tax year), it would have stated “current” tax year as opposed to “tax year immediately preceding” the IFEC’s effective date. See *Lickfeldt v Dep’t of Corrections*, 247 Mich App 299, 306; 636 NW2d 272 (2001) (“We presume that the phraseological distinction reflects a legislative intent to treat these concepts differently.”). It is clear that the “tax year immediately preceding” the December 31, 2019 effective date of the IFEC was January 1, 2018 to December 31, 2018, and not January 1, 2019 to December 31, 2019, which is the tax year that the IFEC was issued (i.e., the “current tax year”). The trial court and the STC erroneously read language into MCL 207.564(1) that is not included in the statute.

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<sup>5</sup> Other similar corrective measures are included in the GPTA. See, e.g., MCL 211.7cc(6) (stating that a local tax assessor may deny a claim for a principal residence exemption “for the *current* year and for the 3 *immediately preceding* calendar years” and amend the tax roll to reflect the denial) (emphasis added); MCL 211.7hh(6) (stating that erroneously granted tax exemptions for qualified start-up businesses shall be corrected in the tax rolls “for the *current* tax year and the 3 *immediately preceding* tax years”) (emphasis added).

## IV. CONCLUSION

The language of MCL 207.564(1) is clear and unambiguous, and therefore, we must enforce it as written. The STC should have used the property's 2018 taxable value for the IFEC. The trial court erred by upholding the STC's application of the property's 2019 taxable value. For the reasons set forth in this opinion, we reverse.

GLEICHER, C.J., and K. F. KELLY and PATEL, JJ., concurred.

## PEOPLE v DEROUSSE

Docket No. 358358. Submitted April 12, 2022, at Lansing. Decided May 5, 2022, at 9:00 a.m.

Brigitte L. Derosse was charged with abandonment of or cruelty to 25 or more animals, MCL 750.50(4)(e), in the Jackson Circuit Court. Defendant was originally charged under MCL 750.50(4)(c) with abandonment of or cruelty to 4 to 10 animals, but the charges were amended following a probable-cause hearing. Defendant moved to suppress evidence regarding the seizure of animals from her property on the ground that the search warrant permitted officers to search “a single-family dwelling,” but officers had also searched two pole barns on her property, from which they seized several animals. Additionally, defendant argued that the search warrant authorized the seizure of five dogs (and various livestock) that were described in the warrant, but officers seized 23 dogs from the property. Following an evidentiary hearing, the trial court, Susan B. Jordan, J., partially granted defendant’s motion and suppressed the evidence seized from the two pole barns. Plaintiff’s interlocutory application for leave to appeal was granted by the Court of Appeals.

The Court of Appeals *held*:

1. Because defendant had a reasonable expectation of privacy in the interior of the barns, a warrant was required before the officer could search inside the barns. When evaluating whether a defendant has a reasonable expectation of privacy in a building sufficient to challenge a search on Fourth Amendment grounds, the court must inquire whether the defendant took normal precautions to maintain their privacy. The prosecutor in this case noted that there was not a separate fence around either barn, both barns could be seen from the road, and both were easily accessible from the road. However, these facts were pertinent to whether defendant had a reasonable expectation of privacy in the *exteriors* of the barns, not their interiors. The prosecution further argued that the barns were not associated with the intimate daily activities of defendant’s home and that the barns were not locked, nor were there other indications that defendant had a privacy expectation in either barn. However, the animal control officer

testified that one of the barns was “secured” when he was on the property before the search warrant was obtained, and although he heard dogs barking inside the barn, he could not see the dogs because the barn was windowless. The door of the other barn was partially opened, according to the officer, but he did not testify that he could see anything amiss when he looked through the opening. The secured nature of one of the barns reflected that defendant took normal precautions to maintain her privacy, and given that nothing incriminating was observed through the partially opened door of the other barn, the evidence did not demonstrate that defendant lacked any reasonable expectation of privacy in the interiors of the barns. Although the United States Supreme Court held in *Oliver v United States*, 466 US 170 (1984), that the Fourth Amendment’s protections do not extend to areas outside the curtilage of a home, *Oliver* recognized that an individual’s privacy expectation in an open field is different than it would be in an enclosed structure. Similarly, in this case, defendant had a privacy expectation in her barns that she did not have in her fields.

2. Contrary to the prosecution’s claims, the search warrant did not authorize officers to search the two barns on defendant’s property. The warrant described a “single-family dwelling,” and it did not refer to the barns. Although the affidavit supporting the search warrant referred to a dog kennel that was being operated out of one of the pole barns, it did not describe or refer to the pole barns. Further, the officer observed the animals described in the affidavit while they were in the open and without having to enter any structure on the property. Therefore, the description of the animals to be seized did not operate to extend the scope of the warrant beyond the place specifically described therein. Moreover, the barns were not located within the curtilage of the residence described in the warrant. The test for determining whether the description in the warrant is sufficient to satisfy the particularity requirement is whether the description is such that the officers with a search warrant can, with reasonable effort, ascertain and identify the place intended. In this case, because the warrant described the residence with particularity but did not refer to the pole barns located outside the curtilage of the home, the warrant did not apply to the barns.

3. Under the good-faith exception to the exclusionary rule, evidence obtained through a defective search warrant is admissible when the executing officer relied on the validity of the warrant in good faith. The search warrant in this case was not defective, but the search of the barns was warrantless because it



was not authorized by the warrant. The good-faith exception has been extended by the United States Supreme Court to cases in which a search was conducted without a warrant, such as when the police conducted a search in reliance on a statute that was subsequently declared unconstitutional, or when a search was made in reliance on clerical errors by court employees. However, the record here did not indicate that the animal control officer conducted his search in reliance on any statute or clerical error. Rather, he believed that the warrant authorized the search of the barns. Accordingly, the suppression of the evidence was not barred by the good-faith exception to the exclusionary rule.

Affirmed.

BOONSTRA, P.J., concurring in part and dissenting in part, agreed with the majority opinion that defendant had a reasonable expectation of privacy in her pole barns, even if they were located outside the curtilage of her home. However, he dissented from Parts (II)(B)(2) and (3) of the majority opinion because he believed that, although the parties had stipulated that the barns were not within the curtilage of defendant's home, whether the barns were *actually* located outside the curtilage of defendant's home was a question of fact that should have been analyzed by the Court of Appeals. In *People v Bawiec*, 228 Mich 32 (1924), the Michigan Supreme Court held that a search warrant for a residence did not authorize the search of a second structure within the curtilage of a residence. Judge BOONSTRA noted that, although *Bawiec* had not been overruled, the Court of Appeals had recognized that our Supreme Court would likely decide the issue differently if they were to revisit it, given subsequent developments in Fourth Amendment law. In the years after *Bawiec*, federal and state courts have held that the Fourth Amendment is not violated when the grounds or outbuildings within a residence's curtilage are searched. Therefore, whether the pole barns were within the curtilage of defendant's house was an important factor in determining whether the search warrant was sufficient to authorize the search of the barns. Additionally, the warrant was ambiguous as to whether it authorized a search beyond the residence and the curtilage, given that it referred to "the property" to be searched and described various farm animals to be seized that would not be expected to be found within a residence, but in open spaces or inside barns. Alternatively, the warrant could have given rise to a good-faith belief that the barns were included within the area that could permissibly be searched. Judge BOONSTRA would have remanded to the lower court for further proceedings regarding

the scope of the warrant and the applicability of the good-faith exception to the warrant requirement.

CONSTITUTIONAL LAW – SEARCHES AND SEIZURES – SEARCH WARRANTS –  
RESIDENCES – STRUCTURES OUTSIDE THE CURTILAGE OF A RESIDENCE.

When the place to be searched described in a search warrant is a residence, if the warrant describes the residence with particularity but does not describe other structures on the property that are outside the curtilage of the residence, the search warrant does not authorize the search of the structures that are outside the curtilage of the residence.

*Dana Nessel*, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Jerard M. Jarzynka*, Prosecuting Attorney, and *Matthew J. Way*, Assistant Prosecuting Attorney, for the people.

*Collis, Griffor & Hendra, PC* (by *Stuart M. Collis*, *Beverly M. Griffor*, and *Andrew C. Hendra*) for defendant.

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

M. J. KELLY, J. The prosecution appeals by leave granted<sup>1</sup> the trial court order partially granting the motion of defendant, Brigitte Derosse, to suppress evidence seized from two barns located outside the curtilage of Derosse’s home.<sup>2</sup> We affirm for the reasons stated in this opinion.

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<sup>1</sup> *People v Derosse*, unpublished order of the Court of Appeals, entered November 8, 2021 (Docket No. 358358).

<sup>2</sup> The capitalization of defendant’s name varies throughout the lower court record. This opinion uses “Derosse” rather than “DeRousse” in accordance with the felony information, defendant’s motion to suppress evidence, and our order granting leave to appeal.

## I. BASIC FACTS

On November 7, 2019, Shawn Lutz, an animal control officer in Jackson County, responded to a call that there was a cow running loose. When he arrived, the cow was in the roadway. He sounded his horn and hollered, and in response, the beast meandered back to Derosse's property with Lutz following in his truck. Once on the property, the cow "jumped" the fence to its pen. Lutz, who intended to ensure that the cow was returned to its enclosure and to speak with its owner, observed an alarming number of dead animals on Derosse's property, including some in carcass form and some that were skeletal. He also saw three emaciated Labrador dogs. From the pole barn on the west side of the property (the "west pole barn"), he could hear the barking and yipping of additional dogs. However, he was unable to observe them because the barn was "secured and there [were] no windows." Lutz learned from a neighbor that there had been multiple complaints of "animals at large" on Derosse's property. Lutz later spoke with Derosse, who acknowledged that the cow that had been running loose was a problem. She also acknowledged that there were a large number of dead animals on the property, but she said she did not know how they had died. Lutz sought a search warrant because he was concerned about the number of dead animals and the emaciated condition of the three dogs he observed.<sup>3</sup>

On November 8, 2019, he returned to Derosse's property with the warrant and seized approximately 35 animals. From the west pole barn, he seized 23 dogs. He testified that the dogs did not have access to

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<sup>3</sup> Lutz explained that the search warrant for Derosse's property was the second warrant he had prepared.

food and that there was feces and urine—up to one inch thick in places—covering the floors. One of the dogs was eating feces. None of the dogs had access to drinking water. Instead, three of the dogs shared a five-gallon bucket with “marginal green water” at the bottom, which the dogs could not reach because of the depth of the bucket. The other dogs had water containers with a small amount of water that was contaminated by urine and feces. A medical examination showed that all of the dogs had internal and external parasites. One dog had a tumor on its stomach. From another pole barn on the east side of the property (the “east pole barn”), Lutz seized a raccoon and two cows. The cows did not have access to food or water. Their enclosure was barely large enough to allow them to turn, and the floor was covered with urine and feces. Lutz also seized several cows located in two outside pens. In both pens, the water provided for the cows was algae-infested and frozen. Hay was available in one pen, but it was covered in a netting. The hay outside the second pen was also covered in netting and the cows had eaten what they could reach from their enclosure. In order to access the hay, the cows in the south pen had to navigate two dead cows. There was also one cow that was so emaciated that it could not stand. The property also had carcasses of dead chickens, a lamb, and a large snapping turtle, which was in a burlap bag near a butcher knife.

Deraussee was initially charged with abandonment of or cruelty to 4 to 10 animals, MCL 750.50(4)(c). However, on September 22, 2020, following a probable-cause hearing, the charges were amended to abandonment of or cruelty to 25 or more animals, MCL 750.50(4)(e). Deraussee moved to suppress evidence regarding the seizure of the animals. Relevant to the issue raised on appeal, Deraussee argued that the

search warrant permitted officers to search “a single-family dwelling,” which did not include the outbuildings on the property. Therefore, she contended that the searches of the pole barns were illegal. Derosse additionally argued that the warrant authorized the seizure of two silver Labradors, a chocolate Labrador, a French Bulldog, a Teacup Chihuahua, nine cows, three sheep, and items related to rabies vaccinations, but officers seized 23 dogs. Derosse argued that the dogs were illegally taken from a red pole barn that was not included in the search warrant. Derosse added that officers also seized a raccoon and the pelvis of a dead animal, which she believed were outside the scope of the warrant. Following an evidentiary hearing, the trial court partially granted Derosse’s motion and suppressed the evidence seized from the two pole barns. This appeal by leave granted follows.

## II. MOTION TO SUPPRESS

### A. STANDARD OF REVIEW

The prosecution contends that the trial court erred by partially granting Derosse’s motion to suppress. This Court reviews for clear error a trial court’s findings at a suppression hearing. *People v Williams*, 472 Mich 308, 313; 696 NW2d 636 (2005). “A finding is clearly erroneous if it leaves this Court with a definite and firm conviction that the trial court made a mistake.” *People v Dillon*, 296 Mich App 506, 508; 822 NW2d 611 (2012). However, “the application of constitutional standards regarding searches and seizures to essentially uncontested facts is entitled to less deference; for this reason, we review de novo the trial court’s ultimate ruling on the motion to suppress.” *Williams*, 472 Mich at 313.

## B. ANALYSIS

## 1. WARRANT REQUIREMENT

The prosecution first argues that the search of the barns did not violate the Fourth Amendment because the barns were located outside the curtilage of Derousse's home<sup>4</sup> and Derousse did not have a reasonable expectation of privacy in either barn. We disagree.

The Fourth Amendment of the Constitution of the United States guarantees to the people the right to be "secure in their persons, houses, papers, and effects, against unreasonable searches and seizures[.]" US Const, Am IV. It also provides that warrants shall not be issued except "upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." *Id.* Similarly, the Michigan Constitution guarantees that "[t]he person, houses, papers, possessions, electronic data, and electronic communications of every person shall be secure from unreasonable searches and seizures," and "[n]o warrant to search any place or to seize any person or things or to access electronic data or electronic communications shall issue without describing them, nor without probable cause, supported by oath or affirmation." Const 1963, art 1, § 11. Absent a compelling reason, Michigan courts must construe Const 1963, art 1, § 11 "to provide the same protection as that secured by the Fourth Amendment." *People v Collins*, 438 Mich 8, 25; 475 NW2d 684 (1991).

"A search within the meaning of the Fourth Amendment 'occurs when an expectation of privacy that society is prepared to consider reasonable is in-

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<sup>4</sup> The parties agreed below that the barns were located outside the curtilage of Derousse's home. Accordingly, that issue is not before us on appeal.

fringed.’” *People v Jones*, 279 Mich App 86, 91; 755 NW2d 224 (2008), quoting *United States v Jacobsen*, 466 US 109, 113; 104 S Ct 1652; 80 L Ed 2d 85 (1984). “The touchstone of the Fourth Amendment is reasonableness.” *People v Hammerlund*, 504 Mich 442, 451; 939 NW2d 129 (2019). When “an individual has a reasonable expectation of privacy in the area searched, or the materials seized, a search has been conducted.” *People v Whalen*, 390 Mich 672, 677; 213 NW2d 116 (1973). An expectation of privacy is reasonable “only if the individual exhibited an actual, subjective expectation of privacy and that actual expectation is one that society recognizes as reasonable.” *People v Taylor*, 253 Mich App 399, 404; 655 NW2d 291 (2002). “Whether the expectation exists, both subjectively and objectively, depends on the totality of the circumstances surrounding the intrusion.” *Id.* at 405. When evaluating whether a defendant has a reasonable expectation of privacy in a building sufficient to challenge a search under the Fourth Amendment, “we must inquire whether [the] defendant took normal precautions to maintain his privacy—that is, precautions normally taken by those seeking privacy.” *Id.* (quotation marks and citation omitted).

The prosecution argues that Derosse had no reasonable expectation of privacy in the barns because there was not a separate fence around either barn, both barns could be seen from the road, and they were both easily accessible from the road. Such facts, however, are pertinent to whether Derosse had a reasonable expectation of privacy in the exteriors of the barns, not the interiors.

The prosecution also asserts that the barns were not associated with the intimate daily activities of Derosse’s home given that Derosse kept animals in the

barns and did not live in either barn. Finally, the prosecution claims that the barns were not locked and that Derousse “failed to set up anything that showed that she had a privacy expectation in either barn.” In making its argument, however, the prosecution ignores the record. Lutz testified that when he was on the property on November 7, 2019, the west pole barn was “secured” and, because it had no windows, he could not “get [a] visual ID” of the dogs that he could hear barking inside it. When he returned the next day, the barn was locked. Further, although the east pole barn had a partially open door, Lutz did not testify that he could see anything amiss when he peeked through that opening on November 7. Given the record actually before us, the secured nature of the west pole barn reflects that Derousse took normal precautions to maintain her privacy. Moreover, although the door to the east pole barn was partially open when Lutz was first on the property, given that nothing incriminating was observed through the entry, we are not persuaded that Derousse lacked any reasonable expectation of privacy in the interior of the barn. Because Derousse had a reasonable expectation of privacy in the interior of both barns, a warrant was required before Lutz could search either barn.

Our conclusion that Derousse had a legitimate expectation of privacy in the interior of her barns is consistent with cases from our sister states. “Caselaw from sister states and federal courts is not binding precedent but may be relied on for its persuasive value.” *Haydaw v Farm Bureau Ins Co*, 332 Mich App 719, 726 n 5; 957 NW2d 858 (2020). We find persuasive the Supreme Court of Illinois’s opinion in *People v Pitman*, 211 Ill 2d 502; 813 NE2d 93 (2004). In that case, the court held that “[t]he fourth amendment [sic] protects structures other than dwellings, and those



structures need not be within the curtilage of the home.” *Id.* at 519. The court concluded that the defendant had a legitimate expectation of privacy in the barn given that he “clearly had a possessory interest in the entire farm and had the ability to control or exclude others from the use of the property.” *Id.* at 521. The court held that the warrantless search of the barn was unreasonable under the Fourth Amendment unless the search fell within an exception to the warrant requirement. *Id.* at 523. Likewise, in *Siebert v Severino*, 256 F3d 648, 654 (CA 7, 2001), the United States Court of Appeals for the Seventh Circuit explained that the Supreme Court held in *United States v Dunn*, 480 US 294, 300; 107 S Ct 1134; 94 L Ed 2d 326 (1987),<sup>5</sup> that officers could look through a barn’s open doorway, but “did not hold that the police could *enter* the barn itself.” The court held that there was a reasonable expectation of privacy in the barn. *Siebert*, 256 F3d at 661. Similarly, the United States Court of Appeals for the Fourth Circuit has held that an officer could make observations by looking through an open loft of a barn, but that an individual has a reasonable expectation of privacy in a barn, and, therefore, an officer could not enter without a warrant. *United States v Wright*, 991 F2d 1182, 1186 (CA 4, 1993). As the Seventh Circuit

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<sup>5</sup> When discussing *Dunn*, Gillespie, Michigan Criminal Law & Procedure, Search and Seizure (2d ed), § 2:21, p 84, explains:

Significantly, the Court did *not* hold that *structures* outside the curtilage may themselves be entered and searched without warrant, the Court accepting “for the sake of argument” that they may not be, but held rather that observations of the contents made without entry are not barred by the Fourth Amendment. The Court’s supposition is correct: Though the fields are not within the protection afforded to one’s “person, houses, papers and effects,” an outbuilding *is* a protected “house,” though not a dwelling house, which falls within the core privacy values protected by the Fourth Amendment. [Citation omitted.]

stated, “a reasonable state actor” would know that a warrant was needed in order to enter a fenced-in, closed structure near a person’s home. *Siebert*, 256 F3d at 655. That is what occurred in this case. Lutz did not enter or attempt to seize animals before obtaining a warrant, and his testimony makes clear that he believed the warrant permitted him to enter the barns to search for and seize the animals located therein.

Moreover, none of the cases cited by the prosecution supports a warrantless search of Derousse’s barns. The prosecution first cites *People v Spencer*, unpublished per curiam opinion of the Court of Appeals, issued May 3, 2012 (Docket No. 304422), and *People v Green*, unpublished per curiam opinion of the Court of Appeals, issued April 9, 2015 (Docket Nos. 323433 and 323435),<sup>6</sup> for the proposition that a defendant does not have a reasonable expectation of privacy in barns located on his or her property. However, in *Spencer*, unpub op at 5, a panel of this Court held that “the officers were not on the curtilage when they knocked on the door of the pole barn in order to make contact with [the] defendant.” The officers in *Spencer* did not enter the barns until the defendant provided consent. *Id.* at 2. Likewise, in *Green*, unpub op at 4-5, a panel of this Court held that a pole barn was not within the home’s curtilage and that the officers did not conduct a search by approaching the pole barn when attempting to contact the residents of the home. Further, the officers did not enter the pole barn until after obtaining a search warrant. *Id.* at 2. Accordingly, neither *Green*

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<sup>6</sup> Although an unpublished opinion is not binding, this Court may follow the opinion if it finds the reasoning persuasive. MCR 7.215(C)(1); *Kern v Kern-Koskela*, 320 Mich App 212, 241; 905 NW2d 453 (2017).

nor *Spencer* supports the prosecution's argument that a warrantless search of the interiors of Derosse's barns was permissible.

The prosecution further relies on *United States v Mooring*, 137 F3d 595, 596 (CA 8, 1998), in which the United States Court of Appeals for the Eighth Circuit affirmed the trial court's finding that a barn was not within the curtilage of a home. The Eighth Circuit explained that although the officer's view of the barn was obscured, "this fact in itself does not establish the barn should be included within the farmhouse's Fourth Amendment protection." *Id.* at 597. But the officers in *Mooring* did not enter the barn until after they obtained a warrant. *Id.* at 596. As a result, it is inapposite.

The prosecution further relies on *United States v Long*, 674 F2d 848, 852-853 (CA 11, 1982), in which the United States Court of Appeals for the Eleventh Circuit held that "there was no legitimate expectation [of privacy] that [the defendant] or anyone else could claim in the contents of [a] barn" because there was no legitimate expectation of privacy in outbuildings unless they were part of the curtilage of a home. However, the court also explained that there was *no residence* on the property and that "even if we had found that a legitimate expectation of privacy could have existed in the contents of the barn, it is highly doubtful that [the defendant] himself had such an expectation since, at the time of the search, not even his wife[, who had previously owned the property where the search was conducted,] owned the lands on which the barn was situated." *Id.* at 853 n 6. Moreover, a customs agent in *Long* climbed a fence in order to look into the door of the barn, but he did not search the barn until he obtained a search warrant. *Id.* at 851-852. This case is

distinguishable from *Long* because Derosse's home is situated on the property, she took steps to secure it so as to exclude others, and no agent saw inside the barns until after a warrant had been obtained.

Finally, the prosecution relies on *Oliver v United States*, 466 US 170; 104 S Ct 1735; 80 L Ed 2d 214 (1984), to argue that it is "well established that the Fourth Amendment's protection does not extend to areas outside the home's curtilage because no expectation of privacy attaches." Yet, in *Oliver*, 466 US at 178, the Supreme Court stated that "an individual may not legitimately demand privacy for activities *conducted out of doors in fields*, except in the area immediately surrounding the home." (Emphasis added.) The Supreme Court explained that there was no "societal interest in protecting the privacy of those activities, such as the cultivation of crops, that occur in open fields," which were "accessible to the public and the police in ways that a home, an office, or commercial structure would not be." *Id.* at 179. The Supreme Court, therefore, recognized that individuals would have a different privacy expectation in an open field than in an enclosed structure. Likewise, in this case, Derosse had a privacy expectation in her barns that she did not have in her fields.

In sum, the prosecution's argument that Derosse lacked an expectation of privacy in the barns is both factually and legally unsupported. A warrant was required to search the barns, notwithstanding that they were located outside the curtilage of Derosse's home.

## 2. SCOPE OF THE WARRANT

The prosecution next argues that the search warrant issued authorized the search of the barns. We disagree.

The search warrant issued in this case described the place to be searched in the following way:

1. The person, place or thing to be searched is described as and is located at:

12505 Dearmyer Road, in Columbia Township, it is a one story single-family dwelling. The residence is a single story ranch tan in color with vinyl siding. The residence is occupied with a brown shingled roof. The front door of the residence faces south and the numbers 12505 are on the front of the house. The residence is located in Columbia Township, Jackson County and State of Michigan.

2. The PROPERTY is to be searched due to animals running at large and several dead animals found on the property. Property to be seized is specifically described as:

A total of two silver labs, a chocolate lab, a French Bull Dog and a Tea Cup Chihuahua, 9 cows and 3 sheep. Items related to rabies vaccines administered by animal owner.

The two pole barns on the property are not described, nor are they even referred to in the search warrant. Further, although the affidavit supporting the search warrant refers to a dog kennel being operated out of the west pole barn, the affiant did not describe or mention that pole barn when describing the place that he was seeking a warrant to search. Moreover, given that Lutz observed the animals described in the affidavit while they were in the open and without entering any structures on the property, it is clear that they were not concealed in a barn. Thus, the description of the animals to be seized does not operate to extend the scope of the warrant from the place specifically described. Finally, as agreed to by the parties, the barns

are not located within the curtilage of the residence located at 12505 Dearmyer Road.

As explained by this Court in *People v McGhee*, 255 Mich App 623, 626; 662 NW2d 777 (2003):

The test for determining whether the description in the warrant is sufficient to satisfy the particularity requirement is whether the description is such that the officers with a search warrant can with reasonable effort ascertain and identify the place intended. *Steele v United States*, 267 US 498, 503; 45 S Ct 414; 69 L Ed 757 (1925); *United States v Gahagan*, 865 F2d 1490, 1496 (CA 6, 1989). The Fourth Amendment safeguard is designed to require a description that particularly points to a definitely ascertainable place so as to exclude all others. *Id.* Thus, the test for determining the sufficiency of the description of the place to be searched is (1) whether the place to be searched is described with sufficient particularity to enable the executing officer to locate and identify the premises with reasonable effort, and (2) whether there is any reasonable probability that another premises might be mistakenly searched. *Id.* at 1496-1497. The requirement is designed to avoid the risk of the wrong property being searched or seized. [Quotation marks and citation omitted.]

Here, because the search warrant describes with great particularity the residence, but does not refer to the barns located outside the curtilage of the home, we conclude that the warrant does not apply to the barns. Our conclusion is based on our Supreme Court's decision in *People v Bawiec*, 228 Mich 32; 199 NW 702 (1924). In that case, the search warrant described the place to be searched as

a two-story frame house unpainted, partly shingled upon the sides, located on the north half of the northeast quarter of section five, \* \* \* in the township of Krakow, in said county and State, and occupied by Joe Bawiec and John Bawiec, as a private dwelling and as a place for the

manufacture, storage, sale, furnishing and giving away of intoxicating liquor. [*Id.* at 33 (quotation marks omitted).]

Rather than search the place described, the police searched “an old log house some 18 or 20 feet away and disconnected from the frame house, but within the curtilage . . . .” *Id.* Our Supreme Court held that

while this court has treated as surplusage misdescriptions where the place to be searched has been otherwise described with such definiteness as to leave no discretion in the officer, *we have not thus far held that a search warrant made valid by a definite description pointing only to a specific building and directing a search therein justifies a search of another building not described although located in the same vicinity*. Nor do we think we should so hold. It is permissible to direct in one warrant the search of the house and outbuildings within the curtilage. [*Id.* at 35 (emphasis added).]

The Court concluded that because only the dwelling-house was definitely described and the outbuilding was not described at all, the search of the outbuilding exceeded the scope of the warrant. *Id.* at 35-36. As recognized by this Court in *McGhee*, 255 Mich App at 632, *Bawiec* has not been overruled or challenged.<sup>7</sup> Therefore, its central holding—that the description of one building does not warrant the search of a building

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<sup>7</sup> We note that this Court posited in *McGhee* that, in light of changes to federal Fourth Amendment jurisprudence, our Supreme Court would likely reject the *Bawiec* analysis were it to decide the issue again. See *McGhee*, 255 Mich App at 633-634. Yet, this Court is bound to follow decisions by our Supreme Court “except where those decisions have clearly been overruled or superseded . . . .” *Pearce Estate v Eaton Co Rd Comm*, 507 Mich 183, 195; 968 NW2d 323 (2021). Here, as *Bawiec* has not been clearly overruled or superseded by our Supreme Court, we must follow *Bawiec*.

on the same property that is not particularly described—must be applied by this Court.<sup>8</sup>

Although the prosecution also relies on *People v Hampton*, 237 Mich App 143, 149-154; 603 NW2d 270 (1999), in which this Court upheld a search when the affidavit and search warrant incorrectly described the home on the fourth page, but correctly described it on the first page, this situation is distinguishable because Lutz’s affidavit and the search warrant both accurately described Derosse’s residence, but did not describe any other buildings on the property. Likewise, the prosecution’s reliance on *People v Jones*, 249 Mich App 131, 139; 640 NW2d 898 (2002), is misplaced. In that case, the police searched a vehicle located within the curtilage of the defendant’s home. *Id.* at 133-134. This Court held that the search warrant “included within its authorization” the search of the vehicle. *Id.* at 139. However, nothing in that opinion indicated that a vehicle inside the curtilage of the defendant’s home should be treated the same as a structure outside the curtilage of the defendant’s home.

In sum, the warrant described with particularity only the residence located on the property. It did not authorize—even indirectly—the search of other structures located on the property. As a result, the search of those structures was a warrantless search.

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<sup>8</sup> The changes noted in *McGhee* would not necessarily resolve the issue on appeal. In *McGhee*, this Court noted that various courts have held that the Fourth Amendment is not violated by searches of outbuildings *within* the curtilage of a residence described in a search warrant. *McGhee*, 255 Mich App at 633-634. However, the barns in this case are located outside the curtilage of Derosse’s home.



## 3. GOOD-FAITH EXCEPTION

The prosecution finally argues that even if a warrant was required and the warrant issued did not authorize the search of the barns, the trial court erred by suppressing the evidence because the good-faith exception to the exclusionary rule applies. We disagree.

Relying on federal precedent, our Supreme Court adopted the good-faith exception to the exclusionary rule in *People v Goldston*, 470 Mich 523, 541; 682 NW2d 479 (2004). Under the good-faith exception, evidence obtained through a defective search warrant is admissible when the executing officer relied upon the validity of the warrant in objective good faith. *Id.* at 525-526, 542-543.<sup>9</sup> In adopting the good-faith exception, our Supreme Court noted that the primary purpose of the exclusionary rule is to deter “official misconduct by removing incentives to engage in unreasonable searches and seizures.” *Id.* at 529. The Court reasoned that “suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant” produces “‘marginal or non-existent benefits’” and “‘cannot justify the substantial costs of exclusion.’” *Id.* at 530, quoting *United States v Leon*, 468 US 897, 922; 104 S Ct 3405; 82 L Ed 2d 677 (1984). See also *People v Hughes (On Remand)*, 339 Mich App 99, 112; 981 NW2d 182 (2021) (noting that in

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<sup>9</sup> Exceptions to the good-faith exception exist. Specifically, as explained in *United States v Leon*, 468 US 897, 923; 104 S Ct 3405; 82 L Ed 2d 677 (1984), even if the officers acted in good-faith reliance on a defective search warrant, suppression is still proper in cases when the judge is misled by knowingly false statements, when the judge abandons their judicial role such that “no reasonably well trained officer should rely on the warrant,” or when the warrant is so lacking in details and particulars that no officer could reasonably believe it to be valid.

cases where an “unlawful search” is “not attributable to an error made by a neutral and detached magistrate, the rationale underlying the good-faith exception does not apply”).

Here, a search warrant was authorized. Although that warrant was not defective, it did not authorize a search of the barns located outside the curtilage of Derousse’s residence. As a result, the search of the barns was conducted without a warrant. The good-faith exception has been extended to cases in which a search is conducted without a warrant. See *Illinois v Krull*, 480 US 340, 346, 353, 356-357; 107 S Ct 1160; 94 L Ed 2d 364 (1987) (extending the good-faith exception to the exclusionary rule when the police conducted a warrantless search in reliance on a statute that was subsequently declared unconstitutional), and *Arizona v Evans*, 514 US 1, 16; 115 St Ct 1185; 131 L Ed 2d 34 (1995) (extending the good-faith exception when a search was made in reliance on clerical errors made by court employees). However, the prosecution has not argued that such an extension is warranted in this case. And, even if it were to do so, the record does not indicate that Lutz conducted his search in objectively reasonable reliance on any statute or clerical error. Instead, he testified that he believed the warrant authorized the search of the barns.<sup>10</sup> As a result, we

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<sup>10</sup> Although Lutz’s testimony is sufficient to show his subjective good faith, the good-faith exception requires that the officer conducting the search did so while acting in objective, good-faith reliance on a search warrant. On appeal, the prosecution has made only a cursory argument that Lutz was acting in good faith, noting his testimony and citing a single unpublished decision by the United States Court of Appeals for the Sixth Circuit. However, it has offered no analysis as to why, under the specific facts of this case, Lutz’s actions were objectively reasonable. “An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment [of an issue] with little or no citation of

conclude that the suppression of the evidence seized during the warrantless search of the barns was not barred by the good-faith exception to the exclusionary rule.

Affirmed.

SWARTZLE, J., concurred with M. J. KELLY, J.

BOONSTRA, P.J. (*concurring in part and dissenting in part*). I fully concur in Part II(B)(1) of the majority opinion. I agree that defendant, Brigitte Derosse, had a reasonable expectation of privacy in the barns located on her property (even if outside the curtilage of the home) and that a warrant was therefore required to search the barns. I respectfully dissent from Parts II(B)(2) and (3), however, for the reasons that follow.

First, I fully recognize that the parties have stipulated that the barns in question are located outside the curtilage of Derosse's home. So that issue is technically not before us. But I think the reason it is not before us has nothing to do with factual realities, but rather is simply because both the prosecution and Derosse have taken post hoc legal positions designed to further their respective legal arguments. That is, the prosecution wanted to advance the argument—which we are rejecting—that a warrant is not required to search a building outside the curtilage of a home. And Derosse wanted to advance the argument that this particular warrant was deficient because it did not specifically refer to the barns (whereas it arguably may

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supporting authority.” *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Consequently, even if we were to conclude that it was appropriate to apply the good-faith exception to the warrantless search of the barns, we would nevertheless conclude that the prosecution has abandoned its argument on appeal.

have been sufficient with respect to barns located within the curtilage of her home).

The majority and I therefore agree that a warrant was required to search the barns regardless of whether the barns were located within the curtilage of the Derousse home. However, the curtilage issue may affect whether this particular warrant was sufficient to allow for the search of the barns. Therefore, I believe that a proper method of analysis—devoid of stipulations arising from legal maneuvering—would be to evaluate whether, as a factual matter, these barns were located with the curtilage of the Derousse home. The constitutional protection of the Fourth Amendment extends to the curtilage of a home. See *Florida v Jardines*, 569 US 1, 6-7; 133 S Ct 1409; 185 L Ed 2d 495 (2013). Four factors should be considered in determining whether an area lies within the curtilage of a home, including: (1) the proximity of the area to the home, (2) whether the area is included in an enclosure surrounding the home, (3) the nature of the uses to which the area is put, and (4) the steps taken by the resident to protect the area from observation. *United States v Dunn*, 480 US 294, 301; 107 S Ct 1134; 94 L Ed 2d 326 (1987).

As the majority notes, this Court held in *People v McGhee*, 255 Mich App 623, 626; 662 NW2d 777 (2003):

The test for determining whether the description in the warrant is sufficient to satisfy the particularity requirement is whether the description is such that the officers with a search warrant can with reasonable effort ascertain and identify the place intended. *Steele v United States*, 267 US 498, 503; 45 S Ct 414; 69 L Ed 757 (1925); *United States v Gahagan*, 865 F2d 1490, 1496 (CA 6, 1989). The Fourth Amendment safeguard is designed to require a description that particularly points to a definitely ascertainable place so as to exclude all others. *Id.*

Thus, the test for determining the sufficiency of the description of the place to be searched is (1) whether the place to be searched is described with sufficient particularity to enable the executing officer to locate and identify the premises with reasonable effort, and (2) whether there is any reasonable probability that another premises might be mistakenly searched. *Id.* at 1496-1497. The requirement is designed to avoid the risk of the wrong property being searched or seized. [Quotation marks and citation omitted.]

And while the majority understandably feels compelled to apply our Supreme Court's dated-but-never-overturned decision in *People v Bawiec*, 228 Mich 32; 199 NW 702 (1924) (holding that a search warrant for a specified residence was insufficient to authorize the search of a separate log home located within the curtilage), this Court in *McGhee* recognized that our Supreme Court likely would decide the issue differently today, given developments in Fourth Amendment law over the last 80 (now nearly 100) years. This Court stated:

[T]he Michigan Supreme Court has held that Const 1963, "art 1, § 11, is to be construed to provide the same protection as that secured by the Fourth Amendment, absent 'compelling reason' to impose a different interpretation." *People v Collins*, 438 Mich 8, 25; 475 NW2d 684 (1991). United States Courts of Appeals and state courts addressing the propriety of searches of outbuildings in the seventy-eight years since *Bawiec* was decided have held that the Fourth Amendment is not violated by a search of the grounds or outbuildings within a residence's curtilage where a warrant authorizes a search of the residence. It is thus to be anticipated that the Michigan Supreme Court would adopt a similar analysis, and, rather than follow *Bawiec*, declare that the protection provided by Const 1963, art 1, § 11 does not render the instant searches unconstitutional. See *Collins*, [438 Mich] at 11, where the Court engaged in a similar analysis, leading it to overrule

*People v Beavers*, 393 Mich 554; 227 NW2d 511 (1975).  
[*McGhee*, 255 Mich App at 633-634.]

Whether the barns are within the curtilage of Derousse's home is therefore an important factor in assessing whether the warrant at issue in this case was sufficient to allow for the search of the barns. Indeed, the majority recognizes as much, acknowledging that the changes in Fourth Amendment jurisprudence noted in *McGhee* would not necessarily resolve the issue on appeal in this case because the parties stipulated that the barns are located outside the curtilage of Derousse's home.

This leads me to a careful inspection of the actual warrant in this case—as well as of the factual realities of the resulting search. The warrant states:

1. The person, place or thing to be searched is described as and is located at:

12505 Dearmyer Road, in Columbia Township, it is a one story single-family dwelling. The residence is a single story ranch tan in color with vinyl siding. The residence is occupied with a brown shingled roof. The front door of the residence faces south and the numbers 12505 are on the front of the house. The residence is located in Columbia Township, Jackson County and State of Michigan.

2. The PROPERTY is to be searched due to animals running at large and several dead animals found on the property. Property to be seized is specifically described as:

A total of two silver labs, a chocolate lab, a French Bull Dog and a Tea Cup Chihuahua, 9 cows and 3 sheep. Items related to rabies vaccines administered by animal owner.

Indisputably, the warrant was not a model of clarity and its ambiguity is not what is desired in a warrant. It provided the property address (which arguably could include the residence, the barns, and open spaces), but also described it as a “one story single-family dwell-

ing.” It did not specify the barns as areas to be searched. However, the warrant also—and arguably more broadly—referred to “The PROPERTY [that] is to be searched” and gave as a basis for the search “animals running at large and several dead animals found *on the property*.” (Emphasis added.) The dead animals had not been found inside the residence, however, and the animals running at large also were not doing so in the residence. In this respect, the warrant’s language suggests that the drafter intended for the search to be of an area broader than simply the residence. And many of the animals specified for seizure were of a type—cows and sheep—that would not typically be expected to be found within a residence, but instead would be expected to be found either in open spaces or inside the barns. The affidavit also mentioned—as a basis for the warrant—that a dog kennel was being operated out of one of the barns.

I am left to conclude that the warrant, while ambiguous, may have been sufficient to allow for a search of the barns in this factual circumstance, or at least may have given rise to a good-faith belief that the barns were included within the area that could permissibly be searched. As the majority notes, our Supreme Court, in *People v Goldston*, 470 Mich 523, 541; 682 NW2d 479 (2004), adopted a good-faith exception to the exclusionary rule. Noting that the exclusionary rule is designed to deter “official misconduct by removing incentives to engage in unreasonable searches and seizures,” *id.* at 529, the Court held that “suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant” produces “‘marginal or nonexistent benefits’” and “‘cannot justify the substantial costs of exclusion.’” *Id.* at 530, quoting *United States v Leon*, 468 US 897, 922; 104 S Ct 3405; 82 L Ed 2d 677 (1984). See also *People v*

*Hughes (On Remand)*, 339 Mich App 99, 112; 981 NW2d 182 (2021) (noting that in cases where an “unlawful search” is “not attributable to an error made by a neutral and detached magistrate, the rationale underlying the good-faith exception does not apply”).

Under these circumstances, in which the warrant ambiguously described the property to be searched and in which the reasons for the search related in part to the mistreatment of farm animals that would not be expected to be found within a residence, I would remand this matter for further proceedings regarding the scope of the warrant and the applicability of the good-faith exception to the warrant requirement—including whether suppressing the evidence serves the purposes of the exclusionary rule in this instance.



## BARROW v WAYNE COUNTY BOARD OF CANVASSERS

Docket No. 358669. Submitted May 3, 2022, at Detroit. Decided May 12, 2022, at 9:00 a.m.

Tom J. Barrow brought an action in the Wayne Circuit Court against the Wayne County Board of Canvassers, seeking a writ of mandamus, a declaratory judgment, and an order to show cause. Plaintiff, who was a losing candidate in a primary election for local office, petitioned defendant to conduct a manual recount; plaintiff alleged that because “malfeasant city actors and officials” had committed various acts of fraud, defendant’s count of absentee ballots was incorrect. Defendant approved plaintiff’s petition and agreed to conduct a recount. However, one day before the recount, plaintiff moved the trial court to issue a writ of mandamus, a declaratory judgment, and an order to show cause. In the motions, plaintiff alleged that, during defendant’s meeting about his petition, counsel for defendant had told defendant that defendant did not have to investigate the factual allegations in plaintiff’s petition. Therefore, plaintiff asked the trial court to issue a writ of mandamus compelling defendant to investigate according to MCL 168.869 and MCL 168.870. Before the trial court ruled on plaintiff’s motions, defendant conducted the recount as scheduled; plaintiff observed the recount, and he complained that the recount was deficient. After the recount, plaintiff filed a brief in support of his motions. Citing MCL 168.869, plaintiff argued that defendant had a clear legal duty to investigate the facts in his petition and that defendant had failed to do so. After a hearing on plaintiff’s motions, the trial court, Timothy M. Kenny, J., found that plaintiff had not established that he had a legal right to anything beyond a recount and that plaintiff had otherwise failed to meet the requirements for mandamus. The trial court reasoned that defendant had the authority to conduct the specific type of investigation that plaintiff wanted only if it appeared to defendant that there was “probably cause” under MCL 168.872 to believe that fraud or wrongdoing occurred. Reasoning that MCL 168.872 required defendant to make a discretionary judgment call, the trial court found that the act

plaintiff sought to be compelled was not ministerial in nature. The trial court therefore denied plaintiff's motions. Plaintiff appealed.

The Court of Appeals *held*:

1. The duty of Michigan courts is to decide actual cases and controversies; therefore, courts generally do not decide moot issues and generally do not declare legal principles that have no practical effect in a case. An issue is moot if an event has occurred that renders it impossible for the court to grant relief. An issue is also moot when a judgment, if entered, cannot for any reason have a practical legal effect on the existing controversy. However, a moot issue will be reviewed if it is publicly significant, likely to recur, and yet likely to evade judicial review. First, the interpretation and application of Michigan's election laws are generally publicly significant. Second, this issue was likely to recur because it is likely that candidates in future primaries will petition for recounts and will be dissatisfied with the adequacy of a board of county canvassers' investigations into their claims. Finally, the issue in this case was likely to evade judicial review because of the short period of time between the primary election and the general election. Accordingly, even though this issue was moot given that the election had concluded, the substantive merits of plaintiff's argument were considered.

2. A writ of mandamus is issued by a court of superior jurisdiction to compel a public officer to perform a clear legal duty. Mandamus is the appropriate remedy for a party seeking to compel action by election officials. To be entitled to a writ of mandamus, a plaintiff must show that (1) the plaintiff has a clear, legal right to performance of the specific duty sought, (2) the defendant has a clear legal duty to perform, (3) the act is ministerial, and (4) no other adequate legal or equitable remedy exists that might achieve the same result. An executive agency may have a clear legal duty when there is a statute that plainly instructs that agency to perform a certain action. Similarly, a clear legal right is one clearly founded in, or granted by, law. A ministerial act is one in which the law prescribes and defines the performance with such precision and certainty as to leave nothing to the exercise of discretion or judgment.

3. MCL 168.869 states, in pertinent part, that upon the filing of a petition for recount and the giving of notice, if notice is required to be given, the board of county canvassers shall be summoned by the clerk of the board and here make an investigation of the facts set forth in the petition. MCL 168.24a(1) states, in pertinent part, that all of the powers granted to and duties

required by law to be performed by all boards of canvassers established by law, other than the board of state canvassers, are granted to and required to be performed by the board of county canvassers. Consequently, defendant had a clear legal duty to make an investigation of the facts set forth in plaintiff's petition. Given this clear legal duty and given that the parties did not dispute that plaintiff filed a valid petition, plaintiff had a corresponding legal right to have defendant investigate the facts he alleged in his petition. Nonetheless, the trial court properly found that mandamus was inappropriate in this case because, in the context of MCL 168.869, the act of investigating is an act that is discretionary in nature—not ministerial. MCL 168.869 does not define “investigation” with such precision and certainty as to leave nothing to the exercise of discretion or judgment; it states only that a board of county canvassers must “make an investigation of the facts set forth in the petition.” It is silent as to what this investigation is supposed to entail. Further, it does not demand a specific method of investigation, nor does it specify how thorough defendant's investigation must be. Additionally, none of the statutes neighboring MCL 168.869 prescribes or supports a particular manner of investigation. Accordingly, while defendant had a clear legal duty to investigate the facts alleged in plaintiff's petition, it had no duty to do so in a particular manner. The manner in which to conduct the investigation was left to defendant's discretion; accordingly, the act plaintiff sought to compel was not ministerial, and it was inappropriate to compel defendant to investigate any further or in any particular manner. The trial court correctly denied plaintiff's request for declaratory judgment.

4. Plaintiff's implication that a recount did not fall within the plain meaning of the term “investigation” lacked merit. MCL 168.869 does not define “investigation,” so resort to a dictionary definition was appropriate. “Investigation” was defined as “the act or process of investigating or the condition of being investigated” or “a searching inquiry for ascertaining facts; detailed or careful examination.” Accordingly, a board of county canvassers combing through ballots from challenged precincts and retallying the vote constituted “a searching inquiry for ascertaining facts” or a “detailed or careful examination.”

Affirmed.

## ELECTIONS – MICHIGAN ELECTION LAW – RECOUNT PETITIONS – WORDS AND PHRASES – “INVESTIGATION.”

MCL 168.869 states, in pertinent part, that upon the filing of a petition for recount and the giving of notice, if notice is required to be given, the board of county canvassers shall be summoned by the clerk of the board and here make an investigation of the facts set forth in the petition; in the context of MCL 168.869, the act of investigating is an act that is discretionary in nature—not ministerial; accordingly, the manner in which to conduct the investigation is left to the discretion of the board of county canvassers.

Tom J. Barrow, *in propria persona*, and Andrew A. Paterson for plaintiff.

James W. Heath, Wayne County Corporation Counsel, and Rebecca A. Camargo, Assistant Corporation Counsel, for defendant.

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

CAVANAGH, J. Plaintiff appeals as of right the trial court’s order denying his emergency motions for mandamus, declaratory judgment, and to show cause. Plaintiff, a losing candidate in a primary election for local office, moved the trial court to declare that defendant had a duty to investigate his claims of fraud and to enter an order compelling defendant to fulfill this duty. The trial court denied his request. On appeal, plaintiff argues that the trial court abused its discretion by denying his motions because MCL 168.869 places a clear legal duty on defendant to investigate plaintiff’s claims of fraud. Observing that the 2021 general election has concluded, plaintiff concedes that he raises a moot issue. But he urges this Court to consider this moot issue because it is an issue of public significance, is likely to reoccur, and is likely to evade judicial review. We agree that we should consider this issue, but we disagree that the trial court

abused its discretion or erred as a matter of law; therefore, we affirm.

This case arises from plaintiff's running in the August 3, 2021 primary election for mayor of the city of Detroit. Plaintiff lost in the primary. MCL 168.862 allows a losing candidate to petition the applicable board of county canvassers<sup>1</sup> for a recount:

A candidate for office who believes he or she is aggrieved on account of fraud or mistake in the canvass or returns of the votes by the election inspectors may petition for a recount of the votes cast for that office in any precinct or precincts as provided in this chapter. The candidate must be able to allege a good-faith belief that but for fraud or mistake, the candidate would have had a reasonable chance of winning the election.

In light of MCL 168.862, on August 17, 2021, plaintiff petitioned defendant to conduct a manual recount of certain "Absent Voter Counting Boards" and certain precincts. In his petition, plaintiff alleged that because "malfeasant city actors" had perpetrated acts of fraud,

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<sup>1</sup> A board of county canvassers has two main functions: to "determine and declare the results of an election for all county and local propositions," *Wills v Iron Co Bd of Canvassers*, 183 Mich App 797, 802; 455 NW2d 405 (1990), citing MCL 168.826, and to conduct recounts of elections within a board's jurisdiction, see MCL 168.24a.

In relevant part, MCL 168.24a states:

(1) A 4-member board of county canvassers is established in every county in this state. All of the powers granted to and duties required by law to be performed by all boards of canvassers established by law, other than the board of state canvassers, are granted to and required to be performed by the board of county canvassers.

(2) The board of county canvassers shall conduct all recounts of elections in cities, townships, villages, school districts, metropolitan districts, or any other districts and be vested with all of the powers and required to perform all the duties in connection with any recount. [MCL 168.24a(1) and (2)].

defendant's count of absentee ballots was incorrect. Though plaintiff's petition is vague, plaintiff seemed to allege that these "malfeasant city actors and officials" committed the following acts of fraud:

- That they had inserted "test ballots" into absentee cases after the polls had closed.
- That on the evening of the primary election, "a van, with the words 'Mobile Voting' on the side, was observed repeatedly entering and leaving the TCF Center Absentee Voter Counting Board area from which thousands of believed false ballots were unloaded."
- That around 1:00 a.m. on August 4, 2021, "a Black Luxury SUV vehicle also arrived and was observed entering the TCF [C]enter from which additional absentee ballots were observed to be unloaded."

Plaintiff alleged that defendant could verify his allegations by undertaking various investigatory steps. Among other things, plaintiff asked defendant to "[c]reate a county spread sheet" showing the number of test ballots and regular ballots delivered to each precinct and to subpoena the Detroit Election Commission to produce a range of different documents.

Defendant approved plaintiff's petition and agreed to conduct a recount, which defendant scheduled for August 31, 2021. A day before the recount, on August 30, 2021, plaintiff moved the trial court to issue a writ of mandamus, a declaratory judgment, and an order to show cause. In the motions, plaintiff alleged that, during defendant's meeting about his petition, counsel for defendant had told defendant that defendant did not have to investigate the factual allegations in plaintiff's petition. Therefore, plaintiff asked the

trial court to issue a writ of mandamus compelling defendant to investigate according to MCL 168.869 and MCL 168.870. Plaintiff also asked for a declaratory judgment that defendant had a duty to investigate in accordance with these statutes and an order requiring defendant to show cause why a declaratory judgment should not issue.

Before the trial court ruled on plaintiff's motions, defendant conducted a recount on August 31, 2021, as scheduled.<sup>2</sup> Plaintiff observed the recount. In an affidavit filed after the recount, however, plaintiff complained that the recount was deficient. Notably, plaintiff averred that defendant had not performed "any act of investigation." Further, he averred that defendant had declined to question his witness, who allegedly saw a car unload ballots at the TCF Center after the polls closed. Finally, he averred that a case containing absentee ballots was 104 ballots short.

In response to plaintiff's affidavit, defendant's counsel asserted that defendant had "observed all necessary formalities" at the recount, that defendant had found no test ballots during its recount, and that 19 of the 20 precincts plaintiff challenged were recountable. Plaintiff had raised three challenges during the recount. Defendant considered those challenges but ultimately rejected them. Defendant provided a "recount calculation sheet" summarizing the results of the recount. This sheet showed that defendant had recounted 19 of the 20 precincts challenged by plaintiff.

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<sup>2</sup> Defendant attached to its brief on appeal a document titled "Minutes of Meeting." This document seems to provide a summary of what occurred at the recount, but this document did not appear in the trial court record. This Court's review is limited to the record developed by the trial court. *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002). We therefore decline to consider its contents.

Before the recount, plaintiff had a total of 534 votes across those 20 precincts. After the recount, his vote total remained unchanged.

After the recount, plaintiff filed a brief in support of his August 30, 2021 motions. Citing MCL 168.869, plaintiff argued that defendant had a clear legal duty to investigate the facts in his petition and that defendant had failed to do so. The statute plaintiff cited, MCL 168.869, states:

*Upon the filing of a petition for recount, and the giving of notice, if notice is required to be given, the board of county canvassers shall be summoned by the clerk of the board and here make an investigation of the facts set forth in the petition.* Should the recount involve a county or district office or proposition, the recount shall not be commenced until the board shall determine by communicating with the secretary of state that no petition has been filed requesting a recount by the board of state canvassers of ballots cast in the same district. In case said board shall be advised by the secretary of state that a petition has been filed with him praying for a recount by the board of state canvassers of the ballots cast in the same county or district, then no action shall be taken upon the recount until the county board shall receive instructions from the board of state canvassers. Nothing herein contained shall act to delay any recount of the ballots cast at any city, ward, township or village election if the ballots cast at such election are not sealed in the same ballot boxes with the state and county offices. With respect to any recount of ballots cast in any city, ward, township, village, school or district election, the board of county canvassers shall charge the appropriate local unit the actual and necessary expenses of conducting the recount, and the local unit shall pay such charges to the county treasurer. [Emphasis added.]

In response, defendant argued that, despite plaintiff's contentions, it did investigate plaintiff's allegations: defendant conducted a recount. And citing



MCL 168.872,<sup>3</sup> defendant opined that it could conduct the specific type of investigation that plaintiff wanted only if defendant found that there was “probably cause” to believe the allegations in plaintiff’s petition. And because defendant had found at the recount that

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<sup>3</sup> MCL 168.872 states:

Whenever a petition has been filed for a recount by any person conceiving himself aggrieved on account of any fraud, wrongdoing or violation of the law perpetrated or committed by any election inspector or inspectors or any other person in respect to said election for which said recount has been petitioned, in any primary or election, *and it shall appear to the board of canvassers having jurisdiction over said recount that there is probably cause to believe that there has been fraud, wrongdoing or a violation of the law in respect to said election for which said recount has been petitioned, the said canvassers shall make full and complete investigation of the same. Said canvassers shall have full power and authority to subpoena witnesses and to open any ballot box, regardless of the condition in which the same may be found, and may break open, if sealed, the seal thereon and examine the ballots contained therein. If, after the investigation, said board has good reason to believe that any fraud, wrongdoing or a violation of the law has been committed in respect to said election, then said board of canvassers shall forthwith make a written report of their findings to the prosecuting attorney and to the circuit judge or judges of the county where the petitioner resides if it be a county, city, township or village election, and to the attorney general and to the circuit judge of the county of Ingham if it be a district or state election. Said reports shall be signed by each of the canvassers having jurisdiction of said recount, or a majority thereof. Pending the making of such report, the board of canvassers having jurisdiction of such recount shall carefully preserve and safeguard the ballot boxes and the ballots contained therein until an order of the court, to which said report was submitted, is made authorizing the disposition of the same. Any action taken in such investigation shall not preclude any official recount of the ballots cast at any such election, if otherwise allowed by the general election laws. The powers of investigation referred to in this section shall terminate with the completion of the recount.* [Emphasis added.]

plaintiff's allegations were baseless, defendant had no duty to investigate further.

After a hearing on plaintiff's motions, the trial court found that plaintiff had not established that he had a legal right to anything beyond a recount and that plaintiff had otherwise failed to meet the requirements for mandamus. In agreement with defendant, the trial court reasoned that defendant had the authority to conduct the specific type of investigation that plaintiff wanted only if it appeared to defendant that there was probably cause to believe that fraud or wrongdoing occurred. Because defendant had concluded that plaintiff's allegations were baseless, defendant had no duty to investigate plaintiff's claims any further. Next, reasoning that MCL 168.872 required defendant to make a "discretionary judgment call," the trial court found that the act plaintiff sought to be compelled was not ministerial in nature. The trial court therefore denied plaintiff's motions. This appeal followed.

#### I. MOOTNESS

On appeal, plaintiff argues that the trial court abused its discretion or otherwise erred by denying his motions for mandamus and declaratory judgment. He argues that defendant had a clear legal duty to investigate the facts alleged in his petition and that defendant violated this duty. Plaintiff concedes that this issue is moot because the general election has long since concluded, but he argues that this Court should still consider this issue because it is an issue of public importance, likely to recur, and likely to evade judicial review.

The duty of Michigan courts is to decide actual cases and controversies; therefore, this Court generally does not decide moot issues, see *Can IV Packard Square*,

*LLC v Packard Square, LLC*, 328 Mich App 656, 661; 939 NW2d 454 (2019), and generally does not “declare legal principles that have no practical effect in a case,” *Barrow v Detroit Election Comm*, 305 Mich App 649, 659; 854 NW2d 489 (2014). “An issue is moot if an event has occurred that renders it impossible for the court to grant relief. An issue is also moot when a judgment, if entered, cannot for any reason have a practical legal effect on the existing controversy.” *Barrow*, 305 Mich App at 659-660 (quotation marks and citation omitted). “However, a moot issue will be reviewed if it is publicly significant, likely to recur, and yet likely to evade judicial review.” *Id.* at 660 (quotation marks and citation omitted).

Our caselaw suggests that issues arising from the interpretation and application of Michigan’s election laws are generally publicly significant. See *Gleason v Kincaid*, 323 Mich App 308, 315-316; 917 NW2d 685 (2018); *Barrow*, 305 Mich App at 660. And the issue presented here is likely to evade judicial review. Primary elections occur in August; general elections occur about three months later in November. See MCL 168.534. But MCL 168.866(3) provides, in relevant part: “Recount petitions shall be filed within 6 days after the original canvass has been completed by the board of county canvassers.” Considering the short period between the primary election and general election, it seems unlikely this Court would ever be able to consider this issue before a general election. See *Barrow*, 305 Mich App at 660 (holding that an issue was likely to evade judicial review because of the short time between the statutory deadline and subsequent election). Finally, this is an issue that is likely to reoccur. It is likely that candidates in future primaries will petition for recounts, and it is likely that those candidates could be dissatisfied with the adequacy of a board of

county canvassers' investigations into their claims. Accordingly, we will consider the substantive merits of plaintiff's argument.

## II. MCL 168.869 AND DUTY TO INVESTIGATE

When reviewing a trial court's decision whether to issue a writ of mandamus, we review de novo the trial court's determination of the existence and extent of a duty. See *Bay City v Bay Co Treasurer*, 292 Mich App 156, 164; 807 NW2d 892 (2011). But we review a trial court's ultimate decision for an abuse of discretion. See *Berry v Garrett*, 316 Mich App 37, 41; 890 NW2d 882 (2016). An abuse of discretion occurs when the result is outside the range of reasonable and principled outcomes. See *Bay City*, 292 Mich App at 164. Any underlying issue of statutory interpretation is a question of law subject to de novo review. See *id.* Likewise, we review de novo a trial court's decision on a motion concerning a request for declaratory judgment. See *Van Buren Charter Twp v Visteon Corp*, 319 Mich App 538, 542; 904 NW2d 192 (2017).

A writ of mandamus is issued by a court of superior jurisdiction to compel a public officer to perform a clear legal duty. See *Jones v Dep't of Corrections*, 468 Mich 646, 658; 664 NW2d 717 (2003). "Mandamus is the appropriate remedy for a party seeking to compel action by election officials." *Attorney General v Bd of State Canvassers*, 318 Mich App 242, 248; 896 NW2d 485 (2016) (quotation marks and citation omitted). "The plaintiff bears the burden of demonstrating entitlement to the extraordinary remedy of a writ of mandamus." *Id.* at 249 (quotation marks and citation omitted). To be entitled to a writ of mandamus, a plaintiff must show that "(1) the plaintiff has a clear, legal right to performance of the specific duty sought,

(2) the defendant has a clear legal duty to perform, (3) the act is ministerial, and (4) no other adequate legal or equitable remedy exists that might achieve the same result.” *Rental Props Owners Ass’n of Kent Co v Kent Co Treasurer*, 308 Mich App 498, 518; 866 NW2d 817 (2014).

An executive agency may have a clear legal duty when there is a statute that plainly instructs that agency to perform a certain action. See *Berry*, 316 Mich App at 43-44. Similarly, 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.” *Rental Props Owners Ass’n*, 308 Mich App at 518-519 (quotation marks and citation omitted). Further, to obtain mandamus, a plaintiff’s clear legal right in the execution of a duty must be more than a right possessed by citizens generally. See *id.* at 519.

