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CASES DECIDED

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COURT OF APPEALS

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COURT OF APPEALS CASES

AHMED v TOKIO MARINE AMERICA INSURANCE COMPANY

Docket No. 352418. Submitted March 3, 2021, at Detroit. Decided April 22, 2021, at 9:00 a.m.

Mohamed Ahmed (plaintiff) brought an action in the Macomb Circuit Court against Tokio Marine America Insurance Company (defendant) and Ali Ahmed, seeking personal protection insurance (PIP) benefits following a car crash. Plaintiff was driving a rental car owned by Meade Lexus of Lakeside that his wife had rented. The terms of the rental agreement provided that only authorized drivers could operate the vehicle and that in order to be an authorized driver, an individual needed to be a validly licensed driver. Plaintiff accompanied his wife when she rented the vehicle, but he was not a party to the rental agreement, and plaintiff did not have a driver's license at the time the accident occurred because his license was revoked almost four years before the accident. Plaintiff testified at his deposition, however, that he had believed his license was merely restricted and that he was driving within the terms of the restrictions at the time of the accident. Plaintiff sought PIP benefits from defendant, and defendant denied plaintiff's request. Plaintiff then brought this action. Northland Radiology, Inc., brought an intervening complaint, which the trial court dismissed with prejudice, and Ali Ahmed brought a motion for summary disposition, which the trial court granted; Northland Radiology, Inc., and Ali Ahmed were not parties on appeal. Defendant moved for summary disposition, arguing that MCL 500.3113(a) disqualified plaintiff from receiving PIP benefits because plaintiff unlawfully took the vehicle by driving it without a driver's license. The trial court, Michael E. Servitto, J., denied defendant's motion for summary disposition because it concluded that a dispute of material fact existed regarding whether plaintiff knew that he did not qualify as an authorized driver and that his license had been revoked. Defendant appealed.

The Court of Appeals *held*:

1. MCL 500.3113(a) provides that a person is not entitled to be paid PIP benefits for accidental bodily injury if at the time of the accident the person was willingly operating or willingly using

a motor vehicle or motorcycle that was taken unlawfully and the person knew or should have known that the motor vehicle or motorcycle was taken unlawfully. As used in MCL 500.3113(a), the word "unlawfully" means contrary to the criminal law. For purposes of MCL 500.3113(a), a vehicle is unlawfully taken if it is taken without the authority of its owner; accordingly, the legality of the taking must be examined from the driver's perspective. In this case, plaintiff knew that the car was rented from Meade Lexus and that there was a written rental agreement; plaintiff testified that his wife rented the car and that he accompanied her when she picked up the car and saw her sign the rental agreement. Plaintiff also testified that on the day of the accident, he drove the car to his job at his family's gas station, where his shift that day was from noon until midnight. He further testified that after work, he used the car to drive from the gas station to pick up a friend, whom he was driving to a pharmacy, and during that drive the accident occurred. These facts were more than sufficient to demonstrate that plaintiff was in possession of the car at the time of the accident, through voluntary action, and thus that he "took" the car. He also was "operating" the car at the time of the accident. Plaintiff's acts of driving the car to work and driving it again after work until his involvement in the accident constituted use, operation, and driving of the car and were outside the authorization of the owner. Accordingly, those acts constituted an "unlawful taking" of the car because they constituted possession of it contrary to the owner's authorization.

2. A change in the language of a prior statute presumably connotes a change in meaning, unless the change is merely stylistic or nonsubstantive. 2014 PA 489 made substantive changes to MCL 500.3113(a), eliminating a safe-harbor provision and imposing instead a scienter requirement. Under the safe-harbor provision, a person was not disqualified from eligibility for benefits so long as the person had a reasonable belief that the taking of the vehicle was lawful, even if such belief was erroneous. Following the amendment, a person who willingly operates or willingly uses a motor vehicle that someone took unlawfully is disqualified from eligibility for benefits if the person "knew or should have known" that the taking of the motor vehicle was unlawful; stated differently, such a person is disqualified from eligibility for benefits unless the person had no reason to know that the taking was unlawful. The new scienter standard is thus significantly more restrictive than was the safe-harbor provision. Accordingly, the amendment of MCL 500.3113(a) through 2014 PA 489 modified the scienter requirement under that statute if a violation of MCL 750.414 is at issue. MCL 750.414 provides, in

pertinent part, that any person who takes or uses without authority any motor vehicle without intent to steal the same, or who is a party to such unauthorized taking or using, is guilty of a misdemeanor punishable by imprisonment for not more than two years or a fine of not more than $1,500. MCL 500.3113(a) and MCL 750.414 relate to the same subject matter and thus must be read *in pari materia*. Accordingly, when disqualification for PIP benefits is at issue, a person acts unlawfully under MCL 750.414 if the person takes a motor vehicle or motorcycle knowing that the owner has prohibited the taking or if the person takes a motor vehicle or motorcycle and should have known that the owner prohibited the taking. In this case, plaintiff knew that the car was rented; he knew that there was a written rental agreement; and the law required him to know his driving status, i.e., whether or not he was a licensed driver, because only a licensed driver may drive. Under the "should have known" standard, plaintiff was obligated to determine the scope of the authorization that the owner, Meade Lexus, had set under the rental agreement for a nonparty such as himself to take and drive the car. Defendant therefore demonstrated that MCL 500.3113(a) was applicable: plaintiff took the car unlawfully within the meaning of MCL 750.414; he willingly operated and willingly used it; and he did so in circumstances under which, at a minimum, he should have known that the car's owner prohibited him from driving the car. Consequently, defendant fully satisfied the standards of MCL 500.3113(a) as they related to MCL 750.414 in establishing an unlawful taking. The trial court erred by failing to grant defendant's motion for summary disposition.

Reversed and remanded for the trial court to enter an order of summary disposition in favor of defendant.

INSURANCE — NO-FAULT — PERSONAL PROTECTION INSURANCE BENEFITS — CRIMINAL LAW — TAKING A MOTOR VEHICLE WITHOUT AUTHORITY — INTENT REQUIREMENT.

MCL 500.3113(a) provides that a person is not entitled to be paid personal protection insurance (PIP) benefits for accidental bodily injury if at the time of the accident the person was willingly operating or willingly using a motor vehicle or motorcycle that was taken unlawfully and the person knew or should have known that the motor vehicle or motorcycle was taken unlawfully; MCL 750.414 provides, in pertinent part, that any person who takes or uses without authority any motor vehicle without intent to steal the same, or who is a party to such unauthorized taking or using, is guilty of a misdemeanor punishable by imprisonment for not more than two years or a fine of not more than $1,500; MCL

> 500.3113(a) and MCL 750.414 relate to the same subject matter and thus must be read *in pari materia*; accordingly, when disqualification for PIP benefits is at issue, a person acts unlawfully under MCL 750.414 if the person takes a motor vehicle or motorcycle knowing that the owner has prohibited the taking or if the person takes a motor vehicle or motorcycle and should have known that the owner prohibited the taking.

Elia & Ponto, PLLC (by *Alexander V. Brown* and *Adam P. Ponto*) for Mohamed Ahmed.

The Berkal Law Firm, PLLC (by *David J. Berkal*) for Tokio Marine America Insurance Company.

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

TUKEL, P.J. In this no-fault action, defendant[1] appeals by leave granted[2] the trial court's order denying its motion for summary disposition. Defendant argues that the trial court erred by concluding that there was a dispute of material fact regarding whether plaintiff, who had no valid driver's license, was barred by MCL 500.3113(a) from eligibility for personal protection insurance (PIP) benefits under the applicable insurance policy. MCL 500.3113(a) bars such eligibility if the motor vehicle is "taken unlawfully" and the person "knew or should have known" of the unlawful nature of the taking. The "knew or should have known" language

[1] There were four parties to this case below: (1) plaintiff, Mohamed Ahmed (plaintiff); (2) intervening plaintiff, Northland Radiology, Inc. (Northland); (3) defendant Tokio Marine America Insurance Company (defendant); and (4) defendant Ali Ahmed, the driver of the other vehicle. The trial court dismissed Northland's intervening complaint with prejudice and granted Ali Ahmed's motion for summary disposition. Plaintiff and defendant Tokio Marine are the only two parties remaining on appeal.

[2] *Ahmed v Tokio Marine America Ins Co*, unpublished order of the Court of Appeals, entered May 6, 2020 (Docket No. 352418).

was added by 2014 PA 489 and has not been addressed by our Supreme Court or this Court in a published opinion. We agree that because plaintiff was not a licensed driver, defendant has satisfied the standard for summary disposition. The rental agreement in this case provided that only a licensed driver was authorized to use, operate, or drive the motor vehicle. As a result, plaintiff's taking of the vehicle was in violation of MCL 750.414 and thus was unlawful; additionally, plaintiff should have known of the unlawful nature of the taking. We reverse the order of the trial court denying defendant's motion for summary disposition and remand with instructions that the trial court enter an order of summary disposition in favor of defendant.

I. UNDERLYING FACTS

This case arises from a car accident in which plaintiff was driving a rental car owned by Meade Lexus of Lakeside. Plaintiff's wife, Ala Hagran, had rented the vehicle shortly before the accident. When Hagran rented the vehicle, the terms of the rental agreement were explained to her, including that only "Authorized Drivers" could operate the rental vehicle and that in order to be an "Authorized Driver," an individual needed to be a validly licensed driver. Plaintiff accompanied Hagran when she rented the vehicle, but he was not a party to the rental agreement; indeed, plaintiff testified at his deposition that he never read the rental agreement. Plaintiff did not have a driver's license at the time the accident occurred because his license had been revoked in 2015, almost four years before the accident at issue here. Plaintiff testified at his deposition, however, that he had believed his license was merely restricted and that he was driving within the terms of the restrictions at the time of the accident.

Paragraph 1 of the rental agreement, entitled "Authorized Drivers," provided that the vehicle was to be "used, operated or driven only by an Authorized Driver." The agreement defined the term "Authorized Driver" as: "(a) the Customer; (b) any person listed by us on Page 1 as an additional driver; (c) the Customer's spouse;" and two other circumstances that could have no applicability here. Following the five categories of Authorized Drivers, ¶1 concluded, "PROVIDED THAT each such person is a licensed driver and is at least age 18."

Plaintiff filed a complaint after defendant denied his claim for PIP benefits. Defendant eventually moved for summary disposition under MCR 2.116(C)(10), arguing that MCL 500.3113(a) disqualified plaintiff from receiving PIP benefits because he unlawfully took the vehicle by driving it without a driver's license. Defendant responded and disagreed, arguing that defendant could not demonstrate that plaintiff knew he was an unlicensed driver when the accident occurred or that he was expressly prohibited from taking the vehicle. The trial court denied defendant's motion for summary disposition because it concluded that a dispute of material fact existed regarding whether plaintiff knew that he did not qualify as an authorized driver and that his license had been revoked. This appeal followed.

II. STANDARD OF REVIEW

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of a complaint and is reviewed de novo. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 205-206; 815 NW2d 412 (2012). This Court reviews a motion brought under MCR 2.116(C)(10) "by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party."

Patrick v Turkelson, 322 Mich App 595, 605; 913 NW2d 369 (2018) (quotation marks and citation omitted). "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)." *Barnes v 21st Century Premier Ins Co*, 334 Mich App 531, 540; 965 NW2d 121 (2020) (quotation marks and citation omitted). 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." *Patrick*, 322 Mich App at 605 (quotation marks and citation omitted). "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008). "Only the substantively admissible evidence actually proffered may be considered." *1300 Lafayette East Coop, Inc v Savoy*, 284 Mich App 522, 525; 773 NW2d 57 (2009) (quotation marks and citation omitted). "Circumstantial evidence can be sufficient to establish a genuine issue of material fact, but mere conjecture or speculation is insufficient." *McNeill-Marks v MidMichigan Med Ctr-Gratiot*, 316 Mich App 1, 16; 891 NW2d 528 (2016). Finally, "[w]e review de novo questions of statutory interpretation." *Hayford v Hayford*, 279 Mich App 324, 325; 760 NW2d 503 (2008).

III. ANALYSIS

A. PRINCIPLES OF STATUTORY INTERPRETATION

This Court and the Michigan Supreme Court have described the rules of statutory construction as follows:

> "The paramount rule of statutory interpretation is that we are to effect the intent of the Legislature. To do so, we begin with the statute's language. If the statute's language is clear and unambiguous, we assume that the Legislature intended its plain meaning, and we enforce the statute as written. In reviewing the statute's language, every word should be given meaning, and we should avoid a construction that would render any part of the statute surplusage or nugatory." [*PNC Nat'l Bank Ass'n v Dep't of Treasury*, 285 Mich App 504, 506; 778 NW2d 282 (2009), quoting *Wickens v Oakwood Healthcare Sys*, 465 Mich 53, 60; 631 NW2d 686 (2001).]

"A provision of a statute is ambiguous only if it irreconcilably conflicts with another provision or is equally susceptible to more than a single meaning." *In re AGD*, 327 Mich App 332, 343; 933 NW2d 751 (2019) (quotation marks and citation omitted). "Unless defined in the statute, every word or phrase of a statute should be accorded its plain and ordinary meaning, taking into account the context in which the words are used." *In re Smith Estate*, 252 Mich App 120, 124; 651 NW2d 153 (2002). Nonetheless, "technical 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." MCL 8.3a.

Finally, statutes that address similar subject matters should be read together as one law:

> Statutes that relate to the same subject or that share a common purpose are *in pari materia* and must be read together as one law, even if they contain no reference to one another and were enacted on different dates. The object of the *in pari materia* rule is to give effect to the legislative intent expressed in harmonious statutes. If statutes lend themselves to a construction that avoids conflict, that construction should control. [*In re AGD*, 327 Mich App at 344 (quotation marks and citations omitted).]

Furthermore,

> When two statutes are *in pari materia* but conflict with one another on a particular issue, the more specific statute must control over the more general statute. The rules of statutory construction also provide that a more recently enacted law has precedence over the older statute. This rule is particularly persuasive when one statute is both the more specific and the more recent. [*Parise v Detroit Entertainment, LLC*, 295 Mich App 25, 27-28; 811 NW2d 98 (2011) (quotation marks, citations, and brackets omitted).]

B. MCL 500.3113(a)

"The no-fault act permits an insurer to avoid coverage of PIP benefits under certain enumerated circumstances," such as those listed in MCL 500.3113. *Meemic Ins Co v Fortson*, 506 Mich 287, 303; 954 NW2d 115 (2020). MCL 500.3113(a) provides that:

> A person is not entitled to be paid personal protection insurance benefits for accidental bodily injury if at the time of the accident any of the following circumstances existed:
>
> (a) The person was willingly operating or willingly using a motor vehicle or motorcycle that was taken unlawfully, and the person knew or should have known that the motor vehicle or motorcycle was taken unlawfully.

The current version of MCL 500.3113(a) dates from 2014.[3] The previous version provided:

> "A person is not entitled to be paid [PIP] benefits for accidental bodily injury if at the time of the accident any of the following circumstances existed:
>
> (a) The person was using a motor vehicle or motorcycle which he or she had taken unlawfully, unless the person

[3] MCL 500.3113, as amended by 2014 PA 489. MCL 500.3113(a) has not been changed since the 2014 amendment, although it has been reenacted twice in identical form. See 2016 PA 346; 2019 PA 21.

> reasonably believed that he or she was entitled to take and use the vehicle." [*Spectrum Health Hosps v Farm Bureau Mut Ins Co of Mich*, 492 Mich 503, 516; 821 NW2d 117 (2012).][4]

The present act thus broadened the provision governing disqualification from eligibility for benefits. The statute no longer disqualifies only a person who personally took a motor vehicle unlawfully; under current law, the disqualification applies to any person (1) "willingly operating or willingly using a motor vehicle or motorcycle" that (2) was unlawfully taken by someone, and (3) the person seeking benefits "knew or should have known" that the motor vehicle was taken unlawfully. Despite the change in the language of MCL 500.3113(a) and the elimination of the safe-harbor provision, the key term, "taken unlawfully," has the same meaning under the present version as it had under the old version. That is because "[t]he provisions of any law or statute which is re-enacted, amended or revised, so far as they are the same as those of prior laws, shall be construed as a continuation of such laws and not as new enactments." MCL 8.3u.

C. "UNLAWFUL" TAKING UNDER MCL 750.414

As used in MCL 500.3113(a), the word "unlawfully" means contrary to the criminal law, for example, any

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[4] In *Auto Club Ins Ass'n v Great American Ins Group*, 800 F Supp 2d 877, 884 (ED Mich, 2011), the United States District Court for the Eastern District of Michigan adopted the term "safe harbor provision," which had been suggested by the parties, to refer to the provision that precluded disqualification for benefits if the plaintiff "reasonably believed that he or she was entitled to take and use the vehicle." As that is an apt and useful shorthand, we use it to refer to that former provision of law. The safe-harbor provision was eliminated by 2014 PA 489, which substituted instead a scienter requirement under which a person is disqualified from eligibility for benefits if he or she "knew or should have known" that a taking of a motor vehicle was unlawful.

violation of the Michigan Penal Code. "The word 'unlawful' commonly means 'not lawful; contrary to law; illegal,' and the word 'take' is commonly understood as 'to get into one's hands or possession by voluntary action.' When the words are considered together, the plain meaning of the phrase 'taken unlawfully' readily embraces a situation in which an individual gains possession of a vehicle contrary to Michigan law." *Spectrum Health*, 492 Mich at 516-517 (citations omitted).[5]

"Because a taking does not have to be larcenous to be unlawful, the phrase 'taken unlawfully' in MCL 500.3113(a) applies to *anyone* who takes a vehicle without the authority of the owner, regardless of whether that person intended to steal it." *Id*. at 518. Thus, "any person who takes a vehicle contrary to a provision of the Michigan Penal Code—including MCL 750.413 and MCL 750.414, informally known as the 'joyriding' statutes—has taken the vehicle unlawfully within the meaning of MCL 500.3113(a)." *Id*. at 537.

[5] Thus, as *Spectrum Health* noted generally, any violation of the criminal law that leads to a taking of a motor vehicle will constitute an "unlawful taking" for purposes of MCL 500.3113(a). *Spectrum Health*, 492 Mich at 517-518; see also *Monaco v Home-Owners Ins Co*, 317 Mich App 738, 749; 896 NW2d 32 (2016) (considering unlawful taking under a criminal provision of the Michigan Vehicle Code, MCL 257.1 *et seq*.). *Spectrum Health* made reference to a violation of the Michigan Penal Code as constituting "unlawful" behavior for purposes of the statute and, responding to the dissent in that case, stated that "in this context, the term 'unlawful' can only refer to the Michigan Penal Code . . . ." *Spectrum Health*, 492 Mich at 517 n 22. As used in *Spectrum Health*, the phrase "in this context" was not referring generally to MCL 500.3113(a) but rather to the particular illegality at issue in the case, joyriding. See *id*. at 517-518 (discussing "joyriding" offenses created by the Michigan Penal Code). The Michigan Vehicle Code defines criminal offenses as well, and violations of its provisions also constitute illegal conduct. See *id*. at 516-517 (defining "unlawful" as "illegal"); MCL 257.901 (defining most violations of the Michigan Vehicle Code as misdemeanors punishable by up to 90 days' incarceration and a fine of not more than $100).

"[F]or purposes of MCL 500.3113(a), a vehicle is 'unlawfully taken' if it is taken without the authority of its owner,' " *id*. at 518 n 25, and thus "requires a threshold determination that a vehicle was 'unlawfully taken' from its *owner*," *id*. (quotation marks and citation omitted). Thus, MCL 500.3113(a) "examines the legality of the taking from the *driver's* perspective[.]" *Id*. at 522; *Rambin v Allstate Ins Co*, 495 Mich 316, 323 n 7; 852 NW2d 34 (2014).

D. STANDARDS APPLICABLE TO MCL 750.414

MCL 750.414 contains a *mens rea* requirement; in other words, "it properly requires a showing of knowingly taking without authority or knowingly using without authority." *Rambin*, 495 Mich at 332.[6] "For a person to take personal property without the authority of the actual owner, there must be some evidence to support the proposition that the person from whom he or she received the property did not have the right to control or command the property." *Id*. In *Rambin*, although by the time of the litigation it was undisputed that the motorcycle involved was owned by Scott Hertzog and had been stolen, the plaintiff maintained that he had been given authority to use the motorcycle by Andre Smith and that it reasonably appeared to him at that time that Smith was the owner. *Id*. at 322-323. In addition, at the time of the *Rambin* litigation, MCL 500.3113(a) contained the safe-harbor provision. See note 4 of this opinion. Our Supreme Court held that

[6] *Mens rea* is defined as " 'criminal intent.' " See *People v Carpenter*, 464 Mich 223, 246 n 7; 627 NW2d 276 (2001) (KELLY, J., dissenting), quoting *Black's Law Dictionary* (6th ed). *Mens rea* thus is the correct term to refer to the mental-state element of MCL 750.414, a criminal statute. The proper term for the mental-state element of MCL 500.3113 is scienter. See note 10 of this opinion.

the "plaintiff may present evidence to establish that he did not run afoul of MCL 750.414, and thus did not unlawfully take the motorcycle under MCL 500.3113, because he did not knowingly lack authority to take the motorcycle because he believed that he had authority to do so." *Id*. at 333. "Stated differently, plaintiff's argument that he did not unlawfully take the motorcycle under MCL 500.3113 is subject to the criminal statute that prohibits an unlawful taking, MCL 750.414, under which plaintiff may present evidence to show that he did not knowingly take the motorcycle without the owner's authority." *Id*. at 333-334.

In the present case, there is no question that plaintiff was "willingly using" and "willingly operating" the car, and there also is no question that plaintiff's use and operation of the car was without the authority of Meade Lexus, the owner, because the rental agreement prohibited an unlicensed person from driving it. We must then determine whether these facts amounted to an unlawful "taking," in other words, that plaintiff got the Lexus "into one's hands or possession by voluntary action." *Spectrum Health*, 492 Mich at 516-517 (quotation marks and citation omitted).

Plaintiff knew that the car was rented from Meade Lexus and that there was a written rental agreement; in his deposition, plaintiff testified that his wife rented the car and that he accompanied her when she picked up the car and saw her sign the rental agreement, although he testified that he never read it. Plaintiff also testified that on the day of the accident, he drove the car to his job at his family's gas station, where his shift that day was from noon until midnight. He further testified that after work, he used the car to drive from the gas station to pick up a friend, whom he was driving to a pharmacy, and during that drive the

accident occurred. These facts are more than sufficient to demonstrate that plaintiff was in possession of the car at the time of the accident, through voluntary action, and thus he "took" it. He also clearly was "operating" the car at the time of the accident. While the requirements under MCL 500.3113(a) that a person "take" and "operate" a vehicle are separate, meaning that each must be established, there is no requirement in the statute that different facts establish each of the elements.

For example, while it is possible to possess or "take" a car without "operating" or driving it, such as by placing it on a flatbed truck and moving it, or by using a tow truck, it is not possible to drive it without also taking it; the act of driving a car can only be accomplished by someone who is in possession of it and operating the controls. Moreover, "possession" is not an act of limited duration; possession continues as long as someone exercises control over the thing possessed. For instance, courts are often called upon to determine when a statute of limitations begins to run. With regard to statutes that involve some sort of unlawful possession, possession is generally deemed a continuing act that continually triggers a new period of limitations. Thus, for example, courts have held that unlawful possession of government property and possession of drugs are continuing offenses, subjecting the person who possesses them to prosecution at any time, precisely because possession is a continuing act and thus a continuing offense. See, e.g., *United States v Blizzard*, 27 F3d 100, 102 (CA 4, 1994) (providing that "[p]ossession is by nature a continuing offense") (quotation marks and citation omitted); *id*. ("The government may prosecute a person who continues to possess unlawful drugs irrespective of the date he first possessed them."); see also *People v Owen*, 251 Mich App 76, 82; 649 NW2d 777 (2002) ("Having

liquor in his possession . . . was a continuing offense as long as possession existed, and for such an offense the statute provides but one penalty.") (quotation marks, citation, and emphasis omitted).

Because possession is a continuing act, plaintiff exercised extended control of the car throughout the day of the accident. He took the car by driving it to the gas station where he worked. He continued to possess it throughout the day while he was at work, even though he was not driving the car, because he had control of it and the keys and thus could permit or exclude anyone from entering or driving the car as he saw fit. And finally, plaintiff continued or resumed his possession of the car when, after work, he again drove it, picked up a friend, continued to drive, and finally was involved in the accident at issue. Meade Lexus, as the owner of the car, placed restrictions in the rental agreement, under which only a licensed driver was authorized to use, operate, or drive the car. Plaintiff's acts of driving the car to work and driving it again after work until his involvement in the accident constituted use, operation, and driving of the car and thus were outside the authorization of the owner. Such acts constituted an "unlawful taking" of the car because they constituted possession of it contrary to the owner's authorization.[7]

E. "UNLAWFUL" TAKING UNDER THE MICHIGAN VEHICLE CODE

1. *MONACO v HOME-OWNERS INS CO*

Defendant also argues that plaintiff's taking of the car was unlawful because, due to the fact that he had no

[7] Plaintiff's exercise of control and possession of the car during the day while he was at work, through his ability to lock the car and control access to it, do not appear to have been contrary to Meade Lexus's authorization.

valid driver's license, it was unlawful for plaintiff to drive. Plaintiff relies on *Monaco v Home-Owners Ins Co*, 317 Mich App 738, 746; 896 NW2d 32 (2016), for the proposition that the distinction between the unlawful "taking" of a motor vehicle and the unlawful "use" of a motor vehicle precludes summary disposition in this case.

In *Monaco*, the plaintiff sued on behalf of her daughter Alison as next friend. *Id*. at 742. Alison was involved in an accident when she was 15 years old. *Id*. at 741. At the time of the accident, Alison had com-

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Although plaintiff was not an "Authorized Driver" because he was not licensed, his possession or taking of the car while it was parked at the gas station was not in violation of the rental agreement, because it did not involve using, operating, or driving the car, the acts that the rental agreement forbade by anyone other than a licensed driver. Thus, although plaintiff took the car while it sat at his workplace, that taking was not unlawful because it was not contrary to the owner's authorization. That fact is unimportant here, however, because only the taking that was involved in plaintiff's injuries is at issue; that is the latest of the acts of possession, namely, plaintiff's driving after work. That last taking was in violation of the owner's prohibitions and thus was an "unlawful taking." *Spectrum Health* noted that MCL 750.414 "contains disjunctive prohibitions: it prohibits someone from 'tak[ing]' a motor vehicle 'without authority' and, alternatively, it prohibits someone from 'us[ing]' a motor vehicle 'without authority.' Thus, it is possible to violate MCL 750.414 without unlawfully *taking* the vehicle and, as a result, not all violations of MCL 750.414 necessarily constitute unlawful *takings* within the meaning of MCL 500.3113(a)." *Spectrum Health*, 492 Mich at 517 n 24. "Nevertheless, a taking that violates MCL 750.414 qualifies for the exclusion under MCL 500.3113(a) . . . ." *Id*. *Rambin* noted that "[f]or a person to take personal property without the authority of the actual owner, there must be some evidence to support the proposition that the person from whom he or she received the property did not have the right to control or command the property." *Rambin*, 495 Mich at 332. The only Authorized Driver under the rental agreement was plaintiff's wife, who had no right to command the property in any manner contrary to the rental agreement. Thus, plaintiff took possession of the car from his wife, contrary to the directive of the owner, Meade Lexus. Plaintiff's acts thus constituted an unlawful taking, whether or not they also constituted using a motor vehicle without authority. *Spectrum Health*, 492 Mich at 517 n 24.

pleted and passed a driver's training course and obtained a permit to drive, but that permit authorized her to drive only if accompanied by certain adults. *Id*. at 741-742. Alison drove the car unaccompanied and was injured. *Id*. at 742. Her mother, the plaintiff and the owner of the car, initially testified at her deposition that Alison had taken the car without permission, but she later changed her testimony and said that she had given permission to her daughter to take the car. *Id*. at 742-743. The trial court denied summary disposition and a directed verdict in favor of the defendant; thus, on appeal of that ruling, this Court was obligated to view the facts in the light most favorable to the plaintiff, meaning it assumed that Alison had been given permission to take the car. *Id*. at 744-745. As framed by the Court, the sole legal question presented on appeal was "whether a person injured in a motor vehicle accident is barred from recovering PIP benefits under MCL 500.3113(a)—which generally precludes coverage when a person used a vehicle that he or she had 'taken unlawfully'—when the owner of the vehicle permitted, gave consent to, or otherwise authorized the injured person to take and use the vehicle, but the injured person used the vehicle in violation of the law with the owner's knowledge." *Id*. at 741. This Court held, given the facts of the case, that MCL 500.3113(a) did not bar recovery. *Id*.

The defendant in *Monaco* alleged that the unlawfulness involved was a violation of the Michigan Vehicle Code, MCL 257.1 *et seq*., specifically MCL 257.326 and MCL 257.310e(4). *Id*. at 750. MCL 257.326 provides that "[n]o person shall knowingly authorize or permit a motor vehicle owned by him or under his control to be driven by any person in violation of any of the provisions of [the Michigan Vehicle Code]"; MCL 257.310e(4) provides that a person with "a level 1 graduated licensing

status," such as Alison had, is not permitted to drive unaccompanied. This Court noted that "[t]he first level of inquiry when applying MCL 500.3113(a) always concerns whether the taking of a vehicle was unlawful, and if the taking was lawful, the inquiry ends because the statute is inapplicable." *Monaco*, 317 Mich App at 747. In analyzing the Michigan Vehicle Code, the Court stated:

> Although it may have been unlawful for plaintiff, as owner of the car, to authorize or permit Alison *to drive the vehicle* in violation of the law, it had no bearing on, nor did it negate, the authorization and permission given by plaintiff for Alison *to take the vehicle*. Alison did not "gain[] possession of [the] vehicle contrary to Michigan law"; rather, she unlawfully used the vehicle, i.e., Alison "put[] it into service" in violation of Michigan law. Plaintiff was not in violation of MCL 257.326 by merely allowing Alison to take possession and control of the car; it was the permission allowing Alison to drive the car that implicated MCL 257.326. While plaintiff's actions might have subjected her to prosecution under MCL 257.326, they did not turn an authorized or permitted taking into an unlawful taking. [*Monaco*, 317 Mich App at 750 (citations omitted).]

Monaco thus involved a completely different theory of unlawfulness than did *Spectrum Health* and *Rambin*, in each of which the source of the alleged unlawfulness was violations of MCL 750.414. In construing MCL 750.414 as applied through MCL 500.3113(a), an individual may demonstrate that he or she did not unlawfully take a vehicle for purposes of MCL 500.3113(a) by "present[ing] evidence to show that he [or she] did not knowingly take the [vehicle] without the owner's authority." *Rambin*, 495 Mich at 333-334. *Monaco* is simply a reiteration of the principle established in *Rambin* that if the person who takes the car "did not knowingly lack authority to take the [car] because he believed that he had authority to do so," *id*. at 333, then the taking

cannot be unlawful for purposes of MCL 750.414 as applied through MCL 500.3113(a). As *Monaco* noted, "The first level of inquiry when applying MCL 500.3113(a) always concerns whether the taking of a vehicle was unlawful, and if the taking was lawful, the inquiry ends because the statute is inapplicable." *Monaco*, 317 Mich App at 747. Thus, in *Monaco*, the analysis was short and straightforward—the taking was with the owner's permission, and therefore Alison did not have the *mens rea* of taking the car contrary to the owner's authorization. Once it was resolved that "the taking was lawful, the inquiry ends because the statute is inapplicable." *Id*. Thus, although *Monaco* offered an additional lengthy commentary, all of it was dicta, as, by its own terms, *Monaco* acknowledged that its analysis under MCL 500.3113(a) was at an end upon its determination of the fact that plaintiff authorized Alison to take the car.[8] See *Wold Architects & Engineers*

[8] We are bound by *Monaco*'s holding, MCR 7.215(J)(1), which as we have noted is narrow, but we pause to note our disagreement with its dicta. Most fundamentally, *Monaco* applied a completely incorrect legal standard. MCL 500.3113(a) "examines the legality of a taking from the *driver's* perspective[.]" *Spectrum Health*, 492 Mich at 522; *Rambin*, 495 Mich at 323 n 7. *Monaco*, however, considered the legality of the taking from the perspective not of Alison, the driver, but from that of her mother, the plaintiff (due to her status as Alison's next friend) and owner of the car. *Monaco* stated that Alison's mother "was not in violation of MCL 257.326 by merely allowing Alison to take possession and control of the car; it was the permission allowing Alison to drive the car that implicated MCL 257.326. While plaintiff's actions might have subjected her to prosecution under MCL 257.326, they did not turn an authorized or permitted taking into an unlawful taking." *Monaco*, 317 Mich App at 750.

Because *Monaco* incorrectly analyzed the case from the perspective of the owner of the car rather than from that of the driver, it also relied on the wrong statute in considering whether the conduct was "unlawful." *Monaco* relied on MCL 257.326, which provides that "[n]o person shall knowingly authorize or permit a motor vehicle owned by him or under his control *to be driven* by any person in violation of any of the

v Strat, 474 Mich 223, 232 n 3; 713 NW2d 750 (2006) ("Statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand, are, however illuminating, but *obiter dicta* and lack the force of an adjudication.") (quotation marks and citation omitted).

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provisions of [the Michigan Vehicle Code]." *Monaco*, 317 Mich App at 750. However, as noted, whether or not conduct was lawful from the perspective of the owner is not the relevant inquiry under MCL 500.3113(a). Instead, *Monaco* should have considered whether the taking was unlawful from the perspective of Alison, the driver and the person on whose behalf an "entitle[ment] to be paid personal protection insurance benefits" was sought. MCL 500.3113(a). Thus, the proper provision to have considered under the Michigan Vehicle Code would have been MCL 257.301, in conjunction with MCL 257.310e(4). MCL 257.301(a) provides, subject to some minor exceptions that were not at issue in *Monaco*, that "an individual shall not drive a motor vehicle on a highway in this state unless that individual has a valid operator's or chauffeur's license . . . ." Pursuant to MCL 257.310e(4), Alison did not have a valid operator's license to be driving unaccompanied. Violation of those provisions was "unlawful" within the meaning of *Spectrum Health*, because there are associated criminal penalties. See MCL 257.901. As we have noted in this opinion, driving a car always constitutes a taking of it, but taking it does not always require driving. Therefore, had *Monaco* considered the question from Alison's perspective, it should have concluded that her driving of the car constituted a taking and that the taking was unlawful because it was illegal under the Michigan Vehicle Code for Alison to drive alone.

Because our disagreement with *Monaco* is in regard to statements that are, for the reasons stated, properly understood to be dicta, they are not binding on us. We trust that *Monaco* is and will remain an outlier—the situation in which a car owner tells a person whom the owner knows to be unlicensed under the circumstances that the person nevertheless may drive the car. We think both cases at issue in *Spectrum Health*, and this case, present the much more likely scenario of an unlicensed person taking a motor vehicle in contravention of the owner's express directives not to take it. Consequently, because *Monaco* is only controlling in the situation in which the owner purports to give permission to an unlicensed person to drive, we have no occasion to call for a special panel pursuant to MCR 7.215(J). We simply note the possible need for a special panel if a case involving facts similar to *Monaco*'s should recur.

2. SCIENTER REQUIREMENT OF MCL 500.3113(A) FOLLOWING THE ENACTMENT OF 2014 PA 489

Unlike in *Monaco*, in which Alison's mother had told Alison that she could take the car, plaintiff's taking of the car in this case was directly contrary to Meade Lexus's express written terms. See *Spectrum Health*, 492 Mich at 524 (in which the driver, Craig Jr., "had express knowledge that Craig Sr. did not give him consent to take and use the vehicle" and "as a result, Craig Jr. took his father's vehicle without authority contrary to MCL 750.414 and, therefore, took it unlawfully within the meaning of MCL 500.3113(a)"). The only additional issue, then, in determining whether MCL 500.3113(a) bars recovery is analyzing whether plaintiff "knew or should have known" that the motor vehicle was taken unlawfully. That was not an issue in *Spectrum Health*; at that time, the safe-harbor provision applied, but because the driver, Craig Jr., undisputedly was aware that his father, the car's owner, had prohibited him from taking it, there was no plausible argument that Craig Jr. reasonably believed that he was permitted to take the car. *Rambin* built upon that analysis, as it involved a case in which the plaintiff claimed he did not take the motorcycle at issue with knowledge that he was forbidden by the owner from doing so.

Rambin held that the

> plaintiff may present evidence to establish that he did not run afoul of MCL 750.414, and thus did not unlawfully take the motorcycle under MCL 500.3113, because he did not knowingly lack authority to take the motorcycle because he believed that he had authority to do so. Stated differently, plaintiff's argument that he did not unlawfully take the motorcycle under MCL 500.3113 is subject to the criminal statute that prohibits an unlawful taking, MCL 750.414, under which plaintiff may present evidence to

> show that he did not knowingly take the motorcycle without the owner's authority. [*Rambin*, 495 Mich at 333-334.]

Because *Rambin* was decided under the previous version of MCL 500.3113(a), while the safe-harbor provision still existed, however, and because the Legislature amended the statute following our Supreme Court's decision in *Rambin*,[9] we first address whether and how the amendment altered the standard set forth in *Rambin*.

We first note a threshold issue: we generally are bound by the Supreme Court's resolution of an issue, even if that issue no longer stands on solid legal footing. Thus, "[t]he Court of Appeals is bound to follow decisions by [the Supreme] Court except where those decisions have *clearly* been overruled or superseded *and is not authorized to anticipatorily ignore* [*Supreme Court*] *decisions where it determines that the foundations of a Supreme Court decision have been undermined*." *Associated Builders & Contractors v Lansing*, 499 Mich 177, 191-192; 880 NW2d 765 (2016). However, "[i]t is clear that in the context in which our Supreme Court used the word 'superseded,' it was including legislative actions that change the state of the law." *People v Anthony*, 327 Mich App 24, 44; 932 NW2d 202 (2019). Thus, we are not only free to consider whether the Legislature has changed the state of the law, but we are obligated to do so.

"[A] change in the language of a prior statute presumably connotes a change in meaning," unless the change is merely "stylistic or nonsubstantive." *People v*

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[9] *Rambin* was decided on May 20, 2014. MCL 500.3113(a) was amended by 2014 PA 489, which was passed in its final version by each house of the Legislature on December 18, 2014, and was signed by the Governor on January 10, 2015.

Arnold, 502 Mich 438, 479; 918 NW2d 164 (2018) (quotation marks and citation omitted). 2014 PA 489 made substantive changes to MCL 500.3113(a), eliminating the safe-harbor provision and imposing instead a scienter requirement.[10] Under the safe-harbor provision, a person was not disqualified from eligibility for benefits so long as the person had a reasonable belief that the taking of the vehicle was lawful, even if such belief was erroneous. Following the amendment, a person who willingly operates or willingly uses a motor vehicle that someone took unlawfully is disqualified from eligibility for benefits if the person "knew or should have known" that the taking of the motor vehicle was unlawful; stated differently, such a person is disqualified from eligibility for benefits unless the person had no reason to know that the taking was unlawful. The new scienter standard is thus significantly more restrictive than was the safe-harbor provision.

As we have noted, *Rambin* explored the "unlawful taking" language at issue in MCL 500.3113(a) in the context of unlawfulness provided by a violation of MCL 750.414, concluding that MCL 750.414 itself had a

[10] The term *mens rea* properly applies to the interpretation of MCL 750.414 because MCL 750.414 is a criminal statute and *mens rea* is a criminal term of art. See note 6 of this opinion. 2014 PA 489 directly amended not the criminal statute but MCL 500.3113(a), a provision of the Insurance Code. Thus, the more exact term for the provision that MCL 500.3113(a) amended is its scienter requirement; the term "scienter" can apply to either a crime or tort and signifies that the act "was done designedly, understandingly, knowingly, or with guilty knowledge." *Massengile v Piper*, 294 Mich 653, 655; 293 NW 897 (1940) (quotation marks and citation omitted). "It is a term used in pleading to signify an allegation setting out the defendant's previous knowledge of a state of facts which it was his duty to guard against, and his omission to do which has led to the injury complained of." *Id*. at 655-656 (quotation marks and citation omitted).

mens rea requirement. Among the reasons for that conclusion was the presumption in the criminal law against strict-liability crimes, which could turn innocent conduct, such as driving a car, into a criminal offense without any bad intent on the part of the actor. See *Rambin*, 495 Mich at 327-328, 332. *Rambin* thus held that "[c]onsidering MCL 750.414 as a whole, we conclude that it properly requires a showing of knowingly taking without authority or knowingly using without authority." *Id*. at 332.

We conclude that the amendment of MCL 500.3113(a) through 2014 PA 489 modified the scienter requirement under that statute if a violation of MCL 750.414 is at issue.[11] As interpreted by our Supreme Court in *Spectrum Health* and *Rambin*, MCL 500.3113(a) and MCL 750.414 relate to the same subject matter and thus are *in pari materia*. As discussed earlier, "[s]tatutes that relate to the same subject or that share a common purpose are *in pari materia* and must be read together as one law, even if they contain no reference to one another and were enacted on different dates." *In re AGD*, 327 Mich App at 344 (quotation marks and citation omitted). Consequently, MCL 500.3113(a) and MCL 750.414 must be read together as one law. See *id*.

Following *Rambin*, the Legislature added the "knew or should have known" language to MCL 500.3113(a). In construing a statute, we assume that when the Legislature crafts legislation it knows what the existing law is and takes it into consideration. *O'Connell v Dir of Elections*, 316 Mich App 91, 99; 891 NW2d 240

[11] As explained later in note 12 of this opinion, because the Legislature altered the scienter requirement of MCL 500.3113(a), the *mens rea* requirement of MCL 750.414 is modified only insofar as it relates to MCL 500.3113(a).

(2016). If we simply treated the current version of MCL 500.3113(a) in exactly the same manner as in *Rambin*, i.e., that a violation "requires a showing of knowingly taking without authority or knowingly using without authority," *Rambin*, 495 Mich at 332, it would be as if 2014 PA 489 had worked no change in the safe-harbor provision or the scienter requirement. *Rambin* permitted disqualification from eligibility for benefits only if the plaintiff knew that the taking was contrary to the owner's direction; the "knew or should have known" standard makes it easier for an insurance company to establish that a plaintiff is disqualified from eligibility for benefits because actual knowledge is no longer necessary so long as a plaintiff should have known that he or she was taking a motor vehicle contrary to the owner's directives.

In other words, if we were to conclude that 2014 PA 489 did not change the *mens rea* requirement that *Rambin* held applies in the context of MCL 750.414, the Legislature's enactment of the words "knew or should have known" would be surplusage and nugatory, contrary to our customary rules of construction. We are constrained to reject such an interpretation. We therefore conclude, applying the plain language of 2014 PA 489, that the Legislature amended *Rambin*'s scienter standard involving MCL 750.414 in cases in which disqualification from eligibility for benefits under MCL 500.3113(a) is at issue. Thus, we hold that when disqualification for PIP benefits is at issue, a person acts unlawfully under MCL 750.414 if the person takes a motor vehicle or motorcycle knowing that the owner has prohibited the taking, *Rambin*, 495 Mich at 332; MCL 500.3113(a) (if the person "knew . . . the motor vehicle or motorcycle was taken unlawfully"), or if the person takes a motor vehicle or

motorcycle and "should have known" that the owner prohibited the taking, MCL 500.3113(a).[12]

This case illustrates the difference between the two standards. We accept, as we must for purposes of a summary-disposition ruling, that plaintiff was unaware of the terms of the rental agreement, as he testified. Plaintiff thus lacked actual knowledge that an unlicensed driver was prohibited by the rental agreement from taking the car; under the previous version of the statute as interpreted in *Rambin*, that would not have constituted an unlawful taking because plaintiff did not knowingly take the car without the owner's authority. *Rambin*, 495 Mich at 332. Nevertheless, the "should have known" language imposes a more restrictive standard. Plaintiff knew that the car was rented; he knew that there was a written rental agreement; and, of course, the law requires him to know his driving status, i.e., whether or not he is a licensed driver, because only a licensed driver may drive. MCL 257.301. Under the "should have known" standard, plaintiff was obligated to determine the scope of the authorization that the owner, Meade Lexus, had set under the rental agreement for a nonparty such as himself to take and drive the car. Stated another way, plaintiff knew that his wife, who was the party to the contractual agreement with Meade Lexus, was not the owner of the car and that any authority to use the car could only be based on the terms set by the owner. Thus, before simply driving off, plaintiff was obligated to learn the terms of the rental

[12] Our construction of the *mens rea* standard of MCL 750.414 applies only in the context of litigation involving MCL 500.3113(a) because of the repeal of the safe-harbor provision and the enactment of a new scienter standard in MCL 500.3113(a). Our Supreme Court's construction of the *mens rea* requirement under MCL 750.414 applies in a criminal prosecution brought under that statute.

agreement; he "should have known" the terms because a person may not simply take what he knows to be another's property without taking any steps to determine if the owner authorized the taking. The mere assumption or supposition that it must be permissible to take a third party's property, without more, does not satisfy the "should have known" standard of MCL 500.3113(a).

Even the most cursory review of the rental agreement would have disclosed to plaintiff immediately that only a licensed driver could be an "Authorized Driver" under the agreement. If plaintiff, in fact, did not actually know that he was unlicensed, he nevertheless by law should have known that fact and thus should have known that his taking of the car was unlawful under the circumstances.[13] Consequently, defendant has fully satisfied the standards of MCL 500.3113(a) as they relate to MCL 750.414 in establishing an unlawful taking. Therefore, the trial court erred by failing to grant defendant's motion for summary disposition.

IV. CONCLUSION

Defendant demonstrated that MCL 500.3113(a) was applicable: plaintiff took the car unlawfully within the

[13] The record establishes that there was an administrative appeal regarding the revocation of plaintiff's driving privileges and that plaintiff attended and testified at a hearing. The appeal was resolved against plaintiff, resulting in the revocation of his license, and a copy of the order was mailed to him. Thus, it is quite likely that plaintiff had actual knowledge that his license had been revoked. We need not, however, consider whether the evidence in that regard is so one-sided that as a matter of law a fact-finder could not reasonably conclude that plaintiff did not have actual knowledge of the status of his license, because the "should have known" standard leads to the same conclusion as would actual knowledge—that plaintiff is ineligible for benefits by virtue of MCL 500.3113(a).

meaning of MCL 750.414; he willingly operated and willingly used it; and he did so in circumstances under which, at a minimum, he should have known that Meade Lexus, the car's owner, prohibited him from driving the car because he was not licensed to drive. Consequently, the trial court erred by failing to enter summary disposition on behalf of defendant. Accordingly, we reverse the order of the trial court denying defendant's motion for summary disposition and remand the case to that court with directions that it enter an order of summary disposition on behalf of defendant. We do not retain jurisdiction. Defendant, as the prevailing party, may tax costs pursuant to MCR 7.219.

JANSEN and CAMERON, JJ., concurred with TUKEL, P.J.

AYOTTE v DEPARTMENT OF HEALTH AND HUMAN SERVICES

Docket No. 350666. Submitted April 9, 2021, at Grand Rapids. Decided April 22, 2021, at 9:05 a.m. Leave to appeal denied 509 Mich 855 (2022).

Joseph Ayotte moved for attorney fees and costs in the Arenac Circuit Court, arguing that the assertion of the Department of Health and Human Services that he was not eligible for federal foster-care funding was frivolous and vexatious. On November 11, 2014, when plaintiff was 16 years old, Arenac Circuit Judge Richard Vollbach entered a temporary detention order for plaintiff after plaintiff assaulted his mother. Plaintiff entered a plea of admission to a delinquency petition on November 12, 2014, and was ordered to serve three days in a juvenile detention center, after which he would be placed on intensive probation in his mother's home under the supervision of a juvenile officer. However, also on November 12, 2014, defendant filed a child-protection petition seeking plaintiff's removal from his mother's home, citing her problems with substance abuse and other issues. The court assumed jurisdiction over plaintiff on November 13, 2014, and specified that plaintiff would be removed from the home on November 14, 2014. Defendant initially determined that plaintiff was eligible for Title IV-E foster-care funding under 42 USC 670 *et seq*., but after defendant reviewed its Title IV-E funding, defendant determined that plaintiff was not eligible because the delinquency order removing plaintiff from his home did not contain language indicating that it was contrary to plaintiff's welfare to remain in the home. Following an administrative hearing, the administrative law judge (ALJ) determined that while a contrary-to-the-welfare finding was made in the November 13, 2014 order, that order was not a removal order because plaintiff had already been removed from the home pursuant to the temporary detention order. Therefore, the ALJ concluded that defendant had properly denied plaintiff Title IV-E funding. On appeal, the circuit court, Harry P. Gill, J., on assignment by the State Court Administrative Office, reversed the ALJ's decision, concluding that the temporary detention order was not the first order of removal, but rather, an arrest warrant. In response to plaintiff's motion, the court awarded attorney fees and costs under the Administrative Procedures Act (APA), MCL

24.201 *et seq*., because the position of defendant was "exceedingly unreasonable." Defendant appealed, and the Court of Appeals, METER, P.J., and K. F. KELLY and GLEICHER, JJ., agreed with the circuit court that the detention order was not the first order of removal for purposes of Title IV-E funding. 326 Mich App 483 (2018). Following the Court of Appeals' decision, the circuit court affirmed its previous decision to award attorney fees and costs and found that defendant's position was frivolous, citing MCL 600.2421d, MCL 24.323, and MCR 7.112. Defendant's application for leave to appeal was granted by the Court of Appeals.

The Court of Appeals *held*:

1. The circuit court asserted that it had authority to award attorney fees under MCL 24.323 and MCL 600.2421d. MCL 24.323(1) provides that the presiding officer that conducts a contested case shall award to a prevailing party the costs and fees incurred by the party if the presiding officer finds that the position of the agency was frivolous. Thus, the plain language of the statute requires the presiding officer to determine that the position of the agency was frivolous according to the conditions specified in MCL 24.323(1)(a) to (c) before an award of attorney fees and costs can be made. In this case, as defined by MCL 24.322(1) and (4), the circuit court was not a presiding officer, and the proceeding in the circuit court was not a contested case. Therefore, the court erred by relying on MCL 24.323(1) to award attorney fees to plaintiff. Under MCL 600.2421d, if a court awards costs and fees to a prevailing party upon judicial review of the final action of a presiding officer in a contested case pursuant to MCL 24.325, then the court shall award those costs and fees provided for in MCL 24.323 if the court finds that the position of the state involved in the contested case was frivolous. Under MCL 24.325, a party who is dissatisfied with the final action of a presiding officer with regard to costs and fees under MCL 24.323 may seek judicial review of that action. The reviewing court may modify that action only if the court finds that the failure to make an award or the making of an award was an abuse of discretion or if the calculation of the award was not based on substantial evidence. No determination on attorney fees was made by the ALJ in this case, so the court did not have a final action on this issue to review. Accordingly, the circuit court could not have made an award of costs and fees under MCL 24.325 pursuant to MCL 600.2421d.

2. MCR 7.112 provides that the circuit court may grant relief as provided in MCR 7.216. MCR 7.216(C)(1) allows the circuit court to award actual and punitive damages when it determines

that any of the proceedings in an appeal was vexatious. Under MCR 7.216(C)(1)(a), an appeal is vexatious when it was taken in order to hinder or delay the proceedings or without any reasonable basis for believing that there was a meritorious issue to be determined on appeal. Under MCR 7.216(C)(1)(b), an appeal is vexatious if, among other reasons, any pleadings, testimony, or other documents filed in the case were grossly lacking in the requirements of propriety. Given the court's reasoning, it clearly relied on MCR 7.216(C)(1)(a) in awarding attorney fees to plaintiff, but MCR 7.216(C)(1)(a) was not applicable because it allows the court to assess damages against the party who filed the meritless appeal; in this case, defendant did not file the appeal. Further, even if MCR 7.216(C)(1)(a) was applicable, the parties' dispute concerned which order constituted the first order of removal for purposes of Title IV-E funding. The depth of the Court of Appeals' analysis in its previous opinion attested to the complexity of the issue, and the complexity of the case rebutted the conclusion that the appeal was taken without any reasonable basis for belief that there was a meritorious issue. Therefore, the circuit court erred by awarding attorney fees under MCR 7.216(C)(1)(a).

3. Michigan follows the American rule regarding the imposition of attorney fees and costs, which provides that attorney fees ordinarily are not recoverable unless a statute, court rule, or common-law exception provides to the contrary. One such exception is the trial court's inherent authority to sanction a litigant or attorney for misconduct by assessing attorney fees. Although it was not clear whether the circuit court in this case awarded attorney fees under its inherent authority to sanction misconduct, to the extent that it did so, it abused its discretion. Defendant's argument was reasonable, so advancing that argument was not misconduct warranting sanctions.

Reversed.

ADMINISTRATIVE PROCEDURES ACT — ATTORNEY FEES — PRESIDING OFFICER — TRIAL COURTS.

Under the Administrative Procedures Act, MCL 24.201 *et seq*., the presiding officer of a contested case must first determine that the agency's position was frivolous according to the conditions specified in MCL 24.323(1) before it can decide whether to award attorney fees to the prevailing party; the circuit court may only award attorney fees upon judicial review of the final action of a presiding officer in a contested case, MCL 24.325, if it finds that the state's position was frivolous, MCL 600.2421d.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Brian K. McLaughlin*, Assistant Attorney General, for the Department of Health and Human Services.

Allegiant Legal, PLLC (by *Paula A. Aylward*) for Joseph Ayotte.

Before: MURRAY, C.J., and MARKEY and LETICA, JJ.

PER CURIAM. In this case involving Title IV-E[1] foster-care funding, defendant appeals by leave granted[2] the circuit court's order awarding plaintiff $29,097.50 in attorney fees and $521 in costs under the Administrative Procedures Act (APA), MCL 24.201 *et seq*. On appeal, defendant advances three arguments for why the circuit court erred by awarding attorney fees and costs to plaintiff: (1) the circuit court did not have jurisdiction to award attorney fees and costs under the APA when the administrative law judge (ALJ) was not asked to make a determination regarding such fees and costs; (2) the circuit court erred by finding that defendant's arguments were vexatious under MCR 7.112 and MCR 7.216; and (3) the circuit court erred to the extent that it sanctioned defendant under the court's inherent authority. We agree and, therefore, reverse.

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[1] Title IV-E refers to Subchapter IV, Part E of the United States Social Security Act, 42 USC 670 *et seq*. "Title IV-E establishes federal funding to support state foster care systems and conditions funding on compliance with federal requirements. . . . Title IV-E requirements are significant in states, including Michigan, that rely on federal funding to support child welfare programs. Because we choose to accept federal funding, noncompliance with the federal scheme results in substantial funding losses and financial penalties." *In re Rood*, 483 Mich 73, 102-103; 763 NW2d 587 (2009).

[2] *Ayotte v Dep't of Health & Human Servs*, unpublished order of the Court of Appeals, entered February 6, 2020 (Docket No. 350666).

I. PROCEDURAL HISTORY

The underlying facts are not in dispute and are set forth in *Ayotte v Dep't of Health & Human Servs*, 326 Mich App 483, 486-488; 927 NW2d 730 (2018):

> Plaintiff, 16 years old at the time, engaged in domestic violence, see MCL 750.81(2), on November 10, 2014, and Arenac Circuit Court Judge Richard Vollbach entered a temporary detention order on November 11, 2014. Plaintiff admitted to assaulting his mother and entered a plea of admission to a delinquency petition on November 12, 2014. Judge Vollbach ordered plaintiff to serve three days in the Roscommon Juvenile Detention Center (RJDC), after which he would be "placed on intensive probation under the supervision of the juvenile officer" in the home of his mother.
>
> However, later in the day on November 12, defendant filed a child-protection petition seeking plaintiff's removal from his mother's home, citing, among other things, her problems with substance abuse. After a plea by the mother, the court assumed jurisdiction over plaintiff on November 13, 2014, and specified a removal-from-the-home date of November 13, 2014. In an amended order of adjudication signed on November 14, 2014, the court ordered that plaintiff be placed with defendant for care and supervision after his "release[] from the [RJDC] on Friday, November 14, 2014[.]"
>
> Initially, defendant determined that plaintiff was eligible for Title IV-E foster-care funding for his placement outside his mother's home. See 42 USC 670 *et seq*. Thereafter, in November 2015, Tiphanie Charbonneau, a Title IV-E specialist with defendant, conducted an annual review of Title IV-E funding, and plaintiff's case was chosen at random for a specific review. Charbonneau concluded that plaintiff, "in fact, was not supposed to be IV-E eligible" because the delinquency order removing plaintiff from his home did not contain language indicating that it was contrary to plaintiff's welfare to be removed from his home.

> Plaintiff's guardian ad litem sought an administrative hearing. . . .
>
> * * *
>
> Relying on 42 USC 672(a)(2)(A)(ii) and 45 CFR 1356.21(c), the ALJ found that "while the finding of contrary to the welfare was made in the Order After Preliminary Hearing [in the child-protection matter], the order was not a removal order as the child was already removed as clearly documented in the Order to Apprehend and Detain . . . ." The ALJ concluded that defendant "acted in accordance with Department policy when it denied continuing Title IV-E funding . . . because the Court's Order to Apprehend and Detain did not have the requisite contrary to the welfare findings."
>
> Plaintiff appealed in the circuit court, which concluded that the ALJ committed clear legal error. The circuit court entered an order reversing the ALJ's decision "[f]or the reasons stated on the record . . . ." The court concluded on the record that the temporary detention order was not the first order of removal but, rather, was an arrest warrant. [Alterations in original.]

Beyond the substantive legal arguments presented in the circuit court, plaintiff requested attorney fees and costs. The circuit court awarded attorney fees and costs under the APA because "the position of the Department is exceedingly unreasonable." The court explained:

> I will award attorney fees because I think the position of [defendant] is exceedingly unreasonable. I think they have a duty to appeal these things if they find, if they are audited, they didn't even wait to be audited. I think the finding of . . . the Department in the Virginia case[3] would have been a good reason to defend this, and I think it is

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[3] *Virginia Dep't of Social Servs*, DAB No. 2379 (2011) (Docket No. A-11-21).

> appropriate to award attorney fees. Now the amount of attorney fees could be subject to litigation, I can't just order that you get anything you want. So if there's a further proceeding necessary on that I will hear it if it can't be agreed.

Thereafter, in a motion for attorney fees and costs and various other filings, plaintiff sought an award of $24,308 in attorney fees and $807.85 in costs. Plaintiff argued that the circuit court had the authority to enter such an award under MCL 600.2421d because defendant's position was frivolous, under MCR 7.216(C) because defendant's position was vexatious, and under the trial court's inherent authority to sanction litigants. In response, defendant argued that MCL 24.323(1) of the APA authorized only the presiding officer, in this case the ALJ, not the circuit court, to award attorney fees. Defendant also argued that, even if the APA applied, plaintiff's request for attorney fees should be denied because defendant's position was neither frivolous nor vexatious. Further, defendant did not engage in misconduct before the circuit court to warrant sanctions.

When this Court granted defendant's application for leave to appeal,[4] the circuit court stayed all proceedings pending the outcome of the appeal. On appeal, this Court agreed with the circuit court that the November 11, 2014 detention order was not the first order of removal for purposes of Title IV-E funding. *Ayotte*, 326 Mich App at 494-495. This Court concluded that the "statutory scheme and agency interpretations align with the ruling of the trial court, and we do not find defendant's arguments to the contrary persuasive." *Id*. at 503.

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[4] *Ayotte v Dep't of Health & Human Servs*, unpublished order of the Court of Appeals, entered March 5, 2018 (Docket No. 339090).

Following this Court's decision in *Ayotte*, the circuit court returned to the issue of attorney fees and costs. Defendant argued that MCL 24.325 gave the circuit court authority to review the final action of a presiding officer regarding attorney fees and costs imposed under MCL 24.323, but the circuit court did not have the authority to award attorney fees. Defendant asserted that the procedural posture of the case required the ALJ to first make a determination regarding costs and fees. Citing *Grass Lake Improvement Bd v Dep't of Environmental Quality*, 316 Mich App 356; 891 NW2d 884 (2016), *Widdoes v Detroit Pub Sch*, 218 Mich App 282; 553 NW2d 688 (1996), and *Sherman Pharmacy, Inc v Dep't of Social Servs*, unpublished per curiam opinion of the Court of Appeals, issued May 16, 1997 (Docket No. 188114), defendant argued that, without a decision by the presiding officer regarding attorney fees, the circuit court could not review the matter.

Plaintiff argued that defendant's interpretation of the caselaw was incorrect and asserted that the cases were distinguishable because they involved review of an ALJ's decision on fees and costs. Plaintiff further argued that MCL 24.323 and MCL 600.2421d clearly provided the circuit court with the authority to award fees and costs, and MCR 7.112 and MCR 7.216 allowed the court to award costs and fees because the court was serving as an appellate tribunal. In any event, plaintiff asserted the court had the inherent authority to sanction defendant for "wast[ing] scarce judicial resources arguing something that was exceedingly unreasonable and untenable under the law . . . ." Defendant responded by arguing that there was a difference between advancing a legal argument that was devoid of merit and having a difference of opinion on the requirements of the law.

Ultimately, the court said that it agreed with defendant's proposition that an unsuccessful argument is not necessarily devoid of merit, "but I don't agree with it as applied to this case because I think it has been frivolous from day one." The court continued: "What happened here is not foster care, has nothing to do with foster care and I think it was frivolous for [defendant] to not acknowledge that throughout these proceedings. And therefore, my ruling [to impose attorney fees and costs] will stand." The court explained that "the position of [defendant] was exceedingly unreasonable and unsupported . . . by the law. I find that to be another description for the word frivolous." Therefore, the court concluded that it had the authority to award fees under MCL 600.2421d, MCL 24.323, and MCR 7.112:

> I find that attorney fees should be awarded under the provisions of MCL [600.]2421d, which turns us to MCL 24.2323 [sic].
>
> I also find that I have authority to award attorney fees under the provisions of [MCR] 7.112, which incorporates the Court of Appeals rules, applies them to this kind of an action, and I find that it was frivolous. I don't think that . . . the position of [defendant] is founded in the law. I think their position was ridiculous, and . . . I think it showed a callous disregard for finding the right answer to this, and that should not be tolerated, and that's what attorney fees exist for. [Emphasis omitted.]

Plaintiff's counsel said that she spent 103 hours working on this case and proposed an hourly rate of $236, despite the statutory ceiling of $75 per hour in MCL 24.323(5)(b), because of the extraordinary circumstances of the case. The circuit court determined that $282.50 was a reasonable hourly rate because of the special circumstances of the case. Accordingly, the circuit court entered an order awarding plaintiff $29,097.50 in attorney fees and $520 in costs. Defen-

dant now appeals, challenging the award of attorney fees and costs.

II. DISCUSSION

On appeal, defendant argues that the circuit court erred by awarding plaintiff attorney fees and costs. We agree.

This Court reviews for an abuse of discretion a trial court's decision whether to award attorney fees and a determination of the reasonableness of those fees. *Teran v Rittley*, 313 Mich App 197, 208; 882 NW2d 181 (2015). The trial court's underlying factual findings are reviewed for clear error, while any underlying questions of law are reviewed de novo. *Id*. "A finding is clearly erroneous where, although there is evidence to support the finding, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been made." *Ambs v Kalamazoo Co Rd Comm*, 255 Mich App 637, 652; 662 NW2d 424 (2003). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008). However, "[a] trial court's findings with regard to whether a claim or defense was frivolous, and whether sanctions may be imposed, will not be disturbed unless it is clearly erroneous." *Meisner Law Group, PC v Weston Downs Condo Ass'n*, 321 Mich App 702, 730; 909 NW2d 890 (2017) (quotation marks and citation omitted).

A. ATTORNEY FEES UNDER THE APA

Defendant argues that the circuit court lacked jurisdiction to award attorney fees under the APA because the circuit court's authority was limited to judicial

review of the ALJ's decision regarding attorney fees. We agree.

This Court and the Michigan Supreme Court have described the rules of statutory construction as follows:

> "The paramount rule of statutory interpretation is that we are to effect the intent of the Legislature. To do so, we begin with the statute's language. If the statute's language is clear and unambiguous, we assume that the Legislature intended its plain meaning, and we enforce the statute as written. In reviewing the statute's language, every word should be given meaning, and we should avoid a construction that would render any part of the statute surplusage or nugatory." [*PNC Nat'l Bank Ass'n v Dep't of Treasury*, 285 Mich App 504, 506; 778 NW2d 282 (2009), quoting *Wickens v Oakwood Healthcare Sys*, 465 Mich 53, 60; 631 NW2d 686 (2001).]

As an initial matter, plaintiff argues that this Court should not review this issue because defendant failed to preserve it in the circuit court. Generally, for an issue to be preserved for appellate review, it must be raised in or decided by the trial court. *Glasker-Davis v Auvenshine*, 333 Mich App 222, 227; 964 NW2d 809 (2020). To preserve a challenge to a trial court's determination of attorney fees, a party must have asserted in the trial court the specific legal grounds on which it seeks this Court's review. See *Ladd v Motor City Plastics Co*, 303 Mich App 83, 104; 842 NW2d 388 (2013).

Defendant preserved its arguments with respect to the award of attorney fees under MCL 24.323(1) in its written objections to plaintiff's motion for attorney fees and costs and in its brief in support of objections to plaintiff's motion for attorney fees and costs; defendant further preserved its arguments under the APA, as well as its argument under MCL 600.2421d and MCR 7.112, in its surreply. Defendant also preserved each

argument at the hearing on plaintiff's motion for fees and costs. However, defendant did not raise its argument that Title IV-E cases are exempt from an award of attorney fees under MCL 24.315(3)(e), and the trial court did not rule on the issue. This argument is not preserved. This Court reviews unpreserved claims of error in civil cases for plain error affecting substantial rights. See *Duray Dev, LLC v Perrin*, 288 Mich App 143, 150; 792 NW2d 749 (2010).

Turning to the merits of defendant's issue, under MCR 7.103(A)(2), we note that a circuit court has appellate jurisdiction of an appeal of right filed by an aggrieved party from a final order or decision of an agency governed by the APA. The circuit court "may affirm, reverse, remand, or modify the decision of the agency and may grant further relief as appropriate based on the record, findings, and conclusions." MCR 7.119(H). The circuit court explained that it had authority to award attorney fees under MCL 24.323, MCL 600.2421d, and MCR 7.112.[5]

MCL 24.323(1) provides:

> The presiding officer that conducts a contested case shall award to a prevailing party, other than an agency, the costs and fees incurred by the party in connection with that contested case, if the presiding officer finds that the position of the agency to the proceeding was frivolous. To find that an agency's position was frivolous, the presiding officer shall determine that at least 1 of the following conditions has been met:
>
> (a) The agency's primary purpose in initiating the action was to harass, embarrass, or injure the prevailing party.

[5] The award of attorney fees under MCR 7.112 is addressed in Part II(B).

> (b) The agency had no reasonable basis to believe that the facts underlying its legal position were in fact true.
>
> (c) The agency's legal position was devoid of arguable legal merit.