Citing MCL 168.869, plaintiff argues that defendant had a clear legal duty to investigate all facts alleged in his petition and, correspondingly, that plaintiff had a clear legal right to an investigation. In pertinent part, MCL 168.869 states:

Upon the filing of a petition for recount, and the giving of notice, if notice is required to be given, the board of county canvassers *shall be summoned by the clerk of the board and here make an investigation of the facts set forth in the petition.* [Emphasis added.]

Considering this language, then, we agree that defendant had a clear legal duty to “make an investigation of the facts” set forth in plaintiff’s petition. MCL 168.869 contains no language indicating that a board of canvassers has the option of declining to investigate the facts alleged in a petition. And MCL 168.24a(1) states, in pertinent part, that “[a]ll of the powers granted to

and duties required by law to be performed by all boards of canvassers established by law, other than the board of state canvassers, are granted to and required to be performed by the board of county canvassers.” Consequently, defendant had a clear legal duty to “make an investigation of the facts” set forth in plaintiff’s petition.

Given this clear legal duty, and given that the parties do not dispute that plaintiff filed a valid petition, it follows that plaintiff had a corresponding legal right to have defendant investigate the facts he alleged in his petition. Nonetheless, we conclude that the trial court correctly found that mandamus was inappropriate here. This is because, in the context of MCL 168.869, the act of investigating is an act that is discretionary in nature—not ministerial.

A ministerial act is one in which the law prescribes and defines the performance with such precision and certainty as to leave nothing to the exercise of discretion or judgment. See *Citizens Protecting Michigan’s Constitution v Secretary of State*, 280 Mich App 273, 286; 761 NW2d 210 (2008), *aff’d* as to result 482 Mich 960 (2008). MCL 168.869 does not define “investigation” with such precision and certainty as to leave nothing to the exercise of discretion or judgment. That statute states only that a board of county canvassers must “make an investigation of the facts set forth in the petition.” MCL 168.869. It is silent as to what this investigation is supposed to entail. It does not demand a specific method of investigation, nor does it specify how thorough defendant’s investigation must be. Cf. MCL 168.872 (providing that a board of county canvassers must make a “full and complete” investigation).

None of the statutes neighboring MCL 168.869 prescribe or support a particular manner of investigation either. For instance, MCL 168.870 states that a board of county canvassers has certain subpoena powers, but it says nothing about the board being required to exercise these powers:

For the purpose of such investigation, the clerk, if no meeting be already appointed, shall call a meeting of such board of canvassers and *the said board shall have power to issue subpoenas requiring the person in charge thereof to bring before it the ballot boxes used in the election precinct or precincts referred to in the petition, as well as the poll lists, tally sheets, statements of returns and such other documents or reports as may be deemed necessary.* Said board shall safely guard such ballots, poll lists, tally sheets and returns and when no longer required shall deliver them to the officials charged with the custody thereof. Whoever, being so subpoenaed, shall fail to appear or shall fail to produce any such box, shall be deemed guilty of a misdemeanor. The persons who are required to appear before the board of canvassers shall be paid the same fees and mileage as are paid circuit court witnesses in the county. They shall be paid by the political subdivision before whose board of canvassers they appear. [Emphasis added.]

MCL 168.872 is no different. It states that, if a board of county canvassers decides that there is probable cause to believe fraud or wrongdoing occurred, the board shall make a full and complete investigation and has certain powers in conducting the investigation; but it does not require the board to exercise them:

Whenever a petition has been filed for a recount by any person conceiving himself aggrieved on account of any fraud, wrongdoing or violation of the law perpetrated or committed by any election inspector or inspectors or any other person in respect to said election for which said recount has been petitioned, in any primary or election,

*and it shall appear to the board of canvassers having jurisdiction over said recount that there is probably cause to believe that there has been fraud, wrongdoing or a violation of the law in respect to said election for which said recount has been petitioned, the said canvassers shall make full and complete investigation of the same. Said canvassers shall have full power and authority to subpoena witnesses and to open any ballot box, regardless of the condition in which the same may be found, and may break open, if sealed, the seal thereon and examine the ballots contained therein. [MCL 168.872 (emphasis added).]*

In short, while defendant had a clear legal duty to investigate the facts alleged in plaintiff's petition, it had no duty to do so in a particular manner. The manner in which to conduct the investigation was left to defendant's discretion. For this reason, the act plaintiff seeks to compel is not ministerial, and it would be inappropriate to compel defendant to investigate any further or in any particular manner.

Had defendant wholly declined to investigate whatsoever (as plaintiff suggests), mandamus might have been appropriate. See *Carter v Ann Arbor City Attorney*, 271 Mich App 425, 438-439; 722 NW2d 243 (2006) (noting that mandamus "may lie to compel the exercise of discretion, but not to compel its exercise in a particular manner") (quotation marks and citation omitted). But defendant did not decline to investigate; it conducted a recount.<sup>4</sup> Accordingly, the trial court

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<sup>4</sup> Plaintiff implies that a recount does not fall within the plain meaning of investigation, but this implication lacks merit. MCL 168.869 does not define what constitutes an "investigation," so "[t]his Court may rely on a dictionary definition to give [this] otherwise undefined word its plain and ordinary meaning." *Barrow*, 305 Mich App at 665 (quotation marks and citation omitted). When used as a noun, the word "investigation" may mean "the act or process of investigating or the condition of being investigated" or "a searching inquiry for ascertaining facts;



correctly concluded that mandamus was inappropriate here. At the same time, because plaintiff's clear legal rights were satisfied by defendant's recount and plaintiff was entitled to nothing further, the trial court correctly denied plaintiff's request for declaratory judgment.

Affirmed.

JANSEN, P.J., and RIORDAN, J., concurred with CAVANAGH, J.

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detailed or careful examination." *Random House Webster's College Dictionary* (2d ed, 1999). When used as a verb, it may mean "to search or examine into the particulars of; examine in detail," "to examine the particulars of so as to learn about something hidden, unique, or complex, esp. in an attempt to find a motive, cause, or culprit," or "to make inquiry, examination or investigation." *Id.* A board of county canvassers combing through ballots from challenged precincts and retallying the vote is such "a searching inquiry for ascertaining facts" or a "detailed or careful examination."

*In re NIKOOYI*

Docket No. 358717. Submitted April 12, 2022, at Detroit. Decided May 12, 2022, at 9:05 a.m.

Petitioner, respondents' adult child, petitioned the Macomb Circuit Court, Family Division, to initiate child protective proceedings against respondents regarding their care of his minor sister, FN, alleging that respondents were unfit to raise FN without state supervision. According to petitioner, his upbringing with respondents was mentally abusive and dysfunctional, and court intervention was necessary to save FN from the same. Petitioner requested that the trial court order supervision of FN's psychological development and unspecified treatment for respondents. At a preliminary inquiry regarding the petition, petitioner acknowledged that he was not a guardian of FN but maintained that anyone who suspects a child's home environment is unsafe may initiate child protective proceedings. The trial court, Tracey A. Yokich, J., dismissed the petition with prejudice for lack of standing because petitioner was unable to provide legal support to demonstrate that he had standing to initiate child protective proceedings. Petitioner moved for reconsideration, alleging that MCL 712A.11 of the Juvenile Code, MCL 712A.1 *et seq.*, provided him standing. The trial court dismissed the motion because no new facts were alleged. Petitioner appealed.

The Court of Appeals *held*:

Under MCR 3.962(B), the trial court has discretion to dismiss or authorize a petition to initiate child protective proceedings or to refer the matter to alternative services. The trial court's decision to dismiss a petition to initiate child protective proceedings following a preliminary inquiry is reviewed for an abuse of discretion. MCR 3.903(A)(20) defines "petition," in pertinent part, as a complaint or other written allegation that a parent has harmed or failed to properly care for a child. MCR 3.903(A)(22) defines "petitioner" as the person or agency who requests the court to take action. Under MCR 3.961(B)(1) to (6), the petition must contain: (1) the child's name, address, and date of birth; (2) the names and addresses of the child's parents; (3) the essential facts that constitute an offense against the child under the

Juvenile Code; (4) a jurisdictional basis; (5) whether the child has any membership in an Indian tribe; and (6) the type of relief requested. MCL 712A.2(b) provides, in pertinent part, that a trial court may exercise jurisdiction over a child (1) whose parent neglects or refuses to provide proper or necessary support, education, medical, surgical, or other care necessary for the child's health or morals; who is subject to a substantial risk of harm to the child's mental well-being; who is abandoned by the child's parents; or who is without proper custody or guardianship; (2) whose home or environment, by reason of neglect, cruelty, drunkenness, criminality, or depravity on the part of a parent, is an unfit place for the juvenile to live in. MCL 712A.11(1) provides, in pertinent part, that if a person gives information to the court that a juvenile is within MCL 712A.2(b), a preliminary inquiry may be made to determine whether the interests of the public or the juvenile require that further action be taken. MCR 3.962(A) provides that a trial court may conduct a preliminary inquiry to determine the appropriate action to be taken on a petition that is not accompanied by a request for placement of the child when the child is not in temporary custody. In this case, the trial court erroneously dismissed the petition for lack of standing. Though the statutes and court rules governing initiation of child protective proceedings do not define "person," their plain language does not restrict who may initiate proceedings or request a preliminary inquiry. MCL 712A.11(1) permits a trial court to conduct a preliminary inquiry pursuant to information from "a person," and MCR 3.903(A)(22) defines a petitioner as the person or agency who requests the court to take action. Accordingly, anyone who complies with the petition requirements of MCR 3.961(B) has standing to initiate child protective proceedings, thereby allowing the trial court to consider the merits of the petition at a preliminary inquiry. If the Legislature had wanted to restrict who may initiate child protective proceedings, it would have done so statutorily—as it did with termination-of-parental-rights proceedings, in which only the Department of Health and Human Services, the child, the child's guardian or legal custodian, the child's foster parent, the state children's ombudsman, or the prosecuting attorney are statutorily authorized to petition for termination of parental rights. Conversely, by allowing any "person" to initiate child protective proceedings, the Legislature expressly provided anyone who has knowledge of potential child abuse or neglect with standing to request court action to protect the child. Accordingly, the adult sibling of a minor qualifies as a person and may initiate proceedings to protect the minor. Petitioner therefore had standing to file the petition against his

parents regarding their care of FN. Additionally, petitioner's petition contained the necessary components under MCR 3.961(B). Because petitioner did not request any form of placement for FN or termination of respondents' parental rights, the trial court had discretion to dismiss the petition after a preliminary inquiry. The trial court necessarily abused its discretion, however, by erroneously dismissing the petition for lack of standing. Because petitioner filed a valid petition to initiate child protective proceedings, the trial court was obliged to consider the merits of the petition and make a discretionary ruling regarding how to proceed. Consequently, reversal was warranted for the trial court to consider the petition's merits and to make a discretionary decision about how to proceed with the petition under MCR 3.962(B).

Reversed and remanded.

PARENT AND CHILD – CHILD PROTECTIVE PROCEEDINGS – INITIATION OF CHILD PROTECTIVE PROCEEDINGS – STANDING.

MCL 712A.11(1) of the Juvenile Code, MCL 712A.1 *et seq.*, provides, in pertinent part, that if a person gives information to the court that a juvenile is within MCL 712A.2(b) (detailing the authority and jurisdiction of the court in proceedings concerning juveniles in certain situations including parental neglect), a preliminary inquiry may be made to determine whether the interests of the public or the juvenile require that further action be taken; by allowing any “person” to initiate child protective proceedings, the Legislature expressly provided anyone who has knowledge of potential child abuse or neglect with standing to request court action to protect the child; accordingly, anyone who complies with the petition requirements of MCR 3.961(B) has standing to initiate child protective proceedings, thereby allowing the trial court to consider the merits of the petition at a preliminary inquiry.

Alexander Nikooyi *in propria persona*.

Before: JANSEN, P.J., and SAWYER and RIORDAN, JJ.

PER CURIAM. Petitioner appeals as of right the trial court's dismissal, for lack of standing, of his petition to initiate child protective proceedings against respondents regarding their care of his minor sister, FN.

We reverse and remand for consideration of the petition on its merits.

#### I. FACTUAL BACKGROUND

Petitioner, respondents' adult child and FN's sibling, filed a petition to initiate child protective proceedings against respondents, alleging that respondents were unfit to raise FN without state supervision. According to petitioner, his upbringing with respondents was mentally abusive and dysfunctional, and court intervention was necessary to save FN from the same. Petitioner alleged that respondents often screamed at him, locked him out of his room, called him rude names, destroyed his belongings, denied him social interactions, and called the police on him for no reason. Petitioner alleged that FN was present for many of these events and that respondents displayed much of the same behavior toward FN. Petitioner asserted that "state jurisdiction is the only option" to protect FN from respondents' "cruel disregard and manipulative behavior." Consequently, petitioner requested that the trial court order supervision of FN's psychological development and unspecified "treatment" for respondents.

At a preliminary inquiry regarding the petition, petitioner acknowledged that he was not a guardian of FN but maintained that anyone who suspects a child's home environment is unsafe may initiate child protective proceedings. The trial court dismissed the petition with prejudice for lack of standing because petitioner was unable to provide legal support to demonstrate that he had standing to initiate child protective proceedings. Shortly thereafter, petitioner filed a motion for reconsideration, alleging that MCL 712A.11 provided him

standing. The trial court dismissed the motion because no new facts were alleged. Petitioner now appeals as of right.

## II. ANALYSIS

Petitioner argues that he had standing to file the petition because any person may initiate child protective proceedings. Petitioner also argues that the trial court abused its discretion by failing to consider the merits of the petition because he provided sufficient evidence to demonstrate that respondents created an unfit home environment for FN. We agree that dismissal of the petition constituted error requiring reversal.

### A. STANDARDS OF REVIEW AND BACKGROUND LAW

Because a trial court has discretion to dismiss or authorize a petition to initiate child protective proceedings, or to refer the matter to alternative services, MCR 3.962(B), this Court reviews for an abuse of discretion the trial court's decision to dismiss a petition following a preliminary inquiry. See *In re Jackson*, 199 Mich App 22, 25; 501 NW2d 182 (1993) (explaining that this Court reviews for an abuse of discretion a trial court's discretionary rulings). "An abuse of discretion occurs when the trial court chooses an outcome falling outside the range of principled outcomes." *In re COH*, 495 Mich 184, 202; 848 NW2d 107 (2014) (quotation marks and citation omitted). The trial court "necessarily abuses its discretion when it makes an error of law." *In re Portus*, 325 Mich App 374, 381; 926 NW2d 33 (2018) (quotation marks and citation omitted). This Court reviews de novo the interpretation and application of statutes and court rules—using the same principles to interpret both. *In re Sanders*, 495 Mich 394, 404; 852 NW2d 524 (2014).

“Absent exigent circumstances, a request for court action to protect a child must be in the form of a petition.” MCR 3.961(A). A petition is merely “a complaint or other written allegation . . . that a parent . . . has harmed or failed to properly care for a child . . .” MCR 3.903(A)(20). A petitioner is “*the person* or agency who requests the court to take action.” MCR 3.903(A)(22) (emphasis added). The petition must contain: (1) the child’s name, address, and date of birth; (2) the names and addresses of the child’s parents; (3) “[t]he essential facts that constitute an offense against the child under the Juvenile Code,” MCL 712A.1 *et seq.*; (4) a jurisdictional basis; (5) whether the child has any membership in an Indian tribe; and (6) “[t]he type of relief requested.” MCR 3.961(B)(1) to (6). A trial court may exercise jurisdiction over a child:

(1) Whose parent or other person legally responsible for the care and maintenance of the juvenile, when able to do so, neglects or refuses to provide proper or necessary support, education, medical, surgical, or other care necessary for his or her health or morals, who is subject to a substantial risk of harm to his or her mental well-being, who is abandoned by his or her parents, guardian, or other custodian, or who is without proper custody or guardianship. . . .

\* \* \*

(2) Whose home or environment, by reason of neglect, cruelty, drunkenness, criminality, or depravity on the part of a parent, guardian, nonparent adult, or other custodian, is an unfit place for the juvenile to live in. [MCL 712A.2(b)(1) and (2).]<sup>[1]</sup>

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<sup>1</sup> Amendments to the Juvenile Code that took effect on October 1, 2021, did not alter the relevant portion of the statutes in effect when petitioner filed the petition.

“[I]f a person gives information to the court that a juvenile is within . . . [MCL 712A.2(b)], a preliminary inquiry may be made to determine whether the interests of the public or the juvenile require that further action be taken.” MCL 712A.11(1) (emphasis added). A trial court may also “conduct a preliminary inquiry to determine the appropriate action to be taken on a petition” that “is not accompanied by a request for placement of the child and the child is not in temporary custody . . . .”<sup>2</sup> MCR 3.962(A). The preliminary inquiry is an “informal review,” MCR 3.903(A)(23), at which the trial court may: (1) deny authorization of the petition; (2) refer the matter to alternative services; or (3) authorize the filing of the petition if there is probable cause—“established with such information and in such a manner as the court deems sufficient”—to believe that one or more of the allegations is true, MCR 3.962(B)(1) to (3). If the trial court authorizes the petition, it must hold an adjudicative hearing to determine whether to exercise jurisdiction over the child, thereby “divest[ing] the parent of her constitutional right to parent her child and giv[ing] the state that authority instead.” *In re Ferranti*, 504 Mich 1, 15-16; 934 NW2d 610 (2019).

B. PETITIONER HAD STANDING TO INITIATE CHILD  
PROTECTIVE PROCEEDINGS

The trial court erroneously dismissed the petition for lack of standing, and this amounted to error requiring reversal.

“Statutory language should be construed reasonably” in light of “the purpose of the statute” and “the

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<sup>2</sup> “ ‘Placement’ means court-approved transfer of physical custody of a child to foster care, a shelter home, a hospital, or a private treatment agency.” MCR 3.903(C)(10).



specific language of the statute.” *In re Jagers*, 224 Mich App 359, 362; 568 NW2d 837 (1997). Because “[t]he purpose and focus of a neglect or abuse proceeding in the juvenile division of the probate court is the protection of children[,] . . . proceedings may be initiated by *anyone* who has information that a child is in need of the court’s protection.” *Id.* at 362-363, quoting *People v Gates*, 434 Mich 146, 161; 452 NW2d 627 (1990). Though the statutes and court rules governing initiation of child protective proceedings do not define “person,” their plain language does not restrict who may initiate proceedings or request a preliminary inquiry, and courts may not judicially construe statutory language that is “clear and unambiguous.” *Jagers*, 224 Mich App at 362. MCL 712A.11(1) permits a trial court to conduct a preliminary inquiry pursuant to information from “a person,” and MCR 3.903(A)(22) defines a petitioner as “*the person or agency who requests the court to take action.*” (Emphasis added.) Thus, it is clear that *anyone* who complies with the petition requirements of MCR 3.961(B) has standing to initiate child protective proceedings, thereby allowing the trial court to consider the merits of the petition at a preliminary inquiry.<sup>3</sup>

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<sup>3</sup> In *Ferranti*, 504 Mich at 14-15, our Supreme Court cited MCL 712A.11(1) to support the proposition that “[a]ny person who suspects child abuse or neglect may report their concerns to the Department [of Health and Human Service (DHHS)],” and DHHS may then file a petition with the trial court. Given the language of MCL 712A.11(1)—which does not reference DHHS at all—the Court’s statement implies that (1) multiple persons or entities have standing under the statute to initiate child protective proceedings and (2) such proceedings may be initiated by alerting DHHS or the trial court. Similarly, although the Court stated in *Sanders*, 495 Mich at 405, that “*the state* must file” a petition to initiate a child protective proceeding, it appears the Court merely used this phrase as a shorthand in the context of a case wherein DHHS happened to file the petition. (Emphasis added.)

If the Legislature wanted to restrict who may initiate child protective proceedings, it would have done so statutorily—as it did with termination-of-parental-rights proceedings. Only the following are statutorily authorized to petition for termination of parental rights: DHHS, the child, the child’s guardian or legal custodian, the child’s foster parent, the state children’s ombudsman, or the prosecuting attorney. MCR 3.977(A)(2); MCL 712A.19b(6); *In re Medina*, 317 Mich App 219, 235-236; 894 NW2d 653 (2016) (explaining who may seek termination of parental rights). “Under the doctrine of *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another), the specification in a statute of one particular class excludes all other classes.” *Smitter v Thornapple Twp*, 494 Mich 121, 137 n 34; 833 NW2d 875 (2013). By specifically outlining who may petition for termination of parental rights, the Legislature implicitly prohibited any others from doing so. Conversely, by allowing any “person” to initiate child protective proceedings, the Legislature expressly provided anyone who has knowledge of potential child abuse or neglect with standing to request court action to protect the child. To read the law regarding initiation of child protective proceedings any more restrictively would ignore both the plain language and expansive purpose of the Juvenile Code. See *Jagers*, 224 Mich App at 362 (explaining that the “Juvenile Code should be liberally construed” to carry out its purpose of protecting children).

Under the plain language of the law, this Court has held that a prosecutor “assuredly qualifies as ‘a person’” and, therefore, may initiate child protective proceedings. *Jagers*, 224 Mich App at 362. Similarly, the adult sibling of a minor assuredly qualifies as a person and may initiate proceedings to protect the minor. Consequently, given the plain meaning of

MCL 712A.11(1), petitioner had standing to file the petition to initiate child protective proceedings against his parents regarding their care of FN.

In addition to having standing, petitioner's petition contained the necessary components, including: (1) FN's name, address, and age; (2) respondents' names and address; (3) a description of "essential facts" alleging that FN was subject to abuse, neglect, or an unfit home environment under MCL 712A.2(b)(1) and (2); and (4) a request for supervision of NF's psychological development and treatment for respondents. MCR 3.961(B)(1) to (6) (explaining the necessary components of a petition to initiate child protective proceedings). Because petitioner did not request any form of placement for FN or termination of respondents' parental rights, the trial court had discretion to dismiss the petition after a preliminary inquiry. MCL 712A.11(1); MCR 3.962(A) and (B). The trial court necessarily abused its discretion, however, by erroneously dismissing the petition for lack of standing. *Portus*, 325 Mich App at 381 (explaining that a trial court abuses its discretion when it makes an error of law).

Because petitioner filed a valid petition to initiate child protective proceedings, the trial court was obliged to consider the merits of the petition and make a discretionary ruling regarding how to proceed. The trial court failed to do so, and its erroneous dismissal of the petition for lack of standing directly affected the outcome of the case by eliminating the possibility of further child protective proceedings. Consequently, reversal is warranted for the trial court to consider the petition's merits and to make a discretionary decision about how to proceed with the petition under MCR 3.962(B). See *In re Williams*, 333 Mich App 172, 181;

958 NW2d 629 (2020) (explaining that outcome-decisive errors require reversal).

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

JANSEN, P.J., and SAWYER and RIORDAN, JJ., concurred.

## ANDERSON v TRANSDEV SERVICES, INC

Docket No. 356541. Submitted May 5, 2022, at Lansing. Decided May 12, 2022, at 9:10 a.m. Leave to appeal denied 510 Mich 1061 (2022).

Marsha Anderson filed a negligence action in the Wayne Circuit Court against Transdev Services, Inc., M1 Rail (collectively, defendants), and others, seeking to recover damages for injuries she suffered while riding the QLine streetcar in Detroit. According to plaintiff, after boarding the streetcar, but before she inserted her ticket or found a seat, the streetcar accelerated, causing her to fall to the floor on top of another woman; plaintiff testified that her friend also fell, apparently landing on top of plaintiff. The driver of the streetcar testified that he could not recall ever waiting a certain amount of time between closing the doors and moving the streetcar forward and that he could not see passengers on the streetcar unless he turned around in his seat, which he did not do before employing the throttle to move the streetcar forward. Plaintiff alleged that defendants, as the owners and operators of the QLine, owed her a duty of reasonable care given her status as a business invitee and that defendants, through the employee-driver, breached their duties to her when the driver, “suddenly and without warning,” accelerated at a high speed before she inserted her ticket on the streetcar and found a seat. Defendants moved for summary disposition, arguing that plaintiff had failed to present any evidence that defendants or the employee-driver acted negligently. The court, Leslie Kim Smith, J., granted defendant’s motion and dismissed plaintiff’s complaint. The court reasoned that the stopping or starting of the streetcar alone was not sufficient to establish negligence and that plaintiff failed to submit evidence of a special reason why the streetcar should have delayed moving forward. In addition, the court concluded that plaintiff failed as a matter of law in establishing that the streetcar’s acceleration was unnecessarily violent or sudden. Plaintiff appealed.

The Court of Appeals *held*:

1. To establish a *prima facie* case of negligence, a plaintiff must prove that (1) the defendant owed the plaintiff a legal duty,

(2) the defendant breached the legal duty, (3) the plaintiff suffered damages, and (4) the defendant's breach was a proximate cause of the plaintiff's damages. Common carriers owe their passengers the common-law duty of due care, which is the duty to exercise such diligence as would be exercised in the circumstances by a reasonably prudent carrier. In general, street railway companies are not required to defer starting cars until all passengers are seated. Underlying this rule is the fact that the overcrowding of streetcars on busy days is one of the primary reasons that the general rule of nonliability exists. Thus, unless there is some special and apparent reason to the contrary, a train or streetcar may be started without waiting for a passenger to reach a seat after entering a vehicle. Plaintiffs' argument in this case—that because passengers are required to place their tickets in a receptacle before finding a seat, the law should recognize an obligation or duty by the driver to wait to move forward until a passenger goes through the process of submitting his or her ticket and finds a seat—did not constitute a special reason for not applying the general rule of nonliability. Accordingly, the trial court did not err by ruling that plaintiff failed to submit evidence of a special reason why the streetcar driver should have delayed moving forward.

2. Unless there is other evidence of negligence in the operation of a common carrier, a plaintiff is not entitled to recover for injuries sustained as a result of the sudden stopping or acceleration of a bus or streetcar because these sudden movements are incidents of travel, which travelers must reasonably anticipate; excessive speed, repeated lurching of the bus side to side, following another vehicle too closely, or jerking or jolting of the vehicle that is unnecessarily sudden or violent may constitute other evidence of negligence in the operation of the vehicle. In this case, evidence that plaintiff and her friend fell when the streetcar accelerated did not create a genuine issue of material fact regarding whether the streetcar's acceleration was unnecessarily violent or sudden. Therefore, the trial court did not err by ruling that plaintiff failed to establish as a matter of law that the acceleration of the streetcar was unnecessarily violent or sudden, and the trial court did not err by granting defendants' motion for summary disposition.

Affirmed.

1. NEGLIGENCE – COMMON CARRIERS – LIABILITY – PASSENGER INJURIES – STOPPING OR ACCELERATION OF COMMON CARRIER.

Unless there is other evidence of negligence in the operation of a common carrier, a plaintiff is not entitled to recover for injuries sustained as a result of the sudden stopping or acceleration of a bus or streetcar because these sudden movements are incidents of travel, which travelers must reasonably anticipate; excessive speed, repeated lurching of the bus side to side, following another vehicle too closely, or jerking or jolting of the vehicle that is unnecessarily sudden or violent may constitute other evidence of negligence in the operation of the vehicle.

2. NEGLIGENCE – COMMON CARRIERS – DUTY OF DUE CARE.

Common carriers owe their passengers the common-law duty of due care, which is the duty to exercise such diligence as would be exercised in the circumstances by a reasonably prudent carrier; unless there is some special and apparent reason to the contrary, a train or streetcar may be started without waiting for a passenger to reach a seat after entering a vehicle.

*Ernst Charara & Lovell, PLC* (by *Ali W. Charara* and *Kevin M. Thompson*) for Marsha Anderson.

*Kitch Drutchas Wagner Valitutti & Sherbrook* (by *Katharine Gostek, Beth A. Wittmann, Gregory A. Behler, Jr.,* and *Mark M. Sesi*) for Transdev Services, Inc., and M1 Rail.

Before: LETICA, P.J., and MARKEY and O'BRIEN, JJ.

MARKEY, J. In this negligence action, plaintiff appeals by right the trial court's final order dismissing her no-fault claim against defendant Old Republic Insurance Company (Old Republic). Plaintiff, however, specifically challenges the trial court's earlier opinion and order granting summary disposition to defendants Transdev Services, Inc. (Transdev), and M1 Rail (M1).<sup>1</sup>

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<sup>1</sup> Defendants Transdev and M1 shall be collectively referred to as "defendants." Defendant Old Republic is not a party to this appeal.

Plaintiff argues that the trial court erred by granting the motion for summary disposition because she submitted evidence sufficient to create a genuine issue of material fact concerning whether defendants breached their duty of care owed to plaintiff. We disagree and affirm.

#### I. BACKGROUND

This case arose when plaintiff, Marsha Anderson, was injured while riding the QLine streetcar in Detroit, Michigan. As the streetcar departed from its stop, plaintiff allegedly fell and suffered numerous injuries. According to plaintiff, after boarding the QLine, but before she had time to insert her ticket and find a seat, the streetcar driver “took off,” causing her to fall to the floor. When asked about the span of time between her stepping onto the streetcar and the streetcar’s forward movement, plaintiff responded, “It was a matter of seconds. It wasn’t long.” Plaintiff testified that she fell on top of another woman and that one of plaintiff’s friends also fell, apparently landing on top of plaintiff.

Kyle Miller, the driver of the streetcar, testified with respect to the boarding and departure process. He stated, “I close the doors, the doors beep and it has lights on it, and I exit—proceed on from the platform.” Miller testified that he pushes a button to initiate the closing of the streetcar’s doors, triggering warnings that flash. According to Miller, only when the doors are closed—a process that takes between 10 and 15 seconds—is he then able to move the streetcar. The warning lights and sounds go off continuously until the doors are fully closed. Miller otherwise independently operates the throttle and brakes for the streetcar, controlling its forward movement and speed; however, the streetcar will brake automatically at a preset



maximum speed. Miller also indicated that he cannot see passengers on the streetcar unless he physically turns around in his seat, which he does not do before employing the throttle to move the streetcar forward. Miller could not recall ever waiting a certain amount of time between closing the doors and moving the streetcar forward, and he had no recollection of any policy or training that required a driver to wait a set period of time once the doors close before driving the streetcar.

Plaintiff filed a complaint following the incident, alleging negligence by defendants and seeking the recovery of no-fault benefits from Old Republic.<sup>2</sup> With respect to the negligence claim, plaintiff asserted that as owners and operators of the QLine, defendants owed her—a business invitee using the service—a duty of reasonable care. Plaintiff additionally alleged that defendants’ statuses as common carriers created an affirmative duty to act reasonably and to protect plaintiff from harm. Plaintiff further contended that defendants, by and through their employee-driver Miller, breached their duties when, just after plaintiff boarded the streetcar, the driver “suddenly and without warning” accelerated at a high rate of speed, causing her to fall to the ground.

Defendants then moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that plaintiff failed to present any evidence that defendants or their employee acted negligently. Following a hearing on the motion, the trial court issued an opinion and order granting defendants summary disposition. Ruling that the sudden stopping or starting of a streetcar alone is insufficient evidence of negligence and that streetcar operators are generally not required to wait for all

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<sup>2</sup> Plaintiff’s no-fault claim against Old Republic was dismissed by stipulated order and is irrelevant to the instant appeal.

passengers to be seated before moving, the trial court concluded that plaintiff failed to submit evidence of a special reason why the streetcar driver should have delayed moving forward in the present case. The court further determined that plaintiff failed to establish as a matter of law that the acceleration of the streetcar was unnecessarily violent or sudden. This appeal followed.

II. STANDARD OF REVIEW AND PRINCIPLES  
UNDER MCR 2.116(C)(10)

We review de novo a trial court's ruling on a motion for summary disposition. *El-Khalil v Oakwood Healthcare, Inc.*, 504 Mich 152, 159; 934 NW2d 665 (2019). MCR 2.116(C)(10) provides that summary disposition is appropriate when, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." A motion brought pursuant to MCR 2.116(C)(10) tests the factual support for a party's action. *Pioneer State Mut Ins Co v Dells*, 301 Mich App 368, 377; 836 NW2d 257 (2013). "Affidavits, depositions, admissions, or other documentary evidence in support of the grounds asserted in the motion are required . . . when judgment is sought based on subrule (C)(10)," MCR 2.116(G)(3)(b) (paragraph structure omitted), and such evidence, along with the pleadings, must be considered by the court when ruling on the (C)(10) motion, MCR 2.116(G)(5). "When a motion under subrule (C)(10) is made and supported . . . , an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial." MCR 2.116(G)(4).

“A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact.” *Pioneer State*, 301 Mich App at 377. “A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.” *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). “The trial court is not permitted to assess credibility, weigh the evidence, or resolve factual disputes, and if material evidence conflicts, it is not appropriate to grant a motion for summary disposition under MCR 2.116(C)(10).” *Pioneer State*, 301 Mich App at 377. “Like the trial court’s inquiry, when an appellate court reviews a motion for summary disposition, it makes all legitimate inferences in favor of the nonmoving party.” *Skinner v Square D Co*, 445 Mich 153, 162; 516 NW2d 475 (1994). “[S]peculation is insufficient to create an issue of fact.” *MEEMIC Ins Co v DTE Energy Co*, 292 Mich App 278, 282; 807 NW2d 407 (2011). A court may only consider substantively admissible evidence actually proffered by the parties when ruling on the motion. *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999); see also MCR 2.116(G)(6).

### III. ANALYSIS

Plaintiff argues that the trial court erred by granting summary disposition to defendants because she submitted evidence sufficient to create a genuine issue of material fact as to whether defendants’ driver was negligent. Plaintiff contends that driver Miller breached the duty of care by (1) failing to wait for her

to insert her ticket and find a seat before moving the streetcar forward and/or (2) accelerating the streetcar in a particularly violent and sudden manner.

“To establish a prima facie case of negligence, a plaintiff must prove the following elements: (1) the defendant owed the plaintiff a legal duty, (2) the defendant breached the legal duty, (3) the plaintiff suffered damages, and (4) the defendant’s breach was a proximate cause of the plaintiff’s damages.” *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157, 162; 809 NW2d 553 (2011). With respect to common carriers, our Supreme Court in *Frederick v Detroit*, 370 Mich 425, 437-438; 121 NW2d 918 (1963), clarified some confusion in the law that had existed regarding the duty of care owed by such carriers:

[W]hen a duty arises as a matter of law between a carrier and its passengers, it is the common-law duty of due care and it may be defined simply as the duty to exercise such diligence as would be exercised in the circumstances by a reasonably prudent carrier. It then becomes the function of the jury to determine from the evidence what action, if any, should have been taken or omitted in order to measure up to the standard of a reasonably prudent carrier in the same circumstances. By instructing the jury that high care or the highest care is required of carriers, a court impinges upon the jury’s obligation to determine the carrier’s compliance with its duty of due care by consideration of the proofs of what a reasonably prudent carrier would have done in the circumstances disclosed by the evidence.

A. ALLEGED NEGLIGENCE FOR FAILING TO WAIT FOR  
PLAINTIFF TO INSERT HER TICKET AND FIND A  
SEAT BEFORE MOVING THE STREETCAR FORWARD

In the early case of *Ottinger v Detroit United R*, 166 Mich 106, 107; 131 NW 528 (1911), our Supreme Court observed that “[t]he general rule adopted by the courts

is that street railway companies are not required to defer starting cars until all passengers are seated, and that a train or street car may be started without waiting for a passenger to reach a seat after entering a vehicle, unless there is some special and apparent reason to the contrary.” (Quotation marks and citation omitted.) Later, in *Getz v Detroit*, 372 Mich 98, 99-100; 125 NW2d 275 (1963), the Michigan Supreme Court applied the rule from *Ottinger* to an injury sustained by a passenger when she fell while standing at the front of a bus waiting for a transfer ticket. The *Getz* Court explained:

Plaintiff's contention as to . . . negligence is twofold. First, because plaintiff was short, obese, 50-some years of age, and took about a minute to board the bus, it was negligent for the driver to fail to look at her, note her condition, and keep the bus at a standstill until she was seated. Plaintiff cites, in this connection, *Wells v. Flint Trolley Coach, Inc.*, 352 Mich 35[; 88 NW2d 285 (1958)]. There the plaintiff, a 79-year-old woman, was described by the Court as “old and feeble” and the driver knew of it. It was held to be a question of fact whether the driver was guilty of negligence in failing to give the passenger sufficient time, in alighting from the bus, to clear it and reach a place of safety and in failing to render the assistance necessary to one whose inability to care for herself was apparent. There is no testimony in the case at bar, however, to show that a look at plaintiff by the driver would have disclosed to him that she was frail, weak, infirm or in any wise disabled or in need of assistance. The testimony and the allegations in plaintiff's declaration are, to the contrary, that she was healthy and strong and performed heavy work. Hence the *Wells Case* is inapt. [*Getz*, 372 Mich at 99-100.]

Under *Getz* and *Ottinger*, the question in this case becomes whether there was some special and apparent reason why we should not apply the general rule that

streetcar drivers are not required to wait until all passengers are seated before operating the streetcar in a forward motion. Plaintiff argues that because passengers are required to place their tickets in a receptacle before finding a seat, the law should recognize an obligation or duty by the driver to wait to move forward until a passenger goes through the process of submitting his or her ticket and finds a seat. We conclude that plaintiff's argument does not constitute a "special" reason for not applying the general rule. Although *Getz* did not place any focus on the fact that the plaintiff was waiting for a transfer ticket when she fell, ticket-related transactions when boarding a bus or streetcar are certainly commonplace, and recognizing an exception to the general rule as proffered by plaintiff would swallow up the rule.

To the extent that plaintiff contends that the driver should have waited because it was an unusually busy day, the Supreme Court's ruling in *Ottinger* reflects the reasoning that overcrowded streetcars is one of the primary reasons that the general rule of nonliability exists. *Ottinger*, 166 Mich at 108 ("So common and unavoidable is the overcrowding of street cars that straps are usually provided, and, if these cars could not lawfully be started until all passengers were seated, or if acceleration of and checking speed could not be prompt, the efficiency of such cars would be seriously impaired."). In sum, we hold that the trial court did not err by ruling that plaintiff failed to submit evidence of a special reason why the streetcar driver should have delayed moving forward in the present case.

B. ALLEGED NEGLIGENCE FOR ACCELERATING THE  
STREETCAR IN AN UNNECESSARILY VIOLENT AND  
SUDDEN MANNER

The law in Michigan is clear that a plaintiff is not entitled to recover for injuries sustained as a result of the sudden stopping or acceleration of a bus or streetcar, absent other evidence of negligence in the operation of the vehicle, because these sudden movements are incidents of travel, which travelers must reasonably anticipate. See *Russ v Detroit*, 333 Mich 505, 508-509; 53 NW2d 353 (1952) (affirming directed verdict in favor of the defendant); *Sherman v Flint Trolley Coach, Inc*, 304 Mich 404, 416; 8 NW2d 115 (1943) (affirming directed verdict in favor of the defendant); *Zawicky v Flint Trolley Coach Co, Inc*, 288 Mich 655, 658-659; 286 NW 115 (1939) (affirming judgment notwithstanding the verdict (JNOV) in favor of the defendant); *Bogart v Detroit*, 252 Mich 534, 537-538; 233 NW 406 (1930) (affirming directed verdict in favor of the defendant).

As referenced earlier, in *Getz*, 372 Mich at 99, the plaintiff, a 54-year-old woman, fell on a city bus when the bus accelerated from a stop. The Michigan Supreme Court upheld the trial court's grant of a JNOV in favor of the city of Detroit for the reason that sudden jerks or jolts in the stopping and starting of a city bus are common incidents of travel, which must be expected by a passenger, and for the reason that the plaintiff did not present any additional evidence of negligence such as excessive speed, repeated lurching of the bus from side to side, or following another vehicle too closely. *Id.* at 101-102. Liability can attach if the jerk or jolt is unnecessarily sudden or violent. *Id.* at 102.

In this case, the only evidence provided in support of the acceleration being unnecessarily violent or sudden was plaintiff's testimony that her friend also fell. Plaintiff relies on the statement in *Ottinger* that no one else had fallen during the sudden stop. *Ottinger*, 166 Mich at 108-109. But as the trial court recognized below, this fact was mentioned only briefly in *Ottinger*, while the Court mostly focused on the plaintiff's fall being a product of natural and expected forces. *Id.* We cannot conclude that evidence that two people fell when the streetcar pulled forward created a genuine issue of material fact regarding whether the streetcar's acceleration was unnecessarily violent or sudden.

Plaintiff's reliance on *Adelsperger v Detroit*, 248 Mich 399; 227 NW 694 (1929), is entirely misplaced because the facts there are easily distinguishable and were as follows:

Plaintiff was a passenger for hire in a motor bus of defendant on one of its streets. Seats of the bus were occupied and plaintiff was standing, holding a hand-rail above. Overtaking a Ford car, the driver of the bus sought to pass and was not accommodated. Continuing his effort to pass for nearly three blocks, the driver became angry. There is evidence that the bus moved at excessive and unlawful speed, 30 to 35 miles per hour; that it swayed; that it was very close to the Ford car, as close as five feet; that passengers protested and frequently sounded the buzzer; and that a movement of the Ford toward an intersecting street caused the driver of the bus to make sudden application of brakes and a sudden turn of the steering wheel. He testified:

"I knew from the suddenness of my stop and jamming on of both brakes and the suddenness with which I twisted the wheel that if passengers were standing in the aisle, they would possibly be propelled forward or fall or something happen to them, if they were not hanging on."



Plaintiff fell, and there is evidence that she suffered serious and permanent injuries. [*Id.* at 401.]

In this case, there is no evidence of conduct by Miller even remotely comparable to the negligent behavior of the driver in *Adelsperger*. In sum, we hold that the trial court did not err by ruling that plaintiff failed to establish as a matter of law that the acceleration of the streetcar was unnecessarily violent or sudden.<sup>3</sup>

We affirm. Having fully prevailed on appeal, defendants may tax costs under MCR 7.219.

LETICA, P.J., and O'BRIEN, J., concurred with MARKEY, J.

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<sup>3</sup> Plaintiff complains that the caselaw on the subject at issue is old and outdated and does not account for the impact of modern technology on transportation. We see no legal or factual basis to disregard or distinguish the caselaw from long ago.

## BELLMORE v FRIENDLY OIL CHANGE INC

Docket No. 357660. Submitted May 3, 2022, at Detroit. Decided May 12, 2022, at 9:15 a.m. Leave to appeal sought. Oral argument ordered on the application 511 Mich 861 (2023).

Karen L. Bellmore sought personal protection insurance (PIP) benefits under the no-fault act, MCL 500.3101 *et seq.*, in the Wayne Circuit Court from State Farm Mutual Automobile Insurance Company. Plaintiff was injured when she fell into a service pit at Friendly Oil Change Inc., while a service technician was changing the oil and filters in her vehicle. Plaintiff moved for partial summary disposition, arguing that she was entitled to PIP benefits under MCL 500.3105(1) because her injuries arose out of the maintenance of a motor vehicle as a motor vehicle or MCL 500.3106(1)(a) because her injuries arose out of the use of a motor vehicle as a motor vehicle that was parked in such a way as to cause an unreasonable risk of bodily injury. State Farm filed a cross-motion for summary disposition, and the trial court, Leslie K. Smith, J., granted plaintiff's motion and concluded that she was entitled to benefits under MCL 500.3105 and that MCL 500.3106 was therefore not applicable. However, the court further concluded that if MCL 500.3106 were applicable, plaintiff would also be entitled to benefits under that statute. State Farm's motion for reconsideration was denied, and the Court of Appeals granted its application for leave to appeal.

The Court of Appeals *held*:

1. "Maintenance" was being performed on plaintiff's vehicle when she was injured within the broad meaning of this term as used in MCL 500.3105 and defined by caselaw. Plaintiff's car was at Friendly Oil Change in order to have its oil and filters changed. Further, plaintiff fell into a service pit and was injured after a service technician asked her to look at one of the filters on her car that the technician believed needed to be replaced. However, despite that maintenance was being performed on plaintiff's vehicle at the time of her injury, caselaw also holds that whether a plaintiff's injuries can be deemed as "arising out of" the maintenance of a motor vehicle under MCL 500.3105(1) requires a causal connection between the claimed injuries and the use of

the motor vehicle as a motor vehicle that was more than incidental, fortuitous, or “but for.” Moreover, the involvement of the vehicle in the injury should be directly related to its character as a motor vehicle. In this case, plaintiff’s injuries did not arise out of the maintenance of her vehicle. Rather, her fall into the service pit was not a direct result of the maintenance being performed on her vehicle, and her injuries were merely incidental to the circumstances in which the injury occurred. Plaintiff’s lack of attention to where she was walking caused her to fall into the pit and sustain injuries. Therefore, plaintiff was not entitled to partial summary disposition because the connection between her claimed injuries and the maintenance of her motor vehicle was no more than “but for,” incidental, or fortuitous.

2. According to plaintiff and the trial court, even if plaintiff’s injuries did not arise out of the maintenance of her vehicle, she was still entitled to PIP benefits under the parked-vehicle exception in MCL 500.3106(1)(a) because her vehicle was parked in such a way as to cause an unreasonable risk of bodily injury. The word “parked” is not defined by the no-fault act, but caselaw has noted that a vehicle is not necessarily parked just because it is stopped, standing, or otherwise not presently in motion. In this case, plaintiff’s vehicle was positioned over a service pit inside the facility to allow the service technician to access the underside of the vehicle to perform the requested maintenance. Plaintiff argued that if her vehicle had completely covered the pit, she would not have fallen in. Therefore, she was contesting the *positioning* of her vehicle over the pit and claiming that its position—with a gap large enough for a person to fall through—posed an unreasonable risk of injury. Under these circumstances, plaintiff’s vehicle was not “parked” within the meaning of MCL 500.3106(1).

Decision reversed and case remanded for entry of summary disposition for State Farm.

*Green & Green, PLLC* (by *Jonathan A. Green*) for  
Karen L. Bellmore.

*Miller, Canfield, Paddock and Stone, PLC* (by *Paul D. Hudson, Amanda Rauh-Bieri, and James L. Woolard*) for State Farm Mutual Automobile Insurance Company.

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

CAVANAGH, J. Defendant State Farm Mutual Automobile Insurance Company appeals by leave granted an order granting plaintiff's motion for partial summary disposition, holding that plaintiff's claimed injuries arising from a fall into a service pit at an oil-change station are compensable under Michigan's no-fault act, MCL 500.3101 *et seq.* We reverse and remand for entry of an order granting summary disposition in favor of defendant.

#### I. BACKGROUND FACTS

On May 21, 2019, plaintiff, Karen L. Bellmore, went to Friendly Oil Change Inc. to have her vehicle's oil and filters changed. Plaintiff's friend, Gregory Vasquez, was driving her vehicle, and she was a passenger. At the service facility, Vasquez pulled in and stopped over a service pit. After the service technician began working on her vehicle, plaintiff was asked to look at a filter the technician thought needed changing. As plaintiff followed the technician toward her vehicle, she saw the service pit area, which was bordered by a yellow-shaded area. She did not know why there was a yellow-shaded area around the pit. Plaintiff testified in her deposition that as she got close to the front of her vehicle, while in the yellow-shaded area, she slipped and fell into the service pit. Plaintiff did not know what she had slipped on; she was not looking down when she fell because she was watching the technician. However, in the recorded statement plaintiff made when she reported the incident to defendant, plaintiff stated that she did not slip or trip on anything before she fell. In her deposition, plaintiff testified that she was reaching for, but not touching, her vehicle when she fell into the service pit and sustained injuries. In the recorded statement plain-

tiff made when she reported the incident to defendant, plaintiff stated that she had no contact with her vehicle before she fell.

Plaintiff filed this action against defendant seeking personal protection insurance (PIP) benefits under the no-fault act.<sup>1</sup> Subsequently, plaintiff moved for partial summary disposition, arguing that—as a matter of law—her injuries “arose out of the maintenance of a motor vehicle as a motor vehicle and/or arose out of the use of a motor vehicle as a motor vehicle that was parked in such a way as to cause unreasonable risk of bodily injury which occurred . . . .” In other words, plaintiff argued that she was entitled to PIP benefits under MCL 500.3105(1) or, in the alternative, under MCL 500.3106(1)(a). Plaintiff argued that she was engaged in the “maintenance” of her motor vehicle because the service technician was going to show her why she needed a new filter for her vehicle when she fell into the service pit. In the alternative, plaintiff argued, her vehicle should have been parked all the way over the service pit and, because it was not, the vehicle was parked in such a way as to cause unreasonable risk of bodily injury. In support of her motion, plaintiff presented screenshot photographs taken from the surveillance videotape of Friendly Oil Change, which showed her just before and just after her fall into the service pit.

Defendant filed a response opposing plaintiff’s motion for partial summary disposition and a cross-motion for summary disposition, arguing that plaintiff was not entitled to PIP benefits because she was not performing maintenance on her vehicle at the time she allegedly

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<sup>1</sup> Plaintiff also sued Friendly Oil Change Inc. under premises liability and negligence theories, but those claims are not relevant to this appeal. Therefore, this opinion will refer only to State Farm as “defendant.”

sustained injuries and that the vehicle was not parked in such a way as to cause unreasonable risk of the bodily injury which occurred. In particular, defendant argued that the causal connection between plaintiff's alleged injuries and the maintenance of the vehicle was no more than incidental, fortuitous, or "but for." That is, plaintiff's accident that caused her injuries could have occurred whether or not the maintenance was being performed on her vehicle. Further, defendant argued, plaintiff's vehicle was not parked over the service pit by Vasquez in such a way as to cause unreasonable risk of the bodily injury which occurred. That is, plaintiff's vehicle was parked in a manner, location, and fashion that was reasonable because plaintiff had ample opportunity to observe, react to, and avoid any purported hazard posed by her vehicle being positioned over a service pit for an oil change—a service pit she knew about because she had gone to this same facility for oil changes for several years. In support of defendant's arguments, it presented several screenshot photographs taken from the surveillance videotape of Friendly Oil Change, which showed plaintiff before and after her fall into the service pit. Defendant also submitted as exhibits to its brief the transcripts of plaintiff's deposition testimony, the deposition testimony of Gregory Vasquez, and the deposition testimony of the service technician, as well as plaintiff's recorded statement made to defendant to report her claim.

After oral arguments were held on the parties' motions, the trial court concluded that plaintiff was engaged in the maintenance of her vehicle at the time of her injury. The court noted that after plaintiff's vehicle was driven over a service pit, "[s]he exited her vehicle

and fell into the service pit, causing her injuries.”<sup>2</sup> The trial court cited *Woodring v Phoenix Ins Co*, 325 Mich App 108; 923 NW2d 607 (2018) (where the plaintiff was washing her vehicle at a self-serve car wash when she slipped and fell), and found that the facts of this case were similar in that “both parties were engaged in the maintenance function at the time of the injury; the injury was connected to an essential function of the maintenance of the vehicle, and that is changing—oil change and filter change at the time; and the falls were connected to the nature of the service area itself.” And, the trial court noted, although plaintiff was not personally performing the maintenance on her vehicle when the injury occurred, unlike the plaintiff in *Woodring*, she was eligible for PIP benefits as explained in *McMullen v Motors Ins Corp*, 203 Mich App 102; 512 NW2d 38 (1993), which held, according to the trial court, “that a passerby who is injured as a direct result of automobile maintenance performed by someone else is still eligible for no-fault benefits, pursuant to MCL 500.3105.” Thus, the trial court concluded that because plaintiff’s injuries arose out of the maintenance of her motor vehicle, the parked-vehicle exception at MCL 500.3106 was not triggered. However, the court further concluded that if the parked-vehicle exception were applicable, plaintiff would still be eligible for PIP benefits because the vehicle was “parked in such a way as to expose a portion of the service pit, which Plaintiff fell into.” Accordingly, the trial court granted plaintiff’s motion for partial summary disposition, concluding that plaintiff was entitled to no-fault benefits. An order was entered that was consistent

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<sup>2</sup> The trial court clearly erred if it meant that plaintiff immediately fell into the service pit upon exiting her vehicle; it is undisputed that she did not.

with the trial court's opinion. After defendant's motion for reconsideration was denied on the grounds that it merely presented the same issues already ruled upon and did not demonstrate palpable error, this appeal followed.

## II. ANALYSIS

Defendant argues on appeal that plaintiff was not entitled to PIP benefits because her injuries did not arise out of the maintenance of her vehicle; rather, her injuries were caused by a fall, and that fall occurred because she was not watching where she was walking. Further, the parked-vehicle exclusion, MCL 500.3106(1), bars plaintiff's claim for PIP benefits because her vehicle was not parked in such a way as to cause unreasonable risk of the bodily injury which occurred.

### A. STANDARD OF REVIEW

A trial court's decision to grant or deny a motion for summary disposition is reviewed de novo. *El-Khalil v Oakwood Healthcare, Inc.*, 504 Mich 152, 159; 934 NW2d 665 (2019). Although unclear, it appears that plaintiff sought summary disposition under both MCR 2.116(C)(8) and (C)(10). The trial court did not specify under which subrule it granted summary disposition, but the parties relied on documents outside the pleadings, so we review the court's decision under MCR 2.116(C)(10). See *Spiek v Dep't of Transp.*, 456 Mich 331, 338; 572 NW2d 201 (1998); *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). The pleadings, affidavits, depositions, and



other documentary evidence are reviewed in the light most favorable to the nonmoving party to determine whether a genuine issue of material fact exists for the jury to decide. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). If reasonable minds could differ on an issue, a genuine issue of material fact exists. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008). Further, this Court reviews issues of statutory interpretation de novo as questions of law. *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521, 525-526; 697 NW2d 895 (2005).

B. MCL 500.3105(1)

MCL 500.3105(1) provides:

Under personal protection insurance an insurer is liable to pay benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle, subject to the provisions of this chapter.

In this case, plaintiff claimed that her injuries arose out of the maintenance of her motor vehicle as a motor vehicle, and the trial court agreed.

First, we address whether “maintenance” was being performed at the time plaintiff sustained her claimed injuries. Historically, the term “maintenance” has been given a liberal construction to advance the purposes of the no-fault act, which is remedial in nature. See, e.g., *Woodring*, 325 Mich App at 111-112 (washing a vehicle is maintenance); *Musall v Golcheff*, 174 Mich App 700, 704; 436 NW2d 451 (1989)<sup>3</sup> (washing a vehicle is maintenance); *Yates v Hawkeye-Security Ins Co*, 157 Mich App 711, 714; 403 NW2d 208 (1987) (preparing to

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<sup>3</sup> We recognize that this case and others decided before November 1, 1990, are not binding precedent on this Court, MCR 7.215(J)(1); how-

tow a disabled vehicle is maintenance); *Wagner v Mich Mut Liability Ins Co*, 135 Mich App 767, 773-774; 356 NW2d 262 (1984) (heating oil pan to start vehicle is maintenance). Further, the injured person need not have been actually performing the maintenance that gave rise to the injury. See *McMullen*, 203 Mich App at 103, 107 (passerby burned by hot water and steam when vehicle owner opened radiator cap for purposes of maintenance was entitled to PIP benefits). Here, plaintiff's vehicle was at Friendly Oil Change for the purpose of having the oil and filters changed. It appears that the service technician was in the process of changing a filter of some kind when he asked plaintiff to come and look at that filter. Thus, considering the broad definition of the term "maintenance," we tend to agree with the trial court that "maintenance" within the contemplation of the statute was being performed on plaintiff's vehicle by the service technician.

Next, we consider whether plaintiff's claimed injuries arose out of that maintenance of her vehicle. Whether a plaintiff's injuries can be deemed as "arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle" depends on the unique facts of each case, and therefore, is determined on a case-by-case basis. MCL 500.3105(1); *Musall*, 174 Mich App at 702. In *Thornton v Allstate Ins Co*, 425 Mich 643, 659-660; 391 NW2d 320 (1986), our Supreme Court explained that the "arising out of" language of MCL 500.3105(1) required that there be a causal connection between the claimed injuries and the use of a motor vehicle as a motor vehicle that was more than incidental, fortuitous, or "but for." The involve-

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ever, they still hold value and are traditionally regarded as retaining some authority if not contradicted by a contemporaneous case. *Woodring*, 325 Mich App at 114.

ment of the vehicle in the injury “should be directly related to its character as a motor vehicle.” *Id.* at 659 (quotation marks and citation omitted). Likewise, when a plaintiff is claiming that injuries arose out of the *maintenance* of a vehicle, there must be a causal connection between the claimed injuries and the maintenance of the vehicle that is more than incidental, fortuitous, or “but for.” See *Woodring v Phoenix Ins Co*, 501 Mich 883 (2017); *Musall*, 174 Mich App at 703.

Here, plaintiff’s claimed injuries did not arise out of the maintenance of her vehicle. Plaintiff’s motor vehicle was merely incidental to the circumstances in which the injuries occurred. As defendant argues, the cause of plaintiff’s injuries was her fall into the service pit. And plaintiff’s fall into the service pit was not in any way a direct result of the maintenance being performed on her vehicle. In other words, the performance of maintenance on plaintiff’s vehicle did not directly cause plaintiff to fall into the service pit and sustain injuries. Unlike in the cases of *Woodring*, 325 Mich App 108, and *McMullen*, 203 Mich App 102—which were relied on by the trial court—in this case no condition created by the maintenance being performed caused plaintiff’s injuries. The filter that plaintiff was being asked to look at did not cause plaintiff to fall into the service pit. And the fact that plaintiff was asked to look at the filter by the service technician did not cause plaintiff to fall into the service pit. Rather, it was plaintiff’s lack of attention to where she was walking that caused her to fall into the service pit and sustain injuries. Even if plaintiff did slip on something before falling as she claimed in her deposition, there was no evidence that the slippery substance came from the filter or plaintiff’s vehicle. “The no-fault act was not designed to compensate all injuries occurring in or around a motor vehicle.” *Rajhel v Auto Club Ins Ass’n*,

145 Mich App 593, 595; 378 NW2d 486 (1985). In short, plaintiff's claimed injuries did not arise out of the maintenance of her vehicle because the connection between plaintiff's claimed injuries and the maintenance of her motor vehicle was no more than "but for," incidental, or fortuitous. See *Thornton*, 425 Mich at 659-660. Therefore, the trial court's order granting plaintiff's motion for partial summary disposition on this ground is reversed.

C. MCL 500.3106(1)

MCL 500.3106 provides, in relevant part:

(1) Accidental bodily injury does not arise out of the ownership, operation, maintenance, or use of a parked vehicle as a motor vehicle unless any of the following occur:

(a) The vehicle was parked in such a way as to cause unreasonable risk of the bodily injury which occurred.

In this case, plaintiff claimed that even if her injuries did not arise out of the maintenance of her vehicle, the parked-vehicle exception, MCL 500.3106(1)(a), applied because her injuries arose out of the use of her parked vehicle as a motor vehicle and her vehicle was parked in such a way as to cause unreasonable risk of the bodily injury which occurred. The trial court agreed.

First, we address the issue whether plaintiff's vehicle was "parked" within the contemplation of this exception to the parked-vehicle exclusion of the no-fault act. As this Court discussed in *Woodring*, 325 Mich App at 120-121, the word "parked" is not defined in the no-fault act, and "a vehicle is not necessarily parked just because it is stopped, halted, standing, or otherwise not presently in motion." In this case, plaintiff's vehicle was inside a vehicle service facility—

Friendly Oil Change—for the purpose of getting the oil and filter changed, i.e., maintenance. Plaintiff's vehicle was positioned over a service pit to allow the service technician access to the underside of plaintiff's vehicle so that the requested maintenance could be performed. Plaintiff argued that if her vehicle had completely covered the service pit, she would not have fallen into the service pit. Plaintiff is, therefore, actually contesting the *positioning* of her vehicle over a service pit during the performance of the maintenance she had requested for her vehicle. Essentially, plaintiff is claiming that the manner in which her vehicle was positioned over the service pit—with a gap large enough for a person to fall through and into the pit—posed an unreasonable risk of injury. Under these circumstances we conclude that plaintiff's vehicle was not “parked” for purposes of the no-fault act; thus, plaintiff's injuries did not arise out of the use of a parked vehicle as a motor vehicle under MCL 500.3106(1). Again, the “no-fault act was not designed to compensate all injuries occurring in or around a motor vehicle.” *Rajhel*, 145 Mich App at 595. Therefore, the trial court's conclusion that plaintiff would also be entitled to PIP benefits under this parked-vehicle exception was erroneous.

### III. CONCLUSION

Plaintiff is not entitled to PIP benefits under the circumstances of this case.

Reversed and remanded for entry of an order granting summary disposition in favor of defendant. We do not retain jurisdiction.

JANSEN, P.J., and RIORDAN, J., concurred with CAVANAGH, J.

## REIGHARD v ESPN, INC

Docket No. 355053. Submitted April 13, 2022, at Lansing. Decided May 12, 2022, at 9:20 a.m.

Jerry Reighard filed an action in the Isabella Circuit Court against ESPN, Inc., and its reporter Daniel Murphy, alleging claims of defamation per se and false-light invasion of privacy. Reighard had been the head gymnastics coach at Central Michigan University (CMU) for 35 years when, in February 2019, CMU announced that it had placed Reighard on paid administrative leave pending an investigation. While the announcement contained no details regarding the investigation, multiple news articles reported that CMU's athletic director had confirmed that the investigation had nothing to do with Larry Nassar (the former team physician for USA Gymnastics and a physician at Michigan State University) or sexual misconduct of any kind. In his capacity as a reporter for ESPN, Murphy had previously reported on Nassar's sexual abuse of gymnasts and on the physical and mental abuse of gymnasts by John Geddert, the former head coach of the United States women's gymnastics team. The day after CMU's announcement regarding Reighard, Murphy posted consecutive tweets concerning women's gymnastics coaches in Michigan. In the first tweet, Murphy stated, "Michigan's attorney general announced today her office is taking over an investigation of John Geddert, the 2012 Olympic team head coach and close friend of Larry Nassar. Several gymnasts have publicly abused [sic] Geddert of physically and mentally harming them." In the second tweet, posted one minute later, Murphy stated, "On the same day as the AG's announcement, Central Michigan said it was putting longtime gymnastics coach Jerry Reighard on leave amid an internal review. No details of the review were shared, but Reighard has a long personal and professional relationship with Geddert." Reighard requested a retraction of the tweets. After confirming that Reighard's leave was unrelated to Nassar or sexual-misconduct allegations, Murphy determined that a retraction was unnecessary, reasoning that there was nothing factually incorrect in the tweets. Later, Murphy tweeted, "Central Michigan hopes to have its internal investigation of Jerry Reighard completed by the end of the semester. An athletic dept. spokes-

man confirmed today Reighard remains on paid leave and the investigation is not connected to the Larry Nassar scandal or sexual misconduct.” Reighard filed the instant action, setting out, in essence, a claim for defamation by implication. Following discovery, defendants moved for summary disposition, arguing that the tweets did not assert any defamatory or materially false facts, that they did not constitute defamation by implication, and that Reighard—a limited-purpose public figure—could not demonstrate that Murphy had acted with actual malice. Reighard opposed the motion, arguing that (1) the tweets contained materially false facts that had implied he was guilty of physical and sexual abuse like Geddert and Nassar and (2) he was not a limited-purpose public figure but that even if he were, Murphy had acted with actual malice when posting the tweets. The court, Eric Janes, J., granted defendants’ motion, concluding that there was no genuine issue of material fact regarding Reighard’s claims because the tweets were substantially true and, even if they were not, Reighard was a limited-purpose public figure and there was no evidence that Murphy had acted with actual malice. The trial court subsequently denied Reighard’s motion for reconsideration. Reighard appealed.

The Court of Appeals *held*:

1. The law of defamation, which arises as a matter of state common law from the world of tort, seeks to protect against injury to reputation caused by the publication of falsehoods. Thus, communication is defamatory if it tends to lower an individual’s reputation in the community or deters third persons from associating or dealing with that individual. However, not all defamatory statements are actionable. If a statement cannot reasonably be interpreted as stating actual facts about the plaintiff, it is protected by the First Amendment of the United States Constitution. To establish a claim of defamation, a plaintiff must establish (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by publication. To establish a cause of action for defamation by implication, a plaintiff must prove that the defamatory implication is materially false; to be successful, it is unnecessary to directly show a literally false statement. Instead, liability for defamation by implication may be imposed not on the basis of what is affirmatively stated, but on what is implied when a defendant juxtaposes a series of facts so as to imply a defamatory

connection between them or creates a defamatory implication by omitting facts such that they may be held responsible for the defamatory implication. When a plaintiff's injury arises from an allegedly harmful implication, the plaintiff must prove by clear and convincing evidence that the defendant intended or knew of the implications that the plaintiff is attempting to draw. In determining whether the communication is false, minor inaccuracies are overlooked in favor of whether the communication was substantially truthful. A statement is not considered false unless it would have a different effect on the mind of the reader from that which the pleaded truth would have produced; the substantial-truth defense applies in claims of defamation by implication. Under *New York Times Co v Sullivan*, 376 US 254 (1964), and its progeny, public officials and public figures may not recover damages for a defamatory falsehood relating to their official conduct unless they prove that the statement was made with actual malice, i.e., with knowledge that it was false or with reckless disregard of whether it was false or not. Recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of their reports. With regard to defamatory-implication claims, "intended" with regard to "actual malice," means either knowledge or recklessness with regard to the implication. Thus, not only must the plaintiff establish that the statement is susceptible of a defamatory meaning that the defendants knew to be false or that the defendants published with reckless disregard for its potential falsity, but also that the defendants intended to imply *or were reckless* toward the implications. "Actual malice" is a subjective concept that mandates a subjective inquiry regarding the knowledge of a defendant at the time of publication. While a failure to investigate the accuracy of a communication before publishing is not alone sufficient to establish actual malice, a purposeful avoidance of the truth is different from the mere failure to investigate, and a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity of a publication is sufficient to find reckless disregard. An individual may be a public figure for all purposes, such as when the individual achieves such pervasive fame or notoriety that they become a public figure for all purposes and in all contexts, or an individual may become a limited-purpose public figure, such as when an individual injects themselves or is drawn into a particular public controversy and thereby becomes a public figure regarding a limited range of issues.

2. Reighard stipulated that he was a limited-purpose public figure for purposes of this action; thus, the actual-malice stan-



dard applied to his claims. There were two allegedly defamatory implications in Murphy's first two tweets: (1) that there was a connection between CMU's decision to place him on administrative leave and the Attorney General's investigation into the allegations that Geddert had physically and mentally harmed gymnasts and (2) that there was a connection between Reighard being placed on administrative leave and Nassar or sexual-abuse allegations. Given the manner in which the statements contained within the tweets were juxtaposed with one another, the implications complained of were capable of defamatory meaning. With regard to the falsity of the information contained in the tweets, concerning the first implication—that there was a connection between CMU's decision to place him on administrative leave and the Attorney General's investigation into the allegations related to Geddert—because Reighard failed to submit any evidence in support of the contention, he abandoned his claim that the tweets implied that there was a connection between CMU's investigation of Reighard and the Attorney General's investigation of Geddert for alleged physical and mental abuse. In addition, it was undisputed that CMU later fired Reighard for the misconduct related to the physical or mental abuse of gymnasts. That implication was therefore not, as a matter of law, materially false, and, as a result, the trial court correctly dismissed that claim of defamation by implication. With regard to the second implication—that there was a connection between Reighard being placed on administrative leave and Nassar or sexual-abuse allegations—it was uncontested that the implication was false. The trial court therefore erred by concluding that the “gist” or substantial truth of the statements contained in the tweets was correct. Reighard therefore satisfied the falsity element for this complained-of implication. Under the circumstances of this case, there was adequate circumstantial evidence regarding the issue of actual malice for the question to be decided by the fact-finder; that is, a reasonable fact-finder could find by clear and convincing evidence that Murphy had conveyed the implication of his tweets with actual malice. Accordingly, the trial court erred by granting summary disposition in favor of defendants with regard to the second complained-of defamatory implication.

3. Because the defamation and false-light invasion-of-privacy claims were governed by the same legal standards, the trial court similarly erred, in part, by granting summary disposition on Reighard's false-light invasion-of-privacy claim.

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

BOONSTRA, P.J., concurring, agreed fully with the majority opinion but wrote separately to expand on the reasoning of the opinion and to provide historical context regarding the law of defamation. Historically, the framers did not intend the First Amendment to protect every utterance; indeed, libelous utterances were not constitutionally protected speech. While the actual-malice standard in *New York Times* originally applied only to a small range of actors (public officials), that standard now applies broadly to many (public figures and limited-purpose public figures). With the advent of the Internet and the ability of everyone to publish at will and with a broadening of the caselaw such that essentially everyone is a limited-purpose public figure, the media can publish whatever it wishes without fear of consequences. Thus, what was once a limited exception to defamation liability has swallowed the rule. Freedom of speech and of the press are fundamental First Amendment rights, but those rights have become distorted in light of the evolution of defamation law, eliminating accountability for those who recklessly damage personal reputations. Judge BOONSTRA urged the United States Supreme Court to take a fresh look at its defamation jurisprudence.

LIBEL AND SLANDER – ACTIONS – DEFAMATION BY IMPLICATION.

To establish a cause of action for defamation by implication, a plaintiff who is a limited-purpose public figure must prove that the defamatory implication is materially false; to be successful, it is unnecessary to directly show a literally false statement; liability for defamation by implication may be imposed not on the basis of what is affirmatively stated, but on what is implied when a defendant juxtaposes a series of facts so as to imply a defamatory connection between them or creates a defamatory implication by omitting facts such that they may be held responsible for the defamatory implication; when a plaintiff's injury arises from an allegedly harmful implication, the plaintiff must prove by clear and convincing evidence that the defendant intended or knew of the implications that the plaintiff is attempting to draw; "intended" in this context means either knowledge or recklessness with regard to the implication; that is, the communicative-intent element of actual malice in defamation-by-implication cases can be satisfied by reckless disregard for the defamatory meaning of a statement.

*Mark Granzotto, PC* (by *Mark Granzotto*) and *The Mastromarco Firm* (by *Victor J. Mastromarco* and *Kevin L. Kula*) for plaintiff.

*Davis Wright Tremaine LLP* (by *Nathan Siegel* and *Alison Schary*) and *Dykema Gossett PLLC* (by *Jill M. Wheaton* and *Erin A. Sedmak*) for defendants.

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

PER CURIAM. In this defamation action, plaintiff, Jerry Reighard (Reighard), appeals by right the trial court's order granting defendants' motion for summary disposition under MCR 2.116(C)(10). We affirm in part, reverse in part, and remand for further proceedings.

#### I. PERTINENT FACTS AND PROCEDURAL HISTORY

For 35 years, Reighard was the head women's gymnastics coach at Central Michigan University (CMU). On February 20, 2019, CMU announced that it had placed Reighard on paid administrative leave pending an investigation. No details regarding the investigation were disclosed in that announcement. However, citing confirmation by CMU's athletic director, multiple news articles reported on that date that the investigation had "nothing to do with [former gymnastics physician] Larry Nassar's case or sexual misconduct of any kind"<sup>1</sup> or "Title IX."<sup>2</sup>

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<sup>1</sup> See *People v Nassar*, unpublished per curiam opinion of the Court of Appeals, issued December 22, 2020 (Docket No. 345699) (indicating that Larry Nassar, a physician at Michigan State University and the team physician for USA Gymnastics, pleaded guilty to multiple counts of criminal sexual conduct based on his sexual abuse of dozens of teenage and prepubescent girls).

<sup>2</sup> See 20 USC 1681 *et seq.*

Defendant Daniel Murphy is a reporter for defendant ESPN, Inc. In that capacity, Murphy had previously reported on issues relating to gymnastics, including covering Nassar's sexual abuse of gymnasts and John Geddert's reported physical and mental abuse of gymnasts.<sup>3</sup> Indeed, Murphy's reporting in 2018 regarding the Nassar sexual-abuse scandal has earned him and his ESPN colleagues multiple awards—including an IRE<sup>4</sup> Award for Sports Investigations and a Peabody Award.<sup>5</sup> Murphy also has co-authored a book entitled: *Start by Believing: Larry Nassar's Crimes, the Institutions that Enabled Him, and the Brave Women Who Stopped a Monster*. According to Murphy, the book refers to Geddert as one of the individuals who enabled Nassar.

On February 21, 2019, Murphy posted on Twitter<sup>6</sup> consecutive tweets about two public announcements concerning women's gymnastics coaches in Michigan. The first tweet referred to an announcement by the Michigan Attorney General:

Michigan's attorney general announced today her office is taking over an investigation of John Geddert, the 2012 Olympic team head coach and close friend of Larry Nassar.

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<sup>3</sup> John Geddert was head coach of the 2012 gold-medal-winning United States women's gymnastics Olympic team. He died by suicide in 2021 after being charged with multiple counts of criminal sexual assault and human trafficking, including of minors. See, e.g., <[https://www.espn.com/olympics/gymnastics/story/\\_/id/30969557/court-documents-detail-deceased-coach-john-geddert-alleged-abuse](https://www.espn.com/olympics/gymnastics/story/_/id/30969557/court-documents-detail-deceased-coach-john-geddert-alleged-abuse)> (last accessed April 18, 2022) [<https://perma.cc/BP8U-TKV4>].

<sup>4</sup> Investigative Reporters and Editors. See <<https://www.ire.org>> (accessed April 15, 2022) [<https://perma.cc/KD2T-8SNQ>].

<sup>5</sup> See <<https://peabodyawards.com>> (accessed April 15, 2022) [<https://perma.cc/D6FQ-XG8A>].

<sup>6</sup> Murphy's Twitter account advertised his then-forthcoming book.

Several gymnasts have publicly abused [sic] Geddert of physically and mentally harming them.

The second tweet—which was posted within a minute of the first tweet—addressed CMU’s announcement concerning Reighard:

On the same day as the AG’s announcement, Central Michigan said it was putting longtime gymnastics coach Jerry Reighard on leave amid an internal review. No details of the review were shared, but Reighard has a long personal and professional relationship with Geddert.

Reighard requested a retraction of the tweets. Murphy then searched for and discovered the earlier reporting in which CMU had confirmed that its investigation of Reighard had nothing to do with Nassar or Title IX. Murphy also then spoke directly with a CMU representative, who again confirmed to Murphy that the investigation had nothing to do with Nassar or Title IX, and that by “Title IX,” he meant “sexual misconduct.” Following that conversation, Murphy concluded that a retraction was unnecessary because there was nothing factually incorrect in the tweets. Instead, on March 11, 2021, he posted an additional tweet—which he testified was not meant as a retraction, but instead was intended to “add more information to [his] reporting”—on Twitter:

Central Michigan hopes to have its internal investigation of Jerry Reighard completed by the end of the semester. An athletic dept. spokesman confirmed today Reighard remains on paid leave and the investigation is not connected to the Larry Nassar scandal or sexual misconduct.

Reighard filed suit, alleging that Murphy’s initial tweets constituted defamation per se and false-light

invasion of privacy.<sup>7</sup> After defendants answered the complaint, discovery ensued. Murphy testified at his deposition that, before publishing the tweets, confidential sources had informed him that Reighard had been placed on administrative leave, that Reighard, like Geddert, had a reputation for physically and mentally abusing gymnasts, and that Geddert and Reighard had a longstanding and friendly relationship. To verify the information, Murphy read CMU's announcement placing Reighard on administrative leave pending an investigation. He also reviewed a 2012 news article indicating that Reighard and Geddert had a professional relationship and that they were friendly with each other. He testified that it was important that he perform due diligence to confirm what he had been told and that due diligence was important because "[i]t's my job." He also testified that his purpose was to establish a relationship between Reighard and Geddert.

Murphy indicated that, given what he had learned, he believed there might be a connection between the Attorney General's announcement regarding the investigation into Geddert and CMU's announcement

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<sup>7</sup> The complaint did not include an express count for defamation by implication. However, the complaint did allege that, by posting the tweets, defendants were "attempting to connect [Reighard] to individuals in the gymnastics community who have been accused of physically and mentally abusing student-athletes." It further alleged that "Defendants' statement implies that [Reighard] was placed on administrative leave due to similar behavior engaged in by Mr. Nassar and of which Mr. Geddert has been accused of." Consequently, the parties litigated the case as setting forth a claim for defamation by implication. Indeed, in moving for summary disposition, defendants described the defamation-by-implication claim as Reighard's "main claim," and Reighard described it as the "heart" of his case. On remand, the trial court should order any amendment of the pleadings it deems necessary to squarely allege, in accordance with the parties' interpretation and litigation of the existing complaint, a claim of defamation by implication.

regarding its investigation into Reighard. In his view, his two initial tweets properly raised that question. He indicated that at the time of his tweets, he had no information suggesting that Reighard was “connected to Larry Nassar and Geddert in any sexual abuse scandal” or that Reighard had been accused of any kind of sexual abuse “in a criminal sense.” He acknowledged that, in his first tweet, he established a relationship between Nassar and Geddert, and in his second tweet, he established a relationship between Geddert and Reighard. But he denied that his tweets had linked the three men. Despite the reference to Nassar in the first tweet, he testified that he did not believe the thread raised any question as to whether the investigation into Reighard was related to Nassar or sexual-abuse allegations.

Murphy also testified, however, that he had not attempted to contact Reighard or CMU’s athletic director before posting his tweets because “[t]he information I needed was in a public press release.” He also testified that he had not seen the earlier news reports confirming that there was no connection between the investigation of Reighard and sexual misconduct of any kind or the sexual-abuse scandal concerning Nassar. He testified that he did not know whether, had he known that information, he would have tweeted as he did. He indicated that he did not know whether it would have been important to include that information in his tweets and that he could not say or control how anyone might read them.

Defendants moved for summary disposition under MCR 2.116(C)(10), arguing that the tweets did not assert any defamatory or materially false facts, that they did not constitute defamation by implication, and that Reighard—a limited-purpose public figure—could

not demonstrate that Murphy had acted with actual malice. Reighard responded that the tweets contained materially false facts<sup>8</sup> and that they had implied that he was guilty of physical and sexual abuse like Geddert and Nassar. He also argued that he was not a limited-purpose public figure, but that even if he were, Murphy had acted with actual malice when posting the tweets.

Following a hearing, the trial court granted defendants' motion, concluding that there were no genuine issues of material fact regarding Reighard's defamation and false-light claims because the tweets were substantially true and, even if they were not, Reighard was a limited-purpose public figure and there was no evidence that Murphy had acted with actual malice.<sup>9</sup> Reighard moved for reconsideration, arguing that the trial court had failed to address his claim for defamation by implication. The trial court denied the motion. This appeal followed.

## II. STANDARD OF REVIEW

Reighard argues that the trial court erred by granting defendants' motion for summary disposition. This Court reviews *de novo* a trial court's decision on a motion for summary disposition and whether the trial

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<sup>8</sup> For example, Reighard contended that he never had a personal relationship with Geddert. And Reighard pointed out that the CMU announcement (concerning Reighard) did not occur "on the same day" as the Attorney General's announcement (concerning Geddert and Nassar), as the tweets had temporally linked them; instead, the CMU announcement had been made the day before the Attorney General's announcement. Those issues are not before us on appeal.

<sup>9</sup> On appeal, defendants contend that summary disposition was appropriate because Reighard cannot establish a claim of defamation *per se*. The trial court, however, did not grant summary disposition on that basis. Consequently, we do not address that particular argument further.



court properly applied the constitutional standard for defamation. *Redmond v Heller*, 332 Mich App 415, 438; 957 NW2d 357 (2020). Summary disposition under MCR 2.116(C)(10) is appropriate when, “[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law.” “A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ.” *Johnson v VanderKooi*, 502 Mich 751, 761; 918 NW2d 785 (2018) (quotation marks, citation, and brackets omitted). The trial court must consider the “pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party.” *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008).

### III. ANALYSIS

#### A. DEFAMATION AND THE FIRST AMENDMENT

The law of defamation lies at a crossroads with that of the First Amendment. The First Amendment, of course, protects, in part, freedom of speech and freedom of the press. US Const, Am I (“Congress shall make no law . . . abridging the freedom of speech, or of the press[.]”).<sup>10</sup>

The law of defamation arises—as a matter of state common law—from the world of tort. It seeks to protect against injury to reputation caused by the publication of falsehoods:

A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of

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<sup>10</sup> The First Amendment applies to the states by virtue of the Fourteenth Amendment. US Const, Am XIV.

the community or to deter third persons from associating or dealing with him. [3 Restatement Torts, 2d, § 559, p 156 (emphasis omitted).]

Thus, “[a] communication is defamatory if it tends to lower an individual’s reputation in the community or deters third persons from associating or dealing with that individual.” *Ireland v Edwards*, 230 Mich App 607, 614; 584 NW2d 632 (1998). “However, not all defamatory statements are actionable.” *Id.* Generally, “[i]f a statement cannot be reasonably interpreted as stating actual facts about the plaintiff, it is protected by the First Amendment.” *Id.* See also *Milkovich v Lorain Journal Co*, 497 US 1, 20; 110 S Ct 2695; 111 L Ed 2d 1 (1990). “Thus, at least some expressions of opinion are protected.” *Ireland*, 230 Mich App at 614, citing *Milkovich*, 497 US at 18-20. Otherwise, a plaintiff can establish a defamation claim by showing:

(1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by publication. [*Smith v Anonymous Joint Enterprise*, 487 Mich 102, 113; 793 NW2d 533 (2010) (quotation marks and citation omitted).]

The quandary lies in determining at what point the law of defamation abridges freedom of speech or of the press.

#### 1. THE STARTING POINT

The starting point for that analysis is how the framers of the First Amendment perceived its interaction with the common law of defamation. As Justice

White stated in *Gertz v Robert Welch, Inc*, 418 US 323, 369-370; 94 S Ct 2997; 41 L Ed 2d 789 (1974) (White, J., dissenting):

For some 200 years—from the very founding of the Nation—the law of defamation and right of the ordinary citizen to recover for false publication injurious to his reputation have been almost exclusively the business of state courts and legislatures. Under typical state defamation law, the defamed private citizen had to prove only a false publication that would subject him to hatred, contempt, or ridicule. Given such publication, general damage to reputation was presumed, while punitive damages required proof of additional facts. The law governing the defamation of private citizens remained untouched by the First Amendment because until relatively recently, the consistent view of the Court was that libelous words constitute a class of speech wholly unprotected by the First Amendment, subject only to limited exceptions carved out since 1964.

## 2. NEW YORK TIMES AND ITS PROGENY

In 1964, the United States Supreme Court issued its seminal decision in *New York Times Co v Sullivan*, 376 US 254; 84 S Ct 710; 11 L Ed 2d 686 (1964). It adopted an “actual malice” test for defamation claims brought by public officials relating to criticism of their official conduct:

The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with “actual malice”—that is, with knowledge that it was false or with reckless disregard of whether it was false or not. [*Id.* at 279-280.]

That test has since been expanded to public figures. See *Curtis Publishing Co v Butts*, 388 US 130, 155;

162; 87 S Ct 1975; 18 L Ed 2d 1094 (1967) (opinion by Warren, C.J., concurring in the result). The Court in *Gertz* described public figures as follows:

Respondent's characterization of petitioner as a public figure raises a different question. That designation may rest on either of two alternative bases. In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions. [*Gertz*, 418 US at 351 (opinion of the Court).]

#### B. DEFAMATION BY IMPLICATION

A subset of the tort of defamation is known as "defamation by implication." "[A] cause of action for defamation by implication exists in Michigan, but only if the plaintiff proves that the defamatory *implications* are materially false[.]" *Hawkins v Mercy Health Servs, Inc*, 230 Mich App 315, 330; 583 NW2d 725 (1998). See also *Locricchio v Evening News Ass'n*, 438 Mich 84, 123; 476 NW2d 112 (1991); *American Transmission, Inc v Channel 7 of Detroit, Inc*, 239 Mich App 695, 702; 609 NW2d 607 (2000). "[S]uch a cause of action might succeed even without a direct showing of any actual literally false *statements*." *Hawkins*, 230 Mich App at 330. Liability for defamation by implication may be imposed based not on what is affirmatively stated, but on what is implied when a defendant "juxtaposes a series of facts so as to imply a defamatory connection between them, or creates a defamatory implication by omitting facts [such that] he may be held responsible for the defamatory implication[.]" Prosser & Keeton, Torts (5th ed, 1988 Supp), § 116, p 117 (citations omitted).

“A defamation by implication stems not from what is literally stated, but from what is implied.” *White v Fraternal Order of Police*, 285 US App DC 273, 279; 909 F2d 512 (1990).

### C. APPLICATION

On appeal, Reighard argues that, even if the statements in Murphy’s tweets were not themselves materially false, the implications arising from the statements were false. He further argues that there was sufficient evidence of actual malice to survive summary disposition. We agree, in part.

#### 1. THE IMPLICATIONS

As noted, the tweets, which were published on February 21, 2019, stated:

Michigan’s attorney general announced today her office is taking over an investigation of John Geddert, the 2012 Olympic team head coach and close friend of Larry Nassar. Several gymnasts have publicly abused [sic] Geddert of physically and mentally harming them.

On the same day as the AG’s announcement, Central Michigan said it was putting longtime gymnastics coach Jerry Reighard on leave amid an internal review. No details of the review were shared, but Reighard has a long personal and professional relationship with Geddert.

Reighard identifies two allegedly defamatory implications in the tweets. First, that there was a connection between CMU’s decision to place him on administrative leave and the Attorney General’s investigation into the allegations that Geddert had physically and mentally harmed gymnasts. Second, that there was a

connection between Reighard being placed on administrative leave and Nassar or sexual-abuse allegations.

## 2. CAPABLE OF DEFAMATORY MEANING

“[A] court may decide as a matter of law whether a statement is actually capable of defamatory meaning.” *Ireland*, 230 Mich App at 619. “Where no such meaning is possible, summary disposition is appropriate.” *Id.* “A communication is defamatory if, considering all the circumstances, it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.” *Id.*

Although the trial court held, on reconsideration, that the tweets “[did] not create a clear implication that plaintiff committed the same kind of sexual abuse crimes as Nassar,” it did not address whether the alleged implications, if proven, were capable of defamatory meaning. Plaintiffs argue that the tweets could reasonably be interpreted as connecting Reighard with sexual-abuse allegations. Defendants disagree. We agree with Reighard.

The first tweet identified Geddert as the head coach of the 2012 Olympic team and that he was close friends with Nassar. At the time, it was well-known that Nassar had been the team physician for USA Gymnastics and had treated many gymnasts in his role as a physician at Michigan State University. The second tweet identified Reighard as CMU’s “longtime gymnastics coach” and stated that Geddert and Reighard are also friends. Thus, reading the tweets in context, a reasonable reader could infer that all three men had been involved in gymnastics and were friends with each other.

Next, the first tweet stated that the Attorney General was taking over an investigation into allegations that Geddert had physically and mentally harmed several gymnasts. Further, by mentioning Geddert's close association with Nassar, the tweet arguably implied a connection between the investigation into Geddert and Nassar's sexual-abuse convictions. The second tweet linked to the first by referring to the Attorney General's investigation. It then noted that Reighard had been placed on administrative leave pending an internal review. It stated that no details of the review were shared by CMU; however, by using the word "but" in its final sentence, the tweet arguably implied that the reason Reighard was placed on administrative leave was related to a supposedly long personal and professional relationship with Geddert. In doing so, a reasonable reader could read the tweets as implying that Reighard had engaged in the same type of misconduct for which the Attorney General was criminally investigating Geddert—physically and mentally harming gymnasts. Further, a reasonable reader could conclude that Reighard was or could have been involved in sexual misconduct or in the Nassar sexual-abuse scandal.

We conclude, particularly in light of the manner in which the statements contained within the tweets were juxtaposed with one another, that the implications complained of are capable of defamatory meaning. See *Ireland*, 230 Mich App at 619-620. The implication that Reighard's placement on leave was related to allegations that Geddert had physically and mentally harmed gymnasts tended to harm Reighard's reputation so as to lower him in the estimation of the community or deter third persons from associating or dealing with him. That assessment is even more true with respect to the second alleged implication, i.e., that

Reighard’s placement on leave was related to Nassar or sexual-abuse allegations. This is not so strained a reading of the tweets as to make summary disposition appropriate. Rather, we conclude that it is one that a reasonable jury should assess. Thus, these statements are actionable.<sup>11</sup>

### 3. FALSITY

In another context, this Court has observed that “claims of defamation by implication, which by nature present ambiguous evidence with respect to falsity, face a severe constitutional hurdle.” *Locricchio*, 438 Mich at 122. That is only partially true in this case, however.<sup>12</sup>

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<sup>11</sup> We reject defendants’ suggestion that the tweets at most raised a question and that questions are not capable of defamatory meaning. First, the tweets did not pose a question. Second, “a blanket protection of defamation liability for any and all questions is inappropriate,” *Boulger v Woods*, 917 F3d 471, 480 (CA 6, 2019), just as it is inappropriate when statements are couched in terms of opinion, *Milkovich*, 497 US at 19 (“Simply couching such statements in terms of opinion does not dispel these implications[.]”). Finally, on the basis of our independent review of the totality of the evidence, the tweets raised not mere questions but actionable implications that reasonably should be assessed by the fact-finder. Defendants’ interpretation would effectively negate an entire area of Michigan jurisprudence—defamation by implication—an invitation that we decline.

<sup>12</sup> In *Philadelphia Newspapers, Inc v Hepps*, 475 US 767, 777; 106 S Ct 1558; 89 L Ed 2d 783 (1986), the Supreme Court held that “the common-law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern.” In other words, it fashioned “a constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages.” *Id.* at 776. See also *Milkovich*, 497 US at 16; *Rouch v Enquirer & News of Battle Creek (After Remand)*, 440 Mich 238, 259; 487 NW2d 205 (1992) (“In contrast to the early common law, where falsity was presumed and the defendant was required to prove substantial truth as a defense, the burden of proving falsity has now been shifted to the plaintiff.”), citing *Hepps*, 475 US 767.



To analyze this element of Reighard's defamation-by-implication claim, we will separately analyze each of the complained-of implications. With regard to the first implication, i.e., that there was a connection between CMU's investigation of Reighard and the Attorney General's investigation of Geddert (for alleged physical and mental abuse),<sup>13</sup> Reighard has failed to put forth any evidence. Rather, he merely asserts that it is false, without directing this Court to the factual basis for his conclusion. In doing so, he has abandoned the issue. See *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959) ("It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position."). Moreover, it is undisputed that CMU ultimately fired Reighard for misconduct related to instructing gymnasts to conceal symptoms of injuries from physicians so that the gymnasts could be cleared to compete notwithstanding their injuries. This undisputed conduct relates to the physical or mental abuse of gymnasts. Because that was also the reported basis of the Attorney General's investigation of Geddert, we conclude that there is no triable issue with regard to the falsity of this alleged implication. There thus was no record evidence refuting the alleged implication that CMU placed Reighard on leave for reasons related to the investigation of Geddert (for allegedly physically and mentally harming gymnasts). Consequently, the implication was not, as a matter of law, materially

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<sup>13</sup> We note that while Geddert ultimately was charged with crimes involving sexual abuse, nothing to that effect was reflected in either the Attorney General's announcement or Murphy's tweets.

false, and summary disposition on this claim of defamation by implication was therefore proper.

The same cannot be said, however, with regard to the second implication, i.e., that there was a connection between Reighard being placed on administrative leave and Nassar or sexual-abuse allegations. Indeed, the falsity of that implication is uncontested. Moreover, the evidence reflects that CMU confirmed on February 20, 2021—as reported by multiple news outlets at that time—that its investigation into Reighard was not connected to Nassar or allegations of sexual abuse. Moreover, when Murphy contacted CMU after being asked to retract his tweets, he was provided with the same information. Reighard has therefore satisfied the “falsity” element with respect to the second complained-of implication.

We note that, in granting summary disposition in favor of defendants, the trial court concluded in part that the “gist” of the statements contained in the tweets was accurate. However, the trial court at that time was considering only the factual statements expressly set forth in the tweets. In subsequently denying Reighard’s motion for reconsideration, the trial court reiterated that it had previously found that the gist of Murphy’s tweets was accurate. The trial court’s language derives from what is known as the “substantial truth defense.” As our Supreme Court stated in *Rouch v Enquirer & News of Battle Creek (After Remand)*, 440 Mich 238; 487 NW2d 205 (1992):

The common law has never required defendants to prove that a publication is literally and absolutely accurate in every minute detail. For example, the Restatement of Torts provides that “[s]light inaccuracies of expression are immaterial provided that the defamatory charge is

true in substance.” [*Id.* at 258-259, quoting 3 Restatement Torts, 2d, § 581A, comment *f*, p 237 (alteration in original).]

The Court in *Rouch* further noted that, notwithstanding that *Hepps* had shifted the burden of proof (of falsity) to the plaintiff, the definition of falsity, based on common-law doctrine, remained as stated in *Masson v New Yorker Magazine, Inc*, 501 US 496; 111 S Ct 2419; 115 L Ed 2d 447 (1991):

“The common law of libel takes but one approach to the question of falsity, regardless of the form of the communication. . . . It overlooks minor inaccuracies and concentrates upon substantial truth. . . . The essence of that inquiry, however, remains the same whether the burden rests upon plaintiff or defendant. Minor inaccuracies do not amount to falsity so long as ‘the substance, the gist, the sting, of the libelous charge be justified.’ . . . Put another way, the statement is not considered false unless it ‘would have a different effect on the mind of the reader from that which the pleaded truth would have produced.’” [*Rouch*, 440 Mich at 260, quoting *Masson*, 501 US at 516-517.]

We further note that this Court has stated that “there is no logical reason why the substantial truth defense should not apply in cases involving the gist or the sting of defamatory implications from statements that are literally true[.]” *Hawkins*, 230 Mich App at 333.

That said, we conclude in the circumstances of this case that the second implication complained of by Reighard—i.e., that there was a connection between Reighard being placed on administrative leave and Nassar or sexual-abuse allegations—would, if proved, “have a different effect on the mind of the reader from that which the pleaded truth would have produced.” *Masson*, 501 US at 517 (quotation marks and citation omitted). Consequently, any implication that Reighard

was placed on administrative leave for reasons related to Nassar or sexual-abuse allegations was false, and the trial court erred, with respect to this alleged implication, to the extent it granted summary disposition on the basis of the “gist” or substantial truth of the statements contained in the tweets.

#### 4. LIMITED-PURPOSE PUBLIC FIGURE

The trial court held that Reighard was a limited-purpose public figure. And, as the trial court noted, many courts indeed have classified sports figures, including coaches, as public figures (or limited-purpose public figures) by virtue of their positions, at least with regard to comments concerning their positions. Reighard has now stipulated to limited-purpose-public-figure status.<sup>14</sup>

#### 5. ACTUAL MALICE

Because Reighard has been deemed to be a limited-purpose public figure, he must also establish by clear and convincing evidence that Murphy made the allegedly defamatory implication with actual malice. *Ireland*, 230 Mich App at 615. Of course, in the defamation context, “actual malice” does not refer to a defendant’s motive or any sense of ill will in the ordinary sense of the term. See *Harte-Hanks Communications, Inc v Connaughton*, 491 US 657, 666-667; 109 S Ct 2678; 105 L Ed 2d 562 (1989); see also *id.* at 666 n 7 (“The phrase ‘actual malice’ is unfortunately

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<sup>14</sup> In response to defendants’ motion for summary disposition, Reighard argued that he was not a limited-purpose public figure. The trial court, however, disagreed, and Reighard expressly does not contest that conclusion on appeal.

confusing in that it has nothing to do with bad motive or ill will.”). Rather, as explained in *Ireland*,

[a]ctual malice is defined as knowledge that the published statement was false or as reckless disregard as to whether the statement was false or not. Reckless disregard for the truth is not established merely by showing that the statements were made with preconceived objectives or insufficient investigation. Furthermore, ill will, spite or even hatred, standing alone, do not amount to actual malice. “Reckless disregard” is not measured by whether a reasonably prudent man would have published or would have investigated before publishing, but by whether the publisher in fact entertained serious doubts concerning the truth of the statements published. [*Ireland*, 230 Mich App at 622 (quotation marks and citation omitted).]

See also *Harte-Hanks*, 491 US at 688 (“In a case such as this involving the reporting of a third party’s allegations, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.”) (quotation marks and citation omitted); *Grebner v Runyon*, 132 Mich App 327, 337; 347 NW2d 741 (1984) (“[T]here was a genuine issue as to whether MegaMedia, in fact, entertained serious doubts concerning the truth of the statements published and whether the failure to make a phone call verifying the report amounted to reckless disregard as to the truthfulness of the report. We find that this matter should have been left to the trier of fact. Where the credibility of a witness or deponent is crucial, summary judgment should not be granted. Plaintiff’s allegations were sufficient to withstand a motion for summary judgment.”).

Thus, “‘actual malice’ is a subjective concept.” *Smith*, 487 Mich at 115. It “mandates a *subjective* inquiry concentrating on the knowledge of a defendant at the time of a publication.” *Battaglieri v Mackinac*

*Ctr for Pub Policy*, 261 Mich App 296, 305; 680 NW2d 915 (2004), citing *Harte-Hanks*, 491 US at 688. However, a defendant will not automatically prevail in a defamation case by stating that the statements were made with a belief that they were true, because a defendant's state of mind may be established "through circumstantial evidence[.]" *Smith*, 487 Mich at 115-116. Moreover, "[a]lthough failure to investigate will not alone support a finding of actual malice, the purposeful avoidance of the truth is in a different category." *Harte-Hanks*, 491 US at 692 (citation omitted).

The actual-malice test is further complicated in this case by the fact that Reighard's claim is one of defamation-by-implication. This Court has said (albeit in the analogous false-light invasion-of-privacy context) that when the plaintiff's injury arises from an allegedly harmful implication, the plaintiff must prove by clear and convincing evidence that the defendant "intended or knew of the implications that the plaintiff is attempting to draw . . . ." *Battaglieri*, 261 Mich App at 305 (quotation marks and citation omitted). See also *Royal Palace Homes, Inc v Channel 7 of Detroit, Inc*, 197 Mich App 48, 56; 495 NW2d 392 (1992) (stating that a defendant is not responsible for every defamatory implication that may be drawn from a report of true facts unless evidence is presented that the defendant intended the defamatory implication).

But what does it mean to "intend" the implication? Delving a bit deeper into the authorities relied on by these cases answers the question. In short, just as "actual malice" means either knowledge or recklessness with regard to *falsity*, so too, "intended" in this context means either knowledge or *recklessness* with regard to the *implication*. See, e.g., *Saenz v Playboy*

*Enterprises, Inc.*, 841 F2d 1309, 1318 (CA 7, 1988) (stating that the plaintiff must show that “the defendants either intended *or were reckless* with regard to the potential falsity of defamatory inferences which might be drawn from the article”) (emphasis added). That is, “[n]ot only must the plaintiff establish that the statement is susceptible of a defamatory meaning which the defendants knew to be false or which the defendants published with reckless disregard for its potential falsity, but also that the defendants intended to imply *or were reckless* toward the implications.” *Id.* (emphasis added). Stated another way, “the communicative-intent element of actual malice in defamation-by-implication cases can be satisfied by reckless disregard for the defamatory meaning of a statement.” *Kendall v Daily News Publishing Co.*, 716 F3d 82, 91 (CA 3, 2013). See also *White*, 285 US App DC at 280 (“It is no defense that the defendant did not actually intend to convey the defamatory meaning, so long as the defamatory interpretation is a reasonable one.”).

To satisfy that element in this case, Reighard directs this Court to Murphy’s deposition testimony. Specifically, Murphy testified that when he wrote the tweets, he did not know—one way or the other—whether there had been allegations of sexual abuse against Reighard and that he did not believe at the time that there was “any connection with sexual abuse” between Reighard, Geddert, and Nassar. That indeed would seem to establish that Murphy lacked awareness as to whether it was true that there was a connection between Reighard and Nassar or any sexual-abuse allegations. It may even suggest that he did not subjectively believe that the alleged implication was true. It does not,

however, answer the question whether Murphy intended to convey, or was reckless in conveying, the implication.

We conclude that there is adequate circumstantial evidence for this question to be decided by the fact-finder. As noted, for example, by using the word “but” in the final sentence of the second tweet, Murphy seemed to imply that Reighard was placed on administrative leave for reasons that were related to a supposedly long personal and professional relationship with Geddert. And those assertions were neatly juxtaposed with the immediately preceding statement establishing a personal relationship between Geddert and Nassar. Moreover, while acknowledging that due diligence was an essential part of his job, and therefore that it was necessary for him to verify the information he had learned, he pointedly did not attempt to contact either Reighard or CMU’s athletic director before posting his tweets, and he did not do even the minimal due diligence that would have alerted him to the fact that CMU had already confirmed—as had been publicly reported—that its investigation of Reighard had nothing to do with Nassar or any sexual-misconduct allegations.

We recognize that “failure to investigate the accuracy of a communication before publishing it” is not alone sufficient to establish actual malice. *Smith*, 487 Mich at 117.<sup>15</sup> However, “a ‘purposeful avoidance of the

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<sup>15</sup> Quoting *Harte-Hanks*, 491 US at 665, the trial court noted (and defendants argue on appeal) that “[e]ven an ‘extreme departure from professional standards’ by a reporter would not alone indicate actual malice.” However, the Supreme Court in *Harte-Hanks* used that language not to condone extreme departures from professional standards of reporting, but rather to explain that the extreme-departure language derived from a proposed standard for public figures set out in Justice Harlan’s plurality opinion in *Curtis Publishing*. *Harte-Hanks*, 491 US at



truth’ is dissimilar from the mere ‘failure to investigate,’ and ‘a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity’ of a publication is sufficient to find reckless disregard.” *Id.*, quoting *Harte-Hanks*, 491 US at 692. In this case, given the totality of the circumstances and our independent review of the entire record, we conclude from the juxtaposition of the statements contained in the successive tweets, the use and positioning of the word “but” in the final sentence of the second tweet, and Murphy’s failure to perform even basic due diligence—notwithstanding his acknowledgment of his professional duty to do so—to explore the accuracy of what we deem to be a reasonable interpretation of the defamatory implication of the tweets, that a reasonable fact-finder could find by clear and convincing evidence that Murphy had conveyed the implication of his tweets with actual malice. Indeed, our conclusion is perfectly in line with that of the Supreme Court in *Harte-Hanks*, which found that the record evidence—including the newspaper-defendant’s failure to interview an important witness and failure to listen to an available tape recording of an interview of the witness, was—just as had been true in *Curtis Publishing*—“‘unmistakably’ sufficient to support a finding of actual malice.” *Harte-Hanks*, 491 US at 692-693.

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665-666. The *Harte-Hanks* Court made clear that Justice Harlan’s proposed standard had been rejected by a majority of the justices in favor of an extension of the *New York Times* actual-malice standard. *Id.*

Accordingly, we reverse the trial court's order granting summary disposition in favor of defendants with respect to the second complained-of defamatory implication.

#### 6. FAULT

Because—as the fact-finder will on remand be instructed—the elements of a defamation claim include “fault amounting at least to negligence on the part of the publisher,” *Smith*, 487 Mich at 113 (quotation marks and citation omitted), liability will not be imposed in this case absent a showing of “fault,” see *Gertz*, 418 US at 347. That issue is therefore properly left to the fact-finder.

#### D. FALSE-LIGHT INVASION OF PRIVACY

Because Reighard's defamation and false-light invasion-of-privacy claims are governed by the same legal standards, see *Ireland*, 230 Mich App at 624-625, we similarly reverse in part the trial court's order granting summary disposition on Reighard's false-light invasion-of-privacy claim.

#### IV. CONCLUSION

For all of the reasons stated, we affirm in part and reverse in part the trial court's order granting summary disposition in favor of defendants and remand for further proceedings consistent with this opinion. We do not retain jurisdiction. No costs are awarded, neither party having prevailed in full. MCR 7.219(A).

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

BOONSTRA, P.J. (*concurring*). I fully concur in the majority opinion. I write separately simply to expand upon its rationale, to provide some historical context, and to suggest that the United States Supreme Court look anew at the morass that the law of defamation has become. Much has happened since the Supreme Court began issuing opinions in this area of law nearly 60 years ago. The “actual malice” standard that the Court created began small but has been ever-expanding in its reach, and now, in practice, it seems to have become nearly insurmountable. At the same time, the news media has been transformed. It exists today in an Internet world that no one could have imagined at that time. With a mere social-media keystroke, virtually everyone can publish at will. There is an increasing rush to publish in order to be the first to print. Too often, the casualty is accuracy in reporting because shortcuts are taken in the investigation-and-verification process that would serve to guarantee accuracy. We are thus left in today’s world with an emboldened media (although that word is becoming increasingly difficult to define) that, as a result of the protections the Supreme Court afforded it—perhaps for good reason at the time—increasingly perceives a court-sanctioned license to publish whatever it wishes, without fear of consequence. At the same time, much of the fourth estate has lost sight of its journalistic mission, and instead engages in issue and political advocacy under the guise of “reporting.” And the “Big Tech” companies that operate popular social-media platforms purport to be able to define the real “truth,” and therefore censor those who do not subscribe to their favored narratives.

Freedom of speech is fundamental. Freedom of the press is equally so. Those fundamental First Amendment rights remain as important today as they were

when the Bill of Rights was ratified in 1791. But we are all losers when the law becomes so distorted as to eliminate all manner of accountability for those who would recklessly damage personal reputations, ostensibly in the name of freedom of speech or freedom the press, no matter the reason or motive.

#### I. DEFAMATION AND THE FIRST AMENDMENT

As the majority opinion adeptly describes, defamatory speech was originally considered to be unprotected by the First Amendment. That is, defamatory statements remained actionable under state common law irrespective of the First Amendment. That began to change when the United States Supreme Court issued its decision in *New York Times Co v Sullivan*, 376 US 254; 84 S Ct 710; 11 L Ed 2d 686 (1964). Since then, the reach of that decision and of the actual-malice test that the Court adopted have been ever-expanding; indeed, what began as a narrow exception appears now to have swallowed the rule.

#### A. HISTORICAL BACKDROP

To properly understand the monumental scope of that transformation, I commend to the reader additional portions of Justice White's historical summation of the First Amendment in *Gertz v Robert Welch, Inc*, 418 US 323; 94 S Ct 2997; 41 L Ed 2d 789 (1974) (White, J., dissenting). While lengthy, it merits a careful read in order to put the questions before us in a proper context. Justice White stated, in part:

The Court does not contend, and it could hardly do so, that those who wrote the First Amendment intended to prohibit the Federal Government, within its sphere of influence in the Territories and the District of Columbia, from providing the private citizen a peaceful remedy for

damaging falsehood. At the time of the adoption of the First Amendment, many of the consequences of libel law already described had developed, particularly the rule that libels and some slanders were so inherently injurious that they were actionable without special proof of damage to reputation. As the Court pointed out in *Roth v. United States*, 354 U.S. 476, 482[; 77 S Ct 1304; 1 L Ed 2d 1498] (1957), 10 of the 14 States that had ratified the Constitution by 1792 had themselves provided constitutional guarantees for free expression, and 13 of the 14 nevertheless provided for the prosecution of libels. Prior to the Revolution, the American Colonies had adopted the common law of libel. Contrary to some popular notions, freedom of the press was sharply curtailed in colonial America. Seditious libel was punished as a contempt by the colonial legislatures and as a criminal offense in the colonial courts.

Scant, if any, evidence exists that the First Amendment was intended to abolish the common law of libel, at least to the extent of depriving ordinary citizens of meaningful redress against their defamers. On the contrary,

“[i]t is conceded on all sides that the common-law rules that subjected the libeler to responsibility for the private injury, or the public scandal or disorder occasioned by his conduct, are not abolished by the protection extended to the press in our constitutions.” 2 T. Cooley, *Constitutional Limitations* 883 (8th ed. 1927).

Moreover, consistent with the Blackstone formula, these common-law actions did not abridge freedom of the press. See generally L. Levy, *Legacy of Suppression: Freedom of Speech and Press in Early American History* 247–248 (1960); Merin, *Libel and the Supreme Court*, 11 Wm. & Mary L. Rev. 371, 376 (1969); Hallen, *Fair Comment*, 8 Tex. L. Rev. 41, 56 (1929).

Alexander Meiklejohn, who accorded generous reach to the First Amendment, nevertheless acknowledged:

“No one can doubt that, in any well-governed society, the legislature has both the right and the duty to prohibit certain forms of speech. Libelous assertions may be, and must be, forbidden and punished. So too must slander. . . . All these necessities that speech be limited are recognized and provided for under the Constitution. They were not unknown to the writers of the First Amendment. That amendment, then, we may take it for granted, *does not forbid the abridging of speech*. But, at the same time, *it does forbid the abridging of the freedom of speech*. It is to the solving of that paradox, that apparent self-contradiction, that we are summoned if, as free men, we wish to know what the right of freedom of speech is.” Political Freedom, *The Constitutional Powers of the People* 21 (1965).

See also Leflar, *The Free-ness of Free Speech*, 15 Vand. L. Rev. 1073, 1080–1081 (1962).

Professor Zechariah Chafee, a noted First Amendment scholar, has persuasively argued that conditions in 1791 “do not arbitrarily fix the division between lawful and unlawful speech for all time.” *Free Speech in the United States* 14 (1954). At the same time, however, he notes that while the Framers may have intended to abolish seditious libels and to prevent any prosecutions by the Federal Government for criticism of the Government, “the free speech clauses do not wipe out the common law as to obscenity, profanity, and defamation of individuals.”

The debates in Congress and the States over the Bill of Rights are unclear and inconclusive on any articulated intention of the Framers as to the free press guarantee. We know that Benjamin Franklin, John Adams, and William Cushing favored limiting freedom of the press to truthful statements, while others such as James Wilson suggested a restatement of the Blackstone standard. Jefferson endorsed Madison’s formula that “Congress shall

make no law . . . abridging the freedom of speech or the press” only after he suggested:

“The people shall not be deprived of their right to speak, to write, or *otherwise* to publish anything but false facts affecting injuriously the life, liberty or reputation of others . . . .” F. Mott, *Jefferson and the Press* 14 (1943).

Doubt has been expressed that the Members of Congress envisioned the First Amendment as reaching even this far. *Merin, Libel and the Supreme Court*, 11 Wm. & Mary L. Rev. 371, § 379–380 (1969).

This Court in bygone years has repeatedly dealt with libel and slander actions from the District of Columbia and from the Territories. Although in these cases First Amendment considerations were not expressly discussed, the opinions of the Court unmistakably revealed that the classic law of libel was firmly in place in those areas where federal law controlled. See *e.g.*, *Washington Post Co. v. Chaloner*, 250 U.S. 290[; 39 S Ct 448; 63 L Ed 987] (1919); *Baker v. Warner*, 231 U.S. 588[; 34 S Ct 175; 58 L Ed 384] (1913); *Nalle v. Oyster*, 230 U.S. 165[; 33 S Ct 1043; 57 L Ed 1439] (1913); *Dorr v. United States*, 195 U.S. 138[; 24 S Ct 808; 49 L Ed 128] (1904); *Pollard v. Lyon*, 91 U.S. 225[; 23 L Ed 308] (1876); *White v. Nicholls*, 3 How. 266[; 11 L Ed 591] (1845).

The Court’s consistent view prior to *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), was that defamatory utterances were wholly unprotected by the First Amendment. In *Patterson v. Colorado, ex rel. Attorney General*, 205 U.S. 454, 462[; 27 S Ct 556; 51 L Ed 879] (1907), for example, the Court said that although freedom of speech and press is protected from abridgment by the Constitution, these provisions “do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare.” This statement was repeated in *Near v. Minnesota, ex rel. Olson*, 283 U.S. 697, 714[; 51 S Ct 625; 75 L Ed 1357] (1931), the Court adding:

“But it is recognized that punishment for the abuse of the liberty accorded to the press is essential to the

protection of the public, and that the common law rules that subject the libeler to responsibility for the public offense, as well as for the private injury, are not abolished by the protection extended in our Constitutions. *Id.*, at 715.

*Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–572[; 62 S Ct 766; 86 L Ed 1031] (1942) (footnotes omitted), reflected the same view:

“There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”

*Beauharnais v. Illinois*, 343 U.S. 250, 254–257[; 72 S Ct. 725; 96 L Ed 919] (1952) (footnotes omitted), repeated the *Chaplinsky* statement, noting also that nowhere at the time of the adoption of the Constitution “was there any suggestion that the crime of libel be abolished.” And in *Roth v. United States*, 354 U.S., at 483 (footnote omitted), the Court further examined the meaning of the First Amendment:

“In light of this history, it is apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance. This phrasing did not prevent this Court from concluding that libelous utterances are not within the area of constitutionally protected speech. *Beauharnais v. Illinois*, 343 U.S. 250, 266. At the time of the adoption of the First Amendment, obscenity law was not as fully developed as libel law, but there is sufficiently contemporaneous evidence to show that obscenity,



too, was outside the protection intended for speech and press.” [*Gertz*, 418 US at 380-386 (White, J., dissenting) (some citations omitted; second alteration in original).]

B. *NEW YORK TIMES* AND ITS PROGENY

With that historical backdrop in mind, where are we today? The United States Supreme Court issued its seminal decision in *New York Times* in 1964. While seemingly narrow in scope (insofar as it applied only to defamation claims brought by public officials relating to criticism of their official conduct), it opened the door to the federalization of defamation law and to the all-too-typical result: a creeping progression by which the exception becomes the all-encompassing rule.

*New York Times* was premised on a desire to guarantee citizens, in the course of debating public issues, a right to criticize their elected officials on matters of official conduct. *New York Times*, 376 US at 270-273. The Court concluded that a “rule compelling the critic of official conduct to guarantee the truth of all his factual assertions” “dampens the vigor and limits the variety of public debate,” and it is therefore “inconsistent with the First and Fourteenth Amendments.” *Id.* at 279. The Court thus adopted—in those limited circumstances—an actual-malice test:

The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not. [*Id.* at 279-280.]

Within three years, the Court had extended that test to apply not only to public officials on matters of official conduct, but to “public figures.” See *Curtis Publishing Co v Butts* (and its companion case, *Associated Press v Walker*), 388 US 130, 162; 87 S Ct 1975; 18 L Ed 2d 1094 (1967) (Warren, C.J., concurring in the result). More accurately, Justice Harlan’s lead opinion in *Curtis Publishing* (in which only three other justices joined, creating a plurality), appeared to announce an entirely new test applicable to an undefined set of “public figures”:

We consider and would hold that a “public figure” who is not a public official may also recover damages for a defamatory falsehood whose substance makes substantial danger to reputation apparent, *on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers*. [*Id.* at 155 (opinion by Harlan, J.) (emphasis added).]

The lead opinion in *Curtis Publishing* referred to “‘public figures’ under ordinary tort rules,” *id.* at 154, and described that one of the named plaintiffs (the athletic director and former head football coach of a public university) “may have attained that status by position alone,” and that the other named plaintiff (a former general who had “taken command of the violent crowd and had personally led a charge against federal marshals sent there to effectuate the court’s decree and to assist in preserving order”) may have done so “by his purposeful activity amounting to a thrusting of his personality into the ‘vortex’ of an important public controversy,” *id.* at 140, 155.

A majority of the Court<sup>1</sup> subscribed to the pertinent aspects of Chief Justice Warren’s concurring-in-the-result opinion; instead of adopting the new test proposed by the lead opinion, the Court thereby effectively extended the *New York Times* actual-malice standard to “public figures”:

MR. JUSTICE HARLAN’s opinion departs from the standard of *New York Times* and substitutes in cases involving ‘public figures’ a standard that is based on ‘highly unreasonable conduct’ and is phrased in terms of ‘extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers’ (*ante*, p. 155). I cannot believe that a standard which is based on such an unusual and uncertain formulation could either guide a jury of laymen or afford the protection for speech and debate that is fundamental to our society and guaranteed by the First Amendment.

To me, differentiation between “public figures” and “public officials” and adoption of separate standards of proof for each have no basis in law, logic, or First Amendment policy. . . .

. . . [I]t is plain that although they are not subject to the restraints of the political process, “public figures,” like “public officials,” often play an influential role in ordering society. And surely as a class these “public figures” have as ready access as “public officials” to mass media of communication, both to influence policy and to counter criticism of their views and activities. Our citizenry has a legitimate and substantial interest in the conduct of such persons, and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of “public officials.” The fact that they are not amenable to the restraints of the political process only underscores the legitimate and substantial

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<sup>1</sup> See *Curtis Publishing*, 388 US at 162-165 (Warren, C.J., concurring in the result); *id.* at 170 (Black, J., concurring in part and dissenting in part), joined by Douglas, J.; *id.* at 172 (Brennan, J., concurring in part and dissenting in part), joined by White, J.

nature of the interest, since it means that public opinion may be the only instrument by which society can attempt to influence their conduct.

I therefore adhere to the *New York Times* standard in the case of “public figures” as well as “public officials.” It is a manageable standard, readily stated and understood, which also balances to a proper degree the legitimate interests traditionally protected by the law of defamation. . . . [T]he *New York Times* standard is an important safeguard for the rights of the press and public to inform and be informed on matters of legitimate interest. Evenly applied to cases involving “public men”—whether they be “public officials” or “public figures”—it will afford the necessary insulation for the fundamental interests which the First Amendment was designed to protect. [*Curtis Publishing*, 388 US at 163-165 (Warren, C.J., concurring in the result).]

The expansion of the *New York Times* standard did not end there. For example, in *Rosenbloom v Metromedia, Inc.*, 403 US 29; 91 S Ct 1811; 29 L Ed 2d 296 (1971), abrogated by *Gertz*, 418 US at 345-347, a three-member plurality of a once-again fractured Court<sup>2</sup> would have extended the *New York Times* standard to *private* persons when the allegedly defamatory falsehoods concerned matters of general or public interest. *Id.* at 52 (opinion by Brennan, J.) (“We thus hold that a libel action . . . by a private individual . . . for a defamatory falsehood in a newscast relating to his involvement in an event of public or general concern may be sustained only upon clear and convincing proof that the defamatory falsehood was published with

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<sup>2</sup> Justice Douglas did not participate. The eight participating Justices issued five separate opinions, ranging from declining a further intrusion of *New York Times* into state defamation law to affording the news media absolute immunity from liability for defamation.

knowledge that it was false or with reckless disregard of whether it was false or not.”).<sup>3</sup>

As noted, the Court in *Gertz* later rejected the *Rosenbloom* plurality’s approach regarding *liability* for defamation of private individuals; but, in doing so, it did preclude liability absent a showing of “fault.” *Gertz*, 418 US at 347 (“We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.”). Further, the Court limited the *damage* recovery available to private plaintiffs absent a showing under the actual-malice standard. *Id.* at 349 (“[W]e hold that the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.”).

The Court in *Gertz* expanded upon the *Curtis Publishing* description of public figures, stating:

Respondent’s characterization of petitioner as a public figure raises a different question. That designation may rest on either of two alternative bases. In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions. [*Id.* at 351.]

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<sup>3</sup> This standard of the plurality opinion was later adopted by many states and lower courts. See *Gertz*, 418 US at 377 & n 10 (White, J., dissenting).

The latter category of “public figures” has come to be known as that of a “limited-purpose public figure.” See, e.g., *Wolston v Reader’s Digest Ass’n, Inc*, 443 US 157, 165-166; 99 S Ct 2701; 61 L Ed 2d 450 (1979).

Dissenting in *Gertz*, Justice White (who had joined the Court’s opinion in *New York Times*) decried the Court’s departure from the historical perspective of the First Amendment in relation to defamation law:

The Court could not accept the generality of this historic view in *New York Times Co. v. Sullivan*. There the Court held that the First Amendment was intended to forbid actions for seditious libel and that defamation actions by public officials were therefore not subject to the traditional law of libel and slander. If these officials (and, later, public figures occupying semiofficial or influential, although private, positions) were to recover, they were required to prove not only that the publication was false but also that it was knowingly false or published with reckless disregard for its truth or falsity. This view that the First Amendment was written to forbid seditious libel reflected one side of the dispute that raged at the turn of the nineteenth century and also mirrored the views of some later scholars.

The central meaning of *New York Times*, and for me the First Amendment as it relates to libel laws, is that seditious libel—criticism of government and public officials—falls beyond the police power of the State. 376 U.S., at 273–276. In a democratic society such as ours, the citizen has the privilege of criticizing his government and its officials. But neither *New York Times* nor its progeny suggests that the First Amendment intended in all circumstances to deprive the private citizen of his historic recourse to redress published falsehoods damaging to reputation or that, contrary to history and precedent, the Amendment should now be so interpreted. Simply put, the First Amendment did not confer a “license to defame the citizen.” W. Douglas, *The Right of the People* 36 (1958).

I do not labor the foregoing matters to contend that the Court is foreclosed from reconsidering prior interpretations of the First Amendment. But the Court apparently finds a clean slate where in fact we have instructive historical experience dating from long before the first settlers, with their notions of democratic government and human freedom, journeyed to this land. Given this rich background of history and precedent and because we deal with fundamentals when we construe the First Amendment, we should proceed with care and be presented with more compelling reasons before we jettison the settled law of the States to an even more radical extent. [*Gertz*, 418 US at 386-388 (White, J., dissenting) (some citations omitted).]

## II. APPLICATION

As outlined in the majority opinion, we have, of course, decided this case under existing law—such as it is. And I agree entirely with the majority’s analysis of plaintiff’s defamation-by-implication claim, with the clarification that the majority provides, i.e., that in applying the actual-malice test in the context of a defamation-by-implication claim, either knowledge *or recklessness* satisfies the requirement that the defendant have intended the implication. I further note that I have difficulty discerning how plaintiff “voluntarily inject[ed] himself or [was] drawn into a particular public controversy,” *Gertz*, 418 US at 351, so as to become a limited-purpose public figure. Moreover, I have concerns that, given the progression of the law that I have described, essentially everyone is now at least a limited-purpose public figure, such that the *New York Times* exception has indeed swallowed the rule.<sup>4</sup>

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<sup>4</sup> As one example of just how far this progression has apparently advanced, the plaintiff in *Ireland v Edwards*, 230 Mich App 607; 584 NW2d 632 (1998), was found to be—and indeed stipulated that she was—a limited-purpose public figure. She was the mother of a child who was the subject of a custody action. *Id.* at 615 & n 5.

That said, inasmuch as plaintiff does not contest his limited-purpose public-figure status, I will not address the issue further.