"Presiding officer" is defined to mean "an agency, 1 or more members of the agency, a person designated by statute to conduct a contested case, or a hearing officer designated and authorized by the agency to conduct a contested case." MCL 24.322(4). An "agency" is "a state department, bureau, division, section, board, commission, trustee, authority or officer, created by the constitution, statute, or agency action," but does not include "an agency in the legislative or judicial branch of state government . . . ." MCL 24.203(2). A "contested case" is "a proceeding . . . in which a determination of the legal rights, duties, or privileges of a named party is required by law to be made by an agency after an opportunity for an evidentiary hearing." MCL 24.203(3). See also MCL 24.322(1).

The plain language of MCL 24.323(1) requires the "presiding officer" to determine that the position of the agency was frivolous under one of the conditions identified in MCL 24.323(1)(a) to (c) before an award of attorney fees and costs can be made. Clearly, the circuit court was not a "presiding officer," and the proceeding in the circuit court was not a contested case. The circuit court erred by relying on MCL 24.323(1) to award attorney fees to plaintiff.

MCL 24.325 provides for judicial review of a presiding officer's determination of costs and fees under MCL 24.323. MCL 24.325 states:

> (1) A party that is dissatisfied with the final action taken by the presiding officer under [MCL 24.323] in regard to costs and fees may seek judicial review of that action pursuant to [MCL 24.301 *et seq*.].

> (2) The court reviewing the final action of a presiding officer pursuant to subsection (1) may modify that action only if the court finds that the failure to make an award or the making of an award was an abuse of discretion, or that the calculation of the amount of the award was not based on substantial evidence.
>
> (3) An award of costs and fees made by a court under this section shall only be made pursuant to [MCL 600.2421d].

Under MCL 600.2421d, "If the court awards costs and fees to a prevailing party upon judicial review of the final action of a presiding officer in a contested case pursuant to [MCL 24.325]," then "the court shall award those costs and fees provided for in [MCL 24.323], if the court finds that the position of the state involved in the contested case was frivolous."

The plain language of MCL 24.325(1) provides that a party dissatisfied with the final action taken by the presiding officer with regard to costs and fees under MCL 24.323 may seek *judicial review of that action*. The reviewing court "may modify" the presiding officer's action only if the court finds that the presiding officer abused his or her discretion or the calculation of the award was not based on substantial evidence. MCL 24.325(2). Again, no determination on attorney fees was made by the ALJ in this case, and therefore, there was no final action taken by the presiding officer with regard to attorney fees under MCL 24.323. Consequently, plaintiff could not seek judicial review under MCL 24.325(1) because there was nothing for the circuit court to review. And, therefore, the circuit court could not make an award of costs and fees under MCL 24.325 pursuant to MCL 600.2421d.

The circuit court interpreted MCL 600.2421d as providing the court with the authority to award costs and fees to a prevailing party upon judicial review of

the *final action of a presiding officer on the merits of a contested case*.[6] However, the circuit court's interpretation is not consistent with the plain language of the statute. The plain language of MCL 600.2421d provides for "judicial review of the final action of a presiding officer in a contested case pursuant to [MCL 24.325]." MCL 24.325 provides judicial review of a final action taken by the presiding officer under MCL 24.323 in regard to costs and fees. The trial court clearly erred by relying on MCL 600.2421d to award attorney fees. See *Widdoes*, 218 Mich App at 289-290 (concluding, in part, that the circuit court erred by awarding reasonable attorney fees to the petitioner because MCL 24.323, MCL 24.325, and MCL 600.2421d did not apply when a presiding officer did not award costs and fees and there was no appeal of such an award).[7]

B. ATTORNEY FEES UNDER THE COURT RULES

Defendant argues that the circuit court erred by finding that defendant's position was vexatious and abused its discretion by awarding attorney fees under MCR 7.112 and MCR 7.216. We agree.

Under MCR 7.112, "[i]n addition to its general appellate powers, the circuit court may grant relief as provided in MCR 7.216." MCR 7.216(C)(1) allows the circuit court to award "actual and punitive damages . . . when

[6] If, on judicial review, the circuit court finds that the presiding officer's failure to make an award was an abuse of discretion, or that the making of an award was an abuse of discretion, the court can make an award of costs and fees under MCL 24.325(3), pursuant to MCL 600.2421d. MCL 24.325(2) and (3). However, as discussed, the circuit court did not find that the failure to make an award was an abuse of discretion.

[7] Because the circuit court did not have the authority to award attorney fees and costs under the APA, we need not consider defendant's remaining arguments concerning the APA.

it determines that an appeal or any of the proceedings in an appeal was vexatious . . . ." An appeal or proceeding is vexatious when:

> (a) the appeal was taken for purposes of hindrance or delay or without any reasonable basis for belief that there was a meritorious issue to be determined on appeal; or
>
> (b) a pleading, motion, argument, brief, document, record filed in the case or any testimony presented in the case was grossly lacking in the requirements of propriety, violated court rules, or grossly disregarded the requirements of a fair presentation of the issues to the court. [MCR 7.216(C)(1).]

The circuit court did not specifically identify whether it relied on MCR 7.216(C)(1)(a) or (b) to award attorney fees. Plaintiff argues that he never sought attorney fees under MCR 7.216(C)(1)(a), so therefore, the circuit court could not have awarded fees under that subrule. The circuit court stated:

> I also find that I have authority to award attorney fees under the provisions of [MCR] 7.112, which incorporates the Court of Appeals rules, applies them to this kind of an action, and I find that it was frivolous. I don't think that . . . the position of [defendant] is founded in the law. I think their position was ridiculous, . . . and I think it showed a callous disregard for finding the right answer to this, and that should not be tolerated, and that's what attorney fees exist for. [Emphasis omitted.]

Given the court's reasoning, it is apparent that it relied on MCR 7.216(C)(1)(a), regardless of whether plaintiff relied on MCR 7.216(C)(1)(a) in his briefing.

Defendant argues that MCR 7.216(C)(1)(a) did not apply because defendant was not the appellant in the circuit court. MCR 7.216(C)(1)(a) allows a circuit court to assess actual and punitive damages against one who files an appeal without any reasonable basis to believe

that there was a meritorious issue to be determined by the court. See, e.g., *BJ's & Sons Constr Co, Inc v Van Sickle*, 266 Mich App 400, 413; 700 NW2d 432 (2005). Here, the appeal in the circuit court was not "taken" by defendant; in other words, defendant did not file the appeal. Therefore, MCR 7.216(C)(1)(a) did not apply.

Even if MCR 7.216(C)(1)(a) did apply, at the heart of the Title IV-E dispute was a disagreement on what constitutes the first order of removal for purposes of Title IV-E funding. The ALJ agreed with defendant that the temporary detention order was the first order of removal and concluded that defendant had "acted in accordance with Department policy when it denied continuing Title IV-E funding . . . because the Court's Order to Apprehend and Detain did not have the requisite contrary to the welfare findings." *Ayotte*, 326 Mich App at 487-488 (quotation marks and citation omitted). Defendant's position remained the same when plaintiff appealed in the circuit court. The circuit court disagreed and reversed the ALJ's decision. Defendant then appealed the circuit court's determination to this Court.

In resolving the dispute between the parties, this Court engaged in a detailed analysis of 42 USC 672(a)(1), considering the provision in the context of the entire statute, as implemented by the Code of Federal Regulations. *Id*. at 493-494. This Court also considered provisions of the Federal Register addressing the proposed federal regulation. *Id*. at 495-498. The cited passages from the Federal Register documented the evolution of the federal regulation in response to many comments provided. Specifically, when read together, the passages explained why the Administration for Children and Families (ACF) "abandoned drawing a distinction between emergency and nonemergency re-

movals with respect to the contrary-to-the-welfare determination" for purposes of Title IV-E funding. *Id*. at 496-497. This Court further considered question-and-answer sections of the Federal Child Welfare Manual, explaining that how the answers provided by the ACF are understood depends on understanding that the questions answered in the Federal Register presume that placement of a child "in a detention facility or a psychiatric hospital is a temporary step undertaken by a court that has already determined that the child should be placed in foster care[.]" *Id*. at 500-502.

The depth of this Court's analysis attests to the complexity of the issue. In fact, the circuit court acknowledged "the complexity of the case" when concluding that the hours plaintiff's counsel claimed were "reasonable." In turn, the complexity of the case rebuts the conclusion that "the appeal was taken . . . without any reasonable basis for belief that there was a meritorious issue to be determined on appeal[.]" MCR 7.216(C)(1)(a). Moreover, the fact that this Court decided to publish the case indicates, at least implicitly, that the entire matter was worthy of binding analysis. See MCR 7.215(B)(2) ("A court opinion must be published if it . . . construes as a matter of first impression a provision of a constitution, statute, regulation, ordinance, or court rule[.]").

Additionally, *Ayotte* cited *Virginia Dep't of Social Servs*, DAB No. 2379 (2011) (Docket No. A-11-21), a decision by the United States Department of Health and Human Services Departmental Appeals Board,[8] in support of its analysis. *Ayotte*, 326 Mich App at 495. In that case, the Virginia Department of Social Services

[8] Available at <https://www.hhs.gov/sites/default/files/static/dab/decisions/board-decisions/2011/dab2379.pdf> (accessed April 14, 2021) [https://perma.cc/UDB8-JZKS].

appealed a decision issued by the ACF disallowing Title IV-E foster-care payments in a specific case because the contrary-to-the-welfare determination was not made when the child was removed from his home and placed in a detention center on November 23, 2009. *Virginia*, DAB No. 2379 at 1-5. The Department of Social Services took custody of the child and placed him in foster care on December 9, 2009, after determining that it would be contrary to the welfare of the child to remain in the home. *Id*. at 4. As in the case at hand, the parties in *Virginia* disagreed as to which order—the November 23, 2009 order or the December 9, 2009 order—was the first removal order. *Id*. at 5. The ACF argued that it was the former, but the appeals board disagreed and held that the Department of Social Services "met the contrary to the welfare requirement necessary to establish [Title] IV-E eligibility . . . ." *Id*. at 5, 13. The fact that the ACF had advanced the argument that the order removing the child from his home and placing him in a detention center was the first removal order rebuts the circuit court's conclusion in this case that defendant's "position was ridiculous, and . . . showed a callous disregard for finding the right answer . . . ."

Of course, sanctions are appropriate for a frivolous action when, on the basis of a ruling in another case, a party has reason to believe the action lacks merit. *Farmers Ins Exch v Kurzmann*, 257 Mich App 412, 423; 668 NW2d 199 (2003). Although *Virginia* is not binding because it is an administrative decision, see *Capac Bus Drivers Ass'n v Capac Community Sch Bd of Ed*, 140 Mich App 542, 549; 364 NW2d 739 (1985), and is not focused on the precise issue addressed in *Ayotte*, the circuit court nevertheless told plaintiff's counsel that it was "a nice piece of work" to find the *Virginia* case. And it supports the conclusion that defendant had a rea-

sonable belief that its position was meritorious. Therefore, the trial court erred by awarding attorney fees under MCR 7.216(C)(1)(a).

Defendant further argues that an award of attorney fees was not warranted under MCR 7.216(C)(1)(b) because the circuit court's rejection of defendant's legal argument cannot support sanctions under the court rule. For the reasons discussed as to why attorney fees were not warranted under MCR 7.216(C)(1)(a), an award of attorney fees and costs under MCR 7.216(C)(1)(b) similarly would have been in error. There is nothing to suggest that "a pleading, motion, argument, brief, document, record filed in the case . . . was grossly lacking in the requirements of propriety, violated court rules, or grossly disregarded the requirements of a fair presentation of the issues to the court." MCR 7.216(C)(1)(b).

C. ATTORNEY FEES UNDER THE COURT'S INHERENT AUTHORITY

Defendant argues that the circuit court erred by awarding attorney fees and costs under its inherent authority to sanction litigants for misconduct.

Michigan follows the American rule regarding the imposition of attorney fees and costs, which provides that attorney fees ordinarily are not recoverable unless a statute, court rule, or common-law exception provides to the contrary. *Smith*, 481 Mich at 526. An exception to the American rule is the trial court's inherent authority to sanction a litigant or attorney for misconduct by assessing attorney fees. *Persichini v William Beaumont Hosp*, 238 Mich App 626, 639; 607 NW2d 100 (2000). The purpose of imposing sanctions "is to deter parties and attorneys from filing documents or asserting claims and defenses that have not been sufficiently investigated and researched or that are

intended to serve an improper purpose." *BJ's & Sons Constr Co, Inc*, 266 Mich App at 405 (quotation marks and citation omitted).

Initially, it is not clear that the trial court awarded attorney fees under a court's inherent authority to sanction misconduct. And it does not appear that the circuit court, sitting as an appellate tribunal, had inherent authority to sanction defendant for misconduct that allegedly occurred in the administrative proceeding. Regardless, because defendant's argument was reasonable, it follows that advancing the argument was not misconduct worthy of sanctions. To the extent that the circuit court awarded attorney fees on the basis of its inherent authority to sanction misconduct, the court abused its discretion.

III. CONCLUSION

Because the presiding officer did not make a determination regarding attorney fees, there was no final action on that issue for the circuit court to review. Therefore, the circuit court erred by awarding attorney fees and costs under the APA and MCL 600.2421d. Further, the circuit court clearly erred by finding that defendant's position was vexatious and abused its discretion by awarding attorney fees under MCR 7.112 and MCR 7.216. Likewise, the circuit court abused its discretion if it sanctioned defendant under its inherent authority. Accordingly, we reverse the circuit court's order awarding attorney fees and costs in favor of plaintiff.

Reversed.

MURRAY, C.J., and MARKEY and LETICA, JJ., concurred.

PEOPLE v BEESLEY

Docket No. 348921. Submitted March 2, 2021, at Detroit. Decided April 22, 2021, at 9:10 a.m. Leave to appeal sought.

Jarrett D. Beesley was convicted after a jury trial in the Wayne Circuit Court of first-degree criminal sexual conduct (CSC-I), MCL 750.520b; unlawful imprisonment, MCL 750.349b; and domestic violence, MCL 750.81(2). He had entered the home of his wife, who lived separately, threatened to kill her, and forced her to have sex. The victim claimed that defendant had a gun while committing these crimes, but the jury acquitted defendant of assault with a dangerous weapon, MCL 750.82, and four counts of possessing a firearm during the commission of a felony, MCL 750.227b. The court, Mariam Saad Bazzi, J., sentenced defendant to concurrent terms of 7 to 20 years' imprisonment for CSC-I and 2 to 15 years' imprisonment for unlawful imprisonment, as well as a term of 65 days in jail for domestic violence. Defendant appealed, arguing that the trial court erred by denying his motion for a mistrial after a police officer testified about defendant's criminal history and by sentencing defendant, in part, on the basis of conduct for which he had been acquitted.

The Court of Appeals *held*:

1. The trial court did not abuse its discretion by denying defendant's motion for a mistrial. A motion for a mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs the defendant's ability to get a fair trial. Although defendant's criminal history was mentioned twice at trial, defense counsel established through cross-examination that defendant had not been convicted of domestic violence, violence against women, or crimes involving firearms, and the trial court instructed the jury to disregard all comments regarding defendant's possible criminal history. These remedies were sufficient to cure the prejudicial effect of the testimony. Defendant's arguments relied heavily on *People v Holly*, 129 Mich App 405 (1983), in which a police officer's unresponsive answer during cross-examination mentioned the defendant's previous involvement in an armed robbery. The *Holly* Court stated that police witnesses have a special obligation not to venture into forbidden

areas when testifying. However, *Holly*'s implication that an officer's testimony should be analyzed for impropriety under a different standard than would be used to evaluate any other witness's testimony was faulty and was expressly rejected. The proper analysis for a motion for mistrial depends principally, if not exclusively, on whether a defendant has been prejudiced by an irregularity or error.

2. The trial court's erroneous finding at sentencing that defendant had used a gun while committing the crimes for which he had been convicted did not require resentencing. Under *People v Beck*, 504 Mich 605 (2019), trial courts cannot make factual findings at sentencing based on conduct for which a defendant had been acquitted, and defendant was acquitted of the charges against him that involved firearms. However, defendant did not preserve this issue for appeal, and he failed to establish that the trial court would have imposed a different sentence without the erroneous finding.

Affirmed.

EVIDENCE — IMPROPER TESTIMONY BY POLICE OFFICERS — MISTRIAL.

A motion for a mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs the defendant's ability to get a fair trial; when considering a motion for a mistrial on the basis of improper testimony, the testimony of a police officer is evaluated using the same standard as would be applied to any other witness.

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

State Appellate Defender (by *Douglas W. Baker*) for defendant.

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

TUKEL, P.J. Defendant appeals as of right his jury-trial conviction of first-degree criminal sexual conduct

(CSC-I), MCL 750.520b (multiple variables);[1] unlawful imprisonment, MCL 750.349b; and domestic violence, MCL 750.81(2).[2] Defendant was sentenced to concurrent terms of 7 to 20 years' imprisonment for CSC-I and 2 to 15 years' imprisonment for unlawful imprisonment, as well as a term of 65 days in jail, time served, for domestic violence. On appeal, defendant argues that the trial court erred by denying his motion for a mistrial following testimony by a police officer regarding defendant's criminal history. Defendant additionally argues that the trial court erred by sentencing him, in part, on the basis of conduct of which he had been acquitted. We disagree and therefore affirm defendant's convictions and sentence.

I. UNDERLYING FACTS

This case arises from an altercation between defendant and the victim, his wife. Defendant and the victim were living separately when the incident occurred. On the evening in question, the victim arrived home to her apartment and discovered defendant inside, uninvited. According to the victim, defendant had a gun and repeatedly threatened to kill the victim and himself. At

[1] The felony information charged defendant with engaging in penetration under the following circumstances: "[D]uring the commission of the felony of home invasion and/or unlawful imprisonment and/or defendant was armed with a weapon or any article used or fashioned in a manner to lead the victim to reasonably believe it to be a weapon[.]" The trial court instructed the jury consistently with the felony information. When rendering its guilty verdict, the jury did not clarify upon which theory it convicted defendant of CSC-I.

[2] The prosecution also charged defendant with first-degree home invasion, MCL 750.110a(2), assault with a dangerous weapon (felonious assault), MCL 750.82, and four counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The jury acquitted defendant of these charges.

one point, defendant grabbed the victim by the throat. The victim testified that she attempted to calm defendant down for several hours and complied with everything defendant asked of her out of fear for her own safety. The victim further testified that her compliance with defendant's directives included having sex with defendant, taking a shower with defendant the following morning, and accompanying defendant to get coffee the morning after the incident occurred. The victim stated that she wanted to escape from defendant throughout the entirety of the encounter, but was too afraid to do so.

During the victim's testimony at trial, defense counsel asked her when she and defendant had last been physically intimate before the incident occurred. The victim responded that her sexual relationship with defendant "ended the weekend that, I don't know if I can say, but he had to go to jail for a weekend for violation of probation. When he got out of jail I believe that was the end of the intimacy . . . ." Defense counsel did not object to this response.

The following day of trial, Detective Joseph Carr of the Wyandotte Police Department testified that he executed the search warrant of defendant's home after the victim reported the incident. On redirect examination, the following exchange occurred:

> [*The prosecutor*]: So you went through all those steps before [SWAT (Special Weapons and Tactics)] just came and knocked [defendant's] door down?
>
> [*Detective Carr*]: Prior to the execution of the search warrant we had a briefing with the [SWAT] team which we went over the circumstances of the case and some of [defendant's] criminal history.

Defense counsel immediately objected and subsequently moved for a mistrial. The trial court denied

defendant's motion for a mistrial but offered to give a curative jury instruction and to strike Detective Carr's answer. Defense counsel chose to recross-examine Detective Carr in lieu of the trial court striking the answer. The trial court also provided a curative jury instruction, and defense counsel expressed satisfaction with the instruction. Defendant was then convicted and sentenced as detailed earlier. This appeal followed.

II. MOTION FOR A MISTRIAL

Defendant argues that Detective Carr's testimony about his criminal history was so prejudicial that the trial court erred by denying defendant's motion for a mistrial. We disagree.

A. STANDARD OF REVIEW

We review a trial court's denial of a motion for a mistrial for an abuse of discretion. *People v Schaw*, 288 Mich App 231, 236; 791 NW2d 743 (2010). "This Court will find an abuse of discretion if the trial court chose an outcome that is outside the range of principled outcomes." *Id*. "A motion for a mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs the defendant's ability to get a fair trial." *People v Dickinson*, 321 Mich App 1, 18; 909 NW2d 24 (2017) (quotation marks and citation omitted). Thus, "[f]or a due process violation to result in reversal of a criminal conviction, a defendant must prove prejudice to his or her defense." *Id*. (quotation marks and citation omitted). And the extent of the prejudice is a critical factor: "[T]he moving party must establish that the error complained of is so egregious that the prejudicial effect can be removed in no other way." *Id*. (quotation marks and citation omit-

ted); see also *People v Caddell*, 332 Mich App 27, 37; 955 NW2d 488 (2020).

B. ANALYSIS

Defendant relies heavily on *People v Holly*, 129 Mich App 405, 415; 341 NW2d 823 (1983), which was decided before November 1, 1990, and therefore lacks precedential authority. See MCR 7.215(J)(1). In *Holly*, a police officer was asked on cross-examination whether the defendant had said anything more than what the officer had written down when taking defendant's statement. The officer responded that Holly had admitted involvement in at least one other armed robbery. *Id*. at 414-415. This Court stated, "[W]hen an unresponsive remark is made by a police officer, this Court will scrutinize that statement to make sure the officer has not ventured into forbidden areas which may prejudice the defense. Police witnesses have a special obligation not to venture into such forbidden areas." *Id*. at 415-416 (citation omitted). The Court further added: "Being a police sergeant and the officer in charge of the case, he should have known better than to volunteer such information. Inadmissible evidence tying a defendant to other crimes is highly prejudicial." *Id*. at 416.

Holly has been cited by a handful of published opinions, but no majority opinion in any of those decisions has cited *Holly* for its view of the "special obligation" police witnesses have to avoid testifying about "forbidden areas," such as a defendant's criminal history. We think *Holly*'s analysis is faulty, and we expressly reject it. The proper analysis for a motion for mistrial depends principally, if not exclusively, on whether a defendant has been prejudiced by an irregularity or error.

After its statement regarding the "special obligation" of police witnesses, the *Holly* Court in fact ignored most of what it had said about improper police testimony and engaged in what was essentially a proper analysis focused on prejudice; consequently, the Court upheld the conviction.[3] The Court stated, "In the present case, the evidence was especially prejudicial. [The defendant] testified that he was not actually involved in the robbery, but did what he did because he feared [the codefendant]. His story's believability is substantially reduced if one knows that [the defendant] previously participated in other armed robberies." *Id*. at 416. Nevertheless, while it acknowledged the "undeniable prejudice of the testimony," the Court affirmed the defendant's convictions, explaining that "[t]he evidence against him was simply too strong." *Id*.

Holly's analysis demonstrates the weakness of its statements about what it termed improper police officer testimony. This Court determined that police officer testimony about Holly's participation in other robberies was prejudicial error but not error requiring reversal. That conclusion about the ultimate effect on the verdict of any improper officer testimony was not affected by the fact that the testimony had been given by a police officer. An analysis of prejudice focuses on the effect of what took place (the hearing of improper testimony), rather than whether an officer acted improperly by testifying to certain facts; in other words, in *Holly*, it was the disclosure of defendant's criminal history or involvement in other robberies which prejudiced him, not the identity of the witness who testified to those facts. *Holly* gave no reason in support of evaluating an officer's testimony for impropriety under

[3] The Court reversed the conviction of the codefendant, but on the grounds of improper denial of a severance. *Holly*, 129 Mich App at 412-413.

a different standard than would be used to evaluate any other witness's testimony; it certainly cannot be because a jury is more likely to believe an officer's testimony, as the law provides, and juries are instructed, that an officer's testimony is to be judged "by the same standards you use to evaluate the testimony of any other witness." M Crim JI 5.11 (police witness).

The facts of this case bear out the deficiencies in *Holly*'s analysis. In this case, defendant's wife testified that he had been jailed for a probation violation. If the jury's verdict would have been affected because that testimony was "so egregious that the prejudicial effect can be removed in no other way" than by the granting of a mistrial, *Dickinson*, 321 Mich App at 18, then the identity of the witness who provided the testimony would not matter. Indeed, it is often family members and close associates of a defendant who are most familiar with the facts regarding a defendant's criminal activity. Yet, as the holding in *Holly* demonstrated, the case turned on the fact that the other evidence was "simply too strong" for the defendant to have been prejudiced; it did not matter to the final result that the testimony was provided by a police officer because the testimony did not affect the verdict. Indeed, if such testimony had instead been given by the defendant's wife, as in this case, it would not have obviated the necessity of determining whether the testimony had prejudiced the defendant.

Holly had other flaws as well. While we agree wholeheartedly that police witnesses (and all witnesses) have an obligation not to venture into forbidden areas of testimony, *Holly*, 129 Mich App at 415-416, the key point is in regards to testimony which is "forbidden." An area of testimony is only "forbidden" if the court rules it inadmissible. While many things,

including a defendant's criminal history, are generally inadmissible, there are exceptions for all such rules. By way of example, in certain instances, "evidence of other crimes, wrongs, or acts" of a defendant are admissible. MRE 404(b). When a defendant testifies, his or her criminal history may be admissible for impeachment purposes. MRE 609(a)(2). *Holly* erred by creating a blanket assumption that a police officer will in all instances know precisely what has been ruled admissible and what has been ruled "forbidden." While it will sometimes be true that a police officer will know precisely what has been deemed inadmissible, it is not invariably so. We suggest that it would be a good practice for a trial court ruling on the admissibility of testimony to instruct the prosecutor to inform the officer regarding what has been ruled inadmissible prior to an officer's testimony.

Applying the principles governing a motion for mistrial here, we conclude that defendant was not prejudiced by the officer's testimony. As discussed earlier, defendant's criminal history was referenced twice at trial. The first time was when the victim mentioned it, in response to defense counsel's question asking when she and defendant stopped having an intimate relationship. In response to that question, the victim testified that the turning point was when defendant had gone to jail for the weekend for a probation violation. Defense counsel did not object to this testimony. The victim's testimony implicitly informed the jury that defendant had a criminal record, but no specific details were offered. Defendant's criminal history was then addressed a second time by Detective Carr, who testified that the SWAT team reviewed "some of [defendant's] criminal history" before it attempted to apprehend defendant at his home. Detective Carr's testimony had the potential to prejudice

defendant, but two remedies were used at trial to mitigate any prejudicial effect of the detective's testimony.

First, the trial court offered to strike Detective Carr's testimony, but defense counsel chose a different remedy, electing instead to question Detective Carr about defendant's criminal history. During this cross-examination, Detective Carr testified that defendant did not have a criminal record of convictions for domestic violence, violence against women, or anything "involving firearms." Second, prior to deliberations, the trial court instructed the jury to disregard all comments regarding defendant's possible criminal history, stating:

> You have heard evidence that the defendant may have a criminal history. You are not to consider this evidence at all in your deliberations. To repeat once more, when determining the facts and evidence in this case you must not use it to decide whether you believe the defendant is guilty of any of the [crimes he] has been charged with.

Defense counsel expressed satisfaction with this jury instruction. Accordingly, both cross-examination and a limiting instruction were employed at trial to cure any prejudice arising from Detective Carr's testimony about defendant's criminal history.

These remedies were sufficient to cure the prejudicial effect of the detective's testimony. To begin with, as noted by the trial court, by the time of Detective Carr's testimony regarding defendant's criminal history the jury already had heard, by virtue of the victim's testimony, that defendant had a criminal history. As noted, defendant did not object to that testimony. In addition, the jury was instructed to ignore all evidence related to defendant's criminal history. The jury is presumed to have followed the trial court's instruction, and the instruction was sufficient to cure any prejudice caused

by Detective Carr's testimony. See *People v Waclawski*, 286 Mich App 634, 710; 780 NW2d 321 (2009). The curative instruction effectively struck the challenged testimony because the trial court directed the jury to disregard any evidence that defendant had a criminal history. Furthermore, neither the victim's nor Detective Carr's testimony provided any specifics about defendant's criminal history, other than to state that defendant had not been convicted previously of any of the same offenses for which he was on trial—domestic violence, violence against women, or firearms offenses. That instruction directly addressed any issue with the most damaging form of propensity evidence—the type that implies that a defendant must be guilty because they had committed the same crime before. Given the various steps taken to mitigate any prejudice, including that defense counsel was permitted to choose a method of mitigation over one suggested by the trial court, it certainly was not the case that "the error complained of is so egregious that the prejudicial effect can be removed in no other way" than the granting of a mistrial. *Dickinson*, 321 Mich App at 18 (quotation marks and citation omitted); see also *Caddell*, 332 Mich App at 37. Thus, we cannot conclude that the trial court abused its discretion by denying defendant's motion for a mistrial. See *Schaw*, 288 Mich App at 236.

III. SENTENCING

Defendant argues that he is entitled to resentencing because the trial court erroneously relied on conduct for which he had been acquitted. We disagree.

A. PRESERVATION AND STANDARD OF REVIEW

"To preserve a sentencing issue for appeal, a defendant must raise the issue at sentencing, in a proper

motion for resentencing, or in a proper motion to remand filed in the court of appeals." *People v Anderson*, 322 Mich App 622, 634; 912 NW2d 607 (2018) (quotation marks and citation omitted). Defendant did none of these. Thus, the issue is unpreserved.

Unpreserved issues are reviewed for plain error. *People v Cain*, 498 Mich 108, 116; 869 NW2d 829 (2015).

> To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice. Finally, once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence. [*People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999) (quotation marks, citations, and brackets omitted).]

"A 'clear or obvious' error under the second prong is one that is not 'subject to reasonable dispute.' " *People v Randolph*, 502 Mich 1, 10; 917 NW2d 249 (2018), quoting *Puckett v United States*, 556 US 129, 135; 129 S Ct 1423; 173 L Ed 2d 266 (2009).

B. ANALYSIS

In *People v Beck*, 504 Mich 605, 629-630; 939 NW2d 213 (2019), our Supreme Court held that trial courts cannot make factual findings at sentencing based on

"acquitted conduct."[4] Trial courts, however, retain discretion to consider uncharged conduct at sentencing. *Id*. at 626-627. " 'Acquitted conduct' means any 'conduct . . . underlying charges of which [the defendant] had been acquitted.' " *People v Roberts (On Remand)*, 331 Mich App 680, 688; 954 NW2d 221 (2020); reversed on other grounds 506 Mich 938 (2020), quoting *United States v Watts*, 519 US 148, 149; 117 S Ct 633; 136 L Ed 2d 554 (1997) (alterations in original). See also *People v Stokes*, 333 Mich App 304, 308-309; 963 NW2d 643 (2020) (quoting *Roberts*). Consequently, "a sentencing court must consider a defendant as having undertaken no act or omission that a jury could have relied upon in finding the essential elements of any acquitted offense were proved beyond a reasonable doubt." *Roberts (On Remand)*, 331 Mich App at 688. But "*Beck* expressly permits trial courts to consider uncharged conduct and any other circumstances or context surrounding the defendant or the sentencing offense." *Id*. Furthermore, *Beck* does not "preclude all consideration of the entire res gestae of an acquitted offense." *Id*. at 691. For example, under *Beck*, a trial court can find at sentencing that a defendant acted with reckless disregard for the safety of others even if the defendant was acquitted of a crime for similar activity requiring a specific-intent *mens rea*. *Id*. at 692. Such factual findings at sentencing are permissible because they are not findings of acquitted conduct; rather, they are essentially findings of uncharged conduct. See *id*. (holding that even though a defendant was acquitted of aiding and

[4] *Beck* was decided after sentencing in this case. Nevertheless, *Beck* applies to this case because "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final." *People v McPherson*, 263 Mich App 124, 135 n 10; 687 NW2d 370 (2004) (quotation marks and citations omitted).

abetting a shooting outside a nightclub, the trial court could still find that the defendant had acted with reckless disregard by bringing a concealed weapon to the nightclub). Additionally, "a sentencing court may review a [presentence investigation report] containing information on acquitted conduct without violating *Beck* so long as the court does not rely on the acquitted conduct when sentencing the defendant," but if "the sentencing court specifically reference[s] acquitted offenses as part of its sentencing rationale, a *Beck* violation [is] apparent." *Stokes*, 333 Mich App at 311-312. Finally, "[i]n the absence of evidence presented by a defendant demonstrating that a sentencing court actually relied on acquitted conduct when sentencing the defendant, the defendant is not entitled to resentencing." *Id*. at 312.

Defendant argues that the trial court erroneously relied on acquitted conduct at sentencing because the trial court referenced defendant's alleged use of a gun and stated that the use of a gun was the basis for defendant's CSC-I conviction. According to defendant, the trial court's reference to the use of a gun constituted improper reliance on acquitted conduct because the jury had acquitted defendant of each firearm-related charge. Defendant's argument is unpersuasive.

At sentencing, the trial court acknowledged that the jury did not find defendant guilty of each count. The trial court noted, however, that defendant was convicted of a violent offense, stating:

> Now, [defense counsel], you've described that this isn't a violent offense. A person doesn't have to be kicked, stabbed, shot or something to be violent. The fact that a gun is used in this court's mind makes it a violent offense. And ultimately it was the basis for the charge of [CSC-I]. And certainly could [the victim] have ran out of the house, I suppose she could have. Does that mean that she

> was—didn't feel like she was forced to stay against her will? I don't think that that's the case. And I think trying to—I think indicating that doesn't take into account the real fear that victims of domestic violence have frankly. And while that fear can't always be articulated sometimes it doesn't always make sense. It's a real fear based on past conduct, based on words, based on communications that are between the two parties.
>
> Frankly, unless you were there you don't know what happened, it's all speculation. But [the victim] testified, she testified under oath and the jury accepted her statements as true in finding the defendant guilty of [CSC-I] as well as unlawful imprisonment.

The trial court ultimately determined that sentencing defendant at the high end of the sentencing guidelines range was appropriate "based on all the facts and circumstances. And, really based on the lifelong effect that this is going to have on [the victim]."[5]

Defendant has not demonstrated that the trial court actually relied on acquitted conduct when imposing his sentence. Unlike in *Beck*, the trial court sentenced defendant within the sentencing guidelines range. See *Beck*, 504 Mich at 610. Defendant does not challenge the trial court's scoring of any specific offense variables (OVs), and none of the OVs scored by the trial court involved the use of a gun. See MCL 777.38 (scoring OV 8); MCL 777.40 (scoring OV 10). This case also differs from *Beck* in that the trial court did not base its sentencing decision on its own conclusion that defendant had committed one of the acquitted charges by a

[5] The victim wrote a letter to the trial court, and the letter was considered by the trial court at sentencing. The letter was not read into the record, but when discussing the victim's letter, the trial court stated: "[W]hen I read [the victim's] letter, it is the impact that occurred because of the actions that were committed on that day is an impact that's much greater and much longer than just that evening."

preponderance of the evidence. See *Beck*, 504 Mich at 629-630. Rather, the trial court's comment about the gun referred to defense counsel's argument that the trial court should not impose consecutive sentences because, as defense counsel stated, "This is not someone who injured [the victim] during the course of this. This was not a violent offense by its very nature." The trial court did not impose a consecutive sentence in this case, but it did apparently believe that a gun was used, which amounted to a finding of fact contrary to acquitted conduct, as defendant was acquitted of multiple firearms offenses in this case. See *Roberts (On Remand)*, 331 Mich App at 688. Consequently, the trial court erred by stating that a gun was used in this case.

Nevertheless, the trial judge's statement that a gun was used in this case, without more, does not amount to a *Beck* violation requiring resentencing. For there to be a *Beck* violation, the trial court's reference to the gun would have to have been part of its sentencing rationale. See *Stokes*, 333 Mich App at 312. The trial court made reference to defendant's use of a gun only in response to defense counsel's argument that defendant had not committed a violent offense. Then the trial court concluded that, even though it would not impose a consecutive sentence, "the high end of the guidelines would be the more appropriate sentence based on all the facts and circumstances" as well as the long-term effects defendant's conduct had on the victim. On the basis of the record before this Court, defendant failed to demonstrate that the trial court relied on defendant's use of a gun as one of the "facts and circumstances" that informed its sentencing decision; the record bears out only that the trial court relied on the long-term effect that defendant's conduct had on the victim. Defendant has the burden of establishing that he was prejudiced by the trial court's error.

See *Carines*, 460 Mich at 763-764. Defendant has failed to establish, however, that the trial court would have imposed a different sentence if it had not found that he used a gun during the commission of his offenses.[6] Such a showing is required for defendant to meet the high burden of establishing prejudice under the plain-error standard. Thus, although the trial court erred by finding that a gun was used in this case, reversal is not warranted because defendant has not established that this finding prejudiced him. See *id*.

IV. CONCLUSION

The trial court was within its discretion in denying defendant's motion for mistrial, and although it erred at sentencing, that error was not prejudicial to defendant. For the reasons stated in this opinion, defendant's convictions and sentences are affirmed.

JANSEN and CAMERON, JJ., concurred with TUKEL, P.J.

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[6] It is important to note that the trial court's characterization of the offense in this case as "violent" is correct even without consideration of whether a gun was used. The victim testified at trial that defendant strangled her and that she continually felt in fear for her own life during the incident. Additionally, when describing the event as violent, the trial court also made reference to the general fear created by domestic violence—a crime for which defendant was also convicted. Consequently, there was ample support for the trial court's conclusion that defendant was being sentenced for a violent offense even without a finding that defendant used a gun. Consequently, defendant cannot show prejudice in the trial court's conduct of his sentencing.

PEOPLE v DAVIS

Docket No. 354927. Submitted February 2, 2021, at Detroit. Decided April 22, 2021, at 9:15 a.m.

Reginald L. Davis was charged with first-degree murder, MCL 750.316, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and was bound over for trial following a preliminary examination by the 36th District Court. After defendant was arraigned, he moved before the Wayne Circuit Court to be released on bond while he awaited trial. The trial court, Tracy E. Green, J., granted defendant conditional bond on the basis that MCR 6.106(B)(1) grants the court discretion to grant bond even when a defendant is charged with murder. The court acknowledged that MCL 765.5 provides that no person charged with murder shall be admitted to bail if proof of their guilt is evident or the presumption is great, but determined that the statute did not supersede the court rule. The prosecution appealed, and the Court of Appeals, CAMERON, P.J., and FORT HOOD and RIORDAN, JJ., vacated the trial court's order granting bond and remanded the case to the trial court to hold defendant without bond until trial. Defendant sought leave to appeal in the Supreme Court, and in lieu of granting leave to appeal, the Supreme Court vacated the order of the Court of Appeals and remanded to the Court of Appeals for consideration as on reconsideration granted. 506 Mich 935 (2020). The Supreme Court directed the Court of Appeals to address whether MCL 765.5 conflicted with MCR 6.106(B)(1), and if so, whether the statute prevailed over the court rule.

The Court of Appeals *held*:

Subject to certain exceptions, a defendant has a constitutional right under Const 1963, art 1, § 15, to have reasonable bail established for pretrial release. Under this provision, bail *may* be denied to a person who is indicted or arraigned on a warrant for murder or treason "when the proof is evident or the presumption great." Therefore, the plain language of Const 1963, art 1, § 15, states that denial of bail is discretionary with the trial court upon a finding by the court that the proof of the defendant's guilt is evident or the presumption of the defendant's guilt is great.

However, this provision does not prevent a trial court from granting bail to a defendant charged with murder, nor does it require the court to determine whether the proof is evident or the presumption great before granting bail to such a defendant. In fact, a trial court has discretion to grant bail to a defendant charged with murder even if the proof is evident or the presumption of guilt is great. By contrast, MCL 765.5 stipulates that no person charged with murder or treason *shall* be admitted to bail if the proof of guilt is evident or the presumption is great. Thus, the statute requires the trial court to determine before granting bail to a person charged with murder or treason whether proof of guilt is evident or the presumption great, and if so, to deny bail. Because the statute requires the trial court to consider whether the proof of the defendant's guilt is evident or the presumption great before granting or denying pretrial release, under the statute it would be an abuse of discretion for a trial court to fail to do so. Therefore, MCL 765.5 inherently conflicts with MCR 6.106. Moreover, MCL 765.5 conflicts with Const 1963, art 1, § 15, on which MCR 6.106(B) is based. When a statute contravenes the provisions of the Michigan Constitution, it is unconstitutional and void. Although MCL 765.5 aligns with previous versions of the constitutional provision, it does not align with the current text of Const 1963, art, 1, § 15, as amended in 1979, and therefore, the statute must give way to the Constitution. In this case, because the court did not deny bail to defendant, the court was not required to make findings regarding whether the proof of defendant's guilt was evident or the presumption of his guilt was great under either Const 1963, art 1, § 15, or MCR 6.106(B)(1). Therefore, the trial court did not abuse its discretion by failing to apply that standard.

Trial court order granting pretrial release affirmed.

CONSTITUTIONAL LAW — RIGHT TO REASONABLE BAIL — DISCRETION OF THE TRIAL COURT — DEFENDANTS CHARGED WITH MURDER.

Const 1963, art 1, § 15, and MCR 6.106(B) give the trial court discretion to grant bail to a defendant charged with murder or treason when the proof of guilt is evident or the presumption of guilt is great; under MCL 765.5, a court must deny bail to a defendant charged with murder or treason when the proof of the defendant's guilt is evident or the presumption is great; because the statute denies the trial court's discretion to grant bail when a defendant is charged with murder or treason while the Constitution grants the court this discretion, the statute inherently conflicts with the Constitution and is void.

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

Perkins Law Group PLLC (by *Adam G. Clements* and *Todd R. Perkins*) for defendant.

Before: FORT HOOD, P.J., and GADOLA and LETICA, JJ.

GADOLA, J. This case returns to this Court from our Supreme Court, as on reconsideration granted, for consideration of whether MCL 765.5 conflicts with MCR 6.106(B)(1), and if so, whether the statute prevails over the court rule. We conclude that the statute conflicts with the court rule but also conflicts with Const 1963, art 1, § 15. By contrast, MCR 6.106(B)(1) is in accordance with Const 1963, art 1, § 15. In light of these determinations, we follow the directive of the Supreme Court and, under MCR 6.106(H)(1), reach the question whether the trial court abused its discretion by granting defendant's request for pretrial release. Because we conclude that the trial court did not abuse its discretion, we affirm the order of the trial court granting defendant pretrial release.

I. FACTS

This case arises from the prosecution's allegation that on April 16, 2020, defendant participated in a drive-by shooting that resulted in the death of Mario Tillmon, who died from multiple gunshot wounds. At the preliminary examination, Tillmon's girlfriend, Carlina Treadwell, testified that she was at home with Tillmon on that day. After Tillmon left to walk to the store, Treadwell heard gunshots coming from directly

in front of her house. She testified that she looked out the window and saw Tillmon running away from a black SUV from which gunshots were being fired. Treadwell further testified that she saw four people inside the SUV and that she had previously seen the driver. At the preliminary examination, she identified defendant as the driver. Treadwell's house had video cameras that were recording at the time of the shooting; during the preliminary examination, Treadwell identified certain aspects of the shooting in the video. On cross-examination, Treadwell acknowledged some discrepancies in her testimony, explaining that she had been hysterical at the time of the shooting, but she confirmed that at the scene, she told the police that she saw who shot Tillmon.

At the conclusion of the preliminary examination, defendant was bound over on charges of first-degree murder, MCL 750.316, possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and as a fourth-offense habitual or subsequent violent-felony offender, MCL 769.12(1)(a). After defendant was arraigned, he moved before the trial court to be released on bond while he awaited trial. Defendant argued that the likelihood of his conviction was not strong because no physical evidence linked him to the shooting, and Treadwell's testimony was inconsistent. At the hearing on the motion, the trial court granted defendant conditional bond. The trial court reasoned:

> So I want to start off by—at a very basic level, determining what law applies to my decision in this case and the People cited the constitutional provision of MCL 765.5 which states, no person charged with treason or murder shall be admitted to bail if proof of his guilt is evident or the presumption is great, and the defense has cited various

subsections of MCR 6.106 which is very well known to govern bond considerations.

However, I would note that [MCR] 6.106 is really just the Michigan Supreme Court's interpretation of the constitution and given that the Michigan Supreme Court promulgates the rules I think that I'm on pretty solid ground in making that statement.

I don't believe that [MCL] 765.5 applies in this case—well, I should say that it shouldn't supersede the court rule only because, although it is a constitutional provision, the court rules were promulgated by the Michigan Supreme Court and the Michigan Supreme Court is the final arbiter of Michigan's constitution.

So I'm going to focus my analysis to [MCR] 6.106 because that's what the Supreme Court intended. I would add, just as a side note, [MCL] 765.5 requires that a person charged with murder should not be admitted bail unless proof of his guilt is evident or the presumption is great. I'm not really sure that that particular provision . . . would satisfy the requirements of the United States constitution because it seems to shift the burden of proof, but that's just an aside.

It's confusing to me how someone can be cloaked with the presumption of innocence and then a finding be made that the presumption of his or her guilt is great. So we're going to focus on [MCR] 6.106. I do not agree, [counsel], that the issue of the complaining witness Miss Treadwell's credibility being the basis for the argument that there's not a high likelihood of [success at] trial, is the factor that I should consider most weighted-ly—and forgive me if I just made up a word—and I'm going to back up just a minute because [MCR] 6.106 states that the Court may remand if someone is charged with murder and so I do agree, as was in the defense brief, that the default or the presumption is that someone will get bond, but that might be even if they are charged with murder because [MCR 6.106(B)(1)(a)] does say that the Court may deny pretrial release.

> So I believe that the Supreme Court in promulgating this rule didn't just assume that because someone is charged with murder that they would be denied bond. So going beyond the Court's ability to deny bond with that "may" provision, I'm going to go . . . deeper into the rule and focus primarily on whether bond should be allowed.
>
> * * *
>
> All right. So my analysis is that you give someone bond unless there's a very, very strong case made even if they are charged with murder, that neither the—neither the assurance that the Defendant will return, nor the assurance that the public will be safe, can be supported by the facts and even then, as is customary and it might be statutory in the federal courts, the presumption is that there will be bond only if no condition or combination of conditions can insure that the public will be safe and that the Defendant will return to court.
>
> So I've already decided, as you've probably have already figured out, that I'm going to give [defendant] bond.

The prosecution sought an emergency appeal to this Court, contending that the trial court had granted defendant pretrial release without applying the correct standard. The prosecution argued that under the Michigan Constitution, MCL 765.5, and MCR 6.106, the trial court was required to determine whether the proof of defendant's guilt was evident or the presumption of his guilt was great before permitting modification of his bond. This Court vacated the trial court's order granting bond and remanded to the trial court with instructions that defendant be held without bond until trial.[1] Defen-

[1] This Court's order provided, in part, that "[p]ursuant to MCR 7.205(E)(2), the September 24, 2020 order of the Wayne Circuit Court granting defendant bond hereby is VACATED. The record contains proof that defendant's guilt is evident or the presumption is great. MCR 6.106(B)(1)(a)(i). *People v Milosavleski*, 450 Mich 954; 544 NW2d 473

dant sought leave to appeal in our Supreme Court, which vacated this Court's order and remanded to this Court "for consideration as on reconsideration granted."[2] This Court thereafter granted the prosecution's application for leave to appeal and stayed further proceedings pending resolution of the appeal before this Court.[3]

(1966). This matter is REMANDED; defendant is to be held without bond until trial." *People v Davis*, unpublished order of the Court of Appeals, entered September 25, 2020 (Docket No. 354927).

[2] The Supreme Court's order provided, in pertinent part:

> The Court of Appeals erred in its analysis of the trial court's order granting the defendant's motion for pretrial release. The trial court acknowledged MCL 765.5, which provides that "[n]o person charged with treason or murder shall be admitted to bail if the proof of his guilt is evident or the presumption great." But the trial court declined to apply this statute based on its conclusion that MCR 6.106(B)(1)(a) gave it the discretion to grant bond regardless of the strength of the prosecution's case. Consequently, it did not determine whether "the proof of his guilt is evident or the presumption great." In the trial court's view, the statute conflicted with the court rule, and the court rule prevailed. This was the pivotal issue on appeal, but the Court of Appeals failed to address it. Instead, the Court of Appeals usurped the trial court's role and made its own determination that "the proof of his guilt is evident or the presumption great." MCL 765.5.
>
> We direct the Court of Appeals to address whether MCL 765.5 conflicts with MCR 6.106(B)(1) and, if it does, whether the statute prevails over the court rule. See, e.g., *People v Watkins*, 491 Mich 450 (2012); *McDougall v Schanz*, 461 Mich 15 (1999). We further direct the Court of Appeals to decide the case on an expedited basis. If the Court of Appeals determines that the statute prevails, then it shall remand the case to the trial court to assess whether "the proof of [the defendant's] guilt is evident or the presumption great" for purposes of MCL 765.5. If the Court of Appeals determines that the court rule prevails, then it shall address whether the trial court abused its discretion by granting the defendant's request for pretrial release. See MCR 6.106(H)(1). [*People v Davis*, 506 Mich 935, 935-936 (2020).]

[3] *People v Davis*, unpublished order of the Court of Appeals, entered October 19, 2020 (Docket No. 354927); *People v Davis*, unpublished

II. DISCUSSION

Our Supreme Court has directed us to determine whether MCL 765.5 conflicts with MCR 6.106(B)(1), and if so, whether the statute prevails over the court rule. In considering this question, we find it necessary to consider Const 1963, art 1, § 15, as well as the statute and court rule. We review de novo questions of constitutional law. *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011). Similarly, the proper application and interpretation of statutes and court rules raise questions of law that this Court reviews de novo. *People v Comer*, 500 Mich 278, 287; 901 NW2d 553 (2017).

With certain exceptions, a criminal defendant in Michigan is entitled as a matter of constitutional right to have reasonable bail established for pretrial release. Const 1963, art 1, § 15; *People v Giacalone*, 16 Mich App 352, 354; 167 NW2d 871 (1969) (discussing the language of the constitutional provision as ratified in 1963, before amendment in 1979).[4] See also MCL 765.6(1) ("Except as otherwise provided by law, a

order of the Court of Appeals, entered October 20, 2020 (Docket No. 354927). Defendant again sought leave to appeal to our Supreme Court, which denied defendant's application for leave to appeal, but noted that defendant was "not precluded from filing a motion in the trial court seeking to enforce the trial court's original bond order." *People v Davis*, 950 NW2d 746 (2020). Defendant thereafter filed a motion in the trial court to enforce the trial court's original bond order. The trial court denied defendant's motion to enforce the bond order and granted the prosecution's motion to stay enforcement of that order pending resolution of this appeal.

[4] See also *Atkins v Michigan*, 644 F2d 543, 550 (CA 6, 1981), citing Const 1963, art 1, § 15; MCL 765.5 ("The Michigan Constitution and statutes provide that before conviction all persons shall be permitted release on bail, except in cases involving murder or treason 'when the proof is evident or the presumption great.' "); accord, *Love v Ficano*, 19 F Supp 2d 754, 764 (ED Mich, 1998).

person accused of a criminal offense is entitled to bail.") By way of background, Michigan's 1908 Constitution provided:

> No person, after acquittal upon the merits, shall be tried for the same offense. All persons shall, before conviction, be bailable by sufficient sureties, except for murder and treason when the proof is evident or the presumption great. [Const 1908, art 2, § 14.]

The 1963 Constitution provides in Article 1, § 15, as follows:

> No person shall be subject for the same offense to be twice put in jeopardy. All persons shall, before conviction, be bailable by sufficient sureties, except for murder and treason when the proof is evident or the presumption great.

Const 1963, art 1, § 15, was amended effective May 1, 1979,[5] and now provides:

> No person shall be subject for the same offense to be twice put in jeopardy. All persons shall, before conviction, be bailable by sufficient sureties, except that bail **may** be denied for the following persons **when the proof is evident or the presumption great**:
>
> (a) A person who, within the 15 years immediately preceding a motion for bail pending the disposition of an indictment for a violent felony or of an arraignment on a warrant charging a violent felony, has been convicted of 2 or more violent felonies under the laws of this state or under substantially similar laws of the United States or another state, or a combination thereof, only if the prior felony convictions arose out of at least 2 separate incidents, events, or transactions.

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[5] After this constitutional provision was amended, our Supreme Court announced its intention that the court rule, then GRC 1963, 790, conform to the constitutional amendment. *People v Gornbein*, 407 Mich 330, 333; 285 NW2d 41 (1979).

(b) **A person who is indicted for, or arraigned on a warrant charging, murder** or treason.

(c) A person who is indicted for, or arraigned on a warrant charging, criminal sexual conduct in the first degree, armed robbery, or kidnapping with intent to extort money or other valuable thing thereby, unless the court finds by clear and convincing evidence that the defendant is not likely to flee or present a danger to any other person.

(d) A person who is indicted for, or arraigned on a warrant charging, a violent felony which is alleged to have been committed while the person was on bail, pending the disposition of a prior violent felony charge or while the person was on probation or parole as a result of a prior conviction for a violent felony.

If a person is denied admission to bail under this section, the trial of the person shall be commenced not more than 90 days after the date on which admission to bail is denied. If the trial is not commenced within 90 days after the date on which admission to bail is denied and the delay is not attributable to the defense, the court shall immediately schedule a bail hearing and shall set the amount of bail for the person.

As used in the section, "violent felony" means a felony, an element of which involves a violent act or threat of a violent act against any other person. [Emphasis added.]

When the language of a constitutional provision is plain and unambiguous, we give the provision the meaning plainly expressed and do not resort to construction of the provision. See *Mich Coalition of State Employee Unions v Civil Serv Comm*, 465 Mich 212, 222; 634 NW2d 692 (2001) ("[I]f the language of a constitutional provision is plain, it is that meaning we give to it."); see also *Nat'l Pride At Work, Inc v Governor*, 481 Mich 56, 80; 748 NW2d 524 (2008).

Const 1963, art 1, § 15, provides, in relevant part, that "[a]ll persons shall, before conviction, be bailable

by sufficient sureties, except that bail may be denied for the following persons when the proof is evident or the presumption great[.]" We find the language of this constitutional provision to be plain and unambiguous. Use of the word "may" ordinarily is permissive. *People v Arnold*, 502 Mich 438, 466; 918 NW2d 164 (2018). Because this provision plainly states that bail may be denied on the condition that proof of that person's guilt is evident or the presumption of that person's guilt is great, we give this provision the meaning plainly expressed and do not resort to its construction. We conclude that the denial of bail on this condition is discretionary with the trial court upon a finding by the trial court that the proof of the defendant's guilt is evident or the presumption of the defendant's guilt is great.

We observe that this constitutional provision permits the trial court to *deny* bail to a person charged with murder if the trial court determines that the proof is evident or the presumption is great; failure to determine whether the proof is evident or the presumption is great before denying bail therefore would be an abuse of the trial court's discretion. However, the constitutional provision does not prevent a trial court from granting bail to a defendant charged with murder, nor does the constitutional provision impose upon the trial court the duty to determine whether the proof is evident or the presumption of guilt great before *granting* bail to a person charged with murder or treason. Indeed, a trial court has discretion to grant bail in the constitutionally specified cases even if proof is evident or the presumption of guilt is great. See Const 1963, art 1, § 15 (providing that "bail *may* be denied . . . when the proof is evident or the presumption great") (emphasis added).

In contrast to the constitutional provision, MCL 765.5[6] provides:

> **No person** charged with treason or murder **shall** be admitted to bail **if the proof of his guilt is evident or the presumption great**. [Emphasis added.]

When interpreting a statute, our primary purpose is to discern and give effect to the Legislature's intent. *People v Williams*, 475 Mich 245, 250; 716 NW2d 208 (2006). "We begin by examining the plain language of the statute; where that language is unambiguous, we presume that the Legislature intended the meaning clearly expressed—no further judicial construction is required or permitted, and the statute must be enforced as written." *Id*. (quotation marks and citation omitted). Thus, when the language of the statute is clear and unambiguous, we enforce the statute according to its plain and ordinary meaning. *People v Zitka*, 325 Mich App 38, 49; 922 NW2d 696 (2018).

MCL 765.5 clearly and unambiguously provides that a person charged with murder or treason shall not be permitted bail if the proof of the person's guilt is evident or the presumption great. Use of the word "shall" in the statute indicates that the directive is mandatory. See *In re Bail Bond Forfeiture*, 496 Mich 320, 339-340; 852 NW2d 747 (2014). The statute thus imposes upon the trial court the duty to determine, before permitting bail for a person charged with murder or treason, whether proof of the person's guilt is evident or the presumption of the person's guilt is great. If so, the statute requires the trial court to deny bail. Unlike the constitutional provision, the statute does not permit a trial court to exercise discretion to

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[6] The text of MCL 765.5 predates Michigan's 1963 Constitution, having been enacted as part of this state's Code of Criminal Procedure by 1927 PA 175 and not amended since.

grant pretrial release to a person charged with murder when the proof of his or her guilt is evident or the presumption great. Thus, the statute requires the trial court to determine, regarding a defendant charged with murder, whether the proof of guilt is evident or the presumption great, and if so, to deny bail.

Stated another way, unlike the constitutional provision, the statute requires the trial court to determine whether the proof of the defendant's guilt is evident or the presumption great before *granting* or *denying* pretrial release to a person charged with murder, and then to base its decision to grant or deny bail upon the outcome of that inquiry. Because the statute requires the trial court to consider whether the proof of the defendant's guilt is evident or the presumption great before granting or denying pretrial release to a defendant charged with murder, under the statute it would be an abuse of discretion for a trial court to fail to do so. See *People v Franklin*, 500 Mich 92, 100; 894 NW2d 561 (2017) (noting that a trial court abuses its discretion when it makes an error of law).

MCR 6.106 expressly refers to Const 1963, art 1, § 15, and provides, in relevant part:

> (A) In General. At the defendant's arraignment on the complaint and/or warrant, unless an order in accordance with this rule was issued beforehand, the court must order that, pending trial, the defendant be
>
> (1) held in custody as provided in subrule (B);
>
> (2) released on personal recognizance or an unsecured appearance bond; or
>
> (3) released conditionally, with or without money bail (ten percent, cash or surety).
>
> (B) Pretrial Release/Custody Order Under Const 1963, Art 1, § 15.
>
> (1) The court **may** deny pretrial release to

(a) a defendant charged with

(i) murder or treason, **or**

(ii) committing a violent felony and

[A] at the time of the commission of the violent felony, the defendant was on probation, parole, or released pending trial for another violent felony, or

[B] during the 15 years preceding the commission of the violent felony, the defendant had been convicted of 2 or more violent felonies under the laws of this state or substantially similar laws of the United States or another state arising out of separate incidents, if the court finds that proof of the defendant's guilt is evident or the presumption great;

(b) a defendant charged with criminal sexual conduct in the first degree, armed robbery, or kidnapping with the intent to extort money or other valuable thing thereby, if the court finds that proof of the defendant's guilt is evident or the presumption great, unless the court finds by clear and convincing evidence that the defendant is not likely to flee or present a danger to any other person. [Emphasis added.]

Regarding granting pretrial release, MCR 6.106(F) provides, in relevant part:

(1) In deciding which release to use and what terms and conditions to impose, the court is to consider relevant information, including

(a) defendant's prior criminal record, including juvenile offenses;

(b) defendant's record of appearance or nonappearance at court proceedings or flight to avoid prosecution;

(c) defendant's history of substance abuse or addiction;

(d) defendant's mental condition, including character and reputation for dangerousness;

(e) the seriousness of the offense charged, the presence or absence of threats, and the probability of conviction and likely sentence;

> (f) defendant's employment status and history and financial history insofar as these factors relate to the ability to post money bail;
>
> (g) the availability of responsible members of the community who would vouch for or monitor the defendant;
>
> (h) facts indicating the defendant's ties to the community, including family ties and relationships, and length of residence, and
>
> (i) any other facts bearing on the risk of nonappearance or danger to the public.
>
> (2) If the court orders the defendant held in custody pursuant to subrule (B) or released on conditions in subrule (D) that include money bail, the court must state the reasons for its decision on the record. The court need not make a finding on each of the enumerated factors.

In addition, MCR 6.106(G)(2)(b) provides, in part:

> Unless the court makes the findings required to enter an order under subrule (B)(1), the defendant must be ordered released under subrule (C) or (D).

We interpret court rules using the same principles that are applicable to the interpretation of statutes. *People v Buie*, 491 Mich 294, 304; 817 NW2d 33 (2012). When the language is clear and unambiguous, we enforce a statute according to its plain and ordinary meaning. *Zitka*, 325 Mich App at 49. MCR 6.106(B) unambiguously provides that the trial court has discretion to deny pretrial release to a defendant charged with murder. See MCR 6.106(B)(1)(a)(i). The court rule does not explicitly state the grounds for denial of pretrial release to a defendant charged with murder, but the heading of the applicable subsection[7] refers to

[7] We acknowledge that MCR 1.106 provides that "[t]he catch lines of a rule are not part of the rule and may not be used to construe the rule more broadly or more narrowly than the text indicates." The reference to the constitutional provision in the catchline of MCR 6.106(B), however,

Const 1963, art 1, § 15. This suggests that the trial court's determination regarding pretrial release for a defendant charged with murder must be in accordance with that constitutional provision, i.e., bail may not be denied unless the court determines that proof of that person's guilt is evident or the presumption of that person's guilt is great. In addition, MCR 6.106(G)(2)(b) requires that the trial court make the findings required to enter an order under MCR 6.106(B)(1), suggesting that the trial court must make findings that a person's guilt is evident or the presumption of that person's guilt is great before *denying* bail.[8]

To summarize, generally before conviction a defendant is entitled to have bail set by the trial court. With respect to a person charged with murder, Const 1963, art 1, § 15, permits the trial court discretion to deny a defendant release on bail if proof of the defendant's guilt is evident or the presumption of the defendant's guilt is great. Similarly, MCR 6.106(B)(1), by referring to and closely echoing Const 1963, art 1, § 15, permits the trial court discretion to deny release to a defendant charged with murder and requires that the trial court make the findings required to deny pretrial release. And MCR 6.106(G)(2)(b) states that a defendant must be ordered released unless the court makes the findings required under Subrule (B)(1) before denying bail. By contrast, MCL 765.5 *precludes* the trial court

appears to have no other purpose than to direct the reader to the constitutional provision, which in turn states the applicable grounds for denying pretrial release.

[8] The court rule echoes the provisions of Const 1963, art 1, § 15. For example, regarding violent felonies other than murder or treason, MCR 6.106(B)(1)(a)(ii)[B] provides that the trial court may deny pretrial release to a defendant if the court finds that proof of the defendant's guilt is evident or the presumption great, which closely follows the language of Const 1963, art 1, § 15.

from releasing on bail a person charged with murder if the proof of his guilt is evident or the presumption great, thus curtailing the discretion granted to the trial court in the constitutional provision and the court rule, and also curtailing the defendant's right to pretrial release under Const 1963, art 1, § 15.

In this case, our Supreme Court instructed this Court to address on remand whether MCR 6.106(B) and MCL 765.5 conflict and directed this Court's attention to *McDougall v Schanz*, 461 Mich 15; 597 NW2d 148 (1999), and *People v Watkins*, 491 Mich 450; 818 NW2d 296 (2012). In *McDougall*, the Supreme Court considered, in the context of two cases alleging medical malpractice, whether MCL 600.2169, which sets forth the requisite qualifications for expert witnesses in medical malpractice cases, was unconstitutional as an impermissible infringement by the Legislature on the province of the Supreme Court to enact rules governing legal practice and procedure. The Court concluded that MCL 600.2169 was an enactment of substantive law and therefore did not impermissibly infringe upon the Court's constitutional rulemaking authority. *McDougall*, 461 Mich at 18. In *Watkins*, the Court determined that MCL 768.27a, which permits the admission of certain other-acts evidence in a criminal case in which the defendant is accused of a listed offense against a minor, irreconcilably conflicted with MRE 404(b), the evidentiary rule which bars the admission of other-acts evidence for the purpose of showing a defendant's propensity to commit similar acts. *Watkins*, 491 Mich at 455. The Court held that the statute in that case prevailed over the court rule because it did not impermissibly infringe on the Court's authority to enact rules of practice and procedure under Const 1963, art 6, § 5. *Id*. at 455-456.

McDougall instructs that we first consider whether a statute and a court rule, here MCL 765.5 and MCR 6.106, can be construed so as not to conflict. *McDougall*, 461 Mich at 24. If there is no inherent conflict, "[w]e are not required to decide whether [the] statute is a legislative attempt to supplant the Court's authority." *Id*. (quotation marks and citation omitted; alterations in original). If the provisions cannot be "read . . . in harmony," then they conflict. *Watkins*, 491 Mich at 472. They also conflict if their application would often compel differing outcomes. See *McDougall*, 461 Mich at 25. In determining whether such a conflict exists, a reviewing court should use ordinary principles of statutory interpretation to construe both the statute and the court rule. *Watkins*, 491 Mich at 467-468. In addition, courts "do not lightly presume that the Legislature intended a conflict, calling into question [our Supreme] Court's authority to control practice and procedure in the courts." *Id*. at 467 (quotation marks and citation omitted).

Here, the statute and the court rule inherently conflict.[9] MCL 765.5 *prohibits* the trial court from granting pretrial release to a defendant charged with murder if the proof of the defendant's guilt is evident or the presumption of guilt is great. By contrast, MCR 6.106, read in conjunction with Const 1963, art 1, § 15, *permits* the trial court to deny pretrial release to a

[9] Although our Supreme Court has cited all three of the provisions in this case together as supporting the statement that "[b]ail may be denied when the proof is evident or the presumption great," *People v Milosavleski*, 450 Mich 954 (1996), citing Const 1963, art 1, § 15; MCL 765.5; and MCR 6.106, an order of our Supreme Court is binding precedent only if it is a final disposition of an application and contains a concise statement of the applicable facts and the reasons for the Court's decision. *DeFrain v State Farm Mut Auto Ins Co*, 491 Mich 359, 369; 817 NW2d 504 (2012). The Court's order in *Milosavleski* lacks such a discussion.

defendant charged with murder if the proof of the defendant's guilt is evident or the presumption of guilt is great, but does not mandate denial of bail.

Because the statute and the court rule conflict, the next inquiry typically is "whether the statute impermissibly infringes upon [our Supreme] Court's constitutional authority to enact rules governing practice and procedure." *McDougall*, 461 Mich at 26. Under Const 1963, art 6, § 5, and separation-of-powers principles, the Supreme Court has "exclusive rule-making authority in matters of practice and procedure" concerning Michigan courts, but lacks authority "to enact court rules that establish, abrogate, or modify the substantive law." *McDougall*, 461 Mich at 26-27. Accordingly, when a statute and court rule conflict, a reviewing court is tasked with determining whether the statute "is an impermissible rule governing the practice and procedure of the courts or a valid enactment of substantive law." *Watkins*, 491 Mich at 473. Here, the parties agree that MCL 765.5 is substantive in nature, not a legislative attempt to assert control over matters of pure juridical procedure.