### III. WHERE DO WE GO FROM HERE?

As noted, and while we have resolved this case on the basis of existing law, I have serious concerns about the state of the law in this area, both with regard to its progressive deviation from the historical underpinnings of both the common law of defamation and the constitutional jurisprudence of the First Amendment, and with regard to its continuing applicability in the modern world. I therefore join Justice Thomas and Justice Gorsuch in calling for the United States Supreme Court to take a fresh look at the jurisprudence in this area. As Justice Thomas recently stated in his dissent from the Supreme Court’s denial of certiorari in *Berisha v Lawson*, 594 US \_\_\_, \_\_\_; 141 S Ct 2424, 2424-2425 (2021):

[Petitioner] now asks this Court to reconsider the ‘actual malice’ requirement as it applies to public figures. As I explained recently, we should. . . .

This Court’s pronouncement that the First Amendment requires public figures to establish actual malice bears “no relation to the text, history, or structure of the Constitution.” In fact, the opposite rule historically prevailed: “[T]he common law deemed libels against public figures to be . . . *more* serious and injurious than ordinary libels.” *McKee v Cosby*, 586 US \_\_\_, \_\_\_; 139 S Ct 675, 679 (2019) (opinion of THOMAS, J.).

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The lack of historical support for this Court’s actual-malice requirement is reason enough to take a second look at the Court’s doctrine. Our reconsideration is all the more needed because of the doctrine’s real-world effects. Public figure or private, lies impose real harm. . . .

The proliferation of falsehoods is, and always has been, a serious matter. Instead of continuing to insulate those who perpetrate lies from traditional remedies like libel suits, we should give them only the protection the First Amendment requires. [First alteration in original; some citations omitted.]

And as Justice Gorsuch, also dissenting from the denial of certiorari, poignantly added:

At the founding, the freedom of the press generally meant the government could not impose prior restraints preventing individuals from publishing what they wished. But none of that meant publishers could defame people, ruining careers or lives, without consequence. Rather, those exercising the freedom of the press had a responsibility to try to get the facts right—or, like anyone else, answer in tort for the injuries they caused.

This principle extended far back in the common law and far forward into our Nation’s history. As Blackstone put it, “[e]very freeman has an undoubted right to lay what sentiments he pleases before the public,” but if he publishes falsehoods “he must take the consequence of his own temerity.” 4 W. Blackstone, *Commentaries on the Laws of England* 151–152 (1769). Or as Justice Story later explained, “the liberty of the press do[es] not authorize malicious and injurious defamation.” *Dexter v. Spear*, 7 F.Cas. 624 (No. 3,867) (CCDRI 1825).

This was “[t]he accepted view” in this Nation for more than two centuries. . . . As a rule, that meant all persons could recover damages for injuries caused by false publications about them. . . .

This changed only in 1964. . . .

Since 1964, however, our Nation's media landscape has shifted in ways few could have foreseen. . . .

The effect of these technological changes on our Nation's media may be hard to overstate. Large numbers of newspapers and periodicals have failed. Network news has lost most of its viewers. With their fall has come the rise of 24-hour cable news and online media platforms that "monetize anything that garners clicks." No doubt, this new media world has many virtues—not least the access it affords those who seek information about and the opportunity to debate public affairs. At the same time, some reports suggest that our new media environment also facilitates the spread of disinformation. A study of one social network reportedly found that "falsehood and rumor dominated truth by every metric, reaching more people, penetrating deeper . . . and doing so more quickly than accurate statements." All of which means that "the distribution of disinformation"—which "costs almost nothing to generate"—has become a "profitable" business while "the economic model that supported reporters, fact-checking, and editorial oversight" has "deeply erod[ed]."

It's hard not to wonder what these changes mean for the law. In 1964, the Court may have seen the actual malice standard as necessary "to ensure that dissenting or critical voices are not crowded out of public debate. But if that justification had force in a world with comparatively few platforms for speech, it's less obvious what force it has in a world in which everyone carries a soapbox in their hands. Surely, too, the Court in 1964 may have thought the actual malice standard justified in part because other safeguards existed to deter the dissemination of defamatory falsehoods and misinformation. In that era, many major media outlets employed fact-checkers and editors, and one could argue that most strived to report true stories because, as "the public gain[ed] greater confidence that what they read [wa]s true," they would be willing to "pay more for the information so provided." Less clear is what sway these justifications hold in a new era where the old economic

model that supported reporters, fact-checking, and editorial oversight is disappearing.

These questions lead to other even more fundamental ones. When the Court originally adopted the actual malice standard, it took the view that tolerating the publication of *some* false information was a necessary and acceptable cost to pay to ensure truthful statements vital to democratic self-government were not inadvertently suppressed. But over time the actual malice standard has evolved from a high bar to recovery into an effective immunity from liability. . . .

The bottom line? It seems that publishing *without* investigation, fact-checking, or editing has become the optimal legal strategy. Under the actual malice regime as it has evolved, “ignorance is bliss.” Combine this legal incentive with the business incentives fostered by our new media world and the deck seems stacked against those with traditional (and expensive) journalistic standards—and in favor of those who can disseminate the most sensational information as efficiently as possible without any particular concern for truth. What started in 1964 with a decision to tolerate the occasional falsehood to ensure robust reporting by a comparative handful of print and broadcast outlets has evolved into an ironclad subsidy for the publication of falsehoods by means and on a scale previously unimaginable. . . . If ensuring an informed democratic debate is the goal, how well do we serve that interest with rules that no longer merely tolerate but encourage falsehoods in quantities no one could have envisioned almost 60 years ago?

Other developments raise still more questions. In 1964, the Court may have thought the actual malice standard would apply only to a small number of prominent governmental officials whose names were always in the news and whose actions involved the administration of public affairs. Here again, the Court may have thought that allowing some falsehoods about these persons and topics was an acceptable price to pay to ensure truthful statements vital to democratic self-government were not inadvertently suppressed. Perhaps the Court weighed the

costs and benefits similarly when it extended the actual malice standard to the “pervasively famous” and “limited purpose public figures.”

But today’s world casts a new light on these judgments as well. Now, private citizens can become “public figures” on social media overnight. Individuals can be deemed “famous” because of their notoriety in certain channels of our now-highly segmented media even as they remain unknown in most. . . .

Again, it’s unclear how well these modern developments serve *Sullivan*’s original purposes. Not only has the doctrine evolved into a subsidy for published falsehoods on a scale no one could have foreseen, it has come to leave far more people without redress than anyone could have predicted. And the very categories and tests this Court invented and instructed lower courts to use in this area—“pervasively famous,” “limited purpose public figure”—seem increasingly malleable and even archaic when almost anyone can attract some degree of public notoriety in some media segment. Rules intended to ensure a robust debate over actions taken by high public officials carrying out the public’s business increasingly seem to leave even ordinary Americans without recourse for grievous defamation. At least as they are applied today, it’s far from obvious whether *Sullivan*’s rules do more to encourage people of goodwill to engage in democratic self-governance or discourage them from risking even the slightest step toward public life.

. . . [G]iven the momentous changes in the Nation’s media landscape since 1964, I cannot help but think the Court would profit from returning its attention, whether in this case or another, to a field so vital to the “safe deposit” of our liberties. [*Berisha*, 594 US at \_\_\_\_; 141 S Ct at 2426-2430 (Gorsuch, J., dissenting from the denial of certiorari) (most citations omitted; final alteration in original).]

I agree.

## IV. CONCLUSION

For these reasons stated, and for the reasons stated by the majority, I concur in affirming in part and reversing in part the trial court's order granting summary disposition in favor of defendants, and in remanding for further proceedings consistent with this opinion.

## SECURA INSURANCE COMPANY v STAMP

Docket No. 357395. Submitted May 3, 2022, at Detroit. Decided May 19, 2022, at 9:00 a.m.

Secura Insurance Company brought an interpleader action in the Sanilac Circuit Court against Deanna Stamp, who was the personal representative of the estate of Brian Stamp, and Jessica Beatty, who was the personal representative of the estate of Rhonda L. Mahaffy. Brian and Rhonda died as a result of injuries they sustained in a crash; the at-fault driver was uninsured. Brian was a named insured under a commercial motor vehicle policy that his family had obtained through Secura Insurance Company that provided uninsured motorist coverage of \$1 million, subject to setoff for other applicable coverage. Rhonda was also considered an “insured” under the Secura policy. In February 2020, Stamp’s estate filed a complaint against Secura in the Sanilac Circuit Court, alleging that Secura was refusing to pay uninsured motorist coverage as required by the policy and requested that the trial court determine and award damages as well as assess penalty interest under MCL 500.2006(4). Secura moved for summary disposition, arguing that its liability was limited to \$500,000 because it was entitled to offset the \$500,000 in insurance proceeds paid by Progressive Marathon Insurance Company. On December 17, 2020, the trial court, Donald A. Teeple, J., issued an opinion and order agreeing with Secura that proration of the two policies was required. The court also ruled that there was a question of fact as to the amount of damages suffered by Stamp’s estate and, absent settlement, that the question would be determined by a jury because Secura had filed a demand for a jury trial. A few days later, Secura filed the present interpleader action, alleging that there would likely be multiple lawsuits relating to the uninsured motorist coverage with aggregate losses exceeding the now \$500,000 limit on uninsured motorist coverage. Upon a motion by Mahaffy’s estate, the prior action was consolidated with the interpleader action. Mahaffy’s estate then moved the trial court to equally divide the \$500,000 between the estates. Stamp’s estate opposed equal distribution of the funds, essentially arguing that it had suffered more damages because Brian had a 14-year-old dependent son

while Rhonda had no dependents. Stamp's estate also maintained that each estate's damages should be determined by a jury. After hearing oral argument, the trial court agreed with Mahaffy's estate that a jury trial was not appropriate and relied on *Moore v McDowell*, 54 Mich App 657 (1974), to conclude that the insurance proceeds should be distributed equally between the estates. Stamp's estate moved for reconsideration, which the trial court denied. Stamp's estate appealed.

The Court of Appeals held:

1. Interpleader actions are equitable in nature. MCR 3.603(A)(1) provides, in pertinent part, that persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. Secura's interpleader action was appropriate under MCR 3.603 because it was undisputed that the estates' aggregate losses exceeded the \$500,000 limit on uninsured motorist coverage.

2. The trial court misinterpreted *Moore* and the meaning of a pro rata distribution. *Moore* did not hold that each claimant should receive the same share of the limited insurance funds regardless of the extent of their damages; rather, it held that when the claims exceed the funds, equity requires distribution on a pro rata basis. Pro rata is defined as "proportionately; according to an exact rate, measure, or interest." Accordingly, a pro rata distribution when there are limited funds means that the claimants will receive distributions in proportion to their claims. If the underlying claims are equal, then the claimants will receive the same proportional shares. But if the claims are unequal, then the proportional shares will differ. To achieve a pro rata distribution, each estate's share of the limited funds must be equal to the ratio of its damages to the total combined damages suffered by the estates. Merely dividing a limited fund into equal shares when a claimant asserts unequal losses is not an equitable result. In this case, because Stamp's estate maintained that its losses exceeded those of Mahaffy's estate, there was a material question of fact as to each estate's damages.

3. To the extent the trial court had discretion to grant a jury trial, the court abused that discretion by resting its decision on a misinterpretation of *Moore*. Generally, a court should see to it that no just right or privilege of trial is lost to either party as a result of having been compelled by bill of interpleader to litigate in a court of equity. In this case, Stamp's estate had a right to a jury trial in the earlier action, which essentially was a breach-of-contract action to recover under the insurance policy. That Secura

demanded a jury trial on damages in that action only supported the conclusion that a jury trial should be held. The trial court stated that it could not “fathom having a jury trial where we are going to have heirs argue that Mr. Stamp’s life was worth so much more than Ms. Mahaffy’s . . . .” But juries regularly decide damages in wrongful-death cases with multiple plaintiffs. Accordingly, the trial court’s concerns were not a valid reason to deny a jury trial on damages that would have occurred absent Secura’s interpleader action. The trial court needed to hold a jury trial to determine the damages arising from each decedent’s death and order a pro rata distribution of the insurance funds.

Reversed and remanded.

1. INTERPLEADER – INTERPLEADER ACTIONS – RIGHTS AND PRIVILEGES OF TRIAL.

Interpleader actions are equitable in nature; MCR 3.603(A)(1) provides, in pertinent part, that persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability; generally, a court should see to it that no just right or privilege of trial is lost to either party as a result of having been compelled by bill of interpleader to litigate in a court of equity.

2. INTERPLEADER – INTERPLEADER ACTIONS — LIMITED FUNDS – WORDS AND PHRASES – PRO RATA DISTRIBUTION.

A pro rata distribution when there are limited funds means that the claimants will receive distributions in proportion to their claims; if the underlying claims are equal, then the claimants will receive the same proportional shares, but if the claims are unequal, then the proportional shares will differ; to achieve a pro rata distribution, each claimant’s share of the limited funds must be equal to the ratio of its damages to the total combined damages; merely dividing a limited fund into equal shares when a claimant asserts unequal losses is not an equitable result.

*Merry, Farnen & Ryan, PC* (by *John J. Schutza*) for Secura Insurance Company.

*Paterson & Paterson* (by *John S. Paterson*) and *Law Office of Joseph S. Harrison* (by *Joseph S. Harrison*) for Deanna Stamp.



*Miller & Tischler, PC* (by *Wayne J. Miller*) for Jessica Beatty.

Before: BORRELLO, P.J., and SHAPIRO and HOOD, JJ.

SHAPIRO, J. This case concerns the distribution of interpleaded insurance funds when those funds are inadequate to pay each claimant in full. The trial court correctly relied on caselaw holding that a pro rata distribution is required under these circumstances but then proceeded to split the insurance proceeds equally between the two estates—without holding a trial or making any factual findings—despite one of the estates claiming unequal losses. We reverse and remand for the trial court to order a pro rata distribution of the funds after each estate’s losses are determined by a jury.

#### I. BACKGROUND

Brian Stamp and Rhonda Mahaffy died as a result of the injuries they sustained in a motor vehicle–motorcycle crash in August 2019. The at-fault driver of the motor vehicle was uninsured. Stamp was a named insured under a commercial motor vehicle policy that his family had obtained through Secura Insurance Company, which provided uninsured motorist (UM) coverage of \$1 million, subject to setoff for other applicable coverage. Mahaffy is also considered an “insured” under the Secura policy.

In February 2020, Stamp’s estate filed a complaint against Secura in the Sanilac Circuit Court.<sup>1</sup> It alleged that Secura was refusing to pay UM coverage as required by the policy and requested that the trial

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<sup>1</sup> Case No. 20-38499-CK.

court determine and award damages as well as assess penalty interest under MCL 500.2006(4). Secura moved for summary disposition, arguing that its liability was limited to \$500,000 because it was entitled to offset the \$500,000 in insurance proceeds paid by Progressive Marathon Insurance Company.<sup>2</sup> On December 17, 2020, the trial court issued an opinion and order agreeing with Secura that proration of the two policies was required. The court also ruled that there was a question of fact as to the amount of damages suffered by Stamp's estate and, absent settlement, that the question would be determined by a jury because Secura had filed a demand for a jury trial.

A few days later, on December 22, 2020, Secura filed the present interpleader action against Stamp's and Mahaffy's estates. Secura alleged that there would likely be multiple lawsuits relating to the UM coverage with aggregate losses exceeding the now \$500,000 limit on UM coverage. Upon a motion by Mahaffy's estate, the prior action was consolidated with the interpleader action.

Mahaffy's estate then moved the trial court to equally divide the \$500,000 between the estates. Stamp's estate opposed equal distribution of the funds, essentially arguing that it had suffered more damages because decedent Stamp had a 14-year-old dependent son while decedent Mahaffy had no dependents. Stamp's estate also maintained that each estate's damages should be determined by a jury. After hearing

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<sup>2</sup> At the time of the crash, Stamp also had UM coverage with Progressive. Progressive filed an interpleader action in the Lapeer Circuit Court, Case No. 20-53780-CZ, and the trial court in that case ordered Progressive's UM benefits to be distributed equally between the two estates. Mahaffy's estate also received \$100,000 in UM benefits from Rhonda's own no-fault policy.

oral argument, the trial court agreed with Mahaffy's estate that a jury trial was not appropriate and relied on *Moore v McDowell*, 54 Mich App 657; 221 NW2d 446 (1974), to conclude that the insurance proceeds should be distributed equally between the estates.<sup>3</sup> The trial court denied a motion for reconsideration, and this appeal followed.<sup>4</sup>

## II. ANALYSIS

Stamp's estate argues that the trial court erred by dividing the \$500,000 insurance proceeds equally without holding a jury trial or evidentiary hearing to determine each estate's losses. We agree.

Interpleader actions are equitable in nature, see *Krause v Hartford Accident & Indemnity Co*, 331 Mich 19, 22; 49 NW2d 41 (1951), and are governed by MCR 3.603, which provides that "[p]ersons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability," MCR 3.603(A)(1). The purpose of interpleader is to save a party from having to defend multiple suits seeking the same property or limited fund. See *Fidelity & Deposit Co of Maryland v Cody*, 278 Mich 435, 443; 270 NW 739 (1936).

Secura's interpleader action was appropriate under MCR 3.603 because it is undisputed that the estates' aggregate losses exceed the \$500,000 limit on UM coverage. Accordingly, the trial court was authorized

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<sup>3</sup> The trial court allowed the case to move forward regarding whether Secura owed Stamp's estate penalty fees under MCL 500.2006.

<sup>4</sup> "This Court reviews de novo matters of equity." *Rodenhiser v Duenas*, 296 Mich App 268, 271; 818 NW2d 465 (2012). Questions of law are also reviewed de novo. *Thomas v New Baltimore*, 254 Mich App 196, 201; 657 NW2d 530 (2002).

by MCR 3.603 to grant Secura various relief, including ordering Secura “discharged from liability as to property deposited or secured *before determining the rights of the claimants.*” MCR 3.603(B)(3) (emphasis added). This appeal concerns *how* a trial court is to determine the rights of the claimants, a matter on which MCR 3.603 offers no guidance.

Stamp’s estate argued that the trial court should hold a jury trial to determine the damages arising from each decedent’s death and then distribute the \$500,000 so that each estate received a proportionate share of the overall damages. The trial court declined this course of action because it concluded on the basis of *Moore*, 54 Mich App 657, that the \$500,000 should be equally divided between the estates.

The question in *Moore* was whether 23 bus passengers injured in a crash should be paid out of the \$20,000 interpleaded insurance funds on a pro rata basis or whether priority should be given to the claimants who had already obtained judgments against the uninsured motorist. *Id.* at 658-660. This Court held that a pro rata distribution was appropriate when the damages claims exceeded the fund from which the claims were to be paid, relying, in part, on *Century Indemnity Co v Kofsky*, 115 Conn 193, 200; 161 A 101 (1932), for the following proposition:

Whenever several persons are all entitled to participate in a common fund, or are all creditors of a common debtor, equity will award a distribution of the fund, or a satisfaction of the claims, in accordance with the maxim, equality is equity; in other words, if the fund is not sufficient to discharge all claims upon it in full, or if the debtor is insolvent, equity will incline to regard all the demands as standing upon equal footing, and will decree a pro rata distribution or payment. The plaintiff has submitted to the court in a proceeding in equity the question of its

liability to pay to the various defendants the amounts due under the policy; justice requires that they share in equal proportions in the sums due under it on account of the particular kind of injuries suffered; and in the circumstances of this case that result can be accomplished without violating any legal principle. [*Moore*, 54 Mich App at 660-661 (quotation marks and citation omitted).]

On the basis of this and other authority, this Court remanded for the insurance funds to “be distributed pro rata among all claimants.” *Id.* at 663.

Although not binding on us, we find persuasive *Moore*’s holding that inadequate insurance funds should be distributed pro rata to the claimants.<sup>5</sup> Indeed, it is consistent with the Supreme Court’s holding in *Fidelity & Deposit Co of Maryland*, 278 Mich at 444, that “[a] just and equitable payment from the bonds [when the claims on the bonds were in excess of liability] would be a distribution *pro rata* upon the amount of the several claims when properly proven.” However, we conclude that the trial court misinterpreted *Moore* and the meaning of a pro rata distribution.

On the basis of the maxim that “equality is equity,” Mahaffy’s estate successfully argued before the trial court that the \$500,000 funds should be equally divided between the estates. But this maxim must be considered relative to the context in which it was used. *Moore* did not hold that each claimant should receive the same share of the limited insurance funds regardless of the extent of their damages; rather, it held that when the claims exceed the funds, equity requires

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<sup>5</sup> “[P]ublished opinions of this Court decided before November 1, 1990, are not strictly binding, MCR 7.215(J)(1), [but] they are nevertheless precedential, MCR 7.215(C)(2), and they are thus afforded significantly more deference than would be given to unpublished cases.” *People v Spaulding*, 332 Mich App 638, 657 n 5; 957 NW2d 843 (2020).

distribution on a pro rata basis.<sup>6</sup> *Moore*, 54 Mich App at 663. Pro rata means “[p]roportionately; according to an exact rate, measure, or interest.” *Black’s Law Dictionary* (11th ed). This definition of pro rata is consistent with Michigan caselaw. See, e.g., *Sokup v Letellier*, 123 Mich 640, 644; 82 NW 523 (1900) (“From these findings of fact, the court below concluded that all the parties must share in the mortgage *pro rata*,—that is, in proportion to the value of the materials furnished by them, respectively[.]”). Accordingly, a pro rata distribution when there are limited funds means that the claimants will receive distributions in proportion to their claims. See *Ballentine’s Law Dictionary* (3d ed) (defining “prorating claims” as “[a] distribution of assets to creditors in *proportion to the size of their respective claims* where there are insufficient assets for payment of all claims in full”) (emphasis added).<sup>7</sup> If the underlying claims are equal, then the claimants will receive the same proportional shares. But if the claims are unequal—as Stamp’s estate asserts in this case—the proportional shares will differ.

This point was expressly made in *Sheehan v Liberty Mut Fire Ins Co*, 288 Ala 137; 258 So 2d 719 (1972).<sup>8</sup> In

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<sup>6</sup> *Moore* did not discuss how the pro rata distribution was to be made in that case, although the procedural history of that case suggests that an arbitrator appointed by the trial court was to determine the amount of each claim. See *Moore*, 54 Mich App at 659.

<sup>7</sup> In contrast, had *Moore* granted priority to the claimants who had already obtained judgments, those claimants would have received a distribution *greater* than their proportionate share because their claims would have been paid in full.

<sup>8</sup> “Caselaw from sister states and federal courts is not binding precedent but may be relied on for its persuasive value.” *Haydaw v Farm Bureau Ins Co*, 332 Mich App 719, 726 n 5; 957 NW2d 858 (2020). See also 48 CJS, Interpleader, § 45, p 151 n 9 (citing *Sheehan* with approval).

that case, the insurer interpleaded funds for UM coverage when there were three claimants whose total claims exceeded the policy limits. *Id.* at 140. The trial court ordered that the funds be divided equally between the three claimants. The Alabama Supreme Court reversed, stating that it did not understand the basis for that ruling “when each claimant sustained an [u]nequal loss.” *Id.* at 143-144 (emphasis omitted). The court was not aware of authority directly addressing this issue and relied, in part, on the passage from *Kofsky*, 115 Conn 193—quoted with approval in *Moore*—explaining that equity requires a pro rata distribution when a common fund is insufficient to pay all claims. *Sheehan*, 288 Ala at 143-144. From this, the court concluded that an equitable proration in that case would require each claimant receiving a portion of the fund equal to the amount that their individual damages bore to the total damages. *Id.* at 144. See also 70 ALR 2d 416, § 2 (“Where several claims arising from an insured event have been joined in one suit against an insurer whose maximum liability under its policy is inadequate to pay in full the amounts deserved by the claimants, courts have held that the proceeds were to be distributed on a prorata basis *in accordance with the amount of damage suffered by each claimant.*”) (emphasis added).

We find the reasoning of *Sheehan* persuasive and in line with *Moore*. To achieve a pro rata distribution, each estate’s share of the limited funds must be equal to the ratio of its damages to the total combined damages suffered by the estates. Merely dividing a limited fund into equal shares when a claimant asserts unequal losses is not an equitable result. Because Stamp’s estate maintains that its losses exceed those of Mahaffy’s estate, there was a material question of fact as to each estate’s damages.

The question becomes whether a jury or the trial court should decide this matter as the trier of fact. Secura and Mahaffy's estate rely on *Curran v Williams*, 352 Mich 278; 89 NW2d 602 (1958), to argue that a jury trial is not appropriate. In that case, the interpleader action was brought to determine whether the seller or purchaser of real property was entitled to a \$1,000 deposit after the purchaser failed to complete the sale. *Id.* at 280. The sellers then filed a cross-complaint in that action to recover their total damages. *Id.* at 281. The Supreme Court agreed with the sellers "[a]s to the general view of the powers of an equity court to hear and dispose of issues between parties once it has assumed jurisdiction," *id.*, and proceeded to quote 30 Am Jur (Rev), Interpleader, § 27, p 503, for the following:

"After it is determined that the plaintiff in interpleader has the right to bring the action and to compel the defendants or claimants to interplead, and after the plaintiff is discharged from liability, with his costs, upon bringing the money or thing in dispute into court, the litigation proceeds among the claimants or defendants. If the bill of interpleader is ripe for decision at the time of hearing, the court ordinarily will proceed at once to render a final decree settling the rights of all parties at once. On the other hand, if the case is not ripe for decision, the court, upon dismissing the plaintiff, will direct an action or an issue or a reference to a master, as may be best suited to the nature of the case. *As between the defendants compelled to interplead, recovery rests upon the strength of the claim of one, rather than upon the weakness of the other.*

*The court, in determining the rights of the claimants, may do complete equity between them and, generally, see to it that no just right or privilege of trial is lost to either party as a result of having been compelled by bill of interpleader to litigate in a court of equity. However, inasmuch as the*



*basis of an interpleader action is equitable, there is no absolute right to a trial by jury.” [Curran, 352 Mich at 281-282 (emphasis added).]*

But the Supreme Court went on to hold that the liquidated-damages provision of the purchase agreement was enforceable, *id.* at 286-287, and so there was no need to determine if a jury trial on the seller’s total damages claim was appropriate.

Although the Supreme Court’s discussion of this issue is arguably dicta,<sup>9</sup> we will assume for purposes of this appeal that *Curran* held that a claimant has no absolute right to a jury trial in an interpleader action. But the fact that Stamp’s estate lacks an absolute right to a jury trial does not answer whether one should have been permitted in this case. It bears emphasizing that *Curran* did not preclude jury trials between claimants in interpleader actions. To the extent the trial court had discretion to grant a jury trial, the court abused that discretion by resting its decision on a misinterpretation of *Moore*. See *Denton v Dep’t of Treasury*, 317 Mich App 303, 314; 894 NW2d 694 (2016) (“An error of law necessarily constitutes an abuse of discretion.”).

Further, Secura and Mahaffy’s estate overlook *Curran*’s guidance that, generally, a court should “see to it that no just right or privilege of trial is lost to either party as a result of having been compelled by bill of interpleader to litigate in a court of equity.”<sup>10</sup>

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<sup>9</sup> “Obiter dicta are not binding precedent. Instead, they are statements that are unnecessary to determine the case at hand and, thus, lack the force of an adjudication.” See *Auto-Owners Ins Co v All Star Lawn Specialists Plus, Inc*, 497 Mich 13, 21 n 15; 857 NW2d 520 (2014) (quotation marks and citation omitted).

<sup>10</sup> We note that there appears to be a growing consensus that interpleader actions should not deprive parties of a jury trial to which they

*Curran*, 352 Mich at 282 (quotation marks and citation omitted). In this case, Stamp's estate had a right to a jury trial in the earlier action, which essentially was a breach-of-contract action to recover under the insurance policy. That Secura demanded a jury trial on damages in that action only supports the conclusion that one should be held. And significantly, no persuasive argument has been offered for why a jury trial should not be held. The trial court stated that it could not "fathom having a jury trial where we are going to have heirs argue that Mr. Stamp's life was worth so much more than Ms. Mahaffy's . . . ." But juries regularly decide damages in wrongful-death cases with multiple plaintiffs. We therefore do not view the trial

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would have otherwise been entitled. As the United States Supreme Court explained in *Ross v Bernhard*, 396 US 531, 541 n 15; 90 S Ct 733; 24 L Ed 2d 729 (1970):

Before merger interpleader actions lay only in equity, and there was no right to a jury even on issues that might, under other circumstances, have been tried to a jury. This view continued for some time after merger, but numerous courts and commentators have now come to the conclusion that the right to a jury should not turn on how the parties happen to be brought into court. [Citations omitted.]

One respected treatise has specifically concluded that "when the issues would be triable to a jury if they were litigated independently, as is true when an insurance company interpleads tort claimants whose damages exceed the policy limits, they should be triable to a jury as a matter of right . . . ." 7 Wright & Miller, *Federal Practice & Procedure: Civil* (3d ed), § 1718.

court's concerns as a valid reason to deny a jury trial on damages that would have occurred absent Secura's interpleader action.<sup>11</sup>

### III. CONCLUSION

On remand, the trial court shall hold a jury trial to determine the damages arising from each decedent's death. The trial court will then order a pro rata distribution of the insurance funds consistent with this opinion. Stamp's estate may tax appellate costs as the prevailing party. MCR 7.219(A). We do not retain jurisdiction.

BORRELLO, P.J., and HOOD, J., concurred with SHAPIRO, J.

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<sup>11</sup> Even if we were to conclude that Stamp's estate was not entitled to a jury trial, an evidentiary hearing or bench trial would nonetheless be required. We are not convinced by the argument that such a hearing is not necessary because an interpleader action is equitable in nature. "Equity" is not a talisman that obviates the presentation of proofs and factual findings when necessary. Divorce proceedings are equitable in nature, *Draggoo v Draggoo*, 223 Mich App 415, 428; 566 NW2d 642 (1997), but no one would suggest that a trial court could divide a marital estate in a contested case without receiving proofs and making factual findings.

## LOCKHART v ONTONAGON TOWNSHIP

Docket No. 356883. Submitted May 10, 2022, at Lansing. Decided May 19, 2022, at 9:05 a.m.

Sue Lockhart appealed in the Michigan Tax Tribunal the denial by Ontonagon Township of her request for a disabled-veteran exemption under the General Property Tax Act (GPTA), MCL 211.1 *et seq.*, for the 2020 tax year. In March 2010, petitioner was deeded real property on Firesteel Road in Ontonagon Township. Petitioner's husband, a disabled veteran, was not named on the deed. Petitioner claimed that she and her husband moved to the Firesteel property in October or November 2010. In December 2010, petitioner's husband died. In January 2020, petitioner filed an affidavit with respondent, requesting a disabled-veteran exemption as a surviving spouse under MCL 211.7b(2) for the Firesteel property. Respondent denied the request because petitioner's husband had not owned the property. On appeal, an administrative law judge (ALJ) also determined that petitioner's husband had not owned the property and that, therefore, petitioner was not entitled to the disabled-veteran exemption as a surviving spouse. The tribunal adopted the ALJ's findings of fact and conclusions of law and held that petitioner was not entitled to the disabled-veteran exemption for the Firesteel property for the 2020 tax year. Petitioner appealed.

The Court of Appeals *held*:

MCL 211.7b authorizes a property-tax exemption for disabled veterans and, in certain circumstances, for their surviving spouses. MCL 211.7b(1) provides that real property “used and owned” as a homestead by a disabled veteran is exempt from the collection of property tax under the GPTA. Under MCL 211.7b(2), the surviving spouse of a disabled veteran may also claim the exemption if the disabled veteran was “otherwise eligible” for it prior to their death and so long as the spouse does not remarry. The State Tax Commission issued bulletins expressing that the disabled-veteran exemption is a personal exemption that is not tied to any property owned or used as a homestead by the disabled veteran before their death and that a surviving spouse who meets the requirements of MCL 211.7b(2) should not be

denied the exemption on the basis that their spouse never owned or occupied the subject property as a homestead. However, the commission's interpretation was not binding on the tribunal or the courts, and an agency's interpretation cannot conflict with the plain language of the statute. In this case, the commission's interpretation of MCL 211.7b conflicted with the plain language of the statute. Under the statute, the disabled-veteran exemption may be extended to the unmarried surviving spouse of a disabled veteran when the disabled veteran would otherwise have been eligible for the exemption before their death. In order to be "otherwise eligible," the veteran must have met the requirements of MCL 211.7b(1), i.e., the real property at issue must have been "used and owned" as a homestead by the veteran. In this case, petitioner's husband did not own the Firesteel property, so he would not have been eligible for the exemption under MCL 211.7b(1). Therefore, petitioner was not eligible for the exemption as a surviving spouse.

Affirmed.

TAXATION – REAL PROPERTY – DISABLED-VETERAN EXEMPTION – ELIGIBILITY OF A SURVIVING SPOUSE.

Real property used and owned as a homestead by a disabled veteran is exempt from the collection of property taxes under MCL 211.7b(1) of the General Property Tax Act, MCL 211.1 *et seq.*; a disabled veteran's unmarried surviving spouse is also eligible for the exemption under MCL 211.7b(2) if the disabled veteran was "otherwise eligible" for the exemption pursuant to the requirements of MCL 211.7b(1), i.e., if the disabled veteran *used and owned* the property as a homestead; if the disabled veteran did not own the subject property, their surviving spouse is not eligible for the exemption.

*Robert E. Peterson* for petitioner.

Before: MURRAY, P.J., and SAWYER and M. J. KELLY, JJ.

PER CURIAM. Respondent, Ontonagon Township, denied petitioner's request for a property-tax exemption for disabled veterans under MCL 211.7b for the 2020 tax year. Petitioner appealed in the Michigan Tax Tribunal (MTT) Small Claims Division, which deter-

mined that petitioner was not entitled to the exemption. Petitioner now appeals that decision as of right. For the reasons stated in this opinion, we affirm.

#### I. BASIC FACTS

Petitioner married John Lockhart in 2001. After marrying, they purchased and resided at 413 S. Steel Street, Ontonagon Township. On March 18, 2010, petitioner was deeded the property at 19596 Firesteel Road, Ontonagon Township (the Firesteel property); her husband was not named on the deed. Petitioner claimed that she and her husband moved to the Firesteel property in October or November 2010. In December 2010, petitioner's husband passed away. It is undisputed that prior to his death, petitioner's husband was a disabled veteran who was honorably discharged from the military with a service-connected disability.

Relevant to this appeal, on January 2, 2020, petitioner filed an affidavit with the township, requesting the disabled-veteran exemption, MCL 211.7b, for the Firesteel property. Under MCL 211.7b(2), a disabled veteran's surviving spouse may claim the disabled-veteran exemption even after the veteran's death so long as the veteran would have been "otherwise eligible" for the exemption. Respondent determined that petitioner's husband had not owned the Firesteel property prior to his death, so it denied the request for the exemption. Petitioner appealed, and following a hearing, an administrative law judge (ALJ) determined that the Firesteel property was deeded only to petitioner and that, because petitioner's husband had not owned the property, petitioner was not entitled to the exemption. Petitioner filed exceptions to the ALJ's decision. Thereafter, the MTT adopted the ALJ's findings of fact and conclusions of law and entered a final

opinion and judgment holding that petitioner was not entitled to the disabled-veteran exemption for the 2020 tax year. This appeal follows.

## II. DISABLED-VETERAN EXEMPTION

### A. STANDARD OF REVIEW

Petitioner argues she was entitled to receive the disabled-veteran exemption on the Firesteel residence for the 2020 tax year. “The standard of review of Tax Tribunal cases is multifaceted.” *Briggs Tax Serv, LLC v Detroit Pub Sch*, 485 Mich 69, 75; 780 NW2d 753 (2010). In the absence of fraud, we review the MTT’s “decision for misapplication of the law or adoption of a wrong principle.” *Id.* The MTT’s interpretation of statutory provisions is reviewed de novo. *Id.*

### B. ANALYSIS

The General Property Tax Act, MCL 211.1 *et seq.*, provides that all real property within Michigan that is “not expressly exempted” shall be subject to taxation. MCL 211.1. MCL 211.7b authorizes a property-tax exemption for disabled veterans and, under certain circumstances, for the surviving spouses of disabled veterans. It provides:

(1) Real property used and owned as a homestead by a disabled veteran who was discharged from the armed forces of the United States under honorable conditions or by an individual described in subsection (2) is exempt from the collection of taxes under this act. . . .

(2) If a disabled veteran who is otherwise eligible for the exemption under this section dies, either before or after the exemption under this section is granted, the exemption shall remain available to or shall continue for his or her unremarried surviving spouse. The surviving

spouse shall comply with the requirements of subsection (1) and shall indicate on the affidavit that he or she is the surviving spouse of a disabled veteran entitled to the exemption under this section. The exemption shall continue as long as the surviving spouse remains unmarried.

On appeal, petitioner relies on the interpretation of MCL 211.7b stated in State Tax Commission (STC) Bulletin No. 2017-24, issued November 28, 2017, available at <<https://perma.cc/EU3R-Y76V>>, and STC Bulletin No. 2020-19, issued November 17, 2020, available at <<https://perma.cc/Z99J-HXD9>>. In both bulletins, the STC classified the disabled-veteran exemption as a personal exemption that is not tied to any property owned or used as a homestead by the disabled veteran prior to his or her death, and it advised that a surviving spouse who meets the requirements of MCL 211.7b(2) should not be denied the exemption on the basis that his or her spouse never owned or occupied the subject property as a homestead. STC Bulletin No. 2017-24, p 7; STC Bulletin No. 2020-19, pp 5-6; see also STC Bulletin No. 2021-18, issued November 16, 2021, p 5, available at <<https://perma.cc/T9VE-3VM3>> (accord). However, the STC's interpretation of MCL 211.7b is not binding on the tribunal or this Court. See *In re Rovas Complaint*, 482 Mich 90, 117-118; 754 NW2d 259 (2008) (“[A]gency interpretations are entitled to respectful consideration, but they are not binding on courts and cannot conflict with the plain meaning of the statute.”). Consequently, before we may rely on the STC's interpretation, we must first determine whether that interpretation conflicts with the plain meaning of the statute.

The goal of statutory interpretation is to give effect to the Legislature's intent as derived from the language of the statute itself. *Sun Valley Foods Co v Ward*,



460 Mich 230, 236; 596 NW2d 119 (1999). “If the language of the statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written. No further judicial construction is required or permitted.” *Id.* Unless defined in the statute, statutory language will be given its plain and ordinary meaning. *Brackett v Focus Hope, Inc*, 482 Mich 269, 276; 753 NW2d 207 (2008).

The first sentence of MCL 211.7b(1) states that real property is exempt from the collection of taxes if it is “used and owned as a homestead by a disabled veteran . . . or by an individual described in subsection (2) . . . .” Petitioner is not a disabled veteran, so in order for the Firesteel property to be exempt from the collection of taxes, petitioner must meet the requirements of Subsection (2). MCL 211.7b(2) states that if an “otherwise eligible” disabled veteran “dies . . . the exemption shall remain available to or shall continue for his or her unremarried surviving spouse.” Stated differently, Subsection (2) permits the disabled-veteran exemption to be extended to the unmarried surviving spouse of a disabled veteran who would have been eligible for the exemption prior to his or her death. In order to be “otherwise eligible” for the exemption, a disabled veteran must meet the requirements in Subsection (1). Again, under MCL 211.7b(1), a disabled veteran’s real property is not exempt from the collection of taxes unless the veteran “used and *owned* [it] as a homestead . . . .” (Emphasis added.) Therefore, under the plain language of the statute, a veteran who did not own the subject property is not a veteran who is “otherwise eligible” under MCL 211.7b(2). Thus, in cases where a disabled veteran did not own the property, his or her surviving spouse is also not eligible for the exemption. Moreover, because the interpretation in

the STC bulletins is contrary to the plain language of the statute, we discern no error in the MTT's decision to rely on the statute's plain language as opposed to the STC's incorrect interpretation.

Applying the plain language of the statute, it is clear that petitioner is not entitled to the exemption. The MTT found that petitioner's husband never owned the Firesteel property because the property was deeded to petitioner only. That finding is supported by competent, material, and substantial evidence. In particular, the quitclaim deed petitioner received for the Firesteel property included only her name, and she admitted that her husband's name was not on the deed because of issues between him and the prior owner of the property. As a result, the MTT's finding is conclusive. See *Briggs Tax Service, LLC*, 485 Mich at 75 (stating that the MTT's factual findings are "conclusive if they are supported by competent, material, and substantial evidence on the whole record.") (quotation marks and citation omitted). Because petitioner's husband did not own the Firesteel property, he was not eligible for the exemption under MCL 211.7b(1). In turn, because he was not eligible for the exemption, petitioner, as his surviving spouse, is not eligible for the exemption.

Petitioner also raises a constitutional challenge. She contends that some taxing authorities may follow the STC's interpretation of MCL 211.7b while other tax authorities may instead rely on the MTT's interpretation. The natural result of different taxing authorities following contradictory interpretations of the statute is that some people in a similar situation to petitioner will receive the disabled-veteran exemption. Petitioner argues that, because she is being treated differently than other hypothetical individuals, her rights to equal protection and due process have been violated. See US

Const, Ams V and XIV; Const 1963, art 1, § 17. However, she has proffered no proof that any other similarly situated individuals have, in fact, been granted the exemption. See *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 486 Mich 311, 318; 783 NW2d 695 (2010) (holding that a petitioner raising an equal-protection claim must show that she was “treated differently from a similarly situated entity”). In the absence of such evidence, petitioner cannot prevail on her claim.<sup>1</sup>

Affirmed. No taxable costs are awarded. MCR 7.219(A).

MURRAY, P.J., and SAWYER and M. J. KELLY, JJ., concurred.

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<sup>1</sup> In her brief on appeal, petitioner asserts that “all unremarried spouses of disabled veterans should either have the exemption or not” and that the determination should not be dependent upon “the location of their residence within Michigan.” We agree. Rather than the determination being dependent upon where the unremarried surviving spouse is residing, the applicability of the exemption should be dependent upon whether the requirements of the statute—as determined from its plain language and not the STC’s incorrect interpretation—are met. Because the statutory requirements are not met in this case, petitioner is not entitled to the exemption.

*In re BELL*

Docket No. 360191. Submitted May 3, 2022, at Lansing. Decided May 19, 2022, at 9:10 a.m.

Respondent-mother filed an ex parte motion in the Genesee Circuit Court, Family Division, for an independent medical examination (IME) of one of her minor children, AB. The Department of Health and Human Services (DHHS) had petitioned to terminate the parental rights of respondents because AB alleged that respondent-father had beaten and raped her several times and that AB told respondent-mother about the abuse but respondent-mother had failed to protect AB. Respondent-mother then filed the ex parte motion. She denied that AB had ever told her that respondent-father had abused AB and alleged that AB only made the allegations against respondent-father in retaliation after respondent-father had told AB that her phone would not be returned to her because of her behavioral issues while in foster care. The trial court, Duncan M. Beagle, J., granted the ex parte motion. AB's guardian ad litem objected, as did DHHS. Following a hearing on the objections, the trial court set aside the ex parte order on procedural grounds, but after analyzing the matter under a due-process framework, the court granted the motion for an IME again. The Court of Appeals granted AB's application for leave to appeal.

The Court of Appeals *held*:

1. Respondent-mother cited MCR 2.311 in support of her motion but did not provide authority to support the position that when the court rules governing child protective proceedings do not specifically address an issue that arises in such a proceeding, the rules of civil procedure are applicable by default. Regardless, MCR 2.311(A) was not applicable in this case, given that a complainant in a sexual-assault case does not put their physical condition “in controversy” like a plaintiff who alleges physical injury in a tort case. Further, respondent-mother did not show that AB's physical condition was in controversy; rather, the matter in controversy was whether AB had reported the alleged sexual abuse to respondent-mother and whether respondent-mother took any action to protect AB.

2. Although no court rule or statute directly addressed this issue, AB's assertion that MCL 333.21527 supported her position that the trial court order was in error was persuasive. Under MCL 333.21527(1), when an individual alleges to healthcare personnel that, within the preceding 120 hours, they were the victim of criminal sexual conduct (CSC), the healthcare personnel must inform the individual of the availability of a "sexual assault medical forensic examination." If the individual consents, the healthcare personnel shall then perform the examination. Although this statute was not applicable in this case because AB did not allege that she was a victim of CSC to healthcare personnel, the statute's 120-hour time window and the need for the victim's consent to perform the examination were relevant in this case. These statutory requirements highlighted the trial court's lack of authority to order an IME without AB's consent and so long after the last alleged assault. Additionally, in CSC cases, the rape-shield statute, MCL 750.520j, substantially limits a criminal defendant's ability to introduce evidence of a victim's history of sexual conduct, in part to remove an unnecessary deterrent to the reporting and prosecution of crimes. Permitting trial courts to order sexual-assault exams in child protective proceedings over the objection of the child and long after the abuse occurred would create an unnecessary barrier to sexual-assault disclosure.

3. Even if trial courts possessed authority in child protective proceedings to order physical examinations of victims of sexual assault, no examination was warranted in this case. Parents possess a fundamental interest in the companionship, custody, care, and management of their children, an element of liberty protected by the due-process provisions of the federal and state Constitutions. The role of the trial court in child protective proceedings is to balance the interests of parents with the interests of the state, typically following the three-part test set forth by the United States Supreme Court in *Mathews v Eldridge*, 424 US 319 (1976). The first factor, the private interest affected by the official action, weighed against ordering the IME. The decision whether to order an IME of AB would minimally affect the ultimate ruling regarding whether respondent-mother's parental rights would be terminated but would certainly encroach on AB's interests in privacy and bodily autonomy. Additionally, there was evidence that AB's existing mental health issues could be negatively affected by forcing her to undergo an IME. The second *Eldridge* factor, the risk of erroneous deprivation of the interest through the procedure, also weighed against entry of the order. Because several months had passed since AB was removed

from respondents' custody, it was unlikely that any evidentiary value would be derived from an IME, nor would an IME be likely to resolve the question whether AB had disclosed the alleged assaults to respondent-mother. Further, it was highly doubtful that failing to compel AB to undergo an IME would contribute to the erroneous deprivation of respondent-mother's rights, given that respondent-mother was still entitled to a termination trial. Finally, the third factor, the state's interest in the action, also weighed against granting the motion. Although the state has a strong interest in preserving the family unit whenever possible, ordering AB to undergo an IME would do little to further this interest. The government interest that would be most affected by the court-ordered IME was its interest in protecting the physical and mental health and safety of minors. Forcing AB to undergo an IME would undermine this interest because the procedure could be detrimental to her mental health. Additionally, allowing trial courts to force complainants in sexual-assault cases to undergo medical exams could have the unintended effect of deterring the disclosure of these offenses.

Decision reversed and case remanded for further proceedings.

TERMINATION OF PARENTAL RIGHTS PROCEEDINGS — SEXUAL-ASSAULT  
ALLEGATIONS — RESPONDENT'S REQUEST FOR AN INDEPENDENT MEDICAL  
EXAMINATION.

No statute or court rule authorizes a trial court presiding over a termination-of-parental-rights proceeding to order a subject child who has made allegations of sexual assault against a parent to undergo an independent sexual-assault examination against the child's wishes.

*Monica Wilson* for AB.

*David S. Leyton*, Prosecuting Attorney, and *Rachel L. Smith*, Assistant Prosecuting Attorney, for the Department of Health and Human Services.

*Ally Legal Services, PLLC* (by *Nichole Poore-Sanchez*) for respondent-mother.

Before: GADOLA, P.J., and SERVITTO and REDFORD, JJ.

SERVITTO, J. In this termination of parental rights matter, the minor child, through her guardian ad litem (GAL), appeals by leave granted<sup>1</sup> the trial court order granting respondent-mother's motion to compel 12-year-old AB to undergo an independent medical examination (IME) to determine whether she has any physical signs of sexual abuse. We reverse and remand.

Respondents have seven minor children ranging in age from 14 to 4.<sup>2</sup> On June 5, 2021, Child Protective Services received a referral that respondents had physically abused their eldest child.<sup>3</sup> The children were removed from the home and placed in foster care, and respondents were granted parenting time.

Five weeks after the children's removal, the court approved a petition from the Department of Health and Human Services (DHHS) for emergency psychiatric treatment for AB. Due to AB's continued behavioral concerns, DHHS requested to place her in a residential treatment facility for therapy and an assessment of the severity of her mental health issues. The court also granted that request.

Thereafter, respondent-mother entered a plea by admission and respondent-father entered a no-contest plea to the order of adjudication. The court entered an order of disposition, directing anger management, substance-abuse treatment for respondent-father, and mental health treatment for respondent-father and the minor children. DHHS then sought termination because AB alleged that respondent-father had beaten

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<sup>1</sup> *In re Bell*, unpublished order of the Court of Appeals, entered February 15, 2022 (Docket No. 360191).

<sup>2</sup> The issue on appeal pertains to only one of the minor children, AB.

<sup>3</sup> Respondents have four prior substantiated petitions for child abuse and neglect.

and raped her several times. The petition also alleged that respondent-mother had failed to protect AB after AB told her of the abuse.

On January 12, 2022, respondent-mother's counsel e-mailed opposing counsel to request that they stipulate to AB undergoing an IME to reveal any medical evidence of sexual abuse. Opposing counsel declined to stipulate to an IME. On January 17, 2022, respondent-mother filed an ex parte motion for an IME. She acknowledged that AB had alleged that respondent-father had raped her repeatedly since she was six years old and that the abuse included vaginal penetration, but respondent-mother denied that AB had ever told her about the abuse. Respondent-mother stated that the allegation arose only after father told AB that her phone would not be returned given her behavioral issues while in foster care, and mother believed that AB made the allegation in retaliation.

On January 21, 2022, the trial court granted the ex parte motion. It directed that AB undergo an IME to determine if there was any physical evidence of sexual assault. The GAL immediately objected to the order, noting that respondent-mother did not comply with MCR 3.207. Further, the GAL argued that the order to undergo an IME was not in AB's best interests, particularly given that the invasive IME would not be determinative of whether AB was assaulted before she was removed from respondents' care in June 2021.

DHHS also objected to the ex parte order, reiterating that respondent-mother had not followed the requirements in MCR 3.207 and that she had failed to inform the court that she previously had sought concurrence from opposing counsel but was denied. DHHS also contended that respondent-mother had failed to show a legal basis to force a 12-year-old child to undergo an



internal sexual assault IME and pointed to the policies relating to the rape-shield laws to argue that an IME should not be performed absent consent. DHHS also provided an affidavit from therapist Paula Archambault, who has been qualified as an expert in child sexual-abuse cases. Archambault stated that sexual abuse is rarely proven through medical examination of the genitalia, particularly after much time has passed. It was Archambault's understanding that AB did not wish to be subjected to an IME, and Archambault opined that a forced IME could be very detrimental to AB's mental health.

A hearing to address the objections to the ex parte order was held on January 25, 2022, and the trial court issued a written opinion and order on the matter on February 3, 2022. In its opinion and order, the court conceded that it should not have entered the order ex parte and instead should have set the matter for oral argument. It thus set aside its earlier ex parte order. However, analyzing the matter under a due-process framework, the court again granted the motion for an IME to determine whether there was physical evidence that AB had been sexually assaulted. AB, through her GAL, applied for leave to appeal that ruling, and this Court granted the application.<sup>4</sup>

Whether a respondent in a termination case was afforded due process is a question of law subject to a de novo standard of review. *In re Williams*, 333 Mich App 172, 178; 958 NW2d 629 (2020). This Court also reviews de novo the interpretation and application of statutes and court rules. *In re Sanders*, 495 Mich 394, 404; 852 NW2d 524 (2014). If the trial court had discretionary authority to order a physical examina-

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<sup>4</sup> DHHS concurs with the GAL's position and has filed a brief in support.

tion, this Court reviews the trial court's exercise of that discretion for an abuse of discretion. See *Burris v KAM Transp, Inc*, 301 Mich App 482, 487; 836 NW2d 727 (2013). An error of law by the trial court necessarily constitutes an abuse of discretion. *Pirgu v United Servs Auto Ass'n*, 499 Mich 269, 274; 884 NW2d 257 (2016).

This case presents a question that this Court has never had to address: does a trial court in a child-protection proceeding have the authority to order a minor child alleging sexual assault to submit to a forensic sexual-assault examination? We conclude that it does not.

First and foremost, respondent-mother did not direct the trial court, nor does she direct this Court, to any viable legal basis for entry of the trial court's order. Respondent-mother has not provided authority to show that she has a right to request an IME, nor has she provided legal precedent for the trial court to order an IME in the context of a termination proceeding. In the absence of authority cited by respondent, she has not shown that she is entitled to a court-ordered IME of AB.

While respondent-mother cites MCR 2.311 in support of her request for an order for examination, respondent-mother likewise acknowledges that MCR 2.311 is a rule of civil procedure—not a rule that is applicable to child protective proceedings.<sup>5</sup> Respondent-mother appears to assert, without authority, that when an issue arises in a child protective proceeding that is not specifically addressed in the rules governing such proceedings, by default, the rules of civil procedure apply. “A party may not merely announce a position and leave it to this Court to

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<sup>5</sup> Child protective proceedings are governed by MCR 3.900 *et seq.*

discover and rationalize the basis for the claim.” *Nat’l Waterworks, Inc v Int’l Fidelity & Surety, Ltd*, 275 Mich App 256, 265; 739 NW2d 121 (2007).

In addition, MCR 2.311(A) permits a trial court to order a party to undergo a physical examination, with good cause shown, when a party puts his or her physical condition “in controversy.” This court rule typically applies to insurance claims, medical-malpractice cases, and tort actions in which the plaintiff seeks damages for a claimed injury. See, e.g., *Schaumann-Beltran v Gemmete*, 335 Mich App 41, 44, 47-48; 966 NW2d 172 (2020) (applying MCR 2.311(A) in medical-malpractice suit), rev’d on other grounds 509 Mich 979 (2022); *Burris*, 301 Mich App at 487-488 (applying MCR 2.311(A) in personal-injury suit). By alleging sexual assault, however, a complainant does not put his or her physical condition at issue like a plaintiff alleging physical injury in a tort suit. This is particularly true in the context of a child protective proceeding, where the minor child has no choice regarding whether DHHS initiates proceedings against the child’s parent. Respondent-mother has not shown that AB’s physical condition is in controversy.<sup>6</sup> What *is* in controversy with respect to AB and respondent-mother is whether AB told respondent-mother that respondent-father had sexually abused AB and whether respondent-mother took any action to protect AB. Any purported injury that would be discoverable through a forensic sexual-assault examination is not in controversy, and a complainant’s disclosure of sexual assault does not make it so. Reading MCR 2.311(A) to

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<sup>6</sup> This is assuming, without deciding, that AB is arguably even a “party” to whom MCR 2.311(A) would apply; AB is listed as an appellant before this Court but is not a “party” in the lower court termination proceeding.

authorize the trial court's unprecedented order would expand the court rule well beyond its bounds.

Given that no court rule or statutory authority directly provides for the order entered by the trial court, AB argues that statutory provisions in criminal cases provide support for her position that the trial court erred by ordering AB to undergo an IME. Although this case involves child protective proceedings, and termination proceedings are not criminal in nature, *In re Richardson*, 329 Mich App 232, 254; 961 NW2d 499 (2019), we find provisions in the criminal code persuasive to the question at issue in this case.

AB focuses heavily on MCL 333.21527(1), which prescribes the following procedures for healthcare professionals to administer sexual-assault examinations:

If an individual alleges to a physician or other member of the attending or admitting staff of a hospital that *within the preceding 120 hours* the individual has been the victim of criminal sexual conduct . . . , the attending health care personnel responsible for examining or treating the individual immediately shall inform the individual of the availability of a sexual assault medical forensic examination, including the administration of a sexual assault evidence kit. *If consented to by the individual*, the attending health care personnel shall perform or have performed on the individual the sexual assault medical forensic examination, including the procedures required by the sexual assault evidence kit. [Emphasis added.]

Importantly, MCL 333.21527(1) applies only to allegations of criminal sexual conduct (CSC) occurring within the preceding 120 hours and provides for a sexual-assault examination to be performed only with the consent of the complainant. Of course, the statute plainly does not apply here as AB did not allege to a physician that she was the victim of CSC. However, the

statute's 120-hour requirement and the need for consent are of particular relevance in this case. AB and the rest of the Bell children were removed from their parents' custody on June 6, 2021, so the last possible act of sexual abuse alleged by AB would have occurred at least 10 months ago. And, as is clear from the fact of this appeal, AB does not consent to the requested IME. The fact that MCL 333.21527(1) requires healthcare professionals to inform a patient who has alleged sexual assault within the preceding 120 hours of the availability of a forensic examination and allows the examination only with consent of the individual further highlights the trial court's lack of authority to order an IME of AB without her consent and so far removed from the time of the alleged assault.

Additionally, in CSC cases, statutory law substantially limits a criminal defendant's ability to introduce evidence of the victim's history of sexual conduct. Known as the rape-shield statute, MCL 750.520j reflects a legislative conclusion that evidence of a complainant's sexual history with individuals other than the defendant is generally "legally irrelevant and inadmissible as a matter of law." *People v Adair*, 452 Mich 473, 480-481; 550 NW2d 505 (1996). More importantly, it removes unnecessary deterrents to the reporting and prosecution of crimes. *People v Arenda*, 416 Mich 1, 10; 330 NW2d 814 (1982). Given the extra vulnerabilities of minors in child protective proceedings, this Court will not create any additional barriers to the disclosure by children of sexual abuse by allowing court-ordered sexual-assault examinations, particularly when the Legislature has given no indication that trial courts possess such authority and, as will be later discussed, due process does not require it.

MCL 776.21 is another persuasive indicator that the trial court lacked authority to order AB to undergo an IME. MCL 776.21(2) prohibits a police officer from requesting or ordering a victim of CSC to submit to a polygraph examination, except when the victim inquires about taking such a test. Therefore, Michigan law already protects complainants of sexual assault from police officers forcing them to submit to a polygraph examination. Given that a polygraph examination is a much less invasive procedure than an IME, it is unlikely that, without explicit statutory authority, the trial court possessed the authority to compel a sexual-abuse complainant to undergo an IME.<sup>7</sup>

Even if this Court concluded that trial courts in child protective proceedings possess some authority to order physical examinations of sexual-abuse victims, an examination in this case is not warranted. A court is limited in child protection proceedings “in that it can only act after it has jurisdiction over a child, and it may only act to ensure a child’s well-being.” *In re Macomber*, 436 Mich 386, 398-399; 461 NW2d 671 (1990). The trial court’s analysis of the issue under due process was incomplete, erroneously determined that the factors set forth in *Mathews v Eldridge*, 424 US 319, 335; 96 S Ct 893; 47 L Ed 2d 18 (1976), favored ordering the IME, and failed to ensure AB’s well-being.

“Parents possess a fundamental interest in the companionship, custody, care, and management of their children, an element of liberty protected by the due

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<sup>7</sup> Also, given that criminal defendants generally receive greater constitutional protections than respondents in child protective proceedings—proof beyond a reasonable doubt versus clear and convincing evidence, as one example—it would be inconsistent to allow the court to compel an IME of a sexual-assault complainant in a parental-rights case but not in a criminal case.

process provisions in the federal and state Constitutions.” *In re Yarbrough Minors*, 314 Mich App 111, 122; 885 NW2d 878 (2016), citing US Const, Am XIV; Const 1963, art 1, § 17. However, this fundamental right is not absolute, as the state has a legitimate interest in safeguarding the health and welfare of children. *Sanders*, 495 Mich at 409-410. In balancing these interests, and in determining what process the state owes parents in a child protective proceeding, Michigan courts have followed the United States Supreme Court’s test set forth in *Eldridge*, 424 US at 335. See *Sanders*, 495 Mich at 410-411. The *Eldridge* Court outlined three factors that must be balanced against one another to decide whether an individual was afforded due process:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. [*Eldridge*, 424 US at 335.]

“In essence, the *Eldridge* test balances the costs of certain procedural safeguards . . . against the risks of not adopting such procedures.” *Sanders*, 495 Mich at 411.

Beginning with the first factor, the private interest affected by the official action, the trial court stated that it had to balance respondent-mother’s request for the IME against the effect of the IME on AB. The trial court subsequently stated, without explanation, that this factor weighed in favor of granting respondent-mother’s motion. While respondent-mother’s fundamental right to the care, custody, and control of her children is undoubtedly strong, AB’s interest in her

own general welfare, which includes her interests in privacy and bodily autonomy, are *at least* as strong. After all, “[t]he substantive component of due process encompasses, among other things, an individual’s right to bodily integrity free from unjustifiable governmental interference.” *Mays v Governor*, 323 Mich App 1, 58-59; 916 NW2d 227 (2018). Moreover, the decision regarding whether to order an IME of AB will have minimal impact on the ultimate ruling as to whether respondent-mother’s rights will be terminated; the issues leading to the trial court taking jurisdiction over the minor children involved far more than the asserted sexual assaults. In other words, whether or not AB is forced to undergo an IME will have little to no effect on respondent-mother’s interest in the care and custody of her children.