In this case, however, although MCL 765.5 conflicts with MCR 6.106, the true crux of the matter is that MCL 765.5 conflicts with Const 1963, art 1, § 15. The Michigan Constitution is paramount to other laws in this state and is the law to which other laws must conform; a statute that conflicts with the state Constitution must fall. *Mays v Governor*, 506 Mich 157, 188-189; 954 NW2d 139 (2020) (opinion by BERNSTEIN, J.), citing *Smith v Dep't of Pub Health*, 428 Mich 540, 640-643; 410 NW2d 749 (1987) (BOYLE, J., concurring in part and dissenting in part). "[W]hen a statute contravenes the provisions of the state constitution it is unconstitutional and void." *Oshtemo Charter Twp v*

Kalamazoo Co Rd Comm, 302 Mich App 574, 590; 841 NW2d 135 (2013) (quotation marks and citation omitted). The Legislature does not have authority to change or amend a provision of the state's Constitution. *Pillon v Attorney General*, 345 Mich 536, 547; 77 NW2d 257 (1956). Of course, in this case, the statute at issue long predates the constitutional provision that now prevails. MCL 765.5, as it was enacted in 1927, aligns with the text of Const 1908, art 2, § 14, and the text of Const 1963, art 1, § 15, as ratified in 1963, which both provided that a person charged with murder or treason shall not be released on bond when the proof of guilt is evident or the presumption great. MCL 765.5, having never been amended, does not align with the current text of Const 1963, art 1, § 15, as amended by the people in 1979, which now provides, in relevant part, that "[a]ll persons shall, before conviction, be bailable by sufficient sureties, except that bail *may* be denied . . . when the proof is evident or the presumption great[.]" (Emphasis added.)

We therefore conclude that the statute must give way to the Constitution. Under Const 1963, art 1, § 15, a defendant is entitled to have bail set by the trial court except in certain circumstances, such as when a defendant is charged with murder and the proof of the defendant's guilt is evident or the presumption great. In that circumstance, the trial court may, in its discretion, deny bail to the defendant. In this case, defendant was charged with murder and the trial court granted bail. Because the trial court did not deny bail to defendant, the trial court was not required under either Const 1963, art 1, § 15, or MCR 6.106(B)(1) to make findings regarding whether the proof of defendant's guilt is evident or the presumption great. We therefore conclude that the trial court, having no

obligation to do so in this case, did not abuse its discretion by failing to apply that standard.

The order of the trial court granting defendant pretrial release is affirmed.

FORT HOOD, P.J., and LETICA, J., concurred with GADOLA, J.

FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN
v ACE AMERICAN INSURANCE COMPANY

Docket No. 352753. Submitted April 6, 2021, at Grand Rapids. Decided April 29, 2021, at 9:05 a.m.

Farm Bureau General Insurance Company of Michigan (Farm Bureau) brought an action in the Kent Circuit Court against ACE American Insurance Company (ACE), Mark Rueckert, Maryan Petoskey, Robynn Rueckert, and Bristol West Preferred Insurance Company (Bristol West), seeking rescission of an insurance policy Farm Bureau had issued to Mark and his step-daughter Maryan and seeking a declaratory judgment that ACE was first in priority. Robynn is Mark's wife and Maryan's mother; all three lived together when the policy was obtained. Both Mark and Maryan testified that Robynn was present at the Farm Bureau office when they purchased the insurance policy; Jeffrey Brandt, the Farm Bureau insurance agent, could not recall if she was. Mark and Maryan were adamant that they would be the only drivers of the insured vehicle. The membership application was completed in Mark's name, and under "spouse information," Robynn's name was listed, along with her date of birth and partial Social Security number. On the insurance application, only Mark and Maryan were listed as owners or drivers of the vehicle. The next section, which directed the applicants to "[l]ist all vehicle owners, residents of household, and/or separated spouse not listed above," was left blank. Mark's marital status was listed as "M." The application also contained a list of eligibility questions, and three questions were relevant to this case; the application stated that if the applicant answered "yes" to any question for Eligibility Questions 6 through 13, the applicant would be ineligible for insurance coverage through Farm Bureau. Question 1 asked, "Do all drivers have a valid Michigan driver license?" The applicants answered affirmatively. Question 9 asked if any driver within the last 36 months had been convicted of "[o]perating a motor vehicle under the influence or while impaired by liquor or controlled substance, whether or not causing serious injury or death?" The applicants answered negatively. Question 13 asked, "Has the Applicant or a member of the Applicant's household driven or moved any vehicle owned by the Applicant which has NOT had the required insur-

ance in force for the preceding six months?" The applicants answered negatively and listed Bristol West as the previous insurer, providing the policy number and an expiration date. Larry Clark, the Farm Bureau underwriter who reviewed the application, determined that the application was incomplete because it indicated that Mark was married but did not contain his spouse's name and because there was inconsistent address information. Clark sent an e-mail to Brandt, who did not respond, and Clark decided to cancel the policy. On April 22, 2013, Farm Bureau sent Mark a letter informing him that the policy was being canceled because of an incomplete or inaccurate application and that his coverage would end on May 25, 2013. On May 22, 2013, three days before the cancellation date, Robynn was severely injured as a pedestrian when she was struck by a garbage truck while she was walking through a crosswalk. The truck, which was insured by ACE, was making a left-hand turn and hit Robynn while she was in the crosswalk when the "walk" sign was on. Farm Bureau was made of aware of Robynn's claim for benefits under the policy when it received a bill from her hospital on June 21, 2013. Farm Bureau informed Mark and Maryan in a letter dated October 22, 2013, that their policy was being rescinded and declared null and void from its inception date for material misrepresentations in the application, including that Robynn was Mark's wife who resided at his home, that Robynn's driving record contained multiple convictions for operating under the influence of liquor or while intoxicated, and that the Bristol West policy had been rescinded. Farm Bureau filed its complaint and moved for summary disposition. The trial court, Christopher P. Yates, J., denied summary disposition to Farm Bureau and granted summary disposition to ACE. Farm Bureau appealed, and in an unpublished per curiam opinion issued on January 19, 2017 (Docket No. 329585), the Court of Appeals, MURPHY, P.J., and METER and RONAYNE KRAUSE, JJ., reversed and remanded the case for entry of summary disposition in Farm Bureau's favor, reasoning that there was no genuine question of fact that Mark and Maryan made a material misrepresentation that entitled Farm Bureau to rescind the policy. ACE sought leave to appeal in the Supreme Court, and in lieu of granting leave to appeal, the Supreme Court vacated the Court of Appeals opinion to the extent it held that Farm Bureau was automatically entitled to rescission as a matter of law and remanded the case to the trial court to determine whether rescission was available as an equitable remedy. 503 Mich 903 (2018). In a concurring statement, Justice MARKMAN identified five nonexclusive factors for trial courts to consider in innocent-third party cases to determine whether rescission would be equitable. On remand, Farm Bureau and ACE

each argued entitlement to summary disposition based on application of the five factors. The trial court held an evidentiary hearing and issued an opinion and order finding that multiple factors weighed against rescission and that rescission as to Robynn would not be equitable. Farm Bureau appealed.

The Court of Appeals *held*:

The trial court did not abuse its discretion by denying rescission in this case. When a plaintiff seeks rescission, the trial court must balance the equities to determine whether the plaintiff is entitled to the relief sought. When one of two innocent parties must suffer by the wrongful act of another, the one to suffer the loss is the one through whose act or neglect a third party was enabled to commit the wrong; the doctrine is equitable and extends no further than is necessary to protect the innocent party in whose favor it was invoked. The five nonexclusive factors that Justice MARKMAN outlined for courts to consider in determining whether rescission as to a third party is equitable include (1) the extent to which the insurer could have uncovered the subject matter of the fraud before the innocent third party was injured; (2) the relationship between the fraudulent insured and the innocent third party to determine if the third party had some knowledge of the fraud; (3) the nature of the innocent third party's conduct, whether reckless or negligent, in the injury-causing event; (4) the availability of an alternate avenue for recovery if the insurance policy is not enforced; and (5) a determination of whether policy enforcement only serves to relieve the fraudulent insured of what would otherwise be the fraudulent insured's personal liability to the innocent third party. The party seeking rescission has the burden of establishing that the remedy is warranted. In this case, the trial court reasoned that the first factor weighed against rescission because Farm Bureau exhibited a lack of professional diligence in discovering grounds for rescission, and the record supported the trial court's conclusion given that Farm Bureau could have discovered grounds for rescission with reasonable efforts, including reviewing the information in both the membership application and the insurance application. Accordingly, the trial court did not clearly err as to the first factor by concluding that Farm Bureau exhibited a lack of professional diligence that prevented it from discovering the grounds for rescission that it later claimed. As to the second factor, the trial court found that it weighed in favor of rescission because it presumed Robynn had some understanding that Mark had procured the insurance policy for himself and Maryan without disclosing Robynn's driving record. Considering Robynn's close

relationship to the insureds, as well as the insureds' testimony that Robynn was present when the policy was obtained, the trial court did not clearly err by finding that this factor weighed in favor of rescission. The trial court found that the third factor weighed against rescission because Robynn was blameless for the accident. It was undisputed that Robynn was in the crosswalk while the walk sign was on. Accordingly, the trial court did not clearly err by finding that this factor weighed against rescission. As to the fourth factor, the trial court found that it favored rescission because if the Farm Bureau policy was rescinded, Robynn would be entitled to no-fault benefits from ACE, the insurer of the accident vehicle. In weighing this factor, the trial court correctly focused on whether the third party had an alternative avenue for relief, and here Robynn could obtain benefits from ACE if rescission was granted; accordingly, the trial court did not err as to this factor. Finally, the trial court determined that the fifth factor weighed against rescission because Mark and Maryan would not be relieved of tort liability if the Farm Bureau policy was enforced. However, *Pioneer State Mut Ins Co v Wright*, 331 Mich App 396 (2020), held that this fifth factor is inapplicable when the fraudulent insured is not involved in the accident. Accordingly, the fifth factor was inapplicable in this case, and it did not weigh either in favor of or against rescission. The trial court also determined that the timing of the premium refund check, which was issued six months after Farm Bureau initially canceled the policy and a month after Farm Bureau decided to rescind the policy, weighed against rescission. It was unclear how much weight the trial court gave to this factor; however, the trial court did not err by considering it. Farm Bureau's failure to act promptly, both in rescinding the policy and issuing the premium refund check, was a proper consideration. In sum, two of the factors weighed against rescission, two weighed in favor, the fifth factor was inapplicable, and a sixth factor weighed against rescission. The trial court carefully weighed the equities in this case after holding a multiday evidentiary hearing and concluded that rescission would be inequitable. The trial court did not abuse its discretion or commit legal error by denying rescission under the circumstances of this case.

Affirmed.

INSURANCE — NO-FAULT — THIRD-PARTY CLAIM — RESCISSION OF THE POLICY — BALANCING OF EQUITIES — FACTORS TO BE CONSIDERED.

An insurance company may seek rescission of an automobile insurance policy on the basis of fraud even when an innocent third party seeks to recover personal protection insurance ben-

efits; whether an insurance company may rescind a policy is contingent on the circumstances of each case; when two equally innocent parties are affected, the court must balance the equities to determine which blameless party should assume the loss; in balancing the equities, a court should consider five nonexclusive factors: (1) the extent to which the insurer could have uncovered the subject matter of the fraud before the innocent third party was injured; (2) the relationship between the fraudulent insured and the innocent third party to determine if the third party had some knowledge of the fraud; (3) the nature of the innocent third party's conduct, whether reckless or negligent, in the injury-causing event; (4) the availability of an alternate avenue for recovery if the insurance policy is not enforced; and (5) a determination of whether policy enforcement only serves to relieve the fraudulent insured of what would otherwise be the fraudulent insured's personal liability to the innocent third party; the party seeking rescission has the burden of establishing that the remedy is warranted.

Willingham & Coté PC (by *Curtis Hadley* and *John A. Yeager*) for Farm Bureau General Insurance Company of Michigan.

Plunkett Cooney (by *Robert G. Kamenec* and *Josephine A. DeLorenzo*) for ACE American Insurance Company.

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

SHAPIRO, P.J. In this insurer-priority dispute, plaintiff Farm Bureau General Insurance Company of Michigan (Farm Bureau) appeals by right the trial court's opinion and order denying Farm Bureau's request for equitable rescission as to third party Robynn Rueckert following an evidentiary hearing. For the reasons stated in this opinion, we affirm.

I. BACKGROUND

This case concerns a no-fault policy that Mark Rueckert and his step-daughter Maryan Petoskey procured from Farm Bureau. Robynn is Mark's wife and

Maryan's mother; all three lived together when the policy was obtained. On February 25, 2013, Mark and Maryan went to the Farm Bureau office near their home to purchase a no-fault policy for a 1996 Dodge Ram van that they jointly own. Jeffrey Brandt was the Farm Bureau insurance agent at the office. Both Mark and Maryan testified that Robynn was present, and Brandt, testifying years later, could not recall if she was.[1] Brandt's main recollection was that Mark and Maryan were adamant that they would be the only drivers of the vehicle.[2]

Mark and Maryan were required to complete an insurance application for Farm Bureau and a membership application for Farm Bureau's parent company, Michigan Farm Bureau. Either Brandt or his assistant read the questions to Mark and Maryan and then recorded their verbal answers. The membership application was completed in Mark's name. Under "spouse information," Robynn's name is listed, along with her date of birth and partial Social Security number. On the insurance application, only Mark and Maryan are listed as owners or drivers of the vehicle. The next section, which directed the applicants to "[l]ist all vehicle owners, residents of household, and/or separated spouse not listed above,"[3] was left blank. Mark's marital status is listed as "M." The application also contained a list of eligibility questions. Three questions are relevant to this case. Question 1 asks, "Do all drivers have a valid Michigan driver license?" The applicants answered affirmatively. Question 9 asks if

[1] Robynn was unable to testify due to her medical condition resulting from the accident.

[2] There is no evidence that Robynn or anyone other than Mark or Maryan drove the van.

[3] Capitalization altered.

any driver within the last 36 months has been convicted of "[o]perating a motor vehicle under the influence or while impaired by liquor or controlled substance, whether or not causing serious injury or death?"[4] The applicants answered negatively. Question 13 asks, "Has the Applicant or a member of the Applicant's household driven or moved any vehicle owned by the Applicant which has NOT had the required insurance in force for the preceding six months?" The applicants answered negatively and listed Bristol West Preferred Insurance Company (Bristol West) as the previous insurer, providing the policy number and an expiration date of May 2, 2013. Mark provided a certificate of insurance for the Bristol West policy showing that the policy covered a 2006 Chevrolet Trailblazer LMT.

The first premium payment was made at the time of application, and the application was preapproved by Farm Bureau on March 4, 2013. Larry Clark was the Farm Bureau underwriter who reviewed Mark and Maryan's application. Clark determined that the application contained incomplete or inaccurate information. Specifically, the application indicated that Mark was married but did not contain his spouse's name or other required information. There was also inconsistent address information pertaining to Maryan. On March 22, 2013, Clark sent an e-mail to Brandt asking for information about Mark's wife and Maryan's address. After Brandt did not respond for a week, Clark decided to cancel the policy. On April 22, 2013, Farm Bureau sent Mark a letter informing him that the policy was being

[4] The application stated that if the applicant answered "yes" to any question for Eligibility Questions 6 through 13, the applicant would be ineligible for insurance coverage through Farm Bureau.

canceled because of an incomplete or inaccurate application and that his coverage would end on May 25, 2013.

On May 22, 2013, three days before the cancellation date, Robynn was severely injured as a pedestrian when she was struck by a garbage truck at 4:20 a.m. The truck was making a left-hand turn and hit Robynn while she was in the crosswalk when the "walk" sign was on. Robynn suffered traumatic brain injuries resulting in permanent cognitive deficits. The garbage truck was insured by defendant ACE American Insurance Company (ACE). The 1996 Dodge Ram was not involved in the accident.

Farm Bureau was made aware of Robynn's claim for benefits under the policy when it received a bill from her hospital on June 21, 2013. Kurt Simon, a special investigator for Farm Bureau, investigated Robynn's claim. After his investigation, Simon informed Mark and Maryan in a letter dated October 22, 2013, that their policy was being rescinded and declared null and void from its inception date for material misrepresentations in the application. Simon detailed the findings of his investigation, including that Robynn was Mark's wife; that she resided at his home; and that Robynn's driving record contained multiple convictions for operating under the influence of liquor or while intoxicated. Simon also determined that the Bristol West policy relating to the Chevrolet Trailblazer listed on Mark and Maryan's February 25, 2013 application had been rescinded in November 2012 and that Robynn had been driving the uninsured vehicle on February 18, 2013, when she received a citation for driving with a suspended license. Simon concluded that the insurance application contained material misrepresentations because Robynn should have been disclosed as a driver of

the insured vehicle and because Eligibility Questions 1, 9, and 13 were answered incorrectly.

In November 2013, Farm Bureau filed a two-count complaint seeking rescission of the policy and a declaratory judgment that ACE was first in priority to pay Robynn's claim of no-fault benefits. In October 2014, Farm Bureau moved for summary disposition under MCR 2.116(C)(10) (no genuine issue of material fact). Farm Bureau argued that there were material misrepresentations in the application for insurance and therefore it properly rescinded the policy pursuant to the antifraud clause. The trial court denied summary disposition to Farm Bureau and granted summary disposition to ACE on the ground that Farm Bureau's decision to cancel the policy prevented it from later rescinding the policy.

On appeal, this Court reversed, reasoning that "the insurer cannot be estopped from [rescinding the policy] on the basis of facts of which the insurer was actually unaware, even if those facts could have been easily ascertained." *Farm Bureau Gen Ins Co of Mich v ACE American Ins Co*, unpublished per curiam opinion of the Court of Appeals, issued January 19, 2017 (Docket No. 329585) (*Farm Bureau I*), p 2. The panel also rejected ACE's argument that Farm Bureau could not rescind the policy as to Robynn, an innocent third party, because the innocent-third-party doctrine was no longer viable in Michigan. *Id*. at 3. The panel concluded that there was "room for disagreement whether Robynn could or should be considered a 'driver' within the meaning of the policy application" but noted that Eligibility Question 13 pertained to "any other member of the household," which Robynn indisputably was. *Id*. at 4. The panel also noted that ACE made a persuasive argument that Mark and

Maryan did not engage in intentional fraud, but the panel concluded that Farm Bureau could seek rescission on the basis of an innocent misrepresentation. *Id*. In sum, the panel concluded that there was no genuine question of fact that Mark and Maryan made a material misrepresentation that entitled Farm Bureau to rescind the policy. Accordingly, the panel reversed the trial court's order granting summary disposition to ACE and remanded for entry of summary disposition in Farm Bureau's favor. *Id*. at 5.

ACE applied for leave to appeal in the Michigan Supreme Court. On July 18, 2018, the Supreme Court decided *Bazzi v Sentinel Ins Co*, 502 Mich 390, 396; 919 NW2d 20 (2018), in which it held that *Titan Ins Co v Hyten*, 491 Mich 547, 562-571; 817 NW2d 562 (2012), abrogated the innocent-third-party rule. However, the Court clarified that rescission was an equitable remedy and that insurers did not have an "automatic" right to rescind an insurance policy with respect to third parties. *Bazzi*, 502 Mich at 411. Following *Bazzi*, in lieu of granting leave to appeal in this case, the Supreme Court vacated the Court of Appeals opinion "only to the extent it held that Farm Bureau was automatically entitled to rescission as a matter of law" and remanded the case to the trial court "to determine whether rescission is available as an equitable remedy as between Farm Bureau and Robynn Rueckert." *Farm Bureau Gen Ins Co of Mich v ACE American Ins Co*, 503 Mich 903, 903 (2018) (*Farm Bureau II*). The Court denied leave in all other respects. In a concurring statement, Justice MARKMAN identified five nonexclusive factors for trial courts to consider in "innocent-third party cases" to determine whether rescission would be equitable. *Id*. at 906-907 (MARKMAN, C.J., concurring).

On remand, Farm Bureau and ACE engaged in additional discovery before filing competing motions for summary disposition under MCR 2.116(C)(10), with each party arguing that it was entitled to summary disposition based on application of the five factors identified by Justice MARKMAN. The trial court determined that it could not decide whether rescission would be equitable as to Robynn under the MCR 2.116(C)(10) standard and so scheduled an evidentiary hearing. At the hearing, the court heard testimony from Brandt (agent), Clark (underwriter), Detective Robert Zabriskie (investigating officer), Justin Klaver (claims adjuster), and Simon (investigator). Mark and Maryan's deposition transcripts were admitted into evidence along with numerous other exhibits. In a written opinion and order, the trial court found that multiple factors weighed against rescission and ultimately determined that rescission as to Robynn would not be equitable. The court reasoned that Robynn was "truly blameless, whereas Farm Bureau should be assigned some blame for the problems at the root of this case." This appeal followed.

II. ANALYSIS

Farm Bureau argues that the trial court abused its discretion by denying rescission in this case. We disagree.[5]

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[5] In *Pioneer State Mut Ins Co v Wright*, 331 Mich App 396, 405; 952 NW2d 586 (2020), this Court set forth the applicable standards of review:

> The remedy of rescission is "granted only in the sound discretion of the court." *Lenawee Co Bd of Health v Messerly*, 417 Mich 17, 26; 331 NW2d 203 (1982); see also [*Bazzi*], 502 Mich at 409. An abuse of discretion occurs when the decision falls outside the range of reasonable and principled outcomes. *Berryman v Mackey*, 327 Mich App 711, 717; 935 NW2d 94 (2019). An abuse of

The Supreme Court's decision in *Bazzi* provided the following guidance in determining whether rescission is warranted:

> When a plaintiff is seeking rescission, "the trial court must balance the equities to determine whether the plaintiff is entitled to the relief he or she seeks." Accordingly, courts are not required to grant rescission in all cases. For example, "rescission should not be granted in cases where the result thus obtained would be unjust or inequitable," or "where the circumstances of the challenged transaction make rescission infeasible." Moreover, when two equally innocent parties are affected, the court is "required, in the exercise of [its] equitable powers, to determine which blameless party should assume the loss . . . ." "[W]here one of two innocent parties must suffer by the wrongful act . . . of another, that one must suffer the loss through whose act or neglect such third party was enabled to commit the wrong." "The doctrine is an equitable one, and extends no further than is necessary to protect the innocent party in whose favor it is invoked." [*Bazzi*, 502 Mich at 410-411 (citations omitted).]

The Supreme Court adopted a case-by-case approach to determine whether rescission is equitable as to third parties, stating that "an absolute approach would unduly hamper and constrain the proper functioning of such remedies." *Id*. at 411.

As noted, following *Bazzi* the Supreme Court partly vacated this Court's prior opinion in this case and remanded to the trial court "to determine whether rescission is available as an equitable remedy as between Farm Bureau and Robynn Rueckert." *Farm Bureau II*, 503 Mich 903. Justice MARKMAN wrote sepa-

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discretion necessarily occurs when the trial court makes an error of law. *Id*. The trial court's factual findings are reviewed for clear error, and a finding is clearly erroneous if the reviewing court is left with a definite and firm conviction that a mistake has been made. *Id*. at 717-718.

rately and identified five nonexclusive factors for courts to consider in determining whether rescission as to a third party is equitable. *Id*. at 906-907 (MARKMAN, C.J., concurring). He also noted that the party seeking rescission has the burden of establishing that the remedy is warranted. *Id*. at 905, citing *Gardner v Thomas R Sharp & Sons*, 279 Mich 467, 469; 272 NW 871 (1937).

Justice MARKMAN's concurring statement is not binding on this Court. See *People v Lampe*, 327 Mich App 104, 115 n 4; 933 NW2d 314 (2019). However, in *Pioneer State Mut Ins Co v Wright*, 331 Mich App 396, 411; 952 NW2d 586 (2020), we adopted Justice MARKMAN's factors, concluding that they "present[] a workable framework as well as necessary guidance to the lower courts and the litigants . . . ." We summarized the five factors as follows:

> (1) the extent to which the insurer could have uncovered the subject matter of the fraud before the innocent third party was injured; (2) the relationship between the fraudulent insured and the innocent third party to determine if the third party had some knowledge of the fraud; (3) the nature of the innocent third party's conduct, whether reckless or negligent, in the injury-causing event; (4) the availability of an alternate avenue for recovery if the insurance policy is not enforced; and (5) a determination of whether policy enforcement only serves to relieve the fraudulent insured of what would otherwise be the fraudulent insured's personal liability to the innocent third party. [*Id*. at 411.]

In this case, the trial court considered the five factors, as well as an additional consideration, and concluded that, as to Robynn, rescission of the Farm Bureau policy would not be equitable. We will address each factor in turn.

The trial court reasoned that the first factor[6] weighed against rescission because "[t]he lack of critical information from Mark Rueckert about his wife on the application he submitted months before the collision put Farm Bureau on notice that something could be awry," yet Farm Bureau chose to cancel the policy instead of "conducting an investigation that in all likelihood would have revealed an obvious basis for rescission, *i.e.*, Robynn Rueckert's history of drunk driving." The record supports the trial court's conclusion that Farm Bureau exhibited a lack of professional diligence. Although Brandt, testifying six years after the event, could not recall if Robynn was present when the application was completed, both Mark and Maryan testified that she was. Brandt therefore had a full opportunity to ask her questions. In any event, even assuming Robynn was not present, the insurance application indicated that Mark was married, the membership application listed Robynn as his spouse, and Brandt agreed that it is assumed that a married couple lives together. Despite all of this, Brandt approved the insurance application that did not identify Robynn as a household member. Although Brandt ran a "C.L.U.E." (comprehensive loss underwriting exchange) report that did not identify any other drivers for the resi-

[6] Justice MARKMAN provided the following explanation of the first factor:

> First, the extent to which the insurer, in fact, investigated or could have investigated the subject matter of the fraud before the innocent third party was injured, which may have led to a determination by the insurer that the insurance policy had been procured on a fraudulent basis. If the insurer could have with reasonable effort obtained information indicating that the insured had committed fraud in procuring the insurance policy, equity may weigh against rescission because the insurer may be deemed to have acted without adequate professional diligence in issuing and maintaining the policy. [*Farm Bureau II*, 503 Mich at 906 (MARKMAN, C.J., concurring).]

dence, the application asked more broadly for any household residents to be listed. Thus, based on the record before us, there is no justification for Brandt ignoring this obvious discrepancy.

Farm Bureau argues that, because the underwriter is the person with ultimate responsibility to determine eligibility for coverage, giving "partial information" to the insurance agent did not give effective notice to Farm Bureau that there was a household resident not identified in the insurance application. To the extent that Farm Bureau is arguing that it is not responsible for Brandt's lack of diligence, it cites no legal authority in support of that position. Brandt testified that he was a captive agent for Farm Bureau and a Farm Bureau employee, so there is no question that Brandt's principal was Farm Bureau, the insurance company. See *Harts v Farmers Ins Exch*, 461 Mich 1, 6-7; 597 NW2d 47 (1999). "The relationship between the insurer and its agent is controlled by the principles of agency." *Id*. at 7. "[A] duly authorized agent has the power to act and bind the principal to the same extent as if the principal acted." *In re Capuzzi Estate*, 470 Mich 399, 402; 684 NW2d 677 (2004). We therefore see no basis for concluding that Farm Bureau is not responsible for Brandt's lack of diligence, which we conclude weighs heavily against rescission, as the trial court found.

Even focusing only on the underwriter's actions, the record still supports the court's conclusion that Farm Bureau could have discovered the grounds for rescission with reasonable efforts. Clark knew there was a problem with the application because it indicated that Mark was married but gave no information about his spouse. However, Clark merely e-mailed Brandt for additional information, and when he received no response after a week, he decided to cancel the policy effective at a future

date rather than: (a) follow up with Brandt; (b) contact the insureds; or (c) perform any additional investigation. Indeed, Clark could have easily obtained identifying information about Robynn from the membership application, which provided her name, date of birth, and partial Social Security number.[7] While Clark testified that it was not a typical part of the underwriting process to obtain a copy of the membership application, he agreed that he could have done so.

Farm Bureau also argues that an additional investigation into Robynn would not have provided grounds for rescission on Eligibility Question 13 because her driving record would not have shown that she had driven an uninsured vehicle in the past six months. Recall that in this Court's prior opinion, we concluded that rescission was warranted for the applicants' response to Question 13 (pertaining to drivers and household residents) and indicated that there was a question of fact whether Questions 1 and 9 (pertaining to drivers only) were falsely answered because there was "room for disagreement" whether Robynn should have been disclosed as a driver of the insured vehicle. *Farm Bureau I*, unpub op at 4. Thus, Farm Bureau argues, Robynn's driving record was not relevant to the only grounds for rescission that have been judicially determined in this case.

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[7] Farm Bureau argues that the trial court's ruling imposes a legal duty on it to discover fraud, contrary to *Titan Ins Co*, 491 Mich 547. But in *Pioneer* we rejected that the first factor is inconsistent with *Titan Ins Co*:

> In *Titan Ins Co*[, 491 Mich at 572-573], our Supreme Court held that "an insurer may seek to avoid liability under an insurance policy using traditional legal and equitable remedies including cancellation, rescission, or reformation, on the ground of fraud made in an application for insurance, notwithstanding that the fraud may have been easily ascertainable and the claimant is a third-party." The first factor does not impose a duty to investigate upon insurers, contrary to *Titan Ins Co*, but merely addresses the process of procurement of insurance and any information disclosed. [*Pioneer*, 331 Mich App at 412 n 6.]

But the fact remains that Farm Bureau sought rescission, in part, on the basis of Robynn not being disclosed as a driver of the insured vehicle who did not have a valid license and who had been convicted of operating while intoxicated in the past 36 months. Thus, an investigation into Robynn and her driving record before the accident would have led Farm Bureau to rescind the policy. Whether a jury would have ultimately agreed with Farm Bureau that Robynn should have been disclosed as a driver of the insured vehicle is a different question.[8] In sum, the trial court did not clearly err by concluding that Farm Bureau exhibited a lack of professional diligence that prevented it from discovering the grounds for rescission that it later claimed.

As to the second factor,[9] the trial court noted that there was "scant evidence that Robynn Rueckert played an active role in procuring the policy from Plaintiff Farm Bureau" but nonetheless found that this factor weighed in favor of rescission because the court "need not engage in a leap of logic to presume that

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[8] We also note that there is nothing in the record to suggest that Farm Bureau could not have discovered before the accident that the Bristol West policy had been rescinded. Further, while Farm Bureau wants to limit "the fraud" to the Bristol West policy for the first factor, it otherwise makes no such distinction and argues that Robynn was culpable for not disclosing her driving record at the insurance office. Farm Bureau cannot have it both ways. Either the fraud relates solely to the application question relating to uninsured vehicles, or it concerns all the purported misrepresentations.

[9] Justice MARKMAN provided the following guidance on the second factor for courts to consider:

> Second, the specific relationship between the innocent third party and the fraudulent insured. If the innocent third party possessed some knowledge of the fraud—perhaps because of a familial or other relationship—equity may weigh in favor of rescission because that individual is seeking to recover from the insurer despite knowledge of the fraud. [*Farm Bureau II*, 503 Mich at 906 (MARKMAN, C.J., concurring).]

Robynn Rueckert had some understanding that her husband had procured family automobile insurance for himself and her daughter without disclosing her driving record . . . ." ACE argues that the court's ruling is based on a presumption, not evidence, because it acknowledged that there was little evidence of Robynn's role in obtaining the policy. However, this factor looks to the relationship between the insured and the third party, suggesting that a close relationship allows for an inference that the third party knew of the fraud. Considering Robynn's close relationship to the insureds, as well as the insureds' testimony that Robynn was present when the policy was obtained, the trial court did not clearly err by finding that this factor weighed in favor of rescission.

Next, the trial court concluded that the third factor[10] weighed against rescission because the court found that Robynn was blameless for the accident. Indeed, it is undisputed that Robynn was in the crosswalk while the walk signal was on. Farm Bureau notes that Robynn had a high blood alcohol content (BAC) at the time of the accident and that the investigating officer, Detective Zabriskie, opined that, based on the position of Robynn's arms in the video, she could have been walking quickly or running through the crosswalk. However, having a high BAC and moving quickly through a crosswalk do not establish negligence, let alone recklessness. We also note that the trial court reviewed the dashcam footage that shows Robynn

[10] The third factor identified by Justice MARKMAN concerns

> the precise nature of the innocent third party's conduct in the injury-causing event. Where the innocent third party acted recklessly or even negligently in the course of the injury-causing event, equity may weigh in favor of rescission because the innocent third party could have avoided the injury by acting more prudently. [*Id*.]

entering the crosswalk in a light-colored shirt as the truck begins to make its turn. For these reasons, the court did not clearly err by finding that Robynn was not at fault in the accident.

The court concluded that the fourth factor[11] favored rescission because, if the Farm Bureau policy was rescinded, Robynn would be entitled to no-fault benefits from ACE, the insurer of the accident vehicle. We see no error in this determination. The trial court also noted that this result would be inconsistent with the no-fault priority scheme, i.e., absent rescission, Farm Bureau would be first in priority. This comment has spawned arguments from both parties, but it had no bearing on the court's weighing of the factor. Further, it is unremarkable that rescission will result in the next-in-line insurer having priority. In weighing this factor, the court correctly focused on whether the third party had an alternative avenue for relief, and here Robynn could obtain benefits from ACE if rescission was granted.[12]

The trial court determined that the fifth factor[13] weighed against rescission because Mark (and

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[11] Justice MARKMAN provided the following explanation for the fourth factor:

> Fourth, whether the innocent third party possesses an alternative avenue for recovery absent enforcement of the insurance policy. Such an avenue for recovery may include, for example, the assigned claims plan or health insurance. Where the innocent third party possesses an alternative means of recovery, equity may weigh in favor of rescission because the insurer need not suffer loss because of the fraud. [*Id*. at 906-907.]

[12] The availability of other coverage should not be found when the claimant would be barred from recovery from a different insurer because of the one-year-back rule. See *Pioneer*, 331 Mich App at 412-414.

[13] The fifth factor concerns

> whether enforcement of the insurance policy would merely relieve the fraudulent insured of what would otherwise be the

Maryan) would not be relieved of tort liability if the Farm Bureau policy was enforced. Farm Bureau maintains that when the fraudulent insured is not involved in the accident, this factor is simply inapplicable. Indeed, after the trial court issued its opinion, we concluded in *Pioneer* that the fifth factor was inapplicable under these circumstances. See *Pioneer*, 331 Mich App at 414. Accordingly, consistent with *Pioneer*, the fifth factor is not applicable in this case, and it does not weigh either in favor of or against rescission.

As noted, the five factors identified by Justice MARKMAN are nonexclusive. In this case, the trial court determined that the timing of the premium refund check, which was issued six months after Farm Bureau initially canceled the policy and a month after Farm Bureau decided to rescind the policy, weighed against rescission. It is unclear how much weight the trial court gave to this factor, and while we do not view it as particularly weighty, we decline to conclude that the trial court erred by considering it. Farm Bureau's failure to act promptly, both in rescinding the policy and issuing the premium refund check, was a proper consideration.[14]

In sum, two of the factors identified by Justice MARKMAN weighed against rescission, two weighed in

> insured's personal liability to the innocent third party. That is, whether enforcement of the insurance policy would subject the insurer to coverage for tort liability for an at-fault insured. In such a case, equity may weigh in favor of rescission because enforcement of the policy would transfer liability to the innocent third party from the insured who committed the fraud to the insurer that did not commit wrongdoing. [*Farm Bureau II*, 503 Mich at 907 (MARKMAN, C.J., concurring).]

[14] Farm Bureau argues that, in considering the equities, the trial court should have considered that ACE was the only insurer who had been paid a premium for the period covering the accident. However, Farm Bureau did receive a premium payment and was attempting to

favor, the fifth factor was inapplicable, and a sixth factor identified by the trial court weighed against rescission. But the factors are not to be merely counted up, and the ultimate issue is which innocent party should bear the loss. *Farm Bureau II*, 503 Mich at 905, 907 (MARKMAN, C.J., concurring). The trial court carefully weighed the equities in this case after holding a multiday evidentiary hearing and concluded that rescission would be inequitable. We are also mindful that the burden was on Farm Bureau to show that rescission was warranted. Based on the record before us, the trial court did not abuse its discretion or commit legal error by denying rescission under the circumstances of this case.

Affirmed.

CAVANAGH and REDFORD, JJ., concurred with SHAPIRO, P.J.

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collect the unpaid premiums until it decided to rescind the policy. In any event, the trial court did not abuse its discretion by not taking the unpaid premiums into account.

HEIN v HEIN

Docket Nos. 353272 and 353285. Submitted April 13, 2021, at Lansing. Decided April 29, 2021, at 9:10 a.m.

Kurt J. Hein filed for divorce from Terri Jo Hein in the Grand Traverse Circuit Court. The parties negotiated a consent agreement that generally divided their assets and debts equally. The circuit court, Thomas G. Power, J., signed the agreement and entered it as a consent judgment. One provision in the consent judgment stated that plaintiff's federal pension was to be divided equally between the parties and that defendant was to be considered a surviving spouse for purposes of distribution of the pension. Defendant's counsel prepared a proposed court order acceptable for processing that provided that defendant would receive pension payments for the remainder of plaintiff's lifetime, but also that her estate would continue to receive defendant's share of the pension payments in the event that defendant predeceased plaintiff. Plaintiff, *in propria persona*, objected to the provision that directed payment of defendant's half of the pension to defendant's estate if she predeceased plaintiff, arguing that the parties had not agreed to this term and that it would unfairly benefit defendant contrary to the consent agreement. Following a hearing, the court signed defendant's proposed order. Plaintiff appealed by right and by application for leave to appeal. The Court of Appeals granted plaintiff's application and consolidated the appeals.

The Court of Appeals *held*:

1. Whether the parties intended for defendant's estate to continue receiving pension payments if she predeceased plaintiff depended on what the parties meant when they agreed in the consent judgment of divorce that the pension was to be "divided equally." As plaintiff noted, 5 CFR 838 generally controls how the relevant federal administrative agencies handle state domestic-relations orders affecting federal pensions. 5 CFR 838.302(b) and 5 CFR 838.222(b) support plaintiff's argument that a court order acceptable for processing may not provide for pension payments or division of employee annuities to a former spouse after the death of the employee or retiree. Additionally, 5 CFR 838.237 provides that,

unless a court order acceptable for processing provides otherwise, a former spouse's share of an employee annuity terminates on the last day of the month immediately preceding the death of the former spouse, and the former spouse's share reverts to the retiree. Therefore, by default, defendant's half of the pension would revert to plaintiff if she predeceased him. However, the federal regulations do not forbid the parties from continuing to divide the pension after defendant's death; it only must be explicitly specified. Regardless, plaintiff reasonably expected that his pension annuity would be divided only for defendant's lifetime unless expressly stated otherwise. But defendant also reasonably expected that the annuity payments would continue after her death if she predeceased plaintiff, pursuant to MCL 552.101(4). Under the statute, "surviving spouse benefits" are a "component" of a pension, and a proportionate share of all components are included in any assignment of a pension in a judgment of divorce. In principle, then, an assignment of half of a pension includes half of all components of that pension. Under plaintiff's construction of the parties' pension-sharing agreement, neither party's estate would receive payments, while under defendant's construction, her estate would receive payments at plaintiff's continuing expense. Both constructions were arguably reasonable, in that plaintiff's construction was consistent with the federal pension scheme, and defendant's construction was consistent with MCL 552.101(4). Therefore, what the parties meant by "divided equally" in the consent judgment was ambiguous, and whether the court order acceptable for processing comported with the parties' intent in the consent judgment was not facially apparent. Although a trial court is not obligated to conduct an evidentiary hearing to resolve an ambiguity in a consent judgment of divorce unless a party expressly asks for such a hearing, a party has a right to such a hearing upon request. Because plaintiff, acting *in propria persona*, attempted to request an evidentiary hearing to object to the court order acceptable for processing, the court should have held an evidentiary hearing to determine the parties' intent and understanding regarding the meaning of "divided equally" in the consent judgment.

2. The trial court erred by entering the court order acceptable for processing pursuant to the seven-day rule in MCR 2.602(B)(3). Under the rule, within seven days after an order or judgment is granted, a party may serve a copy of the proposed order or judgment on the other parties with notice that it will be submitted to the court for signing if no written objections to the order are filed within seven days after service of notice. The rule only comes into effect after the trial court grants a judgment; that is, it is a mechanism for the entry of an order or judgment reflecting a decision made by the trial court and is not a mechanism for

entering a consent judgment or an order that does not effectuate a trial court's ruling. In this case, to the extent the court made a decision, it was that defendant's proposed court order acceptable for processing comported with the parties' consent judgment; therefore, the seven-day rule could not have come into effect until seven days after that.

Decision vacated and case remanded.

Moothart & Sarafa, PLC (by *Jonathan R. Moothart*) for plaintiff.

Before: JANSEN, P.J., and RONAYNE KRAUSE and GADOLA, JJ.

RONAYNE KRAUSE, J. In this consolidated appeal in this divorce proceeding, plaintiff, Kurt J. Hein, appeals by right and by leave granted[1] the trial court's order directing that 50% of plaintiff's federal pension annuity would be paid to defendant, Terri Jo Hein, for the entire existence of the annuity, even if defendant were to predecease plaintiff. We vacate and remand for further proceedings.

I. FACTUAL AND PROCEDURAL BACKGROUND

The parties were married in 1981. The parties had children, and although defendant did work part-time throughout the marriage, she was the primary caretaker of the children and generally relied on plaintiff as the family income-earner. The parties separated in 2019, by which time they had accumulated assets, but their children were no longer minors. The parties generally agreed that the immediate and direct cause of their separation was that plaintiff began a romantic

[1] Plaintiff apparently was uncertain whether the trial court's order was appealable by right, so he simultaneously pursued an appeal by right and an appeal by leave. The appeals are substantively identical and will be treated as one and the same.

relationship with another person; however, they provided differing opinions as to any underlying problems. Defendant described plaintiff as a "bully" who had "engaged in a long sneaky and deceitful extra marital affair" despite defendant being "a faithful, devoted wife." Plaintiff contended that the last decade of the marriage had been unhappy, his efforts to improve the relationship had proved unsuccessful, and his extramarital relationship was a symptom of the marriage having already broken down due to a lack of intimacy and emotional connection. The parties agreed that defendant made about $10,000 a year and had a $400 a month pension; the parties also agreed that plaintiff was retired from federal employment, from which he had an approximately $4,000 a month pension. The parties also agreed that plaintiff had a hobby landscaping business, and plaintiff contended that he made approximately $11,000 a year from that business.[2]

Although both parties were represented by counsel, they nevertheless negotiated a consent agreement that, very generally, divided their assets and debts equally. Most of that division is not at issue. Relevant to this appeal, the agreement specified that defendant would be named a surviving spouse for purposes of plaintiff's federal pension, and spousal support was waived. One of the provisions stated:

> IT IS FURTHER ORDERED that Plaintiff, Kurt J. Hein's, Office of Personnel Management pension shall be divided equally between the parties pursuant to a Qualified Domestic Relations Order and Terri J. Hein, shall be considered a surviving spouse for purposes of distribution of this pension benefit.

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[2] Defendant referred to the business's "gross receivables" but cited no information about the business's profitability. It appears that other than plaintiff's pension, the parties' incomes did not greatly differ.

The meaning of "divided equally" would prove contentious and underlies this appeal. Initially, however, both parties confirmed the consent agreement with those terms, and the trial court signed the consent judgment two months later. The parties' consent judgment of divorce was entered on October 28, 2019.

Thereafter, defendant's counsel prepared a proposed "Court Order Acceptable For Processing Federal Employees Retirement System"[3] and served it on plaintiff's counsel on January 13, 2020. However, plaintiff's attorney had discontinued her representation of plaintiff by that time. According to plaintiff:

> Defendant's counsel sent a letter attaching a proposed form of qualified domestic relations order dividing the Office of Personnel Management pension (Federal Employees Retirement System [FERS]) to Plaintiff's counsel. Plaintiff's counsel advised that she no longer represented Plaintiff and forwarded the communication to him the same day. Plaintiff responded later that day and requested that all communication be sent directly to him.

According to plaintiff, on January 22, 2020, he personally asked defendant's counsel to amend the proposed order in part, because he believed one of its paragraphs to be a departure from the terms of the parties' agreement and a windfall to defendant. Apparently, defendant's counsel never responded.

In relevant part, defendant's prepared Court Order Acceptable For Processing provided as follows:

> The Employee's [i.e., plaintiff] benefit has commenced.
>
> The Former Spouse [i.e., defendant] shall commence her benefits as soon as administratively feasible following

[3] It appears that a "court order acceptable for processing" is, essentially, a kind of qualified domestic-relations order (QDRO) specifically applicable to federal pensions.

> the date this Order is approved as a COAP [Court Order Acceptable for Processing]. Payments shall continue to the Former Spouse for the remainder of the Employee's lifetime.
>
> However, in the event that the Former Spouse dies before the Employee, OPM [Office of Personnel Management] is directed to pay the Former Spouse's share of the Employee's FERS benefit to the Former Spouse's estate.[4]
>
> The Employee agrees to arrange or to execute all forms necessary for the OPM to commence payments to the Former Spouse in accordance with the terms of this Order.

On January 27, 2020, defendant's counsel filed the proposed Court Order Acceptable For Processing for entry pursuant to MCR 2.602(B)(3), the so-called "seven-day rule." Plaintiff, *in propria persona*, objected to the Court Order Acceptable For Processing, explaining that the third quoted paragraph above, directing payment of defendant's half of the pension to her estate if she predeceased plaintiff, was a departure from the parties' agreement and a windfall to defendant.

The trial court held a hearing at which plaintiff appeared, still *in propria persona*, following which it signed defendant's proposed order. Plaintiff, once again represented by his trial counsel, moved for reconsideration, which the trial court denied. These appeals followed.

II. ISSUE PRESERVATION AND STANDARD OF REVIEW

Issues are considered preserved for appellate review if they are raised in the trial court and pursued on appeal. *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994). Appellate consid-

[4] This is the paragraph at issue in this appeal and that plaintiff argues was not agreed to in the parties' consent judgment of divorce.

eration is not precluded merely because a party makes a more sophisticated or more fully developed argument on appeal than was made in the trial court. See *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002). Furthermore, plaintiff proceeded *in propria persona* during critical portions of the proceedings below; therefore, his pleadings during that period are entitled to more generous and lenient construction than they would be if his pleadings had been prepared by a lawyer. *Estelle v Gamble*, 429 US 97, 106; 97 S Ct 285; 50 L Ed 2d 251 (1976). Although plaintiff provides greater explication of his arguments on appeal, all of his arguments were at least generally raised in the trial court. Under the circumstances, we choose to treat plaintiff's arguments as preserved for appellate review.

A consent judgment of divorce is treated and construed as a contract between the parties. *Andrusz v Andrusz*, 320 Mich App 445, 452-453; 904 NW2d 636 (2017). Although a consent judgment gains the enforcement power of a court judgment, it remains a contract in which the parties negotiated an agreement, rather than the kind of judicial act in which the court determined the rights and obligations of the parties. *Trendell v Solomon*, 178 Mich App 365, 367-370; 443 NW2d 509 (1989); *Acorn Investment Co v Mich Basic Prop Ins Ass'n*, 495 Mich 338, 354; 852 NW2d 22 (2014). This Court reviews de novo as a question of law the proper interpretation of a contract, including a trial court's determination whether contract language is ambiguous. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003). In general, a trial court's legal determinations are reviewed de novo, any underlying factual findings are reviewed for clear error, and ultimate discretionary decisions are reviewed for an abuse of that discretion. *Herald Co, Inc v Eastern Mich Univ Bd of Regents*, 475 Mich 463,

470-472; 719 NW2d 19 (2006). " '[F]ailure to exercise discretion when called on to do so constitutes an abdication and hence an abuse of discretion.' " *Rieth v Keeler*, 230 Mich App 346, 348; 583 NW2d 552 (1998), quoting *People v Stafford*, 434 Mich 125, 134 n 4; 450 NW2d 559 (1990). "A trial court necessarily abuses its discretion when it makes an error of law." *Ronnisch Constr Group, Inc v Lofts on the Nine, LLC*, 499 Mich 544, 552; 886 NW2d 113 (2016).

III. INTENT OF THE PARTIES

As discussed, the sole issue is whether the following provision in the Court Order Acceptable For Processing is consistent with the parties' consent judgment of divorce:

> [I]n the event that the Former Spouse dies before the Employee, OPM is directed to pay the Former Spouse's share of the Employee's FERS benefit to the Former Spouse's estate.

The relevant portion of the consent judgment of divorce provides

> that Plaintiff, Kurt J. Hein's, Office of Personnel Management pension shall be divided equally between the parties pursuant to a Qualified Domestic Relations Order and Terri J. Hein, shall be considered a surviving spouse for purposes of distribution of this pension benefit.

Thus, resolution of this issue turns largely on what "divided equally" meant to the parties when they signed their agreement.

Plaintiff first argues that the trial court's construction of the judgment of divorce is facially erroneous. He points out that if he predeceases defendant, his pension will terminate and his estate would not receive any pension payments. Conversely, upon plaintiff's death, as a "surviving spouse," defendant would con-

tinue to receive her own independent survivor annuity. He therefore contends that if defendant were to predecease him, defendant (or her estate) would receive a windfall with no commensurate benefit to plaintiff, which conflicts with the divorce judgment's overall scheme of dividing the parties' debts and assets equally. In other words, defendant's "share" as the former spouse should be understood to mean half of plaintiff's pension during her lifetime and her survivor benefit if she outlives plaintiff.

Plaintiff significantly relies on the procedures set forth in 5 CFR 838.101 *et seq*. (2021). Those provisions generally "regulate[] the Office of Personnel Management's handling of court orders affecting the Civil Service Retirement System (CSRS) or the Federal Employees Retirement System (FERS), both of which are administered by the Office of Personnel Management (OPM)." 5 CFR 838.101(a)(1) (2021). Subpart B, 5 CFR 838.201 *et seq*. (2021), "regulates the procedures that the Office of Personnel Management will follow upon the receipt of claims arising out of State court orders directed at employee annuities . . . ." 5 CFR 838.201(a) (2021). Pursuant to 5 CFR 838.103 (2021),

> [*f*]*ormer spouse* means (1) in connection with a court order affecting an employee annuity or a refund of employee contributions, a living person whose marriage to an employee has been subject to a divorce, annulment of marriage, or legal separation resulting in a court order, or (2) in connection with a court order awarding a former spouse survivor annuity, a living person who was married for at least 9 months to an employee or retiree who performed at least 18 months of civilian service covered by CSRS or who performed at least 18 months of civilian service creditable under FERS, and whose marriage to the employee of retiree was terminated prior to the death of the employee or retiree.

> *Former spouse survivor annuity* means a recurring benefit under CSRS or FERS, or the basic employee death benefit under FERS as described in part 843 of this chapter, that is payable to a former spouse after the employee's or retiree's death.

In other words, 5 CFR 838 (2021) generally controls how the relevant federal administrative agencies handle state domestic-relations orders affecting federal pensions.

Although not a model of clear drafting, 5 CFR 838.302(b) (2021) states that a court order acceptable for processing may not provide for any portion of the employee or retiree's pension to be paid to a former spouse after the death of the employee or retiree. Similarly, 5 CFR 838.222(b) (2021) provides "that OPM can only honor court orders dividing employee annuities during the lifetime of the retiree or phased retiree." Additionally, 5 CFR 838.803(b) (2021) also indicates that benefits will not be paid beyond the lifetime of the employee or retiree. Therefore, plaintiff appears to be correct in asserting that his pension will terminate upon his death, so nothing would be paid into his estate. A necessary corollary is that unless defendant was named a surviving former spouse, she would also receive nothing after plaintiff's death if he predeceased her.

Pursuant to 5 CFR 838.804 (2021), the former spouse survivor annuity must be explicitly directed in a court order acceptable for processing. Defendant's Court Order Acceptable For Processing includes a provision for awarding a former spouse survivor annuity, to which plaintiff does not object. Thus, plaintiff appears to be correct in asserting that defendant will receive a survivor annuity if plaintiff predeceases her. Furthermore, defendant would receive that survivor

annuity irrespective of any other division of plaintiff's pension benefits, although receipt of the survivor annuity would be strictly contingent upon her outliving plaintiff.

More directly affecting this matter, 5 CFR 838.237 (2021) provides in full:

> (a) Unless the court order acceptable for processing expressly provides otherwise, the former spouse's share of an employee annuity terminates on the last day of the month immediately preceding the death of the former spouse, and the former spouse's share of employee annuity reverts to the retiree or phased retiree.
>
> (b) Except as otherwise provided in this subpart, OPM will honor a court order acceptable for processing or an amended court order acceptable for processing that directs OPM to pay, after the death of the former spouse, the former spouse's share of the employee annuity to—
>
> (1) The court;
>
> (2) An officer of the court acting as fiduciary;
>
> (3) The estate of the former spouse; or
>
> (4) One or more of the retiree's or phased retiree's children as defined in 5 U.S.C. 8342(c) or 8424(d).

Consequently, plaintiff is also correct in asserting that *by default*, defendant's half of his pension would revert to him upon defendant's death, in the event she predeceases him. Continuing to divide the pension after defendant's death is not forbidden; it only must be explicitly specified. Nevertheless, we are persuaded that plaintiff would have reasonably expected that his pension annuity would be divided only for defendant's lifetime, rather than for his own lifetime, unless expressly stated otherwise.[5]

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[5] We note that the trial court asked plaintiff, "[W]hy do you think you get it back?" This appears to reflect a misapprehension of the default procedures described above.

However, that does not end the analysis. Defendant and the trial court relied on MCL 552.101(4), which provides:

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

In principle, an assignment of half of a pension therefore includes half of all components of that pension. See *Hudson v Hudson*, 314 Mich App 28, 34-36; 885 NW2d 652 (2016).[6] Importantly, however, MCL 552.101(4) does not mean "that all components are included," and indeed, it excludes provisions that cannot be proportionally divided. See *Hudson*, 314 Mich App at 36. For example, MCL 552.101(4) expressly provides that "surviving spouse benefits" are "components" of a pension. However, the former spouse survivor annuity here is simply incapable of division: it is

[6] When *Hudson* was decided, current MCL 552.101(4) was located at MCL 552.101(5). See MCL 552.101, as amended by 2006 PA 288. It was renumbered (and one nonsubstantive word was changed) to its current position by 2016 PA 378.

a contingent right that definitionally belongs only to defendant and may never pay anything.

As discussed, plaintiff's pension annuity would terminate upon his death, and defendant's survivor annuity would terminate upon her death. By plaintiff's construction, neither party would have anything paid into their estates and neither party would be inconvenienced during their lifetimes; whereas by defendant's construction, only she would have anything paid into her estate, at plaintiff's continued expense. The intent of the federal pension scheme appears to be to make payments only for the lifetimes of the retirees or spouses. Therefore, there seems to be something unbalanced about a division under which one party might continue to receive payments after their death, whereas the other party could not. As noted, it would be reasonable to expect "default" procedures in 5 CFR 838 (2021) to be followed in the absence of an expressly negotiated agreement to the contrary. Nevertheless, the pension annuity is clearly a "component" of the pension and is capable of proportionate division. Therefore, it also would be reasonable for defendant to have expected that under MCL 552.101(4), she would continue to receive half of the pension annuity for the entirety of the existence of that pension; again, unless the parties' agreement specifically provided otherwise.

We disagree with plaintiff that there is a federal supremacy issue in this matter. Both 5 CFR 838.101 (2021) and MCL 552.101(4) create default procedures, but both also permit departures from those defaults. The outcome of this matter turns instead on contract interpretation, which requires the courts to determine the intent of the parties. Pursuant to 5 CFR 838.101 (2021) and MCL 552.101(4), both parties had good reason to assume that "divided equally" would, in the

absence of further specification, support their own construction of how to divide the pension after defendant's death. Furthermore, both constructions are arguably the "fairer" one. Plaintiff's construction appears to be more consistent with the intent of the federal pension scheme, would cause no inconvenience to defendant during her lifetime, and is "equal" in the sense that neither party would receive payments into their respective estates. Defendant's construction appears to be more consistent with the strict letter of MCL 552.101(4) and is "equal" in the sense that the only divisible component of plaintiff's pension would be divided in half with no further complexity.

Under the circumstances, it is ambiguous what "divided equally" was intended to mean. Both parties have a fair, plausible, and reasonable basis for expecting their construction to prevail in the absence of an express statement to the contrary. In other words, the provision in the consent judgment of divorce that the pension should be "divided equally" is susceptible to multiple reasonable interpretations. Consequently, it is ambiguous. See *Kendzierski v Macomb Co*, 503 Mich 296, 311-312, 317; 931 NW2d 604 (2019). Therefore, whether the Court Order Acceptable For Processing comports with the intent of the parties in the consent judgment is not facially apparent.

Strictly speaking, the trial court is not obligated to conduct an evidentiary hearing to resolve an ambiguity in a consent judgment of divorce unless a party expressly asks for such a hearing; however, a party has a right to such a hearing upon request. See *Mitchell v Mitchell*, 198 Mich App 393, 397-399; 499 NW2d 386 (1993). In this case, plaintiff, *in propria persona*, requested "a hearing to [sic] my objection as soon as practicable." Although this is not a clear request for an

evidentiary hearing, it is important to note that plaintiff was not represented by counsel at the time, and therefore his objection is entitled to more lenity and generosity in construction than if it had been prepared by a lawyer. *Estelle*, 429 US at 106. A fair reading of the remainder of plaintiff's objection is that he did not agree to anything that would support the challenged provision in defendant's proposed Court Order Acceptable For Processing. Under the circumstances—including plaintiff's lack of counsel, the trial court's clear misapprehension of plaintiff's argument, and the readily apparent factual confusion during the hearing on plaintiff's objection—we deem plaintiff to have requested (albeit inartfully) an evidentiary hearing.

IV. SEVEN-DAY RULE

Equally critically, the trial court committed a clear procedural error that would require vacation of the Court Order Acceptable For Processing in any event. The aptly named "seven-day rule" provides, in relevant part:

> (B) An order or judgment shall be entered by one of the following methods:
>
> * * *
>
> (3) Within 7 days after the granting of the judgment or order, or later if the court allows, a party may serve a copy of the proposed judgment or order on the other parties, with a notice to them that it will be submitted to the court for signing if no written objections to its accuracy or completeness are filed with the court clerk within 7 days after service of the notice . . . . [MCR 2.602.]

The rule only comes into effect after the trial court actually grants a judgment. *Hessel v Hessel*, 168 Mich App 390, 396; 424 NW2d 59 (1988). Its plain terms

provide that it is a mechanism for the entry of an order or judgment reflecting a decision made by the trial court. Thus, it is definitionally not a mechanism for entering a consent judgment, nor can it be a mechanism for entering an order that is not an effectuation of a trial court's ruling. See *Jones v Jones*, 320 Mich App 248, 261 n 5; 905 NW2d 475 (2017). To the extent the trial court made a decision, it was that defendant's Court Order Acceptable For Processing comported with the parties' consent judgment of divorce. Therefore, the "seven-day rule" could not have come into effect until seven days after that.

V. CONCLUSION

The trial court erred in two ways, either of which would mandate vacation by itself. First, the trial court should have held an evidentiary hearing to determine the intent and understanding of the parties regarding the meaning of "divided equally" in the consent judgment. Secondly, the trial court should not have entered the Court Order Acceptable For Processing pursuant to MCR 2.602(B)(3). For both reasons or for either reason, the trial court's entry of the Court Order Acceptable For Processing is vacated. Unless the parties agree to the terms of a substitute order, or otherwise obviate the need, the trial court must hold an evidentiary hearing that includes testimony from the parties, and on that basis, make a factual determination and enter a judgment as to what the parties intended to happen to plaintiff's pension if he outlives defendant.

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

JANSEN, P.J., and GADOLA, J., concurred with RONAYNE KRAUSE, J.

ABCS TROY LLC v LOANCRAFT LLC

Docket No. 349835. Submitted October 7, 2020, at Detroit. Decided April 29, 2021, at 9:15 a.m.

ABCS Troy LLC brought an action in the 52-4 District Court against Loancraft LLC, asserting claims of breach of contract and promissory estoppel and seeking to recover, among other relief, attorney fees. Plaintiff leased commercial space to defendant, and at the end of the lease term, defendant vacated the premises. Plaintiff alleged that defendant left the premises in poor condition, necessitating $6,132 in repairs to the property; defendant refused to reimburse plaintiff for the repairs and plaintiff brought suit. Defendant filed a counterclaim, asserting breach of contract and similarly seeking, among other relief, attorney fees. The parties' respective requests for attorney fees were based on the lease's fee-shifting provision, which provided that, in the event of a dispute arising under the lease, the nonprevailing party must pay the prevailing party's actual attorney fees. Following a bench trial, the district court, Kirsten Nielsen Hartig, J., found in defendant's favor and awarded defendant $2,692.56 in damages on its counterclaim. Defendant moved for an award of actual attorney fees of $48,576.25 under the lease's fee-shifting provision. The district court concluded that an award of attorney fees under the parties' lease qualified as damages subject to the district court's jurisdictional limit of $25,000. On the basis of that determination, the district court entered judgment in the amount of $25,000 in favor of defendant; the judgment included $2,692.56 in damages related to the counterclaim and $22,307.44 in damages for defendant's attorney fees under the fee-shifting provision. Defendant appealed in the Oakland Circuit Court. The circuit court, Nanci J. Grant, J., affirmed the district court's judgment, including the cap on contractual attorney fees. Defendant appealed by leave granted the district court's order limiting the total award to $25,000.

The Court of Appeals *held*:

1. Under MCL 600.8301(1), district courts in Michigan have exclusive jurisdiction in civil actions when the amount in controversy does not exceed $25,000. Given the $25,000 jurisdictional

limit, district courts may not award damages in excess of that amount. Thus, a plaintiff pleading a case of damages for $25,000 or less who proves and obtains a verdict for more than $25,000 is still limited to awardable damages of not more than the district court's jurisdictional limit of $25,000. Although a district court maintains subject-matter jurisdiction over a case even if the actual damages proved at trial exceed the court's jurisdictional limit, the prevailing party's damage award might be capped at the jurisdictional limit. Alternatively, under MCR 4.002(B), a party may, at any time, file a motion with the district court, requesting that the case be transferred to circuit court because of a change in conditions or circumstances or because of new facts resulting in the amount or nature being beyond the district court's jurisdiction or power to grant.

2. There are two ways in which an award of attorney fees may be treated for purposes of calculating the amount in controversy for jurisdictional limits. Generally, Michigan follows "the American rule" with respect to attorney fees: each party bears its own litigation expenses, including that party's own attorney fees, and therefore, these expenses are usually not part of the matter at controversy between the parties. While trial courts can award expenses (including fees) to a prevailing party under certain circumstances, for the most part, each party is responsible for paying its own expenses in pursuing its own, and defending against, claims. Accordingly, when determining the amount in controversy of a lawsuit, courts generally do not consider a party's own fees, costs, and interest in that calculation. And when fees, costs, and interest are not part of the amount in controversy, an award to the prevailing party for reimbursement of these expenses is not subject to the district court's $25,000 cap on damages. The American rule with respect to attorney fees is not, however, absolute, because parties can contract around the rule with, for example, a fee-shifting provision. In that instance, a claim of attorney fees is one for general damages, which counts toward the amount in controversy and is subject to a court's jurisdictional limit.

3. Federal caselaw holding that attorney fees required by contract or statute are included in the amount-in-controversy calculation for purposes of diversity jurisdiction was persuasive with regard to how to treat attorney fees under a fee-shifting provision because (1) federal courts, like Michigan courts, recognize that the American rule is the general rule, but not an absolute rule, given that parties can contract around the rule with a fee-shifting provision and (2) federal courts recognize that

attorney fees sought under a fee-shifting provision are a form of damages that count toward the amount in controversy for jurisdictional limits. Therefore, as in federal courts, a claim for attorney fees in a Michigan court under a contractual fee-shifting provision is part of the amount in controversy. In other words, contractual fees are an element of general damages, are included in the amount-in-controversy calculation for purposes of a district court's jurisdiction, and any award of those fees by the district court is subject to that court's jurisdictional limit.

4. In this case, the district court had subject-matter jurisdiction in the first instance because neither party prayed for damages in excess of $25,000, and even though an award of attorney fees to the prevailing party was required under the terms of the lease, there was no indication at the outset that the amount in controversy would exceed the jurisdictional limit. The fee-shifting provision in the lease provided that the prevailing party be awarded the payment of actual attorney fees; the award of those fees should have been included in the amount in controversy and was subject to the district court's jurisdictional limit. Defendant could have sought to transfer the case to the circuit court when it became clear that defendant's attorney fees were exceeding the jurisdictional amount; because it chose not to do so, the case remained in the district court, subject to that court's jurisdictional authority. Although defendant sought actual attorney fees of $48,576.25, the district court properly reduced the award of fees under the fee-shifting provision to conform to the court's jurisdiction limit of $25,000; the circuit court properly affirmed the district court on that issue. Given that conclusion, defendant's remaining issue—that the trial court erred by failing to enforce the lease provision requiring an award of *actual* attorney fees to the prevailing party—was moot because an award of the actual attorney fees in this case would have exceeded the district court's jurisdictional limit.

Affirmed.

COURTS — DISTRICT COURTS — JURISDICTION — JURISDICTIONAL LIMITS — AWARD OF ATTORNEY FEES UNDER FEE-SHIFTING PROVISIONS INCLUDED IN AMOUNT-IN-CONTROVERSY CALCULATIONS.

Under MCL 600.8301(1), district courts in Michigan have exclusive jurisdiction in civil actions when the amount in controversy does not exceed $25,000, and district courts may not award damages in excess of that amount; a claim for attorney fees under a contractual fee-shifting provision is part of the amount in controversy (and therefore an element of general damages) when calculating jurisdictional limits.

Hardy, Lewis & Page, PC (by *Russell G. Carniak*) for plaintiff.

Kerr, Russell and Weber, PLC (by *Michael A. Sneyd* and *Broc Gullett*) for defendant.

Before: SWARTZLE, P.J., and JANSEN and BORRELLO, JJ.

SWARTZLE, P.J. Our district courts are courts of limited jurisdiction, and one of the limits is that the amount in controversy must not exceed $25,000. Damages are generally included in that calculation, while litigation expenses, including attorney fees, are generally excluded. The primary question on appeal is how to treat a claim for attorney fees under the parties' contractual fee-shifting provision—as damages, and therefore included in the amount in controversy, or as litigation expenses, and therefore excluded from the amount in controversy? As explained, we conclude that attorney fees sought under a contractual fee-shifting provision are a form of general damages and, as a result, are properly considered as part of the amount in controversy. Finding no error by the district court or circuit court on this issue, we affirm.

I. BACKGROUND

Plaintiff initiated this lawsuit against defendant in district court. Defendant had leased commercial space from plaintiff. When the lease expired, defendant vacated the premises, and plaintiff alleged that defendant left the premises in poor condition. Plaintiff claimed that it spent approximately $6,132 on repairs to the property necessitated by defendant's actions, and it sent defendant a bill for the cost of the repairs, but defendant declined to reimburse plaintiff.

Relevant to this appeal, the lease included a fee-shifting provision. Paragraph 52 of the lease reads in full, "In the event of a dispute arising hereunder, the non-prevailing party shall be responsible for the payment of the actual attorney fees incurred by the prevailing party."

Plaintiff sued defendant, alleging claims for breach of contract and promissory estoppel and seeking, among other relief, attorney fees. Defendant filed a counterclaim against plaintiff, alleging its own claim for breach of contract and seeking, among other relief, attorney fees. After a bench trial, the district court ruled in favor of defendant, awarding it $2,692.56 in damages on its counterclaim. Defendant moved for an award of attorney fees of $48,576.25 under the fee-shifting provision of the parties' contract.

The district court ruled that an award of attorney fees under the parties' contract qualified as damages subject to its jurisdictional limit of $25,000. The district court entered judgment in the amount of $25,000 in favor of defendant, including an award on the counterclaim of $2,692.56 and an award of fees under the fee-shifting provision of $22,307.44.

Defendant moved for reconsideration of that decision; the district court denied the motion. Defendant also moved for attorney fees as sanctions, arguing that plaintiff's lawsuit was frivolous. The district court found that plaintiff's complaint was not frivolous and denied the motion.

Defendant appealed to the circuit court. On appeal, defendant argued that the district court had erred by capping defendant's combined award at the district court's jurisdictional limit. According to defendant, attorney-fee awards should not count toward the jurisdictional limit, whether contractual or otherwise. De-

fendant also argued that the district court erred with respect to its denial of defendant's motion for sanctions. The circuit court affirmed the district court's judgment, including the cap on contractual attorney fees, but the court vacated the order denying defendant's motion for sanctions and remanded to the district court for further findings.

Defendant appealed, by leave granted, the circuit court's affirmance with respect to the contractual attorney fees. *ABCS Troy LLC v Loancraft LLC*, unpublished order of the Court of Appeals, entered October 30, 2019 (Docket No. 349835). The matter involving sanctions is not at issue on appeal.

II. ANALYSIS

Defendant raises two claims of error on appeal. First, the district court misread existing caselaw by holding that attorney fees awarded under a contractual fee-shifting provision are counted against that court's jurisdictional cap of $25,000. Defendant points to cases holding that attorney fees are not included in the amount in controversy with respect to a district court's subject-matter jurisdiction. Second, the district court did not enforce the parties' lease as written, which called for the award of "actual" attorney fees, not reasonable fees.

We begin with the first claim, and as explained, our resolution of that claim moots the second one.

A. STANDARD OF REVIEW

Ordinarily, we review a trial court's decision on attorney fees for an abuse of discretion. *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008). In this case, however, the critical question involves the

jurisdiction of the district court. This presents a question of law that we review de novo. *Bank v Mich Ed Ass'n-NEA*, 315 Mich App 496, 499; 892 NW2d 1 (2016).

B. DISTRICT COURT'S SUBJECT-MATTER JURISDICTION

Our circuit courts are this state's trial courts of general jurisdiction. Const 1963, art 6, § 1. The 1963 Michigan Constitution authorized the Legislature to create courts of limited jurisdiction, and the legislative body "exercised this constitutional authority in 1968 by creating the district court." *Hodge v State Farm Mut Auto Ins Co*, 499 Mich 211, 216; 884 NW2d 238 (2016). As set in statute, the district court has "exclusive jurisdiction in civil actions when the *amount in controversy* does not exceed $25,000.00." MCL 600.8301(1) (emphasis added). Our courts have held that, because the district court is limited to deciding cases in which the amount in controversy does not exceed $25,000, it "may not award damages in excess of that amount." *Hodge*, 499 Mich at 216-217. "In other words, a plaintiff pleading a case of damages for $25,000 or less who proves and obtains a verdict for more than $25,000 would still be limited to awardable damages of not more than the district court's jurisdictional limit of $25,000." *Meisner Law Group, PC v Weston Downs Condo Ass'n*, 321 Mich App 702, 719; 909 NW2d 890 (2017), citing *Hodge*, 499 Mich at 224.

C. THE CROSS OF TWO LINES OF PRECEDENT

The critical question in this case lies at the cross of two lines of precedent. In the first line, our courts have long recognized that this state follows "the American rule" with respect to attorney fees. *Pransky v Falcon Group, Inc*, 311 Mich App 164, 193; 874 NW2d 367

(2015). Generally speaking, each party bears its own litigation expenses, including that party's own attorney fees, and therefore, these expenses are usually not part of the matter at controversy between the parties. See *Hodge*, 499 Mich at 223-224; see also 14AA Wright & Miller, Federal Practice & Procedure (2020), § 3712; *Denbo Iron & Metal Co v Transp Ins Co*, 792 F Supp 1234, 1236 (ND Ala, 1992). Trial courts can award expenses (including fees) to a prevailing party under certain circumstances, see, e.g., MCL 600.2591, but for the most part, each party is responsible for paying its own expenses to pursue its claims or mount its defenses. Moreover, it will not be known for certain at the outset how much a party will incur in attorney fees during the lawsuit, and subject-matter jurisdiction must be established at the outset. Accordingly, when determining the amount in controversy of a lawsuit, courts generally do not consider a party's own "fees, costs, and interest" in that calculation. *Hodge*, 499 Mich at 223-224. And particularly relevant here, when "fees, costs, and interest" are not part of the amount in controversy, an award to the prevailing party for reimbursement of these expenses is not subject to the district court's $25,000 cap on damages. See *Clohset v No Name Corp (On Remand)*, 302 Mich App 550, 569; 840 NW2d 375 (2013).

The second line of precedent also begins with the American rule. This precedent recognizes that the American rule is not an absolute one and that parties can contract around it, as the parties did here with their fee-shifting provision in the lease. *Central Transp, Inc v Fruehauf Corp*, 139 Mich App 536, 548; 362 NW2d 823 (1984) ("Contractual provisions for payment of reasonable attorney fees are judicially enforceable."). When parties do this, a claim of attorney fees under a contractual fee-shifting provision is

one for general damages. *Pransky*, 311 Mich App at 194. And as relevant here, general damages count toward the amount in controversy. *Souden v Souden*, 303 Mich App 406, 412; 844 NW2d 151 (2013).

These two lines of precedent cross in this case. If we hold, as defendant urges, that an award of contractual attorney fees is to be treated no differently than any other instance of "fees, costs, and interest" incurred by a party, then the district court's award to defendant of contractual fees under the lease would not be subject to that court's subject-matter jurisdiction. In that instance, the fee award would not be subject to the $25,000 cap. Alternatively, if we hold, as plaintiff argues, that an award of contractual fees is to be treated differently than other instances of "fees, costs, and interest" incurred by a party because it is an award on a claim for general damages, then the district court's fee award would be subject to that court's subject-matter jurisdiction and the $25,000 cap.

D. CONTRACTUAL ATTORNEY FEES AS PART OF THE AMOUNT IN CONTROVERSY

We begin our analysis by determining whether the district court had subject-matter jurisdiction in the first instance. See *Clohset*, 302 Mich App at 560 (holding that courts must, upon challenge, "or even sua sponte, confirm that subject-matter jurisdiction exists") (quotation marks and citations omitted). When examining whether there is subject-matter jurisdiction, courts look to the face of the parties' pleadings and "the amount prayed for in the complaint" to determine the amount in controversy. *Hodge*, 499 Mich at 220-221.

Neither party prayed for damages in excess of $25,000. In fact, the various allegations of repair costs

and breaches of contract were quite modest, and this is consistent with the district court's award of $2,692.56 to defendant on its breach-of-contract counterclaim. Both parties sought attorney fees, and their contractual fee-shifting provision left no discretion to the trial court—"the non-prevailing party *shall* be responsible for the payment of the actual attorney fees incurred by the prevailing party." Lease, ¶ 52 (emphasis added). And yet, regardless of whether attorney fees were to be included in the amount-in-controversy calculation, neither party has suggested that there was a question raised at the outset of whether the amount in controversy was within the $25,000 limit. This makes sense, as the amounts sought for breaches of contract were modest, and one would not ordinarily expect that a dispute over such amounts would generate the attorney fees that were ultimately incurred in this case. Moreover, the parties have made no showing of bad faith, which could divest the district court of subject-matter jurisdiction. *Hodge*, 499 Mich at 215-216, 223-224. Accordingly, we are satisfied that the district court possessed subject-matter jurisdiction over this lawsuit. *Id*. at 217.

This does not, however, answer the question of whether a claim for contractual attorney fees is part of the amount-in-controversy calculation and thus subject to the district court's jurisdictional cap of $25,000. Michigan courts have long recognized that circumstances might change during a lawsuit, and the amount-in-controversy calculation is simply one made, based on the pleadings, for purposes of subject-matter jurisdiction. *Id*. at 223-224. Thus, the fact that actual damages proved at trial might exceed the district court's jurisdictional limit does not undermine that court's jurisdiction, *Peters v Gunnell, Inc*, 253 Mich App 211, 224 n 10; 655 NW2d 582 (2002) ("Jurisdic-

tional allegations are not viewed in hindsight."), though that fact might mean that the prevailing party's damage award is capped at the jurisdictional limit, *Hodges*, 499 Mich at 216-217, 223-224.

Michigan courts have not squarely addressed how to treat contractual attorney fees with respect to the amount in controversy. Nor have we been able to glean much guidance on this specific question from our caselaw. In *Peters*, for example, this Court recounted the general rule that attorney fees are ordinarily not counted toward the amount in controversy, but the Court then suggested that fees required by statute to be paid to the prevailing party would count toward that calculation. See *Peters*, 253 Mich at 224 n 10. Fees required to be paid under statute are analogous to fees required to be paid under contract. With that said, the observation in *Peters* was dicta found in a footnote, and, therefore, we are hesitant to draw much guidance from this.

We turn next to caselaw outside of our jurisdiction. Federal courts have a rich body of caselaw dealing with this question in a different context—whether attorney fees required by contract or statute are to be included in the amount-in-controversy calculation for purposes of diversity jurisdiction. The weight of caselaw confirms that such fees are included. The United States Supreme Court, for example, has long held that when a statute provides for recovery of attorney fees, a reasonable estimate of those fees may be used in calculating the amount in controversy when a party seeks to remove a case on the grounds of diversity jurisdiction. See, e.g., *Missouri State Life Ins Co v Jones*, 290 US 199, 202; 54 S Ct 133; 78 L Ed 267 (1933). As another example, the United States Court of Appeals for the First Circuit recognized over four

decades ago that attorney fees are usually not considered as part of the amount in controversy: "As a general rule, attorney's fees are excludable in determining the matter in controversy because, normally, the successful party does not collect his attorney's fees in addition to or as part of the judgment." *Velez v Crown Life Ins Co*, 599 F2d 471, 474 (CA 1, 1979). The court went on, however, and recognized that this was not an absolute rule: "There are, however, two logical exceptions to this rule: one, where the fees are provided for by contract, and, two, where a statute mandates or allows the payment of such fees . . . ." *Id*. (citation omitted). Scores of cases have similarly recognized these two exceptions to the general rule in the federal-diversity context. See, e.g., *El v AmeriCredit Fin Servs, Inc*, 710 F3d 748, 753 (CA 7, 2013); *Kroske v US Bank Corp*, 432 F3d 976, 980 (CA 9, 2005); *Smith v GTE Corp*, 236 F3d 1292, 1305 (CA 11, 2001); *Miera v Dairyland Ins Co*, 143 F3d 1337, 1340 (CA 10, 1998); *Graham v Henegar*, 640 F2d 732, 736 (CA 5, 1981); *Clark v Nat'l Travelers Life Ins Co*, 518 F2d 1167, 1168 (CA 6, 1975); *Organic Consumers Ass'n v RC Bigelow, Inc*, 314 F Supp 3d 344, 353 (D DC, 2018); *Denbo Iron & Metal*, 792 F Supp at 1236; *Srour v Barnes*, 670 F Supp 18, 22 n 3 (D DC, 1987).

Defendant points us to a decision by the Supreme Court of Colorado, *Ferrell v Glenwood Brokers, Ltd*, 848 P2d 936 (Colo, 1993). The relevant facts in *Ferrell* are similar to those here. The dispute involved a real estate listing contract that included a fee-shifting provision. *Id*. at 938. The county court entered judgment in favor of Glenwood on its breach-of-contract claim and awarded the brokerage firm recovery of commissions paid to Ferrell as well as attorney fees under the fee-shifting provision. *Id*. Ferrell appealed to the district court (the next highest court in that jurisdiction), argu-

ing that the attorney-fee award pushed the total over the county court's jurisdictional limit, defined by statute as " 'civil actions, suits, and proceedings in which the debt, damage, or value of the personal property claimed does not exceed five thousand dollars.' " *Id*. at 938-939 (citation omitted). The district court rejected Ferrell's contention and affirmed the county court.

On certiorari, the Colorado Supreme Court likewise affirmed. The *Ferrell* court first noted, "When Glenwood commenced its action against Ferrell, the total sum sought including the amount owed on the debt, interest thereon, and attorney fees payable by contract was within the jurisdictional limit." *Id*. at 940. Similar to the rule in Michigan, the court observed that the county court did not subsequently lose jurisdiction simply "because Ferrell contested the case." *Id*. The court rejected the argument that once the dispute approached the county court's jurisdictional limit, it should have been transferred to the district court:

> Implementing such a rule would be a waste of judicial resources. Under that theory, cases properly filed in county court would be transferred to district court at any stage of the litigation, even on the eve of (or during) trial. Two, rather than one, courts would be required to process the same case before it was resolved. Such a rule also would encourage bad faith litigation and discourage settlement because fee-shifting contracts would be enforceable only to a very low limit. Furthermore, such contracts, which are clearly enforceable and serve to discourage non-meritorious contract disputes and to encourage settlement, would be ineffective to serve those purposes. [*Id*.]

The court held that the county court "was not ousted of its jurisdiction solely because, at the time judgment was entered, the amount of attorney fees and underlying debt sued upon exceeded $5,000." *Id*.

We conclude that the line of federal cases discussed above is more persuasive on the question at hand than *Ferrell*. Like with Michigan courts, the federal courts recognize that the American rule of bearing one's own litigation expenses is the general rule and that, therefore, attorney fees should not ordinarily be considered as part of the amount in controversy. Like with Michigan courts, the federal courts also recognize that the American rule is not absolute, and parties can contract around that rule with a fee-shifting provision. And, like with Michigan courts, the federal courts further recognize that attorney fees that are sought under a fee-shifting provision are a form of damages, and damages are considered as part of the amount in controversy. It follows deductively that, like with federal courts, Michigan courts should recognize that a claim for attorney fees under the parties' contractual fee-shifting provision is part of the amount in controversy.

As to *Ferrell*, there are several reasons why defendant's reliance on that decision is not persuasive. First, the *Ferrell* court did not hold that contractual attorney fees were to be categorically excluded from the amount-in-controversy calculation. Rather, the court merely noted that the attorney fees payable by contract and incurred prior to the filing of the suit, together with other claimed damages, were "within the jurisdictional limit" when the lawsuit was filed. *Ferrell*, 848 P2d at 940. This is contrary to defendant's position that, like with other ordinary litigation expenses, *no amount* of attorney fees should be included in the amount-in-controversy calculation, whether incurred before or during the lawsuit. Second, it appears that, unlike with district courts in this state, the lower court in *Ferrell* was not prohibited from awarding damages above its jurisdictional limit. Because the award-based dynamics in the county courts in *Ferrell* were different than those

in our district courts, the *Ferrell* court's efficiency-based remarks are arguably not as relevant or persuasive.

And finally, even setting these differences aside, the Michigan Court Rules provide precisely for the scenario that the *Ferrell* court found so troubling, i.e., the transfer of a case during the middle of litigation. Under MCR 4.002(A)(1), a defendant can bring a counterclaim, after the case has been initiated, seeking relief in an amount beyond the district court's jurisdictional limit. The district court can then transfer the case to the circuit court, either based on notice and verified statement or motion. Even more on point, MCR 4.002(B)(1) permits either party to seek transfer of the case from district court to circuit court when that party seeks new relief "of an amount or nature that is beyond the jurisdiction or power of the court to grant." In support of transfer, the moving party must show that (a) there was "a change in condition or circumstance," or (b) there are now "facts not known by the party at the time the action was commenced." *Id*. If the district court concludes that the party "may be entitled" to the relief now sought "and that the delay in making the claim is excusable," then that court must transfer the case to circuit court irrespective of any inefficiencies. See MCR 4.002(B)(2). Although there are inherent tradeoffs in terms of time and resources when a case is transferred from district court to circuit court during the middle of a lawsuit, our Supreme Court, by adopting MCR 4.002(B), has made clear that (1) maintaining the jurisdictional divide between the two trial courts, and (2) permitting a party to seek full recovery when new facts or circumstances permit, are worth the costs associated with transfer. See 5 Longhofer, *Michigan Court Rules Practice* (7th ed), § 4002.1, p 719 (noting that the rule reflects the fact "that causes of action are not static," and a transfer from district court to circuit

court obviates the need to dismiss the district court action and refile it in circuit court).

Defendant further points out that, at the beginning of the lawsuit, neither party could have known for certain the amount of attorney fees it would incur during the lawsuit. While this is no doubt correct, courts do not require absolute certainty from the parties when calculating the amount in controversy. As noted earlier, the amount-in-controversy calculation is simply a reasonable estimate based on the parties' pleadings, and federal courts have long recognized that, when fees are required by statute or contract, the parties can submit a reasonable estimate of the fees that the parties expect to incur during the pendency of the lawsuit. See, e.g., *Missouri State Life Ins*, 290 US at 202; *Miera*, 143 F3d at 1340. We see no reason why litigants in Michigan courts cannot do the same. In this case, given the parties' relatively modest claims for breaches of contract, it is likely that the parties did not expect that the attorney fees incurred by the prevailing party would exceed the damages awarded for the breach-of-contract claim by a factor of eighteen. But at some point, it had to become clear to at least defendant that its own attorney fees were approaching (and then eclipsing) the district court's jurisdictional limit. At that point, defendant could have sought to transfer the case to circuit court under MCR 4.002(B); it did not do so, and thus the case remained in district court, subject to that court's jurisdictional authority.

In sum, we hold that contractual attorney fees are an element of general damages and are to be included in the amount-in-controversy calculation for purposes of a district court's jurisdiction. If a dispute involves a contract with a fee-shifting provision and a party makes a claim for attorney fees under that provision, then that

party can submit a reasonable estimate of such fees that it expects to incur during the lawsuit for purposes of determining the amount in controversy. Therefore, the district court did not err by capping the award of contractual attorney fees to defendant at $22,307.44, nor did the circuit court err by affirming the district court on this issue. Given our holding on defendant's first claim of error, we need not reach its second claim that the district court erred by awarding defendant reasonable, rather than actual, attorney fees, as a full award under either calculation would exceed the district court's cap on the damages it can award in this case.

III. CONCLUSION

Contractual fee-shifting provisions are an exception to the American rule that a party must bear its own litigation expenses. A claim for attorney fees under such a provision is a claim for damages under existing caselaw. Thus, when calculating the amount in controversy for purposes of a district court's jurisdictional limit, a party's claim for attorney fees under a fee-shifting provision should be included, and any award of such fees by the district court is subject to that court's jurisdictional limit.

Accordingly, the district court in this case properly reduced the award of fees to defendant under the parties' lease to fit within the court's jurisdictional limit, and the circuit court properly affirmed the district court on this issue.

Affirmed. Plaintiff, having prevailed in full, may tax costs under MCR 7.219(F).

JANSEN and BORRELLO, JJ., concurred with SWARTZLE, P.J.

PEOPLE v ROBE

Docket No. 355005. Submitted March 4, 2021, at Lansing. Decided March 18, 2021. Approved for publication April 29, 2021, at 9:20 a.m.

Adam C. Robe was charged in the Jackson Circuit Court with operating a motor vehicle while intoxicated, MCL 257.625(1)(b). Defendant was involved in a two-car crash when the other driver ran a red light. When they arrived at the crash scene, the police officers focused on the other driver, who had been injured. Subsequently, a police officer spoke with defendant for three minutes before requesting that he take a preliminary breath test (PBT). The PBT indicated that defendant, who consented to the test, had a blood alcohol content (BAC) of 0.114%. The police did not conduct field sobriety tests before arresting defendant on the basis of the PBT result. At the station, the police obtained a search warrant for a blood draw, which indicated that defendant had a 0.134 % BAC. Defendant moved to suppress the PBT results because the PBT was not administered in accordance with Mich Admin Code R 325.2655. The court, Susan B. Jordan, J., denied the motion. The court assumed that the rule had been violated but reasoned that the violation did not warrant suppressing the PBT results. Defendant appealed by leave granted.

The Court of Appeals *held*:

For an arrest to be lawful, the police officer making the arrest must have probable cause. Probable cause to arrest for a violation of MCL 257.625(1)(b) exists when a person has an alcohol content of .08 grams or more per 210 liters of breath. Rule 325.2655(2)(b) provides that a person may be administered a preliminary breath alcohol analysis on a preliminary breath alcohol test instrument only after the operator determines that the person has not smoked, regurgitated, or placed anything in his or her mouth for at least 15 minutes; the procedure must be approved by the department and must be in compliance with the rule. The purpose of the rule is to ensure accuracy of test results. There was no dispute in this case that the police officer who administered the test did not comply with the administrative rule; specifically, the officer only observed defendant for three minutes before

administering the PBT, not for 15 minutes as required by the rule. In addition, the officer failed to ask defendant whether he had smoked, regurgitated, or placed anything in his mouth for at least 15 minutes before the test. The violation of the rule was significant and called into question the accuracy of the PBT. Accordingly, the trial court erred by denying defendant's motion to suppress. On remand, defendant could file a motion challenging whether there was probable cause to arrest without the PBT results.

Reversed and remanded.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Jerard M. Jarzynka*, Prosecuting Attorney, and *Jerrold Schrotenboer*, Chief Appellate Attorney, for the people.

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

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

PER CURIAM. In this interlocutory appeal, defendant appeals by leave granted[1] the trial court's order denying his motion to suppress evidence of his preliminary breath test (PBT) results. We reverse.

I. BACKGROUND

Defendant, Adam C. Robe, was involved in a two-car crash after the driver of the other vehicle ran a red light. The record reveals that the other driver was at fault. When the officers arrived on the scene, they focused on assisting the driver of the other vehicle, who had sustained serious injuries. Afterward, an officer spoke with defendant for about three minutes before asking him to take a PBT. Defendant consented to the

[1] *People v Robe*, unpublished order of the Court of Appeals, entered November 6, 2020 (Docket No. 355005).

test, which indicated a 0.114% blood alcohol content (BAC). Field sobriety tests were not performed, and on the basis of the PBT results, the officer arrested defendant and obtained a search warrant for a blood draw. The blood draw revealed a 0.134% BAC.

After he was bound over to the circuit court, defendant moved to suppress the PBT results on the ground that the PBT was not administered in accordance with Mich Admin Code R 325.2655. Specifically, defendant contended that the officer administering the PBT failed to observe him for 15 minutes before administering the PBT. Defendant explained that if the PBT results were suppressed, he would then bring a motion challenging whether there was probable cause for his arrest. The prosecutor did not file a written response but argued at the hearing that the motion should be denied because the PBT results would not be admitted at trial. Further, the prosecutor argued, defendant had voluntarily submitted to the PBT and the 15-minute observation period did not have to be 15 uninterrupted minutes. The trial court took the matter under advisement and later issued an oral ruling from the bench denying defendant's motion. The court assumed that the administrative rule had been violated but determined that, under the facts of this case, the violation did not warrant suppressing the PBT results.

II. ANALYSIS

Defendant argues that the trial court erred by failing to suppress the PBT results. We agree.[2]

[2] We review a trial court's findings of fact associated with a motion to suppress evidence for clear error, but we review de novo both questions of law relevant to the suppression motion and the judge's ultimate decision. See *People v Hawkins*, 468 Mich 488, 496; 668 NW2d 602 (2003); *People v Unger*, 278 Mich App 210, 243; 749 NW2d 272 (2008).

"For an arrest to be lawful, the police officer making the arrest must have probable cause[.]" *People v Vandenberg*, 307 Mich App 57, 69; 859 NW2d 229 (2014). See also *People v Lyon*, 227 Mich App 599, 611; 577 NW2d 124 (1998) ("The constitutional validity of an arrest depends on whether probable cause to arrest existed at the moment the arrest was made by the officer.").

The PBT administered to defendant indicated a breath alcohol content of 0.114%, which is sufficient to establish probable cause to believe that he was operating a motor vehicle while intoxicated. MCL 257.625(1)(b) (providing that operating while intoxicated encompasses when a person has an alcohol content of 0.08 grams or more per 210 liters of breath). The question is whether defendant's PBT results can be considered when determining whether there was probable cause to arrest given that the test was not administered in compliance with Rule 325.2655, which states, in pertinent part:

> (2) A procedure that is used in conjunction with preliminary breath alcohol analysis must be approved by the department and shall be in compliance with all of the following provisions:
>
> * * *
>
> (b) A person may be administered a preliminary breath alcohol analysis on a preliminary breath alcohol test instrument only after the operator determines that the person has not smoked, regurgitated, or placed anything in his or her mouth for at least 15 minutes. [See also *People v Mullen*, 282 Mich App 14, 23; 762 NW2d 170 (2008) ("A PBT should be administered only after the defendant's mouth has been clear of foreign substances for 15 minutes.").]

"The purpose of the rule is to ensure accuracy of test results." *Mullen*, 282 Mich App at 23.

There does not appear to be any dispute that the officer who administered the PBT did not comply with this administrative rule. The officers who arrived on the scene began assisting the other driver. It follows that defendant went unobserved during this period. An officer then observed defendant for approximately three minutes before administering the PBT. Accordingly, the officer who conducted the PBT did not observe defendant for 15 minutes, either continuously or collectively, before administering the test. Nor did the officer ask defendant questions to determine whether he had smoked, regurgitated, or placed anything in his mouth for at least 15 minutes before the test.

Defendant relies on two cases in which the administrative rule requiring a 15-minute observation period before administering a Breathalyzer test was not complied with: *People v Boughner*, 209 Mich App 397; 531 NW2d 746 (1995), and *People v Wujkowski*, 230 Mich App 181; 583 NW2d 257 (1998). Because the administrative rule governing Breathalyzer tests[3] is similar to the one controlling the administration of PBTs, we view *Boughner* and *Wujkowski* as instructive to the resolution of the question presented in this appeal.

In *Boughner*, 209 Mich App at 398-400, this Court held that the failure to comply with the 15-minutes observation rule sufficiently undermined the accuracy of the defendant's Breathalyzer test results to warrant the reversal of his plea-based conviction. We reasoned that, even though there was video of approximately 35 minutes before the Breathalyzer was administered, the

[3] The administrative rule governs the administration of "evidential breath alcohol test instrument[s]," R 325.2655(1)(e), and the breath test at issue in *Boughner* and *Wujkowski* was the Breathalyzer.

operator of the Breathalyzer observed the defendant for no more than eight minutes. *Id*. at 399. Moreover, the operator did not continuously observe the defendant for those eight minutes, and the defendant's hand was either on his face or in his mouth during the time in which he was videotaped. *Id*. at 399-400. We concluded that it was impossible to tell whether the defendant had placed something in his mouth during those times, and because of the questions that arose from a review of the video, the accuracy of the Breathalyzer results was put into question. *Id*. at 400.

In *Wujkowski*, 230 Mich App at 188-189, we held that violation of the 15-minute observation rule did not warrant suppression of the Breathalyzer test results because there was only a *de minimis*, technical violation of the regulation. In that case, the operator who conducted the Breathalyzer test observed the defendant from 5:05 a.m. to 5:23 a.m., i.e., for more than 15 minutes, before administering the first test. *Id*. at 185. The alleged variance from the rule was a six-second period during which the operator walked away from the defendant to check the machine, and during that time there was another officer present while the operator left to check the machine. *Id*. at 185-186. We concluded that "the momentary time that the officer did not observe defendant was so minimal that the test results cannot be assumed to be inaccurate, and there was no allegation that defendant placed anything in his mouth or regurgitated." *Id*. at 186. Accordingly, we held that "suppression of the Breathalyzer test results is not an appropriate remedy in this case because any violation of the administrative rule was harmless." *Id*. at 187. As we stated in the opinion, the facts of the case were materially distinguishable from those in *Boughner*. *Id*. at 187-188.

This case is far closer to *Boughner* than it is to *Wujkowski*. Unlike in *Wujkowski*, the period of nonobservance in this case was much longer than six seconds. Rather, similar to *Boughner*, the officer who administered the test only observed defendant for three minutes, and there is no evidence that anyone else observed defendant for the additional 12 minutes before the test was administered. Further, defendant was left unobserved for a substantial period of time following the accident. Considering the amount of time defendant went unobserved, along with the fact that a significant portion of the 15-minute period remained, the violation of the administrative rule was significant and calls into question the accuracy of the PBT. Accordingly, the trial court erred by denying defendant's motion to suppress.

Defendant requests that we remand so that he may file a motion challenging whether there was probable cause for his arrest absent the PBT results. The prosecution maintains that defendant's arrest and the search warrant for the blood draw were supported by probable cause even without the PBT results. The trial court did not address this issue, however, and we do not view it as properly before us considering that defendant's motion only sought to suppress the PBT results. On remand, defendant may file a motion to determine whether there was probable cause to arrest him for operating a motor vehicle while intoxicated.

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

MARKEY, P.J., and SHAPIRO and GADOLA, JJ., concurred.

BRIGHTMOORE GARDENS, LLC v MARIJUANA REGULATORY AGENCY
UTOPIA GARDENS LLC v MARIJUANA REGULATORY AGENCY

Docket Nos. 353698 and 353739. Submitted April 13, 2021, at Lansing. Decided May 6, 2021, at 9:05 a.m. Leave to appeal denied 508 Mich 983 (2021).

Brightmoore Gardens, LLC, and others (Docket No. 353698) and Utopia Gardens LLC and others (Docket No. 353739) filed separate actions against the Marijuana Regulatory Agency in the Court of Claims, seeking orders compelling the agency to issue each plaintiff a marijuana-establishment license under the Michigan Regulation and Taxation of Marihuana Act, MCL 333.27951 *et seq*. Plaintiffs had requested the respective city clerks of Detroit or Traverse City sign an Attestation 2-C form—i.e., a form created by the agency on which the clerk of the municipality where an applicant plans to open a marijuana establishment is supposed to indicate that (1) the municipality has not adopted an ordinance prohibiting adult-use marijuana establishments, (2) the municipality has an ordinance allowing adult-use marijuana establishments and the applicant is not in violation of the ordinance, or (3) the municipality has adopted an ordinance allowing adult-use marijuana establishments and the applicant is in violation of the ordinance. The city clerks refused to sign the forms, and plaintiffs submitted their license applications to the agency without the Attestation 2-C forms. At the time of the clerks' refusals and plaintiffs' submission of their applications to the agency, neither Detroit nor Traverse City had adopted an ordinance prohibiting marijuana establishments although, within two weeks of plaintiffs' submitting their individual applications, Detroit and Traverse City both passed ordinances prohibiting marijuana establishments in their respective cities. Thereafter, the agency denied plaintiffs' license applications, and plaintiffs filed suit. The agency moved for summary disposition in both cases. The court, CYNTHIA D. STEPHENS, J., granted the motions under MCR 2.116(C)(8), concluding that plaintiffs had failed to state a claim. Plaintiffs appealed in each case, and the Court of Appeals consolidated the cases.

The Court of Appeals *held*:

1. MCL 333.27956 allows a municipality to opt out of allowing marijuana establishments by enacting an ordinance prohibiting them within the municipality. While the act initially vested the Department of Licensing and Regulatory Affairs (LARA) with the responsibility to promulgate rules to implement, administer, and enforce the act, those responsibilities were subsequently transferred to the agency, which issued emergency rules that were in effect during the pendency of this case.

2. Under MCL 333.27959(1), each application for a state license must be submitted to the agency. Upon receipt of a complete application and application fee, the agency must forward a copy of the application to the municipality in which the marijuana establishment is to be located, determine whether the applicant and the premises qualify for the state license and comply with the act, and issue within 90 days the appropriate state license or send the applicant a notice of rejection setting forth specific reasons why the department did not approve the state license application. Under MCL 333.27959(3), the agency must approve a state license application and issue a state license if (1) the applicant has submitted an application in compliance with the promulgated rules, is in compliance with the act, and has paid the required fee and (2) the municipality in which the proposed marijuana establishment will be located does not notify the department that the proposed establishment is not in compliance with an ordinance consistent with MCL 333.27956 in effect at the time of application. Emergency Rule 8, which set forth the application requirements for a state license to operate a marijuana establishment, provided that an application must include, among other things, confirmation of compliance with any municipal ordinance adopted under MCL 333.27956; the confirmation had to be on the attestation form provided by the agency and had to include verification that the municipality had not adopted an ordinance prohibiting marijuana establishments and the date and signature of the clerk of the municipality or their designee on the attestation form attesting that the information stated in the document is correct. Emergency Rule 14(2) provided that a state license could be denied if the applicant failed to comply with the rules and the application requirements under Emergency Rules 6, 7, and 8 or the applicant failed to satisfy the confirmation-of-compliance-by-a-municipality requirement in accordance with the rules; thus, an applicant's failure to comply with Emergency Rule 8 could result in the application being denied. In tandem with those rules, Emergency Rule 9(2)(g) provided that an applicant was ineligible to receive a

state license if the agency determined the municipality in which the applicant's proposed marijuana establishment would operate had adopted an ordinance that prohibited marijuana establishments or that the proposed establishment was noncompliant with an ordinance adopted by the municipality under MCL 333.27956. Although the language of Emergency Rule 9(2)(g) (specifically, that an applicant *is ineligible* for a license if the agency determines that the municipality *has adopted an ordinance that prohibits marijuana establishments*) and the language of MCL 333.27959 (specifically, that the agency shall grant a license to an otherwise eligible applicant if the municipality does not notify the agency that the application is not in compliance with a municipal ordinance *in effect at the time of application*) were different, they did not conflict with each other. Given the dictionary definition of "at the time of," the undefined phrase "in effect at the time of application" in MCL 333.27959 means "when the application happened." Because the statute grants the agency 90 days in which to consider the application, the "time of application" is any time within that 90-day period, which begins on the date the application is submitted. Given that the statute requires the agency to issue a license as long as the municipality has not certified the existence of an ordinance barring retail marijuana establishments, the converse is likewise true—i.e., the agency must reject an application if such a municipal certification is received at any time during the 90-day application period. That MCL 333.27959(3)(b) does not contain the language "upon receipt of" or "after receipt of"—language that is used elsewhere in the act and indicates the specific time at which an application is submitted—further supports the interpretation that the "time of application" is any time within the 90-day period. For those reasons, Emergency Rule 9(2)(g) did not conflict with MCL 333.27959. The act envisions cooperation between the agency and municipalities, and Emergency Rules 8 and 14 granted municipalities authority to alert the agency regarding whether the municipality had enacted an ordinance prohibiting the proposed establishment and whether the applicant had complied. Thus, the agency could properly consider municipal ordinances in effect at the time it rendered its decision regarding an application. In this case, the trial court correctly concluded that Emergency Rule 9(2)(g) did not conflict with MCL 333.27959(3)(a) and (b) and that it was therefore valid. Even though the cities did not have ordinances in effect prohibiting marijuana establishments when plaintiffs submitted their applications, the agency properly rejected the applications because Detroit and Traverse City had those ordinances in effect when the agency rendered its decision within the 90-day consideration

period. Accordingly, the trial court properly granted summary disposition in favor of the agency. Given that resolution, plaintiffs' remaining argument—i.e., that Emergency Rule 8(1)(e)(iii) was arbitrary and capricious—was not considered.

Affirmed.

Pollicella, PLLC (by *Denise Pollicella* and *Jacqueline Langwith*) for plaintiffs.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Erika N. Marzorati* and *Risa N. Hunt-Scully*, Assistant Attorneys General, for the Marijuana Regulatory Agency.

Before: JANSEN, P.J., and RONAYNE KRAUSE and GADOLA, JJ.

GADOLA, J. In these consolidated appeals, plaintiffs[1] appeal as of right the orders of the trial court granting defendant, the Marijuana Regulatory Agency (MRA),[2] summary disposition under MCR 2.116(C)(8) of their claims under the Michigan Regulation and Taxation of Marihuana Act (MRTMA), MCL 333.27951 *et seq*. We affirm.

I. FACTS

In these consolidated appeals, plaintiffs are applicants who sought to obtain licenses to operate commercial marijuana establishments in either Detroit or Traverse City. Defendant denied each plaintiff's application after the municipality where the proposed establish-

[1] We use the term "plaintiffs" in this opinion to refer to the plaintiffs in both Docket No. 353698 and Docket No. 353739.

[2] Throughout this opinion, we use the term "defendant," instead of the term "the MRA" when referring to the MRA's actions in these consolidated cases.

ment was to be located refused to approve the application, though at the time the applications were submitted to defendant, local ordinances in those municipalities did not prohibit the establishments. Plaintiffs contend that the emergency rules under which defendant denied the applications were invalid because they were contrary to the MRTMA.

By way of background, the MRTMA is a 2018 voter-initiated law that generally decriminalizes the possession and use of marijuana for persons 21 years of age or older and provides for the legal production and sale of marijuana. See MCL 333.27952; 2018 IL 1. Under § 6 of the MRTMA, MCL 333.27956, a municipality may opt out of the act by enacting an ordinance prohibiting marijuana establishments within the municipality. That same statutory section permits a municipality that does not opt out to impose reasonable restrictions on marijuana establishments within the municipality.

Initially, the act vested the Department of Licensing and Regulatory Affairs (LARA) with the responsibility to implement the act, MCL 333.27957(1); MCL 333.27953(b), including the responsibility to promulgate rules "pursuant to section 8 of this act [MCL 333.27958] that are necessary to implement, administer, and enforce this act," MCL 333.27957(1)(a). However, Executive Reorganization Order No 2019-02[3] created the MRA within LARA and transferred to the MRA "the authorities, powers, duties, functions and responsibilities" of LARA under Michigan's marijuana laws.[4]

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[3] Executive Reorganization Order No. 2019-2 was promulgated March 1, 2019, and became effective May 1, 2019.

[4] Specifically, the executive order transferred to the MRA LARA's powers under the following: the Michigan Medical Marihuana Act, MCL 333.26421 *et seq*., the Medical Marihuana Facilities Licensing

Among the powers and duties transferred to defendant were the power and the duty to promulgate rules under the MRTMA to implement and administer the act, MCL 333.27958(1), including "[p]rocedures for issuing a state license pursuant to section 9 [MCL 333.27959]," MCL 333.27958(1)(a). MCL 333.27959 provides, in relevant part:

> 1. Each application for a state license must be submitted to the department. Upon receipt of a complete application and application fee, the department shall forward a copy of the application to the municipality in which the marihuana establishment is to be located, determine whether the applicant and the premises qualify for the state license and comply with this act, and issue the appropriate state license or send the applicant a notice of rejection setting forth specific reasons why the department did not approve the state license application within 90 days.
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> 3. Except as otherwise provided in this section, the department shall approve a state license application and issue a state license if:
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> (a) the applicant has submitted an application in compliance with the rules promulgated by the department, is in compliance with this act and the rules, and has paid the required fee;
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> (b) the municipality in which the proposed marihuana establishment will be located does not notify the department that the proposed marihuana establishment is not in compliance with an ordinance consistent with section 6 of this act [MCL 333.27956] and in effect at the time of application[.]

Act, MCL 333.27101 *et seq*., the Marihuana Tracking Act, MCL 333.27901, *et seq*., and the Michigan Regulation and Taxation of Marihuana Act, MCL 333.27951 *et seq*. EO 2019-7(1)(d).

After being vested with the power and the duty to administer the MRTMA, the MRA issued emergency rules that were in effect at the times relevant to the events in these cases.[5] Included in these emergency rules was Emergency Rule 8, which set forth the application requirements for a state license to operate a marijuana establishment. Emergency Rule 8 provided, in relevant part:

> (1) A complete application for a state license must include all the information specified in Rule 7 and all of the following:
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> * * *
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> (e) Confirmation of compliance with any municipal ordinances the municipality may have adopted under section 6 of the act, MCL 333.27956. For purposes of these rules, confirmation of compliance must be on an attestation form prepared by the agency that contains all of the following information:
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> (i) Verification that the municipality has not adopted an ordinance prohibiting marihuana establishments.
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> (ii) Description of any regulations within the municipality that apply to the proposed marihuana establishment.
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> (iii) The date and signature of the clerk of the municipality or his or her designee on the attestation form attesting that the information stated in the document is correct.

An applicant's failure to comply with Emergency Rule 8 could result in denial of the license under Emergency Rule 14, which provided, in relevant part:

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[5] In June 2020, defendant issued permanent rules that replaced the emergency rules. See Mich Admin Code, R 420.1 *et seq*.

> (2) In addition to the reasons for denial in the act, a state license may be denied by the agency for any of the following reasons:
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> * * *
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> (c) The applicant has failed to comply with these rules and the application requirements pursuant to Rules 6, 7, and 8.
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> * * *
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> (f) The applicant failed to satisfy the confirmation of compliance by a municipality requirement in accordance with these rules.

In addition, Emergency Rule 9 provided, in relevant part:

> (2) An applicant is ineligible to receive a state license if any of the following circumstances exist:
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> * * *
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> (g) The agency determines the municipality in which the applicant's proposed marihuana establishment will operate has adopted an ordinance that prohibits marihuana establishments or that the proposed establishment is noncompliant with an ordinance adopted by the municipality under section 6 of the act, MCL 333.27956.

Defendant created application materials that included the "Attestation 2-C" form, which required the notarized signature of the clerk of the municipality after checking one of three boxes verifying that (1) the municipality has not adopted an ordinance prohibiting adult-use marijuana establishments, or (2) the municipality has an ordinance allowing adult-use marijuana establishments and the applicant is not in violation of the ordinance, or (3) the municipality has adopted an

ordinance allowing adult-use marijuana establishments and the applicant is in violation of the ordinance.

On October 31, 2019 through November 4, 2019, the plaintiffs in this case who were seeking to license marijuana establishments in Detroit sought to obtain the signature of Detroit's city clerk. The parties do not dispute that at that time, Detroit did not have an ordinance in place prohibiting marijuana establishments under the MRTMA. Nonetheless, the Detroit city clerk refused to sign the Attestation 2-C form as requested by plaintiffs. Of the plaintiffs applying to license marijuana establishments in Detroit, all but two submitted their applications to defendant without the verification of the city clerk on either November 1, 2019, or November 4, 2019, but with affidavits asserting that the city clerk had refused to sign the Attestation 2-C form.[6] On November 12, 2019, Detroit adopted an ordinance prohibiting marijuana establishments in Detroit.

By letters dated January 29, 2020, defendant denied the Detroit applicants' applications for licensure under MCL 333.27959(3)(a) and (b) and Emergency Rules 9(2)(g) and 14(2)(c) and (f). The denial letters stated the basis for the denials as the failure of the applications to comply with Emergency Rule 8(1)(e) because they failed to include the signature of the Detroit city clerk on the Attestation 2-C form verifying that the municipality had not adopted an ordinance prohibiting marijuana establishments. This failure resulted in denial under Emergency Rule 14(2)(c) (failure to comply with Emer-

[6] The remaining two plaintiffs applying for a marijuana-establishment license in Detroit were allegedly delayed while attempting to obtain the clerk's signature; the two plaintiffs eventually submitted their applications without the clerk's signature on November 20, 2019, and November 22, 2019.

gency Rule 8) and under Emergency Rule 14(2)(f) (failure to obtain confirmation of municipal compliance). Because the applications were not filed in compliance with defendant's rules, defendant further denied each plaintiff's license under MCL 333.27959(3)(a). Defendant also denied each license under MCL 333.27959(3)(b) and Emergency Rule 9(2)(g), on the basis that the city of Detroit had notified defendant that each proposed establishment was not in compliance with the city's ordinance prohibiting the establishments under MCL 333.27956.[7]

Plaintiff WL Green Ventures, Inc., applied for licensure of a marijuana establishment in Traverse City on December 8, 2019. Traverse City's ordinance prohibiting marijuana establishments had lapsed on December 6, 2019. The parties do not dispute that the Traverse City city clerk refused to sign the Attestation 2-C form for inclusion in WL Green Ventures' application. The city adopted a new opt-out ordinance on December 13, 2019. By letter dated February 18, 2020, defendant denied WL Green Ventures' application under Emergency Rule 14(2)(c) and (f) for failure to comply with Emergency Rule 8(1)(e) by obtaining the signature of the city clerk on the Attestation 2-C form, under MCL 333.27959(3)(a) for failure to comply with the agency's rules, and under MCL 333.27959(3)(b) and Emergency Rule 9(2)(g) for failure to comply with the city's ordinance prohibiting marijuana establishments.[8]

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[7] Defendant also denied the application of plaintiff HCM Provisioning, Inc., on the additional basis that the applicant did not pass prelicensure inspection.

[8] Defendant also denied the application of plaintiff WL Green Ventures on the additional basis that the applicant did not pass prelicensure inspection.

Plaintiffs initiated these actions in the Court of Claims,[9] seeking declaratory judgment that Emergency Rules 8(1)(e), 9(2)(g), and 14(2)(f) were invalid because they are contrary to the MRTMA. Defendant moved for summary disposition under MCR 2.116(C)(4) and (8), arguing that the trial court lacked subject-matter jurisdiction because plaintiffs had failed to exhaust their administrative remedies and that plaintiffs had failed to state a claim. The trial court determined that summary disposition was not warranted under MCR 2.116(C)(4), accepting plaintiffs' argument that exhausting their administrative remedies would be futile, but granted defendant's motion for summary disposition in each of the consolidated cases under MCR 2.116(C)(8), dismissing the complaints for failure to state a claim and rejecting plaintiffs' contention that the agency's rules were invalid. Plaintiffs now appeal the respective orders of the trial court.[10]

II. ANALYSIS

Plaintiffs contend that the trial court erred by granting defendant summary disposition under MCR 2.116(C)(8). Plaintiffs argue that contrary to the holding of the trial court, certain of defendant's emergency rules were invalid because they conflict with the intent of the MRTMA, as well as the directive of § 9 of the act. We disagree.

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[9] Plaintiffs also initiated administrative review of defendant's decisions by requesting under Mich Admin Code, R 420.707 and R 420.703(10), a public investigative hearing before an administrative law judge.

[10] This Court granted the joint motion of the parties and consolidated the appeals. *Brightmoore Gardens LLC v Marijuana Regulatory Agency*, unpublished order of the Court of Appeals, entered June 24, 2020 (Docket Nos. 353698 and 353739).

This Court reviews de novo a trial court's decision to grant or deny a motion for summary disposition. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159; 934 NW2d 665 (2019). A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim. *Id*. When reviewing a motion for summary disposition granted under MCR 2.116(C)(8), we accept all factual allegations as true and consider the motion on the basis of the pleadings alone. *Id*. at 160. Summary disposition under MCR 2.116(C)(8) is warranted only when the claim is so unenforceable that no factual development could possibly justify recovery. *Id*.

We also review de novo issues of statutory interpretation, *Cox v Hartman*, 322 Mich App 292, 298; 911 NW2d 219 (2017), as well as the scope of an administrative agency's statutory rulemaking authority, whether an agency exceeded its authority, whether an administrative rule is arbitrary and capricious, and whether an administrative rule comports with the Legislature's intent, *Emagine Entertainment, Inc v Dep't of Treasury*, 334 Mich App 658, 662-663; 965 NW2d 720 (2020).

Administrative agencies have authority to interpret the statutes they administer and enforce. *Clonlara, Inc v State Bd of Ed*, 442 Mich 230, 240; 501 NW2d 88 (1993). Courts respectfully consider an agency's interpretation of a statute that it is empowered to execute and will not overrule that construction absent cogent reasons. *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 103; 754 NW2d 259 (2008). But although an agency's interpretation of the statute it administers is entitled to respectful consideration, it cannot conflict with the intent of the Legislature as expressed in the language of the statute. *Id*. Because the statutory lan-

guage itself controls, this Court's ultimate concern is the proper construction of the plain language of the statute regardless of the agency's interpretation, *id*. at 108, and the primary obligation is to discern and give effect to the Legislature's intent, *Coldwater v Consumers Energy Co*, 500 Mich 158, 167; 895 NW2d 154 (2017).

A rule adopted by an agency in accordance with the Administrative Procedures Act (APA), MCL 24.201 *et seq*., is considered a "legislative rule" and has the force and effect of law. *Clonlara*, 442 Mich at 240. But although the rulemaking power of an administrative agency has been described as quasi-legislative, an agency is not empowered to change law enacted by the Legislature. *Detroit Edison Co v Dep't of Treasury*, 498 Mich 28, 47; 869 NW2d 810 (2015), citing *Rovas*, 482 Mich at 98. When an administrative rule conflicts with a statute, the statute controls. *Emagine Entertainment, Inc*, 334 Mich App at 664; see also *Grass Lake Improvement Bd v Dep't of Environmental Quality*, 316 Mich App 356, 366; 891 NW2d 884 (2016). An agency's legislative rule may be determined to be invalid when the rule goes beyond the parameters of the enabling statute, when the rule does not comply with the legislative intent underlying the enabling statute, or when the rule is arbitrary or capricious. *Slis v Michigan*, 332 Mich App 312, 346; 956 NW2d 569 (2020). In articulating that test, our Supreme Court has summarized:

> "Where an agency is empowered to make rules, courts employ a three-fold test to determine the validity of the rules it promulgates: (1) whether the rule is within the matter covered by the enabling statute; (2) if so, whether it complies with the underlying legislative intent; and (3) if it meets the first two requirements, when [*sic*] it is neither arbitrary nor capricious." [*Ins Institute of Mich v Comm'r of the Office of Fin & Ins Serv*, 486 Mich 370, 385;

785 NW2d 67 (2010), quoting *Chesapeake & Ohio R Co v Pub Serv Comm*, 59 Mich App 88, 98-99; 228 NW2d 843 (1975).]

In these cases, plaintiffs challenge as invalid defendant's Emergency Rules 8(1)(e), 9(2)(g), and 14(2)(c) and (f),[11] under which defendant denied plaintiffs' applications. Specifically, the notice of denial that most plaintiffs in these cases received stated, in relevant part:

> Applicant submitted Attestation 2-C, Confirmation of Section 6 Compliance, as part of its application. However, contrary to MRTMA Emergency Rule 8(1)(e), the attestation did not contain verification that the municipality has not adopted an ordinance prohibiting marijuana establishments and did not contain the signature of the municipality clerk or designee. Instead, applicant submitted an affidavit stating that the applicant was unable to obtain a municipality representative's signature on Attestation 2-C.
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> * * *
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> The municipality later provided the MRA with a Municipal Confirmation of Section 6 Compliance form dated December 3, 2019, on which the deputy city clerk attested that "[t]he municipality has completely prohibited marijuana establishments under Section 6 of the MRTMA" and "[t]he applicant is not in compliance with municipal zoning regulations and ordinances regulating marihuana establishments."
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> Based on the above, the MRA does not approve the application for the following reasons:
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> - Applicant failed to include in its application confirmation of compliance with any municipal ordinances the municipality may have adopted under section 6 of the MRTMA, contrary to MRTMA

[11] This Court has held that an agency's emergency rules may be challenged under § 64 of the APA, MCL 24.264, in the same manner as other rules. See *Slis*, 332 Mich App at 341-342.

Emergency Rule 8(1)(e). Thus, applicant's application may be denied under MRTMA Emergency Rules 14(2)(c) and (f).

- Applicant failed to submit an application in compliance with the rules promulgated by the MRA. Thus, applicant is ineligible for licensure under MCL 333.27959(3)(a).
- The municipality in which the applicant will be located, the City of Detroit, notified the MRA that the proposed establishment is not in compliance with an ordinance consistent with section 6 of the MRTMA. Thus, applicant is ineligible for licensure under MCL 333.27959(3)(b).
- Applicant's proposed establishment is noncompliant with an ordinance adopted by the City of Detroit under section 6 of the MRTMA. Thus, applicant is ineligible to receive a state license under MRTMA Emergency Rule 9(2)(g). Therefore, the MRA denies applicant's application for a state marijuana establishment license under MCL 333.27959(3)(a) and (3)(b) and MRTMA Emergency Rules 9(2)(g), 14(2)(c), and 14(2)(f).

Defendant thus determined that plaintiffs' applications were incomplete under Emergency Rule 8(1)(e) because they lacked the signature of the municipal clerk on the Attestation 2-C form. Because the applications were deemed incomplete under Emergency Rule 8 for failure to include the municipal clerk's certification, defendant denied the applications under Emergency Rule 14(2)(c) and (f). As noted, that rule provided, in relevant part:

> (2) In addition to the reasons for denial in the act, a state license may be denied by the agency for any of the following reasons:
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> * * *

(c) The applicant has failed to comply with these rules and the application requirements pursuant to Rules 6, 7, and 8.

* * *

(f) The applicant failed to satisfy the confirmation of compliance by a municipality requirement in accordance with these rules.

Defendant further denied the applications under Emergency Rule 9(2), which provided:

An applicant is ineligible to receive a state license if any of the following circumstances exist:

* * *

(g) The agency determines the municipality in which the applicant's proposed marihuana establishment will operate has adopted an ordinance that prohibits marihuana establishments or that the proposed establishment is noncompliant with an ordinance adopted by the municipality under section 6 of the act, MCL 333.27956.

Plaintiffs contend that the agency rules in question violate the second prong of the validity test because the rules are contrary to the intent of the MRTMA. The purpose of the MRTMA is set forth in the act as follows:

The purpose of this act is to make marihuana legal under state and local law for adults 21 years of age or older, to make industrial hemp legal under state and local law, and to control the commercial production and distribution of marihuana under a system that licenses, regulates, and taxes the businesses involved. The intent is to prevent arrest and penalty for personal possession and cultivation of marihuana by adults 21 years of age or older; remove the commercial production and distribution of marihuana from the illicit market; prevent revenue generated from commerce in marihuana from going to criminal enterprises or gangs; prevent the distribution of

> marihuana to persons under 21 years of age; prevent the diversion of marihuana to illicit markets; ensure the safety of marihuana and marihuana-infused products; and ensure security of marihuana establishments. To the fullest extent possible, this act shall be interpreted in accordance with the purpose and intent set forth in this section. [MCL 333.27952.]

The MRTMA requires that the act "shall be broadly construed to accomplish its intent as stated in section 2 of [the] act." MCL 333.27967.

Here, plaintiffs specifically contend that Emergency Rule 8(1)(e) is invalid because (1) it ignores the language of the MRTMA, (2) it is an unlawful delegation of authority to municipalities not contemplated by the MRTMA, and (3) it is unreasonably impractical because the rule requires applicants to obtain the municipal clerk's signature. Plaintiffs argue that because Emergency Rule 8(1)(e) is invalid, Emergency Rule 14(2)(c) and (f), which permit defendant to deny an application for failure to comply with Emergency Rule 8, also are invalid. Plaintiffs contend that Emergency Rule 9(2)(g) is invalid because it ignores the language of § 9(3)(b) of the act, MCL 333.27959(3)(b), which permits denial of a license to an otherwise eligible applicant only if a municipality asserts that the application violates an ordinance of the municipality "in effect at the time of application," while defendant's rule instead permits defendant to consider merely whether the municipality "has adopted an ordinance that prohibits marihuana establishments . . . ."

The trial court determined that summary disposition of plaintiffs' claims was warranted under MCR 2.116(C)(8), concluding that the emergency rules were valid and that plaintiffs had failed, therefore, to state a claim. The trial court rejected plaintiffs' contention that the emergency rules conflicted with the directive

of § 9(3)(b) of the act that the agency must issue a license to an otherwise eligible applicant unless prohibited by an ordinance "in effect at the time of application[.]" The trial court concluded that the emergency rules were silent about the time frame of an opt-out ordinance, that silence could not be used to presume the invalidity of a rule, and that there was no support in § 9 of the act for plaintiffs' claim that "because neither Detroit nor Traverse City had an opt-out ordinance in effect as of the date the plaintiffs' application packets were filed with the MRA, they had a right to the issuance of licenses." The trial court further reasoned that plaintiffs' applications were incomplete as defined by the emergency rules because they lacked a signed Attestation 2-C form and that the incomplete applications did not entitle them to licenses under § 9 of the act regardless of when the municipal ordinances were enacted.

Our Supreme Court has directed that "[w]e begin all matters of statutory interpretation with an examination of the language of the statute." *Nickola v MIC Gen Ins Co*, 500 Mich 115, 123; 894 NW2d 552 (2017). When interpreting a statute, a court's primary task is to ascertain and give effect to the intent of the Legislature. *Coldwater*, 500 Mich at 167. This Court first considers the statutory language itself; if the language is unambiguous, we will conclude that the Legislature intended the clearly expressed meaning and enforce the statute as written, *Ford Motor Co v Dep't of Treasury*, 496 Mich 382, 389; 852 NW2d 786 (2014), because the language of the statute provides "the most reliable evidence of its intent," *Coldwater*, 500 Mich at 167 (quotation marks and citations omitted).

Plaintiffs contend that the four agency rules that resulted in their applications being denied conflict with

the intent of the act and, particularly, with § 9, MCL 333.27959. As noted, that statutory section provides, in relevant part:

> 1. Each application for a state license must be submitted to the department. Upon receipt of a complete application and application fee, the department shall forward a copy of the application to the municipality in which the marihuana establishment is to be located, determine whether the applicant and the premises qualify for the state license and comply with this act, and issue the appropriate state license or send the applicant a notice of rejection setting forth specific reasons why the department did not approve the state license application within 90 days.
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> * * *
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> 3. Except as otherwise provided in this section, the department *shall* approve a state license application and issue a state license if:
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> (a) the applicant has submitted an application in compliance with the rules promulgated by the department, is in compliance with this act and the rules, and has paid the required fee;
>
> (b) the municipality in which the proposed marihuana establishment will be located does not notify the department that the proposed marihuana establishment is not in compliance with an ordinance consistent with section 6 of this act [MCL 333.27956] and *in effect at the time of application*[.] [MCL 333.27959 (emphasis added).]

Thus, under § 9 of the act, if the municipality does not notify the agency that the otherwise eligible applicant is in violation of an ordinance in effect at the time of application, the agency "shall" approve the license. Plaintiffs argue that the language of § 9 is clear that "in effect at the time of application" means the date on which the application is submitted and that because

the statutory language is plain no further interpretation or construction is necessary or permitted. Defendant, however, contends that the statutory language should be construed to mean any ordinance in effect within the 90-day statutory window during which defendant must consider and decide upon an application.

Emergency Rule 9(2)(g) provided that an applicant is ineligible to receive a state license if the agency determines that the municipality in which the applicant's proposed marijuana establishment will operate "has adopted an ordinance that prohibits the marihuana establishment . . . ." Although Emergency Rule 9(2)(g) said something different than § 9 of the act, MCL 333.27959, it is not directly in conflict with § 9. Section 9 of the act says that the MRA *shall* grant a license to an otherwise eligible applicant if the municipality does not notify defendant that the application is not in compliance with a municipal ordinance *in effect at the time of application*, thereby placing a duty to issue a license upon defendant under certain circumstances, and placing a temporal limitation on ordinances that meet the statutory requirement. Emergency Rule 9(2)(g) stated that an applicant *is ineligible* for a license if the MRA determines that the municipality *has adopted an ordinance that prohibits marihuana establishments*, but it did not impose a specific temporal limitation.

A statute is not ambiguous merely because a term is undefined or has more than one definition, but ambiguity exists if statutory language "is equally susceptible to more than a single meaning." *Tomra of North America, Inc v Dep't of Treasury*, 325 Mich App 289, 299; 926 NW2d 259 (2018) (quotation marks and citation omitted). Because "what is plain and unam-

biguous often depends on one's frame of reference," *US Fidelity & Guaranty Co v Mich Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich 1, 13; 795 NW2d 101 (2009) (quotation marks and citation omitted), this Court reads a statute "as a whole and in its grammatical context, giving each and every word its plain and ordinary meaning unless otherwise defined," *In re Receivership of 11910 South Francis Rd*, 492 Mich 208, 222; 821 NW2d 503 (2012).

The words "in effect at the time of application" are undefined in the act, but they have a general or common understanding. The words therefore may lend themselves to more than one possible meaning, and the context must be considered to determine the most apt meaning. See *West Mich Annual Conference of United Methodist Church v Grand Rapids*, 336 Mich App 132, 154 n 11; 969 NW2d 813 (2021). In doing so, we conclude that although the phrase "in effect at the time of application" could have more than one *possible* meaning, the phrase has one *probable* meaning. "At the time of" is commonly defined as "when (something) happened," for example, "It was raining at the time of the accident." See Merriam-Webster.com Dictionary, *at the time of* <https://www.merriam-webster.com/dictionary/at%20the%20time%20of> (accessed March 30, 2021) [https://perma.cc/SC8B-QU8A]. Section 9 of the MRTMA directs the MRA to approve a person's application and issue a state license if, in part, the municipality does not notify it that the proposed establishment is not in compliance with an ordinance "in effect at the time of application[.]" MCL 333.27959(3)(b). The act then grants the agency 90 days in which to consider and act upon the application. Applying the common definition, the language "at the time of" means "when the application happened." See Merriam-Webster.com Dictionary. Because the application was subject to consideration for

90 days before being granted or denied, the application was "happening" within that 90-day window. In other words, the statute creates a 90-day application period, leading us to conclude that the "time of application" is any time within that 90-day period, which begins on the date the application is submitted. Furthermore, because the statute requires the agency to issue a license so long as the municipality has not certified the existence of an ordinance barring retail marijuana establishments, this strongly suggests to us that the converse is likewise true—the agency must reject an application if such a municipal certification is received at any time during the 90-day application period. This would be in keeping with the act's intent to allow municipalities to bar or limit retail marijuana establishments.

In addition, the act's use of the phrases "upon receipt of" and "after receipt of" in § 9 and § 16 indicates the specific time at which an application is submitted. See MCL 333.27959(1) and (5); MCL 333.27966(2). Neither of these phrases appears in § 9(3)(b) of the act. The act's use of different terms within the same statute is generally interpreted to connote distinct meanings. *Honigman Miller Schwartz & Cohn LLP v Detroit*, 505 Mich 284, 317; 952 NW2d 358 (2020). Plaintiffs' contention that Emergency Rule 9(2)(g) is invalid because it conflicts with § 9 of the act is, therefore, without merit.

Plaintiffs also challenge the trial court's rejection of their contention that Emergency Rules 8 and 14 are invalid. The trial court reasoned that the rules are a valid implementation of the act because MCL 333.27959(1) contemplates cooperation between the agency and municipalities. We agree that the MRTMA envisions cooperation between defendant and municipalities. To effectuate that intent, the emergency rules

in question gave municipalities authority to alert the MRA regarding whether the municipality has enacted an ordinance prohibiting the proposed establishment and whether the applicant has complied with that ordinance. Further, in general, the law to be applied is the law in effect at the time of the decision by the agency, see *Grand/Sakwa of Northfield, LLC v Northfield Twp*, 304 Mich App 137, 141; 851 NW2d 574 (2014), and thus defendant properly considered the municipal ordinances in effect at the time of rendering the decisions on plaintiffs' applications.

We acknowledge the merit of plaintiffs' challenge to the requirement of Emergency Rule 8(1)(e)(iii) that an applicant obtain the verification of the municipal clerk. That requirement imposes upon applicants a task that is not within the power of the applicants to fulfill given that an applicant has no authority to compel a municipal clerk to verify the applicant's application. As a result, the verification requirement is subject to potential abuse and may be unlawful; a municipal clerk could withhold verification from an applicant even if an ordinance were never adopted by the municipality during the application process, or the clerk could withhold verification from one applicant, but not another. In this case, the clerks refused to confirm that the municipalities did not have valid ordinances prohibiting adult-use marijuana establishments at the time the clerks' signatures were sought, even though the municipalities did not have valid ordinances at those times, and defendant refused to accept the applications without the clerks' signatures. Because Emergency Rule 8(1)(e)(iii) did not provide an avenue for an applicant to complete an application when a clerk refuses to provide a signature, it is prone to abuse. However, under the circumstances of this case, we need not consider whether the rule is arbitrary and

capricious. Plaintiffs' applications were properly rejected on the basis that the municipalities adopted ordinances precluding the establishments while the applications were under consideration, rendering the clerks' refusals to verify the applications irrelevant.

In summary, the MRTMA provides for the issuance of marijuana-establishment licenses to eligible applicants so that they may sell marijuana legally to persons 21 years old or older. The duty and power to administer the MRTMA, and to make rules to implement the act, was assigned to the MRA. The act provides municipalities the power to opt out of the act or to impose certain restrictions on marijuana establishments within the municipality. The MRA's emergency rules effectuated this intent by giving municipalities sufficient time to opt out or regulate marijuana establishments during the 90-day window in which the application is considered by defendant. The trial court did not err by granting defendant summary disposition under MCR 2.116(C)(8) because defendant's Emergency Rule 9(2)(g) was valid.

Affirmed.

JANSEN, P.J., and RONAYNE KRAUSE, J., concurred with GADOLA, J.

PEOPLE v BYCZEK

Docket No. 350341. Submitted December 4, 2020, at Lansing. Decided May 6, 2021, at 9:10 a.m. Leave to appeal denied 509 Mich 938 (2022).

Wilson T. Byczek was convicted following a jury trial in the Iron Circuit Court, C. Joseph Schwedler, J., of threatening an act of terrorism, MCL 750.543m(1), and malicious use of a telecommunications service, MCL 750.540e. Defendant was injured in 2015 while working at the Lac O'Seasons Resort in Iron River, and he filed a civil lawsuit against the resort. In October 2017, defendant called the Iron County Sheriff's Department to obtain a police report concerning the incident at the resort that had caused his injuries. The sheriff's deputy who answered defendant's phone call testified that when defendant had asked for the police report, the deputy told defendant that he needed to file certain paperwork in order to obtain the report. Defendant told the deputy that he was currently out-of-state; that he was returning to Michigan; and that if he did not get the money owed to him, he was going to take care of it himself and "it was going to be hash tag Las Vegas." Less than two weeks before defendant's phone call, a widely publicized mass shooting had occurred in Las Vegas. The deputy considered defendant's statement to be a threat against the resort, but after determining that defendant had called from Spokane, Washington, he concluded that the resort was not in immediate danger. Defendant appealed his convictions, arguing that the evidence was insufficient to support the verdicts because the record did not establish that his use of the phrase "hash tag Las Vegas" was a threat.