On the other hand, ordering AB to undergo an IME is *guaranteed* to encroach upon AB’s interests in privacy and bodily autonomy.<sup>8</sup> The trial court failed to explicitly address these considerations. The trial court also appeared to give minimal weight or consideration to AB’s welfare and the psychological effect that a forced forensic sexual-assault examination could have on her.<sup>9</sup> The importance of considering the mental

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<sup>8</sup> Throughout the briefing, the parties engage in a rhetorical back-and-forth regarding how to characterize the invasiveness of the requested IME. We take no position on the comparisons that the parties use, other than to point out that medical examinations or procedures traditionally require the consent of the patient. See *Werth v Taylor*, 190 Mich App 141, 145-146; 475 NW2d 426 (1991).

<sup>9</sup> The tone of respondent-mother’s responsive brief on appeal is notable. Respondent-mother accuses the GAL and DHHS of “sexualiz[ing]” the IME. Considering that the sole reason for the IME is to determine whether AB’s genitals reflect evidence of sexual abuse, it is disingenuous to characterize those opposing the IME as sexualizing it. Unfortunately, respondent-mother’s pleadings also reflect her attempt to minimize the effect of the IME on her minor daughter.



health effect of a forced sexual-assault examination is particularly salient in AB's circumstances, given that the record clearly indicates that she is a child struggling with numerous mental health and psychological challenges.<sup>10</sup> Therapist Paula Archambault also opined that an unwanted medical examination of the type ordered by the court could have detrimental effects on a child's mental health and could lead to long-lasting psychological trauma for AB. Given the above, this Court finds that the requested IME impacts the private interests of AB significantly more than those of respondent-mother, and, consequently, the first *Eldridge* factor weighs against ordering the examination.

We next find that the second *Eldridge* factor—the risk of erroneous deprivation of the interest through the procedure—is very minimal. Any evidentiary value is unlikely to be derived from the IME because so much time has passed since AB was removed from respondent-father's custody. And regardless of the examining physician's findings, they will not be determinative as to whether AB was actually sexually assaulted.<sup>11</sup> Moreover, the specific allegation against respondent-mother by AB is that she did nothing to protect AB after AB disclosed that respondent-father had been sexually assaulting her. It is highly unlikely that an IME of AB will definitively resolve the question of whether AB was sexually assaulted and even less

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<sup>10</sup> As recently as February 14, 2022, the trial court granted a request from DHHS to place AB in a qualified residential treatment facility, and the court was well aware of AB's mental health difficulties at the time it ordered the IME.

<sup>11</sup> Not only would any potential findings not be dispositive, but there is a reasonable argument that any such information would be minimally relevant. The lack of physical evidence of sexual assault—particularly when the last possible assault occurred 10 months ago—does not necessarily indicate that AB was not sexually assaulted.

likely that the results of an IME would resolve whether AB in fact told respondent-mother about any assault.

Additionally, respondent-mother remains entitled to a termination trial at which the court must find clear and convincing legally admissible evidence of statutory grounds that justify the termination of respondent-mother's parental rights. See MCL 712A.19b(3). At her termination trial, respondent-mother will have an opportunity to challenge the evidence presented by DHHS, including cross-examining AB if she testifies. Respondent-mother will also be able to introduce evidence to rebut the allegations against her. It is thus highly doubtful that the failure to compel AB to undergo an IME will contribute to the erroneous deprivation of respondent-mother's parental rights. The second *Eldridge* factor therefore weighs against the order.

Finally, the third factor—the state's interest—also weighs against ordering respondent-mother's request for an IME. The trial court erroneously concluded that the governmental interest weighed in favor of examination. The trial court stated that its ruling on termination would affect all seven Bell children, acknowledged the state's interest in the welfare of AB, and conceded that the delay between the most recent alleged assault and the IME meant that the exam might show “minimal to no evidence of any sexual assault.” The court nevertheless found that the public interest weighed in favor of ordering the IME.

The government has a range of interests in this case. With respect to fiscal and administrative costs alone, the requested IME places a minimal burden on the state. The government also undeniably has a strong interest in preserving the family unit whenever possible. *Sanders*, 495 Mich at 416. But ordering AB to

submit to an IME would do little to further this interest. The IME is unlikely to provide useful findings in favor of the parents and certainly will not provide a conclusive answer to whether respondent-father sexually assaulted AB and whether respondent-mother was told about this abuse. Therefore, the IME will, at most, marginally impact the government's interest in maintaining family units. The government interest most affected by the court-ordered IME is the interest in protecting the physical and mental health and safety of minors like AB. See *id.* at 409-410. Forcing AB to undergo an IME undermines this interest because it may be detrimental to AB's health. And more broadly, allowing trial courts to force complainants in sexual-assault cases to undergo medical examinations—particularly when the examination will have minimal probative value—could have the unintended effect of deterring disclosure of sexual assault. See *Arenda*, 416 Mich at 10 (discussing how limiting the introduction of evidence of a complainant's sexual history in CSC cases removes an unnecessary deterrent to the reporting of crime). Accordingly, the final *Eldridge* factor weighs in favor of denying the request for a court-ordered IME.

This Court's duty to balance the state's interest in protecting the health and safety of minor children against the fundamental rights of parents to care for their children can be a difficult task. In this case, however, the trial court's due-process analysis was severely lacking in its explanation. Under the circumstances presented here, the *Eldridge* factors all weigh in favor of AB—and in favor of denying an unwanted IME. Balancing the highly invasive nature of an IME and its potentially harmful effect on an unconsenting minor against the limited evidentiary value that an IME may provide in this case, the trial court erred by

concluding that a court-ordered IME to look for evidence of sexual assault was necessary to afford respondent-mother the due process to which she was entitled.

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

GADOLA, P.J., and REDFORD, J., concurred with SERVITTO, J.

*In re* BURNETT ESTATE

Docket No. 357500. Submitted May 11, 2022, at Lansing. Decided May 26, 2022, at 9:00 a.m. Leave to appeal denied 510 Mich 1065 (2022).

Katie Jo Weigandt, as personal representative of the estate of Gregory P. Burnett (the decedent), filed a complaint to quiet title in the Saginaw Probate Court against Lori Jane Burnett and Matthew Rodriguez concerning real property received by the decedent in 2003. The decedent was married to Constance M. Burnett when he received the real property at issue, but her name was not on the deed. In 2006, the decedent transferred the property via quitclaim deed to himself and to appellants. Constance's name and signature were not on the quitclaim deed. Constance died in 2018, and the decedent died in 2020. In her complaint, appellee asked the court to determine that the estate was the sole owner of the property in fee simple absolute and that appellants had no claims to the property. According to appellee, the decedent's transfer via quitclaim deed was void under the statute of frauds because Constance had not signed the deed or waived her dower rights regarding the property. Appellants moved for summary disposition under MCR 2.116(C)(8) and argued that Constance had a mere dower interest in the property, not an ownership interest; therefore, the absence of Constance's signature on the quitclaim deed did not render the transfer void, but rather clouded the title. The probate court, Patrick J. McGraw, J., denied appellants' motion for summary disposition, sua sponte granted summary disposition to appellee under MCR 2.116(I)(2), and ruled that the transfer was void under the statute of frauds. Appellants appealed.

The Court of Appeals *held*:

The Michigan statute of frauds prohibits an interest in land from being granted or assigned unless by act or operation of law, or by a deed or conveyance in writing signed by the party granting or assigning the interest, or by a person who has been authorized by the grantor or assignor to do so. Under MCL 566.108, any conveyance that violates the statute of frauds is void. Appellee argued that the transfer at issue was void because Constance

held a dower interest in the property but did not sign the quitclaim deed. Under MCL 558.1, a widow is entitled to dower, or the use during her natural life of  $\frac{1}{3}$  of all land held by her husband during the marriage, unless she is lawfully barred from it. Although dower rights were abolished by MCL 558.30(1), this subsection does not apply to a widow's dower elected by a widow whose husband died before April 6, 2017, the effective date of MCL 558.30. In *Zaher v Miotke*, 300 Mich App 132 (2013), the Court of Appeals held that a husband's transfer of an easement on a portion of a parcel of real property, held in the husband's name alone but purchased during the marriage, without the signature of the transferor's wife was not void under the statute of frauds; rather, the wife's dower rights were an encumbrance on the property separate from the encumbrance of the easement, and the two encumbrances were not directly contrary and could coexist. Moreover, the *Zaher* Court held that because the wife had later approved a subsequent transfer of the parcel, her dower rights were extinguished and no longer impaired the easement. Similarly, in this case, Constance received a mere dower interest in the property, not a co-ownership interest. Therefore, the absence of her signature on the transfer document merely clouded the property's title and did not void the entire transfer. Appellants wished to proceed with the transfer and were free to do so and take the property with the encumbrance of Constance's dower rights. Further, because the decedent died in 2020, Constance's dower rights were extinguished after April 6, 2017, under MCL 558.30. Additionally, because Constance predeceased the decedent, her rights were extinguished before they could vest. Therefore, any defect in the property was subsequently cured by the extinguishment of Constance's dower interest. Thus, the 2006 quitclaim deed validly transferred the property to the grantees, subject to Constance's dower interest. Accordingly, the probate court should have granted summary disposition in favor of appellants.

Decision reversed and case remanded.

REAL PROPERTY – STATUTE OF FRAUDS – TRANSFERS OF INTEREST – DOWER RIGHTS.

Previously, when a husband acquired real property in his name alone during the marriage, his wife obtained dower rights to the property; dower rights are not equal to a co-ownership interest but are merely an encumbrance on the property; therefore, the husband's transfer of his interest in the property without his wife's signature appearing on the transfer document does not void

the transaction under the statute of frauds; the buyer may take the property subject to the encumbrance if the buyer agrees to do so.

*Matthew E. Gronda* for appellee.

*Brown Law PLC* (by *W. Jay Brown*) for appellants.

Before: MURRAY, P.J., and SAWYER and M. J. KELLY, JJ.

PER CURIAM. In this land dispute, appellants appeal by right the probate court's order denying their motion for summary disposition under MCR 2.116(C)(8) and sua sponte granting summary disposition to appellee under MCR 2.116(I)(2). We reverse and remand.

#### I. BACKGROUND

The material facts are not in dispute. Gregory Price Burnett (the decedent) was married to Constance M. Burnett. In 2003, the decedent received certain real property, but Constance's name was not listed on the deed. In 2006, the decedent transferred the property via quitclaim deed to himself and to appellants. Constance's name and signature were not listed on the deed. Constance died in 2018, and the decedent died in 2020.

Appellee filed a complaint to quiet title to the property and determine that plaintiff was the sole owner in fee simple absolute of the property, free from any claims by defendants. The parties do not dispute that Constance acquired a dower interest in the property under MCL 558.1. Appellee claimed that, because Constance had not signed the 2006 deed or waived her dower rights in the property, the transfer was void under the Michigan statute of frauds, which requires

that real property transfers be in writing and contain the signatures of all interested parties. Appellee asked the probate court to rule that it owns the property in fee simple.

Appellants, in lieu of filing an answer, moved for summary disposition under MCR 2.116(C)(8). They argued that the lack of Constance's signature did not void the transfer completely but merely clouded title on the property because Constance had a mere dower interest, which was different from a regular ownership interest. Appellants cited *Zaher v Miotke*, 300 Mich App 132, 151; 832 NW2d 266 (2013), in which this Court held that the transfer of an easement without the transferor's wife's signature was not void under the statute of frauds. Appellee distinguished *Zaher* and pointed to other caselaw that, appellee contended, was more on point and dispositive. The probate court ultimately agreed with appellee and denied appellants' motion for summary disposition. Moreover, it sua sponte granted summary disposition to appellee under MCR 2.116(I)(2), ruling that the transfer was void under the statute of frauds.

## II. ANALYSIS

### A. STANDARD OF REVIEW

"This Court reviews de novo a trial court's decision on a motion for summary disposition, as well as questions of statutory interpretation and the construction and application of court rules." *Dextrom v Wexford Co*, 287 Mich App 406, 416; 789 NW2d 211 (2010). A motion is properly granted pursuant to MCR 2.116(C)(8) when the opposing party fails to state a claim upon which relief can be granted. Such a motion "tests the legal sufficiency of the claim on the basis of the pleadings



alone . . . .” *Bailey v Schaaf*, 494 Mich 595, 603; 835 NW2d 413 (2013). When reviewing the motion, the trial “court must accept as true all factual allegations contained in the complaint.” *Id.* The trial court must grant the motion “if no factual development could justify the plaintiff’s claim for relief.” *Id.* (quotation marks and citation omitted). In an action based on contract, “the contract attached to the pleading is considered part of the pleading,” even for purposes of MCR 2.116(C)(8). *Liggett Restaurant Group, Inc v Pontiac*, 260 Mich App 127, 133; 676 NW2d 633 (2003). MCR 2.116(I)(2) provides that “[i]f it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party.”

#### B. STATUTE OF FRAUDS

Appellants argue that the probate court erred by ruling that the transfer was void under the statute of frauds. Appellants contend that because dower rights were involved, the absence of Constance’s signature merely clouded the property’s title. We agree.

Under Michigan’s statute of frauds, MCL 566.106:

No estate or interest in lands . . . nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by some person thereunto by him lawfully authorized by writing.

MCL 566.108 provides that, if the statute of frauds is violated, the conveyance “shall be void.” Under MCL 558.1, “[t]he widow of every deceased person, shall be entitled to dower, or the use during her natural life, of

$\frac{1}{3}$  part of all the lands whereof her husband was seized of an estate of inheritance, at any time during the marriage, unless she is lawfully barred thereof.” MCL 558.30(1) abolished all dower rights. However, under MCL 558.30(2)(a), Subsection (1) does not apply to “[a] widow’s dower elected by a woman whose husband died before the effective date of the amendatory act that added this section.” The effective date of MCL 558.30 is April 6, 2017. See 2016 PA 489. Therefore, if a husband died before April 6, 2017, a widow may exercise her dower rights. Otherwise, they are abolished and can no longer be exercised.

“When interpreting a statute, [this Court] must ascertain the Legislature’s intent,” which is accomplished “by giving the words selected by the Legislature their plain and ordinary meanings, and by enforcing the statute as written.” *Griffin v Griffin*, 323 Mich App 110, 120; 916 NW2d 292 (2018) (quotation marks and citation omitted). If a statute is unambiguous, it must be applied as plainly written. *McQueer v Perfect Fence Co*, 502 Mich 276, 286; 971 NW2d 584 (2018). This Court may not read something into the statute “that is not within the manifest intent of the Legislature as derived from the words of the statute itself.” *Id.* (quotation marks and citation omitted).

Appellee principally relies on two opinions from this Court, *Slater Mgt Corp v Nash*, 212 Mich App 30; 536 NW2d 843 (1995), and *Berg-Powell Steel Co v Hartman Group*, 89 Mich App 423; 280 NW2d 557 (1979). In *Slater*, this Court held that a husband’s entry into a purchase agreement to transfer real property without his wife’s signature made the title unmarketable under the statute of frauds and permitted the buyer to forego the sale. *Slater*, 212 Mich App at 31-33. “The agreement contemplated the conveyance of marketable

title.” *Id.* at 31. The transferee later decided not to proceed with the transfer, and the husband, through his corporation, brought suit to enforce specific performance of the agreement. *Id.* The transferee sought summary disposition under the statute of frauds, which the trial court granted. *Id.*

This Court began by stating that “[a] husband may not bargain away his wife’s dower interest.” *Id.* at 32. The panel discussed *Berg-Powell*, which “held that the statute of frauds requires both the seller and his wife with a dower interest to sign a purchase agreement in order to create a valid contract for the sale of land.” *Id.* The Court then held that *Berg-Powell* was dispositive:

*Berg-Powell* is controlling here. Even assuming, but not deciding, that [the husband]’s signature in his corporate capacity was adequate to create a valid contract for the sale of property he held personally, his wife’s signature was also required under the statute of frauds because she has a dower interest in the real estate. The absence of her signature made the purchase agreement plaintiff sought to enforce *ineffective to convey marketable title*. [*Slater Mgt Corp*, 212 Mich App at 32-33 (emphasis added).]

In *Zaher*, 300 Mich App at 151, the case that appellants primarily rely upon, this Court held that the transfer of an easement without the signature of the transferor’s wife was not void under the statute of frauds. In doing so, this Court interpreted *Slater* to mean that transferring property without the transferor’s wife’s signature did not void the transaction but merely “clouded” the title; further, *Berg-Powell* relied on distinguishable Michigan Supreme Court precedent and was “inconsistent” with *Slater*. *Zaher*, 300 Mich App at 144-145. In *Zaher*, Gregory Hoover purchased two lots, Lot 2 and Lot 3, in his own name while married to Linda Hoover. *Id.* at 136. When Gregory bought the lots, Linda acquired a dower interest in

them. *Id.* Gregory later sold Lot 3 to the plaintiff, Zaher, but retained Lot 2 for himself and Linda. *Id.* Gregory later conveyed a written easement to Zaher, but Linda's signature and name were not in the writing. *Id.* Gregory and Linda eventually sold Lot 2 to the defendant, Miotke, and, this time, both Gregory and Linda signed the warranty deed; moreover, Gregory and Linda later both signed another warranty deed for Lot 3, transferring it to Zaher. *Id.* A dispute arose when Miotke took action that encroached on the area of Zaher's purported easement. *Id.* at 137.

Miotke contended that the easement was void under the statute of frauds because Linda had not signed it or waived her dower interest. *Id.* at 138. On the other hand, Zaher argued that the easement was not invalid but that this deficiency "merely cloud[ed] the title to that grant." *Id.* (quotation marks omitted; alteration in original). On appeal, this Court first held that, without Linda's signature, "the granted easement clearly violated the statute of frauds." *Id.* at 141. However, this did not end the analysis: "The question then becomes one of remedy: should the easement be nullified as void from its creation, or is Linda's inchoate dower interest a cloud on the property's title that evaporated when Linda joined the warranty deed transferring the property and waived her dower rights?" *Id.*

The Court then discussed *Slater* and quoted its "ineffective to convey marketable title" language, reasoning that

the purchaser could take title to the property, *but that interest would be subject to the seller's wife's inchoate dower interest* and, upon the seller's death, his wife would become entitled to a one-third interest in the property. Thus, the purchase agreement was not void, *but could transfer only a clouded title.* [*Id.* at 145 (quotation marks and citation omitted; emphasis added).]

The Court next discussed *Berg-Powell* and concluded that it did not comport with *Slater*: “In a manner inconsistent with its later decision in *Slater*, the *Berg* Court held that the contract was nullified, not that the purchaser took the title clouded by the seller’s wife’s dower interest.” *Id.* at 145. Although the Court stated that “*Berg* comports with Supreme Court decisions holding that a contract to transfer a fee interest in land is ‘void’ absent signatures from all *coowners* of the property,” it distinguished a *dower* interest from an ownership interest:

However, an inchoate dower interest is merely a potential future interest. If a wife survives her husband and has not waived her dower interest, she will become entitled to a one-third interest in the property. This is not an ownership interest that prevents a current transfer to another. As noted, it is possible that the wife’s interest will never become consummate and the purchaser’s rights will never be affected. Property law is equitable at its core and voiding a contract because of a murky potential interest can be unjust. In a manner consistent with this idea, our Supreme Court has held in many cases that the courts have the equitable power to enforce a conveyance even absent the participation of the seller’s wife and have the power to value a dower interest’s impact on the property. [*Id.* at 145-146 (citation omitted; emphasis added).]

The *Zaher* Court then engaged in an extensive analysis of previous Supreme Court cases, see *id.* at 146-149, and concluded that “[t]hese cases all stand for the proposition that the transfer of a property interest may stand despite a husband’s failure to secure the release of his wife’s inchoate dower rights. There is no support therefore for a holding that *Zaher*’s easement across lot 2 was invalid from the outset.” *Id.* at 149.

One of the earlier cases discussed by the *Zaher* Court was *Tandy v Knox*, 313 Mich 147; 20 NW2d 844

(1945). In *Tandy*, the defendant signed an agreement for the plaintiff to purchase certain real property that the defendant owned. *Id.* at 149-151. However, the defendant's wife, Mrs. Knox, did not sign this agreement. *Id.* at 151. The agreement called for a land contract to be subsequently executed, but this never happened, due to a dispute between the parties over the amount of land to be conveyed. *Id.* The amount of land to be conveyed was the primary issue on appeal. See *id.* at 152-156. The plaintiff sought specific performance of the agreement. *Id.* at 151. One other issue on appeal was the amount of money that the trial court abated from the purchase price agreement; the trial court had "found that the present value of the inchoate dower interest of the wife was the sum of \$1,000, and provided for the abatement of the purchase price in that amount." *Id.* at 153.

Our Supreme Court stated that "[b]ecause of the refusal of Mrs. Knox to join with her husband in the execution of a land contract, *such contract must be made subject to her inchoate right of dower.*" *Id.* at 156 (emphasis added). The Court stated that "the trial court held that plaintiff, *if he elected to accept specific performance* in lieu of an accounting, was entitled to an abatement of the purchase price in an amount equal to the present value of the inchoate dower interest, such value being fixed at the sum of \$1,000," which the Court determined was in keeping with Supreme Court precedent. *Id.* (emphasis added).

The *Zaher* Court also noted that it "has held that a wife may bar her dower interest through a later transfer, *thereby curing a defect in an earlier conveyance.*" *Zaher*, 300 Mich App at 149 (emphasis added). Therefore, the Court held that "the law dictates, and equity suggests, that Miotke cannot avoid *Zaher's*

easement simply because Linda did not join Hoover's transfer of that interest." *Id.* at 150. The Court reasoned:

If Hoover still owned lot 2 and blocked Zaher's use of the joint driveway, Zaher could successfully file suit to enforce the easement. Hoover created the problem by failing to secure Linda's written consent at the time of the conveyance. To the extent that the easement may have reduced the value of lot 2, Hoover's estate could be required to *recompense Linda* in some way for the monetary effect on her dower interest, but only if Hoover predeceased Linda. *Ultimately, however, the inchoate dower rights would not nullify the easement. Linda's dower rights are an encumbrance on the property separate from the encumbrance from the easement. The two are not directly contrary and can coexist.* [*Id.* (emphasis added).]

Moreover, the Court further noted that

Hoover did transfer his ownership interest in lot 2 to Miotke with Linda's approval. Linda can no longer claim that the value of her dower interest was somehow affected by Zaher's easement; *she no longer has a dower interest. Because Linda extinguished her dower rights to lot 2 by joining Hoover's conveyance to Miotke, those rights no longer impair lot 2 or sit in competition with Zaher's easement.* Miotke might successfully challenge the easement on notice grounds, but Linda's extinct dower rights are not a defense available to him. [*Id.* (emphasis added).]

With this backdrop in mind, we now turn to the present case and hold that the probate court erred by granting summary disposition to appellee under MCR 2.116(I)(2). Constance received a mere dower interest in the property, not a co-ownership interest. Although Constance did not sign the transfer document, this did not render void the entire transfer. Under *Tandy*, *Slater*, and *Zaher*, the absence of Constance's signature merely clouded the property's title. Unlike *Slater*,

in which the buyer wished to not proceed with the sale, in this case the buyers, i.e., appellants, did wish to proceed with the sale, similar to *Tandy*. They were free to do so and to take the property with the encumbrance. See also *Bartos v Czerwinski*, 323 Mich 87, 92; 34 NW2d 566 (1948) (holding that a buyer “entitled to a ‘marketable title’ *may not be required to accept* a conveyance if the title is in such condition that he may be required to defend litigation challenging his possession and interest”) (emphasis added).

We agree with appellants that the reasoning in *Zaher* controls here. Moreover, we note that the decision in *Berg-Powell* is not controlling precedent, having been decided before November 1, 1990. MCR 7.215(J)(1). As for *Slater*, in addition to the overall analysis of that decision by *Zaher*, we particularly note the *Zaher* Court’s observation that “*Slater* held that a purchase agreement was ‘ineffective to convey marketable title’ absent the seller’s wife’s signature.” *Zaher*, 300 Mich App at 144-145, quoting *Slater*, 212 Mich App at 33. But in the case before us, the decedent did not transfer the property by warranty deed in 2006. Rather, he transferred it by quitclaim deed. A warranty deed covenants that the grantor has marketable title. A quitclaim deed, on the other hand, does not warrant valid title and only conveys whatever interest the grantor might have. *Eastbrook Homes, Inc v Dep’t of Treasury*, 296 Mich App 336, 348-349; 820 NW2d 242 (2012); see also *Dep’t of Natural Resources v Carmody-Lahti Real Estate, Inc*, 472 Mich 359, 377-378; 699 NW2d 272 (2005). Thus, in *Slater*, absent the wife’s signature, the seller could not meet his obligation to transfer marketable title and complete the sale unless the purchaser would accept a title clouded by the dower interest. See *Zaher*, 300 Mich App at 145. By contrast, in the case before us, the decedent could



transfer a clouded title by way of quitclaim deed because the deed only transferred whatever interest the decedent had in the property, presumably a fee simple encumbered by his wife's inchoate dower interest.

Furthermore, in order for dower rights to be exercised, the husband must have died before April 6, 2017, see MCL 558.30(2)(a); but the decedent in the present case died in 2020. Therefore, Constance's dower rights were extinguished after April 6, 2017. Moreover, Constance predeceased the decedent, and her rights were extinguished before they could vest. Therefore, any defect in the property was subsequently cured by the extinguishment of Constance's dower interest.

The entirety of appellee's complaint rested on the premise that the transfer was void from the outset and that appellee held title to the property. This was not the case. The 2006 quitclaim deed validly transferred the property to the grantees, subject to Constance's dower interest. Accordingly, the probate court should have granted summary disposition in favor of appellants.

We reverse and remand for the probate court to enter an order granting summary disposition in favor of appellants. We do not retain jurisdiction. Appellants may tax costs.

MURRAY, P.J., and SAWYER and M. J. KELLY, JJ., concurred.

## DeFORGE v ALLOUEZ TOWNSHIP

Docket No. 357568. Submitted May 11, 2022, at Lansing. Decided May 26, 2022, at 9:05 a.m.

Keith W. DeForge petitioned the Michigan Tax Tribunal (the MTT) to dispute the determination of respondent, Allouez Township, to disqualify petitioner's property for the principal residence exemption (PRE) under the General Property Tax Act, MCL 211.1 *et seq.* Petitioner resided in the subject property and rented out three rooms during the summer months. Petitioner had applied for and received the PRE in 2018, but respondent revoked it in 2020 because it determined the property to be a rental property. Specifically, respondent determined that over 50% of the property was used as an Airbnb rental, which respondent concluded disqualified the property from receiving the PRE. Petitioner appealed the MTT. The MTT concluded that only 30% of the property was used as an Airbnb rental and, therefore, petitioner was entitled to a 70% PRE. The MTT's calculations appeared to be based on the square footage devoted to the Airbnb use without adjusting for the portion of time that it was rented out. The MTT also determined that the property was a multiple-purpose structure because petitioner used a portion of the dwelling as an Airbnb rental. Petitioner appealed, arguing that the MTT erred in its analysis and that petitioner should receive a 100% PRE.

The Court of Appeals *held*:

MCL 211.7cc(1) provides, in relevant part, that a principal residence is exempt from the tax levied by a local school district for school operating purposes if an owner of that principal residence claims an exemption as provided in MCL 211.7cc. MCL 211.7cc(16) provides, in relevant part, that if the principal residence is part of a unit in a multiple-unit dwelling or a dwelling unit in a multiple-purpose structure, an owner shall claim an exemption for only that portion of the total taxable value of the property used as the principal residence of that owner in a manner prescribed by the Department of Treasury; MCL 211.7cc(16) further provides that if a portion of a parcel for which the owner claims an exemption is used for a purpose other than as

a principal residence, the owner shall claim an exemption for only that portion of the taxable value of the property used as the principal residence of that owner in a manner prescribed by the Department of Treasury. In this case, the MTT's opinion provided no analysis or citation of authority for the proposition that use of a portion of the residence as a short-term rental turned the house into a "multiple-purpose structure." MCL 211.7cc(16) does not define "multiple-purpose structure." The Michigan Department of Treasury's PRE affidavit form (Form 2368) gives an example of a multiple-purpose structure as "a storefront with an upstairs flat." *Random House Webster's College Dictionary* (2d ed) defines "multiple" as "consisting of, having, or involving several or many individuals, parts, elements, relations, etc." and defines "purpose" as "the reason for which something exists or is done, made, etc." Allowing transient guests to stay in one's home was not a sufficiently distinct purpose to lead to the conclusion that the structure had multiple purposes. The purpose of the structure was to provide a place to sleep, rest, read a book, look out over the lake, etc. While there might have been a pecuniary interest for the property owner, that interest was not sufficiently different from that of a homeowner who provides a room to a boarder who pays rent to deem it a separate purpose. And MCL 211.7dd(c) specifically states that the term "principal residence" includes any portion of a dwelling or unit of an owner that is rented or leased to another person as a residence as long as that portion of the dwelling or unit that is rented or leased is less than 50% of the total square footage of living space in that dwelling or unit. Moreover, *Rentschler v Melrose Twp*, 322 Mich App 113 (2017), held that renting one's home for more than 14 days does not disqualify a homeowner from the PRE. If completely renting out a principal residence for a portion of the year does not disqualify it from the PRE, then renting out a portion of the property for a portion of the year would not disqualify the owner from claiming the PRE. Accordingly, when a property otherwise qualifies for the PRE, the fact that a portion of the property is rented out for a portion of the year as a short-term rental does not disqualify the property from a 100% PRE.

Reversed and remanded to the MTT for entry of judgment in favor of petitioner.

TAXATION – PRINCIPAL RESIDENCE EXEMPTION – SHORT-TERM RENTALS.

MCL 211.7cc(1) provides, in relevant part, that a principal residence is exempt from the tax levied by a local school district for school operating purposes if an owner of that principal residence claims an exemption as provided in MCL 211.7cc; when a prop-

erty otherwise qualifies for a principal residence exemption (PRE), the fact that a portion of the property is rented out for a portion of the year as a short-term rental does not disqualify the property from a 100% PRE.

*Numinen, DeForge & Toutant, PC* (by *Keith W. DeForge*) for Keith W. DeForge.

*Bensinger, Cotant & Menkes, PC* (by *Roger W. Zappa*) for Allouez Township.

Before: MURRAY, P.J., and SAWYER and M. J. KELLY, JJ.

SAWYER, J. This dispute concerns the qualification of petitioner's property located in Keweenaw County for the principal residence exemption (PRE) under the General Property Tax Act, MCL 211.1 *et seq.*<sup>1</sup> Petitioner had applied for and received the PRE in 2018, but respondent revoked it in 2020 on the basis that it determined the property to be a rental property. Specifically, respondent determined that over 50% of the property was used as an Airbnb, which respondent concluded disqualified the property from receiving the PRE. Petitioner appealed to the Michigan Tax Tribunal (the MTT), which concluded that only 30% of the property was used as an Airbnb and, therefore, petitioner was entitled to a 70% PRE.<sup>2</sup> Petitioner now

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<sup>1</sup> MCL 211.7cc.

<sup>2</sup> Respondent argues that the MTT's calculations contain a mathematical error and that the correct percentage of use as an Airbnb under the MTT's analysis would be 35%. Given our conclusion in this case, we need not address that issue. Moreover, even if we agreed with the MTT's conclusion, respondent failed to cross-appeal, and therefore any such error is not before us. *Kosmyna v Botsford Community Hosp*, 238 Mich App 694, 696; 607 NW2d 134 (1999) (failure to file a cross-appeal generally precludes an appellee from raising an issue not raised by the appellant).

appeals in this Court, arguing that the MTT erred in its analysis and that petitioner should receive a 100% PRE. We agree and reverse and remand the matter to the MTT for entry of judgment in favor of petitioner.

The subject property is located on Lake Superior. Petitioner resides in the home and rents out three rooms during the summer months. The MTT based its determination on which portion of the house is used by petitioner as a primary residence and which portion is rented out during the summer. The MTT's calculations appear to be based on the square footage devoted to the Airbnb rentals without adjustment for the portion of time that it is rented out.

The MTT based its determination solely on the basis of MCL 211.7cc(16), which provides as follows:

Except as otherwise provided in subsection (30), if the principal residence is part of a unit in a multiple-unit dwelling or a dwelling unit in a multiple-purpose structure, an owner shall claim an exemption for only that portion of the total taxable value of the property used as the principal residence of that owner in a manner prescribed by the department of treasury. If a portion of a parcel for which the owner claims an exemption is used for a purpose other than as a principal residence, the owner shall claim an exemption for only that portion of the taxable value of the property used as the principal residence of that owner in a manner prescribed by the department of treasury.

The MTT's analysis was relatively brief:

The subject property is a dwelling unit and by utilizing a portion of the dwelling as an Airbnb is considered to be a multi-purpose structure by this Tribunal. The portion advertised and utilized as an Airbnb is 30%[:] Petitioner's PRE is therefore 70%.

Given the narrow nature of the MTT's decision, we view this case as presenting purely a question of statutory construction. Specifically, whether utilizing a portion of a principal residence as a short-term rental disqualifies, even partially, the PRE. As a question of statutory construction, we review the MTT's decision *de novo*.<sup>3</sup>

The MTT's opinion provides no analysis or citation of authority for the proposition that use of a portion of the residence as a short-term rental turns the house into a "multiple-purpose structure" under the statute. We recognize the difficulty presented because the statute does not define a "multiple-purpose structure." Petitioner does refer us to the instructions on the Michigan Department of Treasury's affidavit form (Form 2368) used in applying for the PRE. Specifically, Form 2368 gives an example of a multiple-purpose structure as "a storefront with an upstairs flat." While this is hardly controlling, it does, in our opinion, provide a good example of a multiple-purpose structure. A storefront has little similarity to the residence located above it.

Respondent presents little argument regarding the multiple-purpose structure analysis other than referring to four examples contained in the Michigan Department of Treasury's Principal Residence Exemption Guidelines. As noted in *Rentschler v Melrose Twp*,<sup>4</sup> the guidelines do not have the force of law and, as was the case of the guideline considered in *Rentschler*, are not necessarily legally accurate. While we do not find some of the examples given legally accurate or particularly relevant to this case, one of them, Guideline 142,

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<sup>3</sup> *Rentschler v Melrose Twp*, 322 Mich App 113, 115 n 1; 910 NW2d 711 (2017).

<sup>4</sup> *Id.* at 120.

illustrates the same point as the example in the affidavit form. That guideline uses the example of a property owner who operates an auto repair business on the lower level of the building and lives in an apartment on the second floor. This example does, in fact, illustrate a case of a multiple-purpose structure to which a 100% exemption is not applicable.

In the absence of a statutory definition of “multiple-purpose structure,” we turn to a dictionary for guidance.<sup>5</sup> The *Random House Webster’s College Dictionary* (2d ed) defines “multiple” as “consisting of, having, or involving several or many individuals, parts, elements, relations, etc.” We simply do not see how allowing transient guests to stay in one’s home is a sufficiently distinct purpose to lead to the conclusion that the structure now has multiple purposes. Indeed, the dictionary’s first definition of “purpose” is “the reason for which something exists or is done, made, etc.” It seems to us that the purpose for which the structure exists, whether it be for the property owner or for short-term renters, is to provide a place to sleep, rest, read a book, look out over the lake, etc. While there may be a pecuniary interest for the property owner, it is not sufficiently different from providing a room to a boarder who pays rent to deem it a separate purpose. And MCL 211.7dd(c) specifically allows for a principal residence to be partially rented “as long as that portion of the dwelling or unit that is rented or leased is less than 50% of the total square footage of living space in that dwelling or unit.”<sup>6</sup>

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<sup>5</sup> *Kinder Morgan Mich, LLC v City of Jackson*, 277 Mich App 159, 163; 744 NW2d 184 (2007).

<sup>6</sup> Indeed, it is this “50% rule” that was the original basis for respondent revoking the PRE, which, of course, is not supported by the MTT’s determination because the portion of the residence attributable to the

This brings us to the *Rentschler* case, upon which petitioner largely relies. *Rentschler* is not directly on point. But it is sufficiently similar that it directs us to the same result. In *Rentschler*, the property owner was denied a PRE because, although it was the owner's principal residence, the owner rented out the property for more than 14 days during the year.<sup>7</sup> This determination was based on a guideline that disallowed a PRE for property rented out for more than 14 days a year.<sup>8</sup> The Court concluded that this guideline was contrary to the statute. Specifically, the Court stated that "[r]enting one's home for more than 14 days does not disqualify a homeowner from the PRE."<sup>9</sup> Not only does respondent fail to distinguish *Rentschler* from the case before us, but it completely ignores the *Rentschler* decision. We can neither ignore nor distinguish it. If completely renting out a principal residence for a portion of the year does not disqualify it from the PRE, we cannot conclude that renting out a portion of the property for a portion of the year would disqualify the owner from claiming the PRE.<sup>10</sup>

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Airbnb was determined to be 30%. Although the parties do spend some time discussing this rule, we decline to do so because the MTT did not base its ruling on this provision of the statute. Indeed, the fact that the MTT found that less than 50% of the property was dedicated to Airbnb use indicates that it implicitly rejected this argument. And while respondent does discuss this rule, as previously noted, it has not appealed the MTT's decision.

<sup>7</sup> *Rentschler*, 322 Mich App at 116.

<sup>8</sup> The specific example used in the guideline was for a residence located in a resort area occupied by the owner for a majority of the year but rented out during the summer months, at which time the owner took an apartment in town. *Rentschler*, 322 Mich App at 120-121.

<sup>9</sup> *Rentschler*, 322 Mich App at 123-124.

<sup>10</sup> We acknowledge that there might be a limit to what portion of the year the property may be rented out and still be eligible for the PRE. It is not clear from the *Rentschler* decision exactly how many days of the



For these reasons, we conclude that when a property otherwise qualifies for the PRE, the fact that a portion of the property is rented out for a portion of the year as a short-term rental does not disqualify the property from a 100% PRE. We reverse the MTT's decision to the contrary and remand the matter to the MTT for entry of judgment in favor of petitioner.

Reversed and remanded for further proceedings that are consistent with this opinion. We do not retain jurisdiction. Petitioner may tax costs. MCR 7.219.

MURRAY, P.J., and M. J. KELLY, J., concurred with SAWYER J.

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year the property was rented out, other than that it was rented out for more than 14 days and that the property owner occupied the home for a majority of the tax years in question. *Rentschler*, 322 Mich App at 116. In the case before us, the MTT's opinion reflects that only a portion of the home was rented out, generally on weekends, and that this portion of the home was available for rent five months out of the year. In the absence of a concrete argument regarding the maximum number of days allowed and a specific finding that the number of days in the case exceeds that theoretical maximum, that question remains hypothetical, and we decline to address it.

## SAN MARINO IRON, INC v HAJI

Docket No. 355643. Submitted March 2, 2022, at Lansing. Decided May 26, 2022, at 9:10 a.m. Leave to appeal sought.

San Marino Iron, Inc., brought an action in the Oakland Circuit Court against Louis Haji, alleging breach of contract, fraud in the inducement, unjust enrichment, and conversion. Plaintiff and defendant had entered into a contract for plaintiff to design, create, and install a wrought-iron railing for the staircase in defendant's home. Defendant paid a \$10,000 deposit before plaintiff began its work. Following installation, however, defendant refused to pay the remaining \$16,000. Plaintiff brought suit, asserting that defendant had not paid the agreed-upon price for the railing and yet continued to enjoy the railing plaintiff had installed. Defendant denied liability on all claims because he was dissatisfied with the railing; defendant argued that plaintiff, therefore, had breached the contract. Defendant moved for summary disposition, arguing that plaintiff was a residential maintenance and alteration contractor (RMAC) under MCL 339.2401(b) of the Occupational Code, MCL 339.101 *et seq.*, was required to be licensed but was not, and therefore could not sue to collect on the contract pursuant to MCL 339.2412(1). Plaintiff filed a cross-motion for summary disposition. The trial court, Nanci J. Grant, J., held that plaintiff was required to be licensed as an RMAC under MCL 339.2401(b) and that because plaintiff was not licensed, plaintiff could not maintain its action. Accordingly, the trial court granted defendant's motion for summary disposition, ordered plaintiff to remove the lien on defendant's property, and ordered defendant to return the railing within two weeks. The court eventually vacated its ruling regarding the return of the railing. Plaintiff appealed.

The Court of Appeals *held*:

The Occupational Code provides occupational licensing requirements for certain entities conducting business in Michigan, including an RMAC. When the parties entered into their contract, and when plaintiff installed the railing, MCL 339.2401(b), as amended by 1991 PA 166, defined an RMAC, in relevant part, as a person who, for a fixed sum, price, fee, percentage, valuable

consideration, or other compensation, other than wages for personal labor only, undertakes with another for the repair, alteration, or an addition to, subtraction from, improvement of, wrecking of, or demolition of a residential structure or combination residential and commercial structure, or building of a garage, or laying of concrete on residential property, or who engages in the purchase, substantial rehabilitation or improvement, and resale of a residential structure, engaging in that activity on the same structure more than twice in one calendar year. Under MCL 339.2412(1), a person or qualifying officer for a corporation or member of a residential builder or RMAC shall not bring or maintain an action in a Michigan court for the collection of compensation for the performance of an act or contract *for which a license is required* by this article without alleging and proving that the person was licensed under this article during the performance of the act or contract. Finally, under MCL 339.2412(3), an RMAC shall not impose or take any legal or other action to impose a lien on real property unless that person was licensed under this article during the performance of the act or contract. In this case, the trial court erred by concluding that plaintiff's claims for damages and a construction lien were barred; MCL 339.2401(b) had to be read in conjunction with the crafts and trades that are exclusively eligible for licensure under MCL 339.2404(3), which does not include plaintiff's trade. MCL 339.2404(3) provides, in pertinent part, that a license includes the following crafts and trades: carpentry; concrete; swimming pool installation; waterproofing a basement; excavation; insulation work; masonry work; roofing; siding and gutters; screen or storm sash installation; tile and marble work; and house wrecking. MCL 339.2404(3) further provides that a license shall specify the particular craft or trade for which the licensee is qualified. The listing of what crafts or trades need to be licensed as an RMAC in MCL 339.2404(3) is exhaustive. The Legislature used the word "includes" in a limiting sense, and the remainder of the section clarifies that the list is intended to be exhaustive, given that the statute requires that a license specify the particular craft or trade for which the licensee is qualified. Additionally, the Legislature has amended this particular section to both add and subtract specific crafts and trades, which supported the conclusion that the listing of crafts and trades is exhaustive. Finally, MCL 339.2401(b) had to be interpreted in light of the context provided by MCL 339.2404(3) so that only someone performing a craft or trade for which one may be licensed under MCL 339.2404(3) is required to be licensed as an RMAC. Accordingly, plaintiff did not have to be licensed as an RMAC, and plaintiff's

failure to obtain a license did not preclude it from bringing suit against defendant because installing a wrought-iron railing did not fall within any of the listed crafts or trades. Defendant's argument that installing a wrought-iron railing onto a wood staircase made plaintiff's work carpentry was not persuasive. Plaintiff did not engage in the trade or craft of carpentry simply by affixing a wrought-iron structure onto the staircase. Accordingly, because plaintiff did not need a license, the prohibition of filing suit within MCL 339.2412(1) did not apply.

Reversed and remanded.

SAWYER, J., dissenting, would have concluded that because plaintiff installed the railing in defendant's home, a license was required under the Occupational Code. Specifically, the installation of the railing constituted a repair, addition to, alteration, or improvement of the residential structure and therefore fell within MCL 339.2401(b). The argument that plaintiff's activity of creating and installing the custom railing did not fall within any of the activities on the list failed for two reasons. First, because the railing was ultimately attached to the wooden structure of the building, it fell within the meaning of "carpentry." Second, MCL 339.2404(3) should not have been read as limiting the requirement to have an RMAC license to those crafts and trades specifically listed, because doing so would create a conflict with the broader language of MCL 339.2401. Accordingly, plaintiff was required to possess an RMAC license to install the metal works. Furthermore, plaintiff could not enforce its contract with defendant in light of the fact that it did not possess a license. *Stokes v Millen Roofing Co*, 466 Mich 660 (2022), in which the Supreme Court held that the unlicensed contractor was not only precluded from being compensated for the installation of the roof but also could not recover for the value of the materials supplied, controlled the decision in this case. Under *Stokes*, MCL 339.2412(1) does not permit bifurcation of the contract, and therefore, because installation of the railing made plaintiff an RMAC, there was no basis for permitting plaintiff to recover simply because its installation was only incidental to its obligations under the contract. *Stokes* also prevented the remedy of the railing being returned to plaintiff. Judge SAWYER therefore would have affirmed.

STATUTES – OCCUPATIONAL CODE – LICENSING REQUIREMENTS FOR CRAFTS AND TRADES – RESIDENTIAL MAINTENANCE AND ALTERATION CONTRACTORS.

The Occupational Code, MCL 339.101 *et seq.*, provides occupational licensing requirements for certain entities conducting business in Michigan, including a residential maintenance and alteration

contractor (RMAC) under MCL 339.2401(b); MCL 339.2401(b) must be read in conjunction with the crafts and trades that are exclusively eligible for licensure under MCL 339.2404(3); a person who designs, fabricates, and installs a wrought-iron railing for a staircase in a residence is not required to be licensed as an RMAC under MCL 339.2401(b) and MCL 339.2404(3).

*Fieger, Fieger, Kenney & Harrington, PC* (by *Geoffrey N. Fieger* and *Robert G. Kamenec*) for San Marino Iron, Inc.

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

MURRAY, J. Plaintiff appeals of right the final order of the trial court granting defendant's motion for summary disposition. For the reasons outlined below, we reverse and remand for further proceedings.

#### I. BACKGROUND

This case arises out of a contract between plaintiff and defendant for plaintiff to design, create, and install a wrought-iron railing for the staircase in defendant's home. Defendant paid a \$10,000 deposit before plaintiff began its work. Following installation, however, defendant refused to pay the remaining \$16,000 plaintiff asserted as owing.

Plaintiff brought suit, eventually raising claims of breach of contract, fraud in the inducement, unjust enrichment, and conversion, asserting that defendant had not paid the agreed-upon price for the railing and yet continued to enjoy the work and items installed by plaintiff. In answering plaintiff's second amended complaint, defendant admitted that he entered into the contract with plaintiff and failed to pay \$16,000, but he denied liability on all claims because he was dissatisfied with the railing and argued that plaintiff, therefore, breached the contract.

Defendant moved for summary disposition under MCR 2.116(C)(8) and (10), arguing that plaintiff was a residential maintenance and alteration contractor (RMAC) under MCL 339.2401(b), was required to be licensed but was not, and therefore could not sue to collect on the contract. MCL 339.2412(1). Defendant also argued that because of plaintiff's unlicensed status, the lien plaintiff placed on defendant's property was unlawful and had to be removed.

For its part, plaintiff filed a cross-motion for summary disposition under MCR 2.116(C)(10). Plaintiff argued that defendant breached the contract by accepting installation of the railing but refusing to pay the contract price and that defendant committed conversion by exercising dominion over the railing even though the railing belonged to plaintiff until defendant paid the contract price. Because defendant concedes that he kept the railing and failed to pay the contract price, plaintiff argued that it was entitled to summary disposition on all of its claims.

The trial court found that plaintiff was required to be licensed as an RMAC under MCL 339.2401(b), concluding that plaintiff "installed staircase railings in defendant's home and was aware that such railings had to be installed to code." Because it was not licensed, the court held that plaintiff could not maintain its action. Therefore, the trial court granted defendant's motion for summary disposition under MCR 2.116(C)(8). The court also denied plaintiff's motion for summary disposition, ordered plaintiff to remove the lien on defendant's property, and ordered defendant to return the railing within two weeks.<sup>1</sup>

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<sup>1</sup> The court eventually vacated its ruling regarding the return of the railing and also denied a request for attorney fees.

## II. ANALYSIS

A trial court's decision on a motion for summary disposition is reviewed de novo. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159; 934 NW2d 665 (2019). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by accepting all factual allegations in the complaint as true and determining whether "a claim is so clearly unenforceable that no factual development could possibly justify recovery." *Id.* at 159-160.

This appeal requires interpreting the Occupational Code, MCL 339.101 *et seq.* When interpreting a statute, "the fundamental task of a court is to discern and give effect to the Legislature's intent as expressed in the words of the statute." *Guardian Environmental Servs, Inc v Bureau of Constr Codes & Fire Safety*, 279 Mich App 1, 6; 755 NW2d 556 (2008) (quotation marks and citation omitted). "[T]he provisions of a statute should be read reasonably and in context." *McCahan v Brennan*, 492 Mich 730, 739; 822 NW2d 747 (2012). Every word or phrase of a statute is given its plain and ordinary meaning unless it is defined in the statute or has a technical meaning. *Guardian Environmental Servs*, 279 Mich App at 6. Dictionary definitions may be used to determine the ordinary meaning of undefined terms. *Id.* at 6-7. When the plain and ordinary meaning of statutory language is clear and reasonable minds could not differ about the meaning of the language, judicial construction is improper. *Id.* at 6.

The Occupational Code provides occupational licensing requirements for certain entities conducting business in this state, including an RMAC. When the parties entered into their contract, and when plaintiff

installed the railing, the applicable version of MCL 339.2401(b)<sup>2</sup> defined an RMAC as:

a person who, for a fixed sum, price, fee, percentage, valuable consideration, or other compensation, other than wages for personal labor only, undertakes with another for the repair, alteration, or an addition to, subtraction from, improvement of, wrecking of, or demolition of a residential structure or combination residential and commercial structure, or building of a garage, or laying of concrete on residential property, or who engages in the purchase, substantial rehabilitation or improvement, and resale of a residential structure, engaging in that activity on the same structure more than twice in 1 calendar year . . . .

Under MCL 339.2412(1), an unlicensed RMAC may not bring or maintain an action for compensation for work it performed if that work required a license:

A person or qualifying officer for a corporation or member of a residential builder or residential maintenance and alteration contractor shall not bring or maintain an action in a court of this state for the collection of compensation for the performance of an act or contract *for which a license is required* by this article without alleging and proving that the person was licensed under this article during the performance of the act or contract. [Emphasis added.]

Relatedly, an RMAC “shall not impose or take any legal or other action to impose a lien on real property unless that person was licensed under this article during the performance of the act or contract.” MCL 339.2412(3).

Reading MCL 339.2401(b) in isolation, plaintiff fit within the persons qualifying as an RMAC. The defi-

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<sup>2</sup> The Legislature amended MCL 339.2401 with 2020 PA 341, which was made retroactive to January 1, 2019. 2020 PA 341, enacting § 1. Because plaintiff installed the railing in July 2018, the previous version applies.



inition of an RMAC is broad, covering, in relevant part, “a person who, for a fixed sum, price, [or] fee . . . undertakes with another for the . . . addition to . . . [or] improvement of . . . a residential structure . . . .” MCL 339.2401(b). Plaintiff, for the fixed price of \$26,000, undertook to add to defendant’s home by installing a wrought-iron railing on defendant’s staircase. Accordingly, applying only the plain language of MCL 339.2401(b), plaintiff would qualify as an RMAC.

Ultimately, however, the trial court erred by concluding that plaintiff’s claims for damages and a construction lien were barred because plaintiff is an unlicensed RMAC, as MCL 339.2401(b) must be read in conjunction with the crafts and trades that are exclusively eligible for licensure under MCL 339.2404(3), which, as discussed below, does not include plaintiff’s trade. When reading these statutory provisions together, we hold that plaintiff is not an RMAC and that its claims should not have been dismissed.

The Occupational Code describes the crafts and trades that a license authorizes an RMAC to perform. MCL 339.2404(3) provides, in pertinent part:

[T]he department may issue a residential maintenance and alteration contractor’s license to an individual who applies for the license and who qualifies for the license by passing the examination. A license authorizes the licensee, according to the applicant’s qualifications, crafts, and trades, to engage in the activities of a residential maintenance and alteration contractor. A license includes the following crafts and trades: carpentry; concrete; swimming pool installation; waterproofing a basement; excavation; insulation work; masonry work; roofing; siding and gutters; screen or storm sash installation; tile and marble work; and house wrecking. A license shall specify the particular craft or trade for which the licensee is qualified.

The listing of what crafts or trades need to be licensed as an RMAC is exhaustive. Caselaw, and the language contained within MCL 339.2404(3), support that conclusion.

When used in a statute, the word “includes” can be used as a term of enlargement or limitation, with the context of the word’s use helping determine whether it is used in a limiting or enlarging manner. *Frame v Nehls*, 452 Mich 171, 178-179; 550 NW2d 739 (1996). Here, the Legislature used “includes” in a limiting sense. First, there is no expansive language tied to the word “includes,” such as “for example,” “but not limited to,” or “such as.” *Ewing v Detroit*, 237 Mich App 696, 700; 604 NW2d 787 (1999). Second, the remainder of the section clarifies that the list is intended to be exhaustive, as the statute requires that a license specify the particular craft or trade for which the licensee is qualified. Third, that the Legislature has amended this section to both add and subtract specific crafts and trades lends support for the proposition that the listing is exhaustive and not simply a list of examples. See 2018 PA 527 (amending this section to eliminate “painting and decorating” from the list of crafts and trades). Fourth, enforcing this plain language allows these two provisions to be read harmoniously. MCL 339.2401(b) must be interpreted in light of the context provided by MCL 339.2404(3), so that only someone performing a craft or trade for which one may be licensed under MCL 339.2404(3) is required to be licensed as an RMAC. By being more specific in MCL 339.2404(3) as to what crafts and trades must be licensed, the Legislature has placed limitations on the more general, broad definition contained in MCL 339.2401(b).

With this understanding of how the two statutes interrelate, plaintiff did not have to be licensed as an RMAC, and plaintiff's failure to obtain a license did not preclude it from bringing suit against defendant, MCL 339.2412(1), because installing a wrought-iron railing does not fall within any of the listed crafts or trades. Despite defendant's argument, installing a wrought-iron railing onto a wood staircase did not make plaintiff's work carpentry. *Merriam-Webster's Collegiate Dictionary* (11th ed) defines "carpentry" as "the art or trade of a carpenter" and "carpenter" as "a worker who builds or repairs wooden structures or their structural parts."<sup>3</sup> By installing the wrought-iron railing on the stairway, plaintiff did not build or repair a wooden structure or its structural parts. It simply affixed a wrought-iron fixture onto the staircase. No building or repairing of the wooden structure occurred by plaintiff's installation. Accordingly, plaintiff was not engaged in the trade or craft of carpentry and was not required to be licensed to install the wrought-iron railing. And because plaintiff did not need a "license . . . required by" MCL 339.2404(3), the prohibition of filing suit within MCL 339.2412(1) did not apply.

For these reasons, we reverse the trial court's order granting defendant's motion for summary disposition and remand for further proceedings. We do not retain jurisdiction. Plaintiff may tax costs, having prevailed in full. MCR 7.219(A).

REDFORD, P.J., concurred with MURRAY, J.

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<sup>3</sup> Every word or phrase of a statute is given its plain and ordinary meaning unless it is defined in the statute or has a technical meaning. *Guardian Environmental Servs*, 279 Mich App at 6. Dictionary definitions may be used to determine the ordinary meaning of undefined terms. *Id.* at 6-7.

SAWYER, J. (*dissenting*). I respectfully dissent.

The question posed in this case is whether a person who designs, fabricates, and installs a wrought-iron railing for a staircase in a residence must be licensed as a residential maintenance and alteration contractor (RMAC) under MCL 339.2401(b). The trial court concluded that plaintiff<sup>1</sup> was required to be licensed, and because plaintiff was not licensed, plaintiff was precluded from bringing suit to recover under the contract with plaintiff under MCL 339.2412(1). I conclude that no license would have been required if the only service rendered was the design and fabrication of the railing, but because plaintiff also installed the railing in defendant's home, a license was required. Accordingly, I would affirm the trial court's grant of summary disposition under MCR 2.116(C)(8) (failure to state a claim).

When the parties entered into their contract, and when plaintiff installed the railing, MCL 339.2401(b), as amended by 1991 PA 166,<sup>2</sup> defined an RMAC as

a person who, for a fixed sum, price, fee, percentage, valuable consideration, or other compensation, other than wages for personal labor only, undertakes with another for the repair, alteration, or an addition to, subtraction from, improvement of, wrecking of, or demolition of a residential

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<sup>1</sup> Plaintiff's brief tends to use the term "plaintiff" interchangeably to refer both to San Marino Iron, Inc., and its owner, Dave Ciavaglia. Because plaintiff does not argue that either the individual or the corporation are licensed, or that a different result would apply to one versus the other, this opinion will use the term "plaintiff" interchangeably as well.

<sup>2</sup> The Legislature amended MCL 339.2401 with 2020 PA 341, which was made retroactive to January 1, 2019. 2020 PA 341, enacting § 1. But plaintiff installed the railing in July 2018. Accordingly, the previous version applies, and all citations herein are to that version. The changes to Subdivision (b) were purely stylistic. See 2020 PA 341.

structure<sup>[3]</sup> or combination residential and commercial structure, or building of a garage, or laying of concrete on residential property, or who engages in the purchase, substantial rehabilitation or improvement, and resale of a residential structure, engaging in that activity on the same structure more than twice in 1 calendar year . . . .

Plaintiff argues that it is not an RMAC. Rather, plaintiff argues that it is principally an artisan of unique pieces of metal and that the installation of that metal is merely incidental to its design and creation of the piece. While I do not dispute that it is the artisan aspect of the project that is the primary purpose of plaintiff's activities, it is the installation of the piece that ultimately requires plaintiff to be licensed as an RMAC. Specifically, the installation of the railing constitutes a repair, addition to, alteration, or improvement of the residential structure and falls within MCL 339.2401(b). Plaintiff only cites an unpublished decision of this Court dealing with a home-improvement contractor to support a contrary conclusion. That case is neither precedential nor on point.

A somewhat stronger argument for plaintiff is the language of MCL 339.2404(3),<sup>4</sup> which sets forth a list of "crafts and trades" that a license authorizes an RMAC to perform:

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<sup>3</sup> The previous version of MCL 339.2401(c) defined a residential structure as "a premises used or intended to be used for a residence [sic] purpose and related facilities appurtenant to the premises, used or intended to be used, as an adjunct of residential occupancy." Neither party disputes that defendant's home satisfied this definition.

<sup>4</sup> The version in effect at the time plaintiff installed the railing also included "painting and decorating" among the list of crafts and trades, but the Legislature removed this language with the enactment of 2018 PA 527 (effective March 28, 2019). The Legislature made no other change to this provision.

[T]he department may issue a residential maintenance and alteration contractor's license to an individual who applies for the license and who qualifies for the license by passing the examination. A license authorizes the licensee, according to the applicant's qualifications, crafts, and trades, to engage in the activities of a residential maintenance and alteration contractor. A license includes the following crafts and trades: carpentry; concrete; swimming pool installation; waterproofing a basement; excavation; insulation work; masonry work; roofing; siding and gutters; screen or storm sash installation; tile and marble work; and house wrecking. A license shall specify the particular craft or trade for which the licensee is qualified.

The essence of plaintiff's argument is that its activity of creating and installing the custom railing does not fall within any of the activities on the list. But I find that this argument fails for two reasons. First, because the railing is ultimately attached to the wooden structure of the building, it falls within the meaning of "carpentry."<sup>5</sup>

Second, even if plaintiff's activities do not fall within the meaning of "carpentry," I am not persuaded that this compels the conclusion that plaintiff advances. If we accept plaintiff's argument that only those trades and crafts listed in MCL 339.2404(3) require an RMAC license, that would create a conflict between that section and the broader language of MCL 339.2401. Statutory provisions are to be read in a cohesive manner, reasonably, and in context.<sup>6</sup> To read § 2404(3) as limiting the requirements to have an RMAC license

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<sup>5</sup> *Merriam-Webster's Collegiate Dictionary* (11th ed) defines "carpentry" as "the art or trade of a carpenter" and "carpenter" as "a worker who builds or repairs wooden structures or their structural parts." Clearly, the installation of the railing on the wooden staircase involves building or repairing a structural part of a wooden structure.

<sup>6</sup> *McCahan v Brennan*, 492 Mich 730, 739; 822 NW2d 747 (2012).

to those crafts and trades specifically listed would create a certain conflict with the broader language of § 2401. But to do so also overlooks the use of the word “includes” in § 2404(3). While “include” may refer to the whole list of items, it also may refer to “part of a whole.” See *Random House Webster’s College Dictionary* (2d ed). If use of the word “includes” reflects an intent for the list in § 2404(3) to be nonexhaustive, then the two sections can harmoniously be read together.

For these reasons, I conclude that plaintiff is required to possess an RMAC license to install the metal works that it creates. This then leads to the question whether plaintiff may enforce its contract with defendant in light of the fact that it did not possess such a license, and it cannot.

The statutory provision is very clear. Under MCL 339.2412(1), an unlicensed RMAC may not bring or maintain an action for compensation for work it performed if that work required a license:

A person or qualifying officer for a corporation or member of a residential builder or residential maintenance and alteration contractor shall not bring or maintain an action in a court of this state for the collection of compensation for the performance of an act or contract for which a license is required by this article without alleging and proving that the person was licensed under this article during the performance of the act or contract.

Relatedly, MCL 339.2412(3) provides that an RMAC “shall not impose or take any legal or other action to impose a lien on real property unless that person was licensed under this article during the performance of the act or contract.”

In this regard, this case is controlled by the Michigan Supreme Court’s decision in *Stokes v Millen Roof-*

*ing Co.*<sup>7</sup> In *Stokes*, the defendant, an unlicensed roofer, contracted with the plaintiff to install a new roof, including providing the roofing materials. When the plaintiff refused to pay for the roof, the defendant placed a lien on the house, and the plaintiff sued to clear title. The defendant counterclaimed for breach of contract, quantum meruit, and foreclosure on the construction lien.<sup>8</sup> Of particular import to the case before us, the Court in *Stokes* concluded that the unlicensed contractor was not only precluded from being compensated for the installation of the roof but also could not recover for the value of the materials supplied.

In rejecting the roofing company's argument that it should be reimbursed for the value of the materials because a supplier does not need to be licensed, the Court<sup>9</sup> opined:

The fact that Millen [the roofing company] was not required to be licensed to supply slate is of no consequence here. In order for the "supplier" portion of this contract to be enforced, it would have to be severed from the illegal portions of the agreement. As the dissent points out, for that to occur, the illegal provision must not be central to the parties' agreement. See 2 Restatement Contracts, § 603, pp 1119-1120.

[I]f the agreements are interdependent and the parties would not have entered into one in the absence of the other, the contract will be regarded . . . as entire and not divisible. [3 Williston, Contracts (3d ed), § 532, p 765.]

Hence, the contract can be bifurcated only if the agreement to install the materials is independent of the agreement to supply them. But, here the agreements were not

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<sup>7</sup> *Stokes v Millen Roofing Co*, 466 Mich 660; 649 NW2d 371 (2002).

<sup>8</sup> *Id.* at 662-663, 665.

<sup>9</sup> *Id.* at 666-667 (second and third alterations in original).



independent of one another. Applying the test formulated by the dissent, it becomes apparent that the illegal section, which provided for the installation of a slate roof, was central to the parties' agreement. The parties' contract required Millen to "furnish and install" the roofing components and did not specify the portion of the total cost attributable solely to materials. If the parties had not intended Millen to install the roof, the Stokes would have had the installer they selected deliver the slate. It follows that the contract is entire and indivisible.

Even if, normally, the contract could be bifurcated, the statute prohibits it. Section 2412 bars a suit for compensation if a license was necessary for performance of "an act or contract." The statute requires us to look for either an act or a contract requiring a license. It does not make provision for bifurcating building contracts into separate labor and supply components. Accordingly, it is irrelevant that Millen could have supplied slate without a license.

Similar to the roofing company in *Stokes*, plaintiff argues that it may still recover compensation from defendant because it is a designer and fabricator of wrought-iron railings that only incidentally installs the railings. That may be so, but *Stokes* leaves no room for this argument. Plaintiff's contract with defendant was for "[l]abor, material *and installation*." (Emphasis added.) Under *Stokes*, MCL 339.2412(1) does not permit bifurcation of the contract.<sup>10</sup> Therefore, because the installation of the railing made plaintiff an RMAC, there is no basis for permitting plaintiff to recover simply because its installation was only incidental to its obligations under the contract.

Finally, plaintiff argues that if it is not entitled to be paid for the railing itself, it is entitled to have the

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<sup>10</sup> *Stokes*, 466 Mich at 667.

railing returned to it.<sup>11</sup> Again, however, *Stokes* prevents this remedy. In *Stokes*, the trial court had ruled that if the plaintiff chose not to pay the defendant for the roofing materials, then the defendant was entitled to reclaim the slate roofing materials it had installed as an equitable remedy.<sup>12</sup> The Supreme Court concluded that equity could not be “invoked to avoid application of a statute. Courts must be careful not to usurp the Legislative role under the guise of equity because a statutory penalty is excessively punitive.”<sup>13</sup> The Court<sup>14</sup> then went on to say:

Moreover, as was stated in *Bilt-More Homes, Inc v French*, 373 Mich 693, 699; 130 NW2d 907 (1964):

“Contracts by a residential builder not duly licensed are not only voidable but void—and it is not for a trial court to begin the process of attrition whereby, in appealing cases, the statutory bite is made more gentle, until eventually the statute is made practically innocuous and the teeth of the strong legislative policy effectively pulled. If cases of such strong equities eventually arise that the statute does more harm than good the legislature may amend it . . . .”

While I do not necessarily disagree with plaintiff's position that there is a certain inequity in defendant's being able to keep the railing without paying for it, the law is clear that there is no remedy available to plaintiff to avoid that result.

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<sup>11</sup> The trial court originally ruled that plaintiff was entitled to the return of the railing. The trial court reversed this conclusion on defendant's motion for reconsideration.

<sup>12</sup> *Stokes*, 466 Mich at 663.

<sup>13</sup> *Id.* at 671-672.

<sup>14</sup> *Id.* at 672.

In sum, by installing the railing rather than just supplying the railing, plaintiff was required to have an RMAC license. Being unlicensed, plaintiff is precluded by statute from enforcing its contract with defendant, including payment for the railing itself.

I would affirm.

## 1373 MOULIN, LLC v WOLF

Docket No. 360569. Submitted May 11, 2022, at Detroit. Decided May 26, 2022, at 9:15 a.m.

Plaintiff, 1373 Moulin, LLC, brought an action in the Oakland Circuit Court against Deana Wolf and other defendants to determine title to real property located at 1373 Moulin in Madison Heights, Michigan. In 2006, Wolf purchased the property and granted two mortgages to defendant Wilmington Finance, Inc., to secure debts for \$91,500 (the first mortgage) and \$30,500 (the second mortgage). In 2008, Wolf defaulted on the first mortgage. Wilmington's successor, defendant Litton Loan Servicing, LP, initiated proceedings for foreclosure by advertisement. On December 9, 2008, Litton obtained a sheriff's deed for the property. The redemption period was set to expire on June 9, 2009. On February 9, 2009, Denise Bailey, on behalf of Litton, executed an affidavit stating that Litton and Wolf agreed to set aside the sheriff's sale, thus reinstating the first mortgage. The affidavit was recorded, and Wolf continued to possess the property and made payments on the first mortgage. In May 2020, Wolf and plaintiff entered into a purchase agreement concerning the property. Devon Title Agency prepared the closing documents. The Commitment for Title Insurance included requirements that both mortgages be discharged. Devon's escrow agreement provided for a payoff of \$52,894.50 for the first mortgage and a payoff of \$35,000 for the second mortgage. The closing took place in August 2020, and a total of \$87,894.50 was withheld from the sale proceeds. On August 25, 2020, a warranty deed conveying the property from Wolf to plaintiff was recorded. Devon issued a \$52,894.50 payment to defendant PHH Mortgage Services with a request that the first mortgage be paid in full. In October 2020, Mortgage Electronic Registration Systems, Inc., as nominee for Wilmington, issued and recorded a statement of discharge for the first mortgage. The statement of discharge made no mention of the second mortgage, and Wolf later requested a payoff statement concerning the second mortgage. In November 2020, Dyck O'Neal, Inc., acting as a debt collector, notified Wolf that she owed a debt of \$74,723.68 on the second mortgage. Payments were not made. After the second mortgage was assigned to Dyck O'Neal,

Dyck O'Neal initiated foreclosure proceedings. Plaintiff brought this action in November 2021, alleging that the February 2009 affidavit was ineffective to set aside the mortgage foreclosure sale, thereby resulting in the second mortgage being extinguished. Dyck O'Neal requested a declaration that the second mortgage was a valid and enforceable lien against the property. On November 30, 2021, defendant Arvind Malavia purchased the property at a sheriff's sale. On December 6, 2021, plaintiff filed its first amended complaint and named Malavia as a defendant. The allegations remained essentially unchanged. Plaintiff moved for summary disposition, and Dyck O'Neal filed a cross-motion for summary disposition. The trial court, Victoria A. Valentine, J., granted Dyck O'Neal's cross-motion and dismissed all the parties and claims. Plaintiff appealed.

The Court of Appeals *held*:

1. MCR 7.203(A)(2) provides that the Court of Appeals has jurisdiction of an appeal of right filed by an aggrieved party from a judgment or order of a court or tribunal from which appeal of right to the Court of Appeals has been established by law or court rule. A party is aggrieved by a judgment or order when it operates on the party's rights and property or bears directly on its interest. To be aggrieved, one must have some interest of a pecuniary nature in the outcome of the case and not a mere possibility arising from some unknown and future contingency. In this case, plaintiff argued that it had fee simple interest in the property. Plaintiff was an aggrieved party because the trial court's order operated on plaintiff's alleged rights and property and because plaintiff had a pecuniary interest in the outcome of the case.

2. 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, the district court entered a judgment of possession. However, plaintiff appealed that order, and the appeal was then pending in the Oakland Circuit Court. Consequently, because the district court's decision to enter the judgment of possession could have been overturned and because Malavia's interest in the property hinged on the legal effect of the February 2009 affidavit, plaintiff's argument was considered on appeal.

3. In a quiet-title action, the plaintiff has the initial burden of establishing a prima facie case of title. If the plaintiff establishes a prima facie case of title, the burden shifts to the defendant to prove superior right or title. MCL 565.451a(b) provides that an affidavit stating facts relating to knowledge of the happening of any condition or event that may terminate an estate or interest in real property made by any person having knowledge of the facts

and competent to testify concerning those facts in open court may be recorded in the office of the register of deeds of the county where the real property is situated. In this case, plaintiff sought a declaration that it held fee simple title independently from the second mortgage, which plaintiff alleged was extinguished after the 2008 foreclosure. In February 2009, a representative of Litton filed an affidavit that stated facts about a “happening of [an] . . . event” that affected Litton’s and Wolf’s interest in the property. Specifically, the representative averred that Litton had reached an agreement with Wolf that it would agree to set aside the sheriff’s sale, thus reinstating and reviving the first mortgage if Wolf complied with certain conditions. Wolf complied with the conditions, which then resulted in the execution and recording of the affidavit. At the time the affidavit was executed and recorded, Wolf still had a present interest in the property as the holder of the redemption rights. Wolf paid off the first mortgage in 2020 after she sold the property to plaintiff. There was no indication in the record that Wolf had ever argued that the agreement with Litton was invalid. Accordingly, the affidavit contained information within the scope of MCL 565.451a(b) and therefore had legal effect. Because the undisputed evidence established that the second mortgage was not extinguished in 2009, Dyck O’Neal had an interest in the property by virtue of the lien. Therefore, the trial court did not err by granting summary disposition in favor of Dyck O’Neal.

Affirmed.

*Kutinsky PC (by Adam Kutinsky) and Kitch Drutchas Wagner Valitutti & Sherbrook (by Christina A. Ginter) for 1373 Moulin, LLC.*

*Law Office of Ryan B. Stearn, PC (by Ryan B. Stearn) for Dyck O’Neal, Inc.*

*Dykema Gossett PLLC (by Dawn N. Williams) for PHH Mortgage Corporation and Litton Loan Servicing, LP.*

*Law Offices of Aaron D. Cox, PLLC (by Aaron D. Cox and Brian C. Gurta) for Arvind Malavia.*

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

CAMERON, J. Plaintiff, 1373 Moulin, LLC, brought this action to determine title to real property located at 1373 Moulin in Madison Heights, Michigan (the property). Plaintiff appeals the trial court's March 7, 2022 order, which denied plaintiff's motion for summary disposition and granted defendant Dyck O'Neal, Inc.'s cross-motion for summary disposition. We affirm.

#### I. BACKGROUND

The question in this case is whether plaintiff received unencumbered title to the property or whether the property was subject to a mortgage interest held by Dyck O'Neal. In 2006, defendant Deana Wolf purchased the property. Wolf granted two mortgages to defendant Wilmington Finance, Inc. (Wilmington) to secure debts for \$91,500 (the first mortgage) and \$30,500 (the second mortgage), respectively. In 2008, Wolf defaulted on the first mortgage. Wilmington's successor, defendant Litton Loan Servicing, LP (Litton) initiated proceedings for foreclosure by advertisement. On December 9, 2008, Litton obtained a sheriff's deed for the property. The redemption period was set to expire on June 9, 2009.

On February 9, 2009, Denise Bailey, on behalf of Litton, executed an affidavit. It provides, in relevant part:

4. That Litton Loan Servicing LP, has made an agreement with Deana Wolf, a single woman, that under certain terms and conditions, it would agree to set aside the sheriff's sale, thus reinstating and reviving the [first] mortgage.

5. That Deana Wolf, a single woman, has complied with those terms and conditions set down by Litton Loan Servicing LP.

6. That having complied with Litton Loan Servicing LP[s], terms and conditions, Litton Loan Servicing LP, agrees to set aside the . . . Sheriff's Deed, making it void and of no force or effect, thus reinstating and reviving the [first] mortgage and Note, as if the foreclosure had not occurred.

7. That this affidavit is to be recorded in order to perfect record title, and to show that the Sheriff's Deed on Mortgage Sale, dated December 9, 2008, and recorded December 16, 2008 . . . is void and of no force or effect.

8. That the [first] mortgage . . . is hereby reinstated and is again in full force and effect.

The affidavit was recorded. Wolf continued to possess the property and made payments on the first mortgage. It is unclear whether Wolf made payments on the second mortgage.

In May 2020, Wolf and plaintiff entered into a purchase agreement concerning the property. Devon Title Agency (Devon) prepared the closing documents. The Commitment for Title Insurance included requirements that both mortgages be discharged. Devon's escrow agreement provided for a payoff of \$52,894.50 for the first mortgage and a payoff of \$35,000 for the second mortgage. The closing took place in August 2020, and a total of \$87,894.50 was withheld from the sale proceeds. On August 25, 2020, a warranty deed conveying the property from Wolf to plaintiff was recorded. Devon issued a \$52,894.50 payment to defendant PHH Mortgage Services (PHH) with a request that the first mortgage be paid in full.<sup>1</sup> In October 2020, Mortgage Electronic Registration Systems, Inc., as nominee for Wilmington, issued and recorded a statement of discharge for the first mortgage. The

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<sup>1</sup> The balance of \$35,000 remained in escrow.



statement of discharge made no mention of the second mortgage, and Wolf later requested a payoff statement concerning the second mortgage.

In November 2020, Dyck O’Neal, acting as a debt collector, notified Wolf that she owed a debt of \$74,723.68 on the second mortgage. Payments were not made. After the second mortgage was assigned to Dyck O’Neal, Dyck O’Neal initiated foreclosure proceedings.

In November 2021, plaintiff filed suit against Wolf, Dyck O’Neal, Wilmington, Litton, and PHH. In relevant part, plaintiff alleged that the February 2009 affidavit was ineffective to set aside the mortgage foreclosure sale, thereby resulting in the second mortgage being extinguished. Plaintiff sought an order declaring that it held “absolute fee title” to the property, declaring that the property was not encumbered by the second mortgage, and requiring Wilmington, Litton, and PHH to “take all necessary actions to vest legal title in [plaintiff].” Plaintiff also sought compensation for “litigation costs, impairment of vendibility, [and] lost rents and interest” under MCL 565.108. Dyck O’Neal filed a cross-claim against Wolf for breach of contract. Dyck O’Neal requested a declaration that the second mortgage was a valid and enforceable lien against the property.<sup>2</sup>

On November 30, 2021, defendant Arvind Malavia purchased the property at a sheriff’s sale. On December 6, 2021, plaintiff filed its first amended complaint, which named Malavia as a defendant. The allegations remained essentially unchanged.

Plaintiff moved for summary disposition, and Dyck O’Neal filed a cross-motion for summary disposition.

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<sup>2</sup> A default was later entered against Wolf.

The parties' motions mainly focused on the validity of the February 2009 affidavit and whether the second mortgage was extinguished in 2009. On March 7, 2022, the trial court denied plaintiff's motion for summary disposition, granted Dyck O'Neal's cross-motion for summary disposition, and dismissed all the parties and all the claims. This appeal followed.

## II. JURISDICTIONAL CHALLENGE

At the outset, we must address Malavia's argument that this Court lacks jurisdiction to decide this case because plaintiff is not an aggrieved party. We conclude that Malavia's argument is without merit.

This Court reviews de novo whether it has jurisdiction. *Chen v Wayne State Univ*, 284 Mich App 172, 191; 771 NW2d 820 (2009). MCR 7.203(A)(2) provides that this Court "has jurisdiction of an appeal of right *filed by an aggrieved party* from" "[a] judgment or order of a court or tribunal from which appeal of right to the Court of Appeals has been established by law or court rule." (Emphasis added.) "An aggrieved party is not one who is merely disappointed over a certain result. Rather, . . . a litigant must have suffered a concrete and particularized injury . . ." *Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286, 291; 715 NW2d 846 (2006). "[A] litigant on appeal must demonstrate an injury arising from . . . the actions of the trial court . . . rather than an injury arising from the underlying facts of the case." *Id.* at 292. As stated in *Grace Petroleum Corp v Pub Serv Comm*, 178 Mich App 309, 312-313; 443 NW2d 790 (1989):

An appeal can only be taken by parties who are affected by the judgment appealed from. There must be some substantial rights of the parties which the judgment would prejudice. *A party is aggrieved by a judgment or order*

*when it operates on his rights and property or bears directly on his interest. To be aggrieved, one must have some interest of a pecuniary nature in the outcome of the case, and not a mere possibility arising from some unknown and future contingency.* [Emphasis added.]

Additionally, “MCL 600.2932(1) reflects the Legislature’s intent to confer standing on individuals claiming an interest in real property. The statute authorizes suits to determine competing parties’ respective interests in land[.]” *Trademark Props of Mich, LLC v Fed Nat’l Mtg Ass’n*, 308 Mich App 132, 137; 863 NW2d 344 (2014) (quotation marks and citation omitted; alteration in original). See also *Wilmington Savings Fund Society, FSB v Clare*, 323 Mich App 678, 685; 919 NW2d 420 (2018).

In this case, plaintiff argues that it has fee simple interest in the property and that Dyck O’Neal and Malavia do not have interests in the property because the second mortgage was extinguished. The trial court disagreed with plaintiff and entered an order, which effectively resulted in a declaration that the second mortgage was a valid and enforceable lien against the property. Because the trial court’s order “operates on [plaintiff’s alleged] rights and property” and because plaintiff has a pecuniary interest in the outcome of this case, we conclude that plaintiff is an aggrieved party.

While plaintiff is not entitled to relief for the reasons discussed later in this opinion, the fact that plaintiff did not have viable claims does not deprive plaintiff of standing. See *Trademark Props of Mich, LLC*, 308 Mich App at 136-137 (“Standing in no way depends on the merits of the case. When a cause of action exists under law, or when the Legislature has expressly conferred standing, those circumstances are sufficient

to establish standing.”) (quotation marks and citations omitted). Malavia’s jurisdictional argument therefore fails.

### III. MOOTNESS

Malavia argues that this Court should dismiss the instant appeal as moot because the redemption period “terminated on April 4, 2022, pursuant to MCL 600.3238(10).” We decline to dismiss the appeal.

“Whether an issue is moot is a question of law that this Court reviews de novo. Michigan Courts exist to decide actual cases and controversies . . . . A matter is moot if [a] Court’s ruling cannot for any reason have a practical legal effect on the existing controversy.” *Bailey v Antrim Co*, 341 Mich App 411, 419; 990 NW2d 372 (2022) (quotation marks and citations omitted; alterations in original).

On November 30, 2021, Malavia purchased the property at a sheriff’s sale, and the redemption period was set to expire on May 30, 2022. Prime Property Investors, on behalf of Malavia, served a notice of inspection on plaintiff and “All Occupants.” The notice stated that Malavia had purchased the property at a foreclosure sale and requested “the rightful opportunity to conduct an interior inspection of the property pursuant [to] MCL 600.3237 and MCL 600.3238” on December 3, 2021. Plaintiff responded that Malavia’s sheriff’s deed related “to a junior mortgage that was discharged . . . following foreclosure of a senior mortgage held by Wilmington Finance, Inc.” Plaintiff alleged that Malavia’s claim of ownership for the property was therefore “invalid” and requested that Malavia “cease and desist all efforts to . . . assert rights under the November 30, 2021 sheriff’s deed.”

Malavia filed a summary proceeding action for possession in the 43rd District Court. On April 4, 2022, the district court entered a judgment of possession in favor of Malavia. The order permitted Malavia to obtain an order of eviction if plaintiff and other occupants did not vacate the premises on or before April 14, 2022.

MCL 600.3238, which governs foreclosures of real estate mortgages by advertisement, states, in relevant part:

(1) After a foreclosure sale under this chapter and providing notice under [MCL 600.3237], the purchaser at the sale may inspect the property, including the exterior and interior of any structures on the property, as provided in this section.

(2) The purchaser may conduct an initial inspection of the interior of any structures on the property. In addition to the notice provided in [MCL 600.3237], the purchaser shall provide notice to the mortgagor by certified mail, physical posting on the property, or in any manner reasonably calculated to achieve actual notice of the purchaser's intent to inspect the property at least 72 hours in advance and shall set the time of the inspection at a reasonable time of day, in coordination with the mortgagor if possible.

\* \* \*

(6) If an inspection under this section is unreasonably refused or if damage to the property is imminent or has occurred, the purchaser may immediately commence summary proceedings for possession of the property under [MCL 600.5701 *et seq.*] or file an action for any other relief necessary to protect the property from damage. If a purchaser commences an action for possession or any other relief under this section, the purchaser may also name as a party to the action any person who may redeem the property under [MCL 600.3240].

(7) Before commencing summary proceedings for possession of the property under this section, the purchaser shall provide notice to the mortgagor by certified mail, physical posting on the property, or in any other manner reasonably calculated to achieve actual notice, that the purchaser intends to commence summary proceedings if the damage or condition causing reasonable belief that damage is imminent is not repaired or corrected within 7 days after receipt of the notice.

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(10) If a judgment for possession is entered in favor of the purchaser in an action under [MCL 600.5701 *et seq.*] as described in [MCL 600.3238(6)], the right of redemption under [MCL 600.3240] is extinguished and title to the property vests in the purchaser as provided in [MCL 600.3236] as to all persons against whom judgment was entered.

Thus, a purchaser at a foreclosure sale is permitted to inspect the property if the purchaser provides the proper notice. MCL 600.3238(1). “If an inspection . . . is unreasonably refused,” the purchaser is permitted to “immediately commence summary proceedings for possession of the property under [MCL 600.5701 *et seq.*] . . .” MCL 600.3238(6). “If a judgment for possession is entered in favor of the purchaser,” “the right of redemption . . . is extinguished and title to the property vests in the purchaser . . . as to all persons against whom judgment was entered.” MCL 600.3238(10).

In this case, the district court entered a judgment of possession. However, plaintiff filed an appeal from that order, and the appeal is currently pending in the Oakland Circuit Court. Consequently, because the district court’s decision to enter the judgment of possession could be overturned and because Malavia’s inter-

est in the property hinges on the legal effect of the February 2009 affidavit, we will consider plaintiff's argument on appeal.<sup>3</sup>

#### IV. LEGAL EFFECT OF THE AFFIDAVIT

Plaintiff argues that the trial court erred by granting summary disposition in favor of Dyck O'Neal. According to plaintiff, the February 2009 affidavit did not have legal effect, and the second mortgage was extinguished, thereby leaving Dyck O'Neal without an interest in the property. We disagree.

##### A. STANDARDS OF REVIEW AND GENERAL PRINCIPLES OF LAW

"Actions to quiet title are equitable in nature, and equitable rulings are reviewed de novo." *Houston v Mint Group, LLC*, 335 Mich App 545, 557; 968 NW2d 9 (2021). A trial court's decision regarding a motion for summary disposition is also reviewed de novo. *Glasker-Davis v Auvenshine*, 333 Mich App 222, 229; 964 NW2d 809 (2020). Although the trial court did not specify the grounds for granting Dyck O'Neal's motion for summary disposition and for denying plaintiff's motion for summary disposition, it relied on documentary evidence to support its decisions. Accordingly, MCR 2.116(C)(10) is the appropriate basis for review. See *BC Tile & Marble Co, Inc v Multi Bldg Co, Inc*, 288 Mich

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<sup>3</sup> In so indicating, we are in no way commenting on the district court's April 4, 2022 decision to enter the judgment of possession. Indeed, that issue is not directly before us. We are also not considering plaintiff's arguments that the November 2021 sheriff's sale is void because of Dyck O'Neal's alleged failure "to comply with the foreclosure statute . . . ." Plaintiff did not seek to set aside the foreclosure in the first amended complaint. See *Bailey*, 341 Mich App at 424 ("A party is bound by [its] pleadings, and it is not permissible to litigate issues or claims that were not raised in the complaint[.]") (quotation marks and citation omitted; alterations in original).

App 576, 582; 794 NW2d 76 (2010) (“Where the parties rely on documentary evidence, appellate courts proceed under the standards of review applicable to a motion made under MCR 2.116(C)(10).”) (quotation marks and citation omitted).

A motion under MCR 2.116(C)(10) . . . tests the factual sufficiency of a claim. When considering such a motion, a trial court must consider all evidence submitted by the parties in the light most favorable to the party opposing the motion. A motion under MCR 2.116(C)(10) may only be granted when there is no genuine issue of material fact. A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ. [*El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 160; 934 NW2d 665 (2019) (quotation marks, citations, and emphasis omitted).]

This Court “review[s] de novo a trial court’s interpretation and application of a statute.” *Grand Rapids v Brookstone Capital, LLC*, 334 Mich App 452, 457; 965 NW2d 232 (2020). “The primary goal of statutory interpretation is to give effect to the intent of the Legislature. If the language of a statute is clear and unambiguous, the statute must be enforced as written and no further judicial construction is permitted.” *Mich Head & Spine Institute, PC v Mich Assigned Claims Plan*, 331 Mich App 262, 272; 951 NW2d 731 (2019) (quotation marks and citations omitted).

#### B. ANALYSIS

An action to quiet title is equitable in nature and is “available to a party in possession of real property who [seeks] to clear the property’s title as against the world.” *Adams v Adams*, 276 Mich App 704, 711; 742 NW2d 399 (2007). In a quiet-title action, the plaintiff “has the initial burden of establishing a prima facie



case of title . . . .” *Special Prop VI LLC v Woodruff*, 273 Mich App 586, 590; 730 NW2d 753 (2007). If the plaintiff establishes a prima facie case of title, the burden shifts to the defendant to prove superior right or title. *Beulah Hoagland Appleton Qualified Personal Residence Trust v Emmet Co Rd Comm*, 236 Mich App 546, 550; 600 NW2d 698 (1999).

In this case, plaintiff sought a declaration that it holds fee simple title independently from the second mortgage, which plaintiff alleges was extinguished after the 2008 foreclosure. We conclude that the trial court properly granted summary disposition in favor of Dyck O’Neal on this claim.

In 2006, Wolf granted two mortgages. In 2008, Wolf defaulted on the first mortgage, and Litton initiated proceedings for foreclosure by advertisement. On December 9, 2008, Litton obtained a sheriff’s deed for the property. The redemption period was set to expire on June 9, 2009. Thus, Wolf had six months after the sale was completed to “redeem the property by paying the requisite amount . . . .” *Bryan v JPMorgan Chase Bank*, 304 Mich App 708, 713; 848 NW2d 482 (2014). If Wolf failed to do so, the sheriff’s deed would “become operative,” title would vest in Litton, and all of Wolf’s “rights in and to the property [would be] extinguished.” *Id.* (quotation marks and citation omitted). Additionally, the second mortgage would have been extinguished. See *In re \$55,336.17 Surplus Funds*, 319 Mich App 501, 509 n 1; 902 NW2d 422 (2017) (holding that a junior mortgagee’s interests in property are extinguished after the statutory redemption period expires and after the mortgagor fails to redeem the property).

Before the redemption period expired, however, a representative of Litton executed an affidavit, which provides, in relevant part, as follows:

4. That Litton Loan Servicing LP, has made an agreement with Deana Wolf, a single woman, that under certain terms and conditions, it would agree to set aside the sheriff's sale, thus reinstating and reviving the [first] mortgage.

5. That Deana Wolf, a single woman, has complied with those terms and conditions set down by Litton Loan Servicing LP.

6. That having complied with Litton Loan Servicing LP[s], terms and conditions, Litton Loan Servicing LP, agrees to set aside the . . . Sheriff's Deed, making it void and of no force or effect, thus reinstating and reviving the [first] mortgage and Note, as if the foreclosure had not occurred.

7. That this affidavit is to be recorded in order to perfect record title, and to show that the Sheriff's Deed on Mortgage Sale, dated December 9, 2008, and recorded December 16, 2008 . . . is void and of no force or effect.

8. That the [first] mortgage . . . is hereby reinstated and is again in full force and effect.

The affidavit was recorded. Thereafter, Wolf continued to possess the property until the property was sold to plaintiff in 2020. It is undisputed that Wolf made payments on the first mortgage during the time that she possessed the property and that Wolf paid off the first mortgage when she sold the property to plaintiff.

On appeal, plaintiff does not challenge the validity of Wolf and Litton's underlying agreement to set aside the foreclosure sale, invalidate the sheriff's deed, and reinstate the first mortgage. Rather, plaintiff argues that the February 2009 affidavit did not have legal effect under MCL 565.451a(b), which provides:

An affidavit stating facts relating to any of the following matters that may affect the title to real property in this state and made by any person having knowledge of the facts and competent to testify concerning those facts in

open court may be recorded in the office of the register of deeds of the county where the real property is situated:

\* \* \*

(b) Knowledge of the happening of any condition or event that may terminate an estate or interest in real property.

Because the statute does not define “condition” or “event,” it is proper to consult dictionary definitions. See *Salem Springs, LLC v Salem Twp*, 312 Mich App 210, 218; 880 NW2d 793 (2015). *Random House Webster’s College Dictionary* (1997) defines “condition” as “a restricting, limiting, or modifying circumstance” and defines “event” as “something that happens or is regarded as happening; an occurrence, esp. one of some importance.”

In *Wilmington Savings Fund Society, FSB v Clare*, this Court considered whether an “expungement affidavit” filed under MCL 565.451a(b) could serve to expunge a foreclosure sale and revive an extinguished mortgage. *Clare*, 323 Mich App at 686-690. The *Clare* Court held as follows:

The plain language of [MCL 565.451a(b)] does not include any indication that an affidavit may be used to *create* a condition. It necessarily follows that a party cannot unilaterally revoke a foreclosure sale by recording an affidavit that is itself the claimed condition. There is no statutory basis for concluding that the Legislature intended for a party to be able to rescind a foreclosure sale and revive a mortgage by merely recording an affidavit that it “agrees” to do so. We may not read language into unambiguous statutes. [*Id.* at 689.]

Thus, the *Clare* Court held that “a party cannot set aside a foreclosure sale simply through the unilateral filing of an expungement affidavit.” *Id.* at 687.

Unlike the mortgagee in *Clare*, a representative of Litton filed an affidavit that stated facts about a “happening of [an] . . . event” that affected Litton and Wolf’s interest in the property. Specifically, the representative averred that Litton had reached an agreement with Wolf that “it would agree to set aside the sheriff’s sale, thus reinstating and reviving the [first] mortgage” if Wolf complied with certain conditions. Wolf complied with the conditions, which then resulted in the execution and the recording of the affidavit. Thus, unlike the affidavit in *Clare*, the affidavit in this case did not create the condition that affected an interest in the property. Rather, Wolf and Litton’s independent agreement created the condition, and the affidavit merely stated facts concerning the representative’s knowledge of that agreement.

Additionally, at the time the affidavit was executed and recorded, Wolf still had a present interest in the property as the holder of the redemption rights. See *In re \$55,336.17 Surplus Funds*, 319 Mich App at 509 n 1 (a mortgagor does “not lose all interest in the property until the time for redemption under the foreclosure decree [has] expired”). See also *Senters v Ottawa Savings Bank, FSB*, 443 Mich 45, 50; 503 NW2d 639 (1993) (“If the mortgagee purchases the property at the [foreclosure] sale, it stands in the position of an ordinary purchaser and obtains an ownership interest in the land, subject to the mortgagor’s opportunity of redemption.”). This is unlike the mortgagor in *Clare*. Indeed, the affidavit in *Clare* was filed *years* after the redemption period had expired and after the mortgagee that had purchased the property purported to convey the property to another entity. *Clare*, 323 Mich App at 681-682. While plaintiff argues that the affidavit was unilaterally filed because only a representative from Litton signed it, the assertions in the affidavit

and the fact that Wolf continued to retain possession of the property while making payments on the first mortgage supports that the parties had reached a mutual agreement. Additionally, as already stated, Wolf paid off the first mortgage in 2020 after she sold the property to plaintiff. There is no indication in the record that Wolf had ever argued that the agreement with Litton was invalid. In sum, the affidavit contained information within the scope of MCL 565.451a(b) and therefore had legal effect.<sup>4</sup>

Because the undisputed evidence establishes that the second mortgage was not extinguished in 2009, Dyck O’Neal had an interest in the property by virtue of the lien. Therefore, the trial court did not err by granting summary disposition in favor of Dyck O’Neal on the quiet-title claim and did not err by granting summary disposition in favor of Dyck O’Neal on the slander-of-title claim. See *B & B Investment Group v Gitler*, 229 Mich App 1, 8; 581 NW2d 17 (1998) (“To establish slander of title . . . , a plaintiff must show *falsity*, malice, and special damages, i.e., that the defendant maliciously published false statements that disparaged a plaintiff’s right in property, causing special damages.”) (emphasis added). Given this holding,

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<sup>4</sup> Plaintiff also relies on Standard 16.46 of the Michigan Land Title Standards (5th ed) to support that the affidavit lacked legal effect. However, Standard 16.46 is an adoption of *Clare* and therefore does not alter our conclusion.

it is unnecessary to consider the parties' remaining arguments on appeal.<sup>5</sup>

Affirmed.

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

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<sup>5</sup> We note that Malavia has requested that sanctions be imposed against plaintiff pursuant to MCR 7.216(C). Sanctions for a vexatious appeal may be awarded on this Court's own initiative or when a party files a motion under MCR 7.211(C)(8). MCR 7.216(C)(1). However, "[a] party's request for damages or other disciplinary action under MCR 7.216(C) must be contained in a motion . . . . A request that is contained in any other pleading, including a brief filed under MCR 7.212, will not constitute a motion . . . ." MCR 7.211(C)(8). Thus, a request for sanctions for a vexatious appeal must be made in a proper motion. See *Prentis Family Foundation, Inc v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 60; 698 NW2d 900 (2005). There is no indication that Malavia has separately filed a motion for sanctions at the appellate level. Therefore, we decline to address the issue of whether sanctions are warranted at this time.

## JOHNSON v BOARD OF STATE CANVASSERS

Docket No. 361564. Submitted June 1, 2022, at Lansing. Decided June 1, 2022, at 9:00 a.m. Leave to appeal denied 509 Mich 1015 (2022).

Perry Johnson filed a complaint in the Court of Appeals seeking a writ of mandamus to compel the Board of State Canvassers (the Board), the Secretary of State, and the Bureau of Elections Director to certify his name as a Republican gubernatorial candidate on the August 2, 2022 primary-election ballot. Under MCL 168.53 and MCL 168.544f, Johnson was required to submit nominating petitions with the signatures of at least 15,000 registered electors in order to be included on the primary ballot. He submitted petitions with 23,193 signatures, but staff for the Bureau of Elections (the Bureau) recommended that the petitions be determined insufficient after invalidating 6,983 signatures because the signatures appeared on sheets submitted by individuals whom the Board had determined to be fraudulent-petition circulators. Moreover, the Bureau found that several petition circulators had engaged in fraud across multiple petitions submitted on behalf of multiple candidates. In order to address the apparent widespread fraud, the Bureau used a modified version of its standard approach in order to process the nominating petitions, which added the step of having staff conduct a targeted signature check across each circulator's sheets. The Board held a public meeting on May 26, 2022, during which it intended to make a final determination on whether to accept the Bureau's recommendation to determine Johnson's petitions insufficient. However, the Board deadlocked along partisan lines, and Johnson filed his complaint the next day as well as a motion for immediate consideration. The Court of Appeals granted the motion for immediate consideration and ordered that the matter be submitted on the briefs filed and without oral argument under MCR 7.206(D)(4).

The Court of Appeals *held*:

The Board of State Canvassers has a duty under MCL 168.552 to determine whether the signatures on a nominating petition are valid, including the signatures of the petition circulators;

whether they are the signatures of registered voters; and whether there are sufficient valid signatures to certify the petition. Under MCL 168.552(8), subject to MCL 168.552(13), the Board may check a doubtful signature against the qualified voter file in order to determine the validity of a signature. Additionally, MCL 168.552(8) requires the Board to verify the registration or genuineness of a signature as required by MCL 168.552(13). MCL 168.552(13) allows the Board the discretion to use the qualified voter file when verifying the registration of signers, but it requires the Board to use the qualified voter file when determining “the genuineness of a signature on a petition.” According to Johnson, he was entitled to a writ of mandamus ordering the certification of his name for the ballot because he submitted at least 15,000 signatures and signatures on petitions are presumed valid, with the burden being on the challenger to prove by clear, convincing, and competent evidence that the signatures are invalid. Johnson further argued that signatures may only be invalidated using the procedure set forth in MCL 168.552(8) and (13) and that, because the statute uses the singular form “a signature,” the Board had a clear legal duty to check each individual signature against the qualified voter file before it could deem the signature invalid. However, Johnson’s argument did not account for MCL 168.544c(8) and (10), which prohibit an individual from signing a petition with a name other than their own or from signing a petition with multiple names. If, after a canvass, the Board determines that an individual has knowingly and intentionally failed to comply with these provisions, the Board may disqualify obviously fraudulent signatures on a petition that violated MCL 168.544c(8) or (10) without checking the signatures against local registration records. Therefore, the Board had a clear legal duty under the statute to investigate, but it did not have a duty to compare each fraudulent signature against the qualified voter file. Because the Board had the discretion not to check each individual signature submitted by the fraudulent-petition circulators, the act that Johnson sought to compel the Board, the Bureau, and the Secretary of State to perform was not ministerial in nature. Given that Johnson failed to show that the requested act was ministerial or that the Board had a clear legal duty to act, he was not entitled to mandamus.

Complaint for mandamus denied.

ELECTIONS – NOMINATING PETITIONS – CANVASSING – CHECKING SIGNATURES FOR VALIDITY.

MCL 168.552 requires the Board of State Canvassers to canvass nominating petitions to determine whether they have been signed



by the requisite number of qualified and registered electors and to use the qualified voter file to determine “the genuineness of a signature on a petition”; although MCL 168.552(3) uses the singular form “a signature,” the Board is not required to check every signature submitted on a nominating petition against the qualified voter file; rather, under MCL 168.544c, the Board may disqualify obviously fraudulent signatures on a petition without checking the signatures against the qualified voter file after determining that the circulators of those petitions violated MCL 168.544c(8) or (10) by signing a petition with a name other than their own or by signing a petition with multiple names.

*Smith Haughey Rice & Roegge* (by *Jonathan B. Koch, D. Adam Tountas, and Rachael M. Roseman*) for Perry Johnson.

*Dana Nessel*, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Heather S. Meingast*, Assistant Attorney General, for the Bureau of Elections Director.

Amici Curiae:

*Honigman LLP* (by *Andrea L. Hansen* and *Douglas E. Mains*) for Count MI Vote, doing business as Voters Not Politicians.

*Dykema Gossett PLLC* (by *Steven C. Liedel, Gary P. Gordon, Kyle M. Asher, and Paul J. Mooney*) for Carol Bray.

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

PER CURIAM. In this expedited matter,<sup>1</sup> plaintiff, Perry Johnson, has filed an original complaint seeking a writ of mandamus compelling defendants, the Board of State Canvassers (the Board), the Secretary of State,

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<sup>1</sup> *Johnson v Bd of State Canvassers*, unpublished order of the Court of Appeals, entered May 27, 2022 (Docket No. 361564).

and the Bureau of Elections Director (the Director),<sup>2</sup> to certify his name as a Republican candidate for the office of Governor on the August 2, 2022 primary-election ballot. We conclude that Johnson has not carried his burden of establishing that he is entitled to a writ of mandamus, so we deny his complaint.

#### I. BASIC FACTS

In order to be included on the August 2, 2022 primary ballot as a prospective candidate for the office of Governor, Johnson was required to submit nominating petitions that included the signatures of at least 15,000 registered electors. See MCL 168.53 and MCL 168.544f. Prior to the applicable filing deadline, he submitted nominating petitions that included a total of approximately 23,193 signatures, each of which was purportedly the signature of a different registered elector. Thereafter, on May 23, 2022, staff for the Bureau of Elections (the Bureau) issued a report recommending that Johnson’s petition be determined insufficient.<sup>3</sup>

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<sup>2</sup> The Director is appointed by the Secretary of State and supervises the Bureau of Elections. MCL 168.32(1); MCL 168.34. The Director is “vested with the powers and shall perform the duties of the secretary of state under his or her supervision, with respect to the supervision and administration of the election laws.” MCL 168.32(1). As “a nonmember secretary of the state board of canvassers,” *id.*, the Director supervises the Bureau as it assists the Board in canvassing petitions.

<sup>3</sup> Nonparty Carol Bray filed a sworn complaint with the Board challenging the validity and genuineness of the signatures on Johnson’s nominating petitions. The Board, however, did not commence an investigation of her complaint because it had already determined that Johnson’s nominating petitions were insufficient.

The staff report included the following summary:

**NUMBER OF VALID SIGNATURES REQUIRED:**

15,000 signatures.

**TOTAL FILING:** 23,193 signatures.

**RESULT OF REVIEW:** 13,800 facially valid signatures,  
9,393 invalid signatures.

|                                                                                                                                                                                                             |              |        |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------|--------|
| Total number of signatures filed                                                                                                                                                                            |              | 23,193 |
| Not registered                                                                                                                                                                                              | <i>Less:</i> | 68     |
| Jurisdiction errors (no city in county known by name given by signer, dual jurisdiction entry, jurisdiction name given by signer does not align with address)                                               | <i>Less:</i> | 1,136  |
| Date errors (no date given by signer, date of birth entered, or date given by signer is later than circulator's date of signing)                                                                            | <i>Less:</i> | 269    |
| Address errors (no street address or rural route given)                                                                                                                                                     | <i>Less:</i> | 81     |
| Circulator errors (circulator did not sign or date petition, etc.)                                                                                                                                          | <i>Less:</i> | 239    |
| Signature errors (no signature or incomplete signature)                                                                                                                                                     | <i>Less:</i> | 15     |
| Miscellaneous errors (signatures of dubious authenticity where the petition signature does not match the signature on file or multiple signatures appear to have been written by the same individual, etc.) | <i>Less:</i> | 402    |
| Number of signatures on sheets submitted by fraudulent-petition circulators                                                                                                                                 | <i>Less:</i> | 6,983  |

The point of contention in this matter is the 6,983 signatures that were invalidated because they were on sheets submitted by individuals whom the Board de-

terminated to be fraudulent-petition circulators.<sup>4</sup> It is undisputed that, contrary to the traditional methodology employed to canvass a nominating petition, the Bureau used an additional approach due to the volume of signatures submitted by a number of petition circulators who appear to have engaged in widespread fraud across multiple petitions submitted on behalf of multiple candidates. Specifically, the Bureau estimated that “at least 68,000 invalid signatures [were] submitted across 10 sets of nominating petitions” and concluded that “[i]n several instances, the number of invalid signatures submitted by [the fraudulent-petition circulators] was the reason a candidate had an insufficient number of valid signatures.” The Bureau summarized the problem as follows:

These petition sheets tended to display at least one of the following patterns:

- An unusually large number of petition sheets where every signature line was completed, or where every line was completed but one or two lines were crossed out;
- Many sheets showing signs of apparent attempts at “intentional” signature invalidity, including sheets where an entry listed a county in the “city or township” field, or a birth date rather than the date of signing in the “date” field;
- An unusually large number of petition sheets that showed no evidence of normal wear that accompanies circulation, including folding, scuffing, minor water damage from rain, or any of the other characteristics

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<sup>4</sup> Based on the record before this Court, it does not appear that any specific candidates or campaigns were aware of the activities of the individuals who were determined to have provided fraudulent signatures in connection with multiple nominating petitions. Nor does it appear that any civil actions or criminal charges have been brought against those individuals.

that come from sheets being kept on clipboards and handled by multiple people in public or outdoor conditions.

- Sheets that appeared to be “round-tabled[.]” a practice in which a group of individuals passes around sheets with each individual signing one line on each sheet with handwriting different from the circulator’s handwriting, in an attempt to make handwriting and signatures appear authentic and received from actual voters.
- Sheets on which blank and completed lines were randomly interspersed, indicating that a sheet had been submitted “mid-round-table.” In such cases, a sheet was submitted even though the round-tabling process had not been completed.
- Sheets where all ten lines had signatures and partial addresses or dates, but only a random subset were fully completed;
- Sheets on which every instance of the handwriting of certain letters across different signatory lines and sheets, including in the signatures themselves, was near-identical;
- Sets of sheets where the two or three distinct handwriting styles appeared on multiple sheets.

Based on these observations, staff began to compare signatures on the petitions to the [qualified voter file (QVF)]. During its review against the QVF, staff noticed the following:

- Discrepancies in the signature appearing on the petition sheet and the voter’s signature appearing in the Qualified Voter File;
- An unusually high number of signatures corresponding to addresses where the voter was previously but not currently registered to vote;
- An unusually high number of signatures corresponding to formerly registered voters whose registrations were cancelled because the voter had died months or years prior to the date of the signature;
- Several errors in the voters’ names where the name on

the petition was spelled differently than the voters' registration in the QVF or where the petition used the voter's middle name or a diminutive or nickname;

- The jurisdictions listed almost always utilized the mailing address versus the actual jurisdiction.

After review, staff identified across multiple drives numerous circulators that had submitted fraudulent signatures and assembled a list of the names of circulators who had signed multiple petition sheets consisting of invalid signatures. These patter[n]s suggest to staff that the fraudulent circulators were utilizing an outdated mailing list obtained from some source. As more nominating petitions were submitted, staff continued to identify fraudulent sheets and build the list of circulators consistently submitting such sheets.

In order to address the apparent widespread fraud, the Bureau used a modified version of its standard approach to process the nominating petitions. The Bureau explained its modified approach in a May 23, 2022 staff report on fraudulent nominating petitions. That report stated:

The Bureau's standard approach to processing nominating petitions has two stages. First, staff "face reviews" every petition sheet and signature for facial compliance with the Michigan Election Law, which includes: checking that the signature header and the circulator certificate are properly completed; that each signature is accompanied by an address, name, and date; that the city or township in which the signer claimed to reside was in the county written on the signature header; and other issues required for a facially valid sheet or signature. During past face reviews, the Bureau has identified scattered instances of signatures of dubious authenticity, and upon review of the signature removed these from the total of valid signatures[.]

At the conclusion of stage one (face review), staff determines how many signatures have been disqualified for facial errors and . . . calculates the balance of remaining potential valid signatures remaining. If the candidate

now has fewer signatures than the total required to qualify, the Bureau will recommend that the Board determine the petitions insufficient. If the candidate has more signatures remaining than the required number to qualify, the Bureau notes the difference (the “cushion”).

In the second stage, Bureau staff then reviews any challenges to the petition’s sufficiency. . . .

\* \* \*

Because, in the past, the number of signatures of dubious authenticity were typically scattered throughout petitions and relatively small in number, the Bureau has previously not developed a separate review procedure for fraudulent petition sheets. Instead, the Bureau would review sheets and signatures individually if identified during face review or during a challenge. However, because of the unprecedented number of fraudulent petition sheets consistent of [sic] invalid signatures identified during the initial review of petition sheets submitted this election cycle, and the fact that the same fraudulent-petition circulators submitted petition sheets for many different candidates, it was not practical to review these sheets individually during the course of ordinary face review and challenge processing.

Instead, staff utilized an additional step within the processing method described above. Prior to face review, staff reviewed each candidate’s petitions for petitions signed by circulators who were suspected of submitting fraudulent sheets. Signatures appearing on these fraudulent sheets were separated from the remaining petition sheets for each candidate. To verify that these fraudulent petition sheets did not include sheets or individual signatures that were actually valid signatures submitted by registered voters, staff conducted a *targeted signature check* of signatures across each circulator’s sheets for each candidate to confirm that these circulators’ submissions in fact consisted of fraudulent sheets with invalid signatures.<sup>12</sup>

The Bureau determined that all *reviewed* signatures appearing on sheets signed by the fraudulent-petition circulators were invalid. After petition sheets submitted

by the fraudulent-petition circulators were identified, the number of signatures appearing on those sheets was totaled and that total was subtracted from the number of signatures submitted by the candidate. If the candidate had enough potentially valid signatures . . . remaining to avoid immediate disqualification, the petitions were then put through the face review and challenge process described above. If not, Bureau recommended the Board determine the petitions insufficient.

Staff determined that the fraudulent petition sheets consisted of signatures that were invalid because the petitions consisted of names of voters who were not registered in the appropriate jurisdiction, or names of valid registered voters with forged signatures. Staff were able to identify fraudulent petition sheets using a combination of methods. First, staff noted that the signatures, names, addresses, and dates on many of the fraudulent sheets were obviously signed by one or a small number of individuals which can be seen in the [sic] Upon noticing these similarities in handwriting, staff began to check individual signatures and voter information against the Qualified Voter File.

Review showed that a significant percentage of alleged signatories were no longer registered in the jurisdiction because they had moved from the address marked on the petition sheet months or years before. Review also revealed that a number of the alleged signatories' registrations were cancelled because the individual had died prior to the date of signing. None of the reviewed signatures appearing on these petition sheets had redeeming qualities demonstrating a match when compared with the signature on file. [Emphasis added.]

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<sup>12</sup> If this targeted review showed that a circulator had collected legitimate signatures, the circulator was removed from the list of fraudulent-petition circulators and signature appearing on that circulator's petition sheets were added back into the universe of potentially valid signatures.

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With respect to Johnson's nominating petitions, the May 23, 2022 staff report addressed the impact of the fraudulent-petition circulators as follows:

Staff reviewed each petition sheet submitted by Mr. Johnson. During that review, staff flagged each sheet which was signed by a fraudulent-petition circulator. For additional information on sheets submitted by fraudulent-petition circulators, see *Staff Report on Fraudulent Nominating Petitions*.

In total, staff's review of Mr. Johnson's petition sheets identified 9,393 invalid signatures and 13,800 facially valid signatures, which dropped him below the 15,000 threshold and rendered him ineligible for the ballot.

Signatures from the following fraudulent-petition circulators were included in Mr. Johnson's submission:

|                      |                  |
|----------------------|------------------|
| Davon Best           | 60 signatures    |
| Antonio Braxton      | 177 signatures   |
| Brianna Briggs       | 254 signatures   |
| Nicholas Carlton     | 404 signatures   |
| DeShawn Evans        | 401 signatures   |
| Jehvon Evans         | 70 signatures    |
| Justin Garland       | 203 signatures   |
| LeVaughn Hearn       | 108 signatures   |
| Brianna Heron        | 450 signatures   |
| Aaliyah Ingram       | 154 signatures   |
| Niccolo Mastromatteo | 97 signatures    |
| Giovanna Smith       | 460 signatures   |
| Ryan Snowden         | 1,077 signatures |
| Trevon Stewart       | 29 signatures    |
| Stephen Tinnin       | 1,034 signatures |
| Yazmine Vasser       | 576 signatures   |
| Diallo Vaughn        | 440 signatures   |
| William Williams     | 989 signatures   |
|                      | <hr/>            |
|                      | 6,983 signatures |

Distinctive characteristics of petition sheets submitted by fraudulent-petition circulators included all of the following:

**1. Signatures from voters who have been canceled or have not lived at the address on the petition for years.**

Through its review, staff identified a number of fraudulent signatures that were purported to be from voters who had been canceled. Voters were canceled for a variety of reasons which included moving out of state and death. Several signatures also listed an address where the voter has not resided from at least one to eight years prior to signing.

\* \* \*

**2. Misspelled names or addresses.**

In some cases, the voter's name is misspelled, either in the signature block or in the block for the voter's printed name. Misspelling of the purported individual's own name is an indicator of fraud. Although signatures do not need to be legible to be accepted, a large number of signatures in which the proffered signature appears to have a different spelling than the printed name is an indicator of fraud.

\* \* \*

**3. Repeated use of an uncommon signature abbreviation.**

An additional anomaly is the use of a first name and last initial as a signature. Using a first initial and last name (for example, J. Smith) is not uncommon; the nverse (John S.) is rare. Nonetheless, this unusual combination was included throughout the fraudulent petition sheets . . .

\* \* \*

**ADDITIONAL INVALID SIGNATURES IDENTIFIED DURING FACE REVIEW:** As with all candidates, the staff initially conducted a face review of Mr. Johnson's petition sheets. Substantial numbers of signatures were deemed invalid on face review based on the errors described above, with one of the largest numbers coming from jurisdictional errors. . . .

\* \* \*

The petition also included 402 signatures with miscellaneous errors, including signatures of dubious authenticity submitted by circulators other than those listed in the fraudulent-circulator report. For instance, Dulce Amaya Romero submitted 4 petition sheets which 40 signatures of dubious authenticity [sic].

\* \* \*

. . . Mr. Johnson did not meet the threshold for certification to the ballot based on the staff's initial review.<sup>[5]</sup>

On May 26, 2022, the Board held a public meeting at which it intended to make a final determination on whether to accept the staff's recommendation. A motion was made to accept the staff's recommendation that Johnson's nominating petitions were "insufficient," and the Board deadlocked along partisan lines.<sup>6</sup>

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<sup>5</sup> In an affidavit submitted in support of the Board's answer to the complaint, the Director of the Bureau averred that, of the 6,983 signatures invalidated because they were submitted by the fraudulent-petition circulators, the Bureau checked 1,405 (approximately 20.1%) of the signatures against the qualified voter file. None of the signatures that were compared to the qualified voter file were determined to be valid.

<sup>6</sup> We conclude that, although the Board deadlocked on the issue of whether to find Johnson's petitions sufficient or insufficient, its inaction "constitutes an action, which is the equivalent of a determination." *Deleeuw v Bd of State Canvassers*, 263 Mich App 497, 506 n 4; 688 NW2d 847 (2004).

The next day, May 27, 2022, Johnson filed the instant complaint for mandamus, along with a brief in support and a motion seeking immediate consideration. This Court granted immediate consideration and ordered that, pursuant to MCR 7.206(D)(4), the matter would be submitted for decision on the briefs filed without oral argument.

## II. JURISDICTION

As explained in *Citizens for Protection of Marriage v Bd of State Canvassers*, 263 Mich App 487, 491-492; 688 NW2d 538 (2004):

This Court has jurisdiction to entertain a mandamus action against a state officer. MCR 7.203(C)(2); *Comm for Constitutional Reform v Secretary of State*, 425 Mich 336, 338 n 2; 389 NW2d 430 (1986); see also MCL 600.4401 (allowing a party to commence a mandamus action in the Court of Appeals). Whether the defendant had a clear legal duty to perform and whether the plaintiff had a clear legal right to the performance of that duty are questions of law that we review de novo. See *In re MCI*, 460 Mich 396, 442-443; 596 NW2d 164 (1999).

## III. WRIT OF MANDAMUS

“The plaintiff bears the burden of demonstrating entitlement” to a writ of mandamus. *Citizens for Protection of Marriage*, 263 Mich App at 492. “Mandamus is a discretionary writ and an extraordinary remedy.” *Comm to Ban Fracking in Mich v Bd of State Canvassers*, 335 Mich App 384, 394; 966 NW2d 742 (2021). “The writ is one of grace,” and “equitable principles” apply. *Franchise Realty Interstate Corp v Detroit*, 368 Mich 276, 279; 118 NW2d 258 (1962). “The primary purpose of the writ of mandamus is to enforce duties created by law, where the law has established no specific remedy

and where, in justice and good government, there should be one.” *State Bd of Ed v Houghton Lake Community Sch*, 430 Mich 658, 667; 425 NW2d 80 (1988) (citation omitted).

To obtain the extraordinary remedy of a writ of mandamus, the plaintiff must show that (1) the plaintiff has a clear, legal right to performance of the specific duty sought, (2) the defendant has a clear legal duty to perform, (3) the act is ministerial, and (4) no other adequate legal or equitable remedy exists that might achieve the same result. [*Rental Props Owners Ass’n of Kent Co v Kent Co Treasurer*, 308 Mich App 498, 518; 866 NW2d 817 (2014).]

“[A] clear, legal right is one clearly founded in, or granted by, law; a right which is inferable as a matter of law from uncontroverted facts regardless of the difficulty of the legal question to be decided.” *Id.* at 519 (quotation marks and citation omitted). “A ministerial act is one in which the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment.” *Hillsdale Co Senior Servs, Inc v Hillsdale Co*, 494 Mich 46, 58 n 11; 832 NW2d 728 (2013) (quotation marks and citation omitted).

Johnson contends, somewhat inelegantly, that defendants have a clear, legal duty to certify his name for the ballot because he submitted at least 15,000 valid signatures across his nominating petitions. He notes, correctly, that signatures on petitions are presumed valid and that the burden is on the challenger to the signatures to prove by clear, convincing, and competent evidence that the signatures are invalid. *Jaffe v Oakland Co Clerk*, 87 Mich App 281, 285; 274 NW2d 38 (1978); see also *Farm Bureau Mut Ins Co of Mich v Comm’r of Ins*, 204 Mich App 361, 365-368; 514 NW2d 547 (1994). He argues that defendants have a clear

legal duty to invalidate signatures using only the procedure set forth in MCL 168.552(8) and (13).

MCL 168.552 sets forth relatively “detailed procedures for investigating and resolving complaints about nominating petitions,” *Berry v Garrett*, 316 Mich App 37, 43; 890 NW2d 882 (2016), and it also sets forth the Board’s “duties with regard to qualifying petitions,” *Deleeuw v Bd of State Canvassers*, 263 Mich App 497, 500-501; 688 NW2d 847 (2004). The Board’s duty is, in short, “to determine whether the signatures on the petitions are valid, including those of the people who circulate the petitions, whether they are the signatures of registered voters, and whether there are sufficient valid signatures to certify the petitions.” *Id.*

Relevant to this matter, MCL 168.552(8) provides:

Upon the receipt of the nominating petitions, the board of state canvassers shall canvass the petitions to ascertain if the petitions have been signed by the requisite number of qualified and registered electors. *Subject to subsection (13), for the purpose of determining the validity of the signatures, the board of state canvassers may cause a doubtful signature to be checked against the qualified voter file or the registration records by the clerk of a political subdivision in which the petitions were circulated.* If the board of state canvassers receives a sworn complaint, in writing, questioning the registration of or the genuineness of the signature of the circulator or of a person signing a nominating petition filed with the secretary of state, the board of state canvassers shall commence an investigation. *Subject to subsection (13), the board of state canvassers shall verify the registration or the genuineness of a signature as required by subsection (13).* If the board is unable to verify the genuineness of a signature on a petition, the board shall cause the petition to be forwarded to the proper city clerk or township clerk to compare the signatures on the petition with the signatures on the registration record, or in some other manner determine whether the signatures on the petition are valid and

genuine. The board of state canvassers is not required to act on a complaint respecting the validity and genuineness of signatures on a petition unless the complaint sets forth the specific signatures claimed to be invalid and the specific petition for which the complaint questions the validity and genuineness of the signature or the registration of the circulator, and unless the complaint is received by the board of state canvassers within 7 days after the deadline for filing the nominating petitions. [Emphasis added.]

The first emphasized sentence affords the Board discretion to “cause a doubtful signature to be checked” either “against the qualified voter file” or “the registration records by the clerk of a political subdivision in which the petitions were circulated.” Thus, although the first emphasized sentence allows some leeway, that leeway is tempered by the requirements of § 552(13). The second emphasized sentence mandates that when verifying “the registration or the genuineness of a signature,” the Board must comply with § 552(13). MCL 168.552(13) provides:

*The qualified voter file may be used to determine the validity of petition signatures by verifying the registration of signers.* If the qualified voter file indicates that, on the date the elector signed the petition, the elector was not registered to vote, there is a rebuttable presumption that the signature is invalid. If the qualified voter file indicates that, on the date the elector signed the petition, the elector was not registered to vote in the city or township designated on the petition, there is a rebuttable presumption that the signature is invalid. *The qualified voter file shall be used to determine the genuineness of a signature on a petition.* Signature comparisons shall be made with the digitized signatures in the qualified voter file. The county clerk or the board of state canvassers shall conduct the signature comparison using digitized signatures contained in the qualified voter file for their respective investigations. If the qualified voter file does not contain a

digitized signature of an elector, the city or the township clerk shall compare the petition signature to the signature contained on the master card. [Emphasis added.]

The plain language of MCL 168.552(13), therefore, allows the Board the discretion to use or not use the qualified voter file when verifying the registration of signers, but requires the Board to use the qualified voter file when determining “the genuineness of *a* signature on a petition.” The phrase “a signature” is singular. Johnson contends that, as a result, the Board had a clear, legal duty to check each and every signature against the qualified voter file before it could deem the signature invalid. Because the targeted signature check resulted in the Board not checking each and every purportedly invalid signature against the qualified voter file, Johnson believes that he is entitled to relief. His argument, however, does not properly account for MCL 168.544c. As relevant here, under MCL 168.544c(8)(a), “[a]n individual shall not . . . [s]ign a petition with a name other than his or her own.” Under MCL 168.544c(10), “[a]n individual shall not sign a petition with multiple names.” The fraudulent-petition circulators are individuals and, based on the record before this Court, there is evidence that they signed Johnson’s nominating petitions with names other than their own and that they signed his nominating petitions with multiple names. MCL 168.544c(11) provides:

If after a canvass and a hearing on a petition under section 476 or 552 the board of state canvassers determines that an individual has knowingly and intentionally failed to comply with subsection (8) or (10), the board of state canvassers may impose 1 or more of the following sanctions:



(a) Disqualify obviously fraudulent signatures on a petition form on which the violation of subsection (8) or (10) occurred, *without checking the signatures against local registration records*.