The Court of Appeals *held*:

1. Under MCL 750.543m(1)(a) of the Michigan Anti-Terrorism Act, MCL 750.543a *et seq*., a person is guilty of making a terrorist threat if they threaten to commit an act of terrorism and communicate that threat to any other person. An act of terrorism, under MCL 750.543b(a), is an act (1) that would be a violent felony under Michigan law, (2) that the person knows or has reason to know is dangerous to human life, and (3) that is intended to intimidate or coerce a civilian population or influence or affect the conduct of

government or a unit of government through intimidation or coercion. The Court of Appeals previously held that only true threats are prohibited under §§ 543m and 543b. "True threats" are statements that encompass the communication of a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. Further, the statutes require the existence of an intent to intimidate or coerce. The prosecution is not required to prove under the statutes that the defendant had the intent or capability to actually carry out the threatened act of terrorism, but it must show that the defendant had a general intent to communicate a true threat. The first inquiry in this case was whether the evidence supported the conclusion that defendant threatened to commit an act of terrorism and communicated it to another person. The evidence showed that defendant made the statement, "it's going to be hash tag Las Vegas," to the deputy; therefore, defendant communicated the statement to another person. Whether the statement was a threat of an act of terrorism depended on whether, by making the statement, defendant indicated he was going to commit a willful and deliberate act that (1) would be a violent felony under the laws of this state, (2) he knew or had reason to know was dangerous to human life, and (3) was intended to intimidate or coerce a civilian population or to influence or affect the conduct of government or a unit of government through intimidation or coercion. Determining the meaning of "hash tag Las Vegas" required some knowledge of popular culture. On social media websites, "hashtag" indicated a word followed by a hash mark (#), which facilitated a search for the word on social media. "Hashtag" was also used in popular culture to precede a word or phrase to add emphasis or to make a joke. Therefore, it was plausible that "hash tag Las Vegas" had more than one meaning. However, the mass shooting in Las Vegas had occurred less than two weeks before defendant's October 2017 phone call to the Iron County Sheriff's Department. Additionally, defendant's brother and sister-in-law both testified that after the phone call, defendant told them that he had referred to the Las Vegas shooting while speaking to the deputy. The jury could have reasonably concluded that defendant's use of the phrase "hash tag Las Vegas" during the call was a reference to the shooting. Given that the evidence supported that conclusion, the next inquiry was whether the evidence supported the jury's conclusion that defendant's reference to the shooting was a threat of an act of terrorism. One plausible meaning of "it's going to be hash tag Las Vegas" was that defendant was threatening to copy the actions of the Las Vegas shooter. Pursuant to MCL 750.543b, such a shooting would be a violent felony under the laws of Michigan and was no doubt

known to defendant to be dangerous to human life. It was unclear whether such conduct would be intended to intimidate or coerce a civilian population or the government, and pursuant to defendant's conversation with the deputy, it was not clear whether defendant's statement was directed at the deputy, the resort, or another party. However, defendant's statement suggested that the objective of such an act would be to exact vengeance or to retaliate. Therefore, it was not unreasonable to conclude that the intent of such an act would be to intimidate or to coerce civilians, such as the people at the resort, or the government, i.e., the deputy or the police in general. The jury was permitted to draw reasonable inferences from the evidence to determine the weight of those inferences. Sufficient evidence was presented from which the jury could reasonably infer that defendant threatened to commit a terrorist act and communicated that threat to another person. The prosecution also demonstrated that defendant's statement was a true threat in light of the fact that defendant told his brother and sister-in-law that he had made a threatening statement to the police by referring to the Las Vegas shooting during a phone call. Therefore, there was sufficient evidence from which a jury could conclude that the statement was a true threat. Accordingly, when viewed in the light most favorable to the prosecution, a rational trier of fact could have found that there was sufficient evidence to convict defendant of threatening an act of terrorism.

2. A person is guilty of malicious use of a telecommunications service under MCL 750.540e(1)(a) if they used that service with the intent to frighten, intimidate, or threaten another person by threatening physical harm or damage to any person or property. There was no dispute that defendant used a telecommunications service when he made the October 2017 phone call to the police. A trier of fact could have reasonably inferred that defendant had threatened to shoot people during the call, thus threatening physical harm or damage to a person or property. A trier of fact could have also inferred that defendant intended to frighten, intimidate, or threaten another person when he made the statement referring to the Las Vegas shooting during the October 2017 phone call. Viewing the evidence in the light most favorable to the prosecutor, a rational trier of fact could have found that the evidence was sufficient to convict defendant.

Affirmed.

BOONSTRA, J., concurring in part and dissenting in part, agreed with the majority's decision to affirm defendant's conviction of malicious use of a telecommunications service, but he opined that the Legislature did not intend for the Michigan

Anti-Terrorism Act to apply to defendant's conduct. The legislative analysis concerning the act referred to the need to address the adequacy of existing laws to deter terrorist threats and to punish terrorist acts following the terrorist attacks of September 11, 2001, which indicated that the Legislature's intent was to address large-scale terrorist attacks on the civilian population and government infrastructure. Accordingly, an "act of terrorism" was narrowly defined under the act and was not intended to apply to defendant's conduct. Additionally, Judge BOONSTRA did not believe that the prosecution proved that defendant threatened an act of terrorism under MCL 750.543b(a)(*iii*). Although it could be inferred that defendant's use of the phrase "hash tag Las Vegas" was a threat, he opined that the pertinent question was not whether defendant's words were a threat, but rather whether there was sufficient evidence to establish that the threatened act fit the definition of an act of terrorism under the statute. That is, in order for the statute to apply, the threatened act must be of such a nature that it is intended to intimidate or coerce. Judge BOONSTRA would have concluded that no evidence was presented to support the determination that defendant's threatened act fit the statutory definition.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Melissa Powell*, Prosecuting Attorney, for the people.

Dana B. Carron for defendant.

Before: BOONSTRA, P.J., and GADOLA and TUKEL, JJ.

GADOLA, J. Defendant appeals on delayed leave granted his convictions of threatening an act of terrorism, MCL 750.543m(1), and malicious use of a telecommunications service, MCL 750.540e. Defendant was sentenced as a fourth-offense habitual offender, MCL 769.12, to serve a prison term of 7 to 30 years for making a terrorist threat, and to serve a concurrent sentence of 68 days for malicious use of a telecommunications service, with credit for 68 days served. We affirm.

I. FACTS

This case arises from a statement defendant made to a sheriff's deputy during a telephone conversation. On October 12, 2017, defendant called the Iron County Sheriff's Department to obtain a police report. Defendant had been seriously injured two years earlier while performing excavation work at Lac O'Seasons Resort in Iron River, sustaining a broken hip, a crushed pelvis, and dislocation of his other hip. Although not diagnosed with a brain injury, family members testified that defendant's injuries had affected his memory and ability to work. At the time that defendant called the Iron County Sheriff's Department, defendant had a civil lawsuit pending against the resort regarding his injuries and had been urged by his attorney to obtain the police report regarding the 2015 accident.

Iron County Sheriff's Deputy Adam Schiavo testified that he answered the telephone call from defendant while he was on duty on October 12, 2017.[1] Deputy Schiavo testified that defendant had identified himself and explained that he had been injured at Lac O'Seasons Resort in 2015, and that he had not been able to recover money from the resort. Deputy Schiavo testified that defendant had asked for a police report from the 2015 accident, and Schiavo had told defendant that he needed to file the proper paperwork. According to Schiavo, defendant had seemed agitated and was speaking very quickly and "rambling." Schiavo testified that defendant had indicated he was on the west coast but was on his way back to Michigan; that if he did not get the money owed to him, he was

[1] Deputy Schiavo is the only person who heard the telephone call; the call was not recorded, and no transcript or notes from the call were made.

going to return to Michigan and "take care of it himself[;] and that it was going to be hash tag Las Vegas."[2] Deputy Schiavo testified that he did not remember at what point defendant had said that he would "take care of it myself," and agreed that defendant could have been referring to completing the paperwork necessary to obtain the police report. Schiavo testified that defendant hung up after he said "hash tag Las Vegas."

Less than two weeks before the telephone call, a widely publicized shooting had occurred in Las Vegas.[3] Deputy Schiavo testified that when defendant said "hash tag Las Vegas," he determined that defendant was referring to the Las Vegas shooting, and he considered defendant's statement to be a threat directed to Lac O'Seasons Resort. Schiavo testified that defendant did not specifically mention the Las Vegas shooting, did not say that he was going to shoot anyone, did not indicate that he had a gun or other weapon, and did not state that he was angry with anyone. After locating the source of defendant's call as Spokane, Washington, Schiavo determined that there was no immediate dan-

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[2] The word "hashtag" is defined in connection with its use on social media websites as "a word or phrase preceded by a hash mark (#), used within a message to identify a keyword or topic of interest and facilitate a search for it[.]" A secondary definition is "a word or phrase preceded by a hash mark (#) or by the word *hashtag*, used to add wit or emphasis to a spoken or written statement." Dictionary.com, *hashtag* <http://www.dictionary.com/browse/hashtag> (accessed December 7, 2020) [https://perma.cc/DXZ2-LB67].

[3] On October 1, 2017, a gunman fired over 1,100 rounds of ammunition from a hotel room into a crowd attending a concert in Las Vegas, Nevada, killing 58 people and injuring more than 800 others. History.com, *Gunman Opens Fire on Las Vegas Concert Crowd, Wounding Hundreds and Killing 58*, <https://www.history.com/this-day-in-history/2017-las-vegas-shooting> (accessed December 7, 2020) [https://perma.cc/SDS9-EFCT].

ger to Lac O'Seasons Resort. Schiavo contacted Randy and Nancy Schauwecker, the managers and part-owners of the resort, and informed them of the telephone call and that it constituted a possible threat.

Nancy Schauwecker testified that she and her husband, Randy, manage and live at Lac O'Seasons Resort and that they own several of the buildings at the resort. Nancy confirmed that while defendant was doing excavation work at the resort in 2015, the ditch where he was working collapsed and he was seriously injured. She further testified that she had not had any contact with defendant, and that defendant had not directly threatened her or the resort.

Randy Schauwecker testified that he knew defendant before defendant worked at the resort because he had taught defendant as a seventh-grade student. Randy testified that after defendant was injured at the resort, defendant filed multiple claims against the resort and there was a pending lawsuit. Randy testified that defendant had contacted him after the accident and had been polite and apologetic about suing the resort for damages. Randy testified that defendant never directly communicated any threats of terrorism to him.

Defendant's mother, Starr Adank, testified that defendant and his girlfriend, Amery Saylor, had moved to Spokane, Washington in August 2017. On October 11, 2017, she spoke with defendant, who told her he was returning to Michigan. During the conversation, Adank encouraged defendant to call the police to find out if there was a police report regarding the 2015 accident. Adank testified that defendant later told her he called to try to get a police report but had become frustrated talking to the deputy. Regarding defendant's use of the phrase "hash tag Las Vegas," Adank testified that defendant often traveled to Las Vegas

and had used that term to mean "I'm going to Las Vegas again." Adank testified that defendant, in fact, went to Las Vegas on November 3, 2017, before he moved back to Michigan.

Iron County Sheriff's Lieutenant Ryan Boehmke testified that he had listened to a phone conversation between defendant and Adank on December 9, 2017. During the conversation, defendant explained that during the October 12, 2017 phone call to the police, he had asked to file a complaint against Lac O'Seasons and had said, "They're going to pay for what they did to me"; "I am coming back to Michigan. I'm going to handle this on my own" or "[h]andle this myself"; and then, before hanging up, he had said, "Now it's hash tag Las Vegas."

Defendant's brother, Todd Byczek, testified that defendant told him that he had made "some kind of threat to Iron County where, you know, a threat for mass shooting and referenced Las Vegas . . . ." Todd also testified that he had gone to Las Vegas with defendant in November 2017, but that the trip had been planned "kind of last second," on or around October 31, 2017.

Todd's wife, Elizabeth Byczek, testified that defendant and Saylor began living with her and Todd in Washington in August or September 2017. Elizabeth testified that defendant was frustrated about his lawsuit against Lac O'Seasons Resort and believed that the resort owed him money. She testified that on October 12, 2017, defendant told her that he had called the Iron County Sheriff's Department; he appeared embarrassed and mentioned that he had lost his temper and made a threat by referring to the recent mass shooting in Las Vegas. Elizabeth testified that, to her knowledge, defendant did not have a trip planned to Las Vegas on October 12, 2017; rather, Elizabeth planned a

trip for the two couples to Las Vegas for November on October 30, 2017. The e-mail confirmation of the four plane tickets purchased by Elizabeth on October 31, 2017, was admitted into evidence. Elizabeth testified that she, Todd, defendant, and Saylor had traveled to Las Vegas on November 3, 2017, and returned on November 6, 2017.

FBI Special Agent David Whitlow testified that he had assisted in the investigation and had interviewed defendant. During the interview, defendant had admitted that he had called the Iron County Sheriff's Department on October 12, 2017, and had said "something to the effect of, 'You don't know what people are thinking, like that guy in Las Vegas.' " Whitlow testified that defendant had explained that he had been agitated, and in hindsight, he wished he would have chosen his words more carefully. Whitlow conducted a cursory review of defendant's cell phone and bedroom and did not find any weapons or anything that led Whitlow to believe that there was an imminent threat of danger.

After a jury trial, defendant was convicted of threatening an act of terrorism, MCL 750.543m(1), and malicious use of a telecommunications service, MCL 750.540e. The trial court sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to serve a prison term of 7 to 30 years for making a terrorist threat and to serve a concurrent sentence of 68 days for malicious use of a telecommunications service, with credit for 68 days served. Defendant now appeals.

II. ANALYSIS

Defendant contends that there was insufficient evidence to convict him under MCL 750.543m(1) of threatening an act of terrorism because the prosecutor failed to present evidence that he made a threat. Defendant

similarly contends that there was insufficient evidence to support a conviction of malicious use of a telecommunications service under MCL 750.540e(1)(a). Defendant argues that the jury's conclusion that his use of the phrase "hash tag Las Vegas" was a threat is not supported by the record and therefore is insufficient to support the verdict. We disagree.

A. STANDARD OF REVIEW

This Court reviews de novo a challenge to the sufficiency of the evidence. *People v Speed*, 331 Mich App 328, 331; 952 NW2d 550 (2020). In determining the sufficiency of the evidence, we view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. See *People v Harris*, 495 Mich 120, 126; 845 NW2d 477 (2014). In doing so, we draw all reasonable inferences and make credibility choices in support of the verdict. *People v Oros*, 502 Mich 229, 239; 917 NW2d 559 (2018). We also review de novo issues of statutory interpretation. *Speed*, 331 Mich App at 331.

B. THREAT OF ACT OF TERRORISM

The Michigan Anti-Terrorism Act, MCL 750.543a *et seq*., provides in § 543m as follows:

> (1) A person is guilty of making a terrorist threat or of making a false report of terrorism if the person does either of the following:
>
> (a) Threatens to commit an act of terrorism and communicates the threat to any other person.
>
> (b) Knowingly makes a false report of an act of terrorism and communicates the false report to any other person, knowing the report is false.

(2) It is not a defense to a prosecution under this section that the defendant did not have the intent or capability of committing the act of terrorism.

(3) A person who violates this section is guilty of a felony punishable by imprisonment for not more than 20 years or a fine of not more than $20,000.00, or both. [MCL 750.543m.]

Section 543b of the act defines the terms "act of terrorism," "dangerous to human life," and "violent felony" as follows:

As used in this chapter:

(a) "Act of terrorism" means a willful and deliberate act that is all of the following:

(*i*) An act that would be a violent felony under the laws of this state, whether or not committed in this state.

(*ii*) An act that the person knows or has reason to know is dangerous to human life.

(*iii*) An act that is intended to intimidate or coerce a civilian population or influence or affect the conduct of government or a unit of government through intimidation or coercion.

(b) "Dangerous to human life" means that which causes a substantial likelihood of death or serious injury or that is a violation of [MCL 750.349 or MCL 750.350.]

* * *

(h) "Violent felony" means a felony in which an element is the use, attempted use, or threatened use of physical force against an individual, or the use, attempted use, or threatened use of a harmful biological substance, a harmful biological device, a harmful chemical substance, a harmful chemical device, a harmful radioactive substance, a harmful radioactive device, an explosive device, or an incendiary device. [MCL 750.543b.]

MCL 750.543m(1) was previously challenged as an unconstitutional restriction of free speech in *People v*

Osantowski, 274 Mich App 593; 736 NW2d 289 (2007), rev'd in part on other grounds 481 Mich 103 (2008).[4] This Court concluded that the statute prohibited only statements that are "true threats" and therefore constituted a restriction on free speech that was not unconstitutional. This Court explained:

> First Amendment protections are not absolute and the United States Supreme Court has recognized the permissibility of governmental regulation of certain categories of speech without violating an individual's right to free expression, such as statements deemed to comprise "true threats." *Virginia v Black*, 538 US 343, 358-359; 123 S Ct 1536; 155 L Ed 2d 535 (2003).
>
> " '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." *Id*. at 359. "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.' " *Black*, *supra* at 359-360, quoting *RAV v City of St Paul*, 505 US 377, 388; 112 S Ct 2538; 120 L Ed 2d 305 (1992). [*Osantowski*, 274 Mich App at 602 (alteration in *Black*).]

This Court thus held that when MCL 750.543m and MCL 750.543b(a) are read together and according to their plain and ordinary meaning, the statutes are not an unconstitutional restriction of free speech because they prohibit only true threats, i.e., statements that "encompass the communication of a serious expression of an intent to commit an act of unlawful violence to a

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[4] The decision of this Court was reversed by our Supreme Court only to the extent of the scoring of Offense Variable 20 and its effect on the defendant's sentence. See *People v Osantowski*, 481 Mich 103, 105; 748 NW2d 799 (2008).

particular individual or group of individuals," and because "the statutes require the existence of an intent to 'intimidate or coerce.' " *Osantowski*, 274 Mich App at 603. This Court also concluded that in proving a terrorist threat or the making of a false report of terrorism under MCL 750.543m, the only intent that the prosecution must demonstrate is the defendant's general intent to communicate a true threat. *Id*. at 605, citing *Black*, 538 US at 359-360; see also *Buchanan v Crisler*, 323 Mich App 163, 189 n 5; 922 NW2d 886 (2018) ("[T]here is no constitutional protection for 'true threats,' meaning '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.' "), quoting *Black*, 538 US at 359. This Court observed that generally, whether a statement constitutes a true threat is a question of fact for the jury. *Osantowski*, 274 Mich App at 612.

To summarize, to demonstrate that a defendant is guilty of making a terrorist threat under MCL 750.543m(1), the prosecution must prove that the defendant (1) threatened to commit an act of terrorism[5]

[5] The concurrence/dissent would interpret this factor to require the extremely nuanced condition that to threaten to commit an act of terrorism a defendant must threaten an act that the defendant intends will intimidate or coerce, rather than intending that the threat itself (the statement that defendant intends to do the act) be the source of the intimidation or coercion. In other words, the concurrence/dissent would hold that the defendant must intend people to fear the threatened actions rather than fear the defendant's threat. The concurrence/dissent therefore observes that "whether defendant's *words* were a threat isn't precisely the question . . . ." We disagree. Whether defendant can be found guilty of making a terrorist threat depends entirely upon whether the evidence sufficiently demonstrated that defendant's words to Officer Schiavo constituted a threat to commit an act of terrorism, being a threat to do a willful and deliberate act that would be a violent felony

and (2) communicated the threat to another person. MCL 750.543m(1)(a). An act of terrorism is a willful and deliberate act that (1) would be a violent felony under the laws of this state, (2) is an act that the defendant knows or has reason to know is dangerous to human life, and (3) is an act that is intended to intimidate or coerce a civilian population or to influence or affect the conduct of government or a unit of government through intimidation or coercion. MCL 750.543b(a). The prosecution is not required to prove that the defendant had the intent or the capability to actually carry out the threatened act of terrorism, MCL 750.543m(2), but the prosecution must prove the defendant's general intent to communicate a true threat; that is, the "communication of a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals," made with "an intent to 'intimidate or coerce.'" *Osantowski*, 274 Mich App at 603, 605.[6]

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under Michigan law, that defendant knew or had reason to know would be dangerous to human life, and that defendant intended would intimidate or coerce a civilian population or influence or affect the conduct of government or a unit of government through intimidation or coercion. Attempting to separate the intended fear of the threat from the intended fear of the threatened action seems an obscure inquiry; as a practical matter, a threat is feared only if the action threatened is feared.

[6] The concurrence/dissent quotes extensively from an analysis of the legislation that led to the enactment of the statute at issue in this case, prepared by the House Legislative Analysis Section, and relies upon that analysis to support its construction of the statute, stating, "It is thus evident that many of my concerns, as expressed in this opinion, were shared by the Legislature when it enacted the legislation in question." That conclusion is unwarranted. As our Supreme Court has advised, "[I]n Michigan, a legislative analysis is a feeble indicator of legislative intent and is therefore a generally unpersuasive tool of statutory construction." *Frank W Lynch & Co v Flex Technologies*, 463 Mich 578, 587; 624 NW2d 180 (2001). The Supreme Court has further concluded, "In no way can a 'legislative analysis' be said to officially summarize the intentions of those who have been designated by the Constitution to be participants in this legislative process. . . . For that reason, legislative analyses should be

In this case, the statement that caused defendant to be charged with threatening an act of terrorism was his statement to Deputy Schiavo that if he did not receive the money he was owed, he was going to take care of it himself and "it was going to be hash tag Las Vegas." The first inquiry is whether the evidence supported the conclusion that defendant threatened to commit an act of terrorism and communicated it to another person. Here, the evidence demonstrates that defendant made the statement to the deputy and thus communicated the statement to another person. The question then is whether the statement, "it's going to be hash tag Las Vegas," was a threat of an act of terrorism. That is, the question is whether the evidence demonstrated that by saying "it's going to be hash tag Las Vegas" defendant communicated that he was going to commit a willful and deliberate act (1) that would be a violent felony under the laws of this state, (2) that he knew or had reason to know was dangerous to human life, and (3) that would be intended to intimidate or coerce a civilian population or to influence or affect the conduct of government or a unit of government through intimidation or coercion.

To answer this question, we must consider what the phrase "hash tag Las Vegas" means, which requires the listener to bring some knowledge of popular culture to the conversation to decipher the meaning. The word "hashtag" is defined in connection with use on social media websites to indicate a hash mark (#) followed by a word which facilitates a search for that word on social media. However, a secondary usage in popular culture is

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accorded very little significance by courts when construing a statute." *In re Certified Question from the US Court of Appeals for the Sixth Circuit*, 468 Mich 109, 115 n 5; 659 NW2d 597 (2003). See also *In re AGD*, 327 Mich App 332, 342; 933 NW2d 751 (2019) (describing legislative bill analyses as "nothing more than the summaries and interpretations of unelected employees of the legislative branch").

to precede a word or phrase with "hashtag" to add emphasis or to make a joke. Therefore, it is plausible that the phrase "hash tag Las Vegas" could be used to mean different things; there is no one meaning.

In this case, however, a widely publicized mass shooting had occurred in Las Vegas less than two weeks before defendant's telephone call to Deputy Schiavo. Defendant's brother, Todd, and Todd's wife, Elizabeth, both testified that after the telephone call defendant told them that he had made a reference to the Las Vegas shooting when talking to Schiavo. The jury therefore reasonably could conclude from this evidence that defendant was referring to the Las Vegas shooting that had occurred two weeks earlier when he used the phrase "hash tag Las Vegas."

Having established that there is evidence to support the conclusion that defendant's statement was a reference to the Las Vegas shooting, the inquiry is whether the evidence supports the jury's conclusion that defendant's reference to the shooting was a threat of an act of terrorism; that is, whether the evidence demonstrated that by referring to the Las Vegas shooting, defendant communicated that he was going to commit a willful and deliberate act (1) that would be a violent felony under the laws of this state, (2) that he knew or had reason to know would be dangerous to human life, and (3) that would be intended to intimidate or coerce a civilian population or to influence or affect the conduct of government or a unit of government through intimidation or coercion. In other words, was defendant's reference to the Las Vegas shooting a threat to copy the Las Vegas shooter?

Schiavo testified that defendant said that if he did not get the money he believed he was owed, then it was "going to be hash tag Las Vegas." One plausible meaning of this statement is that defendant was threatening

to copy the actions of the shooter in Las Vegas. Clearly, shooting someone would be a violent felony under the laws of Michigan, and such conduct was no doubt known to defendant to be dangerous to human life. It is unclear whether such conduct would be intended to intimidate or coerce a civilian population or to influence or affect the conduct of the government through intimidation or coercion. According to Deputy Schiavo, defendant told him that he wanted to obtain a police report related to the 2015 incident that had caused his injuries in hopes of prevailing in litigation against Lac O'Seasons Resort. Schiavo testified that when defendant grew frustrated because Schiavo could not produce the report, defendant said that if he did not get the money he believed he was owed, then it was going to be "hash tag Las Vegas." On the basis of this conversation, it is unclear whether defendant's statement was directed at Deputy Schiavo, Lac O'Seasons Resort, or some unidentified person. However, because defendant's statement suggests that the objective of such an act would be to exact vengeance or to retaliate, it is not unreasonable to conclude that the intent of the act would be to intimidate or to coerce either civilians (people at Lac O'Seasons or perhaps a random crowd as occurred in Las Vegas) or the government (Deputy Schiavo or the police generally).

As noted, a jury may draw reasonable inferences from the evidence and determine the weight of those inferences. *Oros*, 502 Mich at 239. We conclude that sufficient evidence was presented from which the jury reasonably could infer that defendant threatened to commit an act of terrorism by threatening a willful and deliberate act that (1) would be a violent felony under the laws of this state, (2) defendant knew or had reason to know would be dangerous to human life, and (3) would be intended to intimidate or coerce a civilian

population or to influence or affect the conduct of government or a unit of government through intimidation or coercion. MCL 750.543b(a). The prosecution also demonstrated that defendant communicated the threat to another person. MCL 750.543m(1)(a). There was therefore sufficient evidence from which the jury could conclude that the elements of a terrorist threat under MCL 750.543m(1) had been demonstrated.

In addition to these elements, however, the prosecution also was required to demonstrate that defendant's statement was a true threat,[7] meaning that it was the "communication of a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals" made with "an intent to 'intimidate or coerce.' " *Osantowski*, 274 Mich App at 603, 605. In this case, defendant made a statement to Deputy Schiavo that suggested that he was threatening an act of violence. Although the statement alone is somewhat cryptic, defendant then clarified the reference when he told other people that he had made a threatening statement to police by referring to the Las Vegas shooting. Defendant thus confirmed that his statement was meant to communicate a serious expression of an intent to commit an act of unlawful violence. That general intent being demonstrated, there was sufficient evidence from which a jury could conclude that the statement was a "true threat." See *id*. at 612 (stating that, generally, whether a statement constitutes a true threat is a question of

[7] Although not yet adopted at the time of trial in this case, M Crim JI 38.4(3), adopted August 1, 2020, specifically provides that to prove the crime of making a threat to commit an act of terrorism, the prosecution must prove that the threat "must have been a true threat, and not have been something like idle talk, or a statement made in jest, or a political comment. It must have been made under circumstances where a reasonable person would think that others may take the threat seriously as expressing an intent to inflict harm or damage."

fact for the jury). Accordingly, on the basis of the entire record and reviewing the evidence in a light most favorable to the prosecutor, a rational trier of fact could have found that there was sufficient evidence to convict defendant of threatening an act of terrorism. See *Harris*, 495 Mich at 126.

Our conclusion is bolstered by a consideration of federal law, which construes the *mens rea* to prove a threat in a manner consistent with our opinion in this case. The Michigan Anti-Terrorism Act, passed in the wake of the September 11, 2001 terrorist attacks, largely mirrors the federal statute. For example, the federal statute's definition of "international terrorism" is almost identical to the Michigan definition of terrorism, incorporating "violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State," which "appear to be intended" to "intimidate or coerce a civilian population;" "to influence the policy of a government by intimidation or coercion;" or "to affect the conduct of a government by mass destruction, assassination, or kidnapping." Compare 18 USC 2331(1) and MCL 750.543b(a).[8] Other definitions within the Michigan statute align with comparable federal definitions.[9]

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[8] 18 USC 2331 does not define a criminal offense. Rather, its definition of terrorism serves as a prerequisite for other actions, such as granting the United States Attorney General primary investigative responsibility over all federal acts of terrorism, 18 USC 2332b(f), and providing a civil remedy for any United States national injured by an act of international terrorism, 18 USC 2333. An almost identical definition, see 18 USC 2332b(g)(5), is provided for the term "[f]ederal crime of terrorism," which applies to the sections defining various terrorism-related criminal offenses. See 18 USC 2332a-2332i.

[9] Compare MCL 750.543b(d) (defining "material support or resources") and 18 USC 2339A(b)(1) (defining the same); MCL 750.543b(c) (referring to the definitions of "harmful biological substance," "harmful biological device," "harmful chemical substance," "harmful chemical device," "harm-

Unlike Michigan's Anti-Terrorism Act, the federal statute does not have one catchall threat provision. Rather, for those offenses for which Congress wished to criminalize threats, it created specific subsections doing so. For example, the offense "[a]cts of terrorism transcending national boundaries," 18 USC 2332b, the elements of which are very similar to the Michigan statute except for the requirement of crossing international boundaries, provides that "[w]hoever threatens to commit an offense" defined in § 2332b(a)(1), "or attempts or conspires to do so," shall be punished as provided by the statute. 18 USC 2332b(a)(2).

Although there are numerous federal threat statutes covering a range of threats, these statutes do not define the words "threat" or "threaten." In *Elonis v United States*, 575 US 723; 135 S Ct 2001; 192 L Ed 2d 1 (2015), the United States Supreme Court interpreted 18 USC 875(c), which criminalized the transmission in interstate commerce of a communication containing a threat to kidnap any person or to injure the person of another; at issue was the *mens rea* requirement for a violation of the statute. In discussing a "threat," the Supreme Court observed generally that "[t]he parties agree that a defendant under Section 875(c) must know that he is transmitting a communication. But communicating *something* is not what makes the conduct 'wrongful.' Here 'the crucial element separating legal innocence from wrongful conduct' is the threatening nature of the communication. The mental state requirement must therefore apply to the fact that the

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ful radioactive material," and "harmful radioactive device" at MCL 750.200h(f), (g), (h), (i), and (*l*)) with 18 USC 2332a(c)(2)(B), (C), and (D) (defining similar materials in similar ways); 18 USC 2339B(g)(6) (defining the term "terrorist organization" for purposes of the statute prohibiting the provision of "material support . . . to . . . foreign terrorist organizations," 18 USC 2339B, with MCL 750.543c (defining "terrorist organization" in the same manner).

communication contains a threat." *Elonis*, 575 US at 737 (citation omitted).

Similarly, under the federal terrorism statute, it is the threatening nature of the communication that makes it worthy of criminal sanction, which does not and should not require the same *mens rea* as a completed substantive offense. That is, to constitute a threat for purposes of federal terrorism law, there is no requirement that a defendant have the *mens rea* of intending to intimidate a particular population or government; the transmission of a threat to commit an act that would have that effect is sufficient. Indeed, if a defendant had the same *mens rea* required for the substantive offense, it would require only a "substantial step" toward completion of the offense to transform a "threat" into an "attempt." See, e.g., *United States v Mehanna*, 735 F3d 32, 53 (CA 1, 2013). But threats are categorially different and pose a danger regardless of whether an individual actually intended to carry them out, as long as the threat constitutes a "true threat."

Given the similarity between the federal and Michigan approaches to terrorism and the dangers posed by threats, it is apparent that Michigan's Legislature, in enacting MCL 750.543m(1)(a), intended to address those evils through a lesser *mens rea* than is required for a complete substantive offense. The construction placed on that statute by the concurrence/dissent would frustrate that purpose. We therefore conclude that the Legislature did not intend to impose the intent requirement that the concurrence/dissent concludes the statute requires, but rather required only a true threat. The evidence here fully met that standard.

C. MALICIOUS USE OF TELECOMMUNICATIONS SERVICES

We also conclude that the record supports the jury's conclusion that defendant was guilty of malicious use

of a telecommunications service beyond a reasonable doubt. MCL 750.540e(1)(a) provides:

> (1) A person is guilty of a misdemeanor who maliciously uses any service provided by a telecommunications service provider with intent to terrorize, frighten, intimidate, threaten, harass, molest, or annoy another person, or to disturb the peace and quiet of another person by any of the following:
>
> (a) Threatening physical harm or damage to any person or property in the course of a conversation or message through the use of a telecommunications service or device.

"Telecommunications" and "telecommunications service" are defined as

> any service lawfully provided for a charge or compensation to facilitate the origination, transmission, retransmission, emission, or reception of signs, data, images, signals, writings, sounds, or other intelligence or equivalence of intelligence of any nature over any telecommunications system by any method, including, but not limited to, electronic, electromagnetic, magnetic, optical, photo-optical, digital, or analog technologies. [MCL 750.219a(6)(a).]

There is no dispute that defendant used a telecommunications service when he made the October 12, 2017 phone call to the Iron County Sheriff's Department. A trier of fact could reasonably infer that defendant threatened to shoot people, thus threatening physical harm or damage to a person or property. Defendant's brother and sister-in-law testified that defendant stated that he had communicated a threat to the Iron County Sheriff's Department during a phone call by referring to the Las Vegas shooting. A trier of fact could reasonably infer that defendant intended to frighten, intimidate, or threaten another person when he made the statement during the October 12, 2017 phone call.

Viewing the evidence in a light most favorable to the prosecutor, a rational trier of fact could have found that there was sufficient evidence to convict defendant of maliciously using a telecommunications service. See *Harris*, 495 Mich at 126.

Affirmed.

TUKEL, J., concurred with GADOLA, J.

BOONSTRA, P.J. (*concurring in part and dissenting in part*). I concur in affirming defendant's conviction of the malicious use of a telecommunications service, MCL 750.540e(1)(a). For the reasons that follow, I respectfully dissent, however, from the majority's determination to affirm defendant's conviction of threatening an act of terrorism, MCL 750.543m(1).

With due respect to the majority, it misses the critical issue, in my judgment. And while I appreciate that defendant may have missed it as well, and while I generally respect the party-presentation principle, we should not blindly follow that principle when doing so, as in this case, makes for bad law. See *Mack v Detroit*, 467 Mich 186, 206-207; 649 NW2d 47 (2002) (noting that a reviewing court's "ability to probe for and provide the correct solution" on a "controlling legal issue" is not limited by "the parties' failure or refusal to offer correct solutions to the issue"); see also *People v Carines*, 460 Mich 750, 761-762; 597 NW2d 130 (1999); *Napier v Jacobs*, 429 Mich 222, 233 n 2; 414 NW2d 862 (1987) (noting that "appellate review might well be the only remedy" for a criminal defendant and that a "malpractice claim based upon ineffective assistance of counsel, for example, could hardly compensate a wrongfully convicted person for undeserved imprisonment in a state prison"). That is particularly true

when, as here, the issue is one of statutory interpretation, namely, in this case, determining whether a charged act constitutes a "threat[] to commit an act of terrorism" as that term has been statutorily defined by our Legislature. See *People v Walker*, 276 Mich App 528, 545; 741 NW2d 843 (2007) (stating that this Court may overlook preservation requirements when the issue is one of law, the record is factually sufficient, and resolving the issue is necessary to the proper determination of the case).

My concerns are particularly heightened in the current hyperpolitical environment, which reflects an increasing proclivity among some in our society to tarnish anyone who might disagree with them with the moniker of a "terrorist" and who would criminalize any conduct (or perhaps even the thoughts) of such persons as that of a "terrorist." In my judgment, the term "terrorist" has a unique meaning. It's a special kind of criminality. It requires something more. A "plus" factor. Call it, perhaps, "criminality plus." It is critical, therefore, that we properly interpret MCL 750.543m(1)(a) and that we correctly delineate the bounds of that statute to assure its proper application in the future.

Indeed, the Legislature itself has recognized the concerns that underlie this opinion. Certainly, I am not one to unduly rely on legislative history (and my opinion in this case does not depend on it), but it bears noting that this case is "Exhibit A" in demonstrating how the proponents of the Michigan Anti-Terrorism Act, MCL 750.543a *et seq*., assured us it would not be used (or misused). The act was passed in the wake of the September 11, 2001 attacks on our country, the Legislature being concerned with the adequacy of existing laws "to deter terrorist threats and to punish terrorist acts" in the wake of a large-scale terrorist

attack on the civilian population and government infrastructure.[1] The problem being addressed by the legislation was described as follows:

> Prior to last September, terrorism was, for many Americans, the subject of action movies or news articles about events in foreign countries. However, since the events of September 11, 2001, when terrorists destroyed the World Trade Center, damaged the Pentagon, and crashed four jumbo jets, terrorism has become very real. For those in law enforcement who are charged with enforcing laws and preserving public safety, September 11th **became a wake-up call to examine municipal and school emergency plans; the safety of governmental infrastructures such as water supplies, the food supply, power plants, and governmental buildings; places where large crowds gather such as stadiums, bus and train stations, and schools; and especially, the adequacy of existing laws to deter terrorist threats and to punish terrorist acts**.
>
> After scrutinizing Michigan laws, many felt that existing laws needed to be revised to more adequately address the threat of acts of terrorism against Michigan targets. As part of a bi-partisan, bicameral approach addressing the issues revolving around possible acts of terrorism on Michigan soil, the adoption of a multi-bill package of legislation has been recommended. [House Legislative Analysis, SBs 930, 936, 939, 942, 946, 948, 949, 995 and 997 and HBs 5495, 5509, 5512, 5513 and 5520 (September 16, 2002), pp 1-2 (emphasis added).]

The legislative analysis also described the arguments for the legislation and the response to those arguments,

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[1] House Legislative Analysis, SBs 930, 936, 939, 942, 946, 948, 949, 995 and 997 and HBs 5495, 5509, 5512, 5513 and 5520 (September 16, 2002), pp 1-2, available at <https://www.legislature.mi.gov/documents/2001-2002/billanalysis/House/pdf/2001-HLA-0930-b.pdf> [https://perma.cc/68LN-QRWG].

with prescient implications for the case now before us. It included the following:

Arguments For:

• "Senate Bill 930 would create the Michigan Anti-Terrorism Act. **The bill would narrowly define an 'act of terrorism.'** " *Id*. at 7 (emphasis added).

• "It is obvious, therefore, that **even a violent crime such as a murder, armed robbery, or sexual assault would not meet all the criteria**. **Even a crime involving the placement or detonation of a bomb would not necessarily meet the criteria so as to be charged as a crime of terrorism.**" *Id*. (emphasis added).

• "It is also **reasonable to assume that prosecutors and juries would be judicious in their application of such a criminal charge so as to only include those individuals or organizations targeting a larger population with**

Response:

• "**Not everyone would agree that the bill's definition of an act of terrorism is crystal clear or as narrowly defined as purported to be.** In fact, though the bill is said to be addressing terrorism, such as the forces behind the September 11th attacks, it could be applied to environmental groups protesting the demolition of the rainforests, placements of nuclear dumps, and air and water pollution; animal rights activists; activists who target meetings of the World Trade Organization; labor union activists; and certain militia groups." *Id*. (emphasis added).

• "Couldn't hate crimes be reclassified as acts of terrorism, or bombings of abortion clinics be prosecuted as an act of terrorism?" *Id*.

the intent of bringing down our government, severely crippling the ability of government to function efficiently, or to keep the population in a state of fear and terror." *Id*. (emphasis added).

- "[**W**]**hat is to protect an individual from an overzealous prosecutor?**" *Id*. (emphasis added).

- "**Juries, too, can be unpredictable; is it wise to place complete trust in a jury's ability to discern which crime should or shouldn't be prosecuted as a terrorist act?**" *Id*. (emphasis added).

- "Closer scrutiny should be given to language that could result in the limitation of free speech or the inadvertent "capturing" of protesters who are not in the same category as true terrorists." *Id*.

It is thus evident that many of my concerns, as expressed in this opinion, were shared by the Legislature when it enacted the legislation in question. And the proponents of the legislation said not to worry, that the definition of an "act of terrorism" was narrow, that it would only be applied to efforts to bring down the government (or the like), and that we could trust prosecutors and juries to be "judicious." And yet here we are, applying a supposedly "narrow definition" to conduct that it would appear the statute was never intended to cover, faced with an injudicious

or overzealous prosecutor who, in bringing criminal charges against defendant, applied the definition to conduct that the statute was apparently never intended to cover. Accordingly, we are asked to consider a conviction that was achieved in blind reliance on a jury that, frankly, didn't know any better, because it wasn't told that the definition of an "act of terrorism" was a narrow one (and, in fact, was told quite the opposite).

Yet the majority now says that all of this is OK. I believe, to the contrary, that by affirming defendant's conviction on the record before us, the concerns expressed in the legislative analysis have now become a reality. And it puts us one step closer to authorizing our government to punish dissenters as "terrorists," something that I am unwilling to do.

With this backdrop, I will reframe the question as it applies to this case. Did defendant's conduct constitute extortion? Or threatening an act of terrorism? That, to me, is the question. Both are crimes under the laws of the state of Michigan. But they are different crimes, as the plain language of the respective statutes demonstrates. The difference between the two crimes, as applied in this case and on the basis of the evidence presented in the trial court, compels me to dissent from the majority's determination to affirm defendant's conviction of threatening an act of terrorism, MCL 750.543m(1).

I. THE TWO STATUTES

MCL 750.543m (Threatening an Act of Terrorism)

MCL 750.543m provides, in pertinent part:

> (1) A person is guilty of making a terrorist threat . . . if the person . . . :
>
> (a) *Threatens* to commit *an act of terrorism* and communicates the threat to any other person. [Emphasis added.]

An "act of terrorism" is defined, in pertinent part, in MCL 750.543b as a "willful and deliberate act," and

> [*a*]*n act that is intended to intimidate or coerce* a civilian population or influence or affect the conduct of government or a unit of government through intimidation or coercion. [MCL 750.543b(a)(*iii*) (emphasis added).][2]

MCL 750.213 (Extortion)

MCL 750.213 provides, in pertinent part:

> Any person who shall, either orally or by written . . . communication, maliciously *threaten any injury to the person or property . . . of another with intent thereby to extort money or any pecuniary advantage* whatever, *or with intent to compel the person* so threatened *to do or refrain from doing any act against his will*, shall be guilty of a felony[.] [Emphasis added.][3]

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[2] Other components of the statutory definition of an "act of terrorism" are not disputed and are not at issue on appeal.

[3] As our Supreme Court has explained with regard to MCL 750.213:

> According to the plain language of the statute, the crime of extortion is complete when a defendant (1) either orally or by a written or printed communication, maliciously threatens (2) to accuse another of any crime or offense, *or* to injure the person or property or mother, father, spouse or child of another (3) with the intent to extort money or any pecuniary advantage whatever, *or* with the intent to compel the person threatened to do or refrain from doing any act against his or her will. [*People v Harris*, 495 Mich 120, 128-129; 845 NW2d 477 (2014).]

Viewing the evidence in the light most favorable to the prosecution, *People v Harris*, 495 Mich 120, 126; 845 NW2d 477 (2014), it could certainly be credibly argued that defendant's conduct constituted extortion under MCL 750.213. The jury could have reasonably concluded that defendant made an oral threat of violence against Nancy and Randy Schauwecker (the owners of Lac O'Seasons Resort), with the intent of compelling them to pay him money and communicated that threat to Deputy Adam Schiavo of the Iron County Sheriff's Office, who in turn communicated it to the Schauweckers.[4] But the prosecution did not charge defendant with that crime. So, the question before us is whether defendant's conduct rose to the level of threatening an act of terrorism (as statutorily defined) under MCL 750.543m and, more specifically, whether there was sufficient evidence in support of the jury's guilty verdict on that charge.

II. "ACT OF TERRORISM"

The pertinent and compelling difference between the two criminal statutes, of course, is that the crime of

[4] The extortion statute does not require that the defendant communicate the threat directly to the intended victim, or even that the intended victim ever perceive the threat. Although this Court has not stated so in published cases, several unpublished opinions have held that a "communication" need not reach the victim at all to satisfy the extortion element, so long as *someone* perceives it as a threat. See, e.g., *People v Martin*, unpublished per curiam opinion of the Court of Appeals, issued June 2, 2015 (Docket No. 319400). Unpublished opinions of this Court are not binding precedent, but may be considered instructive or persuasive. *Paris Meadows, LLC v City of Kentwood*, 287 Mich App 136, 145 n 3; 783 NW2d 133 (2010). A federal statute analogous to our extortion statute similarly does not require that the communication be direct from the extortionist to the victim, or even perceived by the victim at all. See 18 USC 875(a), (b), and (d); see also, e.g., *United States v Holder*, 302 F Supp 296, 299 (D Mont, 1969).

threatening an act of terrorism requires that the threat be of an "act of terrorism," as defined in the statute. And for the reasons that I will explain, I conclude, from my review of the record and on the basis of the plain language of the statute, that the prosecution did not prove that defendant threatened an "act of terrorism." That is certainly not to minimize or condone what defendant did, or to exonerate him from any criminal culpability. As noted, he may, for example, be properly found guilty of extortion or some other crime.[5] But context matters, words have meaning, and statutory definitions do as well. And I conclude in this context, interpreting the statutory definition of an "act of terrorism," that the prosecution did not prove a threat of an "act of terrorism" and that the evidence was therefore insufficient to support defendant's conviction under MCL 750.543m.

As noted, MCL 750.543b(a)(*iii*) defines an "act of terrorism," in pertinent part, as a "willful and deliberate act" that is

> *intended to intimidate or coerce* a civilian population or influence or affect the conduct of government or a unit of government through intimidation or coercion. [Emphasis added.]

Again, viewing the evidence in the light most favorable to the prosecution (and the jury verdict), *Harris*, 495 Mich at 126, it could certainly be inferred that defendant's use of the phrase "hash tag Las Vegas" was a "threat" and, indeed, a threat of an act of violence against the owners of Lac O'Seasons Resort, who had not compensated him for the injury he sustained while working on the premises. It could further be inferred

[5] Indeed, we are affirming defendant's conviction of the malicious use of a telecommunications service, MCL 750.540e(1)(a).

that defendant's threat was intended to intimidate or coerce them into compensating him for his injury.[6]

But the question whether defendant's *words* were a threat isn't precisely the question for purposes of MCL 750.543m (threatening an act of terrorism).[7] Rather, the pertinent question is whether there was sufficient evidence to support a finding that *the threatened act* was "[*a*]*n act that is intended* to intimidate or coerce a civilian population or influence or affect the conduct of government or a unit of government through intimidation or coercion." MCL 750.543b(a)(*iii*) (emphasis added). And what is important to glean from that statutory language is that it is not the *threat itself* that must be intended to intimidate or coerce (as indeed, it would seem that threats generally are intended to do), but rather the threatened *act* must be of such a nature that *it* is intended to intimidate or coerce.[8] Indeed, it is

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[6] I agree with the majority that defendant's communication could properly be viewed as a "threat"; my contention is not that defendant made no threat, but simply that it was not established that the threatened act was an "act of terrorism." Relatedly, the majority's analysis of the necessary *mens rea* misses the mark in my judgment. Contrary to what the majority suggests, I am not engrafting an additional specific-intent requirement onto the statute; my conclusion does not hinge on whether defendant *intended* to communicate a threat, whether of terrorism or otherwise, or how defendant *intended* that his threat be perceived. Rather, I believe, on this record, that it was not established that the threat communicated by defendant, whether he intended to carry it out or not, was a threat to commit an "act of terrorism." No additional evidence of defendant's intent is required by my interpretation of the statute. Indeed, my focus is not on "intent," but rather is on whether the nature of the threatened act is such that it fully satisfies the statutory definition of an "act of terrorism." I also see no need or proper basis, in interpreting the Michigan statute, to strain to interpret it as mirroring the majority's interpretation of federal law.

[7] It would, however, be a pertinent question in assessing whether defendant had committed extortion under MCL 750.213.

[8] Had the Legislature intended otherwise, i.e., had it intended that a conviction under MCL 750.543m(1) require only that a *threat* (rather

that distinction that makes terrorism *terrorism*, as distinguished from some other criminal act, such as extortion.

III. THE TRIAL

So, what evidence was presented at trial to support a finding that defendant's threatened act was of such a nature that it was intended to intimidate or coerce? From my review of the record, there was none.

A. JURY INSTRUCTIONS

Jury instructions obviously are not "evidence," but they are the framework around which jurors evaluate the evidence that is presented during a trial. In its preliminary jury instructions in this case, the trial court described the elements of the crime of threatening an act of terrorism, MCL 750.543m(1), as follows:

> To prove the charges beyond a reasonable doubt, the Prosecutor must prove, with respect to the [charge of] making a terrorist threat or a false report of terrorism, that the Defendant either threatened to commit an act of terrorism and communicated that threat to some other person; or, the Defendant knowingly made a false report of an act of terrorism and communicated that report to some other person knowing it to be false. It is not a defense that Defendant did not have the intent or capacity to commit

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than a threatened *act*) be "intended to intimidate or coerce," then it would not have used the "intended to intimidate or coerce" language as part of the statutory definition of an "act of terrorism"; it instead would have simply provided that a threat be made *with* the intent to intimidate or coerce. We are not free to ignore statutory language the Legislature has chosen to employ. See *People v Peltola*, 489 Mich 174, 181; 803 NW2d 140 (2011) (stating that a court construing a statute should avoid any construction that would render any part surplusage or nugatory); *People v Jackson*, 487 Mich 783, 791; 790 NW2d 340 (2010) (emphasizing that as far as possible, effect should be given to every phrase or clause in a statute).

> the act of terrorism. Terrorism means a willful and deliberate act that would be a violent felony under the laws of this state, whether or not committed in this state, mainly threatening to commit mass murder.
>
> A person who knows or has reason to know is dangerous [sic] to human life, meaning that it could cause substantial likelihood of death or serious injury; *is intended to intimidate or coerce* a civilian population; or influence or affect the conduct of government or any unit of government through intimidation or coercion. [Emphasis added.][9]

Close, but not quite. While the distinction between a *threat* that is intended to intimidate or coerce and the threat of an *act of terrorism* that is intended to intimidate or coerce is a subtle one, it is also a critically important one.[10] And this preliminary jury instruction, which set the stage for the entire trial, as well as its counterpart in the final jury instructions, muddied that important distinction; indeed, they both left the

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[9] The trial court's final jury instructions, given at the end of the trial and after closing arguments, were substantially identical and are not quoted in this opinion.

[10] The majority characterizes this distinction as "nuanced" and "obscure." But, with respect to the majority, any such nuance or obscurity was built into the plain language of the statute by the Legislature. See note 8 of this opinion. And appropriately so, because the distinction is also what gives meaning to the statutory definition of an "act of terrorism." "Terrorism" is, and ought to be recognized as, an entirely different animal than a more run-of-the-mill crime such as extortion. Simply put, "terrorism" requires something more, that "plus factor," even if it seems nuanced or obscure. Otherwise, we risk converting (or enabling the prosecutorial arm of government to convert) any threat of harm (wrongful and criminal though it may be) into the much more serious realm of "terrorism," with potentially dire consequences for our jurisprudence and our liberties. Particularly in the modern political era, which reflects an increasing movement (at least in some quarters) toward criminalizing (including as "terrorism") the conduct, the speech, and perhaps even the thoughts of one's political opponents, we should be careful, precise, and ever vigilant in our statutory interpretation lest we, by blurring critical distinctions, find ourselves at the bottom of a dangerous, slippery slope.

sentence phrase, "is intended to intimidate or coerce," without a proper subject (i.e., one that would make clear that it was the threatened *act*, not the *threat* itself, that had to be "intended to intimidate or coerce").

B. OPENING STATEMENTS

The prosecution then proceeded to its opening statement, during which it seized upon the ambiguity of the preliminary jury instruction[11] to suggest to the jury that its burden of proof would be satisfied if it was able to prove merely that defendant's *threat* was intended to intimidate or coerce (without regard to whether the threatened *act of terrorism* was intended to intimidate or coerce).

> [*Prosecutor*]: This case is about a 37 year old man, Wilson Thompson Byczek, a man who was fed up, distraught, frustrated, and upset that he wasn't getting what he felt was his due. He wasn't getting a police report filed by the Iron County Sheriff's Office, and he wasn't getting paid for injuries he felt were caused by Lac O'Seasons Resort. *So he resorted to intimidation to get his way*. *He called the Iron County Sheriff's Office, agitated and upset, and said in the phone call that if he didn't get paid for his injuries it was going to be "hash tag Las Vegas."* That call came in 11 days after the mass murder in Las Vegas. *When someone makes a threat, they mean to get a specific, intended response*. *And Mr. Byczek's phone call got a specific intended response*.
>
> * * *
>
> Ladies and gentlemen, this isn't Mayberry anymore. *Threats are not ignored*. And at the end of this case we will ask you to return a verdict of guilty on the offenses charged. [Emphasis added.]

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[11] I do not mean to impugn in any way either the trial court or any of the attorneys in this case. To the contrary, I suggest only that they do not

Defense counsel's opening statement also did not clarify the distinction. Indeed, it exacerbated the ambiguity by confirming the prosecution's incorrect assertion that the jury need only find that the *threat* (as opposed to the threatened *act*) was "intended to intimidate or coerce":

> In order for you to convict [defendant] at the end of this case, you'd have to believe that he was threatening to commit mass murder, which is intended to intimidate or coerce a civilian population. *So the threat has to intimidate or coerce* a civilian population. [Emphasis added.]

C. THE EVIDENCE AT TRIAL

As the trial proceeded, the following witnesses testified: Deputy Schiavo, Nancy and Randy Schauwecker, Robert Olsen (a 911 dispatcher in Iron County), Sheriff Mark Valesano of the Iron County Sheriff's Office, Starr Adank (defendant's mother), Amery Saylor (defendant's girlfriend), Lieutenant Ryan Boehmke of the Iron County Sheriff's Office, Elizabeth Byczek (defendant's sister-in-law), Todd Byczek (defendant's brother), and Special Agent David Whitlow of the Federal Bureau of Investigation.

Based upon my review of the trial court record, the prosecution presented its case consistently with its opening statement and principally endeavored to elicit evidence regarding the intent behind the *threat* itself, as opposed to the nature of the threatened *act* (were it to be carried out). And defense counsel's strategy appears to have been to create juror doubt about whether defendant's use of the words "hash tag Las Vegas" was a threat at all.

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appear to have recognized or appreciated the significance of the distinction that I find to be so important in evaluating whether there was sufficient evidence to support defendant's conviction of threatening an act of terrorism, MCL 750.543m(1).

The testimony that came closest to addressing the issue appears to have come from Elizabeth Byczek and Lieutenant Boehmke. Elizabeth Byczek testified on direct examination as follows:

> *Q*. Did the Defendant at that point in time say anything about a phone call to the Iron County Sheriff's Office?
>
> *A*. He did indicate it. He was pretty vague in what he said. I think he was really embarrassed at the time, but he had mentioned that he had kind of snapped, lost his temper earlier in the morning, and *he had made a threat*, his words, not mine, to the Iron County Sheriff's Department *to try to get some action out of them*. He, again, was very vague on exactly what he said, but he made some sort of reference to the recent mass shootings in Las Vegas. We didn't know what he meant by that. And we weren't really pressing him either at the time because he was very upset, he was very emotional. We really just wanted to calm him down and get him into a better headspace. We weren't there to, you know, drill him and get all of the—get a ton of answers out of him. [Emphasis added.]

And Lieutenant Boehmke testified on direct examination as follows:

> *Q*. So what did the Defendant say about the incident?
>
> *A*. When he started talking about the actual phone call that he placed to the deputy, he told his mom that, "This is exactly what I said," he said, "My name is Wilson Byczek and I'd like to file a complaint on Lac O'Seasons. *They're going to pay for what they did to me*." [Emphasis added.]

It consequently appears to me that the evidence presented at trial, or the inferences to be drawn from the evidence, construed in a light most favorable to the prosecution (and the jury verdict), was that defendant's threat was intended to intimidate or coerce the Schauweckers to compensate him for his injuries, to intimidate or coerce the Iron County Sheriff's Office to file a police report regarding his injury at Lac O'Seasons

Resort or take other action to facilitate his desired compensation, or perhaps to exact retribution upon the Schauweckers or the Lac O'Seasons Resort for failing to compensate him. There was "zero" evidence, however, to support a finding that defendant's threatened *act* (even assuming that his use of the term "hash tag Las Vegas" was intended to refer to a mass shooting) would itself have been intended to intimidate or coerce either the Schauweckers or the Sheriff's Office (or, perhaps more appositely, the "larger population" that the statute apparently was intended to protect from such threats).

D. CLOSING ARGUMENTS

During closing arguments, which are not "evidence," but which help in framing the issues before the jury, the prosecution again told the jury, as it had during its opening statement, that it only had to prove that defendant's *threat* was intended to coerce or intimidate. The prosecution argued, in relevant part:

> Lieutenant Boehmke[,] he went and listened to the jail call, and he gave you reasons as to why law enforcement officers do that. They catch smugglers in the jail, they get narcotics information, you know, they hear things about cases that are helpful. And he testified that the Defendant said, "My name is Wilson Byczek. I want to file a complaint against Lac O'Seasons. *They're going to pay for what they did to me*. I'm coming back to Michigan. Fill out the paperwork. Right now it's hash tag Las Vegas." He was upset, he was worked up. He had a bad conversation with his attorney and his case wasn't going well.
>
> * * *
>
> [*E*]*very one of these threats is made with an intent to get a response. It is intended to instill fear in those who are the subject of the threat*. . . .
>
> * * *

> *It is a crime to even say it, whether it's true or not* . . . . And the reason for this are so citizens are not frightened, panicked, terrorized; so they don't have to decide whether to evacuate, close down, "What do we tell our customers; what do we tell our employees? How do we protect our people?" So that thousands to millions of dollars in a mass murder and resources are not spent investigating something that is nothing more than someone spouting off because they didn't get what they wanted out of life. *That's why it's a crime regardless of whether it was a joke or said out of frustration*. [Emphasis added.]

And then the prosecution repeated the earlier errant muddying of whether it was sufficient that the threat itself (as opposed to the threatened act) be "intended to intimidate or coerce," and incorrectly told the jury that the term "act of terrorism" was broadly (rather than narrowly) defined under the law:

> Let's look at the elements of the crime. . . .
>
> With respect to making terroristic threats or false reports of terrorism, they have to prove that the Defendant threatened to commit an act of terrorism and communicated that threat to some other person. Or, we have to prove that the Defendant knowingly made a false report of an act of terrorism and communicated that report to another person knowing it to be false. And as I said, it is not a defense, not a defense, that the Defendant did not have the intent or capability of committing the act of terrorism.
>
> Terrorism, and it's not what—we talked about terrorism in jury selection, terrorism like the 9/11 bombers, terrorism like, you know, the Orlando shooting—the shooting at the Orlando club. You know, *terrorism is a much broader term*, as was discussed in jury selection. And terrorism under Michigan's criminal law means a willful and deliberate act that would be violent under the laws of this state, whether or not committed in this state, mainly, that a person knows or has reason to know is dangerous to human life, meaning that it could cause a

substantial likelihood of death or serious injury, and—I'm sorry—committed in a state, namely mass murder. That a person knows or has reason to know is dangerous to human life, meaning that it could cause a substantial likelihood of death or serious injury. *And, is intended to intimidate or coerce a civilian population or influence or affect the conduct of government or a unit of government through intimidation or coercion.*

And I would submit to you that the civilian population in this case was Lac O'Seasons Resort; the people that use it, the people that love it and enjoy it. Not just the family, but the employees and the guests. *He intended to intimidate the owners of the Lac O'Seasons Resort*. *He intended to coerce the*[*m*]. *He wanted them to settle that lawsuit*. [Emphasis added.]

IV. SUFFICIENCY OF THE EVIDENCE

For all of these reasons, I am left to conclude that the entire framework for the prosecution and trial of this case was built around a misconception of the law, i.e., that the prosecution need only prove that a *threat*, rather than the *act* threatened, was intended to intimidate or coerce, in order to secure a conviction of threatening an act of terrorism in violation of MCL 750.543m(1). That is, after all, what distinguishes terrorism from other crimes.[12] The evidence presented at trial fit neatly within that incorrect framework, and

[12] The majority postulates that "because defendant's statement suggests that the objective of such an act would be to exact vengeance or to retaliate, it is not unreasonable to conclude that the intent of the act would be to intimidate or to coerce either civilians (people at Lac O'Seasons or perhaps a random crowd as occurred in Las Vegas) or the government (Deputy Schiavo or the police generally)." I disagree both on the basis of the evidence presented and because I believe that this reasoning again blurs the distinction between terrorism (or threatening an act of terrorism) and other crimes, such as extortion, and that to properly describe something as "terrorism" requires something more, as the plain language of the statute itself dictates.

consisted of a lack of any evidence, much less sufficient evidence, to support a conclusion that defendant threatened an *act of terrorism* that would justify his conviction under MCL 750.543m(1).

V. CONCLUSION

Certainly, it would be easy to say that it was within the prosecution's discretion to charge defendant with threatening an act of terrorism in violation of MCL 750.543m(1), rather than with extortion in violation of MCL 750.213. And it would be equally easy to say that it was the jury's prerogative to weigh the evidence and to render a verdict of guilty. But by doing so in this case, we are, in my judgment, effectively jettisoning any pretense of adherence to the fundamental underlying presumption of the legislative proponents of the Michigan Anti-Terrorism Act, i.e., that "prosecutors and juries would be judicious in their application of . . . criminal [charges arising under the act] so as to only include those individuals or organizations targeting a larger population with the intent of bringing down our government, severely crippling the ability of government to function efficiently, or to keep the population in a state of fear and terror." Moreover, in my judgment, blind deference to the prosecution and the jury does not serve the interests of justice under the circumstances of this case (given the framework of the trial and the lack of any evidence that the threatened act was of such a nature that it was itself intended to intimidate or coerce), particularly when doing so propagates a misinterpretation of statutory law and therefore makes for bad law. Indeed, there already exist unpublished opinions of this Court that fail to recognize the distinction

that this opinion has endeavored to highlight. I conclude that it is therefore necessary to attempt to set the law back on its right course, even by way of a dissent, based on sound statutory interpretation, and I accordingly dissent from the majority's determination to affirm defendant's conviction of threatening an act of terrorism, MCL 750.543m(1).

BURTON-HARRIS v WAYNE COUNTY CLERK

Docket No. 353999. Submitted May 6, 2021, at Detroit. Decided May 7, 2021, at 9:00 a.m. Judgment vacated as to Parts II, IV, V, and part of Part III, and leave denied in all other respects 508 Mich 985 (2021).

Victoria Burton-Harris filed a verified complaint and emergency motion in the Wayne Circuit Court to preclude Kym Worthy from appearing on the August 2020 primary election and November 2020 general election ballots as a candidate for Wayne County Prosecutor. Plaintiff submitted a letter to the Wayne County Clerk and Wayne County Election Commission (the Wayne County defendants) on June 2, 2020, challenging Worthy's candidacy. According to plaintiff, following Worthy's election as prosecutor in 2016, Worthy failed to file a postelection statement as required under MCL 168.848 before assuming office. Therefore, Worthy's affidavit of identity (AOI), filed with respect to her 2020 candidacy pursuant to MCL 168.558(4), falsely attested that she had filed all required statements under the Michigan Campaign Finance Act, MCL 169.201 *et seq*. Plaintiff argued that because Worthy's AOI contained a false statement, the Wayne County defendants had a duty not to certify Worthy for inclusion on the August 2020 primary ballot. The Wayne County Clerk determined that a facial review of Worthy's AOI indicated that it complied with MCL 168.558(2), and the clerk certified a list of candidates for Wayne County Prosecutor that included Worthy. Plaintiff then initiated this action, and Robert Davis filed an emergency motion to intervene on June 11, 2020, before the scheduled show-cause hearing on plaintiff's motion on June 15, 2020. The trial court, Timothy M. Kenny, J., denied plaintiff's emergency motion and Davis's motion to intervene. Davis appealed as of right.

The Court of Appeals *held*:

1. The issues in Davis's appeal were moot given that, after he filed his appeal, the August 2020 primary election and November 2020 general election took place with Worthy's name on the ballot. Therefore, Davis could not be granted relief that would exclude Worthy as a candidate in the 2020 elections. However, the

issues were reviewed regardless because the strict time constraints involved in elections created a reasonable expectation that the issues could recur yet escape judicial review.

2. MCR 2.209(A)(3) allows intervention by right when the applicant's interest may otherwise be inadequately represented, while MCR 2.209(B)(2) allows permissive intervention when an applicant's claim and the main action have a question of law or fact in common. Davis's motion to intervene relied on both subrules and asserted that his interest in the proper enforcement of election laws was not adequately represented by plaintiff because he anticipated that plaintiff would not pursue appellate review of an adverse ruling. The trial court denied Davis's motion because his interest was adequately represented by plaintiff, and it further opined that Davis's intervention was precluded by the doctrine of laches. When the trial court denied Davis's motion, it was unclear whether plaintiff would appeal the court's decision to deny her motion. MCR 2.209(A)(3) is to be liberally construed in favor of intervention when the applicant's interest *may* otherwise be inadequately represented. But even if the perceived adequacy of plaintiff's representation was not an appropriate basis for denying Davis's motion to intervene under MCR 2.209(A)(3), the court's application of laches to deny intervention was not an abuse of its discretion. Both MCR 2.209(A)(3) and (B) condition intervention on timely application. Laches bars a claim when there is an unexcused or unexplained delay in commencing an action and a corresponding change of material condition that results in prejudice to a party. Davis moved to intervene six days after plaintiff filed the action and five days after the Election Commission began printing ballots. If Davis had been allowed to intervene after his motion was heard at the hearing on plaintiff's emergency motion, the court would have had to either adjourn plaintiff's emergency motion to permit Davis time to brief the issues, or decide the motion without affording him an opportunity to address the merits of the case. In light of the tight schedule mandated by the issues before the court, the court's denial of Davis's motion to intervene as untimely was not outside the range of principled outcomes.

3. A plaintiff seeking a writ of mandamus must establish that: (1) the party seeking the writ has a clear legal right to the performance of the duty sought to be compelled, (2) the defendant has a clear legal duty to perform the act requested, (3) the act is ministerial, i.e., it does not involve discretion or judgment, and (4) no other legal or equitable remedy exists that might achieve the same result. The trial court denied mandamus on the basis that

the second and third requirements were not established. According to Davis, the Wayne County defendants had a clear legal duty to exclude Worthy from the primary election ballot under MCL 168.848 (which requires elected candidates to file a postelection statement attesting that, among other things, all statements and reports required of the candidate or the candidate's election committee have been filed) and MCL 168.558 (which requires candidates to file an AOI attesting that, among other things, all statements and reports required to be filed by the candidate under the Michigan Campaign Finance Act have been filed and mandates that a candidate may not be certified to the board of election commissioners if the candidate executed an AOI containing a false statement). Under MCL 168.558(4), a county clerk has a clear legal duty to not certify a candidate's name to the county election commission if the candidate's AOI contains a false statement. Plaintiff asked the court to declare that Worthy made a false statement on her AOI, but the court did not discuss this issue. If the court had determined that plaintiff's allegation was correct, the Clerk would have had a clear legal duty to not certify Worthy for inclusion on the primary ballot under MCL 168.558(4). Moreover, this action would be ministerial because it would not require the exercise of discretion. In light of plaintiff's unresolved declaratory-judgment claim, the trial court's denial of mandamus on the merits was premature. However, the court's denial of mandamus was not premised solely on the merits of plaintiff's claim. The court also applied laches to bar plaintiff's complaint, and noted that plaintiff could have challenged Worthy's AOI at any time after Worthy filed it in March 2020, but chose to wait until June 5, 2020, the day before ballot printing began. Although a mandamus action would not have presented a ripe controversy before June 5, 2020, plaintiff could have pursued a declaratory judgment that Worthy's AOI contained a false statement, rendering her ineligible for certification under MCL 168.558(4). Plaintiff's delay substantially prejudiced the Wayne County defendants because it impaired their ability to produce the primary election ballots within the time frame required by statute and exposed them to significant financial waste if reprinting was required. The trial court did not err by determining that plaintiff's action was barred by laches.

4. Davis argued that the trial court should have granted plaintiff's request for a declaratory judgment. 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 could be sought or granted. An actual controversy exists when a declaratory judgment is needed to guide a party's future conduct in order

to pursue the party's legal rights. In this case, there was an actual and present controversy before the court that required judgment to guide the parties' future conduct and rights with respect to Worthy's inclusion on the 2020 primary election ballot. The trial court did not address this issue, but it can reasonably be inferred that the court's application of laches extended to preclusion of plaintiff's declaratory-judgment count. This was not error, because a declaratory-judgment claim would have been ripe for review well before the Clerk certified the candidates for the 2020 primary election and the Election Commission approved ballot printing.

Affirmed.

Robert Davis *in propria persona*.