(b) Disqualify from the ballot a candidate who committed, aided or abetted, or knowingly allowed the violation of subsection (8) or (10) on a petition to nominate that candidate. [Emphasis added.]

Based on the record before this Court, it is apparent that, after a canvass and hearing on a petition under MCL 168.552, the Board determined that several individuals—the fraudulent-petition circulators—knowingly and intentionally failed to comply with MCL 168.544c(8) and (10). As a result, the Board had the discretion to disqualify their obviously fraudulent signatures without checking the signatures against local registration records. The Board, therefore, had a clear legal duty to investigate, but it did not have a clear legal duty to conduct a comparison of each fraudulent signature against the qualified voter file. Likewise, because the Board had the discretion to not check each and every signature submitted by the fraudulent-petition circulators, the act Johnson is seeking to compel defendants to perform is not ministerial in nature. See *Hillsdale Co Senior Servs, Inc*, 494 Mich at 58 n 11. Because Johnson bears the burden of demonstrating his entitlement to the requested writ, see *Citizens for Protection of Marriage*, 263 Mich App at 492, we conclude that his failure to show that the act requested is ministerial and his failure to show a clear legal duty on the part of the Board are fatal to his claim.<sup>7</sup>

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<sup>7</sup> We do not reach the merits of Johnson's due-process claim because it is not properly addressed via mandamus. However, we note that he was provided with the names of each of the fraudulent-petition circulators,

For those reasons, Johnson’s complaint for mandamus is denied on the merits. This opinion constitutes our final judgment in this case, see MCR 7.215(E)(1), and this judgment shall have immediate effect pursuant to MCR 7.215(F)(2). Given that the instant case involves questions of significant public interest, no taxable costs are awarded. MCR 7.219(A).

K. F. KELLY, P.J., and M. J. KELLY and HOOD, JJ., concurred.

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was told how many signatures they had collected that were invalidated, and was made aware that each and every signature submitted by those individuals have, in fact, been invalidated. Based on that information, it is clear that he was provided with notice as to which signatures were being invalidated and the basis for which they were being invalidated. He was also provided with a meaningful opportunity to challenge the finding of invalidity at the May 26, 2022 hearing before the Board. See *Spranger v City of Warren*, 308 Mich App 477, 483; 865 NW2d 52 (2014) (“At a minimum, due process requires notice and an opportunity to be heard in a meaningful time and manner.”).

## WASIK v AUTO CLUB INSURANCE ASSOCIATION

Docket No. 355848. Submitted February 9, 2022, at Detroit. Decided June 2, 2022, at 9:00 a.m.

Griffin Wasik sought personal protection insurance (PIP) benefits and uninsured motorist (UM) benefits from Auto Club Insurance Association and Progressive Marathon Insurance Company in the Oakland Circuit Court after he was injured in a motor vehicle collision. Plaintiff was a passenger in a vehicle driven by his girlfriend when another vehicle, a Ford Explorer, slid on a patch of ice and struck the girlfriend's vehicle. The driver of the Explorer and plaintiff's girlfriend exited their vehicles to check for damage. After determining that their vehicles were not damaged, plaintiff's girlfriend and the driver of the Explorer agreed that there was no need to contact the police, and they did not exchange their insurance or other identifying information. Plaintiff did not feel well following the accident and was later diagnosed with a concussion. Plaintiff sought PIP and UM benefits, and defendants moved for summary disposition with respect to plaintiff's claims for UM benefits on the basis that the Explorer was not a "hit-and-run vehicle" within the common meaning of the phrase or under the insurance policies. The trial court, Daniel P. O'Brien, J., granted summary disposition for defendants. The court later denied plaintiff's motion for reconsideration, and plaintiff appealed.

The Court of Appeals *held*:

UM coverage is optional and not statutorily mandated; therefore, the language of the insurance policy alone controls when determining whether a claimant is entitled to an award of UM benefits. Defendants' insurance policies covered the insured for injuries arising out of the use of an "uninsured motor vehicle." Both policies also defined an "uninsured motor vehicle" as including a "hit-and-run vehicle," whose operator and owner are unknown and which strikes or makes contact with the insured or a vehicle occupied by the insured, causing injury. However, neither policy defined "hit-and-run vehicle," and all parties agreed that whether plaintiff was entitled to UM benefits depended on whether the Explorer was a hit-and-run vehicle. The plain and

ordinary meaning of “hit-and-run” included “being or involving a motor-vehicle driver who does not stop after being involved in an accident.” Under the language of the policies, a hit-and-run vehicle also must have an unknown driver. Applying the common understanding of the phrase, a hit-and-run vehicle does not exclusively mean a vehicle that hits another vehicle and does not stop at the scene of the incident. Rather, under the policies, a hit-and-run vehicle means a vehicle that hits another vehicle and whose driver leaves the scene of the collision either without stopping or at any time before an exchange of information can take place. The requirement that the driver be unidentified in order for either policy to apply meant that the “run” had to occur before there was an opportunity to exchange information, which can happen if the vehicle does not stop *or* if the vehicle stops but leaves before there is an opportunity to exchange information. Under this definition and considering the undisputed facts in this case, plaintiff was not struck by a hit-and-run vehicle. It was undisputed that the driver of the Explorer did not flee from the scene and left only after both drivers had agreed that there was no need to exchange information. Therefore, the trial court did not err by finding that the Explorer was not a hit-and-run vehicle and that defendants were entitled to summary disposition.

Affirmed.

*Lipton Law, PC* (by *Kyle J. Kelly* and *Ronald K. Weiner*) for Griffin Wasik.

*Mary T. Nemeth, PC* (by *Mary T. Nemeth*) for Auto Club Insurance Association.

*Garan Lucow Miller, PC* (by *Daniel S. Saylor*) for Progressive Marathon Insurance Company.

Before: RICK, P.J., and MURRAY and SHAPIRO, JJ.

MURRAY, J. Plaintiff appeals as of right the final order granting motions for summary disposition brought by defendants, Auto Club Insurance Association and Progressive Marathon Insurance Company, and dismissing the case with prejudice.



In resolving this appeal, we must decide a matter of first impression: does the phrase “hit-and-run vehicle” under an auto insurance policy include a vehicle that is pulled over after hitting another vehicle, the drivers of both vehicles exit the cars and inspect the vehicles for damage, and mutually conclude that because no damage exists, there is no need to contact the police or exchange insurance information? For the reasons expressed below, we conclude that it does not, and therefore affirm the trial court’s order.

#### I. BACKGROUND

The parties agree that the material facts regarding the accident and its immediate aftermath are undisputed. Anna Mayer, plaintiff’s girlfriend, was driving her car with plaintiff as the sole passenger. Mayer was stopped at a red light, and when she attempted to turn right, she felt her vehicle slide on a patch of ice. As she continued turning, the car behind her, a Ford Explorer, slid on the same patch of ice and hit the back passenger side of Mayer’s vehicle. Mayer and the driver of the Explorer turned on their hazard lights, and the Explorer followed Mayer to the nearest parking lot, where Mayer and the driver exited their vehicles to check for damage and ensure there were no injuries. On finding no damage to her vehicle, Mayer assured the driver of the Explorer that there was no damage, and they mutually agreed that there was no need to contact the police. Mayer and the driver of the Explorer left the scene without exchanging information.

Plaintiff began complaining of injuries almost as soon as he and Mayer arrived at plaintiff’s house, so Mayer drove plaintiff to an emergency room that night, where he was diagnosed with a concussion. Plaintiff thereafter sought personal protection insurance and

uninsured motorist (UM) benefits from Progressive (the insurer of plaintiff's mother's vehicle) and Auto Club (the insurer of Mayer's vehicle) under the no-fault act, MCL 500.3101 *et seq.*, for medical expenses, replacement services, and attendant care related to injuries plaintiff sustained in the motor vehicle accident.

Progressive and Auto Club eventually moved for summary disposition under MCR 2.116(C)(10) with respect to plaintiff's UM claims, arguing that plaintiff was not entitled to benefits because under the common meaning of the phrase "hit and run vehicle," the Explorer was not a "hit-and-run vehicle" under the insurance policies. Plaintiff argued that it was unnecessary to apply the common meaning of the phrase "hit-and-run vehicle" because it was already defined by MCL 257.617, MCL 257.617a, and MCL 257.619. As noted, the trial court held that the Explorer was not a "hit-and-run vehicle" under either policy, employing the plain and ordinary meaning of the phrase. Plaintiff moved for reconsideration, which the trial court denied. This appeal followed.

## II. STANDARDS OF REVIEW

### A. APPELLATE STANDARDS OF REVIEW

In this appeal, we must decide whether the trial court properly granted defendants' motions for summary disposition, which in turn requires us to determine whether the trial court correctly applied the plain language of the insurance contracts. We engage in a de novo review of both issues. See *Dell v Citizens Ins Co of America*, 312 Mich App 734, 739; 880 NW2d 280 (2015) ("This Court . . . reviews de novo a trial court's decision on a motion for summary disposition.") and *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 197; 747 NW2d

811 (2008) (The de novo standard of review applies to “[q]uestions involving the proper interpretation of a contract or the legal effect of a contractual clause . . .”). This, of course, means we give respectful consideration, but no deference, to the trial court decision. *Gillette Commercial Operations North America & Subsidiaries v Dep’t of Treasury*, 312 Mich App 394, 405 n 3; 878 NW2d 891 (2015) (“Though we can give no deference to the trial court’s legal rulings, unlike the deference we give to discretionary calls on evidence or findings of fact, we nevertheless give the trial court’s legal rulings careful consideration.”).

#### B. LEGAL PRINCIPLES GOVERNING OUR REVIEW

The two motions for summary disposition were brought pursuant to MCR 2.116(C)(10), which requires a court to consider “the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party.” *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). “Summary disposition is appropriate . . . if there is no genuine issue regarding any 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.*

The standards for reading and applying insurance contracts are familiar and require a court to construe an insurance contract “in the same manner as other contracts, assigning the words in the contract their ‘ordinary and plain meaning if such would be apparent to a reader of the instrument.’” *Auto-Owners Ins Co v Seils*, 310 Mich App 132, 145; 871 NW2d 530 (2015),

quoting *DeFrain v State Farm Mut Auto Ins Co*, 491 Mich 359, 366-367; 817 NW2d 504 (2012). “[I]f the language of the contract is unambiguous, [this Court] construe[s] and enforce[s] the contract as written.” *Holland v Trinity Health Care Corp*, 287 Mich App 524, 527; 791 NW2d 724 (2010) (quotation marks and citations omitted). “Courts may not impose an ambiguity on clear contract language.” *Coates v Bastian Bros Inc*, 276 Mich App 498, 503; 741 NW2d 539 (2007). And a provision is not ambiguous if “it is not susceptible to more than one interpretation and does not conflict with any other provision.” *Id.* at 510.

“An ambiguous provision in an insurance contract is construed against the insurer and in favor of coverage,” *Seils*, 310 Mich App at 146, though “this rule is only to be applied if all conventional means of contract interpretation, including the consideration of relevant extrinsic evidence, have left the [factfinder] unable to determine what the parties intended their contract to mean,” *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 471; 663 NW2d 447 (2003). An insurance contract is not ambiguous “merely because a term is not defined in the contract,” *McGrath v Allstate Ins Co*, 290 Mich App 434, 439; 802 NW2d 619 (2010), nor simply because the parties disagree on its meaning, *Gortney v Norfolk & Western R Co*, 216 Mich App 535, 540; 549 NW2d 612 (1996) (“The fact that the parties dispute the meaning of a release does not, in itself, establish an ambiguity.”).

### III. DISCUSSION

“Because providing UM coverage is optional and not statutorily mandated under the no-fault act, the policy language alone controls the circumstances entitling a claimant to an award of benefits.” *DeFrain*, 491 Mich

at 367. We, therefore, look to the terms agreed to by the parties in their insurance contracts.

Progressive's UM insurance policy, which was owned by plaintiff's mother and which covered plaintiff, states:

[W]e will pay for damages that an insured person is legally entitled to recover from the owner or operator of an uninsured motor vehicle because of bodily injury:

1. sustained by an injured person;
2. caused by an accident; and
3. arising out of the ownership, maintenance or use of an uninsured motor vehicle. [Emphasis omitted.]

The Progressive policy defines the term "uninsured motor vehicle" as:

[A] land motor vehicle or trailer of any type:

\* \* \*

d. that is a hit-and-run vehicle whose owner or operator cannot be identified and which strikes:

- (i) you, a relative, or a rated resident;
- (ii) a vehicle that you, a relative, or a rated resident are occupying[.]

The "hit-and-run vehicle" provisions of the Auto Club policy that covered Mayer's vehicle were quite similar to the Progressive policy, and provide:

Subject to the Definitions, Exclusions, Conditions and Limits of Liability of this policy, we will pay damages for bodily injury to an insured person which:

- a. is caused by accident; and
- b. arises out of the ownership, operation, maintenance or use of an uninsured motor vehicle; and

c. that insured person suffers death, serious impairment of body function or permanent serious disfigurement; and

d. that insured person is legally entitled to recover from the owner or operator of an uninsured motor vehicle. [Emphasis omitted.]

The Auto Club policy defines the term “uninsured motor vehicle,” in pertinent part, as a motor vehicle that is

a hit-and-run motor vehicle of which the operator and owner are unknown and which makes direct physical contact with:

(1) you or a resident relative, or

(2) a motor vehicle which an insured person is occupying. [Emphasis omitted.]

For plaintiff to obtain UM benefits under either policy, he must establish that (1) a “hit-and-run vehicle” (2) whose operator is unknown (3) made direct physical contact with the motor vehicle plaintiff was occupying. Neither policy defines the phrase “hit-and-run vehicle,” and all parties agree that whether plaintiff is entitled to receive no-fault UM benefits from either insurer depends on whether the Explorer was a “hit-and-run vehicle.”

Because the phrase “hit-and-run” is undefined, we must determine its plain and ordinary meaning. *McGrath*, 290 Mich App at 439. *Merriam-Webster’s Collegiate Dictionary* defines “hit-and-run” as “being or involving a motor-vehicle driver who does not stop after being involved in an accident.” *Merriam-Webster’s Collegiate Dictionary* (11th ed). But we must apply all the words of the policy, *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 566; 489 NW2d 431 (1992), not just select ones, and tethered to the vehicle being a “hit-

and-run vehicle” is that the operator must be unknown. So, for example, if a vehicle strikes another vehicle and does not stop, but the operator of that vehicle is known, there would be no coverage. Thus, it is not just a fleeing vehicle that triggers coverage; the operator of the striking vehicle must also be unknown.

While no party identified a Michigan case that determined the meaning of “hit-and-run vehicle” under an auto insurance policy,<sup>1</sup> defendants presented decisions from other states addressing the meaning of nearly identical insurance policy language and under very similar facts. Cited are *Kasid v Country Mut Ins Co*, 776 NW2d 181, 187 (Minn App, 2009), where the court held that “when an individual is not denied an opportunity to obtain information following an accident, but fails to obtain such information, that accident is not a hit-and-run accident for purposes of UM benefits,” and *State Farm Mut Auto Ins Co v Seaman*, 96 Wash App 629; 980 P2d 288 (1999), where the court determined that the plaintiff failed to establish involvement in a hit-and-run accident because the at-fault driver did not flee the scene after the accident.

In line with those decisions is *Sylvestre v United Servs Auto Ass’n Cas Ins Co*, 42 Conn App 219; 678 A2d 1005 (1996), *aff’d* 240 Conn 544 (1997). There, the

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<sup>1</sup> There is one Michigan decision that references this issue, albeit it is dictum in an unpublished opinion. In *Grimmett v Farmers Ins Exch*, unpublished per curiam opinion of the Court of Appeals, issued October 6, 2015 (Docket No. 321492), the Court concluded that a “hit-and-run” accident “does not just encompass an accident where the other motorist immediately flees the scene—it also includes accidents where the other driver *does not* immediately flee the scene, but nonetheless fails to provide his contact and identification information to the policy holder or the authorities after the accident occurs.” *Id.* at 1 n 1. However, the issue before the Court was solely whether the plaintiff satisfied the notice provisions of the contract, and thus, the conclusion set forth in note 1 is dictum.

vehicle that struck the plaintiff stopped, and the operator exited the vehicle to see if the plaintiff was hurt. *Id.* at 220. After a few minutes, the plaintiff told the driver that he was fine and the driver could leave. *Id.* The plaintiff did not ask for any identifying information. *Id.* at 220-221. The trial court dismissed the case, concluding that the policy—which like here, required that the plaintiff be hit by a “hit and run vehicle” whose operator was unknown—did not apply because plaintiff had the opportunity to obtain the driver’s identification but chose not to obtain it. *Id.* at 221 & n 1, 222. The Court of Appeals affirmed, but with different reasoning. The appellate court instead held that the vehicle that had hit the plaintiff was not a “hit and run vehicle” as that phrase is commonly understood because the driver did stop and checked on the plaintiff:

We look to dictionary definitions to ascertain the ordinary meaning of a “hit and run vehicle.” See *Wrin v State*, 234 Conn 401, 406; 661 A2d 1034 (1995). The term has meaning in common parlance. “Hit-and-run,” as it refers to the driver of a vehicle, has been defined as “guilty of leaving the scene of an accident without stopping to render assistance or to comply with legal requirements.” Webster’s Third New International Dictionary. It has also been defined as “[d]esignating or involving the driver of a motor vehicle who drives on after striking a pedestrian or another vehicle.” American Heritage Dictionary (New College Ed 1981). Because the driver of the vehicle that struck the plaintiff stopped to render assistance and because the plaintiff affirmatively acted to dismiss the driver from the scene of the accident, we conclude that the plaintiff was not struck by a hit and run vehicle. Accordingly, under the facts here, the policy’s provisions for uninsured motorist coverage are inapplicable and we, therefore, do not reach the issue of whether the plaintiff



had a duty to ascertain the identity and insurance status of the operator of the automobile that struck him. [*Sylvestre*, 42 Conn App at 224.]

Though defendants point us to the favorable principles articulated in *Kasid* and *Seaman*, they failed to mention that another line of decisions from other states more broadly apply the phrase or deem the phrase ambiguous and thus construe it in favor of coverage. See, e.g., *Zarder v Humana Ins Co*, 324 Wis 2d 325; 782 NW2d 682 (2010); *Wilson v Progressive Northern Ins Co*, 151 NH 782; 868 A2d 268 (2005); *Commerce Ins Co v Mendonca*, 57 Mass App 522; 784 NE2d 43 (2003). In both *Zarder* and *Wilson* the courts concluded that the contractual phrase “hit-and-run” was ambiguous because it could reasonably be read to mean a vehicle that strikes and flees, or a vehicle that strikes and stops after the accident, but leaves before providing any information. See *Zarder*, 324 Wis 2d at 346, and *Wilson*, 151 NH at 789. Because the phrase was susceptible to more than one reasonable interpretation, it was construed in favor of insurance coverage. On the other hand, in *Mendonca* the Massachusetts Court of Appeals rejected a literal interpretation of “hit-and-run” in part because that state’s supreme court had previously rejected a literal interpretation of “hit,” and because a coverage gap would exist between someone hit by a vehicle that fled, and someone who was hit by a vehicle that stopped but left before information could be collected. *Mendonca*, 57 Mass App at 524-526.

Although these decisions are informative, our decision is anchored in the words of these contracts. In applying the common understanding of this phrase, we do not read “hit-and-run vehicle” to exclusively mean, as defendants argue, a vehicle that hits another vehicle

and does not stop at the scene of the accident, and thus is unidentified. Instead, we hold that under these contracts, “hit-and-run vehicle” means a vehicle that hits another vehicle and the driver leaves the scene of the accident—either without stopping or at any time before an exchange of information can take place. This reading comports with the plain meaning of the phrase “hit-and-run” and enforces the common understanding of that phrase. Importantly, it also takes into consideration the remaining sentence of each policy stipulating that the driver either be “unknown” or “cannot be identified,” i.e., each policy requires in some form that the driver be unidentified. The requirement that the driver be unidentified for the policy to apply means to us that the “run” has to occur *before* the *opportunity* to exchange information can take place. And that type of “run” occurs if a vehicle flees without stopping or if the vehicle stops but leaves before there is an *opportunity* to exchange information.<sup>2</sup>

Working with this definition and considering the undisputed facts, we readily conclude that plaintiff was not hit by a hit-and-run vehicle, as it is undisputed that the driver of the Explorer did not flee from the scene of the accident but instead followed Mayer to the nearest parking lot where he and Mayer checked for injuries and damage to their vehicles.<sup>3</sup> Additionally,

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<sup>2</sup> The requirement that the driver stop and provide an opportunity to exchange information does not require proof of a driver’s intent. *Russell v Sentinel Ins Co, Ltd*, 906 NW2d 543, 547 (Minn App, 2018) (“We conclude that the ordinary meaning of hit-and-run and its interpretation in our caselaw do not require a showing that an unidentified driver fled, or left, with the intent to escape liability.”).

<sup>3</sup> Plaintiff argues that an occupant of a vehicle may be sufficiently injured such that they do not have the opportunity to obtain identifying information from the striking driver at the scene. While that scenario is plausible, the trial court noted that plaintiff testified that after the

the driver only left the accident scene *after* Mayer told him there was no damage to her vehicle, and they both agreed there was no need to contact the police or exchange information. In other words, it is undisputed that the driver of the vehicle that hit Mayer's vehicle did not "run" from anything; he remained at the scene so that there was an opportunity to exchange information. Both drivers simply agreed it was not necessary to do so. Given those undisputed facts, the Explorer does not fall under the plain and ordinary meaning of the phrase "hit-and-run vehicle." Thus, the trial court did not err in granting summary disposition in favor of Progressive and Auto Club, as UM benefits were not available under either contract.

Plaintiff's challenge to this conclusion comprises two arguments, neither of which carries the day. First, plaintiff argues that the meaning of "hit-and-run vehicle" should be determined by analyzing the obligations within MCL 257.617, MCL 257.617a, MCL 257.618, and MCL 257.619.<sup>4</sup> However, "[u]ninsured

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accident he exited the car but did not request identifying information or write down the license plate of the Explorer. Although plaintiff testified that he "wasn't feeling well" at the scene, that alone is not sufficient to create a genuine issue of material fact whether he was deprived of an opportunity to obtain the unknown driver's information.

<sup>4</sup> Although the meaning of the policy is governed only by its own terms, this definition is in harmony with the requirements of MCL 257.617, MCL 257.617a, and MCL 257.618, which contain nearly identical first paragraphs and provide requirements for drivers to follow when involved in an accident:

The driver of a vehicle who knows or who has reason to believe that he or she has been involved in an accident upon public or private property that is open to travel by the public shall immediately stop his or her vehicle at the scene of the accident and shall remain there until the requirements of section 619 are fulfilled or immediately report the accident to the nearest or most convenient police agency or officer to fulfill the requirements of section 619(a) and (b) if there is a reasonable and honest belief

motorist benefit clauses are construed without reference to the no-fault act because such insurance is not required under the act.” *Twichel v MIC Gen Ins Corp*, 469 Mich 524, 533; 676 NW2d 616 (2004); see also *Dawson v Farm Bureau Mut Ins Co of Mich*, 293 Mich App 563, 568; 810 NW2d 106 (2011) (“Like uninsured-motorist benefits, underinsured-motorist coverage is not required by Michigan law, and the terms of coverage are controlled by the language of the contract itself, not by statute.”). The referenced statutes neither define “hit-and-run vehicle,” nor do they contain that phrase. And even though the statutes do not play a role in defining terms in a UM policy, as we pointed out in note 4, the meaning of the phrase is in harmony with the obligations placed on motorists under those statutes.

Second, plaintiff provides a different definition of “hit and run” through application of Law.com’s legal dictionary, which defines “hit and run” as “the crime of a driver of a vehicle who is involved in a collision with another vehicle, property or human being, who knowingly fails to stop to give his/her name, license number and other information as required by statute to the injured party, a witness or law enforcement officers.” Law.com, hit and run <<https://dictionary.law.com/Default.aspx?selected=869>> [<https://perma.cc/V4SC-S772>]. However, “hit-and-run” is a nonlegal phrase,

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that remaining at the scene will result in further harm. The stop shall be made without obstructing traffic more than is necessary. [MCL 257.617(1).]

MCL 257.619 states that “[t]he driver of a vehicle who knows . . . that he or she has been involved in an accident with . . . another vehicle . . . shall . . . (a) [g]ive his or her name and address, and the registration number of the vehicle he or she is operating, including the name and address of the owner, to a police officer, the individual struck, or the driver or occupants of the vehicle with which he or she has collided[, and] (b) [e]xhibit his or her operator’s or chauffeur’s license to

and the meaning of an undefined nonlegal term is not provided by a legal dictionary. *Sands Appliance Servs, Inc v Wilson*, 463 Mich 231, 240-241; 615 NW2d 241 (2000). And, in any event, the driver of the Explorer would not fall within plaintiff's preferred definition because there is no dispute that the driver did not "knowingly fail[] to stop" and did discuss exchanging information with Mayer.<sup>5</sup>

Affirmed. Having prevailed in full, defendants may tax costs. MCR 7.219(A).

RICK, P.J., and SHAPIRO, J., concurred with MURRAY, J.

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a police officer, individual struck, or the driver or occupants of the vehicle with which he or she has collided."

<sup>5</sup> Plaintiff, relying upon *Group Ins Co of Mich v Czopek*, 440 Mich 590; 489 NW2d 444 (1992), argues the trial court erred because it did not consider plaintiff's perspective when it determined the meaning of the term "hit-and-run vehicle." *Czopek* is not helpful, as the policy language in *Czopek* specifically directed the consideration of circumstances that are "unforeseen and unexpected by the person injured." *Id.* at 597 (quotation marks and citation omitted). No similar language is contained in either of these policies.

## DUCKETT v SOLKY

Docket No. 357346. Submitted May 3, 2022, at Detroit. Decided June 2, 2022, at 9:05 a.m.

Arthur Duckett filed an action in the Wayne Circuit Court against Mary Solky, asserting a claim under 42 USC 1983 for a deprivation of his due-process rights. Duckett was involuntarily hospitalized in 2004 after pleading not guilty by reason of insanity to several stabbings. The prosecution moved to continue his involuntary hospitalization, which resulted in jurisdiction being transferred from the circuit court to the probate court. From 2004 to 2017, the probate court granted petitions for continuing-treatment orders, continuing Duckett's involuntary hospitalization for mental health treatment. On July 12, 2017, Duckett was granted authorized leave status (ALS). Under the terms of the ALS contract, Duckett was allowed to reside outside of the hospital subject to certain terms and conditions, including continuing mental health treatment. Solky revoked Duckett's ALS contract on September 27, 2017, and Duckett was readmitted to the hospital; it was uncontested that Solky did not provide Duckett with notice of his right to appeal his rehospitization as required by MCL 330.1408 and MCR 5.743. In a separate proceeding held on April 13, 2018, Duckett petitioned for discharge from his continuing mental health treatment, challenging the conclusion in a periodic-review report that he continued to be a person who required continuing involuntary mental health treatment and requesting discharge from involuntary hospitalization. The probate court rejected the petition, finding that Duckett had a mental illness that required continued treatment. Duckett thereafter filed the instant action, alleging that Solky denied him procedural due process by failing to provide notice of his right to appeal his rehospitization and to have a hearing after his ALS contract was revoked. In particular, Duckett asserted that Solky deprived him of his conditional liberty interest by violating MCL 330.1408(3) and MCR 5.743 after revoking his ALS contract; Duckett sought compensatory and exemplary damages, an injunction, and attorney fees. Duckett argued that he was entitled to the same due-process procedural protections when his ALS contract was revoked that a parolee is entitled to under *Morrissey*

*v Brewer*, 408 US 471 (1972), when their parole is revoked. Solky moved for summary disposition. The circuit court, David Groner, J., granted the motion, concluding that Duckett was barred by the Eleventh Amendment of the United States Constitution from recovering damages against Solky under 42 USC 1983, at least with regard to the actions taken by Solky in her official capacity. The circuit court further ruled that Duckett's request for injunctive relief was moot because the April 2018 probate court hearing allowed Duckett to challenge his rehospitalization with appointed counsel. Duckett appealed.

The Court of Appeals *held*:

1. Various statutory provisions of the Mental Health Code, MCL 330.1001 *et seq.*, provide the procedures that must be followed for involuntary hospitalization after an individual has been acquitted of a criminal charge by reason of insanity. Such patients under a hospitalization treatment order are not necessarily physically confined in a psychiatric hospital. In that regard, MCL 330.1479 allows patients to be approved for leaves or absences from the hospital in accordance with established rules and procedures. Applicable here, such patients may reside outside the psychiatric hospital and in the community under an ALS contract. A patient's ALS contract can be revoked, and the patient returned to the hospital, if the patient fails to comply with the terms of the contract. MCL 330.1408 and MCR 5.743 govern a patient's right to appeal their rehospitalization if the patient's ALS contract is canceled. MCL 330.1408(1) provides that an individual is subject to being returned to a hospital if (1) the individual was admitted to the hospital by judicial order and (2) the individual has left the hospital without authorization or has refused a lawful request to return to the hospital while on an authorized leave or other authorized absence from the hospital. Important to this case, MCL 330.1408(3) provides that an opportunity for appeal, and notice of that opportunity, must be provided to an individual who objects to being returned from any authorized leave in excess of 10 days. MCR 5.743(B) sets forth the specific procedures that must be followed when an individual on authorized leave is returned to the hospital: (1) the hospital director must, within 24 hours, notify the court of the return and notify the individual of the right to appeal the return and have a hearing to determine the appeal and (2) the probate court must then notify the individual's attorney or appoint a new attorney to consult with the individual and determine whether the individual desires a hearing. In addition to those procedures, MCR 5.743(C), (E), and (F) provide that an individual must appeal a rehospital-

ization order within seven days and that a hearing must be scheduled to occur within seven days of receipt of the individual's appeal request; the hospital director must show at the hearing that the individual requires treatment in the hospital. If the probate court finds that the individual requires treatment at a hospital, the court must dismiss the appeal and order the individual returned to the hospital. However, if the probate court finds that the hospital director lacked an adequate basis for concluding that the individual requires further treatment in the hospital, the probate court must either order the individual returned to ALS or order treatment through an alternative to hospitalization.

2. The Fourteenth Amendment of the United States Constitution prohibits the state from depriving a person of life, liberty, or property without due process of law and protects against arbitrary action of the government. Procedural due-process questions are analyzed by first determining whether the state has interfered with a protected liberty or property interest and then determining whether the procedures leading to the deprivation of that interest were constitutionally deficient. With regard to the first question, an individual claiming a protected interest must have a legitimate claim of entitlement to the interest; indeed, the interest must rise to more than an abstract need or desire and must be based on more than a unilateral hope. With regard to the second question—whether the procedures leading to the deprivation were constitutionally deficient—the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. A court must consider three factors when determining what due process requires in a particular situation: (1) the interest that will be affected by the official action; (2) the risk of an erroneous deprivation of that interest through the procedures used and the probable value that additional or substitute safeguards would have; and (3) the government's interest, including the function involved as well as the fiscal and administrative burdens that the additional or substitute procedures would require. Fundamentally, due process requires that a party receive notice of the proceedings and a meaningful opportunity to be heard.

3. Involuntary confinement for the treatment of mental illness is a massive curtailment of liberty. Thus, involuntary commitment to a mental hospital, like involuntary confinement of an individual for any reason, is a deprivation of liberty that the state cannot accomplish without due process of law. Similarly, ALS is a conditional release from hospitalization that is entitled to due-



process protections. The procedures set forth in MCL 330.1408 and MCR 5.743 mandate notice and an expeditious opportunity to appeal, thereby mitigating the risk of an erroneous deprivation of liberty by allowing for a prompt appeal of the decision to revoke ALS, appointing counsel, and holding a hearing before the probate court. The procedures mandated by statute and court rule permit a prompt, thorough hearing with the assistance and advice of counsel. Accordingly, MCL 330.1408 and MCR 5.743 satisfy due process. In this case, Solky revoked Duckett's ALS contract and returned him to the hospital without following the procedures in MCL 330.1408 and MCR 5.743. By failing to follow those procedures, Solky violated Duckett's due-process rights. The later probate hearing (in which Duckett separately petitioned for release) did not remedy the due-process violation because (1) the hearing addressed a different issue than would an appeal of an ALS contract revocation (whether involuntary mental health treatment was required at the time of the petition hearing versus whether Duckett should continue to receive his involuntary mental health treatment outside of a hospital setting), and (2) the hearings addressed Duckett's mental health at different times (Duckett's mental health condition on September 27, 2017, when his ALS contract was revoked, versus his mental health condition on April 13, 2018, when the hearing was conducted on his petition for release). The delayed hearing did not offer the same protections as those afforded by MCL 330.1408 and MCR 5.743, and the hearing did not remedy the due-process violations resulting from Solky's failure to provide Duckett notice of his right to appeal, to consult with counsel, and to have a hearing.

4. In *Morrissey*, the United States Supreme Court held that, because a parolee's liberty is valuable and is protected by the Due Process Clause, a parolee is entitled to a hearing before their parole is revoked. In general, parolees are entitled to retain their liberty as long as they substantially abide by parole conditions. Before revoking parole, the state must provide a hearing that follows certain minimum requirements of due process. Although there are some similarities between parole and ALS, the similarities do not justify extending the protections of *Morrissey* to administrative leave for involuntarily hospitalized patients. Of particular relevance is that the purpose of involuntary hospitalization is treatment, not punishment. In addition, the underlying reason for revoking parole is the willful and knowing violation of a condition or conditions of parole imposed after being convicted of violating a criminal law while revocation of administrative leave stems exclusively from a determination that the individual

requires continuing mental health treatment. Therefore, *Morrissey* does not apply, and a hearing related to the revocation of a patient's administrative leave, including revocation of an ALS contract, does not have to include the specific protections articulated by the *Morrissey* Court.

5. Neither a state nor a state official acting in their official capacity may be sued under 42 USC 1983. However, a § 1983 action for money damages may be maintained against a state official in their individual capacity. Therefore, Duckett's claim for money damages against Solky in *her individual capacity* was not precluded under § 1983. The circuit court erred to the extent it held otherwise, but damages against Solky in *her official capacity* were barred. Duckett's claim for prospective injunctive relief was also barred by sovereign immunity because he failed to show an ongoing violation of federal law, failed to allege the existence of an official policy or practice, and failed to assert that the alleged conduct was likely to occur again. Absent those allegations, it was assumed that Solky would act to avoid future constitutional violations. Injunctive relief was not justified because the possibility that Duckett would again be deprived of procedural due process was too speculative to justify injunctive relief.

6. Duckett had a due-process right to notice of the opportunity to appeal the revocation of his ALS contract and to a hearing. Duckett was therefore entitled to nominal damages against Solky, and his claim for damages against Solky in her individual capacity was not moot. Although Duckett did not specifically request nominal damages in his amended complaint, he included a catchall provision that encompassed such an award. Because Duckett established a procedural due-process violation justifying relief under § 1983, the trial court erred by granting Solky's motion for summary disposition. The case was remanded to the circuit court for Duckett to pursue his claim for nominal damages and attorney fees.

Circuit court order reversed, and case remanded for further proceedings.

MENTAL HEALTH – INVOLUNTARY HOSPITALIZATIONS – AUTHORIZED LEAVE –  
REVOCATION OF AUTHORIZED LEAVE – DUE PROCESS.

Revocation of authorized leave from involuntary hospitalization involves a liberty interest that is afforded due-process protections after that leave is revoked; the procedures set forth in MCL 330.1408 and MCR 5.743 mandate notice and an expeditious opportunity to appeal the decision to revoke authorized leave; the

procedures mandated by MCL 330.1408 and MCR 5.743 satisfy due process; failure to follow those procedures violates the individual's due-process rights.

*Margolis & Cross* (by *Laurence H. Margolis* and *Ian T. Cross*) for Arthur Duckett.

*Dana Nessel*, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Katherine J. Bennett*, Assistant Attorney General, for Mary C. Solky.

Before: BORRELLO, P.J., and SHAPIRO and HOOD, JJ.

HOOD, J. Plaintiff, Arthur Duckett, was involuntarily hospitalized in 2004. In July 2017, Duckett was placed on authorized leave status, which entitled him to live outside of the hospital while receiving outpatient treatment and supervision. Defendant, Mary Solky, revoked Duckett's leave a few months later without affording him notice of his right to appeal her order. The questions before the Court are whether an involuntarily hospitalized person on authorized leave is entitled to due process of law after revocation of that leave and, if so, the nature and scope of the available remedies.

Michigan's Mental Health Code, MCL 330.1001 *et seq.*, mandates that individuals on an authorized leave be afforded notice and an opportunity to appeal an order to return to the hospital. In conjunction with the corresponding court rule, MCR 5.743, MCL 330.1408 establishes a protected liberty interest in authorized leave status. We reverse the circuit court's contrary conclusion and remand for further proceedings consistent with this opinion.

## I. BACKGROUND

Duckett’s involuntary hospitalization originated with his plea of not guilty by reason of insanity (NGRI) following several stabbings Duckett committed in 2002. The circuit court accepted his plea and committed Duckett to the custody of the Michigan Department of Health and Human Services (MDHHS), Center for Forensic Psychiatry (CFP). The prosecution successfully moved to continue his involuntary hospitalization, thereby transferring jurisdiction from the circuit court to the probate court. Duckett’s treatment continued at the Walter P. Reuther Psychiatric Hospital (WPRPH), a state hospital operating under the umbrella of MDHHS, where he has been committed since 2006.

From 2004 to 2017, the probate court granted petitions for continuing-treatment orders, which continued Duckett’s involuntary hospitalization for mental health treatment. As described in Part II of this opinion, Duckett’s continued hospitalization was subject to yearly review.

On July 12, 2017, Duckett was allowed to reside outside of WPRPH under an authorized leave status contract (“ALS contract”). Under the terms of the contract, Duckett “agreed to comply with a series of conditions . . . for a period of five years in exchange for release from physical confinement in a State-operated psychiatric hospital.” A week later, on July 19, 2017, the probate court entered an order for continuing mental health treatment, continuing Duckett’s state-supervised treatment while allowing him to live outside of the state hospital.

On September 27, 2017, MDHHS revoked Duckett’s ALS contract and reinterned Duckett at WPRPH. Solky concedes that after MDHHS revoked Duckett’s

ALS contract, she did not provide him with notice of his right to appeal his rehospitization, despite the plain language of MCL 330.1408 and MCR 5.743 requiring her to have done so.

Three and a half months after his return to WPRPH, Duckett filed a petition for discharge from his continuing mental health treatment, challenging a periodic-review report's conclusion that he continued to be a person requiring continuing involuntary mental health treatment. In his petition, Duckett requested discharge from involuntary hospitalization. The parties agree that the petition was not an appeal of the decision to revoke his ALS contract.

At a subsequent probate court hearing on Duckett's petition, the court ordered that Duckett's involuntary mental health treatment continue, finding "clear and convincing evidence that [Duckett] has a mental illness and continues to require treatment."

Duckett filed this action under 42 USC 1983, three months after the probate court hearing. His amended complaint alleges that Solky denied him procedural due process by failing to provide notice of his right to appeal his rehospitization and to have a hearing.

The amended complaint avers Solky violated MCL 330.1408(3) and MCR 5.743 while acting in both an individual and an official capacity, thereby depriving him of a conditional liberty interest. Duckett's amended complaint analogized his due-process right following revocation of authorized leave to the due-process right of parolees to challenge revocation of parole, citing *Morrissey v Brewer*, 408 US 471; 92 S Ct 2593; 33 L Ed 2d 484 (1972). The relief requested included compensatory and exemplary damages, an injunction, and attorney fees.

Solky moved for summary disposition under MCR 2.116(C)(7) and (C)(10) in lieu of an answer. Solky argued that the Eleventh Amendment and sovereign immunity barred Duckett's official-capacity claims and that Duckett's individual-capacity claims were moot given the order for Duckett's continued hospitalization. Solky additionally contended that the probate court hearing on Duckett's petition for discharge afforded Duckett due process, that no ongoing illegal practices warranted an injunction, and that Duckett had suffered no harm warranting compensatory or exemplary damages.

Duckett responded that he had a statutory right to contest the revocation of his ALS contract and that Solky's failure to provide notice of his opportunity to appeal the revocation, or a hearing, violated due process. Distinct from the statutorily required hearing, Duckett argued that he was entitled to a hearing offering the same procedural protections described in *Morrissey*. The issues were not moot, he insisted, because the probate court had addressed whether he continued to qualify as a person requiring treatment, not whether revocation of his ALS was appropriate. Even absent compensatory damages, he concluded, he could still pursue nominal damages stemming from the denial of his due-process rights.

The circuit court granted Solky's motion for summary disposition, first concluding that the Eleventh Amendment barred recovery of damages against state officials under 42 USC 1983 "at least where the claim is based on actions taken in the Defendant's official capacity." Further, the court ruled, the probate hearing allowed Duckett to challenge his reinternment with appointed counsel, rendering his request for injunctive relief moot. Duckett now appeals.

II. AN OVERVIEW OF THE STATUTES GOVERNING  
INVOLUNTARY-COMMITMENT PROCEDURES

We begin by reviewing the statutory framework applicable to involuntary hospitalization and not guilty by reason of insanity pleas before addressing the substance of Duckett's issues on appeal.

A. THE STATUTORY PROCEDURES REQUIRED FOR  
INVOLUNTARY HOSPITALIZATION FOLLOWING A  
FINDING OF NGRI

In Michigan, after a criminal defendant pleads not guilty by reason of insanity or is acquitted by reason of insanity, the trial court must commit the defendant to the custody of the CFP for an initial inpatient diagnostic period not exceeding 60 days. See MCL 330.2050(1). Following this initial diagnostic commitment, the CFP is required to provide the trial court, prosecutor, and defense counsel a report and opinion addressing whether the individual qualifies as a "person requiring treatment." See MCL 330.2050(2) (providing the requirements for the report and opinion); see also MCL 330.1401(1) (defining "person requiring treatment" as a person having a mental illness who satisfies at least one of three criteria); MCL 330.1400(g) (defining "mental illness"). If the report confirms that the individual is a "person requiring treatment," the trial court may direct the prosecuting attorney to file a petition with the probate court for an order of hospitalization pursuant to MCL 330.1434. See MCL 330.2050(3) and (4).

If the prosecuting attorney files a petition pursuant to MCL 330.1434, a hearing must be "convened promptly, but not more than 7 days after the court's receipt" of "[a] petition for a determination that an individual is a person requiring treatment[.]" MCL 330.1452(1)(a). Before ordering a person to be involun-

tarily hospitalized or to involuntarily undergo mental health treatment, a probate court (or jury) must find by clear and convincing evidence that the individual is a “person requiring treatment.” MCL 330.1465. If the probate court determines that the individual is a person requiring treatment, it must then enter an initial order of involuntary mental health treatment, limited in duration depending on the type of order entered. MCL 330.1472a(1). “Not less than 14 days before the expiration of an initial” order of involuntary mental health treatment, the hospital director, agency, or mental health professional supervising treatment must file a petition for a second order of involuntary mental health treatment if the treatment provider believes “the individual continues to be a person requiring treatment” and the individual “is likely to refuse treatment on a voluntary basis when the order expires.” MCL 330.1473.

If a petition for a second order of involuntary mental health treatment is filed under MCL 330.1473, a hearing is conducted. MCL 330.1452(1)(b). If the court finds that the individual continues to be a person requiring treatment, the court must enter a second order of involuntary mental health treatment “that shall not exceed 90 days.” MCL 330.1472a(2). Then, “[n]ot less than 14 days before the expiration of” the second order of involuntary mental health treatment, a petition for a continuing order of involuntary mental health treatment must be filed. MCL 330.1473. And upon receipt of a petition for a continuing order of involuntary mental health treatment, a hearing under MCL 330.1452(1)(b), and a finding that the individual continues to be a person requiring treatment, the probate court must issue a continuing order for involuntary mental health treatment “that shall not exceed 1 year.” MCL 330.1472a(3).



An order to continue involuntary hospitalization is, thus, limited to a one-year duration. *Id.* But if petitions for continuing orders for mental health treatment continue to be filed under MCL 330.1473 and the probate court continues to find that the individual qualifies as a person requiring treatment, continuing orders for involuntary hospitalization may be reissued every year. MCL 330.1472a(4).

In addition to this annual review, every patient subject to a one-year continuing hospitalization order must receive a psychological reevaluation six months after entry of the one-year order. See MCL 330.1482. The psychological reevaluation is performed to determine whether the individual continues to qualify as a person requiring treatment. *Id.* The results of the psychological evaluation are “made part of the individual’s record” and filed with the court “in the form of a written report” within five days of the evaluation. See MCL 330.1483(1). “[W]ithin those 5 days,” the hospital director must give the individual notice of the results of the evaluation, as well as “information on the individual’s right to petition for discharge to,” in relevant part, the individual and the individual’s attorney. See *id.* If the report issued pursuant to MCL 330.1483 concludes that the patient requires continuing involuntary mental health treatment and “the individual or the executive director objects to the conclusions, the individual or the executive director has the right to a hearing and may petition the court for discharge of the individual from the treatment program.” MCL 330.1484. The petition must be “presented to the court within 7 days, excluding Sundays and holidays, after the report is received.” *Id.* Additionally, the probate court must hold a hearing on a petition for discharge filed under MCL 330.1484 and

issue an appropriate order. See MCL 330.1452(1)(c); MCL 330.1484; MCL 330.1485a.

#### B. AUTHORIZED LEAVE STATUS

NGRI patients under a hospitalization treatment order are not necessarily physically confined in a psychiatric hospital. A patient may be approved for leaves or absences from the hospital in accordance with established rules and procedures. See MCL 330.1479. Before being placed on leave, however, the CFP must evaluate and recommend a patient for leave. See MCL 330.2050(5); see also MCL 330.1128 (requiring MDHHS to maintain the CFP as an entity under MDHHS's jurisdiction). NGRI patients are allowed to reside outside the psychiatric hospital and in the community under an ALS contract.

A patient's failure to comply with the terms of the ALS contract can result in revocation of authorized leave status and subsequent rehospitalization. Non-compliance warranting rehospitalization is not necessarily tied to misconduct but can include, among other things, failing to take medication, failing to maintain sobriety, or leaving the state without permission.

If a patient under an ALS contract is returned to the hospital, MCL 330.1408 and MCR 5.743 govern that individual's right to appeal his or her rehospitalization. MCL 330.1408 provides, in relevant part:

- (1) An individual is subject to being returned to a hospital if both of the following circumstances exist:
  - (a) The individual was admitted to the hospital by judicial order.

(b) The individual has left the hospital without authorization, or has refused a lawful request to return to the hospital while on an authorized leave or other authorized absence from the hospital.

\* \* \*

(3) An opportunity for appeal, and notice of that opportunity, shall be provided to an individual who objects to being returned from any authorized leave in excess of 10 days. [MCL 330.1408(1) and (3).]

A corresponding court rule, MCR 5.743(B), establishes specific procedures that must be followed when an individual on authorized leave is returned to the hospital. The hospital director “must, within 24 hours, notify the court of the return and notify the individual of the right to appeal the return and have a hearing to determine the appeal.” MCR 5.743(B). The probate court must then “notify the individual’s attorney or appoint a new attorney to consult with the individual and determine whether the individual desires a hearing.” *Id.*

An appeal of a rehospitalization order must be filed within seven days, and a hearing must be scheduled to occur within seven days of receipt of the individual’s request for an appeal. MCR 5.743(C). At the hearing, the hospital director must show that “the individual requires treatment in the hospital.” MCR 5.743(E). If the probate court finds that the “individual requires treatment at a hospital, it must dismiss the appeal and order the individual returned to the hospital.” MCR 5.743(F). But if the probate court finds that the hospital director “lacked an adequate basis for concluding that the individual requires further treatment in the hospital,” the probate court must either order the individual returned to authorized leave status or order

treatment through an alternative to hospitalization. *Id.* Thus, at its outer limits, the probate court hearing must occur no later than 15 days after ALS revocation.<sup>1</sup>

We turn to the question of whether the Mental Health Code endows Duckett with a liberty interest related to the revocation of authorized leave during an involuntary hospitalization that is subject to due-process protections.

### III. DUCKETT'S DUE-PROCESS CLAIM

Duckett first contends that Solky violated his right to due process of law by revoking his ALS without notice of his right to appeal. We review de novo this legal question. *Sandstone Creek Solar, LLC v Benton Twp*, 335 Mich App 683, 712; 967 NW2d 890 (2021). We also review de novo a trial court's interpretation and application of statutes and court rules. *Id.* at 698, 712.

#### A. LEGAL STANDARD FOR DUE PROCESS

The Fourteenth Amendment prohibits the state from depriving a person of life, liberty, or property without due process of law, and protects against the arbitrary action of the government. See US Const, Am XIV; *Kentucky Dep't of Corrections v Thompson*, 490 US 454, 459-460; 109 S Ct 1904; 104 L Ed 2d 506 (1989). Courts examine procedural due-process questions in two steps: first, we ask whether the state has interfered with a protected liberty or property interest; second, we inquire whether the procedures leading to

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<sup>1</sup> This 15-day calculation is based on the 24-hour notice that must be given to the individual and the court after rehospitalization, the seven days within which the individual must request a hearing, and the seven days within which the court must schedule and hold a hearing after receiving the individual's request for a hearing. MCR 5.743(B) and (C).

the deprivation of that interest were constitutionally sufficient. *Thompson*, 490 US at 460. Regarding the first question, the “liberty” and “property” interests for Fourteenth Amendment purposes are not unlimited; the interest must rise to more than “an abstract need or desire,” *Bd of Regents of State Colleges v Roth*, 408 US 564, 577; 92 S Ct 2701; 33 L Ed 2d 548 (1972), and must be based on more than “a unilateral hope,” *Connecticut Bd of Pardons v Dumschat*, 452 US 458, 465; 101 S Ct 2460; 69 L Ed 2d 158 (1981). “Rather, an individual claiming a protected interest must have a legitimate claim of entitlement to it.” *Thompson*, 490 US at 460.

Regarding the second question, the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *In re KB*, 221 Mich App 414, 419; 562 NW2d 208 (1997) (quotation marks and citations omitted). To determine what due process requires in a particular situation, the court must consider three factors:

- (1) the interest that will be affected by the official action;
- (2) the risk of an erroneous deprivation of that interest through the procedures used and the probable value that additional or substitute safeguards would have; and (3)
- the government’s interest, including the function involved as well as the fiscal and administrative burdens that the additional or substitute procedures would require. [*Id.*, citing *Dobrzenski v Dobrzenski*, 208 Mich App 514, 515; 528 NW2d 827 (1995), and *In re Jacobs Attorney Fees*, 185 Mich App 642, 645; 463 NW2d 171 (1990).]

B. DUE PROCESS PROTECTS AN INVOLUNTARILY  
HOSPITALIZED PERSON’S LIBERTY INTEREST IN  
AUTHORIZED LEAVE STATUS

The first inquiry in analyzing an alleged due-process violation is whether the individual has a liberty inter-

est subject to due-process protections. See *Thompson*, 490 US at 460. In accord with binding caselaw, the parties do not dispute that an involuntarily hospitalized person has a liberty interest tied to authorized leave.

Involuntary confinement for the treatment of mental illness is a “massive curtailment of liberty.” *Humphrey v Cady*, 405 US 504, 509; 92 S Ct 1048; 31 L Ed 2d 394 (1972). “There can be no doubt that involuntary commitment to a mental hospital, like involuntary confinement of an individual for any reason, is a deprivation of liberty which the State cannot accomplish without due process of law.” *O’Connor v Donaldson*, 422 US 563, 580; 95 S Ct 2486; 45 L Ed 2d 396 (1975) (Burger, C.J., concurring). And “it appears settled that the revocation of a conditional release from hospitalization involves a liberty interest that should be afforded due process protection.” *In re KB*, 221 Mich App at 419. Accordingly, Duckett’s authorized leave status was a conditional release from hospitalization, and he was, therefore, entitled to due-process protections.

We next consider the procedures necessary to satisfy due process and whether the procedures in place meet due-process standards. See *Morrissey*, 408 US at 481. Due process is flexible and calls for such procedural protections as the particular situation demands. *Id.* Fundamentally, “[d]ue process requires that a party receive notice of the proceedings against it and a meaningful opportunity to be heard.” *Sandstone Creek Solar, LLC*, 335 Mich App at 712, citing *Bonner v Brighton*, 495 Mich 209, 235; 848 NW2d 380 (2014).

Here, the procedures in place satisfied due-process requirements. By mandating notice and an expeditious opportunity to appeal, the statute and the court rule

mitigate the risk of an erroneous deprivation of liberty by allowing for a prompt appeal of the decision to revoke ALS, appointing counsel, and holding a hearing before the probate court. The court must notify the person's attorney or appoint a new attorney, MCR 5.743(B), and the court rule further requires the hospital director to provide the individual and his or her attorney with copies of a clinical certificate and alternative-treatment report three days before the hearing, MCR 5.743(D). These safeguards ensure that an appeal is meaningful. The procedures also accommodate the government's interest in avoiding unnecessary hearings by appointing counsel to assist with an appeal. This procedure not only protects the patient's rights, it also provides some safeguards against frivolous appeals by vetting them through the advice of counsel. If followed, these procedures permit a prompt, fulsome hearing with the assistance and advice of counsel, without overly burdening the government or fisc. Accordingly, MCL 330.1408 and MCR 5.743 satisfy due process.

When Solky revoked Duckett's authorized leave status and reinterned him at the hospital, Solky and the CFP did not follow the procedures in MCL 330.1408 and MCR 5.743. Contrary to the requirements of MCL 330.1408(3) and MCR 5.743, Solky failed to notify Duckett of his right to appeal the return and to have a hearing within seven days. Solky never notified the probate court of Duckett's reinternment, depriving the court of the opportunity to appoint counsel for Duckett. Solky's failure to provide Duckett notice of the opportunity to appeal his rehospitization, and for a hearing, violated his due-process rights.

We reject Solky's argument that the later probate hearing (in which Duckett petitioned for release) rem-

edied the due-process violation for two reasons. First, the hearing addressed a different question than would an appeal of an ALS revocation. The issue at the probate hearing was whether Duckett required involuntary mental health treatment at that time, not whether Duckett could continue to receive his involuntary mental health treatment outside of a hospital setting. Second, even if we accept that the issues at these two types of hearings are effectively the same—which they are not—the hearings addressed Duckett’s mental health at different times. An appeal of the ALS revocation would have focused on Duckett’s mental health condition on September 27, 2017. The hearing conducted on his petition for release inquired into his mental health on April 13, 2018, 6½ months later.

The statutorily required deadlines and reviews reflect that mental health is dynamic, particularly for those who suffer from severe mental health conditions. Duckett’s treatment needs on September 27, 2017, may have been very different from those displayed at the later hearing. The procedures contained in MCL 330.1408 and MCR 5.743 satisfy due process, in part, because the tight time frame for appeal guards against erroneous deprivation of the liberty interest tied to ALS. The delayed hearing did not offer the same protection. And it does not remedy the due-process violation that resulted from Solky’s failure to provide notice of Duckett’s right to appeal, to consult with counsel, and to have a hearing.

C. *MORRISSEY v BREWER* DOES NOT APPLY TO AUTHORIZED  
LEAVE FOR INVOLUNTARILY HOSPITALIZED PERSONS

In *Morrissey*, the United States Supreme Court held that a hearing must be held for a parolee before revocation of parole. *Morrissey*, 408 US at 482-484.



“The essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence.” *Id.* at 477. “[T]he liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a ‘grievous loss’ on the parolee and often on others.” *Id.* at 482. The *Morrissey* Court concluded that a parolee’s liberty “is valuable and must be seen as within the protection of the Fourteenth Amendment,” so “[i]ts termination calls for some orderly process, however informal.” *Id.* The Court also described the typical conditions of parole:

To accomplish the purpose of parole, those who are allowed to leave prison early are subjected to specified conditions for the duration of their terms. These conditions restrict their activities substantially beyond the ordinary restrictions imposed by law on an individual citizen. Typically, parolees are forbidden to use liquor or to have associations or correspondence with certain categories of undesirable persons. Typically, also they must seek permission from their parole officers before engaging in specified activities, such as changing employment or living quarters, marrying, acquiring or operating a motor vehicle, traveling outside the community, and incurring substantial indebtedness. Additionally, parolees must regularly report to the parole officer to whom they are assigned and sometimes they must make periodic written reports of their activities. [*Id.* at 478.]

These conditions, although restrictive on a parolee’s freedom, constitute an implicit promise “that the parolee is entitled to retain his liberty as long as he substantially abides by the conditions of his parole.” *Id.* at 479. The *Morrissey* Court identified the minimum requirements of due process for parole-revocation proceedings:

(a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a “neutral and detached” hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole. [*Id.* at 489.]

Here, the question is whether the liberty interest tied to authorized leave from involuntary hospitalization is sufficiently similar to the liberty interest associated with parole such that *Morrissey*’s procedural requirements apply. We hold that it is not.

Admittedly, there are some similarities between parole and administrative leave. The *Morrissey* Court described some typical conditions of parole, including restrictions on the parolee’s use of alcohol, and the need to seek permission from a parole officer to engage in certain activities such as “changing employment or living quarters” and “traveling outside the community[.]” *Morrissey*, 408 US at 478. Similar conditions exist in ALS contracts. For example, the sample ALS contract submitted by Duckett requires a patient on administrative leave to maintain sobriety, to remain in the state unless permitted to leave, and to obtain approval before any change of address or placement. Like a parolee, an individual on authorized leave can lead a relatively normal life, subject to the conditions of the release. These similarities do not, however, justify extending the protections of *Morrissey* in light of the differences between administrative leave and parole.

The primary difference is that the purpose of involuntary hospitalization is treatment, not punishment.

*Rouse v Cameron*, 125 US App DC 366, 367; 373 F2d 451 (1966).<sup>2</sup> Second, administrative leave is a “therapeutic device in a program of medical treatment of a mentally ill person” that has no penal or deterrent aspects. See *Dietrich v Brooks*, 27 Or App 821, 825; 558 P2d 357, 360 (1976). Imprisonment and parole, on the other hand, serve “penal and deterrent” functions. *Id.* Thus, “the basic purposes and societal expectations of each are fundamentally different.” *Id.* at 826. Third and most relatedly, the natures of the revocation of administrative leave and the revocation of parole are different. Revocation of parole results from a “willful and knowing violation of a condition or conditions imposed upon one previously convicted of having violated the criminal law,” while a decision regarding hospitalization or reinternment stems exclusively from medical necessity:

[T]his case is fundamentally different from those involving revocation of probation or parole. In the latter, revocation is based upon a finding that there has been a willful and knowing violation of a condition or conditions imposed upon one previously convicted of having violated the criminal law. These people, at least presumably, are sane and their acts are the result of their own volition. They are not persons suffering from a condition or disease which requires continuing medical treatment.

In the case of mental patients, even more than in the case of patients suffering from physical ailments, a decision as to whether to keep the patient in the hospital or to discharge him must remain a medical one, to be decided by medical experts, based upon the mental condition of the

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<sup>2</sup> “Caselaw from sister states and federal courts is not binding precedent but may be relied on for its persuasive value.” *Haydaw v Farm Bureau Ins Co*, 332 Mich App 719, 726 n 5; 957 NW2d 858 (2020).

patient and the necessity for hospital treatment, as determined by them. [*Hooks v Jaquith*, 318 So 2d 860, 861 (Miss, 1975).]

Here, the revocation of Duckett's administrative leave was tied exclusively to his treatment needs, even if the source of the revocation was misconduct.<sup>3</sup> See MCL 330.1408(1) (subjecting an individual to rehospitalization if the individual was "admitted to the hospital by judicial order" and either "left the hospital without authorization" or "refused a lawful request to return to the hospital while on an authorized leave or other authorized absence from the hospital"); MCR 5.743(E) (requiring showing at the hearing that the individual requires treatment in a hospital); MCR 5.743(F) (requiring either dismissal of the appeal and entry of an order for rehospitalization if the individual requires treatment at a hospital, or, if no adequate basis for finding further treatment in hospital is required, an order returning the individual to authorized leave status or ordering treatment through an alternative to hospitalization). The revocation in *Morrissey*, on the other hand, was solely a sanction for alleged misconduct. See *Morrissey*, 408 US at 472-473. The process for evaluating whether revocation was proper also differs between parole and administrative leave. The *Morrissey* Court explained that a two-step analysis was necessary: whether the alleged misconduct actually happened and, if so, whether revocation was the proper sanction. *Morrissey*, 408 US at 487-488.