Janet Anderson Davis, Assistant Corporation Counsel, for the Wayne County Clerk and Wayne County Election Commission.

The Miller Law Firm, PC (by *Melvin B. Hollowell* and *Angela L. Baldwin*) for Kym L. Worthy.

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

PER CURIAM. Robert Davis appeals as of right the trial court's order denying his motion to intervene and plaintiff's emergency motion for a temporary restraining order, mandamus relief, and declaratory relief. We affirm.

I. BACKGROUND

This case involves events that occurred before the August 2020 primary election and concerns the duties owed by defendants Wayne County Clerk (the Clerk) and Wayne County Election Commission (the Election Commission) (collectively, the Wayne County defendants) with respect to MCL 168.558(4) of the Michigan Election Law, MCL 168.1 *et seq*. On March 18, 2020, intervenor-defendant, Kym Worthy, filed an affidavit of

identity (AOI) regarding her candidacy for the office of Wayne County Prosecutor in the 2020 election. The form affidavit included the following statement before her signature:

> I swear, or affirm, that the facts I have provided and the facts contained in the statement set forth below are true.
>
> > *At this date, all statements, reports, late filing fees, and fines due from me or any Candidate Committee organized to support my election to office under the Michigan Campaign Finance Act, PA 388 of 1976, have been filed or paid*.
>
> I acknowledge that making a false statement in this affidavit is perjury — a felony punishable by a fine up to $1,000.00 or imprisonment for up to 5 years, or both and may result in disqualification from the ballot (MCL 168.558, 933, and 936).

Plaintiff, also a candidate for Wayne County Prosecutor, submitted a letter to the Wayne County defendants on June 2, 2020, to challenge Worthy's candidacy. Plaintiff explained that when Worthy was last elected in 2016, she was required to file a postelection statement under MCL 168.848 before assuming office. According to plaintiff, Worthy never filed the required statement. Consequently, the affirmation in Worthy's AOI was false, and the Wayne County defendants had a duty to not certify Worthy for inclusion on the August 2020 primary ballot.

In response to plaintiff's challenge, the Clerk indicated that a facial review of Worthy's AOI "determined that all sections deemed mandatory by the Michigan Campaign Finance Act [MCL 169.201 *et seq*.] have been complied with and the requirements of MCL 168.558(2) have been met." The Clerk advised plaintiff that it did not have the power to investigate "the truth or falsity of a candidate's affirmation in the Campaign Finance

Compliance Statement and Attestation section of the Affidavit of Identity." On June 5, 2020, the Clerk certified a list of candidates for Wayne County Prosecutor that included Worthy, and the Election Commission approved the printing of the August 2020 primary ballots.

Plaintiff immediately initiated this action by filing a verified complaint and emergency motion in an attempt to preclude Worthy's name from appearing on the ballots, and a show-cause hearing was scheduled for June 15, 2020. Davis filed an emergency motion to intervene on June 11, 2020, which the trial court addressed at the beginning of the June 15, 2020 hearing. Although Davis's proposed complaint substantially mirrored the mandamus and declaratory-judgment counts in plaintiff's complaint, Davis urged the court to allow his intervention because he was concerned that plaintiff would not appeal an adverse ruling. Davis asserted that, as a registered voter in Wayne County, he had a right to pursue proper enforcement of election laws. The trial court denied Davis's motion to intervene and plaintiff's emergency motion. This appeal followed.

II. MOOTNESS

Considering the timing of this appeal, Davis preemptively addressed the mootness doctrine, arguing that the issues involved in this case are either not moot because an alternative remedy could be fashioned or, if moot, should still be addressed because the issues are publicly significant and likely to recur but evade judicial review.[1] "[T]he question of mootness is a threshold

[1] This Court denied Davis's motion to expedite this appeal under MCR 7.213(C)(4). *Burton-Harris v Wayne Co Clerk*, unpublished order of the

issue that a court must address before it reaches the substantive issues of a case." *Can IV Packard Square, LLC v Packard Square, LLC*, 328 Mich App 656, 661; 939 NW2d 454 (2019), quoting *In re Tchakarova*, 328 Mich App 172, 178; 936 NW2d 863 (2019) (quotation marks omitted). Whether an issue is moot is a question of law that is reviewed de novo. *Can IV Packard Square*, 328 Mich App at 661.

An issue is moot if it involves an abstract question of law without foundation in existing facts or rights or is presented under circumstances "in which a judgment cannot have any practical legal effect upon a then existing controversy." *TM v MZ*, 501 Mich 312, 317; 916 NW2d 473 (2018) (quotation marks and citation omitted). Although this Court will not generally address such issues, *Can IV Packard Square*, 328 Mich App at 661, "a moot issue will be reviewed if it is publicly significant, likely to recur, and yet likely to evade judicial review," *In re Indiana Mich Power Co*, 297 Mich App 332, 340; 824 NW2d 246 (2012).

Since Davis filed this appeal, the August 2020 primary election and November 2020 general election have taken place with Worthy's name appearing on the ballots.[2] Therefore, even if we found merit in the issues

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Court of Appeals, entered July 1, 2020 (Docket No. 353999). The Supreme Court also denied Davis's emergency interlocutory application for leave to appeal this Court's July 1, 2020 order. *Burton-Harris v Wayne Co Clerk*, 505 Mich 1141 (2020).

[2] See Wayne County, *Official Results Summary Report for the August 2020 Primary Election*, p 12, available at <https://www.waynecounty.com/documents/clerk/official_electionsummaryreport_8.2020.pdf> [https://perma.cc/6S85-STVQ]; Wayne County, *Official Results Summary Report for the November 2020 General Election*, p 14, available at <https://www.waynecounty.com/documents/clerk/!electionsum_11032020.pdf> [https://perma.cc/NU22-9J7C]. This Court may take judicial notice of a public record. *Gleason v Kincaid*, 323 Mich App 308, 314 n 1; 917 NW2d 685 (2018).

presented for review, we could not grant relief that would exclude Worthy as a candidate in the 2020 elections. The issues before the Court are therefore moot, see *TM*, 501 Mich at 317, but we agree that they should still be considered because the strict time constraints involved in elections create a reasonable expectation that the issues involved in this appeal could recur yet escape judicial review, *In re Indiana Mich Power Co*, 297 Mich App at 340.[3]

III. INTERVENTION

Next, Davis challenges the trial court's denial of his motion to intervene. A trial court's ruling regarding a motion to intervene is reviewed for an abuse of discretion. *Kuhlgert v Mich State Univ*, 328 Mich App 357, 377; 937 NW2d 716 (2019). "An abuse of discretion occurs when the decision is outside the range of principled outcomes." *Id*. at 377-378 (quotation marks and citation omitted). A trial court's application of laches is reviewed de novo. *Knight v Northpointe Bank*, 300 Mich App 109, 113; 832 NW2d 439 (2013).

MCR 2.209 governs intervention. *Kuhlgert*, 328 Mich App at 378. Davis moved to intervene by right under MCR 2.209(A)(3). Under that subrule, intervention is allowed on timely application

[3] This exception is commonly applied in cases involving election-related issues because "the strict time constraints of the election process necessitate that, in all likelihood, such challenges often will not be completed before a given election occurs, rendering the discussion . . . moot before appellate review." *Gleason*, 323 Mich App at 316. See also *Christenson v Secretary of State*, 336 Mich App 411, 418; 970 NW2d 417 (2021) (regarding address on nominating petition); *Nykoriak v Napoleon*, 334 Mich App 370, 384 n 4; 964 NW2d 895 (2020) (regarding defective AOI); *Barrow v Detroit Election Comm*, 305 Mich App 649, 659-660; 854 NW2d 489 (2014) (*Barrow II*) (regarding requirements for write-in candidacy).

> when the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties. [MCR 2.209(A)(3).]

"[T]he rule should be liberally construed to allow intervention when the applicant's interest otherwise may be inadequately represented." *Auto-Owners Ins Co v Keizer-Morris, Inc*, 284 Mich App 610, 612; 773 NW2d 267 (2009) (quotation marks and citation omitted; alteration in original). Davis also sought permissive intervention under MCR 2.209(B)(2), which allows intervention "when an applicant's claim or defense and the main action have a question of law or fact in common." "[A] court deciding a request for permissive intervention must 'consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.' " *Kuhlgert*, 328 Mich App at 378-379, quoting *Hill v LF Transp, Inc*, 277 Mich App 500, 508; 746 NW2d 118 (2008). Both intervention rules "condition intervention on timely application." *Kuhlgert*, 328 Mich App at 379.

The trial court denied Davis's motion because his interest in the case was adequately represented by plaintiff. The court reasoned that plaintiff's interest in the matter was even more compelling than Davis's interest because plaintiff was not merely a qualified elector, but also a candidate for the same office pursued by Worthy. And although the court agreed that the claims presented by plaintiff and Davis involved common questions of law and fact, it opined that laches precluded Davis's intervention because "any delay in rendering and resolving this particular matter would,

in fact, work a hardship upon, not only the clerks, but also upon the voters of Wayne County."

Davis maintains on appeal that his interest in proper enforcement of election laws was not adequately represented by plaintiff because he anticipated that plaintiff would not pursue appellate review of an adverse ruling. Davis compares the circumstances at hand to *Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286; 715 NW2d 846 (2006), wherein the Supreme Court determined that the Attorney General could not, by moving to intervene before the Supreme Court, appeal a decision of this Court when the original litigants did not file a timely appeal. The Supreme Court recently clarified that its decision in *Federated Ins Co* was premised on the absence of a "justiciable controversy because neither of the losing parties below filed a timely appeal and because the Attorney General was not an aggrieved party." *League of Women Voters of Mich v Secretary of State*, 506 Mich 561, 576; 957 NW2d 731 (2020). The Court continued:

> *Federated* never held that there would be no justiciable controversy if the losing parties below failed to file a timely appeal but a party with appellate standing filed a timely motion to intervene (i.e., before the deadline to file an application for leave to appeal). Therefore, *Federated* left open the possibility that there may be a justiciable controversy in such circumstances. This rule makes sense—we see no reason why an entity that otherwise is aggrieved and therefore has appellate standing should be prohibited from intervening before a lower-court judgment becomes final, i.e., before the deadline to file an application for leave to appeal. [*Id*.]

Appellate standing exists when a litigant "suffered a concrete and particularized injury . . . arising from either the actions of the trial court or the appellate court judgment . . . ." *Federated Ins Co*, 475 Mich at

291-292. While a litigant must generally have an injury, right, or interest that distinguishes the litigant from the citizenry at large, *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 372; 792 NW2d 686 (2010), "the bar for standing is lower when a case concerns election law," *League of Women Voters*, 506 Mich at 587. As previously summarized by this Court:

> Michigan jurisprudence recognizes the special nature of election cases and the standing of ordinary citizens to enforce the law in election cases. *Deleeuw v Bd of State Canvassers*, 263 Mich App 497, 505-506; 688 NW2d 847 (2004). See also *Helmkamp v Livonia City Council*, 160 Mich App 442, 445; 408 NW2d 470 (1987) ("[I]n the absence of a statute to the contrary, . . . a private person . . . may enforce by mandamus a public right or duty relating to elections without showing a special interest distinct from the interest of the public." [Quotation marks omitted.]). The general interest of ordinary citizens to enforce the law in election cases is sufficient to confer standing to seek mandamus relief. See *Citizens Protecting Michigan's Constitution* [*v Secretary of State*, 280 Mich App 273, 282; 761 NW2d 210 (2008), aff'd in part 482 Mich 960 (2008)] (permitting a ballot question committee to challenge a petition). [*Protect MI Constitution v Secretary of State*, 297 Mich App 553, 566-567; 824 NW2d 299 (2012), rev'd on other grounds 492 Mich 860 (2012) (first and second alterations in original).]

Thus, considering the subject matter of this case, it appears that Davis would have appellate standing.

When the trial court denied Davis's motion, the appellate concerns raised by Davis were still speculative because it was not yet apparent whether the court would deny plaintiff's requested relief or whether plaintiff would file an appeal in that event. Of course, the first of these questions was resolved moments later at the same hearing, but it remained unclear whether plaintiff would appeal the trial court's decision. None-

theless, MCR 2.209(A)(3) is to be liberally construed in favor of intervention when "the applicant's interest otherwise *may* be inadequately represented." *Auto-Owners Ins Co*, 284 Mich App at 612 (quotation marks and citation omitted; emphasis added). In other words, "inadequacy of representation need not be definitely established." *Vestevich v West Bloomfield Twp*, 245 Mich App 759, 762; 630 NW2d 646 (2001).

But assuming, without deciding, that the perceived adequacy of plaintiff's representation was not an appropriate basis for denying Davis's motion to intervene under MCR 2.209(A)(3), that was not the only reason for the trial court's ruling. As noted earlier, the court also applied laches to bar Davis's intervention as untimely. "MCR 2.209(A)(3) and (B) both condition intervention on timely application." *Kuhlgert*, 328 Mich App at 379. Laches is an equitable doctrine that bars a claim when "there is an unexcused or unexplained delay in commencing an action and a corresponding change of material condition that results in prejudice to a party." *Wayne Co v Wayne Co Retirement Comm*, 267 Mich App 230, 252; 704 NW2d 117 (2005) (quotation marks omitted), quoting *Dep't of Pub Health v Rivergate Manor*, 452 Mich 495, 507; 550 NW2d 515 (1996). Because the mere passage of time is an insufficient basis for invoking laches, the court's inquiry should focus on the prejudice caused by the delay. *Knight*, 300 Mich App at 114-115.

Plaintiff initiated this action on June 5, 2020, and Davis filed his motion to intervene six days later on June 11, 2020. While such a short period would be considered negligible in most cases, the narrow deadlines at issue in election matters are significant. Ballot printing began on June 6, 2020, and the Election Commission had to deliver absent voter ballots to the

Clerk by June 18, 2020, for distribution to local clerks by June 20, 2020, in anticipation of the August 4, 2020 primary election. MCL 168.713; MCL 168.714. Davis's motion to intervene was heard on June 15, 2020, the same day plaintiff's emergency motion was scheduled for oral argument. If Davis had been allowed to intervene, the trial court would have needed to either adjourn plaintiff's emergency motion to permit Davis time to brief the issues or decide the motion without affording Davis an opportunity to address the merits of the issues. Considering the tight schedule mandated by the issues before the court, the court's denial of Davis's motion to intervene as untimely was not outside the range of principled outcomes.

IV. MANDAMUS

Davis also challenges the trial court's denial of mandamus. "A trial court's decision whether to issue a writ of mandamus is reviewed for an abuse of discretion, but any underlying issue of statutory interpretation is a question of law, which is reviewed de novo on appeal." *PT Today, Inc v Comm'r of Office of Fin & Ins Servs*, 270 Mich App 110, 133; 715 NW2d 398 (2006) (citations omitted). "[A]n abuse of discretion occurs only when the trial court's decision is outside the range of reasonable and principled outcomes." *Barrow v Detroit Election Comm*, 305 Mich App 649, 662; 854 NW2d 489 (2014) (*Barrow II*), quoting *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007) (quotation marks omitted; alteration in original). Whether the defendant has a clear legal duty to perform an act is also a question of law reviewed de novo. *Rental Props Owners Ass'n of Kent Co v Kent Co Treasurer*, 308 Mich App 498, 518; 866 NW2d 817 (2014).

Mandamus is an extraordinary remedy used to enforce duties required of governmental actors by law. *Stand Up for Democracy v Secretary of State*, 492 Mich 588, 618; 822 NW2d 159 (2012); *Mercer v Lansing*, 274 Mich App 329, 333; 733 NW2d 89 (2007). The plaintiff seeking a writ of mandamus has the burden of establishing four requirements:

> (1) the party seeking the writ has a clear legal right to the performance of the duty sought to be compelled, (2) the defendant has a clear legal duty to perform the act requested, (3) the act is ministerial, that is, it does not involve discretion or judgment, and (4) no other legal or equitable remedy exists that might achieve the same result. [*Southfield Ed Ass'n v Bd of Ed of Southfield Pub Sch*, 320 Mich App 353, 378; 909 NW2d 1 (2017) (quotation marks and citation omitted).]

The trial court denied mandamus relief, finding the second and third requirements lacking. "A clear legal duty, like a clear legal right, is one that 'is inferable as a matter of law from uncontroverted facts regardless of the difficulty of the legal question to be decided.' " *Hayes v Parole Bd*, 312 Mich App 774, 782; 886 NW2d 725 (2015), quoting *Rental Props Owners Ass'n*, 308 Mich App at 518-519. "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 v Garrett*, 316 Mich App 37, 42; 890 NW2d 882 (2016), quoting *Hillsdale Co Senior Servs, Inc v Hillsdale Co*, 494 Mich 46, 58 n 11; 832 NW2d 728 (2013) (quotation marks omitted).

Davis argues that the Wayne County defendants had a clear legal duty to exclude Worthy from the primary election ballot. In support of his position, Davis relies on the interplay between MCL 168.558 and MCL 168.848. MCL 168.848 provides, in relevant part:

> (1) Each elected candidate subject to the Michigan campaign finance act, 1976 PA 388, MCL 169.201 to 169.282, and whose candidate committee received or expended more than $1,000.00 during the election cycle shall file a postelection statement with the filing official designated to receive the elected candidate's candidate committee campaign statements under section 36 of the Michigan campaign finance act, 1976 PA 388, MCL 169.236. All of the following apply to a postelection statement required by this section:
>
> (a) The postelection statement must be on a form prescribed by the secretary of state.
>
> (b) The elected candidate shall file the postelection statement before the elected candidate assumes office.
>
> (c) The postelection statement shall include an attestation signed by the elected candidate that, as of the date of the postelection statement, all statements, reports, late filing fees, and fines required of the candidate or a candidate committee organized to support the candidate's election under the Michigan campaign finance act, 1976 PA 388, MCL 169.201 to 169.282, have been filed or paid.
>
> (d) The postelection statement shall include an attestation signed by the elected candidate acknowledging that making a false statement in a postelection statement is punishable by a fine of not more than $1,000.00 or imprisonment for not more than 5 years, or both.
>
> (2) Failure to file a postelection statement as required by subsection (1) is a misdemeanor punishable by a fine of not more than $500.00 or imprisonment for not more than 93 days, or both.

MCL 168.558 governs the filing of certain documents by a candidate for elected office, including AOIs. *Nykoriak v Napoleon*, 334 Mich App 370, 375; 964 NW2d 895 (2020). Subsection (4) provides:

> An affidavit of identity must include a statement that as of the date of the affidavit, all statements, reports, late filing fees, and fines required of the candidate or any

> candidate committee organized to support the candidate's election under the Michigan campaign finance act, 1976 PA 388, MCL 169.201 to 169.282, have been filed or paid; and a statement that the candidate acknowledges that making a false statement in the affidavit is perjury, punishable by a fine up to $1,000.00 or imprisonment for up to 5 years, or both. . . . *An officer shall not certify to the board of election commissioners* the name of a candidate who fails to comply with this section, or *the name of a candidate who executes an affidavit of identity that contains a false statement with regard to any information or statement required under this section*. [MCL 168.558(4) (emphasis added).]

Additionally, under MCL 168.567, "[t]he boards of election commissioners shall correct such errors as may be found in said ballots, and a copy of such corrected ballots shall be sent to the secretary of state by the county clerk."

On March 18, 2020, Worthy signed and filed a form AOI that included an affirmation consistent with the requirement in the first sentence of MCL 168.558(4). Plaintiff supported her complaint in this case with an affidavit stating that the public database containing campaign finance statements demonstrated that Worthy did not file the postelection statement required under MCL 168.848 before assuming office in 2017. Plaintiff also produced an e-mail chain in which Davis requested Worthy's postelection statement from the Clerk's office and was advised that it did not have a postelection statement from Worthy on file. Davis argues that because Worthy's AOI contained a false statement indicating that she had filed all necessary statements, MCL 168.558(4) required that the Wayne County defendants not include Worthy as a candidate on the 2020 ballot, and the trial court should have ordered the Wayne County defendants to remove Worthy's name from the ballot.

This Court has previously examined the duties imposed by MCL 168.558. The plaintiff in *Berry* sought a writ of mandamus against the county clerk and county election commission compelling them to exclude two candidates from a primary election ballot because the candidates' AOIs did not include a precinct number as required by former MCL 168.558(2). *Berry*, 316 Mich App at 40. This Court reversed the trial court's denial of mandamus, agreeing with the plaintiff that MCL 168.558(4) imposed a clear legal duty not to certify the name of a candidate who failed to comply with statutory requirements. *Id*. at 44. Moreover, having failed to perform that duty when they certified the two challenged candidates for inclusion on the ballot, the county defendants had "a clear legal duty to 'correct' such errors as may be found in the resulting, improper ballots." *Id*., citing MCL 168.567. This Court further explained:

> [T]he action that plaintiff now seeks to compel is decidedly "ministerial" in nature. The duty to correct the ballots under § 567 is set forth "with such precision and certainty as to leave nothing to the exercise of discretion or judgment." See *Hillsdale*, 494 Mich at 58 n 11. Because the affidavits of identity . . . were defective on their face, defendants' assertion that they had no authority to review the affidavits is misplaced. Rather, by doing nothing more than the ministerial task of completing a facial review of the affidavits, defendants would undertake to perform their clear legal duty under § 558(4) to "not certify to the board of election commissioners the name of a candidate who [had] fail[ed] to comply" with § 558(2). [*Berry*, 316 Mich App at 44-45 (second and third alterations in original).]

This Court addressed MCL 168.558(4) again in *Bsharah v Wayne Co Clerk*, unpublished per curiam opinion of the Court of Appeals, issued June 6, 2018

(Docket No. 344081).[4] Confronted with a remarkably similar claim of error, this Court determined that a county clerk did not have a clear legal duty to look beyond the face of an AOI to determine the truthfulness of a candidate's statements. *Id*. at 4-6. Recognizing the clear parallels between *Bsharah* and this case, the trial court relied on *Bsharah* to deny plaintiff's request for a writ of mandamus.

We do not question the soundness of the *Bsharah* Court's analysis at the time that case was decided, but the key statute at issue, MCL 168.558(4), was subsequently amended by 2018 PA 650. At the time *Bsharah* was decided, MCL 168.558(4) required an AOI to include a statement regarding the candidate's compliance with necessary filings and acknowledgment of the consequences for making a false statement. MCL 168.558(4), as amended by 2014 PA 94. The last sentence of former MCL 168.558(4) stated, "An officer shall not certify to the board of election commissioners the name of a candidate who fails to comply with this section." MCL 168.558(4), as amended by 2014 PA 94. Following the 2018 amendment of MCL 168.558(4), the last sentence now provides, "An officer shall not certify to the board of election commissioners the name of a candidate who fails to comply with this section, *or the name of a candidate who executes an affidavit of identity that contains a false statement with regard to any information or statement required under this section*." MCL 168.558(4), as amended by 2018 PA 650 (emphasis added). The addition of the emphasized language in MCL 168.558(4) undercuts the *Bsharah*

[4] "Unpublished decisions of this Court are not precedentially binding, MCR 7.215(C)(1), but may be considered instructive or persuasive, *Sau-Tuk Indus, Inc v Allegan Co*, 316 Mich App 122, 137; 892 NW2d 33 (2016)." *Broz v Plante & Moran (On Remand)*, 331 Mich App 39, 47 n 1; 951 NW2d 64 (2020).

Court's conclusion that a county clerk's duty is limited to determining whether the necessary statements were made. Under the unambiguous language of the amended statute, the Clerk's duty is clear—if a candidate's AOI contains a false statement, the Clerk cannot certify that candidate's name to the Election Commission. And as this Court explained in *Berry*, MCL 168.567 requires the Election Commission to correct ballot errors. *Berry*, 316 Mich App at 44.

The Wayne County defendants and Worthy make much of the Legislature's failure to enact express statutory authority for the Clerk to investigate the veracity of a candidate's statements in an AOI or resolve a challenge regarding the same, despite having established clear authority for such investigations in other election-related matters. See MCL 168.552 (describing procedures for challenges regarding nominating petitions). According to the Wayne County defendants and Worthy, the Legislature's silence on this point in MCL 168.558(4) demonstrates that it did not intend to impose an investigative duty on the Clerk in this context. This position is unpersuasive because it ignores the narrow scope of the mandamus relief sought by plaintiff.

Plaintiff did not ask the court to order the Wayne County defendants to investigate or assess the truth of Worthy's affirmation regarding her campaign filings—she asked only that the Wayne County defendants be ordered to remove Worthy's name from the August 2020 primary election ballot. Plaintiff coupled this request with a declaratory-judgment claim asking the court—not the Wayne County defendants—to determine that Worthy made a false statement on her AOI. If the court had determined that plaintiff's allegation was correct, the Clerk would then have a clear

legal duty to not certify Worthy for inclusion on the primary election ballot. MCL 168.558(4). And to the extent that her name already appeared on the printed ballots, the Election Commission was obligated to correct that error. MCL 168.567. Moreover, both of these actions would be purely ministerial because they would not require exercise of judgment or discretion. *Berry*, 316 Mich App at 44-45. See also *Barrow v Detroit Election Comm*, 301 Mich App 404, 412; 836 NW2d 498 (2013) (*Barrow I*) ("The inclusion or exclusion of a name on a ballot is ministerial in nature."). The trial court's denial of mandamus on the merits was premature in light of plaintiff's unresolved declaratory-judgment claim.

However, the trial court's denial of mandamus was not premised solely on the merits of plaintiff's claim. As it did with respect to Davis's motion to intervene, the trial court applied laches as a bar to plaintiff's complaint because plaintiff could have pursued her challenge any time after Worthy filed her AOI on March 18, 2020, yet plaintiff waited until the ballot printing was nearing completion. The trial court's reasoning was somewhat factually inaccurate, in that plaintiff initiated this action on June 5, 2020, i.e., the day *before* ballot printing began and the same day she learned that (1) the Clerk's certified candidate list included Worthy and (2) the Election Commission had voted to print the ballots with the names certified by the Clerk.

Nonetheless, the trial court's point remains—plaintiff could have challenged Worthy's AOI much earlier, at a time that would not obstruct the ballot printing process.[5] We acknowledge that a mandamus

[5] The trial court's reasoning applies equally to Davis. Davis did not need to wait for plaintiff to file this lawsuit; he could have initiated his own action any time after Worthy filed her AOI in March 2020.

action would not have presented a ripe controversy before June 5, 2020, but plaintiff could have pursued a declaratory judgment that Worthy's AOI contained a false statement, thereby rendering her ineligible for certification under MCL 168.558(4). Laches can be invoked when "there is an unexcused or unexplained delay in commencing an action and a corresponding change of material condition that results in prejudice to a party." *Wayne Co*, 267 Mich App at 252, quoting *Rivergate Manor*, 452 Mich at 507 (quotation marks omitted). In this instance, plaintiff's delay caused substantial prejudice to the Wayne County defendants because it impaired their ability to produce the primary election ballots within the time frame required by statute and exposed them to significant financial waste if reprinting was required. Consequently, the trial court did not err by determining that plaintiff's action was barred by laches.

V. DECLARATORY JUDGMENT

Lastly, Davis argues that the trial court should have granted plaintiff's request for a declaratory judgment. "Questions of law relative to declaratory judgment actions are reviewed de novo, but the trial court's decision to grant or deny declaratory relief is reviewed for an abuse of discretion." *Barrow II*, 305 Mich App at 662, quoting *Pioneer State Mut Ins Co v Dells*, 301 Mich App 368, 376; 836 NW2d 257 (2013) (quotation marks omitted). "[A]n abuse of discretion occurs only when the trial court's decision is outside the range of reasonable and principled outcomes." *Barrow II*, 305 Mich App at 662, quoting *Saffian*, 477 Mich at 12 (quotation marks omitted; alteration in original).

"The purpose of a declaratory judgment is to definitively declare the parties' rights and duties, to guide

their future conduct and relations, and to preserve their legal rights." *Barrow II*, 305 Mich App at 662. "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). The "actual controversy" requirement is met when "a plaintiff pleads and proves facts demonstrating an adverse interest necessitating a judgment to preserve the plaintiff's legal rights." *Mich Ass'n of Home Builders v City of Troy*, 504 Mich 204, 225; 934 NW2d 713 (2019). An actual controversy has also been described as existing "when a declaratory judgment is needed to guide a party's future conduct in order to preserve that party's legal rights." *League of Women Voters*, 506 Mich at 586. Although a court may enter a declaratory judgment before an injury or loss occurs, hypothetical or anticipated disputes will not suffice—there must be a present controversy before the court. *Id*.

In this case, there was an actual and present controversy before the court that required judgment to guide the parties' future conduct and rights with respect to Worthy's inclusion on the 2020 primary election ballot. Although the court did not address this issue, we can reasonably infer that the trial court's application of laches extended to plaintiff's declaratory-judgment count. For the reasons discussed above, the trial court did not err by concluding that plaintiff's delay in challenging Worthy's AOI precluded her claims. The trial court's reasoning is even more compelling in the context of a declaratory-judgment claim because such a claim would have been ripe for review well before the Clerk certified the candidates for the 2020 primary election and the Election Com-

mission approved ballot printing. Accordingly, the trial court did not err by dismissing plaintiff's action.

Affirmed.

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

In re PREPODNIK, MINOR

Docket No. 352041. Submitted April 9, 2021, at Grand Rapids. Decided May 13, 2021, at 9:00 a.m.

In 2016, the Department of Health and Human Services (DHHS) initiated neglect proceedings in the Dickinson Circuit Court, Family Division, regarding EP, a minor. EP's father died during the proceedings. The court, Thomas D. Slagle, J., determined that it would be in EP's best interests not to terminate his mother's parental rights and to appoint him a juvenile guardian. EP's maternal grandmother, Shirley Ridolphi, and his paternal aunt, Jeanann Upperstrom, were the only two who sought to be appointed. After an evidentiary hearing on the issue, the court awarded the juvenile guardianship to Ridolphi, but noted that it was in EP's best interests to maintain a meaningful relationship with his paternal family. The present case was opened in the Iron Circuit Court, Family Division, to monitor the guardianship. That court, C. Joseph Schwedler, J., awarded significant visitation with the Upperstroms, who lived in Green Bay, Wisconsin—one weekend per month, alternating holidays, and half of the summer. An order setting out those specific dates was set to expire in August 2019. Ridolphi, citing her status as EP's full legal guardian, challenged the issuance of a similar order for the following year, contending that the Upperstroms had no legal basis to request court-ordered visitation and that the trial court therefore had no authority to grant it. There was some evidence that Upperstrom was coordinating visitation for EP's paternal grandmother, Patsy Prepodnik, but Prepodnik did not participate in the case beyond appearing at a mediation session in November 2017. After a two-day evidentiary hearing in October 2019, the trial court determined that it did have the authority to order Ridolphi, as full legal guardian, to allow EP to have significant visitation with the Upperstroms in Green Bay, and Ridolphi applied for leave to appeal this decision. The Court of Appeals denied Ridolphi's application for leave to appeal, but on October 27, 2020, the Supreme Court, in lieu of granting leave to appeal, remanded the case to the Court of Appeals for consideration as on leave granted. 506 Mich 939 (2020).

The Court of Appeals *held*:

1. The trial court committed a clear legal error when it determined that it had the authority to order visitation with EP's paternal relatives. During neglect proceedings, courts are required by MCL 712A.19a to hold permanency planning hearings and determine whether the child may be placed in a legal guardianship. MCL 712A.19a(10) and MCR 3.979(E), which govern juvenile guardianships created during neglect proceedings, provide that a juvenile guardian has the powers and responsibilities of a parent. Under *In re Ballard*, 323 Mich App 233 (2018), a parent of a child subject to a juvenile guardianship who has not had their parental rights terminated may seek a court order for parenting time. While MCL 712A.19a(14) and *Ballard* only bestow such a right on a parent, there is statutory and caselaw support for a parent and grandparent to seek court-ordered visitation from a juvenile guardian. However, the parties cited no authorities to support the proposition that a relative who is not a parent or grandparent has authority to request court-ordered visitation, nor did there appear to be any. The record indicated that Upperstrom was coordinating visitation with EP's paternal relatives, including his paternal grandmother, Prepodnik, who had a right to seek grandparenting time under certain circumstances under MCL 722.27b(1). But the court ordered parenting time for the Upperstroms, not Prepodnik. Thus, the trial court's order requiring visitation with Upperstrom and her family, but not Prepodnik, lacked legal authority.

2. Even if Upperstrom was representing Prepodnik's interests in the case, the appropriate procedural steps were not taken to ensure grandparenting time. Under MCL 722.27b, when a circuit court has continuing jurisdiction over a child, a grandparent who seeks a grandparenting-time order must file a motion with that circuit court that is accompanied by an affidavit setting forth facts supporting the requested order. In the present case, there was no evidence of a motion filed by Prepodnik, or by Upperstrom on Prepodnik's behalf, seeking a grandparenting-time order, nor was there any indication that Prepodnik sought such an order in the neglect proceedings. Moreover, to the extent that certain visitation orders were entered, they had since expired. Consequently, the trial court had no legal authority under MCL 722.27b to grant court-ordered visitation to EP's paternal family. The trial court only had legal authority to award court-ordered visitation for Prepodnik, but the procedural requirements for doing so were not met. Therefore, by ordering EP to have significant visitation with the Upperstroms, the trial court went beyond its authority.

Reversed.

PARENT AND CHILD — JUVENILE GUARDIANSHIPS — COURT-ORDERED VISITATION — NONPARENT RELATIVES.

A trial court lacks the authority to order visitation between a child subject to a juvenile guardianship created during neglect proceedings under MCL 712A.19a and a relative who is not a parent or grandparent.

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Kendricks, Bordeau, Keefe, Seavoy & Larsen, PC (by *Stephen F. Adamini* and *Erica N. Payne*) for Shirley Ridolphi.

Before: MURRAY, C.J., and MARKEY and LETICA, JJ.

PER CURIAM. In this action regarding a juvenile guardianship, appellant Shirley Ridolphi, the guardian and maternal grandmother of EP, appeals by leave granted[1] the trial court's order denying Ridolphi's challenge to the trial court's authority to grant visitation with EP's paternal relatives. We reverse.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The Department of Health and Human Services (DHHS) initiated neglect proceedings regarding EP after his father's death and because of his mother's struggle with substance abuse. Eventually, the trial court judge in the neglect proceedings determined that

[1] Originally, this Court denied Ridolphi's application for leave to appeal. *In re Prepodnik*, unpublished order of the Court of Appeals, entered April 17, 2020 (Docket No. 352041) (METER, J., would have granted leave to appeal). However, on October 27, 2020, in lieu of granting leave to appeal, our Supreme Court remanded the case to this Court for consideration as on leave granted. *In re Prepodnik*, 506 Mich 939 (2020).

it would be in EP's best interests to appoint a juvenile guardian for EP and not to terminate his mother's parental rights. Ridolphi and EP's paternal aunt, Jeanann Upperstrom, were the only two who sought to be appointed as EP's guardian. After an evidentiary hearing on the issue, the court in the neglect proceedings awarded the juvenile guardianship to Ridolphi. That court cautioned Ridolphi that it believed it was in EP's best interests to maintain a meaningful relationship with his paternal family, even if a specific court order was required to ensure that.

Given that a juvenile guardianship had been established, the present case was opened to monitor it. Issues between the Upperstroms and Ridolphi arose almost immediately and continued through to this appeal. The trial court, relying largely on the decision in the neglect proceedings, awarded significant visitation with the Upperstroms, who lived in Green Bay, Wisconsin. Indeed, the order was similar to those typically issued to a noncustodial parent—EP spent one weekend per month, alternating holidays, and half of the summer in Green Bay. An order setting out those specific dates was set to expire in August 2019, and the trial court was considering entering another similar order for the next year. Ridolphi, citing her status as EP's full legal guardian, challenged the issuance of the new order, contending that the Upperstroms had no legal basis to request court-ordered visitation, and thus, the trial court had no authority to grant it. There was some implication in the proceedings that Upperstrom was coordinating visitation for EP's paternal grandmother, Patsy Prepodnik. Prepodnik, however, did not participate in the case except for attending a mediation session in November 2017.

After a two-day evidentiary hearing in October 2019, the trial court determined that it did have the authority to order Ridolphi, as full legal guardian, to allow EP to have significant visitation with the Upperstroms in Green Bay. This appeal followed.

II. JUVENILE GUARDIANSHIPS AND VISITATION

Ridolphi argues that the trial court did not have authority to grant, and Upperstrom did not have authority to request, parenting time with EP. We agree.

A. STANDARDS OF REVIEW

In a recent case involving requested visitation by a nonparent relative—a grandparent—this Court provided the following summary of law regarding the appropriate standards of review:

> "Orders concerning [grand]parenting time must be affirmed on appeal unless the trial court's findings were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue." *Keenan v Dawson*, 275 Mich App 671, 679; 739 NW2d 681 (2007) (quotation marks and citation omitted). The Court should affirm a trial court's findings of fact unless the evidence "clearly preponderate[s] in the opposite direction." *Fletcher v Fletcher*, 447 Mich 871, 879; 526 NW2d 889 (1994) (quotation marks and citation omitted; alteration in original). A trial court abuses its discretion on a custody matter when its "decision is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias." *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008). We conclude that this standard should also apply to decisions about parenting and grandparenting time. A court commits clear legal error "when it incorrectly chooses, interprets, or applies the law." *McIntosh v McIntosh*, 282 Mich App 471, 475; 768 NW2d

325 (2009). [*Geering v King*, 320 Mich App 182, 188; 906 NW2d 214 (2017) (alterations in original).]

B. LAW AND ANALYSIS

The trial court committed a clear legal error when it determined that it had the authority to order visitation with EP's paternal relatives, including his paternal grandmother, organized by Upperstrom.

Ridolphi contends that Upperstrom did not have legal authority to request, and the trial court did not have legal authority to grant, parenting time with the Upperstroms in Green Bay. This juvenile guardianship, unlike a typical guardianship, arose during neglect proceedings involving EP and his mother. MCR 3.979(E) ("A juvenile guardianship approved under these rules is authorized by the Juvenile Code and is distinct from a guardianship authorized under the Estates and Protected Individuals Code [MCL 700.1101 *et seq*.].."). During neglect proceedings, courts are required to hold permanency planning hearings, at which "the court shall determine whether and, if applicable, when the . . . child may be placed in a legal guardianship." MCL 712A.19a(4)(c). Indeed, under MCL 712A.19a(9)(c), juvenile guardianships are one of a few options available to a court when it determines that termination of parental rights is not in the best interests of the minor child. In the neglect case involving EP, the judge decided that a guardianship with Ridolphi, without terminating the parental rights of EP's sole living parent, was in EP's best interests. *Id*.

When a trial court finds that appointment of a juvenile guardian is in the best interests of the minor child, it is required to enter an order establishing a guardianship and appointing the guardian. MCR 3.979(B). The chosen guardian, then, must file an

acceptance of that appointment, which "at a minimum" must state "that the juvenile guardian accepts the appointment, submits to personal jurisdiction of the court, will not delegate the juvenile guardian's authority, and will perform required duties." MCR 3.979(B)(1). Subsequently, the court issues "letters of authority" to the guardian, in which "[a]ny restriction or limitation of the powers of the juvenile guardian must be set forth . . . , including but not limited to, not moving the domicile of the child from the state of Michigan without court approval." MCR 3.979(B)(2). Despite being separate from typical guardianships in Michigan, "[a] guardian appointed under [MCL 712A.19a(9)(c)] has all of the powers and duties set forth under . . . MCL 700.5215." MCL 712A.19a(10). See also MCR 3.979(E) ("A juvenile guardian has all the powers and duties of a guardian set forth under section 5215 of the Estates and Protected Individuals Code."). In that regard, according to MCL 700.5215, "[a] minor's guardian has the powers and responsibilities of a parent who is not deprived of custody of the parent's minor and unemancipated child . . . ."

After appointing a juvenile guardian in a neglect case, the statutory scheme requires that the neglect proceedings be dismissed. MCL 712A.19a(12) ("The court's jurisdiction over a juvenile under [MCL 712A.2(b)] must be terminated after the court appoints a guardian under this section and conducts a review hearing under section 19 of this chapter, unless the juvenile is released sooner by the court."); MCR 3.979(C)(1)(a) ("The court's jurisdiction over a juvenile under section 2(b) of the Juvenile Code, MCL 712A.2(b), . . . shall be terminated after the court appoints a juvenile guardian under this section and conducts a review hearing . . . ."). The court's jurisdiction over the juvenile guardianship, however, "must

continue until released by court order." MCL 712A.19a(13). See also MCR 3.979(C)(1)(a) ("[T]he court's jurisdiction over a juvenile guardianship shall continue until terminated by court order."). "The court shall review a guardianship created under this section annually and may conduct additional reviews as the court considers necessary." MCL 712A.19a(13). Those annual review hearings must continue until the child turns 18 years old. MCR 3.979(D)(1). When reviewing juvenile guardianships, the trial court is required to consider an abundance of issues and factors, including "any written or oral information concerning the child from the child's parent, guardian, custodian, foster parent, child caring institution, relative with whom the child is placed, or guardian ad litem *in addition to any other evidence, including the appropriateness of parenting time*, offered at the hearing." MCL 712A.19a(14) (emphasis added).

In sum, then, the statutory law, MCL 712A.19a(10), and court rule, MCR 3.979(E), governing juvenile guardianships created during neglect proceedings provide that a juvenile guardian "has the powers and responsibilities of a parent . . . ." MCL 700.5215. This Court, in a recent opinion, determined that a parent of a child subject to a juvenile guardianship who has not had their parental rights terminated may seek a court order for parenting time. *In re Ballard*, 323 Mich App 233, 237-238; 916 NW2d 841 (2018). This Court in *Ballard* reasoned that, "[b]ecause MCL 712A.19a(14) plainly envisions a trial court having an authoritative role with respect to parenting time during the course of a guardianship, we construe MCL 712A.19a(14) as providing a court with authority to order parenting time for a parent after a juvenile guardianship has been established . . . ." *Ballard*, 323 Mich App at 237. Consequently, the juvenile guardian's role can be in-

vaded by a parent seeking parenting time with the minor child that is subject to the guardianship. *Id*. Notably, however, this case does not involve a *parent* seeking parenting time with EP. Instead, it involves Upperstrom, the paternal aunt, seeking parenting time for, purportedly, the entire paternal family.

While MCL 712A.19a(14) and *Ballard* only bestow such a right on a parent, there is statutory and caselaw support for one other type of relative seeking court-ordered visitation in the case of a guardianship. To begin, recall that a juvenile guardian has the powers and responsibilities of a parent in most cases. MCL 712A.19a(10); MCL 700.5215; MCR 3.979(E). Thus, a juvenile guardian, like a parent, is typically provided the right to choose what third parties interact with their child or ward. MCL 700.5215(c) ("The guardian shall facilitate the ward's education and social or other activities, and shall authorize medical or other professional care, treatment, or advice."). Courts, however, can invade the role of a parent with respect to those decisions under certain circumstances involving grandparents. MCL 722.27b. In pertinent part, MCL 722.27b(1)(c) permits a grandparent to "seek a grandparenting time order" when "[t]he child's parent who is a child of the grandparents is deceased." Similarly, a grandparent can seek such an order when "legal custody of the child has been given to a person other than the child's parent, or the child is placed outside of and does not reside in the home of a parent." MCL 722.27b(1)(e). In *Book-Gilbert v Greenleaf*, 302 Mich App 538, 547; 840 NW2d 743 (2013), this Court held that a grandparent could obtain an order for grandparenting time when a child was placed in a juvenile guardianship. Notably, this Court further held that a guardian was not entitled to the presumption given to

a "fit parent" under MCL 722.27b(4)(b) regarding the decision to deny grandparenting time. *Book-Gilbert*, 302 Mich App at 547-549.

To summarize, it is clear that there is statutory and caselaw support for a parent and grandparent to seek court-ordered visitation from a juvenile guardian. The parties have not identified any statutes, court rules, or caselaw that suggest a relative who is not a parent or grandparent has authority to request court-ordered visitation, nor does there appear to be any. Likely because of that, early on in the proceedings, DHHS sought to ensure that the trial court understood that Upperstrom was coordinating visitation with EP's paternal relatives, including his paternal grandmother, Prepodnik. This was an important distinction because, as discussed, grandparents have a right to seek grandparenting time under certain circumstances. MCL 722.27b(1). Indeed, in the family court's August 2018 order, it was clear that Upperstrom was "coordinating" visitation with the paternal family. As the case progressed, and especially during the final evidentiary hearing dates, the implication that Upperstrom was coordinating with Prepodnik was never mentioned. In the brief filed by DHHS before the evidentiary hearing took place, it specifically relied on *Ballard*, 323 Mich App at 237-238, and MCL 712A.19a(14), which provides for a parent to seek parenting time from a guardian. DHHS implied, without providing legal support for the argument, that the Upperstroms could step into the shoes of EP's deceased father to seek parenting time. The grandparenting-time statute, MCL 722.27b, was not mentioned, nor was Prepodnik's involvement in the case. At the October 2019 hearings, all of the testimony regarding the paternal family involved EP's interactions with the Upperstroms and their children.

Prepodnik was not mentioned during the hearing, nor was she called to testify. In fact, Prepodnik never testified in the case at all.

Nevertheless, because of those implications in the record, there seems to be a suggestion that the trial court's authority for entering visitation orders sprung from the grandparenting-time statute, MCL 722.27b. Reading the record in this manner would defy logic and common sense. The clear implication from the proceedings was that parenting time was being ordered for the Upperstroms, not Prepodnik. Thus, the trial court's order requiring visitation with Upperstrom and her family, but not Prepodnik, lacked legal authority.

Importantly, even if it were true that Upperstrom was merely representing Prepodnik's interests in the case, the appropriate procedural steps were not taken to ensure grandparenting time. Under MCL 722.27b(3)(a), when, as here, "the circuit court has continuing jurisdiction over the child, the child's grandparent shall seek a grandparenting time order by filing a motion with the circuit court in the county where the court has continuing jurisdiction." Further, the required motion "shall be accompanied by an affidavit setting forth facts supporting the requested order." MCL 722.27b(4)(a).

In the present case, there is no evidence of a motion filed by Prepodnik, or by Upperstrom on Prepodnik's behalf, seeking a grandparenting-time order. Instead, the first time that visitation with the paternal family was ordered was in the neglect proceedings. That arose after an extended hearing about whether Upperstrom or Ridolphi should be made EP's juvenile guardian. There is no indication that Prepodnik was involved in that case or requested grandparenting time. Moreover, to the extent that certain visitation orders were en-

tered, they had since expired. Indeed, the order being appealed in the present case was entered *after* the August 2018 visitation order expired. Thus, for purposes of this appeal, the true issue was whether to order visitation for EP's paternal family. Even if we were to assume that Prepodnik was behind the requests, despite a lack of evidence supporting that contention, the proper procedural steps still were not taken. Neither Prepodnik nor anyone on her behalf filed a motion seeking grandparenting time. Further, there was no evidence of an affidavit by Prepodnik detailing her reasons for seeking such time. Consequently, the trial court had no legal authority under MCL 722.27b to grant court-ordered visitation to EP's paternal family. As discussed earlier, there is no statutory support for Upperstrom, on her own, to request court-ordered visitation either.

This analysis of the issue is supported by this Court's decision in *Falconer v Stamps*, 313 Mich App 598, 601; 886 NW2d 23 (2015), which involved a custody dispute between a minor child's mother and paternal grandmother. After an evidentiary hearing on the issue, the trial court awarded full legal and physical custody to the child's mother. *Id*. at 637, 639. The trial court continued, however, by awarding significant grandparenting time to the paternal grandmother. *Id*. at 601, 639. On appeal, this Court noted that a request for grandparenting time required a motion to be filed along with a supporting affidavit. *Id*. at 643. Consequently, the panel reversed the trial court's decision because that motion and affidavit were not filed and "a request for grandparenting time is not automatically included in a third-party request for custody." *Id*. at 648. Instead, the Court determined that it must "vacate that portion of the circuit court's order that granted [the paternal grandmother] grandparenting

time where the issue of grandparent visitation was not properly before the circuit court." *Id*.

The same problem exists in the present case. As established, Upperstrom and her family have no authority to seek court-ordered visitation with EP. While Prepodnik does have such authority under the law, there are certain procedural requirements. In pertinent part, Prepodnik was required to file a motion along with a supporting affidavit. MCL 722.27b(3)(a) and (4)(a). Her failure to do so in this case, like the paternal grandmother's failure in *Falconer*, 313 Mich App at 643, 648, was fatal to a claim for grandparenting time. In sum, the trial court only had legal authority to award court-ordered visitation for Prepodnik, but the procedural requirements for doing so were not met in this case. Therefore, by ordering EP to have significant visitation with the Upperstroms, the trial court went beyond its authority, and we reverse.[2]

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[2] Considering that reversal is required because of the trial court's lack of legal authority, the remaining issues raised by Ridolphi have been rendered moot, and we decline to consider them. *TM v MZ*, 501 Mich 312, 317; 916 NW2d 473 (2018).

It is important to note that the trial court is not left without recourse if it believes that Ridolphi is not acting in EP's best interests by limiting his relationship with his paternal family. As discussed, the trial court maintains jurisdiction over the guardianship and must annually review the case. MCR 3.979(D)(1)(a); MCL 712A.19a(13). The court can also schedule more reviews, if it sees fit. *Id*. In doing so, if the trial court determines that the juvenile guardian is no longer appropriate, it can revoke the guardianship. MCR 3.979(F)(1)(a); MCL 712A.19a(15). Thus, by alerting Ridolphi to the fact that the court believes that EP's best interests would be served by maintaining a meaningful relationship with his paternal family, the implied course of action for violation of that finding would be to revoke Ridolphi's guardianship. Stated differently, if a trial court believes that a juvenile guardian does not wish to act in a minor child's best interests, then it can always revoke the guardianship and appoint someone else who will

Reversed.

MURRAY, C.J., and MARKEY and LETICA, JJ., concurred.

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take those interests into consideration. Given the state of the law in Michigan, the court cannot, however, order a juvenile guardian to provide parenting time with relatives who are not parents or grandparents.

In re SANBORN, MINOR

Docket Nos. 354915 and 354916. Submitted April 8, 2021, at Grand Rapids. Decided May 13, 2021, at 9:05 a.m.

In 2019, the Department of Health and Human Services filed an action in the Ionia Circuit Court, Family Division, seeking to remove respondents' newborn from their care because of concerns regarding their ability to care for the child. In the initial petition, the department sought removal because of respondents' lack of housing or income, because of respondents' failure to adhere to their respective mental health treatment plans, because of concerns about respondents' cognitive abilities, and because their rights to a previous child had been terminated in 2018 due to noncompliance with, and failure to benefit from, a treatment plan. At the first hearing in May 2019, the court, Robert S. Sykes, J., ordered the child removed from respondents' care and ordered reasonable efforts be made to reunify the family; the court did not authorize the petition at the hearing because counsel had not yet been appointed for respondents. The department thereafter filed an amended petition, seeking termination of respondents' parental rights under MCL 712a.19b(3)(*i*) on the basis that their parental rights had been terminated to one or more siblings of the child because of serious and chronic neglect or physical or sexual abuse and they had failed to rectify the conditions that led to the prior termination of parental rights. After taking testimony during the next hearing held in May 2019, the court assumed jurisdiction over the child, concluding that the department had established by a preponderance of the evidence that probable cause existed that one or more of the allegations contained in the termination petition were true and that, under MCL 712A.19a(2)(c), reasonable efforts to reunify the family were not required because of the previous termination and respondents' apparent failure to rectify the conditions that led to that termination. In the subsequent July 2019 hearing in which testimony was taken, the trial court concluded that there was not clear and convincing evidence to terminate respondents' parental rights under MCL 712A.19b(3)(*i*). As a result, the court ordered the department to initiate a case service plan and offer reasonable efforts to reunify respondents with the child. The department thereafter offered numerous services to

respondents, including: foster care case management; Right Door case management (which included individual therapy, medication management, and case management); infant mental health referrals; supportive visitation referrals; housing assistance; individual therapy; supervised parenting time with the child; psychological-evaluation referrals; services for feeding therapy; physical therapy; transportation assistance; and a Positive Solutions, Informed Choices referral for parenting skills and techniques, and parenting packets. The services offered respondents repeated exposure in how to feed and care for the minor child given his medical needs. The psychologist who evaluated respondent-mother testified that she needed IQ testing to fully establish her intellectual disability, which could have resulted in her qualifying for more social services. The department caseworkers were aware of respondent-mother's intellectual disabilities from the previous termination case, but the department changed its recommendation of reunification to termination because respondents had stopped discussing their progress with the caseworkers. In August 2020, the trial court terminated respondents' parental rights to the child under MCL 712A.19b(3)(c)(*ii*) (failure to rectify other conditions) and (j) (reasonable likelihood that child will be harmed if returned to parent). Respondent-mother appealed in Docket No. 354915, and respondent-father appealed in Docket No. 354916.

The Court of Appeals *held*:

1. Generally, the department has an affirmative duty to make reasonable efforts to reunify a family before seeking termination of parental rights; thus, the department 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. Reasonable efforts to reunify the child and family must be made in all cases except those involving specified circumstances under MCL 712A.19a(2). Relevant here, MCL 712A.19a(2)(c) provides that reasonable efforts to reunify the child and family need not be made if the parent has had their rights to the child's siblings involuntarily terminated and the parent has failed to rectify the conditions that led to that termination of parental rights. With regard to the procedural process related to assuming jurisdiction over a child or terminating parental rights, MCR 3.977(E)(2) provides that the trial court must order termination of the parental rights of a respondent at the initial dispositional hearing, and must order that additional efforts for reunification of the child shall not be made if at the trial or plea proceedings, the trier of fact finds by a preponderance of the evidence that one or more of the grounds for *assumption of*

jurisdiction over the child under MCL 712A.2(b) have been established. In contrast, MCR 3.977(E)(3) provides that the trial court must order termination of the parental rights of a respondent at the initial dispositional hearing if, at the initial dispositional hearing, the court finds on the basis of clear and convincing legally admissible evidence that had been introduced at the trial or plea proceedings, or that is introduced at the dispositional hearing, that one or more facts alleged in the petition are true and *establish grounds for termination of parental rights* under MCL 712A.19b(3)(a), (b), or (d) through (m). In this case, the trial court did not err by finding at the second May 2019 hearing that the department had established, by a preponderance of the evidence, that probable cause existed that one or more of the allegations in the initial petition was true—i.e., that under MCL 712A.19a(2)(c), respondent-mother's parental rights to a sibling had previously been terminated and that she had failed to rectify the conditions that led to that termination of parental rights; thus, the trial court did not err by assuming jurisdiction over the child and ordering that reasonable efforts not be made to reunify respondent-mother with the child. The trial court's subsequent conclusion in the July 2019 termination hearing that the department had failed to establish by clear and convincing evidence that a statutory ground for terminating respondent-mother's parental rights existed under MCL 712A.19b(3)(*i*) did not invalidate the trial court's initial determination assuming jurisdiction over the child or otherwise make that initial determination erroneous when that determination was made under a lower (preponderance of the evidence) standard; the court rules require different standards of proof depending on whether the court is assuming jurisdiction over the child or terminating a respondent's parental rights. Accordingly, respondent-mother failed to establish plain error affecting her substantial rights and the trial court did not clearly err when it made the separate determinations.

2. In addition to the department's affirmative duty to make reasonable efforts to reunify a family before seeking termination of parental rights, the department has obligations under the Americans with Disabilities Act (ADA), 42 USC 12101 *et seq*., that dovetail with its obligations under the Probate Code, specifically, the obligation that it must make reasonable modifications for a parent with a known or suspected intellectual, cognitive, or developmental impairment in its policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability unless the modification would fundamentally alter the service provided. Absent reasonable modification, efforts at reunification cannot be reasonable if the department

has failed to modify its standard procedures in ways that are reasonably necessary to accommodate a disability under the ADA. When challenging the services offered, a respondent must establish that they would have fared better if other services had been offered. In this case, respondent-mother provided only conclusory statements about the offered services and how those services were not appropriate given her intellectual disability. In addition, respondent-mother failed to identify how those services were deficient or not reasonable in light of her disability and did not identify any services that she believed would have benefited her more than those actually provided. Respondent-mother received a breadth of services, and she failed to establish that those services did not comport with the psychologist's recommendation that she receive comprehensive parenting-education classes and more social-services intervention. Respondent-mother had in-person supervised parenting visits with the child between July 2019 and March 2020, at which point in-person visits were stopped because of concerns related to the Covid pandemic. Respondent struggled with videoconferencing technology and refused to create videos and take photographs to send to the child. Under these facts, the department was not at fault for respondent-mother's failure to engage in the activities that were the only realistic way to continue forming a bond with the child during the first couple months of the pandemic. Accordingly, the trial court did not err by finding that the department made reasonable efforts to reunify respondent-mother with the child.

3. MCL 712A.19a(2) provides that the court shall conduct a permanency planning hearing within 30 days after there is a judicial determination that reasonable efforts to reunite the child and family are not required. In turn, MCL 712A.19(3) provides that if a child is subject to the court's jurisdiction and removed from his or her home, a review hearing must be held not more than 182 days after the child's removal from their home and no later than every 91 days after that for the first year that the child is subject to the court's jurisdiction. With respect to a delay under MCL 712A.19a(2), MCR 2.613(A) provides that an error in a ruling or order, or an error or defect in anything done or omitted by the court or by the parties is not grounds for granting a new trial; for setting aside a verdict; or for vacating, modifying, or otherwise disturbing a judgment or order unless refusal to take this action appears to the court inconsistent with substantial justice. In this case, respondent-mother's receipt of services after the trial court's July 2019 refusal to terminate her parental rights essentially cured any due-process violations from the extra month delay between the preliminary hearing at the end of May 2019 and the

termination/disposition hearing in July 2019. Even though the permanency planning hearing did not occur within 30 days after the trial court determined that reasonable efforts to reunite the child and family were not required (as required by MCL 712A.19a(2)), there was no fundamental unfairness because respondent-mother subsequently received services, she had previously received services for the other child to whom her rights had already been terminated, and there was little to no evidence that she had benefited from those services. Accordingly, substantial justice was served by terminating respondent-mother's parental rights despite her argument that she could have received an additional month of services if the hearing had occurred within the 30-day time frame. The department's delay in filing a termination petition, contrary to the trial court's order to do so within 28 days of the adjudication order, provided respondent-mother with more opportunity to engage in services, and the delay was therefore not inconsistent with substantial justice.

4. In order to terminate parental rights, the trial court must find by clear and convincing evidence that at least one of the statutory grounds for termination in MCL 712A.19b(3) has been met. If the trial court did not clearly err by finding one statutory ground existed, then that one ground is sufficient to affirm the termination of a respondent's parental rights. Grounds for termination exist under MCL 712A.19b(3)(c)(*ii*) if 182 or more days have elapsed since the issuance of an initial dispositional order and (1) the parent is the respondent in a child-neglect proceeding, (2) other conditions exist that cause the child to come within the court's jurisdiction, (3) the parent received recommendations to rectify those conditions and had a reasonable opportunity to do so and failed to rectify the other conditions, and (4) there is no reasonable likelihood that the parent will do so within a reasonable time given the age of the child. In this case, more than 182 days had passed since the initial July 2019 dispositional order when the trial court ordered respondent-mother's rights terminated in August 2020. Although respondent-mother participated in all the services offered by the department, she had stopped communicating with the caseworkers about her progress, and there was no evidence that she had overcome the barriers for reunification or that she would do so within a reasonable time given the age of the child. Given that the trial court did not clearly err by finding that grounds for termination of respondent-mother's parental rights existed under MCL 712A.19b(3)(c)(*ii*), the Court of Appeals did not address the trial court's termination of her rights under MCL 712A.19b(3)(j). The trial court also did not clearly err by determining that termination of respondent-mother's parental rights was in the best

interests of the child because some of the issues that existed with respect to the other child carried over to the child in this case (including her lack of insight or knowledge about child development, childcare practices, and parenting techniques), because there was no evidence that she sufficiently benefited from the services, and because of the child's need for permanency. Accordingly, a preponderance of the evidence established that respondent-mother's parental rights should be terminated, and the trial court did not clearly err by making that determination.

5. Termination under MCL 712A.19b(3)(j) is appropriate when there is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent; the harm contemplated under MCL 712A.19b(3)(j) includes emotional harm as well as physical harm. In this case, although respondent-father participated in the services offered by the department, he failed to communicate with the service providers, leading the department to conclude that he had not benefited from the services. Respondent-father's lack of insight or knowledge on how to properly parent the child caused a reasonable likelihood that the child would be harmed if returned to his care. Accordingly, there was sufficient evidence to support the trial court's decision to terminate respondent-father's parental rights under MCL 712A.19b(3)(j).

Affirmed.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Kyle B. Butler*, Prosecuting Attorney, and *Barbara Tsaturova*, Assistant Prosecuting Attorney, for petitioner.

Lindsey M. Dubis for Erlita A. Schneider.

Leo F. Madarang for Samuel C. Sanborn.

Before: MURRAY, C.J., and MARKEY and LETICA, JJ.

PER CURIAM. In these consolidated appeals,[1] respondents appeal as of right the trial court's order termi-

[1] *In re Sanborn Minor*, unpublished order of the Court of Appeals, entered September 29, 2020 (Docket Nos. 354915 and 354916).

nating their parental rights to the minor child under MCL 712A.19b(3)(c)(*ii*) (failure to rectify other conditions) and (j) (reasonable likelihood that child will be harmed if returned to parent). We affirm.

I. MOTHER'S APPEAL

A. REASONABLE EFFORTS

Mother first argues that the trial court erred by failing to order reasonable efforts before the initial termination hearing in 2019. We review for clear error a trial court's decision regarding reasonable efforts. *In re Fried*, 266 Mich App 535, 542-543; 702 NW2d 192 (2005). However, unpreserved issues are reviewed for "plain error affecting substantial rights." *In re Utrera*, 281 Mich App 1, 8; 761 NW2d 253 (2008). "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." *In re VanDalen*, 293 Mich App 120, 135; 809 NW2d 412 (2011) (quotation marks and citations omitted). "Generally, an error affects substantial rights if it caused prejudice, i.e., it affected the outcome of the proceedings." *In re Utrera*, 281 Mich App at 9.

Generally, "the [Department of Health and Human Services (DHHS)] has an affirmative duty to make reasonable efforts to reunify a family before seeking termination of parental rights." *In re Hicks*, 500 Mich 79, 85; 893 NW2d 637 (2017), citing MCL 712A.18f(3)(b) and (c) and MCL 712A.19a(2). "In general, when a child is removed from the parents' custody, the petitioner is required to make reasonable efforts to rectify the conditions that caused the child's removal by adopting a service plan." *In re Fried*, 266 Mich App at 542, citing

MCL 712A.18f(1), (2), and (4). "[T]he Department 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 at 85-86. This general duty exists "to reunite the parent and children unless certain aggravating circumstances exist." *In re Moss*, 301 Mich App 76, 90-91; 836 NW2d 182 (2013). "Reasonable efforts to reunify the child and family must be made in *all* cases except those involving aggravated circumstances under MCL 712A.19a(2)." *In re Rippy, Minor*, 330 Mich App 350, 355; 948 NW2d 131 (2019), citing *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010).[2] Furthermore, MCL 712A.19a(2) provides, in pertinent part:

> The court shall conduct a permanency planning hearing within 30 days after there is a judicial determination that reasonable efforts to reunite the child and family are not required. Reasonable efforts to reunify the child and family must be made in all cases except if any of the following apply:
>
> * * *
>
> (c) The parent has had rights to the child's siblings involuntarily terminated and the parent has failed to

[2] To the extent our Court has previously stated that the DHHS "is not required to provide reunification services when termination of parental rights is the agency's goal," *In re HRC*, 286 Mich App 444, 463; 781 NW2d 105 (2009), that statement was dicta because (1) aggravated circumstances were present in that case, (2) it has been implicitly clarified by *In re Rippy, Minor*, and (3) the case is contrary to *In re Rood*, 483 Mich 73, 99-100; 763 NW2d 587 (2009) (opinion by CORRIGAN, J.) and *id*. at 124 (CAVANAGH, J., concurring in part), and *In re Hicks*, 500 Mich at 85. As Judge BECKERING explained in her dissenting opinion, the general statement from *In re HRC* was taken out of context and is inconsistent with prior and subsequent binding law, a point the majority did not dispute. See *In re Rippy, Minor*, 330 Mich App at 370 n 5 (BECKERING, J., dissenting).

> rectify the conditions that led to that termination of parental rights.

The DHHS's initial petition sought removal of the child from mother's care, but the petition did not seek termination. On the basis of the allegations contained in the initial petition, the trial court ordered the child removed from mother's care. Mother does not contest that removal. However, the trial court did not authorize the initial petition at the first May 2019 hearing because it wanted to wait until respondents had appointed counsel. Consequently, the trial court ordered reasonable efforts to reunify the family at that hearing. It was not until after the first hearing that the DHHS filed its first amended petition seeking termination. The termination petition contained allegations that parental rights were terminated to one or more siblings of the child " 'due to serious and chronic neglect or physical or sexual abuse, and the parent has failed to rectify the conditions that led to the prior termination of parental rights.' " (Quoting MCL 712a.19b(3)(*i*).) Thereafter, the trial court took testimony at the second hearing in May 2019 and concluded that probable cause existed that one or more of the allegations contained in the termination petition were true. It further concluded that reasonable efforts to reunify the family were not required because of the previous termination and respondents' apparent failure to rectify the conditions that led to that termination.

Reasonable efforts are likewise not required when a parent has his or her parental rights involuntarily terminated to a sibling of the child at issue and the parent has failed to rectify the conditions that led to that earlier termination of parental rights. See MCL 712A.19a(2)(c). Mother's argument in this regard essentially focuses on the fact that the trial court later

determined that there was not clear and convincing evidence to terminate respondents' parental rights after the trial court heard testimony during the July 2019 termination hearing. However, the evidence presented up to the July 2019 hearing established by a preponderance of the evidence that mother's parental rights were terminated to the child's sibling and that mother had failed to rectify the conditions that led to that termination. Under a less strenuous burden of proof, the trial court did not err by denying reasonable efforts at the outset. Then, when the burden of proof became clear and convincing evidence to terminate parental rights, the trial court concluded that there was not clear and convincing evidence and ordered that reasonable efforts to reunify the child and family be made.

Stated differently, the trial court operated with the evidence available to it at the time it made its initial reasonable-efforts finding. The DHHS alleged in its first amended petition, under MCL 712A.19b(3)(*i*), that mother's parental rights to the other child were terminated because of serious and chronic neglect or physical or sexual abuse and that mother failed to rectify those conditions that led to that termination. Following the steps outlined in MCR 3.977(E), the trial court (1) concluded that the amended petition contained a request for termination and (2) found by a preponderance of the evidence that one or more of the grounds for assumption of jurisdiction over the child had been established. The evidence introduced to the trial court at the time of the first three hearings established by a preponderance of the evidence that mother's parental rights were involuntarily terminated with respect to a sibling of the child and that the conditions that existed to warrant the termination still existed. "Pursuant to MCL 712A.19a(2)(c), the prior involuntary termination

of parental rights to a child's sibling is a circumstance under which reasonable efforts to reunite the child and family need not be made." *In re Smith*, 291 Mich App 621, 623; 805 NW2d 234 (2011).

As the case progressed to the initial termination hearing, the burden of proof rose from a preponderance of the evidence to clear and convincing evidence. See MCR 3.977(E)(2) and (3). It was at the July 2019 hearing that the trial court determined that the DHHS had not met its burden to prove by clear and convincing evidence that a statutory ground for termination existed under MCL 712A.19b(3)(*i*). In other words, the trial court concluded that there was not sufficient evidence to prove by *clear and convincing* evidence that mother's parental rights were terminated to the other child on the basis of serious and chronic neglect or physical or sexual abuse. Consequently, there was no longer a basis to deny reasonable efforts under MCL 712A.19a(2)(c) because there was no evidence presented to establish by clear and convincing evidence the existence of a statutory ground under MCL 712A.19b(3)(*i*).

The trial court cannot be faulted for making its initial finding on the basis of a less-stringent burden of proof. The DHHS's subsequent failure to prove by clear and convincing evidence a statutory ground for termination does not invalidate the trial court's initial determination or otherwise make that initial determination erroneous. After the trial court concluded that the DHHS failed to meet its burden, the trial court ordered the DHHS to initiate a case service plan and offer reasonable efforts to reunify the family. Accordingly, the trial court did not commit clear error, and mother has failed to establish any plain error affecting her substantial rights. See *In re Utrera*, 281 Mich App at 9; *In re BZ*, 264 Mich App 286, 296-297; 690 NW2d 505 (2004).

Mother next challenges the trial court's findings that reasonable efforts were made after the July 2019 initial termination hearing leading up to the August 2020 termination hearing. Her challenge in this regard is two fold: (1) that the DHHS did not offer reasonable efforts to accommodate her intellectual disabilities under the Americans with Disabilities Act (ADA), 42 USC 12101 *et seq*., and (2) notwithstanding the lack of accommodations under the ADA, the DHHS's efforts to reunify the family were not sufficient. We review unpreserved claims for plain error affecting substantial rights. See *In re Utrera*, 281 Mich App at 9.[3]

In addition to the DHHS's affirmative duty to make reasonable efforts to reunify a family before seeking termination of parental rights, *In re Hicks*, 500 Mich at 85-86, the DHHS also has "obligations under the ADA that dovetail with its obligations under the Probate Code," *id*. at 86. The DHHS "must make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless . . . the modifications would fundamentally alter . . . the service provided." *Id*. (quotations marks and citation omitted). This includes a parent with "*a known or suspected* intellectual, cognitive, or developmental impairment." *In re Hicks*, 315 Mich App 251, 281-282; 890 NW2d 696 (2016), aff'd in part and vacated in part 500 Mich 79 (2017).

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[3] Mother did not assert "that the services provided [were] inadequate to her particular needs . . . ." *In re Terry*, 240 Mich App 14, 26; 610 NW2d 563 (2000). In *In re Terry*, we held that "[a]ny claim that the parent's rights under the ADA were violated must be raised well before a dispositional hearing regarding whether to terminate her parental rights, and the failure to timely raise the issue constitutes a waiver." *Id*. at n 5. We address the merits of mother's claim nonetheless.

Absent reasonable modifications, "efforts at reunification cannot be reasonable under the Probate Code if the [DHHS] has failed to modify its standard procedures in ways that are reasonably necessary to accommodate a disability under the ADA." *In re Hicks*, 500 Mich at 86. When challenging the services offered, a respondent must establish that he or she would have fared better if other services had been offered. See *In re Fried*, 266 Mich App at 542-543.

When the trial court ordered reasonable efforts, the DHHS offered several services, including foster care case management, Right Door case management (which included individual therapy, medication management, and case management), infant mental health referrals, supportive visitation referrals, housing assistance, individual therapy, gas cards, and supervised parenting time with the child. As the case progressed, the DHHS offered psychological-evaluation referrals for respondents; services for feeding therapy; physical therapy; transportation assistance; and Positive Solutions, Informed Choices (PSIC) referral for parenting skills and techniques. Respondents were also offered parenting packets.

Mother underwent her psychological evaluation in March 2020, which identified that mother needed comprehensive IQ testing to fully establish her intellectual disability, which, if mother met the criteria for being intellectually disabled, "could potentially open up more opportunities for social service intervention and would also greatly assist the caseworkers in designing the family services intervention." Dr. Jeffrey Kieliszewski also recommended a "comprehensive parenting education class" to "accommodate her intellectual deficits and reading difficulties." According to the record, the DHHS caseworkers were aware of mother's intellec-

tual disabilities from the previous termination case. Despite this knowledge and Dr. Kieliszewski's recommendations, the DHHS decided to change the goal from reunification to termination. This change in plan was made because, around the time that mother received her psychological evaluation, mother had stopped discussing her progress with the DHHS caseworker. The DHHS caseworker testified that there were several occasions that mother refused to work with her. Before Dr. Kieliszewski conducted the psychological evaluation, the DHHS offered numerous services, even services that were designed to provide mother "repeated exposure," something that Dr. Kieliszewski testified was appropriate for someone with an intellectual disability to receive. For example, the DHHS hired a private nursing agency to teach mother how to properly feed the child after doctors had already shown her the feeding techniques during medical appointments. The DHHS offered this because mother struggled to grasp how to properly feed the child given his medical condition. Therefore, the DHHS inadvertently offered mother repeated exposure on how to properly feed the child, but she was still unable to appropriately feed the child.

Notably, mother's entire argument merely provides conclusory statements about the services that were offered and how those services were not appropriate given her intellectual disability. However, mother does not provide any substantive argument on how those services were deficient or how they were not reasonable or appropriate in light of her intellectual disability. Mother also does not identify any service that she believes would have benefited her more than the services that were actually provided. Mother merely lists the results of the psychological evaluation and the recommendations of Dr. Kieliszewski to essentially

argue that the services offered by the DHHS were insufficient. But, when challenging the services offered, mother must establish that she would have fared better if other services had been offered. See *In re Fried*, 266 Mich App at 542-543. Without an identification of services to accommodate mother's intellectual disability, we are left to speculate what other services the DHHS *could* have offered.

Unlike *In re Hicks*, the record does not establish that there were specific services that the DHHS failed to provide. Instead, mother has failed to identify what services the DHHS should have provided to accommodate her specific needs. See *id*. at 542-543. Even considering Dr. Kieliszewski's recommendations, which came approximately at the time that mother failed to report to the DHHS caseworker, mother has not shown that the services offered by the DHHS did not comport with the recommendation, i.e., that mother receive comprehensive parenting-education classes and more social-services interventions. Mother received numerous referrals for parenting classes through PSIC, which would have provided "repeated exposure" to the parenting lessons.[4] She also had a breadth of other services, including foster care case management, Right Door case management (which included individual therapy, medication management, and case management), infant mental health referrals, supportive visitation referrals, housing assistance, individual therapy, gas cards, and supervised parenting time with the child

[4] Mother asserts that she needed "hands-on instruction" and that the PSIC classes "consisted only of online videos[.]" However, she neglects to mention that the DHHS caseworker testified that PSIC was "trying to recommend different services for them that the parents refused to comply with." The DHHS caseworker also testified that the repeated exposure to the videos would have "been incredibly beneficial for" mother considering her cognitive abilities.

before the pandemic. Mother's blanket denial that the services offered were sufficient in light of her intellectual disability, without identifying any services that would have been appropriate in light of such disability or how the services that were offered were deficient, does not establish plain error affecting substantial rights. *In re Utrera*, 281 Mich App at 9.

Furthermore, mother faults the DHHS for failing to facilitate the development of a bond between her and the child. However, the record indicates that mother had several supervised parenting visits with the child beginning in July 2019. These supervised parenting visits continued up until March 2020 when the parents volunteered to stop in-person visits for the sake of the child's health because of COVID-19 related concerns. The DHHS then provided photos and videos of the child, as well as set up virtual meetings to engage with the child over the Zoom video platform. However, the record indicates that mother struggled with video conferencing technology. The DHHS caseworker also recommended that mother create videos and take photographs to send to the child. Instead, there were threats made to the foster parents, and respondents refused to film themselves for the child because respondents believed that the foster parents would take their fun ideas and use them for themselves. Mother cannot fault the DHHS for her refusal to engage in recommendations that the DHHS believed would help foster a bond with the child. Given the circumstances of the pandemic and the child's health issues, videoconferencing, photos, and videos were the only realistic way to continue forming a bond with the child, albeit not the best way. Still, mother's refusal to engage in those activities for the first couple months of the pandemic does not amount to a failure by the DHHS to facilitate the development of a bond.

We conclude that the trial court did not err by finding that the DHHS made reasonable efforts to reunify the family.

B. UNTIMELY HEARINGS

Next, mother argues that the trial court violated her due-process rights by not scheduling timely hearings. "Generally, whether child protective proceedings complied with a respondent's substantive and procedural due process rights is a question of law that this Court reviews de novo." *In re TK*, 306 Mich App 698, 703; 859 NW2d 208 (2014). However, an "unpreserved claim of constitutional error is reviewed for plain error affecting substantial rights." *In re Williams*, 286 Mich App 253, 274; 779 NW2d 286 (2009).

"The fundamental requisite of due process of law is the opportunity to be heard. The hearing must be at a meaningful time and in a meaningful manner." *In re Rood*, 483 Mich 73, 92; 763 NW2d 587 (2009) (opinion by CORRIGAN, J.) (quotation marks and citations omitted). "Due process requires fundamental fairness, which is determined in a particular situation first by considering any relevant precedents and then by assessing the several interests that are at stake." *Id*. (quotation marks and citations omitted). "In Michigan, procedures to ensure due process to a parent facing removal of his child from the home or termination of his parental rights are set forth by statute, court rule, DH[H]S policies and procedures, and various federal laws . . . ." *Id*. at 93. "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *In re Brock*, 442 Mich 101, 111; 499 NW2d 752 (1993) (quotation marks and citation omitted; alteration in original).

Relevant to this case are the procedures outlined in MCL 712A.19a(2) and MCL 712A.19(3). MCL 712A.19a(2) provides, in relevant part:

> The court shall conduct a permanency planning hearing within 30 days after there is a judicial determination that reasonable efforts to reunite the child and family are not required.

MCL 712A.19(3) provides, in relevant part:

> Except as otherwise provided in subsection (4), if, in a proceeding under section 2(b) of this chapter, a child is subject to the court's jurisdiction and removed from his or her home, a review hearing must be held not more than 182 days after the child's removal from his or her home and no later than every 91 days after that for the first year that the child is subject to the court's jurisdiction. After the first year that the child has been removed from his or her home and is subject to the court's jurisdiction, a review hearing must be held not more than 182 days from the immediately preceding review hearing before the end of that first year and no later than every 182 days from each preceding review hearing after that until the case is dismissed. A review hearing under this subsection must not be canceled or delayed beyond the number of days required in this subsection, regardless of whether a petition to terminate parental rights or another matter is pending.

Here, even assuming the trial court held hearings outside the applicable 30-day and 91-day windows required by MCL 712A.19a(2) and MCL 712A.19(3), we conclude that any delay was harmless. First, it is worth noting that the delay between the January 2020 hearing and the May 2020 hearing was at no fault of the trial court. At the time of the January 2020 hearing, the trial court scheduled the next hearing for April 2020, but the COVID-19 pandemic struck Michigan in March 2020. As a result, Governor Gretchen

Whitmer issued several executive orders, and the Michigan Supreme Court issued several administrative orders, that severely limited hearings conducted at the trial court level. See Executive Order No. 2020-21 and Administrative Order No. 2020-1, 505 Mich cii (2020). As the trial court mentioned, it conducted the May 2020 hearing via Zoom. Therefore, any delay between the January 2020 hearing and the May 2020 hearing can be attributed to the unprecedented COVID-19 pandemic and not to the trial court.

With respect to the delay under MCL 712A.19a(2), MCR 2.613(A) provides that

> an error in a ruling or order, or an error or defect in anything done or omitted by the court or by the parties is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice.

We have stated that "a trial court's error in issuing a ruling or order *or an error in the proceedings* is not grounds for this Court to reverse or otherwise disturb an order unless this Court believes that failure to do so would be inconsistent with substantial justice." *In re TC*, 251 Mich App 368, 371; 650 NW2d 698 (2002) (emphasis added). We conclude that mother's subsequent receipt of services after the trial court's denial to terminate her parental rights during the July 2019 hearing essentially cured any due-process violation that arose from the delay between the preliminary hearing and the termination/disposition hearing. "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *In re Brock*, 442 Mich at 111 (quotation marks and citation omitted; alteration in original). The trial court afforded mother these protections by declining to terminate her

parental rights during the July 2019 hearing and subsequently ordering reasonable efforts.

Because of mother's subsequent receipt of services, there was no fundamental unfairness. Mother seemingly argues that she could have received an extra month of services had the permanency planning hearing occurred within the 30-day limit. Considering mother's previous involvement in services with respect to her other child, and the subsequent termination of her parental rights to that child, it was not fundamentally unfair that mother did not receive an extra month of services with respect to this child. Furthermore, although evidence established that mother participated in the services offered by the DHHS, there was little to no evidence presented that she benefited from those services; moreover, testimony demonstrated that mother refused to work with the DHHS caseworker despite her engagement in services, meaning the DHHS caseworker was unable to get an update on the benefits, if any, the services were having. Accordingly, upholding the trial court's termination order despite mother's argument that she could have received an additional month of services is consistent with substantial justice. See MCR 2.613(A).

Mother also raises an issue with the DHHS's delay in filing the termination petition after the May 2020 hearing. The trial court ordered the DHHS to initiate termination proceedings "no later than 28 days from the date of this hearing." It was not until July 2020, that the DHHS filed its petition requesting termination, which was clearly outside the 28-day time frame that the trial court ordered. MCL 712A.19a(8) authorizes the trial court to order termination proceedings in its discretion:

> If the court determines at a permanency planning hearing that a child should not be returned to his or her parent, the court may order the agency to initiate proceedings to terminate parental rights.

Although the DHHS filed its petition outside of the 28-day limit imposed by the trial court, this two-month delay provided mother further opportunity to engage in services that would have otherwise been halted two months previously had the DHHS filed its petition within the 28-day limit. In other words, the DHHS's delay in filing a termination petition actually provided *more* opportunity for mother to engage in services, benefit from services, and continue supervised parenting visits (albeit virtual) that she would have otherwise lost out on had the petition been timely filed because services and supervised parenting time continued during the time between the May 2020 hearing and the filing of the July 2020 termination petition. Accordingly, the DHHS's delay was *not* inconsistent with substantial justice. See MCR 2.613(A); *In re TC*, 251 Mich App at 371.

C. STATUTORY GROUNDS

Mother also asserts that the trial court erred by finding that a statutory ground existed to terminate her parental rights under MCL 712A.19b(3)(c)(*ii*) or (j). "In order to terminate parental rights, the trial court must find by clear and convincing evidence that at least one of the statutory grounds for termination in MCL 712A.19b(3) has been met." *In re VanDalen*, 293 Mich App at 139. We review the trial court's determination of statutory grounds for clear error. *Id*. "A finding of fact is clearly erroneous if the reviewing court has a definite and firm conviction that a mistake has been committed, giving due regard to the trial

court's special opportunity to observe the witnesses." *In re BZ*, 264 Mich App at 296-297. "Appellate courts are obliged to defer to a trial court's factual findings at termination proceedings if those findings do not constitute clear error." *In re Rood*, 483 Mich at 90 (opinion by CORRIGAN, J.). If the trial court did not clearly err by finding one statutory ground existed, then that one ground is sufficient to affirm the termination of respondent's parental rights. See *In re HRC*, 286 Mich App 444, 461; 781 NW2d 105 (2009).

Grounds for termination exist under MCL 712A.19b(3)(c)(*ii*) "if 182 or more days have elapsed since the issuance of an initial dispositional order" and

> (1) the parent is the respondent in a child-neglect proceeding, (2) other conditions exist that cause the child to come within the court's jurisdiction, (3) the parent received recommendations to rectify those conditions and had a reasonable opportunity to do so and the respondent failed to rectify the other conditions, and (4) there is no reasonable likelihood she will do so within a reasonable time given the age of the child. [*In re JK*, 468 Mich 202, 211; 661 NW2d 216 (2003).]

Here, the first dispositional order was the trial court's July 2019 order denying the DHHS's initial request for termination on the basis of MCL 712A.19b(3)(*i*). Subsequently, mother's parental rights were terminated in August 2020. Therefore, consistent with MCL 712A.19b(3)(c), more than 182 days had passed since the initial dispositional order.

With respect to other conditions existing, it became evident that mother lacked the requisite parenting skills and emotional stability to care for the child, who had several medical conditions that required particular care. Given that adjudication over mother was exercised on the basis of her plea, during which she

admitted that she was homeless and that her homelessness affected her ability to care for the child, the other conditions that arose during the pendency of the case were unrelated to the grounds that led to the initial adjudication. Furthermore, the DHHS offered mother services to rectify those conditions, i.e., her parenting skills and emotional stability; mother had a reasonable opportunity to rectify those conditions, and she failed to rectify those conditions.

Although mother participated in all the services that the DHHS offered, mere participation is not the same as overcoming the barriers in place. See *In re TK*, 306 Mich App at 711. Mother also stopped communicating with the DHHS caseworker, which was one of the reasons that the DHHS moved from reunification to termination. Evidence established that, although mother participated in the services, there was no way to determine whether she actually benefited from those services because she stopped informing the DHHS caseworker about her progress. There was also testimony that mother was paranoid, suspicious, and distrusting of the service providers aside from her therapist and that mother was afraid to be left alone with the child. Further, although mother admitted that she took Zoloft to treat her depression, there was evidence presented that father at one point forbade her from taking the medication.

Regarding whether there was a reasonable likelihood to rectify the conditions given the child's age, mother asserts that she should have been given "more time to continue to progress given that she had clearly shown that she was willing to do so to the best of her abilities and that she was making progress." Yet, this neglects that "there is no reasonable likelihood she will do so *within a reasonable time given the age of the child*." *In re*

JK, 468 Mich at 211 (emphasis added). The DHHS took custody of the child only two days after the child's birth, and the case then proceeded for the next 15 months, during which mother received services for approximately 12 months. Even before the pandemic, mother received eight months of services and supervised in-person parenting visits with the child. Still, during those eight months, evidence established that, although mother was appropriate with the child during the in-person visits, she did not understand the child's development and was unsuccessful at feeding him. This was despite mother receiving extra training from a nursing agency that the DHHS had hired to train mother on how to properly feed the child given his medical needs. Dr. Kieliszewski also testified that he recommended long-term and intensive parenting services if reunification occurred, which was already on top of the 15 months that the child was in the DHHS's care, and he did not identify how long those services would be needed. As the trial court concluded, "[I]t just does not seem likely that these issues will be rectified within a reasonable time considering the age of the child." Mother repeatedly directs us to her consistent participation in services, but she fails to realize that she must "demonstrate that [she] sufficiently benefited from the services provided," of which there was insufficient evidence. *In re Frey*, 297 Mich App 242, 248; 824 NW2d 569 (2012).[5]

D. BEST INTERESTS

Lastly, mother challenges the trial court's findings with regard to whether termination was in the child's

[5] Because we conclude that the trial court did not clearly err in respect to this statutory ground, we need not address the statutory ground under MCL 712A.19b(3)(j). See *In re HRC*, 286 Mich App at 461

best interests. We review for clear error the trial court's determination of best interests. *In re Olive/Metts Minors*, 297 Mich App 35, 40; 823 NW2d 144 (2012). "A finding of fact is clearly erroneous if the reviewing court has a definite and firm conviction that a mistake has been committed, giving due regard to the trial court's special opportunity to observe the witnesses." *In re BZ*, 264 Mich App at 296-297. "Appellate courts are obliged to defer to a trial court's factual findings at termination proceedings if those findings do not constitute clear error." *In re Rood*, 483 Mich at 90 (opinion by CORRIGAN, J.).

"Even if the trial court finds that the [DHHS] has established a ground for termination by clear and convincing evidence, it cannot terminate the parent's parental rights unless it also finds by a preponderance of the evidence that termination is in the best interests of the children." *In re Gonzalez/Martinez Minors*, 310 Mich App 426, 434; 871 NW2d 868 (2015). Before it could terminate mother's parental rights, the trial court was required to find by a preponderance of the evidence that termination was in the child's best interests. See *In re Olive/Metts Minors*, 297 Mich App at 40. "In making its best-interest determination, the trial court may consider the whole record, including evidence introduced by any party." *In re Medina*, 317 Mich App 219, 237; 894 NW2d 653 (2016) (quotation marks and citation omitted). "[T]he 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, are all factors for the court to consider when deciding whether

("Having concluded that at least one ground for termination existed, we need not consider the additional grounds upon which the trial court based its decision.").

termination is in the best interests of the child." *In re Gonzalez/Martinez Minors*, 310 Mich App at 434 (quotation marks and citation omitted). The trial court may also consider the child's age, inappropriate parenting techniques, and continued involvement in domestic violence. See *In re Jones*, 286 Mich App 126, 131; 777 NW2d 728 (2009). It may further consider visitation history, the parent's engaging in questionable relationships, the parent's compliance with treatment plans, the child's well-being in care, and the possibility of adoption. See *In re BZ*, 264 Mich App at 301; *In re AH*, 245 Mich App 77, 89; 627 NW2d 33 (2001).

A preponderance of the evidence supported a finding that termination of mother's parental rights was in the child's best interests. The trial court noted that mother received services in regard to her other child before her parental rights to that child were terminated in 2018. But some of the issues that existed with respect to the other child carried over to the child in this case, such as mother's lack of insight or knowledge about child development, childcare practices, and parenting techniques. The trial court indicated that it was not holding parenting techniques against mother because of the COVID-19 pandemic essentially canceling in-person visits with the child. The trial court further indicated that it was not holding the lack of bond between the child and mother against mother because of the COVID-19 pandemic.

However, although there was evidence that mother complied with the case service plan, there was no evidence that mother sufficiently benefited, if at all, from the services. Mother could not recall what she had learned from the parenting classes, she was unable to talk about how she would teach the child to roll over, and she was unable to provide any examples of how to

parent a young child that she had learned from her therapist. Further, mother testified that she would throw a ball to play catch with the child when the child was not even a year old, providing more evidence that mother lacked the requisite knowledge of child development. Mother was also unable to successfully feed the child when in-person visits were offered despite repeated exposure to feeding therapy and a private lesson.[6] The trial court also concluded that the child's need for permanency, considering how long the child was in foster care and how long the child might have to wait for mother to rectify the conditions that still existed, was a heavy factor in favor of termination. Dr. Kieliszewski testified that he recommended long-term, intensive intervention services if reunification were to occur, but he did not indicate how long those services would be required. This was also on top of the 15 months that the child was already in foster care. Accordingly, there was a preponderance of evidence to establish that termination of mother's parental rights was in the child's best interests, and we are not left with a definite and firm conviction that a mistake was

[6] Mother asserts that she was unable to establish any benefit from the services because of the cessation of services as a result of the pandemic. But mother fails to demonstrate why the pandemic precluded her from doing so. Moreover, mother provides no explanation for why she could not establish any benefit from services during the first eight months of this case, which was before the pandemic. Simply looking at the evidence up to the "shutdown," there was only testimony that mother *complied* with the services and attended all of her parenting visits. In other words, mother was an ideal parent in terms of compliance with the case service plan, but this was not a case focused on mother's noncompliance; rather, the trial court was focused on mother's failure to establish *benefit* from her compliance. *In re TK*, 306 Mich App at 711.

made. See *In re Olive/Metts Minors*, 297 Mich App at 41; *In re BZ*, 264 Mich App at 296-297.

II. FATHER'S APPEAL

Father's only argument on appeal is that the trial court erred by finding that a statutory ground existed to terminate his parental rights. We review for clear error the trial court's determination of statutory grounds. See *In re VanDalen*, 293 Mich App at 139.

Termination under MCL 712A.19b(3)(j) is appropriate when "[t]here is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent." The harm contemplated under MCL 712A.19b(3)(j) includes emotional harm as well as physical harm. See *In re Hudson*, 294 Mich App 261, 268; 817 NW2d 115 (2011). Sufficient evidence supported the trial court's decision to terminate father's parental rights under this statutory ground. There was evidence that, although father participated in the services offered by the DHHS, there was a failure to communicate with the service providers, which led the DHHS to believe that father had not benefited from the services because father provided no insight into any benefit that he may have received.

> The record establishes that respondent was provided with a multitude of intensive services. Although respondent had cooperated, [he] had made little progress. [He] lacked insight into the needs of [his] children and had not internalized what [he] had been taught. Not only must respondent cooperate and participate in the services, [he] must benefit from them. [*In re TK*, 306 Mich App at 711 (concluding in the context of reasonable efforts).]

Father's own testimony established that he was unable to recall anything that he had learned from the

parenting classes and that he needed further assistance with respect to the child's medical needs. He also could not recall any of the knowledge that he gained throughout the duration of this case to help care for the child. Therefore, father's lack of insight or knowledge on how to properly parent the child causes a reasonable likelihood that the child would be harmed if returned to father's care. See MCL 712A.19b(3)(j). Even father admitted that he was not ready to have the child return home despite the services he had received leading up to the termination hearing. Accordingly, we are not left with a definite and firm conviction that a mistake was made by terminating father's parental rights under this statutory ground. See *In re BZ*, 264 Mich App at 296-297.[7]

Affirmed.

MURRAY, C.J., and MARKEY and LETICA, JJ., concurred.

[7] Because we conclude that termination under this statutory ground was supported by the evidence, we need not address the other statutory ground supporting the termination order. *In re HRC*, 286 Mich App at 461.

TRAVERSE CITY RECORD-EAGLE v TRAVERSE CITY AREA PUBLIC SCHOOLS BOARD OF EDUCATION

Docket No. 354586. Submitted May 4, 2021, at Grand Rapids. Decided May 13, 2021, at 9:10 a.m.

The Traverse City Record-Eagle filed a complaint under the Freedom of Information Act (FOIA), MCL 15.231 *et seq*., against the Traverse City Area Public Schools Board of Education (TCAPS) and M. Sue Kelly, the Board President of TCAPS, in the Grand Traverse Circuit Court. Plaintiff sought a document prepared by Kelly (the Kelly document) that included complaints about Ann Cardon, the superintendent. Defendants held a meeting to discuss the complaints against Cardon, and Cardon requested a closed session under the Open Meetings Act (OMA), MCL 15.261 *et seq*. The closed session was granted, and the Kelly document was used during the session. After the meeting, defendants and Cardon agreed that she would resign, and defendants hired an interim superintendent and formally ratified his contract during a subsequent open meeting. Plaintiff submitted a FOIA request for the Kelly document; defendants refused to provide the document on the ground that it was exempt from disclosure. Plaintiff filed its action seeking the Kelly document and alleging numerous OMA violations, including that defendants hired the interim superintendent without adequately addressing the decision during a public meeting. Both parties moved for partial summary disposition, and the trial court, Kevin A. Elsenheimer, J., granted both parties' motions. Defendants appealed the court's decision regarding the FOIA claim, and plaintiff cross-appealed regarding the court's OMA decision.

The Court of Appeals *held*:

1. Unless an express exemption exists, FOIA gives a person the right to inspect or receive copies of a requested public record of a public body. Records that are exempt under FOIA include minutes from a closed meeting under MCL 15.267 and MCL 15.268 of the OMA. Contrary to defendants' argument, the Kelly document was not part of the minutes of the closed session under the OMA and therefore was not exempt from disclosure under FOIA. The plain and ordinary meaning of "minutes" is the official

record of the proceedings at a group's meeting. According to defendants, because the OMA does not exclusively list the information required to be included in the minutes of a meeting, the Kelly document could properly be considered part of the meeting minutes. But just because the OMA does not provide an exclusive list of what may be contained in a meeting's minutes does not mean that every document referred to in the meeting can be said to be part of the minutes. Similarly, the fact that the Kelly document may have assisted in TCAPS's deliberations did not exempt it from disclosure. The Court of Appeals previously rejected as without statutory basis the argument that the OMA categorizes documents as either factual or deliberative, with only deliberative information exempt from disclosure under the OMA. Although the OMA distinguishes between a public body's deliberations and its decisions, it does not classify the content of the communications that occur during the deliberations process as either factual or deliberative. Caselaw also suggested that, while minutes and transcripts of a closed session are exempt from disclosure, documents that may have been relevant to or relied upon during a closed session are not necessarily exempt, including personnel files, settlement agreements, and performance evaluations. The Kelly document was subject to disclosure under FOIA, and defendants could not render it exempt merely because it was the subject of a closed meeting.

2. The OMA requires all meetings held by a public body to be open to the public, and all decisions of a public body must be made at meetings that are open to the public. Plaintiff argued that defendants violated the OMA because, although the interim superintendent was hired at an open meeting, there was no deliberation or decision at that or any other open meeting involving the offer to the interim superintendent or other candidates. Plaintiff concluded therefore that the decision to choose the interim superintendent was reached outside of an open meeting in violation of the OMA. However, the record did not support this conclusion and established that Kelly and TCAPS properly met at an open meeting in October 2019 and made the decision to hire the interim superintendent. Although Kelly affirmed that she had approached the interim superintendent about the position before the October 2019 meeting, no decision was made and no contractual terms were discussed at that time. Moreover, because Kelly met him by herself, no quorum of TCAPS was present to trigger MCL 15.263(3), which requires all deliberations of a public body constituting *a quorum* of its members to take place at a meeting open to the public, except when meeting in a closed session as

provided under the statute. Accordingly, plaintiff's claims regarding the OMA violation were mere speculation and were not supported by the evidence.

Affirmed.

Butzel Long, PC (by *Robin Luce Herrmann*, *Joseph E. Richotte*, and *Javon R. David*) for Traverse City Record-Eagle.

O'Neill Wallace & Doyle, PC (by *Kailen C. Piper* and *Gregory W. Mair*) for Traverse City Area Public Schools Board of Education and M. Sue Kelly.

Amici Curiae:

The Smith Appellate Law Firm (by *Michael F. Smith*) for Detroit Free Press, The Detroit News, Michigan Press Association, MLive Media Group, Michigan Coalition for Open Government, Bridge Michigan, and Society of Professional Journalists—Detroit Chapter.

Before: MURRAY, C.J., and FORT HOOD and GLEICHER, JJ.

FORT HOOD, J. Defendants, the Traverse City Area Public Schools Board of Education (TCAPS) and M. Sue Kelly,[1] appeal by leave granted[2] the trial court's decision granting partial summary disposition for plaintiff, the Traverse City Record-Eagle,[3] and granting partial summary disposition for defendants. The trial court granted plaintiff's motion as it related to its disclosure claim under the Freedom of Information Act (FOIA),

[1] M. Sue Kelly was the Board President of TCAPS.

[2] *Traverse City Record-Eagle v Traverse City Area Pub Sch Bd of Ed*, unpublished order of the Court of Appeals, entered October 9, 2020 (Docket No. 354586).

[3] Plaintiff is a Traverse City newspaper.

MCL 15.231 *et seq*., and it granted defendants' motion as it related to plaintiff's violation claim under the Open Meetings Act (OMA), MCL 15.261 *et seq*. Defendants appeal the trial court's decision on the FOIA claim. In a cross-appeal, plaintiff appeals the trial court's decision on the OMA claim. We affirm as to both issues.

I. FACTUAL BACKGROUND

This case involves the interplay between FOIA and the OMA. Ann Cardon was hired by defendants as the school superintendent, but soon after her hiring, various complaints arose against her. Defendants convened a meeting to discuss the complaints, and Cardon requested a closed session under the OMA. The closed session was granted. At the session, a document created by Kelly and referred to by the parties as the "Kelly document" contained the complaints against Cardon. That document is the subject of the FOIA issue in this case. No formal decision was reached after the closed session; however, soon after the meeting, Cardon and defendants mutually agreed that Cardon would resign. After this, defendants held an open meeting and moved to name Jim Pavelka as the interim superintendent. At a future open meeting, defendants formally ratified Pavelka's contract.

Plaintiff filed its FOIA request and requested the Kelly document; defendants refused, maintaining that the document was exempt from disclosure. Plaintiff filed this action, seeking the Kelly document and alleging numerous OMA violations. Relevant to this appeal, plaintiff argued that defendants' conduct with Pavelka was improper and outside the OMA requirements. Each party moved for partial summary disposition. The trial court ultimately granted summary disposition in plain-

tiff's favor as to the FOIA claim, ruling that the Kelly document was subject to disclosure. The trial court granted summary disposition in defendants' favor as to the OMA claim, ruling that plaintiff had failed to create a genuine issue of material fact and that defendants were entitled to judgment as a matter of law.

II. 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) (citations omitted). A motion is properly granted pursuant to 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. "This Court is liberal in finding genuine issues of material fact." *Jimkoski v Shupe*, 282 Mich App 1, 5; 763 NW2d 1 (2008).

Additionally, questions of statutory interpretation, construction, and application are reviewed de novo. *Dextrom*, 287 Mich App at 416. "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).

Finally, "certain FOIA provisions require the trial court to balance competing interests," and "when an appellate court reviews a decision committed to the trial court's discretion, such as [a] balancing test[,] . . . the appellate court must review the discretionary determination for an abuse of discretion and cannot disturb the trial court's decision unless it falls outside the principled range of outcomes." *Herald Co, Inc v Eastern Mich Univ Bd of Regents*, 475 Mich 463, 470, 472; 719 NW2d 19 (2006). But "where a party challenges the underlying facts that support the trial court's decision," the clear error standard applies. *Id*. at 472. "Clear error exists only when the appellate court is left with the definite and firm conviction that a mistake has been made." *Id*. at 471 (quotation marks and citation omitted).

II. THE KELLY DOCUMENT

Defendants contend that the trial court incorrectly concluded that the Kelly document was unprotected by the OMA and disclosable under FOIA. We disagree.

FOIA "requires public bodies to release certain information at a citizen's request." *City of Warren v Detroit*, 261 Mich App 165, 166; 680 NW2d 57 (2004). Except when expressly exempted, "a person has a right to inspect, copy, or receive copies of [a] requested public record of [a] public body." MCL 15.233(1). A "public record" is defined as

> a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created. Public record does not include computer software. This act separates public records into the following 2 classes:
>
> (*i*) Those that are exempt from disclosure under [MCL 15.243].
>
> (*ii*) All public records that are not exempt from disclosure under [MCL 15.243] and that are subject to disclosure under this act. [MCL 15.232(i).]

The purpose of FOIA is for people to "be informed so that they may fully participate in the democratic process." MCL 15.231(2).

Our Legislature created numerous exemptions to the general rule of disclosure. See MCL 15.243. Relevant to this appeal are "[r]ecords or information specifically described and exempted from disclosure by *statute*." MCL 15.243(1)(d) (emphasis added). One such exemption described by statute applies to minutes of a closed meeting conducted under the OMA. Normally, the minutes of open meetings held by public bodies are disclosable to the public. See MCL 15.269. The same is not true of the minutes for closed meetings.

MCL 15.268 provides:

> A public body may meet in a *closed* session only for the following purposes:
>
> (a) To consider the dismissal, suspension, or disciplining of, or to hear *complaints* or charges brought against, or to consider a periodic personnel evaluation of, a public officer, employee, staff member, or individual agent, *if the named person requests a closed hearing*. A person requesting a closed hearing may rescind the request at any time, in which case the matter at issue shall be considered after the rescission only in open sessions. [Emphasis added.]

MCL 15.267(2) provides that "[a] separate set of minutes shall be taken by the clerk or the designated secretary of the public body at the closed session. These minutes shall be retained by the clerk of the public body, *are not available to the public*, and shall only be disclosed if required by a civil action filed under [MCL 15.270], [MCL 15.271], or [MCL 15.273]."[4] (Emphasis added.) These minutes are not disclosable to the public under a FOIA request; only a court order can require their disclosure. *Titus v Shelby Charter Twp*, 226 Mich App 611, 615; 574 NW2d 391 (1997). The exemptions from MCL 15.243 "are narrowly construed, and the burden of proof rests on the party asserting the exemption." *Bradley v Saranac Community Sch Bd of Ed*, 455 Mich 285, 293; 565 NW2d 650 (1997).

Defendants heavily rely on *Titus* for the contention that the Kelly document is not disclosable because it should be considered part of the exempt meeting minutes. In *Titus*, this Court held that the meeting "minutes" of a closed session described in the OMA and exempt from disclosure include transcripts of the closed meeting. *Titus*, 226 Mich App at 615. In reaching this conclusion, we stated:

> The plain and ordinary meaning of "minutes" of a meeting refers to the official record of the proceedings at a group's meeting. *Random House Webster's College Dictionary* (2d ed, 1995), p 837. [MCL 15.269(1)] of the OMA does not purport to be an exclusive listing of the information that may be contained in minutes of a meeting. The requirement in the statute that the "minutes must show" certain items is properly read as a minimum requirement, but not as excluding other information. We

[4] Such civil actions include: an action challenging the final decision of a public body, MCL 15.270; an action to enforce compliance, MCL 15.271; and an action alleging that a public official intentionally violated the OMA, MCL 15.273.

> therefore hold that a transcript of the proceedings in a public body's closed session is part of the official record and, hence, part of the minutes of the session. [*Id*. at 615-616.]

Defendants' attempts to analogize *Titus* to the present case are unpersuasive. Defendants refer us to the *Titus* Court's statement that "[MCL 15.269(1)] of the OMA does not purport to be an *exclusive listing* of the information that may be contained in minutes of a meeting." *Id*. at 615 (emphasis added). Defendants rely on this statement to argue that the Kelly document may properly be considered part of the meeting minutes. However, the crux of our decision in *Titus* centered on the close relation between the definitions of minutes and transcripts. As noted, *Titus* involved the *transcripts* of a closed session, and it made logical sense in that case for this Court to hold that transcripts are part of a meeting's minutes. See *id*. at 615-616 (referring to the plain and ordinary meaning of "minutes" as "the official record of the proceedings at a group's meeting"). That is, just because the OMA does not give an *exclusive* list of what may be contained in a meeting's minutes does not mean that every document referred to in the meeting can be said to be a part of the same.[5]

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[5] To that end, we note defendants' argument that, because the complaint in this case was made part of the official record, it was part of the minutes and therefore exempt. Again, the focus should be on the plain and ordinary meaning of "minutes," not on whether the Kelly document was made part of the official record. We agree with the trial court that to hold otherwise would seemingly allow any public body to attach *anything* to the official record in order to exempt it from disclosure, essentially rendering other exemptions and parts of the OMA surplusage and nugatory. See *Johnson v Recca*, 492 Mich 169, 177; 821 NW2d 520 (2012) (stating that "courts 'must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory' ").

Defendants also suggest that the Kelly document assisted in TCAPS's deliberations, and that, under *Titus*, this exempted the document from disclosure. This argument is also unavailing. In *Titus*, this Court addressed an argument by the plaintiff that "the communications documented in a transcript of a public body's closed session must be further categorized as 'deliberative' or 'factual non-deliberative,' with only 'deliberative' information exempt from disclosure under [MCL 15.267(2)]." *Id*. at 616. We rejected this argument, holding "that such a distinction has no statutory basis," and that, although "the OMA makes a distinction between a public body's deliberations and its decisions," the OMA "does not, however, classify the content of the communications that take place during the deliberation process as either factual or deliberative." *Id*. We explained:

> In this case, the testimony of the witnesses at the March 30, 1994, closed session, as well as the dialogue between board members during the session, may be said to be part of the process of deliberating whether to terminate plaintiff's employment. The minutes of the closed session include the transcript of the proceedings, *without regard to whether the communications transcribed were factual statements provided to help the board make an informed decision or were part of board members' actual deliberations*. [*Id*. (emphasis added).]

In other words, and again, the *Titus* Court focused on the fact that the transcripts were part of the minutes because of the "plain and ordinary meaning of 'minutes,' " and not because the transcripts involved deliberations of the public body within the closed session. See *id*. at 615-616. Defendants fail to persuasively show how the Kelly document, which contained complaints against Cardon, falls within the plain and ordinary meaning of "minutes."

Our decision is bolstered by our Supreme Court's decision in *Bradley*, wherein the Court held that the personnel files of public school teachers are not exempt from disclosure under FOIA. In that case, the teachers contended that various exemptions from MCL 15.243 applied, but the Court rejected each contended exemption.[6] *Bradley*, 455 Mich at 293-300. *Bradley* was an action by the teachers to *prevent* disclosure; this Court described the action as a "reverse FOIA action," and our Supreme Court stated that this "may be [an] apt" description. *Id*. at 291 (quotation marks and citation omitted). Regardless, the Court stated that actions challenging a "FOIA request may turn on an interpretation of whether the FOIA requires disclosure, notwithstanding that the FOIA does not prevent disclosure." *Id*. Accordingly, the Court examined the teachers' action under FOIA. See *id*. at 291-300. Of note, when examining the proposed exemptions, the Court stated that, for one of the plaintiffs, the personnel records contained "corrective or disciplinary actions, *complaints filed*, and performance evaluations." *Id*. at 294 (emphasis added). Absent a specific exemption related to the same, such files were ultimately deemed to be disclosable. *Id*. at 300. See also *Detroit Free Press, Inc v Detroit*, 480 Mich 1079, 1079 (2008) (concluding that a settlement agreement and "Notice of Rejection" were disclosable under FOIA because neither were the subject of a specific FOIA exemption).

Defendant points out that the trial court placed considerable weight on an Attorney General opinion, OAG 1990, No. 6,668 (November 28, 1990), and argues

[6] Admittedly, the argued exemptions in *Bradley* are different from those advanced in the present appeal. We further note defendants' argument that *Bradley* did not involve issues related to the OMA. Irrespective of that issue, *Bradley* is instructive for its application of FOIA to the type of document at issue in this case.

that it erred in doing so.[7] Noting that the opinion comports with the subsequent decision in *Bradley*, we disagree. The opinion addressed the following question:

> When a board of education lawfully convenes in closed session in accordance with section 8(a) of the Open Meetings Act to review a superintendent's evaluation, is the evaluation document discussed in the closed session exempt from disclosure under section 13(1)(d) of the Freedom of Information Act?

The opinion referenced *Ridenour v Bd of Ed of City of Dearborn Sch Dist*, 111 Mich App 798, 804; 314 NW2d 760 (1981), abrogated on other grounds by *Speicher v Columbia Twp Bd of Trustees*, 497 Mich 125 (2014), which held that the OMA did not permit a closed meeting session for routine performance evaluations of a public employee. The Attorney General opinion noted that, after *Ridenour*, the Michigan Legislature amended the OMA to explicitly permit closed sessions for routine performance evaluations. OAG 1990, No. 6,668. The Attorney General opinion concluded that, because the Legislature amended the OMA but not FOIA, this meant that the Legislature did not intend for the performance evaluations to be exempted from FOIA disclosure. OAG 1990, No. 6,668. We note that *Bradley* was decided in 1997, and the personnel files at issue in that case involved performance evaluations. *Bradley*, 455 Mich at 294. Thus, in holding that that the files were not exempt, *id*. at 300, our Supreme Court's opinion in that case complemented the Attorney General opinion.

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[7] As defendants correctly contend, an attorney general opinion is not binding on the Court. See *Frey v Dep't of Mgt and Budget*, 429 Mich 315, 338; 414 NW2d 873 (1987).

Defendants point out that the performance evaluations discussed in the Attorney General opinion are not the same as the Kelly document, and while we agree to some extent, we also note that the two are undeniably related. The Kelly document contained complaints against Cardon and performance evaluations could, theoretically, contain the same. More important are the similarities between the Kelly document, the personnel files in *Bradley*, and the settlement agreements in *Detroit Free Press*. Although characterized as a "reverse FOIA" action, the *Bradley* Court applied standard FOIA principles when analyzing the issue presented. See *id*. at 291-300. The personnel records contained "corrective or disciplinary actions, *complaints filed*, and *performance evaluations*" against the teachers. *Id*. at 294 (emphasis added). The *Bradley* Court held that the files were disclosable. *Id*. at 300. Complaints and performance evaluations were treated seemingly the same way by the *Bradley* Court, and we discern no persuasive reason to deviate from *Bradley* in the present case. See also *Detroit Free Press*, 480 Mich at 1079.

Bradley, *Detroit Free Press*, and *Titus*, when read together, suggest that, although the minutes and transcripts of a closed session are exempt from disclosure, various documents that may be relevant to or relied upon during a closed session are *not* necessarily exempt. In other words, the exact discussions and deliberations of those involved within the closed session are exempt; however, documents, such as personnel files, settlement agreements, and performance evaluations that are brought into the closed session are disclosable where no individualized exemption exists for the same. See *Bradley*, 455 Mich at 291-300; *Detroit Free Press*, 480 Mich at 1079. The Kelly document was one such document. And, while there may be situations in which

such documents are not disclosable, for purposes of this appeal, we hold that the trial court correctly concluded that the Kelly document was disclosable under FOIA and that defendants could not render the document exempt merely because it was a subject of the closed meeting.

III. OMA VIOLATIONS

Plaintiff contends that the trial court erred in partially granting defendants' motion for summary disposition because defendants violated the OMA by hiring Pavelka without adequately addressing the same in a public meeting. At the very least, plaintiff suggests that genuine issues of material fact existed as to that issue. We disagree.

Under the OMA, "[a]ll meetings of a public body must be open to the public and must be held in a place available to the general public." MCL 15.263(1). Similarly, "[a]ll decisions of a public body must be made at a meeting open to the public," MCL 15.263(2), and "[a]ll deliberations of a public body *constituting a quorum* of its members must take place at a meeting open to the public except as provided in this section and sections 7 and 8 [i.e., closed sessions]," MCL 15.263(3) (emphasis added). The OMA's purpose "is to promote governmental accountability by facilitating public access to official decision making and to provide a means through which the general public may better understand issues and decisions of public concern." *Vermilya v Delta College Bd of Trustees*, 325 Mich App 416, 419; 925 NW2d 897 (2018) (quotation marks and citations omitted).

In the present case, plaintiff contended that, although defendants named Pavelka to be the interim superintendent at an open meeting, there was no

deliberation or decision at that or another open and public meeting involving the offer to Pavelka or any other candidates. Plaintiff, therefore, maintained that the actual decision to choose Pavelka was reached outside an open meeting and in violation of the OMA. We conclude that the record provides no support for plaintiff's position and, instead, works against it. At the relevant open meeting, a motion was put forth to name Pavelka as the interim superintendent, and all TCAPS members approved. Kelly affirmed that she "had a discussion with . . . Pavelka in order to gauge whether or not he would consider acting as TCAPS Interim Superintendent on a temporary basis" and that this discussion "did not advance beyond whether he would consider returning and no agreement for his return was made during our conversation." Kelly further affirmed that, at the time of the open meeting, on October 17, 2019, "there had been no acceptance of any position or discussion of any contract terms pertinent to the position." In fact, the record shows that TCAPS's contract with Pavelka was formally ratified at a subsequent open meeting on October 28, 2019.

In other words, the record evidence establishes that Kelly and TCAPS properly met in an open meeting on October 17, 2019, and made the decision to hire Pavelka as interim superintendent. Kelly affirmed that, although she had previously approached Pavelka about the position, no decision was made and no contractual terms were discussed; she had simply inquired about his interest in the position. Kelly was by herself when she talked to Pavelka, and there was, accordingly, no quorum in place to trigger MCL 15.263(3). Plaintiff provided no evidence to rebut Kelly's affidavit or to show that there were improper deliberations made outside of the October 17, 2019 meeting with a quorum of TCAPS. We accordingly agree with defendants' contention that

plaintiff's claims as to the OMA violation were mere speculation and unsupported by documentary evidence. See *McNeill-Marks v MidMichigan Med Ctr-Gratiot*, 316 Mich App 1, 16; 891 NW2d 528 (2016) (noting that, although "[c]ircumstantial evidence can be sufficient to establish a genuine issue of material fact, . . . mere conjecture or speculation is insufficient").

Furthermore, plaintiff offered no authority below, and offers none on appeal, to show that the *quality* or *length* of deliberations was deficient for purposes of the OMA. The OMA merely requires that decisions and deliberations be made in an open meeting, MCL 15.263(2) and (3); it does not require that any specific *type* of deliberations take place. Kelly and TCAPS moved for Pavelka to be named interim superintendent, and the motion carried. The contract was subsequently ratified at another public meeting. Although plaintiff may be unhappy with the short length of the deliberations by defendants, plaintiff points to no authority to show this was improper. "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).

IV. CONCLUSION

We hold that documents otherwise discoverable under FOIA are not generally rendered exempt merely because they provide the basis for a closed meeting under the OMA or are included in the official record of the same. The trial court therefore did not err by

granting partial summary disposition to plaintiff as it related to disclosure of the Kelly document. We further conclude that the trial court did not err by partially granting defendants' motion as it related to the alleged OMA violation concerning defendants' hiring of Pavelka.

Affirmed.

MURRAY, C.J., and GLEICHER, J., concurred with FORT HOOD, J.

PEOPLE v CASTILLO

Docket No. 351841. Submitted May 5, 2021, at Grand Rapids. Decided May 13, 2021, at 9:15 a.m. Leave to appeal denied 508 Mich 1016 (2022).

Heather L. Castillo pleaded no contest to a moving violation causing death, MCL 257.601d(1), in the 60th District Court, after she struck a motorcyclist, Todd Beebe, while operating her vehicle. The prosecution moved for restitution under the Code of Criminal Procedure's general restitution statute, MCL 769.1a, and under the misdemeanor restitution statute, MCL 780.826, of the Crime Victim's Rights Act (CVRA), MCL 780.751 *et seq*. The district court, Harold F. Closz III, J., denied the motion, concluding that a violation of MCL 257.601d(1) was a civil infraction, not a crime or misdemeanor, and that therefore, restitution was not warranted because Beebe was not a "victim" as defined by either the CVRA or MCL 769.1a. The district court further concluded that Beebe's estate was precluded from seeking restitution under MCL 780.752(3) because Beebe was operating his motorcycle without insurance or a motorcycle endorsement when he was struck by Castillo. On appeal in the Muskegon Circuit Court, the prosecution argued that the district court had erred by relying on MCL 780.766 of the CVRA, which applies to felonies, rather than MCL 780.826, which applies to misdemeanors. The prosecution further noted that a moving violation causing death under MCL 257.601d(1) was a misdemeanor and not a civil infraction. The circuit court, Annette R. Smedley, J., affirmed the district court's denial of restitution, concluding that the prosecution had waived the issue by agreeing with the district court's analysis that Beebe, had he survived, would have been precluded from seeking restitution under MCL 780.752. The Court of Appeals, MARKEY, P.J., and SHAPIRO and REDFORD, JJ., denied the prosecution's application for leave to appeal, but the Supreme Court remanded the case for review as on leave granted. 505 Mich 1132 (2020).

The Court of Appeals *held*:

1. The district court asked the prosecutor whether, under MCL 780.752(3), a felony restitution statute, Beebe would have been entitled to restitution if he had survived. The prosecutor

agreed that, because Beebe had lacked motorcycle insurance at the time of the crash, he would not have been able to pursue restitution under that statute. However, MCL 780.752(3) was not applicable to the case, and the prosecution's restitution argument focused on the general restitution and misdemeanor restitution statutes, not the felony restitution statute. Therefore, because the prosecution agreed only that the district court's interpretation of an inapplicable statute was correct, the prosecution did not waive its restitution arguments premised on the general restitution and misdemeanor restitution statutes.

2. Defendant argued that the CVRA's misdemeanor restitution statute, MCL 780.826, conflicts with and controls over the general restitution statute, MCL 769.1a, such that restitution is only authorized when a defendant is charged with a serious misdemeanor. Defendant asserted that because she had been charged with a nonserious misdemeanor, restitution was barred. Indeed, restitution was barred under the misdemeanor restitution statute because the plain language of that statute precludes application to defendants who are convicted of nonserious misdemeanors. The general restitution statute was applicable, however, because it is not restricted to only serious misdemeanors; moreover, the general restitution statute is readily reconcilable with the misdemeanor restitution statute. The CVRA defines "defendant" as a person charged with or convicted of a serious misdemeanor against a victim. Because a moving violation causing death does not qualify as a serious misdemeanor as defined by the CVRA, the misdemeanor statute did not support restitution in this case. However, contrary to defendant's argument, the general restitution statute does not define the word defendant in the same way as the misdemeanor restitution statute. Had the Legislature intended "defendant" in the general restitution statute to have a particular meaning it would have said so, as it did in the CVRA. Further, a natural reading of the general restitution statute supported restitution in misdemeanor cases. The Code of Criminal Procedure, MCL 760.1 *et seq*., which contains the general restitution statute, defines a misdemeanor as a violation of a penal law in this state that is not a felony or a violation of a rule or regulation and that is punishable by imprisonment or a fine that is not a civil fine, MCL 761.1(n). Because defendant's crime of conviction was categorized as a misdemeanor under the Code of Criminal Procedure, she was liable for restitution under MCL 769.1a, the general restitution statute.

3. Defendant argued that, like the CVRA's misdemeanor restitution statute, application of the general restitution statute

should also be limited to "serious misdemeanors." However, the general restitution statute did not support this reading. Although the misdemeanor restitution statute and the general restitution statute differ as to the types of misdemeanors for which restitution must be ordered, there was no reason why the statutes could not harmoniously coexist.

Circuit court judgment reversed and case remanded to the district court for further proceedings.

RESTITUTION — MISDEMEANORS.

MCL 780.826, the misdemeanor restitution statute of the Crime Victim's Rights Act, MCL 780.751 *et seq*., limits restitution to victims of defendants who were convicted of serious misdemeanors; however, the general restitution statute, MCL 769.1a, of the Code of Criminal Procedure, MCL 760.1 *et seq*., does not contain the same limitation; although the statutes differ regarding the types of misdemeanors for which restitution must be ordered, there is no reason why they cannot harmoniously coexist.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *D. J. Hilson*, Prosecuting Attorney, and *Charles F. Justian*, Chief Appellate Attorney, for the people.

Muskegon County Public Defender (by *Thomas G. Oatmen*) for defendant.

Before: MURRAY, C.J., and FORT HOOD and GLEICHER, JJ.

GLEICHER, J. Heather Castillo pleaded no contest to a moving violation causing death, MCL 257.601d(1), after she turned left at an intersection and struck Todd Beebe, a motorcyclist. The prosecution sought restitution on behalf of Beebe's estate. Beebe's operation of his motorcycle without an endorsement barred a restitution award, the district court found. The circuit court ruled that the prosecution had waived its restitution claim.

On leave granted, the prosecution again seeks restitution. Waiver bars this appeal, Castillo claims. She

additionally contends that the misdemeanor restitution statute authorizes restitution only for "serious misdemeanors," a category that does not include her offense. See MCL 780.811(a). And Castillo takes this argument one step further, arguing that the relevant section of the misdemeanor restitution statute, MCL 780.826, irreconcilably conflicts with and supersedes the general restitution statute, MCL 769.1a, precluding *any* restitution award.

We hold that the prosecution did not waive its restitution claim, but that only the general restitution statute applies. We reverse the circuit court's contrary judgment and remand to the district court for proceedings consistent with this opinion.

I. BACKGROUND

On a June evening in 2018, Castillo made a left turn without yielding the right-of-way to Beebe. Her Ford Fusion collided with Beebe's Harley Davidson motorcycle. The Michigan State Police incident report indicated that Beebe had a valid driver's license but lacked a motorcycle endorsement or insurance. Beebe died the day after the collision. He is survived by his wife and adult children. Castillo pleaded no contest to a moving violation causing death in violation of MCL 257.601d(1). The district court ordered Castillo to pay a $400 fine and $350 in costs.

The prosecution then sought restitution. At a district court hearing, the prosecution argued that restitution was warranted under both the general restitution statute, MCL 769.1a, and the misdemeanor restitution statute, MCL 780.826, of the Crime Victim's Rights Act (CVRA), MCL 780.751 *et seq*. The prosecutor contended that the misdemeanor restitution statute authorizes treble damages and requested $1,412,411.34 in trebled

damages as compensation for property damage, medical and funeral expenses, and wage loss.[1]

Castillo responded that the CVRA did not entitle family members to a deceased victim's future lost wages because the deceased could not suffer income loss after passing away, and she further argued that liability for medical expenses should flow through the no-fault act, MCL 500.3101 *et seq*., not the restitution statutes. Castillo characterized this case as "a tragedy," but "also an accident." And treble damages were an excessive punishment under the Eighth Amendment of the United States Constitution, Castillo urged.

Relying on MCL 780.752(3), the court inquired whether restitution for lost wages would have been warranted if Beebe had not died, but had instead suffered severe injuries.[2] The following exchange between the district court and the prosecutor underlies Castillo's waiver argument:

> [*District Court*]: "An individual who is charged with a crime arising out of the same transaction from which the charge against the defendant arose is not eligible to exercise the privileges and rights established for victims under this article." That's what (3) indicates. If the deceased were not deceased and were . . . operating a motorcycle in violation of state law, . . . without insurance and without a [motor]cycle endorsement, both misdemeanors—then [he] wouldn't be able to pursue this under the [CVRA], is that correct?

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[1] The prosecution made mathematical errors in calculating the requested restitution award. The trebled sum of the amounts requested actually added up to $1,444,279.56.

[2] MCL 780.752(3) states: "An individual who is charged with a crime arising out of the same transaction from which the charge against the defendant arose is not eligible to exercise the privileges and rights established for victims under this article." We refer to this as the "criminal-activity exception."

[*Prosecutor*]: That is correct, Your Honor.

[*District Court*]: All right. But because the person is deceased, therefore, he obviously isn't going to be charged.

[*Prosecutor*]: That is correct, Your Honor.

The district court determined that a moving violation causing death under MCL 257.601d(1) was a civil infraction, not a crime or misdemeanor. Relying on that conclusion and referencing the definition of a "victim" under MCL 769.1a and MCL 780.766,[3] the district court found that Beebe did not "come[] within the definition of victim" because he "suffered those physical, financial, and emotional harm[s] as a result of the commission of a civil infraction," not as the result of a felony, a misdemeanor, or an ordinance violation. Although the prosecutor interjected to alert the district court that a moving violation causing death was a misdemeanor and not a civil infraction, the district court indicated its "ruling remain[ed] the same," noting that MCL 257.601d "refers to a person committing a moving violation," which was "not covered by the definition of [a] victim . . . ." And in any event, the district court concluded, the estate was "precluded from pursuing restitution under the [CVRA] because of [MCL] 780.752[(3)]." The district court reasoned it was "pretty apparent that the intent of" MCL 780.752(3) (the criminal-activity exception)

[3] MCL 769.1a(1)(b) of the general restitution statute defines "victim" as "an individual who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of a felony, misdemeanor, or ordinance violation." And, as used in the CVRA only, MCL 780.766(1) defines "victim" as "an individual who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of a crime." As used in Article 1, "crime" is defined as "a violation of a penal law of this state for which the offender, upon conviction, may be punished by imprisonment for more than 1 year or an offense expressly designated by law as a felony." MCL 780.752(1)(b).

was "to preclude [restitution under the CVRA] when the victim of a crime or otherwise victim of the crime is committing criminal offenses him or herself."

On appeal to the circuit court, the prosecution argued that the district court had relied on the wrong provision of the CVRA. The prosecutor pointed out that MCL 780.766, the statute referenced by the district court, is found in Article 1 of the CVRA and only applies to felonies. MCL 780.826, found in Article 3 of the CVRA, governs restitution for victims of misdemeanors, the prosecution explained, as does the general restitution statute. A moving violation causing death under MCL 257.601d(1) is a misdemeanor, the prosecutor summarized, triggering the restitution provisions of both the CVRA and the general restitution statute.

The prosecution also argued that the district court erred in concluding that restitution was barred because Beebe had operated his motorcycle without an endorsement. Even if Beebe had survived and been charged with failing to obtain a motorcycle endorsement, the prosecution contended, he would not have been barred from receiving restitution under MCL 780.811(3).

Castillo again maintained that her conduct constituted a civil infraction, not a crime, and emphasized the district court's determination that Beebe's failure to secure a motorcycle endorsement would have barred his right to restitution had he lived. The prosecution waived its argument that the failure to obtain a motorcycle endorsement did not bar restitution, Castillo added, because at the restitution hearing the prosecutor had "endorsed" that position.

The prosecution insisted that it had not waived any arguments in favor of restitution, but had simply acknowledged that if the *felony* restitution were in play, restitution would have been barred. Castillo retorted

that the prosecution had "agreed with" the district court that Beebe would not have been entitled to restitution given his lack of a motorcycle endorsement and this rendered the issue "done." She requested that the circuit court affirm the district court's decision, noting this situation is "why we have a robust civil statute and no-fault insurance in order for them . . . to make claims there."[4]

The circuit court affirmed the district court's denial of restitution on waiver grounds, rejecting the district court's conclusion that a moving violation causing death was a civil infraction barring restitution. Rather, the circuit court noted that a moving violation causing death was a misdemeanor, and the circuit court "was required to order restitution under both the [general restitution statute] and [CVRA]." Nevertheless, by "expressly agree[ing] to the district court's interpretation" of MCL 257.312a (regarding failure to obtain a motorcycle endorsement) and MCL 780.752 (the criminal-activity exception), the circuit court concluded that the prosecution had waived its restitution claim.

We initially denied the prosecution's application for leave to appeal, but the Supreme Court remanded the case to us for review as on leave granted. *People v Castillo*, 505 Mich 1132 (2020). The prosecution contin-

[4] This Court has previously held that the no-fault act does not bar a motorcyclist's right to bring a third-party claim for damages, even if uninsured:

> The language of MCL 500.3135(2)(c) is unambiguous: individuals injured while operating a motor vehicle that is both owned by them and uninsured in violation of MCL 500.3101 are not entitled to recover damages. Motorcycles are not motor vehicles under the no-fault act. MCL 500.3101(2)(i)(*i*). Accordingly, MCL 500.3135(2)(c) does not limit the right of motorcyclists to recover damages. [*Brickey v McCarver*, 323 Mich App 639, 648; 919 NW2d 412 (2018).]

ues to argue that the district court misinterpreted the statute under which Castillo was convicted and improperly applied the criminal-activity exception to the restitution statute. And no waiver occurred, the prosecution insists.

Castillo again advances waiver on appeal, but also raises a new argument. She contends that the misdemeanor restitution statute authorizes restitution only when a defendant is charged with or convicted of a "serious misdemeanor" and characterizes her conviction as a nonserious misdemeanor. Because the misdemeanor restitution statute conflicts with and is more specific than the general restitution statute, Castillo posits that it supersedes the general restitution statute and precludes restitution. Although unpreserved, we will consider this argument in addition to Castillo's waiver claim.[5]

II. WAIVER

The circuit court erroneously concluded that the prosecution had waived its restitution claim.

"[W]aiver is the intentional relinquishment or abandonment of a known right or privilege." *People v Bragg*,

[5] "[A]lthough we will not normally consider issues that the trial court did not have the opportunity to address, this Court can—and will—overlook preservation requirements if it is in the interests of justice to do so." *People v Gioglio (On Remand)*, 296 Mich App 12, 17-18; 815 NW2d 589 (2012), vacated in part on other grounds 493 Mich 864 (2012); see also *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002) ("[T]his Court may overlook preservation requirements where failure to consider the issue would result in manifest injustice, if consideration of the issue is necessary to 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.") (citations omitted). Castillo's arguments involve questions of law, the facts necessary for their resolution have been presented, and judicial economy warrants our consideration of this argument.

296 Mich App 433, 465; 824 NW2d 170 (2012) (cleaned up). Waiver precludes appellate review of an asserted deprivation of a right because the waiver extinguishes any error. *People v Carter*, 462 Mich 206, 209, 215; 612 NW2d 144 (2000). The prosecution may not "harbor[] error at the trial level and subsequently seek[] relief on the basis of that error." *People v Szalma*, 487 Mich 708, 710; 790 NW2d 662 (2010).

At the restitution hearing, the prosecutor requested payment of restitution to Beebe's estate under the general and misdemeanor restitution statutes. The district court then asked the prosecutor whether in light of MCL 780.752(3), a felony restitution statute, Beebe would have been entitled to restitution had he survived. Quoting MCL 780.752(3), the district court further inquired whether, if Beebe had not passed away and had operated his motorcycle without insurance or an endorsement, "then [he] wouldn't be able to pursue this under the [CVRA], is that correct?" The prosecutor stated, "That is correct, Your Honor."

The prosecutor admitted only that the district court's interpretation of an inapplicable statute was correct. The district court referenced MCL 780.752, a felony restitution statute, and the prosecutor agreed with the district court's interpretation of that statute. But the prosecution's restitution argument focused on the general and misdemeanor restitution statutes, not the felony restitution statute. The prosecutor's agreement with the district court regarding an inapplicable statute did not constitute a waiver of restitution arguments premised on other statutory provisions.

III. RESTITUTION

The prosecution contends that this Court should reverse the decisions of the district court and circuit

court and order restitution to Beebe's estate under the general or misdemeanor restitution statutes, or both. Castillo counters that the circuit court reached the correct result in denying restitution for the alternative reason that the misdemeanor restitution statute, MCL 780.826, conflicts with and controls over the general restitution statute, MCL 769.1a, and authorizes restitution only when a defendant is charged with a serious misdemeanor. Castillo asserts that because she was charged with a nonserious misdemeanor, restitution was barred.

We agree with Castillo, but only in part. The plain language of the misdemeanor restitution statute precludes its application to her because she was charged with and convicted of a nonserious misdemeanor. The general restitution statute is applicable, however, because the two restitution statutes are readily reconcilable and represent alternative routes to restitution orders.

A. REVIEW OF THE STATUTES

Both the general restitution statute and the CVRA provide for restitution in cases arising from misdemeanors. By defining the term "defendant" as "a person charged with or convicted of having committed a serious misdemeanor against a victim," the CVRA limits restitution in misdemeanor cases to "serious misdemeanor[s]." See MCL 780.811(c). Because Castillo's offense of conviction does not qualify as a "serious misdemeanor" as that term is defined in the CVRA, the misdemeanor restitution statute does not provide a path to restitution in this case.

Castillo's conflict argument rests on the proposition that if restitution is precluded under the CVRA, it must also be precluded under the general restitution

statute. We reject this argument for the simple reason that the two statutory provisions regarding restitution in misdemeanor cases can be interpreted harmoniously without doing violence to either.

1. THE MISDEMEANOR RESTITUTION STATUTE

MCL 780.826(2), the misdemeanor restitution statute, states, in relevant part:

> Except as provided in subsection (8), when sentencing a defendant convicted of a misdemeanor, the court shall order, in addition to or in lieu of any other penalty authorized by law or in addition to any other penalty required by law, that the defendant make full restitution to any victim of the defendant's course of conduct that gives rise to the conviction or to the victim's estate.

As used in Article 3 of the CVRA, governing misdemeanors, the term "defendant" is defined as a "person charged with or convicted of having committed a serious misdemeanor against a victim." MCL 780.811(1)(c). Although MCL 780.811 provides an avenue for overriding definitions in Article 3 ("[e]xcept as otherwise defined"), "defendant" is not otherwise defined within the misdemeanor restitution portion of the act. Therefore, the definition of "defendant" under MCL 780.811(1)(c) controls for purposes of MCL 780.826.[6]

Within the CVRA, a "misdemeanor" is defined as "a violation of a law of this state or a local ordinance that is punishable by imprisonment for not more than 1 year or a fine that is not a civil fine, but that is not a felony." MCL 780.826(1)(a). And, a "[s]erious misde-

[6] In contrast, MCL 769.1a does not contain a specific definition for "defendant." MCL 761.1, which contains definitions applicable to the Code of Criminal Procedure, which includes MCL 769.1a, does not specifically define "defendant" either.

meanor" is defined as one or more of 16 offenses, MCL 780.811(1)(a)(*i*) to (*xvi*); a corresponding ordinance violation, MCL 780.811(1)(a)(*xvii*); or a "violation charged as a crime[7] or serious misdemeanor enumerated in subparagraphs (*i*) to (*xvii*) but subsequently reduced to or pleaded to as a misdemeanor," MCL 780.811(1)(a)(*xviii*).