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<sup>3</sup> The record is silent on what triggered Duckett's revocation. There is no evidence indicating *why* his ALS contract was revoked, but the sample ALS contract that Duckett submitted with his brief indicates that it could be revoked for noncompliance with its provisions. Because the probate court's inquiry on an appeal following revocation is whether hospitalization is necessary, the underlying reason is less important than at a parole-revocation hearing.

Here, MCL 330.1408 and MCR 5.743 direct the probate court to answer a single question: is hospitalization required? See MCL 330.1408(1); MCR 5.743(E) and (F). These differences between parole and administrative leave for mental health patients compel the conclusion that *Morrissey* is inapplicable.

In sum, *Morrissey* does not apply, and a hearing related to the revocation of a patient's administrative leave, like Duckett's ALS contract, need not include the specific protections articulated by the *Morrissey* Court. The provisions of MCL 330.1408 and MCR 5.743 satisfy due process. Despite the fact that *Morrissey* does not apply, however, Duckett has an actionable due-process claim under 42 USC 1983 for the reasons already discussed. We turn to Duckett's remedies.

#### IV. DUCKETT'S REMEDIES

##### A. GENERAL LEGAL PRINCIPLES

Duckett's amended complaint seeks damages against Solky in both her individual and official capacities, and an injunction. We hold that damages are available for the individual-capacity suit only and that injunctive relief is precluded on immunity grounds.

Neither states nor state officials acting in an *official* capacity may be sued under 42 USC 1983. *Will v Mich Dep't of State Police*, 491 US 58, 62-71; 109 S Ct 2304; 105 L Ed 2d 45 (1989), affirming *Smith v Dep't of Pub Health*, 428 Mich 540, 544; 410 NW2d 749 (1987); *Thomas v McGinnis*, 239 Mich App 636, 643 n 6; 609 NW2d 222 (2000). The Eleventh Amendment bars such suits unless the state has waived its immunity, or unless Congress has exercised its power to override that immunity. *Will*, 491 US at 66. But a lawsuit for money damages against a public official in

his or her individual capacity is not precluded. *Thomas*, 239 Mich App at 643 n 6, citing *Goodmon v Rockefeller*, 947 F2d 1186, 1187 (CA 4, 1991).

Thus, Duckett's claim for money damages against Solky in her individual capacity is not precluded under § 1983. *Thomas*, 239 Mich App at 643 n 6. To the extent the circuit court concluded otherwise, the circuit court erred. Damages against Solky in her official capacity, however, are barred. See *Will*, 491 US 58; *Thomas*, 239 Mich App at 643 n 6.

Sovereign immunity also bars Duckett's claim for prospective injunctive relief in light of *Ex parte Young*, 209 US 123; 28 S Ct 441; 52 L Ed 714 (1908). Our Supreme Court has described the central holding in *Young* as follows:

*Ex parte Young* . . . helped to lay the groundwork for the Supreme Court's development of the concept of official-versus personal-capacity suits. In *Young*, the Court carved out an exception to the Eleventh Amendment's prohibition against suing a state in federal court. . . .

\* \* \*

The Supreme Court . . . found that the Eleventh Amendment did not preclude official-capacity suits for injunctive relief because such suits "stripped" an official of his "official or representative character," thus exposing only the *individual* occupying the office to liability. [*Smith*, 428 Mich at 583, 585 (opinion by BRICKLEY, J.).]

*Ex parte Young* applies, however, only when a complaint "alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Ladd v Marchbanks*, 971 F3d 574, 581 (CA 6, 2020) (quotation marks and citation omitted). "Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if

unaccompanied by any continuing, present adverse effects.’” *Los Angeles v Lyons*, 461 US 95, 102; 103 S Ct 1660; 75 L Ed 2d 675 (1983) (alteration and brackets omitted), quoting *O’Shea v Littleton*, 414 US 488, 495-496; 94 S Ct 669; 38 L Ed 2d 674 (1974). Courts should assume that, absent an official policy or practice encouraging unconstitutional behavior, individual government officials will act constitutionally. *Lyons*, 461 US at 103; *O’Shea*, 414 US at 497.

Duckett has not shown an ongoing violation of federal law. The allegations in Duckett’s complaint center on past violations and do not describe any future risk of harm. Duckett also fails to allege the existence of an official policy or practice, and he does not suggest that the alleged conduct is likely to occur again. Absent such allegations, this Court assumes that Solky will act to avoid future constitutional violations. *Lyons*, 461 US at 103; *O’Shea*, 414 US at 497. The possibility that Duckett will again be deprived of procedural due process is too speculative to justify injunctive relief or to deem the alleged activity an ongoing violation of federal law.

B. THE NATURE OF THE DAMAGES TO WHICH  
DUCKETT IS ENTITLED

We first consider whether Duckett’s damages claim is moot given that he remains hospitalized. This Court generally does not “address moot questions or declare legal principles that have no practical effect in a case.” *Christenson v Secretary of State*, 336 Mich App 411, 418; 970 NW2d 417 (2021) (citation omitted). An issue is rendered moot when “an event has occurred that renders it impossible for the court to grant relief. An issue is also moot when a judgment, if entered, cannot for any reason have a practical legal effect on the

existing controversy.” *Id.* (quotation marks and citation omitted). We may, however, review moot issues if they are “publicly significant, likely to recur, and yet likely to evade judicial review.” *Id.* (quotation marks and citation omitted).

The mootness doctrine does not bar Duckett’s claim for nominal damages. The federal courts have held that a violation of one’s procedural due-process rights is actionable for nominal damages, even absent proof of actual injury. *Carey v Phipus*, 435 US 247, 266; 98 S Ct 1042; 55 L Ed 2d 252 (1978); *Uzuegbunam v Preczewski*, 592 US 279, \_\_\_; 141 S Ct 792, 796, 800; 209 L Ed 2d 94 (2021); see also *Franklin v Aycock*, 795 F2d 1253, 1264-1265 (CA 6, 1986) (explaining that if a plaintiff shows that his or her procedural due-process rights were violated but the defendant disproves causation, the plaintiff is still entitled to nominal damages). Additionally, a claim for nominal damages may generally “go forward in an otherwise-moot case . . . .” *Morrison v Boyd Co Bd of Ed*, 521 F3d 602, 611 (CA 6, 2008) (citations omitted); see also *Ermold v Davis*, 855 F3d 715, 719 (CA 6, 2017) (“Claims for damages are largely able to avoid mootness challenges.”). We adopt these holdings.

Duckett had a due-process right to notice of the opportunity to appeal his return to the hospital and to a hearing. Accordingly, Duckett is entitled to nominal damages and his claim for damages against Solky in her individual capacity is not moot. *Carey*, 435 US at 266; *Uzuegbunam*, 592 US at \_\_\_; 141 S Ct at 796, 800.

Solky’s objection to a nominal-damages award rests on her assertion that Duckett did not specifically request nominal damages in his amended complaint. Although Duckett’s amended complaint does not use the term “nominal damages,” he included a catchall



provision requesting “such other further relief as this Court deems just and efficient under the circumstances of this case.” This catchall provision sufficiently requests an award of nominal damages, and such an award may be justified by the circumstances of this case. Additionally, Duckett is entitled to amend his complaint to specifically allege a claim for nominal damages should he choose to do so. See MCR 2.116(I)(5).

Solky next contends that even if Duckett is entitled to nominal damages for a “technical violation of the due-process clause” and his claim is not moot, remanding would be an “improper waste of judicial resources” on “such grounds.” None of the cases on which Solky relies involves nominal damages in the context of a due-process violation. To deny Duckett the possibility of nominal damages is to leave unredressed Solky’s failure to follow clearly delineated statutory requirements for individuals on authorized leave who are returned to the hospital. Judicial resources are not “wasted” in fashioning a nominal form of relief.

#### V. CONCLUSION

Duckett established a procedural due-process violation justifying relief under 42 USC 1983, and the circuit court erred by summarily dismissing this claim. We remand for the circuit court to allow Duckett to pursue a claim for nominal damages and for attorney fees. We do not retain jurisdiction.

BORRELLO, P.J., and SHAPIRO, J., concurred with HOOD, J.

## PEOPLE v BURKMAN

Docket Nos. 356600 and 356602. Submitted April 13, 2022, at Detroit.  
Decided June 2, 2022, at 9:10 a.m. Leave to appeal granted 510 Mich 968 (2022).

John M. Burkman and Jacob A. Wohl were charged in the 36th district court with bribing or intimidating voters, MCL 168.932(a); conspiracy to bribe or intimidate voters, MCL 750.157a; and two counts of using a computer to commit a crime, MCL 752.796. Following an investigation, defendants were found to have designed and financed a robocall in 2020 targeting voters in Michigan who lived in areas with a significant African American population. The robocall made a number of claims about mail-in voting, including that it would result in the voter's personal information becoming part of a public database that would be used by the police to "track down old warrants" and by credit card companies to collect debt, and that the Centers for Disease Control and Prevention were "pushing" to use the supposed database to "track people down for mandatory vaccines." The district court, Kenneth J. King, J., bound defendants over for trial in the Wayne Circuit Court following a preliminary examination after concluding that there was probable cause that defendants had committed the charged offenses. In the circuit court, defendants moved to quash the bindover. The trial court, Margaret M. Van Houten, J., denied the motion. Defendants' applications for leave to appeal were denied by the Court of Appeals, and defendants then applied for leave to appeal in the Supreme Court. The Supreme Court, in lieu of granting leave to appeal, remanded to the Court of Appeals for consideration as on leave granted. 508 Mich 951 (2021).

The Court of Appeals *held*:

1. Defendants argued that the robocall was not menacing within the meaning of the election law statute because it did not involve a threat of physical assault. Although "menace" is not defined in MCL 168.932, the plain and ordinary meaning of the word does not require a physical component. Moreover, the plain language of the statute does not require that the menace be achieved through physical contact as reflected by the statute's

qualification that a person shall not attempt to influence an elector by means of menace, “either directly or indirectly.” Thus, because a menace may occur in a direct or indirect manner, it may be achieved with or without physical contact.

2. Defendants invoked the statutory canon of construction *noscitur a sociis*, i.e., the principle that a word or phrase is given meaning by its context or setting, to argue that “corrupt means or device” in MCL 168.932(a) must be interpreted by reference to bribery and menace. Although the meaning of grouped words should be given a related meaning, this does not require that the terms be subsumed within the same definition. Applying *noscitur a sociis* in order to equate “corrupt means or device” with menace or bribery would fail to give effect to every word, phrase and clause in MCL 168.932(a) and would render the phrase nugatory. Moreover, relying on a legal maxim was unnecessary because caselaw provided a definition of “corrupt behavior” and “corrupt intent,” while “corrupt” was defined by lay and legal dictionaries. The evidence presented was sufficient to bind over defendants on the theory that they violated the statute by deterring voting through “other corrupt means or device.” Defendants discussed how they could “hi-jack” the election and scripted a robocall that claimed that the personal information of electors who used mail-in voting would become part of a public database that would be accessible to law enforcement and debt collectors. Defendants further arranged to send the robocall to zip codes with a predominantly African American population. In addition, the robocall was sent during the COVID-19 pandemic, when many voters felt that mail-in voting was their only option to safely exercise their right to vote. On the basis of this evidence, a fact-finder could conclude that defendants intentionally disseminated a dishonest message with the depraved motive of deterring voting. Therefore, the trial court did not abuse its discretion by denying defendants’ motion to quash. Additionally, although defendants argued that the bindover should have been quashed because the robocall only deterred one method of voting without deterring other methods, such as traditional in-person voting, this ignored the timing of the robocall. As noted, the robocall was disseminated during a pandemic when in-person voting carried a risk to a voter’s health, and the robocall could also have deterred voters who were unable to vote in person for other reasons.

3. Defendants claimed that the robocall could not lead to criminal liability under the election law because the message contained opinion statements, statements that were plausibly true, or statements that were not true that defendants did not

know to be false. In order for the robocall to be deemed a corrupt means or device, it had to be established that defendants deliberately used a wrongful method with a depraved intent to interfere with voting. Regardless of whether the message was worded in the form of an opinion, was possibly true, or unknowingly false, if defendants intended to influence, deter, or interrupt an elector in giving their vote, MCL 168.932(a) was satisfied. The prosecution presented sufficient evidence to establish probable cause that defendants had the requisite intent to violate the statute.

4. Defendants argued that MCL 168.932(a) is unconstitutional on its face and as applied to defendants. Defendants contended that MCL 168.932(a) is void for vagueness because it does not adequately define “other corrupt means or device.” However, “corrupt,” the key term in this phrase, has been interpreted in judicial opinions. Based on these interpretations, a person of reasonable intelligence would understand that MCL 168.932(a) is violated by using any intentional, purposeful, deliberate, and knowingly wrongful method with the depraved intent to interfere with voting. Defendants also contended that the statute was overbroad because it criminalizes protected speech in a manner that is not narrowly tailored to fit a compelling governmental interest. The government may not ordinarily restrict speech on the basis of its content except in various well-recognized areas, including true threats and speech integral to criminal conduct. In this case, MCL 168.932(a) bars speech beyond the scope of the true-threat exception because the statute prohibits threats of nonviolent harm. The robocall warned of harm to the freedom, financial security, and bodily autonomy of mail-in voters, but it did not include a serious expression of an intent to commit an act of unlawful violence, as required to constitute a true threat. Therefore, the statute could not avoid constitutional scrutiny under the true-threat exception. But the exception to First Amendment protection for speech integral to criminal conduct was applicable here. In *Giboney v Empire Storage & Ice Co*, 336 US 490 (1949), the United States Supreme Court held that freedom of speech did not extend immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute. The purpose of MCL 168.932(a) is to preserve and protect the right to vote, which is a compelling state interest. To the extent that the fact-finder agrees, defendants’ dissemination of the message deterred voting through corrupt means; therefore, defendants’ speech was an integral part of conduct criminalized by MCL 168.932(a) and should not be

protected by the First Amendment merely because the conduct was carried out by means of language.

Affirmed.

REDFORD, J., concurring in part and dissenting in part, agreed with the majority opinion that the trial court did not abuse its discretion by denying defendants' motion to quash the bindover on the theory that the robocall was an "other corrupt means or device" used to deter voting in violation of MCL 168.932(a) and that defendants' First Amendment rights were not violated because their speech was integral to criminal conduct. But he disagreed that the conduct alleged and evidence presented supported the theory that defendants' conduct constituted a "menace" under the statute. Judge REDFORD noted that caselaw discussing menacing behavior indicated that a "menace" involves making a serious threat of assault by overt conduct that causes the victim to reasonably believe that the person making the threat will do what is threatened. He noted that defendants did not express in the robocall that they would carry out the threatened acts; instead, they stated that others might do the acts described. Therefore, the robocall did not fit within the jurisprudential concept of a menace.

1. ELECTION LAW – MCL 168.932(a) – DETERRING AN ELECTOR FROM GIVING THEIR VOTE – WORDS AND PHRASES – "MENACE."

Under MCL 168.932(a), a person may not attempt to deter an elector from giving their vote by means of bribery, menace, or other corrupt means or device; "menace" is commonly defined as showing or threatening an intention to inflict harm and does not require an accompanying physical component; the plain language of the statute also does not require that the menace be achieved through physical contact, given the stipulation that the menace may occur either directly or indirectly.

2. CONSTITUTIONAL LAW – ELECTION LAW – MCL 168.932(a) – VAGUENESS – FAIR NOTICE – "OTHER CORRUPT MEANS OR DEVICE."

Under MCL 168.932(a), a person may not attempt to deter an elector from giving their vote by means of bribery, menace, or other corrupt means or device; although the phrase "corrupt means or device" is not defined by the statute, caselaw has interpreted "corrupt" such that a person of reasonable intelligence should understand that they violate the statute by using any intentional, purposeful, deliberate, and knowingly wrongful method with the depraved intent to interfere with voting; there-

fore, the statute is not unconstitutionally vague because it provides fair notice of what is prohibited.

*Dana Nessel*, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Richard L. Cunningham*, Assistant Attorney General, for the people.

*Grabel & Associates* (by *Scott A. Grabel* and *Timothy A. Doman*) for John M. Burkman.

*McManus & Amadeo PLLC* (by *William Amadeo*) for Jacob A. Wohl.

Before: LETICA, P.J., and REDFORD and RICK, JJ.

LETICA, P.J. In these consolidated appeals,<sup>1</sup> defendants, John Macauley Burkman and Jacob Alexander Wohl, appeal as on leave granted<sup>2</sup> the trial court's orders denying their motions to quash and dismiss. Defendants were both charged with attempting to influence, deter, or interrupt electors, MCL 168.932(a), conspiracy to commit that offense, MCL 750.157a, and two counts of using a computer to commit a crime, MCL 752.796.

Defendants contend that the charges should have been dismissed because their dissemination of a robocall regarding possible repercussions of mail-in voting

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<sup>1</sup> *People v Burkman*, unpublished order of the Court of Appeals, entered November 9, 2021 (Docket Nos. 356600 and 356602).

<sup>2</sup> This Court denied defendants' applications for leave to appeal, *People v Burkman*, unpublished order of the Court of Appeals, entered May 6, 2021 (Docket No. 356600), and *People v Wohl*, unpublished order of the Court of Appeals, entered May 6, 2021 (Docket No. 356602), but the Supreme Court remanded to this Court for consideration as on leave granted. *People v Burkman*, 508 Mich 951 (2021); *People v Wohl*, 508 Mich 951 (2021). We refer to "defendants" to reflect collective action but refer to each defendant by his last name where appropriate to reflect individual activity.

did not constitute a menace or use of other corrupt means or device under MCL 168.932(a). We conclude the robocall did involve menace and could also be construed as a corrupt means or device. Defendants further contend that MCL 168.932(a) is unconstitutional both on its face and as applied in this case. However, the phrase “other corrupt means or device” is not unconstitutionally vague. Concerning defendants’ First Amendment arguments, the robocall message was not a “true threat” but is still not subject to First Amendment protections because it was speech integral to criminal conduct. Accordingly, we affirm.

#### I. BASIC FACTS AND PROCEDURAL HISTORY

Derrick Thomas was a retired firefighter, resident of the city of Detroit, and registered voter. As a regular voter, Thomas received “robocalls,” i.e., prerecorded phone messages disseminated to a large group of people via a computer or robot. Thomas had telephone service through both a landline at his home and a cell phone. Thomas had placed himself on a do-not-call list several times, but it did not stop unsolicited calls to his home.<sup>3</sup> His landline phone had a 313 area code, caller identification, and the ability to simultaneously record a message and play it aloud as it was recorded. On August 26, 2020, at 11:16 a.m., Thomas did not answer

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<sup>3</sup> According to the Federal Communications Commission (FCC), “Political campaign-related autodialed or prerecorded voice calls, including autodialed live calls, autodialed texts, and prerecorded voice messages, are prohibited to cell phones, pagers or other mobile devices without the called party’s prior express consent.” FCC, *Rules for Political Campaign Calls and Texts* <<https://www.fcc.gov/rules-political-campaign-calls-and-texts>> (accessed May 31, 2022) [<https://perma.cc/Y2AF-5UMK>]. However, “[p]olitical campaign-related autodialed or prerecorded voice calls are permitted when made to landline telephones, even without prior express consent.” *Id.*

a phone call to his landline from a phone number he did not recognize. Still, he heard the message that was left as it was recorded:

Hi, this is Tamika Taylor from Project 1599,<sup>[4]</sup> the civil rights organization founded by Jack Burkman and Jacob Wohl. Mail-in voting sounds great, but did you know that if you vote by mail your personal information will be part of a public database that will be used by police departments to track down old warrants and be used by credit card companies to collect outstanding debts? The [Centers for Disease Control and Prevention (CDC)] is even pushing to use records from mail-in voting to track people for mandatory vaccines. Don't be finessed into giving your private information to the man. Stay safe and beware of vote by mail.

The message upset Thomas because he believed it was designed to act as “a deter[r]ent from mail-in voting.” Although Thomas did not believe that his direct physical safety was threatened, indirectly, he felt concerned about his safety because politics were polarizing. Thomas found the message offensive because it indicated that voting information would be used to allow the police to determine if an individual had any bench warrants, allow credit card companies to learn if an individual had any outstanding debts, and allow the CDC to force an individual to get vaccinated. Thomas

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<sup>4</sup> According to the FCC, Project-1599 is not a registered legal entity, but a branding name used to describe the activities conducted by defendants and JM Burkman & Associates, LLC, an entity providing registered lobbying services. See *In re Burkman*, 36 FCC Rcd 12979, 12980 n 6 (2021), available at <<https://docs.fcc.gov/public/attachments/FCC-21-97A1.pdf>> (accessed May 31, 2022) [<https://perma.cc/4M9M-CXXH>]. Although the FCC proposed a forfeiture of \$5,134,500 against defendants and the lobbying entity, the basis of the fine was the unlawful robocalls to wireless numbers without subscribers' prior express consent. For this reason, the content of the robocall was irrelevant to the proposed forfeiture. *Id.* at 12979-12980 & n 10.



felt appalled more than threatened by the message because it deterred mail-in voting during a pandemic when voting in person was not as safe.

Thomas tried to notify the Detroit Election Commission about the phone call and message but was unable to speak to a person. Thomas then called a local news radio station, and he was interviewed for a story. He played the recorded message for the station employee and gave consent to have the radio station record the message.

As a result of the radio interview, Thomas was contacted by the Department of Attorney General (the Department). Thomas did not have firsthand knowledge about whether there was any truth to the contents of the message. He did not allow himself to be affected by the message and voted by mail.

The Department assigned Jeffrey Campbell the task of investigating the robocall. Campbell learned that the robocall was sent by a company called Message Communications, operated by Robert Mahanian. Additionally, the investigation determined that defendants paid to have the robocall sent by Mahanian's company and were responsible for the robocall's content. Through search warrants, Campbell obtained e-mail exchanges between defendants, and because of the volume of the e-mails, Campbell had not yet reviewed all of them at the time of the preliminary examination. In the e-mails Campbell had read, defendants discussed how to "hijack" this "boring" election. On August 19, 2020, Burkman wrote to Mahanian and copied Wohl that the checks paying for Mahanian's services had been sent in a "two[-]day pouch," and once they arrived, "then we attack." On August 22, 2020, defendants communicated to Mahanian that they were

ready to begin the robocalls and that the payment had been mailed.

On August 25, 2020, Wohl e-mailed Burkman that the audio file of the robocall was attached. Wohl further suggested that the robocall be sent “to black neighborhoods in Milwaukee, Detroit, Philadelphia, Charlotte, Richmond, Atlanta and Cleveland.” In response, Burkman suggested that the robocall be sent to “[Cleveland], Philadelphia, Minnesota, Chicago, New York City and Detroit.” It was determined that the robocalls would be sent in “two waves” consisting of 267,000 calls in each wave.

On August 26, 2020, Mahanian notified defendants that their “campaign is currently running and recording.” Defendants exchanged e-mails that the robocalls were being discussed on the Twitter platform. On August 26, 2020, at 12:36 p.m., Burkman wrote to Wohl to comment on the success of the robocalls, stating, “I love these robo calls getting angry black call backs, win or lose, the black robo calls was [sic] a great idea.”

On August 27, 2020, Wohl seemingly wrote Burkman that they should deny sending the robocalls because it would generate more written discussion. Indeed, in response to a writer from a political news and opinion website, Burkman wrote, “[W]e have no connection to those robo calls.” A short time later, Burkman addressed the same writer, stating:

[C]ouple points, one, no one in their right mind would put their cell [phone number] on [the] robo call. I bet a [George] Soros Group is trying to embarrass us. Thirdly, we have been asked by the Trump Campaign to do robo calls and politely declined. We don’t do that stuff.

Additionally, a member of the Associated Press wrote Burkman and asked if defendants were involved in the robocall. Burkman wrote back, “[N]o sir, not at all . . . .” However, on October 26, 2020, Burkman presented at a federal court hearing in New York and acknowledged that defendants had prepared and caused the robocall message to be sent. At the same hearing, Wohl affirmed the statement made by Burkman.<sup>5</sup>

Campbell was asked by Burkman’s counsel whether there was other evidence that his client desired to deter mail-in voting. Although Campbell had not completed his review of the e-mails, he responded there were e-mails “between [defendants] discussing other plans to influence the election by creating false schemes, hiring actors to create false allegations and so forth.” When asked to provide an opinion regarding the nature of the e-mail between defendants, Campbell responded that “one of their intentions [was] to influence the election unfairly” and to deter mail-in voting. He acknowledged that the e-mails did not discuss in-person voting.

During Campbell’s investigation, he learned that defendants had uploaded the content of the robocall. Furthermore, defendants, not Mahanian, chose the *zip codes* where the robocall was deployed. Campbell had no evidence that Mahanian altered the content of the robocall presented by defendants, and Mahanian kept detailed records addressing client involvement and content history.

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<sup>5</sup> During the preliminary examination, counsel for both defendants inquired whether Campbell had interviewed their clients. Campbell testified that he had asked to conduct interviews after the charges were issued, but his request was denied.

Khyla Craine, an attorney, served as the second in command of the Legal Services Administration, which included the Bureau of Elections, within the Michigan Department of State and provided legal and policy consultations. Craine also was the Chief Privacy Officer and addressed data-related questions. Craine described a robocall as “[a]n automated [message] dialed to a group of residents that will encourage them to do something, usually tied to [an] election, but it could be for any purpose[.]” Craine was made aware of this particular robocall in late August or early September 2020. There was an accusation “that it would be [a] voter suppression type of robo call targeted [at] African American citizens in the City of Detroit.” Craine heard the robocall in October 2020.

Craine testified that information related to elections was part of a public record. However, there were search limitations on the record. She opined that the robocall’s content regarding access to voter records by law enforcement, credit card agencies, or the CDC was false. A state election file contained the voter’s name, address, participation in an election, and type of vote cast, i.e., mail-in or in-person. This information could be shared publicly. However, state law prohibits the voter’s phone number or e-mail address from being shared. Because the qualified voter file contained limited data that did not include contact information, it did not make sense that law enforcement or credit card agencies would use this compiled material. Moreover, there were other compiled databases that law enforcement and credit card agencies used that contained the information they required for their work. For example, the driver information file provided companies more details than the qualified voter file. The Law Enforcement Information Network system was the database used by police agencies to achieve their objectives.

Craine was unaware of any voting information requested by or given to the CDC, and she was unaware of any mandated vaccinations as stated on the robocall. Even Craine did not have access to the qualified voter files because the access was given on a need-to-know basis, and the recipients that received these files were vetted by the Bureau of Elections. Thus, Craine opined that law enforcement did not have access to the qualified voter file unless there was an investigation into an elections-related offense. Further, it was not used by credit card companies to collect outstanding debts. Thousands of entities request information from the driver files, not the qualified voter files. Craine opined that voters had no reason to be concerned about mail-in voting, but she “would have a concern if [voters] listened to this robo call and got misinformation [that affected] whether or not . . . they would feel that mail[-]in voting was safe.”

On cross-examination, Craine stated that a person or entity could not request the personal information of an individual voter from the qualified voter file. However, a person or entity could request this information for a group of voters, such as those registered in a specific jurisdiction, zip code, or house district. Furthermore, if debt collection was the reason for seeking this information, as implied in the robocall, other databases provided more suitable information. Craine affirmed that she was offended by the robocall because the state had the “responsibility . . . to [e]nsure that all of our voters are able to vote without any type of issue and that they’re not intimidated or given misinformation about the accuracy or security of their ballot.” Also, on cross-examination, Craine again opined that the information contained in the robocall was false. Although Craine did not call the CDC to determine if it

would seek to access voter files, there were no mandated vaccinations at that time.

Craine also never sought out defendants to inquire about their reason for the robocall. But, if they were motivated by concern over mail-in ballots, Craine found it curious that defendants only directed the robocall to Detroit residents rather than cautioning citizens across the state of Michigan about mail-in voting. In Craine's experience addressing voter suppression, the robocall fit into the pattern of misinformation that is directed to select individuals in a particular jurisdiction. When it was proffered that defendants' purchase of information pertaining to the 313 area code of Wayne County included suburban communities that were "highly Caucasian," Craine maintained that Wayne County remained "disproportionately African American." Again, Craine testified that defendants appeared to target a particular group of people, not just general voters, in light of the fact that the robocall was disseminated to a limited area and not the entire state. Further, she opined that the use of phrases such as "mandatory vaccinations" and "the man" was verbiage directed to a particular group of people. Because the robocall attempted to deter mail-in voting and COVID-19 had disproportionately affected African Americans in Detroit, Craine concluded that suppression of the vote was the logical objective of the call in light of the combination of factors. In the 18 months that Craine had worked in her position, the police, credit card agencies, and the CDC had never used the qualified voter files.

At the conclusion of this testimony, defendants opposed the bindover, alleging that the statute did not govern the message at issue or did not clearly define the conduct it governed and that the message at issue

contained speech that was protected by the First Amendment. The prosecution asserted that it presented sufficient information to support the elements and that the speech at issue was not protected.

The district court concluded that the crimes alleged were committed in the city of Detroit and that there was probable cause to believe that defendants committed them. The district court noted Craine's testimony that law enforcement, credit card companies, and the CDC did not access the qualified voter files to contact people or to execute their duties. It was also noted that defendants disseminated the call to a particular group of people in light of defendants' "very strong political views," and the appropriate inquiry was not the effect of the message on the recipient, but defendants' intent. The district court also stated that the message was directed to a community that was 85% African American, and this community equated the term "the man" to "the white man."

In the circuit court, defendants moved to quash the bindover. First, defendants argued that MCL 168.932(a) did not criminalize their conduct because they did not engage in acts of physical harm. Second, defendants submitted that MCL 168.932(a) was unconstitutional on its face and as applied and that their conduct was protected by the First Amendment. The prosecution opposed the motion, alleging that defendants' actions were criminal and in violation of MCL 168.932(a) because they sent a threatening message designed to deter individuals from voting and arguing that a threat need not be physical to violate the statute. The prosecution further alleged that the message was not protected by the First Amendment because it was a true threat and there was a need to protect the right to vote.

After hearing oral argument, the trial court rejected defendants' arguments. The trial court concluded that the district court did not abuse its discretion in binding defendants over in light of the content of the message, the e-mails exchanged between defendants regarding their desire to "hijack" the election, the community to which the message was directed, and the circumstances surrounding the pandemic as residents were encouraged to stay home. The trial court also rejected the contention that the prosecution violated defendants' First Amendment rights, noting that the state had a compelling interest in protecting the right to vote and that the Legislature had narrowly tailored MCL 168.932 to prevent any attempt to influence the vote or deter a vote. Moreover, the trial court characterized the message as not expressing an opinion, but presenting misleading and possibly false information. From this decision, defendants appeal.

## II. STANDARDS OF REVIEW

A trial court's ruling regarding a motion to quash the information is reviewed for an abuse of discretion. *People v Zitka*, 325 Mich App 38, 43; 922 NW2d 696 (2018). "An abuse of discretion occurs when a trial court's decision falls outside the range of reasonable and principled outcomes." *People v Burger*, 331 Mich App 504, 510; 953 NW2d 424 (2020) (quotation marks and citation omitted). A trial court necessarily abuses its discretion when it commits an error of law. *Id.* The bindover decision is reviewed de novo to determine whether the district court abused its discretion without any deference to the circuit court decision. *People v Hawkins*, 340 Mich App 155, 173; 985 NW2d 853 (2022). Similarly, the denial of a defendant's motion to dismiss charges is reviewed for an abuse of discretion.



*People v Korkigian*, 334 Mich App 481, 489; 965 NW2d 222 (2020). To determine whether dismissal is appropriate for the failure to demonstrate the defendant's intent, the facts and circumstances or context of the defendant's conduct may be considered. See *People v Gerhard*, 337 Mich App 680, 694-695; 976 NW2d 907 (2021); *People v Byczek*, 337 Mich App 173, 187-190; 976 NW2d 7 (2021).

Issues involving statutory interpretation are reviewed de novo. *People v Lydic*, 335 Mich App 486, 490; 967 NW2d 847 (2021). The lower court's determination that a defendant's conduct falls within the scope of a penal statute is reviewed de novo. *Korkigian*, 334 Mich App at 489. Further, application of the facts to the law is reviewed de novo. *Lydice*, 335 Mich App at 490. A challenge to the constitutionality of a statute presents a question of law reviewed de novo on appeal. *People v GR*, 331 Mich App 58, 68; 951 NW2d 76 (2020).

### III. APPLICATION OF MCL 168.932

Defendants first assert that their conduct does not constitute a violation of the voter-suppression statute. We disagree.

When interpreting a statute, the primary goal is to ascertain and give effect to the intent of the Legislature. *People v Morrison*, 328 Mich App 647, 651; 939 NW2d 728 (2019). If the statutory language is plain and unambiguous, the legislative intent is clearly expressed, and judicial construction is neither permitted nor required. *People v Costner*, 309 Mich App 220, 224; 870 NW2d 582 (2015). When interpreting a statute, the appellate court must give effect to every word, phrase, and clause and not render any part of the statute surplusage or nugatory. *People v Rea*, 500 Mich 422, 427-428; 902 NW2d 362 (2017). "When a word or

phrase is not defined by the statute in question, it is appropriate to consult dictionary definitions to determine the plain and ordinary meaning of the word or phrase.” *Id.* at 428. “In construing a legislative enactment we are not at liberty to choose a construction that implements any rational purpose but, rather, must choose the construction which implements the legislative purpose perceived from the language and the context in which it is used.” *In re D*, 329 Mich App 671, 688; 944 NW2d 180 (2019) (quotation marks and citation omitted).

A. MENACE

MCL 168.932 provides, in pertinent part:

A person who violates 1 or more of the following subdivisions is guilty of a felony:

(a) A person shall not attempt, by means of bribery, menace, or other corrupt means or device, either directly or indirectly, to influence an elector in giving his or her vote, or to deter the elector from, or interrupt the elector in giving his or her vote at any election held in this state.

Defendants contend that the robocall was not menacing because it did not involve a threat of physical assault. Because the term “menace” is not defined in MCL 168.932, we may consult a dictionary definition to determine the plain and ordinary meaning of the word. *Rea*, 500 Mich at 428. “Menace” is defined as “a show of intention to inflict harm”; “one that represents a threat”; “to make a show of intention to harm”; or “to represent or pose a threat to.” *Merriam-Webster’s Collegiate Dictionary* (11th ed). The term “menace” as defined in the dictionary does not require an accompanying physical component, but may be established through a threat. Indeed, the plain language of MCL 168.932(a) does not require that the menace be

achieved through physical contact as reflected by the Legislature's further qualification that a person shall not attempt by menace, either *directly or indirectly*, to deter the elector from giving his vote. Thus, the behavior equated with menace may occur either directly or indirectly. The term "directly" is defined as "in a direct manner"; "in immediate physical contact"; and "in the manner of direct variation." *Merriam-Webster's Collegiate Dictionary* (11th ed). Further, the term "indirectly" is defined as "deviating from a direct line or course"; "not straightforward and open"; and "not directly aimed at or achieved." *Id.* By the Legislature's allowance for the menace to occur in a direct or indirect manner, the menace may be achieved with or without physical contact. This challenge is without merit.

Nonetheless, defendants posit that the term "menace" has acquired a peculiar meaning in the law requiring physical harm, and because the robocall did not threaten physical harm, the motion to quash should be granted. Defendants' citation of criminal cases involving an assault are not persuasive.<sup>6</sup> There is no indication that the Legislature intended for the term "menace" to have the same meaning in the election statute that it has acquired in criminal-assault caselaw. Further, the interpretation urged by defendants is contrary to the rules governing statutory construction. We are to apply the term "menace" according to the legislative intent as expressed by the statutory language of the election law statute. See *Costner*, 309 Mich App at 225. Thus, the term must be examined in the context in which it is used *in election*

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<sup>6</sup> Moreover, the cases cited by defendants did not examine the precise meaning of menace. See *People v Johnson*, 407 Mich 196, 241; 284 NW2d 718 (1979) (LEVIN, J., dissenting); *People v Doud*, 223 Mich 120, 123; 193 NW 884 (1923); *Hamlin v Mack*, 33 Mich 103, 106 (1875); *People v Plumsted*, 2 Mich 465, 466 (1853).

*law* to implement the legislative purpose as expressed by the plain language. *In re D*, 329 Mich App at 688. MCL 168.932(a) criminalized the interference with the exercise of the right to vote as well as a breach of the integrity of the process through interference, i.e., the interruption of the elector in giving his or her vote. The requirement of a physical component underlying the term “menace” in MCL 168.932(a), when the statute provides that the menace may occur directly or indirectly, is contrary to the legislative purpose and intent as expressed in the statute’s plain language. Accordingly, we decline defendants’ invitation to read a physical component into the voter-suppression statute, MCL 168.932(a).

#### B. CORRUPT MEANS OR DEVICE

Alternatively, defendants assert that the robocall message did not constitute a “corrupt means or device” because it was not intrinsically unlawful like bribery or menace.<sup>7</sup> We disagree.

Specifically, invoking the statutory canon of construction *noscitur a sociis*, a doctrine that “stands for the principle that a word or phrase is given meaning by its context or setting,” *People v Morris*, 314 Mich App 399, 410; 886 NW2d 910 (2016) (quotation marks and citation omitted), defendants submit that “corrupt means or device” must be interpreted by reference to bribery and menace. Indeed, words in a statute should not be examined in a void, but should be read as a

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<sup>7</sup> In the discussion of this issue addressing the statute’s terms, defendants raise a number of hypothetical circumstances. Because these hypotheticals were raised in the context of a statutory-construction challenge and not First Amendment freedoms, we must focus on the specifics of the case at hand. *People v Lockett*, 295 Mich App 165, 176; 814 NW2d 295 (2012).

whole to harmonize the meaning and give effect to the whole act. *People v Hill*, 486 Mich 658, 668; 786 NW2d 601 (2010). Applying *noscitur a sociis*, words and clauses are not detached from those which precede and those that follow. *Id.* Although the meaning of grouped words should be given a related meaning, that does not require that the terms be subsumed or contrived to fall within the same definition. Rather, “it is clear that what a court should do in construing a term in a criminal statute for which there are a variety of potential definitions is to determine from among those definitions which the Legislature most reasonably intended by the specific context in which the term is found.” *Id.* at 669.

We decline the request to apply *noscitur a sociis* in order to achieve defendants’ goal of equating “corrupt means or device” with menace or bribery. To do so, we would fail to give effect to every word, phrase and clause in MCL 168.932(a) and render “corrupt means or device” surplusage or nugatory. *Rea*, 500 Mich at 427-428. Further, there is no need to resort to such legal maxims given that this Court has previously explained in the context of misconduct in office that “corrupt behavior” refers to “intentional, purposeful, deliberate, and knowing wrongful behavior.” *People v Waterstone*, 296 Mich App 121, 138; 818 NW2d 432 (2012). Our Supreme Court has likewise described “corrupt intent” as a “sense of depravity, perversion or taint.” *People v Perkins*, 468 Mich 448, 456; 662 NW2d 727 (2003). Additionally, both lay and legal dictionaries provide similar definitions of “corrupt.” See *Merriam-Webster’s Collegiate Dictionary* (11th ed) (“morally degenerate and perverted,” “characterized by improper conduct (as bribery or the selling of favors)”; *Black’s Law Dictionary* (11th ed) (“[h]aving unlawful or de-

praved motives; given to dishonest practices, such as bribery”) (emphasis added).

The evidence at the preliminary examination was sufficient to bind over defendants premised on “other corrupt means or device.” The prosecution introduced e-mails exchanged between defendants in which they discussed “hi-jack[ing] this boring election.” In order to achieve this goal, defendants composed a robocall message stating that mail-in voting “will” allow personal information to become part of a public database. It was then concluded that *this* database “will be used by police departments to track down old warrants and be used by credit card companies to collect outstanding debts[.]” Further, the robocall posited that the CDC was “pushing” to use mail-in voting records to “track people for mandatory vaccines.” Defendants then arranged to send the robocall message to predominantly African American metropolitan neighborhoods<sup>8</sup> and expressed pleasure when they received “angry black call backs.” When defendants were contacted about their participation in the robocall, they initially denied any involvement. Months later, during a separate court proceeding in another state, defendants admitted they were responsible for disseminating the robocall message. Craine opined that the robocall statements were false because the qualified voter files had never been used in the manner suggested by the robocall, nor

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<sup>8</sup> Campbell testified that he learned the robocall was disseminated by zip code, but did not specify the zip codes on the record. Thomas testified that he received the robocall to his landline in his Detroit residence which had a 313 area code. During the questioning of Craine, defense counsel noted that defendants had purchased information pertinent to the 313 area code in Wayne County. From the record, it is unclear if defendants purchased the qualified voter files of metro Detroiters or some other database and then directed the robocall to specific zip codes premised on race or other factors in light of the data purchased.

would it be practical for law enforcement, creditors, or the CDC to use qualified voter files when other publicly available databases provided more personal details. Further, she noted that there were no mandatory vaccinations at the time of the robocall. Thomas, a voter who received the robocall, construed it as trying to deter listeners from mail-in voting and opined that many people may not want to vote at all if they felt that in-person voting during the COVID-19 pandemic was their only option. In light of the content of the robocall and the pandemic, a voter, contingent on his or her circumstances, could have deemed it ill-advised or unsafe to exercise the right to vote either through mail-in or in-person voting. A fact-finder could conclude from this evidence that defendants intentionally disseminated a dishonest message with the depraved motive of deterring voting. *Gerhard*, 337 Mich App at 694-695; *Byczek*, 337 Mich App at 187-190. Consequently, the trial court did not abuse its discretion by denying defendants' motion to quash because there was probable cause to believe that defendants used a corrupt means or device to deter voting, MCL 168.932(a), in light of all the facts and circumstances. See *Zitka*, 325 Mich App at 43.

Defendants also argue that the bindover should have been quashed because MCL 168.932(a) prohibits influencing, deterring, or interrupting an elector from "giving his or her vote," and the robocall message only deterred one specific method of voting—mail-in voting—without discouraging traditional in-person voting. But as the prosecution points out in response, the timing of the robocall was significant. Our nation was in the midst of the COVID-19 pandemic, such that in-person voting carried with it a serious risk to a voter's health. The message could also deter all voting by robocall recipients who were entirely unable to vote

in person for reasons other than the risk of contracting or spreading COVID-19. Thus, whether defendants influenced, deterred, or interrupted electors from giving their votes under these circumstances is a question of fact. See *Gerhard*, 337 Mich App at 694-695; *Byczek*, 337 Mich App at 187-188.<sup>9</sup>

Defendants contend that the robocall message cannot lead to criminal liability under MCL 168.932(a) because the message asserted opinion, plausibly true facts, or untrue facts defendants did not know to be false. As noted, MCL 168.932 provides, in pertinent part:

A person who violates 1 or more of the following subdivisions is guilty of a felony:

(a) A person shall not attempt, by means of bribery, menace, or other corrupt means or device, either directly or indirectly, to influence an elector in giving his or her vote, or to deter the elector from, or interrupt the elector in giving his or her vote at any election held in this state.

Defendant's arguments address the intent required by MCL 168.932(a). As noted, for the robocall to be deemed a corrupt means or device, it must be established that defendants deliberately used a wrongful method with a depraved intent to interfere with voting. Regardless of whether the message was worded in the

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<sup>9</sup> Defendants also contend that there was no evidence that a voter was dissuaded from voting as a result of the robocall. Indeed, Thomas testified that he was appalled by the robocall's message, but it did not deter him from voting. The clear and plainly expressed language of MCL 168.932(a) prohibits the "attempt, by means of . . . menace, or other corrupt means or device, either directly or indirectly, to influence . . . or deter . . . or interrupt the elector in giving his or her vote at any election held in this state." (Emphasis added.) See *Costner*, 309 Mich App at 224. Thus, the plain language punishes, as a felony, the attempt and there is no further requirement that the attempt be successful to punish the conduct.



form of an opinion, possibly true,<sup>10</sup> or unknowingly false, if defendants intended to influence, deter, or interrupt an elector in giving his or her vote, MCL 168.932(a) is satisfied. The prosecution presented sufficient evidence to establish probable cause that defendants had the requisite intent, and the trial court did not abuse its discretion by denying defendants' motion to quash the bindover.

Lastly, defendants submit that this Court should apply the rule of lenity because the definition of "other corrupt means or device" is ambiguous. "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) (quotation marks and citation omitted). Stated otherwise, "[t]he rule of lenity stands for the proposition that penal laws are to be strictly construed, with all doubts resolved in a defendant's favor," and "[t]he rule applies only when the statutory text is ambiguous[.]" *People v Arnold*, 508 Mich 1, 24 n 51; 973 NW2d 36 (2021). Because MCL 168.932(a) is

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<sup>10</sup> Defendants contend that the content of the robocall was plausibly true because law enforcement and credit card agencies use other databases in the course of their work. However, the robocall's message did not convey that other databases afforded those entities the information created by mail-in voting or that qualified voter files were subject to dissemination. Rather, defendants' robocall message correlated mail-in voting to the creation of information leading to the possible execution of a bench warrant, adverse consequences for credit card debtors, and possible mandated vaccination. The implication being, that by using mail-in voting, the voter would incur unintended or unwanted consequences. That is, mail-in voting would essentially cause the voter's undoing. The message, its truth or falsity, and its implications as applied to MCL 168.932(a) present a question for resolution by the trier of fact.

not ambiguous and the Legislature's intent is clear from the statutory language, the rule of lenity has no application here. *Id.*

#### IV. FIRST AMENDMENT

Defendants contend that MCL 168.932(a) is unconstitutional on its face and as applied to defendants. We disagree. Rather, we conclude that MCL 168.932(a) is not void for vagueness nor is it unconstitutional as applied to defendants because it criminalizes speech integral to criminal conduct.

A challenge to the constitutionality of a statute presents a question of law reviewed de novo on appeal. *GR*, 331 Mich App at 68. The statute is presumed to be constitutional unless its unconstitutionality is plainly apparent, and when possible, the statute is to be construed as constitutional. *Id.* "The burden is on the party challenging the statute's constitutionality to prove its invalidity." *Id.*

"Congress shall make no law . . . abridging the freedom of speech[.]" US Const, Am I. The First Amendment applies to the states through the Fourteenth Amendment, US Const, Am XIV. *J & J Constr Co v Bricklayers & Allied Craftsmen, Local 1*, 468 Mich 722, 729; 664 NW2d 728 (2003). The Michigan Constitution provides the same protection as the First Amendment. Under Const 1963, art 1, § 5, "[e]very person may freely speak, write, express and publish his views on all subjects, being responsible for the abuse of such right; and no law shall be enacted to restrain or abridge the liberty of speech . . . ." "The rights of free speech under the Michigan and federal constitutions are coterminous." *In re Contempt of Dudzinski*, 257 Mich App 96, 100; 667 NW2d 68 (2003).

“The void for vagueness doctrine is derived from the constitutional guarantee that the state may not deprive a person of life, liberty, or property, without due process of law.” *People v Lawhorn*, 320 Mich App 194, 198; 907 NW2d 832 (2017) (quotation marks and citation omitted). A statute may be deemed unconstitutionally vague for three reasons: “(1) it is overbroad and impinges on First Amendment freedoms; (2) it does not provide fair notice of the conduct proscribed; or (3) it is so indefinite that it confers unstructured and unlimited discretion on the trier of fact to determine whether an offense has been committed.” *Id.* at 199 (quotation marks and citation omitted). Defendants submit that MCL 168.932(a) is void for vagueness because it does not adequately define “other corrupt means or device[s].”

“A statute provides fair notice when it give[s] a person of ordinary intelligence a reasonable opportunity to know what is prohibited.” *People v Miller*, 326 Mich App 719, 738; 929 NW2d 821 (2019) (quotation marks and citation omitted; alteration in original). “Fair notice exists when the statute’s meaning can be determined by referring to judicial interpretations, common law, dictionaries, treatises, or the common meaning of words.” *Id.* As explained earlier, the key term in the challenged phrase—corrupt—has been interpreted by judicial opinions. “Corrupt behavior” refers to “intentional, purposeful, deliberate, and knowing wrongful behavior,” *Waterstone*, 296 Mich App at 138, while “corrupt intent” means a “sense of depravity, perversion or taint,” *Perkins*, 468 Mich at 456. A person of reasonable intelligence should therefore understand that he or she violates MCL 168.932(a) by using any intentional, purposeful, deliberate, and knowingly wrongful method with the depraved intent to interfere with voting.

Defendants also contend that the phrase “corrupt means or device” makes the statute overbroad because it criminalizes protected speech in a manner that is not narrowly tailored to fit a compelling governmental interest. Defendants characterize this argument as a facial challenge, but only present arguments regarding the breadth of the statute as applied specifically to the robocall message. “A facial challenge attacks the statute itself and requires the challenger to establish that no set of circumstances exist under which the [a]ct would be valid. The fact that the . . . [a]ct might operate unconstitutionally under some conceivable set of circumstances is insufficient.” *People v Johnson*, 336 Mich App 688, 692; 971 NW2d 692 (2021) (quotation marks and citation omitted; alterations in original). “An as-applied challenge alleges a present infringement or denial of a specific right or of a particular injury in process of actual execution of government action.” *Id.* (quotation marks and citation omitted). Because defendants focus on specific application of the statute to the facts at hand, we treat this issue as an as-applied challenge.

In *United States v Stevens*, 559 US 460, 470; 130 S Ct 1577; 176 L Ed 2d 435 (2010), the United States Supreme Court explained:

The First Amendment’s guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it.

Consequently, the government may not ordinarily restrict speech on the basis of its content, except in a

number of well-recognized areas. *United States v Alvarez*, 567 US 709, 716; 132 S Ct 2537; 183 L Ed 2d 574 (2012). “Among these categories are advocacy intended, and likely, to incite imminent lawless action; obscenity; defamation; speech integral to criminal conduct; so-called ‘fighting words’; child pornography; fraud; true threats; and speech presenting some grave and imminent threat the government has the power to prevent . . . .” *Id.* at 717 (citations omitted). The parties here disagree as to whether the prohibition against using corrupt means or devices to interfere with voting falls within the exceptions for true threats or speech integral to criminal conduct.

We agree with defendants that MCL 168.932(a) operates in this case to bar speech beyond the scope of the true-threat exception because it extends to threats of nonviolent harm.

“True threats” encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats “protect[s] individuals from the fear of violence” and “from the disruption that fear engenders,” in addition to protecting people “from the possibility that the threatened violence will occur.” Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death. [*Virginia v Black*, 538 US 343, 359-360; 123 S Ct 1536; 155 L Ed 2d 535 (2003) (citations omitted; alteration in original).]

Relying on the Supreme Court’s articulation of a true threat in *Black*, this Court has likewise stated that true threats involve threats of unlawful violence. *TM v MZ (On Remand)*, 326 Mich App 227, 239; 926 NW2d

900 (2018). The message disseminated by defendants warned of harm to the listener’s freedom, financial security, and bodily autonomy, but did not involve a “serious expression of an intent to commit an act of unlawful violence . . . .” *Black*, 538 US at 359. MCL 168.932(a), therefore, cannot avoid constitutional scrutiny in this case under the true-threat exception.<sup>11</sup>

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<sup>11</sup> In reaching this conclusion, we are mindful of the decisions rendered in *United States v Nguyen*, 673 F3d 1259 (CA 9, 2012), and *Nat’l Coalition on Black Civic Participation v Wohl*, 498 F Supp 3d 457 (SD NY, 2020). In *Nguyen*, the defendant, a Republican candidate for a seat in the United States House of Representatives, mailed a Spanish-language letter to registered voters with Hispanic surnames who were registered as Democrats or “decline[d] to state[]” their party affiliation. *Nguyen*, 673 F3d at 1261. He challenged his conviction of obstruction of justice for failing to disclose the full extent of his knowledge regarding the mailing of the letter, which was designed to act as an attempt at voter intimidation. *Id.* at 1262. In addition to challenging whether there was probable cause to issue a search warrant, defendant alleged that his letter was political speech entitled to First Amendment protection. *Id.* at 1262, 1266. The *Nguyen* Court rejected the First Amendment challenge, citing *Black*, 538 US at 360, and concluding that “[i]ntimidation in the constitutionally proscribable sense of the word is a type of true threat.” *Nguyen*, 673 F3d at 1266 (brackets in original). However, the *Nguyen* Court never examined the additional aspect of *Black* that the statement communicate an intent to commit an act of unlawful violence to a particular individual or group. See *id.* at 1266. In *Nat’l Coalition*, the plaintiffs sued defendants in this case, among others, for sending the same robocall at issue in the present case to minority populations in New York City in violation of the Voting Rights Act, 52 USC 10307(b), and requested injunctive relief. *Nat’l Coalition*, 498 F Supp 3d at 463-466. The *Nat’l Coalition* Court recognized the *Nguyen* decision as well as the *Black* Court’s requirement that a threat to commit a violent act accompany a true threat. The *Nat’l Coalition* Court nonetheless granted the request for injunctive relief despite a First Amendment challenge noting that a nonviolent or illegal per se act may still constitute interference, intimidation or coercion for purposes of the Voting Rights Act. *Id.* at 477-485. Because Michigan has applied the threat of violence to the true-threat exception to First Amendment protections, *TM*, 326 Mich App at 239, we do not conclude that *Nguyen* and *Nat’l Coalition* are dispositive. See MCR 7.215(J)(1) (“A panel of the Court of Appeals must follow the rule of law established by a prior

However, we conclude that the exception to First Amendment protection for “speech integral to criminal conduct” is applicable. See *Alvarez*, 567 US at 717. *Giboney v Empire Storage & Ice Co*, 336 US 490; 69 S Ct 684; 93 L Ed 834 (1949), the authority commonly cited for this exception, involved an injunction against peaceful picketing at an ice-distribution facility by members of an ice-peddlers union. *Id.* at 491-492. The union members’ goal was to compel the ice distributor to stop selling to nonunion peddlers, contrary to a state statute prohibiting participation in any “pool, trust, agreement, combination, confederation or understanding with any person or persons in restraint of trade or competition . . .” *Id.* at 491 n 2, 492. Had the distributor agreed to stop selling ice to nonunion members, it too would have been in violation of the state antitrust restraint law. *Id.* at 493. The union peddlers argued, in part, that the injunction violated their First Amendment right to freedom of speech because they were merely publicizing truthful facts in a peaceful manner. *Id.* at 497-498. But the Supreme Court disagreed, reasoning that the “sole immediate object of the publicizing adjacent to the premises of [the distributor] . . . was to compel [the distributor] to agree to stop selling ice to nonunion peddlers,” contrary to state law. *Id.* at 498. The Court concluded that freedom of speech did not “extend[] its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute.” *Id.* “[I]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct

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published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals as provided in this rule.”).

was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.” *Id.* at 502.

Here, the purpose of MCL 168.932(a) is to preserve and protect the right to vote, a compelling state interest. See *Burson v Freeman*, 504 US 191, 198-199; 112 S Ct 1846; 119 L Ed 2d 5 (1992) (recognizing protection of right to vote freely as compelling state interest); *Mich Alliance for Retired Americans v Secretary of State*, 334 Mich App 238, 257; 964 NW2d 816 (2020) (noting the state’s compelling interest in preserving the integrity of elections). The statute carries out this goal by prohibiting influencing, deterring, or interrupting an elector from giving his or her vote by way of bribery, menace, or other corrupt means or device. To the extent a fact-finder agrees with the prosecution’s theory that defendants spread a dishonest message with the depraved intent to discourage voting, defendants’ dissemination of the message deterred voting through corrupt means. Like the picketing in *Giboney*, the speech was an integral part of conduct criminalized by MCL 168.932(a) and should not be constitutionally protected merely because the conduct was “carried out by means of language.” *Giboney*, 336 US at 502.

Affirmed.

RICK, J., concurred with LETICA, P.J.

REDFORD, J. (*concurring in part and dissenting in part*). I concur with the majority’s conclusion that the circuit court did not err by denying defendants’ motion to quash their bindover for a violation of MCL 168.932(a) under a theory of culpability alleging “other corrupt means or device.” I likewise concur with the majority that the prosecution of defendants’ conduct



does not violate defendants' First Amendment rights to free speech because defendants' speech was integral to criminal conduct. I dissent from the majority's conclusion that the conduct alleged and proofs offered below support a theory of culpability alleging a "menace" in violation of MCL 168.932(a), and I would reverse the trial court's decision in that regard.

As noted in the majority opinion, in these consolidated appeals, defendants, John Macauley Burkman and Jacob Alexander Wohl, appeal as on leave granted the trial court's orders denying their motions to quash and dismiss. Defendants were both charged with attempting to influence, deter, or interrupt electors, MCL 168.932(a), conspiracy to commit that offense, MCL 750.157a, and two counts of using a computer to commit a crime, MCL 752.796.

Defendants contend that the charges should have been dismissed because their dissemination of a robocall regarding possible repercussions of mail-in voting did not constitute a menace or use of other corrupt means or device under MCL 168.932(a). I conclude the robocall did not involve a menace to the call's recipient; however, it could be construed as a corrupt means or device. Defendants further contend that MCL 168.932(a) is unconstitutional both on its face and as applied in this case. I conclude the phrase "other corrupt means or device" is not unconstitutionally vague. Concerning defendants' First Amendment arguments, the robocall message was not a "true threat," but is still not subject to First Amendment protections because it was speech integral to criminal conduct. Accordingly, I would reverse in part, affirm in part, and remand to the trial court for further proceedings consistent with this opinion.

I generally concur with the majority's description of the basic facts and procedural history of the case, found in Part I of its opinion. I agree with the majority's recitation of the standard of review in Part II, the analysis of MCL 168.932 regarding a corrupt means or device in Part III(B), and the First Amendment analysis in Part IV.

I disagree with the majority's analysis in Part III(A) regarding the menace theory of liability under MCL 168.932.

#### I. APPLICATION OF MCL 168.932 REGARDING MENACE

Defendants assert that their conduct does not constitute a violation of the voter-suppression statute. I agree that the charged conduct and evidence presented below do not constitute a menace under the statute but disagree that they do not constitute the use or attempted use of a corrupt means or device.

MCL 168.932 provides, in pertinent part:

A person who violates 1 or more of the following subdivisions is guilty of a felony:

(a) A person shall not attempt, by means of bribery, menace, or other corrupt means or device, either directly or indirectly, to influence an elector in giving his or her vote, or to deter the elector from, or interrupt the elector in giving his or her vote at any election held in this state.

Defendants contend that the robocall was not menacing because it did not involve a threat of physical assault. I agree.

Cases discussing menacing behavior indicate that to "menace" means to make a serious threat of assault by overt conduct that causes the victim to reasonably believe that the person making the threat will do what is threatened. See generally *People v Doud*, 223 Mich

120, 129-131; 193 NW 884 (1923) (explaining that Michigan law forbids the “menacing of human life” by threatening an assault with a dangerous weapon); *People v Reeves*, 458 Mich 236, 245; 580 NW2d 433 (1998) (describing menacing conduct as the defendant’s placement of his hand in a bag and pointing it at the complainant while saying, “What’s more important, your job or your life?”). In *People v Braman*, 30 Mich 460, 467-468 (1874) (opinion by GRAVES, C.J.), our Supreme Court discussed the proper interpretation of a statute that criminalized threatening to accuse another of a crime as a means of extortion and specifically considered what the Legislature meant regarding a threat:

Do not the expressions which the legislature have here employed fairly denote that the accusation threatened must be signified or indicated as one to *proceed from the defendant*?

When the law speaks of *his* threat “to accuse,” when it exclusively alludes to the defendant and the party threatened, and makes no reference to any one else, in the relation we are now considering, can it be supposed that it was intended to include the case of a threat that some *third* party would accuse?

If such had been the design, we may suppose the legislature would have expressed themselves in terms certainly more appropriate to convey it. Considering the phraseology used, and considering also that it occurs in a provision introducing and defining a criminal offense, I am unable to apply the expression broadly and as though the words imported no *limitation*. The idea conveyed is, as it seems to me, that the *accusation* menaced is to be one threatened to come *from* the *party* threatening, and not exclusively from some other. Hence, however malicious and wicked the threat, unless it menace a criminal accusation by the author of the threat, the case is not within

the offense the legislature have seen fit to mark out.—*1 Bish. C. L.*, § 67; *Coe v Lawrence*, 16 *E. L. & E.*, 252; *Reg v Williams*, 1 *Den. C. C.*, 39.

In this case, defendants did not express to recipients of the robocalls that defendants would do the acts threatened but stated that others might do the described offensive acts. Accordingly, defendants' expression in the robocalls does not fit the jurisprudential concept of a menace or menacing, and therefore, the robocall was not menacing.

## II. CONCLUSION

For the reasons set forth in that portion of the majority's opinion with which I concur and for the reasons set forth above, I conclude that the trial court did not err by denying the motion to quash the bindover in this matter on all grounds but for the menace theory of liability. I further conclude that the district court did not abuse its discretion in the decision to bind over defendants to the circuit court for trial for violation of the statute by corrupt means or device. I would affirm in part, reverse in part, and remand to the trial court for further proceedings consistent with this opinion.<sup>1</sup>

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<sup>1</sup> This opinion does not stand for the proposition nor should it be understood to express a conclusion that no set of facts or circumstances could be alleged to support a charge under the "menace" provision of MCL 168.932.