Castillo was charged with and convicted of a moving violation causing death under MCL 257.601d(1), a misdemeanor. But MCL 257.601d(1) is not among the offenses listed under MCL 780.811(1)(a)(*i*) through (*xvi*), nor does it qualify as a corresponding ordinance violation under MCL 780.811(1)(a)(*xvii*), or as a violation that was charged as a crime or serious misdemeanor under MCL 780.811(1)(a)(*i*) through (*xvii*) but subsequently reduced to or pleaded to as a misdemeanor, MCL 780.811(1)(a)(*xviii*). Therefore, a moving violation causing death is not a serious misdemeanor for purposes of the CVRA. Because Castillo was charged with and convicted of a moving violation causing death and that offense does not qualify as a "serious misdemeanor," Castillo was not a "defendant" for purposes of the payment of restitution under MCL 780.826.

2. THE GENERAL RESTITUTION STATUTE

The general restitution statute, MCL 769.1a(2), states:

> Except as provided in subsection (8), when sentencing a defendant convicted of a felony, misdemeanor, or ordinance violation, the court shall order, in addition to or in

[7] MCL 780.811(1)(a)(*xviii*) relies on the definition of "crime" provided in MCL 780.752(1)(b). As set forth in note 3, "crime" is defined in MCL 780.752(1)(b) as "a violation of a penal law of this state for which the offender, upon conviction, may be punished by imprisonment for more than 1 year or an offense expressly designated by law as a felony."

> lieu of any other penalty authorized by law or in addition to any other penalty required by law, that the defendant make full restitution to any victim of the defendant's course of conduct that gives rise to the conviction or to the victim's estate.

Castillo posits that she cannot be considered a "defendant convicted of a . . . misdemeanor" under this statute because she does not meet the definition of "defendant" used in the misdemeanor section of the CVRA. Our understanding of the meaning of the word "defendant" in the general restitution statute is guided by the axiom that "if the statutory language is plain and unambiguous, then no judicial interpretation is necessary or permitted." *People v Speed*, 331 Mich App 328, 331; 952 NW2d 550 (2020) (quotation marks and citation omitted). The meaning of "defendant" is plain, unambiguous, and indisputably applies to Castillo. Moreover, "[c]ourts cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute, and then, on the basis of that assumption, apply what is not there." *Farrington v Total Petroleum, Inc*, 442 Mich 201, 210; 501 NW2d 76 (1993). Had the Legislature intended the word "defendant" as used in the general restitution statute to have a special or particular meaning it would have said so—just as it did in the CVRA.

A natural reading of the general restitution statute supports restitution in misdemeanor cases. The general restitution statute is located within the Code of Criminal Procedure, MCL 760.1 *et seq*., in which "misdemeanor" is defined as "a violation of a penal law of this state that is not a felony or a violation of an order, rule, or regulation of a state agency that is punishable by imprisonment or a fine that is not a civil fine." MCL 761.1(n). Castillo's crime of conviction qualifies as a misdemeanor under the Code of Criminal Procedure.

As a defendant convicted of a misdemeanor, she is liable for restitution under MCL 769.1a, the general restitution statute.

B. HARMONIZING THE TWO STATUTES

Michigan's two restitution statutes relate to the same subject and therefore must be interpreted *in pari materia*. *Apsey v Mem Hosp*, 477 Mich 120, 129 n 4; 730 NW2d 695 (2007). We acknowledge that as applied to misdemeanants, the statutes contain different definitions of the word "defendant." But this does not mean that the two statutes irreconcilably conflict and that only one may survive. As our Supreme Court explained in *Apsey*, our task is to harmonize apparently conflicting statutes if doing so gives effect to legislative intent. See *id*. at 127.

> The Legislature need not repeal every law in a given area before it enacts new laws that it intends to operate in addition to their preexisting counterparts. The Legislature has the power to enact laws to function and interact as it sees fit. And when it does so, this Court is bound to honor its intent. [*Id*. at 131.]

When interpreting statutes that seem at odds, we must also remember that "[w]henever possible, every word of a statute should be given meaning. And no word should be treated as surplusage or made nugatory." *Id*. at 127. As stated by this Court, "When two statutes cover the same general subject, they must be construed together to give reasonable effect to both, if at all possible." *Titus v Shelby Charter Twp*, 226 Mich App 611, 615; 574 NW2d 391 (1997).

Castillo urges us to limit the application of the general restitution statute to "serious misdemeanors," but we find nothing in the text of the statute that would support such a reading. To the contrary, the

applicable definition of "misdemeanor" in the general restitution statute unquestionably embraces a conviction under MCL 257.601d(1), a moving violation causing death. Were we to interpret the general restitution statute in the manner Castillo urges, we would rewrite that statute's definition of "misdemeanor." Further, when enacting the CVRA's misdemeanor restitution statute, the Legislature did not repeal the general restitution statute; indeed, both have been amended several times since then. Obviously, the Legislature is aware that two statutes with different provisions and language govern restitution in our state, yet it has made no effort to eliminate either.

Our Supreme Court has characterized certain sections of the two statutes as "complementary to the broad mandate for complete restitution." *People v Garrison*, 495 Mich 362, 369; 852 NW2d 45 (2014). And this Court acknowledged differences in the breadth of the two statutes regarding restitution for medical and professional services in *People v Corbin*, 312 Mich App 352, 365; 880 NW2d 2 (2015), in which we enforced a portion of a restitution order supported by language in the general restitution statute but not in the CVRA. Although the provisions of the two statutes at issue here differ regarding the types of misdemeanors for which restitution must be ordered, we discern no reason that they cannot harmoniously coexist.

Our reasoning is also informed by the Michigan Constitution, which specifically endows crime victims with a right to restitution. Const 1963, art 1, § 24. The purpose of restitution laws is "to enable victims to be compensated fairly for their suffering at the hands of convicted offenders." *Garrison*, 495 Mich at 368 (quota-

tion marks and citation omitted). Applying the general restitution statute under the circumstances of this case fulfills constitutional goals.

Finally, we note several differences between the general and misdemeanor restitution statutes that may help explain why the Legislature treats restitution in cases of "serious misdemeanors" differently than in other misdemeanor prosecutions. The CVRA permits a crime victim to make a victim-impact statement for use in the presentence investigation report, MCL 780.824, and to make a statement at a defendant's sentencing, MCL 780.825. The CVRA also permits a court to amend an order of restitution on motion of a party "based upon new information related to the injury, damages, or loss for which the restitution was ordered." MCL 780.826(19). These provisions do not appear in the general restitution statute. It makes sense that these expanded procedural protections for victims are permitted in cases of "serious misdemeanors" rather than in all misdemeanor cases. Restricting these procedures enhances judicial economy, particularly when the underlying matters are less likely to merit a restitution award. And particularly relevant here, the general restitution statute does not authorize trebling damages, perhaps reflecting legislative recognition that in a nonserious misdemeanor case this penalty might be disproportionate.[8]

IV. CONCLUSION

The prosecution sought restitution under the general restitution statute, the misdemeanor statute, or

[8] We note that the general restitution statute provides that "[t]he court shall not order restitution to be paid to a victim or victim's estate if the victim or victim's estate has received or is to receive compensation for that loss, and the court shall state on the record with specificity the

both. The misdemeanor restitution statute is inapplicable, as Castillo's crime of conviction does not qualify as a "serious misdemeanor" under that statute. The general restitution statute does apply, however. Accordingly, we reverse the circuit court and remand to the district court for proceedings consistent with this opinion. We do not retain jurisdiction.

MURRAY, C.J., and FORT HOOD, J., concurred with GLEICHER, J.

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reasons for its action." MCL 769.1a(8). Additionally, the statute states, "Any amount paid to a victim or a victim's estate under an order of restitution shall be set off against any amount later recovered as compensatory damages by the victim or the victim's estate in any federal or state civil proceeding . . . ." MCL 769.1a(9). We anticipate that on remand, the district court will hold a restitution hearing at which evidence of any other payments will be entertained.

In re GORDON GUARDIANSHIP

Docket No. 354646. Submitted May 5, 2021, at Detroit. Decided May 13, 2021, at 9:20 a.m.

Rodrick Gordon petitioned the Wayne County Probate Court to terminate his guardianship. Although Gordon lived independently for more than 20 years, a guardianship was established after he was assaulted and the probate court determined that he was no longer able to care for himself. About a year after the guardianship was established, Gordon petitioned the court to have it terminated. The court, David Braxton, J., denied the petition following a series of hearings. Gordon appealed.

The Court of Appeals *held*:

The probate court denied Gordon's petition on the basis that it was not in Gordon's best interests to terminate the guardianship. According to the probate court, the issue was governed by MCL 700.5219(1) of the Estates and Protected Individuals Code, MCL 700.1101 *et seq*. However, that statute governs guardians of minors. Gordon was not a minor; therefore, the petition to terminate his guardianship should have been evaluated under MCL 700.5310, which governs guardians of incapacitated individuals. MCL 700.5310(4) requires the court to follow the same procedures that apply to a petition for the appointment of a guardian, i.e., the court must find that the ward remains incapacitated and that the appointment remains necessary as a means of providing continuing care and supervision for the ward. Additionally, the court's findings must be supported separately on the record. Because the probate court relied on the wrong legal standard in this case, no such findings were made.

Order denying petition reversed and case remanded for further proceedings.

Michigan Elder Justice Initiative (by *Nicole Shannon*) for Rodrick Gordon.

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

PER CURIAM. Petitioner, Rodrick Gordon, appeals by right the probate court order denying his petition to terminate his guardianship.[1] Because the probate court relied on an incorrect legal framework, we reverse and remand for further proceedings.

I. BASIC FACTS

Gordon is a deaf and blind man. At the hearing on the petition to terminate the guardianship, he testified through two interpreters that he had lost his sight following a medical operation and that he had lost his hearing because of a tumor. Thereafter, he was trained at the Michigan State Commission for the Blind and the Helen Keller National Center for Deaf-Blind Youth and Others. Because of that training, he was able to live independently for more than 20 years. Then, in 2018, he was mugged near his apartment. As a result of the assault, he was hospitalized and later released to a group home because of the hospital's assessment of the risk of danger associated with him living alone. Eventually, however, Gordon left the group home and returned to living in an apartment. Thereafter, Gordon went multiple days without food before he was found wandering the streets in Detroit. Gordon was taken back to the hospital, and it was determined that he could no longer care for himself. A petition to establish a guardianship was filed with the probate court and was granted. Approximately one year later, Gordon filed a petition to terminate the guardianship, arguing that he was lucid and could not progress in a group

[1] The written order denying the petition to terminate the guardianship states "petition granted," as opposed to "petition denied." However, based on the entirety of the lower court record, it is apparent that the notation was a clerical error.

home. Following a series of hearings on the petition, the probate court denied the petition.

II. PETITION TO TERMINATE A GUARDIANSHIP

A. STANDARD OF REVIEW

Gordon argues that the trial court employed the wrong legal framework when it denied his petition to terminate the guardianship. This Court reviews a probate court's dispositional ruling for an abuse of discretion. *In re Redd Guardianship*, 321 Mich App 398, 403; 909 NW2d 289 (2017). "A probate court abuses its discretion when it chooses an outcome outside the range of reasonable and principled outcomes." *Id*. (quotation marks and citation omitted). A court necessarily abuses its discretion when it makes an error of law. *TM v MZ (On Remand)*, 326 Mich App 227, 235-236; 926 NW2d 900 (2018).

B. ANALYSIS

The Estates and Protected Individuals Code, MCL 700.1101 *et seq*., governs the laws concerning the affairs of protected individuals and legally incapacitated individuals. *In re Vansach Estate*, 324 Mich App 371, 382; 922 NW2d 136 (2018).[2] "The court may appoint a guardian if the court finds by clear and convincing evidence both that the individual for whom a guardian is sought is an incapacitated individual and that the appointment is necessary as a means of providing continuing care and supervision of the inca-

[2] " 'Incapacitated individual' means an individual who is impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or other cause, not including minority, to the extent of lacking sufficient understanding or capacity to make or communicate informed decisions." MCL 700.1105(a).

pacitated individual, with each finding supported separately on the record." MCL 700.5306(1). Thereafter, a ward[3] may petition the court to remove the guardian, appoint a successor guardian, modify the guardianship's terms, or terminate the guardianship. MCL 700.5310(2). "A request for [such an] order may be made by informal letter to the court or judge." MCL 700.5310(2). In this case, Gordon's sister retained a lawyer on his behalf, who filed a formal petition seeking termination of the guardianship.

The probate court denied the petition. When stating its findings on the record, the probate court stated that the issue was governed by MCL 700.5219(1) and that the question to be answered was, "Is it in the best interest of [Gordon] for [the guardianship] to be terminated?" The court repeatedly referred to the best-interest standard, and it ultimately found that there was no evidence indicating that terminating the guardianship was in Gordon's best interests. In doing so, the probate court applied the wrong legal standard. MCL 700.5219(1) governs guardians of minors and provides, in part, that "[a] person interested in a ward's welfare or, if 14 years of age or older, the ward may petition for the removal of a guardian on the ground that removal would serve the ward's welfare or for another order that would serve the ward's welfare." Gordon is not a minor. Therefore, the petition for termination of his guardianship should have been evaluated under MCL 700.5310, which governs guardianships of incapacitated individuals.

Again, MCL 700.5310(2) provides that a ward may petition the probate court for an order terminating the guardianship. To safeguard the ward's rights, on a

[3] " 'Ward' means an individual for whom a guardian is appointed." MCL 700.1108(a).

petition to terminate a guardianship, the probate court must follow the same procedures that apply to a petition for the appointment of a guardian. MCL 700.5310(4). In particular, a ward has the right "[t]o require that proof of incapacity and the need for a guardian be proven by clear and convincing evidence, as provided in [MCL 700.5306]." MCL 700.5306a(q). Consequently, when deciding a petition to terminate an adult guardianship, the trial court must find that the ward remains incapacitated and that the appointment remains necessary as a means of providing continuing care and supervision for the ward. Further, each finding must be "supported separately on the record." See MCL 700.5306(1). Because the probate court relied upon the wrong legal standard, no such findings were made in this case. Consequently, we reverse the court's order denying the petition to terminate the guardianship and remand for further proceedings. Because the relevant circumstances may have materially changed while this appeal was pending, the court should consider up-to-date information on remand.[4]

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[4] On appeal, Gordon challenges the admissibility of a letter from Dr. Eric Brooks. In the proceedings before the probate court, Gordon challenged the accuracy of the information included in the letter, noting that certain statements were false and that others were not supported by Dr. Brooks's personal knowledge. Gordon also brought to the probate court's attention that when he met with Dr. Brooks, no interpreter was present. Given that Gordon is deaf and blind, it is clear that his ability to communicate with Dr. Brooks was seriously imperiled by the absence of interpreters. Yet, notwithstanding his challenges to the letter, Gordon's lawyer consented to the court considering it when reaching a decision. By agreeing to the admission of evidence, a party waives a claim of error regarding the admission of the stipulated evidence on appeal. *In re Horton Estate*, 325 Mich App 325, 334 n 4; 925 NW2d 207 (2018). Therefore, we decline to consider Gordon's evidentiary challenge.

Gordon also complains that the probate court required him to produce medical evidence to prove that he was no longer an incapacitated individual and that, in doing so, the court improperly shifted the

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

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

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burden of proof. We note that there is no requirement that a petition to terminate a guardianship be supported by medical testimony. However, the absence of such testimony may prove fatal to a ward's petition for termination of a guardianship. In evaluating a claim, the probate court is not required to find credible a ward's testimony that he or she can live independently and does not need a guardian. The court is free to instead credit medical evidence presented by respondent that supports a finding of continuing incapacity and an ongoing need for a guardianship.

Moreover, viewed in context, the probate court provided Gordon with an opportunity to undergo an independent medical examination and a psychological evaluation, see MCL 700.5306a(1)(f), to rebut Dr. Brooks's letter that was presented by respondent at the first hearing on the petition. Providing such opportunities, which Gordon declined to take, does not amount to a shifting of the burden of proof. Additionally, we noted that the probate court was permitted to order Gordon to submit to an independent medical examination. When considering a petition to appoint a guardian, "[i]f necessary, the court may order that an individual alleged to be incapacitated be examined by a physician or mental health professional appointed by the court who shall submit a report in writing to the court . . . ." MCL 700.5304(1). This authority extends to petitions to terminate a guardianship. See MCL 700.5310(4).

PEOPLE v BOSHELL

Docket Nos. 347207 and 347208. Submitted January 6, 2021, at Detroit. Decided May 13, 2021, at 9:25 a.m. Leave to appeal denied 510 Mich ___ (2022).

In consolidated cases, Jeremiah J. Boshell was convicted of multiple charges following a jury trial in the Macomb Circuit Court. In Docket No. 347208, the convictions from which defendant appealed arose out of the August 15, 2016 shooting death of Lisa Fabbri, defendant's on-again, off-again girlfriend. Fabbri died from a gunshot wound to her head while sitting in her car, which was parked at the house of defendant's friend; at the time of her death, Fabbri was in Macomb County and was 12 weeks pregnant. From those events, defendant was convicted of first-degree premeditated murder, MCL 750.316(1)(a); assault of a pregnant individual causing a miscarriage or stillbirth, MCL 750.90a; and two counts of possession of a firearm during the commission of a felony (second offense) (felony-firearm), MCL 750.227b. In Docket No. 347207, the convictions from which defendant appealed arose out of events on August 16, 2016, during which (1) defendant threatened to shoot two people (Rob and Dylan) whom he believed to have set up Fabbri to be killed and (2) defendant committed a series of offenses after the police spotted and chased him; during the high-speed pursuit, defendant fired gunshots out of his vehicle. All of the events in Docket No. 347207 occurred in Lapeer County. From those events, defendant was convicted of assault with intent to commit murder (AWIM), MCL 750.83; felon in possession of a firearm, MCL 750.224f; carrying a weapon with unlawful intent, MCL 750.226; third-degree fleeing or eluding a police officer, MCL 257.602a(3); and two counts of felony-firearm, second offense. Defendant moved to dismiss the crimes alleged to have been committed in Lapeer County (Docket No. 347207), arguing that venue was not proper in Macomb County. The prosecutor opposed the motion, asserting that under MCL 762.8 and MCL 762.9, defendant's actions were part of the same plan: first, to kill Fabbri; second, to kill Rob and Dylan; and three, to kill himself. The court, Carl J. Marlinga, J., denied the motion, reasoning that venue was proper in Macomb County because all of the events—those related to Fabbri's murder in Macomb

County as well as those that occurred in Lapeer County during police pursuit of defendant—were part of a coherent plan right from the start. During the trial, defendant unsuccessfully challenged the introduction of a cropped photograph of the fetus from the autopsy, certain text messages between him and Fabbri, and a photograph of himself in jail shortly after his arrest. Defendant also unsuccessfully moved for a mistrial on the basis of the trial court's questioning of defendant's firearms and toolmark expert. Defendant was convicted of the specified offenses in each case. Defendant appealed in both cases, and the Court of Appeals consolidated the cases.

The Court of Appeals *held*:

1. When a defendant pleads not guilty to a crime, the prosecution may offer all relevant evidence, subject to MRE 403, on every element. In turn, MRE 403 provides that although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury. To establish the offense of assault of a pregnant individual causing a miscarriage or stillbirth under MCL 750.90a, the prosecution must prove beyond a reasonable doubt that the defendant assaulted a pregnant individual and that the assault resulted in a miscarriage or stillbirth or death to the embryo or fetus. Photographs are admissible to corroborate a witness's testimony, and the gruesomeness of a photograph alone need not cause exclusion. In this case, the black-and-white, cropped photograph of the fetus was relevant and probative of the charged crime, and its admission did not substantially outweigh its probative value. Accordingly, the trial court did not abuse its discretion by admitting the photograph. In addition, the court did not abuse its discretion by admitting text messages from defendant to Fabbri. Although the messages included crude and vulgar sexual messages, they were relevant because they showed the relationship and discord between them. Further, any unfair prejudice did not substantially outweigh the probative value of the evidence and any error was not outcome-determinative given that the evidence against defendant was strong.

2. Every defendant has a due-process right to a fair trial, including the right to be presumed innocent. For that reason, 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. The cropped photograph of defendant—showing defendant standing

with his hands behind his back against a blank wall—was admitted to show the shirt defendant was wearing after his arrest; the cropping removed any background that could have indicated that it was taken at the jail. The inadvertently displayed photograph did not suggest that defendant was in a jail, and it did not taint his presumption of innocence. Accordingly, its display to the jury did not deprive defendant of a fair trial.

3. In general, defendants should be tried in the county where the crime was committed; however, the Legislature is permitted to create exceptions to this general rule. In that regard, MCL 762.8 provides that whenever a felony consists or is the culmination of two or more acts done in the perpetration of that felony, the felony may be prosecuted in (1) any county where any of those acts were committed or (2) in any county that the defendant intended the felony or acts done in perpetration of the felony to have an effect; the test for determining whether venue is proper in a county where the crime did not take place does not include consideration of whether the events were part of a coherent plan from the start or, in other words, were linked. Instead, the relevant inquiry under MCL 762.8 is whether defendant intended any of his acts in the one county to have an effect in the other county. In turn, MCL 762.9 provides that whenever a felony has been committed on a railroad train, automobile, aircraft, vessel or other moving vehicle, said offense may be prosecuted in any county, city, or jurisdiction in which such conveyance was during the journey in the course of which said offense was committed. MCL 762.9 is intended to apply to felonies committed in a moving vehicle in a situation in which it is difficult to determine the county in which the criminal acts occurred. Any error with respect to statutory venue is not jurisdictional and does not constitute constitutional error. In order to reverse for a mistake in venue, a defendant must demonstrate prejudice, i.e., that the error affected the outcome of the lower court proceedings. In this case, Fabbri was killed in Monroe County on one day and defendant was apprehended following a police chase in Lapeer County the following day. Defendant's act of fleeing the police in Lapeer County did not have an effect on anyone in Monroe County. Even if he was ostensibly fleeing in Lapeer County to avoid arrest for the murder in the Monroe County, the act of fleeing did not have an effect in Monroe County. Moreover, even if all of defendant's acts were part of the same plan—i.e., to kill Fabbri, to kill Rob and Dylan who were purportedly involved in Fabbri's murder, and to kill himself—that fact did not confer venue on Monroe County. Accordingly, venue was not proper under MCL 762.8. Venue was also not proper under MCL 762.9 because the entirety

of defendant's acts related to Docket No. 347207 occurred in Lapeer County. As a result, the trial court abused its discretion when it denied defendant's motion to dismiss the Lapeer County charges because of venue. Reversal was not required because evidence of defendant's guilt with regard to the Lapeer County crimes was overwhelming and, as a result, defendant could not establish that the result would have been different had he been tried in Lapeer County.

4. A trial judge has broad, but not unlimited, discretion when controlling the court's proceedings. The overriding principle is that a court's actions cannot pierce the veil of judicial impartiality, and invading the prosecutor's role is a clear violation of that tenet. Under MRE 614(b), the trial court may question witnesses to clarify testimony or elicit additional relevant information. However, the trial court must exercise caution and restraint to ensure that its questions are not intimidating, argumentative, prejudicial, unfair, or partial. The test to determine whether a trial judge's conduct pierces the veil of impartiality, thereby violating the constitutional guarantee of a fair trial, is whether, under the totality of the circumstances, it is reasonably likely that the judge's conduct improperly influenced the jury by creating the appearance of advocacy or partiality against a party. In reviewing the totality of the circumstances, a court should consider (1) the nature of the judicial conduct, (2) the tone and demeanor of the trial judge, (3) the scope of the judicial conduct in the context of the length and complexity of the trial and issues therein, (4) the extent to which the judge's conduct was directed at one side more than the other, and (5) the presence of any curative instructions. In this case, the trial court's questioning of defendant's firearm and toolmark expert went beyond what is generally acceptable under MRE 614(b). In addition, while the court's tone and demeanor were not hostile and its questioning was not directed toward a single party, the expert's testimony did not warrant the extent of the judicial intervention. But the court repeatedly reminded the jury that its questions were not meant to reflect any personal opinion and that it was for the jury to decide the facts. In addition, the trial court provided a curative instruction after it denied defendant's motion for a new trial. On those facts, the trial court's conduct did not pierce the veil of impartiality, and the court did not abuse its discretion when it denied defendant's motion for a mistrial.

Affirmed.

TUKEL, J., concurring, joined the majority opinion in full but wrote separately to draw attention to the fact that under the

> current rules, postjudgment challenges to venue are effectively unreviewable. Because venue is not constitutionally mandated, MCL 600.1645 prohibits reversal of a conviction on the basis of a venue error alone unless a miscarriage of justice would result. Thus, venue challenges should be made through interlocutory appeal. Like Justice CORRIGAN did in her concurring opinion in *People v Houthoofd*, 487 Mich 568 (2010), Judge TUKEL would urge the Supreme Court to adopt a rule, or the Legislature to adopt a statute, to permit effective resolution of claims of improper venue that otherwise would go uncorrected.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Jean M. Cloud*, Prosecuting Attorney, and *Joshua R. Van Laan*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Katherine Marcuz* and *Michael Waldo*) for defendant.

Before: FORT HOOD, P.J., and CAVANAGH and TUKEL, JJ.

PER CURIAM. Defendant stood trial in two different cases that were consolidated for a jury trial. In Docket No. 347207, defendant appeals as of right his convictions of assault with intent to commit murder (AWIM), MCL 750.83; felon in possession of a firearm, MCL 750.224f; carrying a weapon with unlawful intent, MCL 750.226; third-degree fleeing or eluding a police officer, MCL 257.602a(3); and two counts of possession of a firearm during the commission of a felony (second offense) (felony-firearm), MCL 750.227b.[1] The trial court sentenced defendant to life imprisonment for the AWIM conviction, five years' imprisonment for each felony-firearm conviction, and 30 to 60 months' imprisonment for the remaining convictions. In Docket No.

[1] Defendant pleaded guilty of felon in possession of a firearm and the accompanying felony-firearm charge, and a jury convicted defendant of the remaining offenses.

347208, defendant appeals as of right his jury convictions of first-degree premeditated murder, MCL 750.316(1)(a); assault of a pregnant individual causing a miscarriage or stillbirth, MCL 750.90a; and two counts of felony-firearm (second offense). The trial court sentenced defendant to life imprisonment without parole for the first-degree murder conviction, five years' imprisonment for each felony-firearm conviction, and 375 to 600 months' imprisonment for the assault-of-a-pregnant-individual conviction. This Court consolidated defendant's appeals.[2] For the reasons provided below, we affirm.

I. BASIC FACTS

Defendant's convictions in Docket No. 347208 arise from the shooting death of Lisa Fabbri in Macomb County. At the time of her death, Fabbri was 12 weeks' pregnant. Her body was found inside her car, which in turn was found in the backyard of defendant's friend, Wallace Grala. Defendant and Fabbri were an on-and-off couple for many years, and they had a 16-year-old son at the time of Fabbri's death.

Grala lived on Frost Road in Lenox Township, which is in Macomb County. On the evening of August 14, 2016, defendant came over, unannounced, to visit Grala. Defendant was driving a gray F-150 pickup truck, and he drove it around Grala's attached garage and parked the vehicle behind the garage. At some point that evening, defendant used cocaine and donned a tactical vest. When Grala went to bed, defendant was still at the home. The next morning, on August 15, 2016, defendant was still present when Grala left for work.

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[2] *People v Boshell*, unpublished order of the Court of Appeals, entered February 1, 2019 (Docket Nos. 347207 and 347208).

That same afternoon, Grala's neighbor, Beverly Burgess, noticed a gray pickup truck parked behind Grala's house. At approximately 5:00 p.m., she noticed activity coming from Grala's driveway. Specifically, she heard an "elevated" woman's voice, which sounded angry or upset. Then Beverly saw a PT Cruiser in Grala's driveway with a woman next to it. At approximately 5:15 p.m., Beverly heard a gunshot, which sounded like it came from a smaller firearm—not a rifle. Beverly's husband, Bill Burgess, arrived home shortly thereafter around 5:30 p.m. After Bill arrived home, Beverly heard a truck "take off" on the gravel road. She explained that the truck had come from next door and that it was accelerating quickly on Frost Road. Beverly did not get a good look at the truck but saw that it was an "obscure gray" color. Bill identified the vehicle as a gray Ford pickup truck, which he recognized was not Grala's.

The next morning, August 16, 2016, Grala went out to his barn and saw a car parked in his field. Upon closer inspection, Grala saw that the car was Fabbri's PT Cruiser and that Fabbri was "hunched over" with blood all over herself. Grala called 911. Fabbri's death was classified as a homicide. She had been shot in the left side of the forehead, with an exit wound out the back, right portion of her head. The presence of stippling indicated that the gun was anywhere from three to six inches away from Fabbri's head at the time of the shooting. In the ensuing police investigation, tracks were noticed leading from Grala's driveway and terminating where the PT Cruiser was parked. The police recovered a spent shell casing from Grala's driveway and a bullet from the PT Cruiser's passenger-side door.

Later in the afternoon on August 16, 2016, defendant drove to a couple of different transmission shops in the Lapeer area, looking for two people named "Rob"

and "Dylan." Defendant was wearing his tactical vest with lots of ammunition and had an AR-15 rifle, a shotgun, and a nine-millimeter handgun in the truck. Defendant was acting very upset and repeatedly stated that he was going to kill Rob and Dylan because he believed they had "set up" his girlfriend "to get whacked." The police were notified and were on the lookout for defendant.

Defendant's convictions in Docket No. 347207 arise from a series of offenses committed after the police eventually spotted defendant driving in Lapeer County, which led to a police chase. There were numerous vehicles involved in the chase, including unmarked vehicles from the Macomb County Sheriff's Department, marked and unmarked vehicles from the Lapeer County Sheriff's Department, and marked Michigan State Police vehicles. Evidence was presented that during the pursuit, defendant fired a gunshot out of his driver's side window. Neighbors heard the gunshot, and a bullet was later found inside one of the homes. There also was a large amount of broken glass in the street.

The pursuit continued onto North Saginaw Street. Defendant was driving erratically and aggressively, including in the oncoming traffic lane, at a high rate of speed. Defendant passed a pedestrian, Virgil Nordlund, narrowly missing him. According to Nordlund, defendant fired a shot out his passenger-side window, which caused glass to shatter and fall onto the road. Nordlund, a Vietnam veteran, testified that he heard and felt the bullet fly right by his head. Seconds later, as Detectives James Onyski and Grant Perry approached in an unmarked police vehicle, defendant fired another shot out his driver's side window, causing more glass to shatter. The pursuit continued for many

more miles, ultimately ending on I-69, where defendant was apprehended after his vehicle ended up in a side ditch.

The police recovered an AR-15 rifle, a shotgun, a nine-millimeter pistol, and lot of ammunition from defendant's vehicle. The shell casing that was found in Grala's driveway was positively identified as having been fired from the nine-millimeter handgun found in defendant's possession. The spent bullet found in the PT Cruiser passenger door was of the same class to have been fired from the nine-millimeter gun, but it could not be positively identified as having been fired from any particular firearm.

Defendant was charged in Docket No. 347208 for the offenses related to Fabbri's shooting death in Macomb County and charged in Docket No. 347207 for the offenses associated with the police pursuit in Lapeer County. Both cases were prosecuted in Macomb County. Defendant moved to dismiss the crimes alleged to have been committed in Lapeer County, arguing that venue was not proper in Macomb County. The trial court denied the motion. The two cases were consolidated for trial, and defendant was convicted of the offenses as noted above. This appeal followed.

II. EVIDENTIARY ISSUES

Defendant first argues that the trial court erroneously admitted an autopsy photograph and a series of text messages between him and Fabbri. He contends that the autopsy photograph admitted at trial, depicting Fabbri's dead fetus, as well as text messages unfairly prejudicial toward defendant should have been excluded under MRE 403. We disagree.

We review a trial court's decision regarding the admissibility of evidence for an abuse of discretion.

People v Aldrich, 246 Mich App 101, 113; 631 NW2d 67 (2001). A trial court abuses its discretion when it selects an outcome that falls outside the range of reasonable and principled outcomes. *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008).

When a defendant pleads not guilty to a crime, "the prosecution may offer *all* relevant evidence, subject to MRE 403, on *every* element." *People v Mills*, 450 Mich 61, 71; 537 NW2d 909 (1995) (emphasis added), mod 450 Mich 1212 (1995). Indeed, a defendant's offer to stipulate certain elements does not alter this principle for those elements. *Id*. at 70 & n 5. In this case, defendant was charged with assaulting a pregnant woman causing stillbirth or miscarriage. One of the elements of that offense is that the defendant assaulted a pregnant individual, and another element is that the defendant's conduct "resulted in a miscarriage or stillbirth . . . or death to the embryo or fetus." MCL 750.90a(b). Therefore, the prosecution was entitled to offer all relevant evidence establishing that Fabbri was pregnant and that defendant's actions resulted in the death of Fabbri's fetus. Clearly, any photographs showing the dead fetus would be highly relevant to both of these elements and thus admissible, subject only to MRE 403.

MRE 403 states, in pertinent part, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." "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 Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2002) (quotation marks and citation omitted). Contrary to defendant's suggestion, photographs are not inadmissible simply because a witness can testify

about the information contained in the photographs. *Mills*, 450 Mich at 76. Moreover, photographs are admissible to corroborate a witness's testimony, and a photograph's "[g]ruesomeness alone need not cause exclusion." *Id*. The proper analysis is whether the photograph's probative value is substantially outweighed by unfair prejudice. *Id*.

Initially, we note that, when defendant raised this evidentiary issue before trial commenced, the prosecution offered to submit a black-and-white version of the initially proposed true-color exhibit because its appearance was less gruesome. The prosecution also offered to crop out some "wetness" along the bottom of the photograph, so the focus would solely be on the sac and fetus. The trial court agreed that admitting the cropped, black-and-white version was permissible under MRE 403. The copy of the photo that defense counsel provided to this Court looks more like an illustration from a textbook or dictionary, or a copy of an ultrasound photo. While a fetus is identifiable, the black-and-white photo lacks any "gruesomeness" factor. The mere fact that it displays a fetus is not unfairly prejudicial to defendant because, as previously discussed, that is what makes the photo relevant and probative. Because of the lack of color and resulting lack of details, such as blood or other "wetness," we cannot see how the photo's introduction injected any risk of unfair prejudice. Moreover, assuming any unfair prejudice was introduced, it did not substantially outweigh the probative value of the evidence. Accordingly, the trial court did not abuse its discretion by admitting this exhibit.[3]

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[3] Defendant has cited cases from other jurisdictions in support of his argument, but we find those cases distinguishable and unpersuasive. See *People v Spaulding*, 332 Mich App 638, 648 n 2; 957 NW2d 843

Next, with respect to the text messages, at the prosecution's request, the trial court admitted numerous text exchanges between defendant and Fabbri. On appeal, as he did in the trial court, defendant asserts that the admission of many of these messages was unfairly prejudicial because the messages were not relevant for any purpose except to show defendant in a bad light and to demonstrate that he was a "jerk" who was more likely to have committed the charged crimes. The challenged messages include numerous comments that were demeaning of Fabbri, such as calling her a "whore" and a "floozy." Defendant also often used crude and vulgar sexual language in requesting oral sex from Fabbri. The trial court ruled that the messages, although involving crude sexual references, were relevant to show the relationship between defendant and Fabbri, and the probative value of the evidence was not substantially outweighed by unfair prejudice. The court noted that because the allegations against defendant included an allegation of premeditated murder, the messages were relevant to show the relationship and discord between defendant and Fabbri.

There is no question that the text messages contained many crude sexual terms and that they exhibited a lack of respect toward Fabbri. Regardless, while these references had the potential to inject prejudice into the trial, we cannot conclude that the trial court reached an unprincipled decision in determining that any unfair prejudice did not *substantially* outweigh the probative value of the evidence. As the trial court noted, in a first-degree, premeditated murder case, it is highly relevant to show the past relationship between the defendant and the victim. See *Unger*, 278 Mich App

(2020) (stating that cases from other states, while they can be deemed persuasive, are not binding on this Court).

at 229; *People v Plummer*, 229 Mich App 293, 300; 581 NW2d 753 (1998). Thus, while there arguably was some potential for unfair prejudice that could have been injected into the proceedings through these text messages, it did not substantially outweigh the messages' probative value.

Moreover, even to the extent that the text messages violated MRE 403, reversal would not be required. For a preserved, nonconstitutional error, the defendant has the burden to demonstrate that the error resulted in a miscarriage of justice. *People v Hawthorne*, 474 Mich 174, 181; 713 NW2d 724 (2006), citing *People v Lukity*, 460 Mich 484; 596 NW2d 607 (1999). "[S]uch an error does not warrant reversal unless after an examination of the entire cause, it shall affirmatively appear that it is more probable than not that the error was outcome determinative." *Hawthorne*, 474 Mich at 181 (quotation marks and citations omitted). And "[a]n error is deemed to have been outcome determinative if it undermined the reliability of the verdict." *Id*. at 181-182 (quotation marks and citations omitted).

The evidence against defendant, although circumstantial, was very strong. Fabbri was last seen in Grala's driveway having a heated exchange with someone. Grala was not home at the time, but evidence suggested that defendant was still there from the night before: a neighbor had seen a gray pickup truck parked behind Grala's house, which is where defendant had parked his vehicle the previous night. Further, shortly after this heated exchange, a gunshot was heard by neighbors. The shell casing that was found in Grala's driveway was fired from the handgun that was found in defendant's possession. Fabbri's PT Cruiser was relocated from the driveway to the rear of Grala's house. And sometime after the shooting, a gray Ford

pickup truck, which was consistent with the truck defendant was driving at the time and was inconsistent with Grala's Chevy truck, was seen and heard speeding away from Grala's home. Further, defendant's statements the following day indicating that Fabbri had been killed tended to show that defendant was the killer because the police explained that they had informed no one—including defendant's father—that Fabbri had been killed. In other words, the only way defendant would have known that Fabbri had been killed was to have been present at the time of the killing. Consequently, even if the text messages were erroneously admitted, it does not affirmatively appear that the error affected the outcome of the proceedings. Therefore, reversal would not be required.

III. FAIR TRIAL

Defendant next argues that he was denied his due-process right to a fair trial through the inadvertent display to the jurors of a photograph depicting defendant in jail shortly after his arrest. Defendant also argues that the trial court erred by denying his motion for a mistrial related to this issue. We disagree.

This Court reviews constitutional due-process claims de novo. *People v Bosca*, 310 Mich App 1, 26-27; 871 NW2d 307 (2015). We review for an abuse of discretion a trial court's decision on a motion for a mistrial. *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001). In *People v Rose*, 289 Mich App 499, 517; 808 NW2d 301 (2010), this Court stated:

> Every defendant has a due process right to a fair trial, which includes the right to be presumed innocent. 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. [Quotation marks and citations omitted.]

At issue is the inadvertent display to the jury of a photograph of defendant. At trial, the prosecutor was attempting to show a cropped version of the photo in question. The purpose was to show the shirt defendant was wearing after his arrest. The photo of defendant in actuality was taken at the Macomb County Jail, and the cropping was to remove any background that possibly might indicate that defendant was in jail at the time. The trial court described the events, outside the presence of the jury, as follows:

> It appears that what we're talking about is a photograph that was taken while the Defendant was in the County Jail. It was agreed off the record that we would crop the photo because all that the Prosecutor was interested in is getting a picture of his shirt. The investigator was being directed to crop the picture so that we would not show the Defendant in the jail setting. The main screen was turned off so that the jurors didn't see it on the main screen, but we are in electronically enhanced courtrooms, meaning that there are one, two, three, four screens in the jury box that the jurors can see. I had a funny feeling and so I asked if anybody is seeing anything on the screen and their answer was yes and I confirmed that by looking down at the screen I have in front of me and seeing it as well. Which means that the jury has seen, briefly, but they've seen maybe for about at least five or six seconds a photograph of the Defendant, not in cuffs, not restrained, but in a setting that could be the basement of this building, could be any other block-type structure. But it is the jail and do [sic] a perceptive eye it could very well look like the jail.
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> Now of course the jury has already seen the Defendant being taken into custody, so we obviously don't want to have the jury see the Defendant in any type of restraints or any indication that he must be guilty because, lookit [sic], they have him in handcuffs. But we don't see that in this photograph.

> On the other hand I think a fair, objective way to look at the photograph is that out of 15 jurors probably eight to ten already guessed that that was a photo of him in a jail. That's my initial documentation for the record as to what we saw and obviously what the problem now is.

Defendant thereafter moved for a mistrial, albeit without providing any substantive argument. In response, the prosecutor argued that the picture did not depict defendant behind bars, handcuffed, or in jail attire; instead, the picture merely showed defendant standing with his hands behind his back. Further, for the background, it was a plain, "yellowish," "tile wall," with no indication that this was a jail setting. The prosecutor even opined that the background resembled the cafeteria in the basement of the courthouse. The prosecutor also noted that the jury had already seen a videorecording wherein defendant was handcuffed after he was arrested after the pursuit ended on I-69. The prosecutor contended that, as a result, there was no prejudice to defendant.

The trial court denied the motion for a mistrial, recognizing that the main question concerned whether the photograph was prejudicial. The court stated that defendant was pictured

> in what can be best described as an at ease stance if one were in an Army type of pose. He has his hands behind his back. But he doesn't appear, I mean he clearly doesn't appear like he's shackled, like he's restrained, nor does it look like a mug shot. It is simply a photograph of him up against a wall.
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> I do think that most people will presume that this was in some official building where he was being held. But it is already clear from his arrest that was seen on the tape, and it had to be seen on the tape because it's the conclusion of the high speed chase. It's one of those unavoidable, real facts about the case that there was a chase, that this was

> the person that was taken from the car. The jury already knows that he was under arrest. The jury already knows that at one point he was in handcuffs as he was being led from the car. It would have been better had this picture never been shown, but the amount of restraint does not, certainly it's far less concerning than seeing him in handcuffs being led away from the conclusion of a high speed chase. And that I do think is absolutely controlling over here.

The trial court later noted that between it, the prosecutor, and defense counsel, they were intimately familiar with how a jail looks and, therefore, that they would be more prone to say, "that's got to be a jail," while common jurors might not "think anything of this at all."

After reviewing the inadvertently shown photo, it is clear that defendant was not deprived of a fair trial. As the trial court correctly observed, there is no explicit indication in the inadvertently shown photo that defendant was in jail. There are no visible handcuffs or any other types of restraints. There also is no prison garb or attire. Additionally, the fact that defendant's hands are behind his back in the inadvertently shown photo is not pertinent because this is seen in the noncontested[4] and admitted photo as well. Further, the background appears to be a nondescript "tile wall." While jurors could speculate that this photo was indeed taken from a jail, according to the trial court's description, *there is nothing that expressly indicates that this was taken from jail*. In sum, the photo did not suggest that defendant was in a jail, and it did not, somehow, taint his presumption of innocence. Accordingly, the brief display of the photograph did not deprive defendant of a fair trial.

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[4] Defendant on appeal has characterized the admitted version as the "sanitized version."

We further note that the photo showed defendant right after he was arrested following the police chase. In the video that the jury saw, defendant was arrested, handcuffed, and taken to a police vehicle at the scene. Thus, the jury was aware that defendant was being taken *somewhere* to be in custody; whether that place was a "jail" or "police station" or anywhere else is immaterial. With the jurors already having the knowledge that defendant had been restrained and arrested, their seeing defendant later—without any visible restraints and against a generic background—could not have unfairly influenced the jury.

IV. VENUE

Defendant next argues that his convictions in Docket No. 347207 should be vacated because venue in Macomb County was improper for those charges. Although we agree that venue was improper for those charges, we decline to disturb those convictions because the error was harmless.

"A trial court's determination regarding the existence of venue in a criminal prosecution is reviewed de novo." *People v Houthoofd*, 487 Mich 568, 579; 790 NW2d 315 (2010). We review for an abuse of discretion a trial court's ruling addressing a motion to dismiss. *People v Lewis*, 302 Mich App 338, 341; 839 NW2d 37 (2013). "An abuse of discretion occurs when the trial court chooses an outcome falling outside the range of principled outcomes." *People v Buie*, 491 Mich 294, 320; 817 NW2d 33 (2012).

"The general venue rule is that defendants should be tried in the county where the crime was committed." *Houthoofd*, 487 Mich at 579. But the Legislature is permitted to create exceptions to this general rule. See *id*. In this instance, there is no dispute that defen-

dant's alleged actions constituting the crimes in Docket No. 347207 were all committed in Lapeer County. Thus, for venue to be proper in Macomb County, a statutory exception must apply. See *People v McBurrows*, 322 Mich App 404, 414; 913 NW2d 342 (2017), aff'd 504 Mich 308 (2019). In opposing defendant's motion to dismiss these charges on account of lack of venue, the prosecution relied on MCL 762.8 and MCL 762.9.

MCL 762.8 provides that "[w]henever a felony consists or is the culmination of 2 or more acts done in the perpetration of that felony, the felony may be prosecuted in any county where any of those acts were committed or in any county that the defendant intended the felony or acts done in perpetration of the felony to have an effect." There are two aspects to this statute, both of which apply only when a felony consists or is the culmination of two or more acts: (1) "venue for prosecution of the felony is proper in any county in which any one of the acts was committed," and (2) venue is proper "in any county that the defendant intended the felony or acts done in perpetration of the felony to have an effect." *McBurrows*, 322 Mich App at 415 (quotation marks, citations, and emphasis omitted).[5]

In the trial court, the prosecution argued that defendant intended his actions in Lapeer County to have an effect in Macomb County because defendant went to Lapeer County to harm people who he claimed were

[5] The Supreme Court in *Houthoofd*, 487 Mich at 583-584, held that the version of MCL 762.8 in effect at that time did not contemplate venue for prosecution in places where the effects of the act were felt. After that decision, the Legislature amended MCL 762.8 to include the phrase "or in any county that the defendant intended the felony or acts done in perpetration of the felony to have an effect." 2013 PA 128; see also *McBurrows*, 322 Mich App at 415.

responsible for Fabbri's death. The trial court openly questioned this rationale and asked:

> [W]hat is the [e]ffect that it has in Macomb County, because the timing is that the homicide has already been completed in Macomb County. Going to Lapeer the day after has an effect upon, in the words of John Dunn, the death of one person diminishes me, it has an [e]ffect all around the world. It has an [e]ffect in all other counties in Michigan. What is the peculiar [e]ffect that it has in Macomb County?

In response, the prosecutor averred that if defendant is fleeing the homicide, which happened in Macomb County, then "that's the [e]ffect it has." In other words, according to the prosecutor, a defendant fleeing into Lapeer County has an effect on Macomb County for the sole reason that the original crime was committed in Macomb County. We disagree with that position. It is not clear how Macomb County, or anyone inside the county, was affected by any of defendant's actions in Lapeer County a day after Fabbri was killed. Merely fleeing the police in one county does not have an effect on anyone in a neighboring county, even if the person ostensibly was fleeing to avoid arrest for a murder that occurred in that neighboring county.

The prosecutor then contended that venue was proper in Macomb County because all of defendant's acts were part of the same plan, where the first part was to kill Fabbri, the second part was to kill Rob and Dylan, and the third part was to kill himself. While this may have indeed been defendant's plan, the trial court erred when it failed to recognize or analyze the actual statutory requirements for allowing venue in a county where the crimes did not take place. During the motion hearing, the court stated that it was inclined to agree with the prosecutor because it thought that in

order for defendant to prevail, he must show that "the prosecutor has no facts, no evidence no argument, whatsoever to *link* the two counties." (Emphasis added.) And in making its ultimate ruling, the trial court affirmatively stated that venue would be proper in Macomb County if all of the events were "part of a coherent plan right from the start" or, in other words, were "linked." However, as defendant correctly states on appeal, being part of the same "plan" or having events "linked" is not the test for determining whether venue is proper in a county where the crime did not take place. The relevant inquiry under MCL 762.8 is whether defendant *intended* any of his acts in Lapeer County to have any effect in Macomb County.[6] As already discussed, we answer that question in the negative.

Although the prosecution cited MCL 762.9 in its response to defendant's motion to dismiss for lack of venue, it did not make any arguments related to this provision at the motion hearing. MCL 762.9 provides that "[w]henever a felony has been committed on a railroad train, automobile, aircraft, vessel or other moving vehicle, said offense may be prosecuted in any county, city or jurisdiction in which such conveyance was during the journey in the course of which said

[6] The other aspect of MCL 762.8 is not applicable. The prosecution never put forth any argument that the first aspect of MCL 762.8 applied, i.e., that defendant committed any acts in Macomb County in perpetration of the crimes that he allegedly committed in Lapeer County. This part of the statute "merely requires that a defendant commit at least one act of a multiple act felony in the prosecuting jurisdiction." *People v Meredith (On Remand)*, 209 Mich App 403, 409; 531 NW2d 749 (1995). But "it is not necessary that the act constitute an essential element of an offense." *Id*. In this instance, there is no evidence that defendant committed any acts in Macomb County in furtherance of the charged crimes that occurred in Lapeer County.

offense was committed." This provision does not apply to the circumstances in this case.

As this Court has explained, MCL 762.9 "is intended to apply to felonies committed in a moving vehicle in situations where it is difficult to determine the county in which the criminal acts occurred." *People v Slifco*, 162 Mich App 758, 762; 413 NW2d 102 (1987). It is undisputed that the entirety of defendant's acts related to the crimes charged in Docket No. 347207 occurred in Lapeer County. Indeed, there was no evidence that defendant was in Macomb County on August 16, 2016, at any point before he was taken there after his arrest. At best, the prosecutor maintained that defendant necessarily *started* his trip from Macomb County because he left the county after killing Fabbri on August 15. However, just because defendant was in Macomb County in the evening of August 15 and was in Lapeer County on August 16 does not show that he traveled through Macomb County "during the journey in the course of which said offense[s] [were] committed." MCL 762.9. Indeed, the evidence shows that the events constituting the Lapeer County criminal charges occurred approximately 24 hours after defendant was last known to be in Macomb County and after defendant did other things, such as stopping at the credit union (in Lapeer County) on the morning of August 16 and meeting with his father later that day (in Lapeer County). Therefore, MCL 762.9 is not applicable to place venue with Macomb County.

Consequently, the trial court abused its discretion when it denied defendant's motion to dismiss the Lapeer County charges on account of venue.

However, any error with respect to statutory venue is not jurisdictional and does not constitute constitutional error. *Houthoofd*, 487 Mich at 588; *McBurrows*,

322 Mich App at 410-411. Rather, defendant has the burden of establishing a miscarriage of justice under a "more probable than not" standard to justify reversing a conviction. *Houthoofd*, 487 Mich at 590 (quotation marks and citations omitted). Thus, defendant must show prejudice, i.e., "that the error affected the outcome of the lower court proceedings." *Id*. Defendant has failed to make this showing. Defendant merely suggests that the jury was impermissibly swayed to find against him on the Lapeer County crimes because it had been influenced by what it heard related to the Macomb County crimes, including the premeditated murder of Fabbri. The evidence against defendant was overwhelming with respect to his Lapeer County convictions. Defendant was convicted of AWIM as to Nordlund, felony-firearm, carrying a weapon with unlawful intent, and fleeing or eluding police officers, and two counts of felony-firearm. In short, because the evidence of defendant's guilt of these crimes was overwhelming, he has not shown that the result would have been different had he been tried in Lapeer County.

Notably, regarding the AWIM charge, there were several witnesses who all saw (as evidenced by the shattering and flying of glass from the truck defendant was driving) and heard a gunshot as defendant drove on North Saginaw Street near Nordlund. Nordlund testified that he heard the bullet go right by his head. The fact that defendant fired near Nordlund, coupled with the fact that Nordlund immediately before had given defendant "the finger," is strong circumstantial evidence that defendant intended to shoot Nordlund in anger or retaliation. See *People v Kanaan*, 278 Mich App 594, 622; 751 NW2d 57 (2008) (stating that a defendant's intent can be established with minimal circumstantial evidence). And it is beyond any serious

dispute that defendant also eluded police in Lapeer County. While that fact may have been uncertain at the beginning of the pursuit when unmarked police vehicles tried to stop defendant, any confusion was removed later when marked police vehicles with lights and sirens took the lead in the pursuit and defendant still failed to pull over.

We also note that defendant's position that the jury was impermissibly influenced by being exposed to the circumstances of Fabbri's murder is belied by the fact that the jury acquitted defendant of AWIM with respect to both Detectives Onyski and Perry. The jury's decision to acquit defendant of those charges shows that the jury took its responsibility very seriously and individually considered each of the charged counts, as it was supposed to do. Accordingly, it is not more probable than not that the venue error affected the outcome of the proceedings. Therefore, we decline to disturb defendant's convictions for the Lapeer County offenses in Docket No. 347207.

V. JUDICIAL IMPARTIALITY

Defendant lastly argues that he is entitled to a new trial because the trial court's questioning of his expert witness pierced the veil of impartiality. We disagree.

Whether judicial conduct denied a "defendant a fair trial is a question of constitutional law that this Court reviews de novo." *People v Stevens*, 498 Mich 162, 168; 869 NW2d 233 (2015). We review the trial court's decision to deny defendant's motion for a mistrial related to this issue for an abuse of discretion. *People v Ortiz-Kehoe*, 237 Mich App 508, 513; 603 NW2d 802 (1999).

At issue is the trial court's questioning of defense firearms and toolmark expert, David Balash. Balash's

testimony, for the most part, mimicked that of the prosecution's firearms and toolmark expert. Both Balash and the prosecution's expert opined that the casing found in Grala's driveway had been fired from the nine-millimeter handgun found in defendant's possession.[7] Both experts also testified that testing on the bullet retrieved from the passenger door of Fabbri's PT Cruiser was "inconclusive" and could not be positively traced to defendant's nine-millimeter firearm. As Balash noted, because the testing was inconclusive, the bullet "might have been fired [from that gun], it might not have been fired [from that gun]." Further, both Balash and the prosecution's expert agreed that the presumed "bullet" retrieved from inside the home on West Oregon Street in Lapeer was "totally consistent" with being a bullet core, albeit without any jacket covering, which made it impossible to trace to any particular firearm. Without explaining the significance at the time, Balash made a solitary reference to the bullet hole at the house not being "perfectly round."

The last pertinent item that was examined by the experts was the pair of metal fragments that were found inside a utility pole near where Nordlund claimed to have been fired upon. The prosecution's expert opined that the small fragments[8] were merely "suspected lead fragments," which could be parts of a fragmented bullet, but he could not say for certain that they were from a fired bullet. Balash agreed that the metal fragments weighed 3.4 grains and agreed that, independently, they could have been part of a bullet

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[7] Indeed, Balash's testimony arguably went even further because he said he was "100-percent" certain of the identification.

[8] The expert stated that the fragments weighed a total of 3.4 "grains," while an intact .223-caliber bullet normally would weigh about 62 grains.

core. However, Balash thought that because they were retrieved from a fairly clean, round hole in the pole, they could not have been parts of a bullet core. Balash explained that bullet *cores* "never, ever make a round hole of entry" because if it is only a bullet core flying through the air, that means it has been damaged already and its jacket has been removed, making the bullet core ballistically unstable, which in turn makes it incapable of making a round hole of entry. Balash stated that he would expect to see an irregularly shaped hole, such as a "keyhole"-shaped hole, as a result of a bullet core. He also questioned that, if by happenstance the bullet core did manage to strike the pole squarely in the midst of its tumbling through the air, thereby making a "perfectly round hole," where did the rest of the bullet core go? He would have expected to see maybe 40 to 50 grains' worth of bullet core, but in this instance, there were only 3.4 grains. In other words, it was Balash's opinion that the 3.4 grains of metal fragments could not have caused the hole in the pole and therefore were not fragments of a bullet core.

During Balash's testimony, the trial court asked numerous questions of the witness. Many of the questions were focused on the presence, or lack of presence, of a metal jacket with the fragments that were found in the utility pole. The judge's questioning occurred multiple times, with the first session occurring during defense counsel's examination of Balash. The second occasion occurred after the prosecutor concluded his questioning. After the parties followed up with a few questions of their own, the trial judge revisited the topic once again, asking several more questions.

A trial judge has broad, but not unlimited, discretion when controlling the court's proceedings. *People v Taylor*, 252 Mich App 519, 522; 652 NW2d 526 (2002);

People v Paquette, 214 Mich App 336, 340; 543 NW2d 342 (1995). The overriding principle is that a court's actions cannot pierce the veil of judicial impartiality. *Stevens*, 498 Mich at 170; *People v Davis*, 216 Mich App 47, 50; 549 NW2d 1 (1996). Invading the prosecutor's role is a clear violation of this tenet. *People v Ross*, 181 Mich App 89, 91; 449 NW2d 107 (1989). The trial court, pursuant to MRE 614(b), may question witnesses in order to clarify testimony or elicit additional relevant information. *People v Conyers*, 194 Mich App 395, 404; 487 NW2d 787 (1992). "However, the trial court must exercise caution and restraint to ensure that its questions are not intimidating, argumentative, prejudicial, unfair, or partial." *Id*. at 405. The test to determine whether a trial judge's conduct pierces the veil of impartiality, thereby violating the constitutional guarantee of a fair trial, is whether, when considering the totality of the circumstances, "it is reasonably likely that the judge's conduct improperly influenced the jury by creating the appearance of advocacy or partiality against a party." *Stevens*, 498 Mich at 171.

> This inquiry requires a fact-specific analysis. A single inappropriate act does not necessarily give the appearance of advocacy or partiality, but a single instance of misconduct may be so egregious that it pierces the veil of impartiality. Ultimately, the reviewing court should not evaluate errors standing alone, but rather consider the cumulative effect of the errors. [*Id*. at 171-172 (quotation marks and citations omitted).]

Because a reviewing court is to look at the totality of the circumstances,

> the reviewing court should inquire into a variety of factors, including [(1)] the nature of the judicial conduct, [(2)] the tone and demeanor of the trial judge, [(3)] the scope of the judicial conduct in the context of the length and complexity of the trial and issues therein, [(4)] the extent

> to which the judge's conduct was directed at one side more than the other, and [(5)] the presence of any curative instructions. [*Id*. at 172.]

A. THE NATURE OF THE CONDUCT

For the first factor, the nature of the judicial conduct was the trial judge's questioning of Balash. As the Supreme Court has acknowledged, such questioning generally is appropriate under MRE 614(b). *Id*. at 173. Which side this factor favors is a close question. On the one hand, it seems fairly obvious that the trial court devoted way too much energy and time in trying to get Balash to explain his views related to the presence or absence of a metal jacket near the utility pole on Saginaw Street. Balash's views were pretty well explained without the judge's inquiries. Balash opined that, although the fragments retrieved from the pole, by themselves, could have been consistent with bullet fragments, given the circumstances, these fragments could not have been a bullet for one main reason. Because the hole was nearly perfectly round, he would have expected an intact bullet to have made it (assuming a bullet made the hole in the first place). Thus, with only a meager 3.4 grains of fragments found in the hole, it was evident to Balash that these fragments were not bullet fragments that caused that hole. On the other hand, it appears that the judge held a sincere belief that Balash's testimony was at least partially confusing.

In our view, the trial judge did not fully comprehend Balash's views and because of this miscomprehension, it created an "inconsistency" in the judge's mind that needed to be clarified. The judge repeatedly stated that he was confused regarding why it was not important that a metal jacket was not found in the West Oregon house but it supposedly was important that no jacket

was found at the Saginaw Street utility pole. If this were the substance of Balash's testimony, then it seems it certainly would have been a valid area for the court to attempt to clarify with further questions. However, it does not appear that Balash stated what the trial court thought he had said. To the extent that Balash suggested that a metal jacket should have been found in the utility pole on Saginaw Street, it was in the context that he would have expected to have seen an "intact" bullet (necessarily including the metal jacket), which, according to him, would have been required to have created the nearly perfectly round hole.[9]

Therefore, although in the trial judge's mind, he was attempting to seek clarification of a patent "inconsistency" in Balash's testimony, in reality, there was no patent inconsistency. Consequently, while trial judges are allowed to question witnesses, it does not appear that there was any need to clarify Balash's testimony, and therefore, the questioning here went beyond what generally is contemplated. Importantly, a judge's altruistic intent is irrelevant. See *id*. at 174 ("It is inappro-

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[9] For reasons that are unclear, when presented with the judge's questions, specifically asking why the absence of a metal jacket at one location mattered but did not matter at another location, Balash never reminded the judge that he had previously stated that the hole at the West Oregon house was *irregularly* shaped, which meant that a *damaged* bullet would be expected in the house. This was distinguishable from the perfectly round hole in the utility pole, which if caused by a bullet, one would expect to find a nearly *intact* bullet (arguably including a metal jacket). The mere difference in hole shape between the two locations likely would have resolved any inconsistency in the judge's mind.

We also note that because Balash's testimony regarding the shape of the hole at the West Oregon house was very fleeting (and was a single answer of "No, not at all" to a somewhat leading question asked by defense counsel), it is possible that the trial judge simply missed this fact.

priate for a judge to exhibit disbelief of a witness, intentionally or unintentionally.").

B. TONE AND DEMEANOR

Next, a reviewing court is to consider the tone and demeanor that the trial judge displayed in front of the jury. Of note, "[a] judge should avoid questions that are intimidating, argumentative, or skeptical." *Id*. at 175. As our Supreme Court has recognized, appellate courts do not have the benefit of viewing a trial judge's tone and demeanor first hand. *Id*. at 176. But sometimes, the nature of the words used can exhibit hostility, bias, or incredulity. *Id*. In this instance, we perceive no ill or hostile tone from the trial judge. Although his questioning was pervasive and arguably repetitious, it does not appear to have had a hostile tone.[10] Further, at the end of Balash's testimony, the trial judge thanked Balash for his testimony and commented that he "thoroughly enjoyed" and appreciated it. Notably, in response, Balash stated that he enjoyed testifying as well. In any event, we conclude that this factor weighs in favor of no impermissible partiality.

C. SCOPE OF JUDICIAL INTERVENTION

For the third factor, "a reviewing court should consider the scope of judicial intervention within the context of the length and complexity of the trial, or any given issue therein." *Id*. "[G]iven the principle that a judge's questions may serve to clarify points that are obscure or confusing, a judge's inquiries may be more

[10] On appeal, defendant does not present any persuasive argument that the trial judge exhibited a hostile tone or demeanor. Instead, defendant relies on the repetitiveness and insistent questioning, which we have addressed. The mere fact that questioning is repetitive or insistent does not mean that the person asking had a hostile tone.

appropriate when a witness testifies about a topic that is convoluted, technical, scientific, or otherwise difficult for a jury to understand." *Id*. (citation omitted). Although this was a very lengthy trial, as already noted, the complexity of the issue presented through Balash's testimony did not warrant the extent of the judicial intervention. While the trial judge perceived that there was an inconsistency with the significances Balash attributed to the lack of a metal jacket at both the West Oregon house and the scene at North Saginaw, in actuality, there was no inconsistency. Also, what makes the trial court's questioning even more perplexing is that the court later (correctly) acknowledged that whether the metal fragments retrieved from the utility pole were bullet fragments was wholly inconsequential. As the court recognized, the evidence was overwhelming that defendant had shot his firearm when near Nordlund. Many witnesses heard the gunshot and saw the glass fly from defendant's passenger-side window, and Nordlund stated that he heard and felt the bullet fly right by his head. Thus, it did not matter if those particular fragments from the pole came from defendant's AR-15—the fact that defendant had shot his firearm in the vicinity of Nordlund was uncontested.[11]

D. THE DIRECTION OF THE JUDICIAL INTERVENTION

For the fourth factor, we must assess whether the judicial intervention was directed toward a particular party more than the other. "Judicial partiality may be exhibited when an imbalance occurs with respect to either the frequency of the intervention or the manner of the conduct." *Id*. at 177. Determining whether judi-

[11] Indeed, defense counsel, in arguing against an AWIM conviction with respect to Nordlund, focused on how the evidence did not show that defendant had an intent to kill Nordlund.

cial intervention was directed more toward a particular party is important because it helps "distinguish excessive but ultimately neutral questioning from biased judicial questioning." *Id*. at 188 (emphasis omitted). In this case, there was no imbalance of judicial intervention. While the trial judge's inquiries of Balash were extensive, the judge asked numerous witnesses various questions. In other words, the trial judge was an equal-opportunity questioner.

E. ABSENCE OF CURATIVE INSTRUCTIONS

Finally, a reviewing court is to consider the presence or absence of curative instructions. In this instance, the trial court repeatedly reminded the jury that its questions were not meant to reflect any personal opinion and that it was for the jury to decide the facts. The judge further stated that if the jury for some reason thought that he had an opinion on the case, the jury was to ignore it and make its factual determinations on its own. Moreover, the trial court provided a curative instruction after it denied defendant's motion for a new trial. In that instruction, the court acknowledged that it asks lots of questions of witnesses and apologized for any delay its questions may have caused. The court also reiterated that the jury was the sole judge of the facts in this case and that if the jury thought the judge had an opinion about any fact in the case, that opinion was likely wrong and that in any event, the jury is to "totally disregard whatever you think I might be thinking because my thoughts on any issue, any witness, any fact, are totally irrelevant." The judge also cautioned that the fact that he may have asked a lot of questions of various witnesses should not be interpreted as favoring or disfavoring any part of a witness's testimony. "Jurors are presumed to follow their instructions, and it is presumed that instructions cure most errors." *People*

v Mahone, 294 Mich App 208, 212; 816 NW2d 436 (2011). This fact weighs in favor of the conclusion that the trial judge's conduct did not pierce the veil of impartiality.

F. CONCLUSION

In considering the totality of the circumstances, it is evident that the trial court asked numerous questions throughout the proceedings. Although the trial court's questioning of Balash appears to have been wholly unnecessary, the questioning did not show a bias against Balash or defendant. Instead, the questioning at most indicated that the trial judge for some reason thought the presence or absence of a metal jacket was significant, when all the evidence indicated that it was not. We cannot see how such questioning would have put Balash or defendant in a bad light. Moreover, in addition to the court providing general cautionary instructions related to how the jury is not to read anything into the court's questions, the court specifically instructed the jurors the day after Balash concluded his testimony that, while it had asked a lot of questions, the jury must disregard whatever it believed the court may have thought related to any fact or witness. The court reiterated that the jury is the ultimate judge of the facts in the case.

With all of the above in mind, we conclude that the court's line of questions regarding the metal jackets did not pierce the veil of judicial impartiality and that, therefore, the trial court did not abuse its discretion when it denied defendant's motion for a mistrial.

Affirmed.

FORT HOOD, P.J., and CAVANAGH, J., concurred.

TUKEL, J. (*concurring*). I agree with the majority that defendant's convictions should be affirmed in all respects, and I join the Court's majority opinion in full. I write separately to make an additional point or two about venue.

Almost 11 years ago, in *People v Houthoofd*, 487 Mich 568; 790 NW2d 315 (2010), Justice CORRIGAN proposed that the Supreme Court or the Legislature adopt a rule to permit effective resolution of claims of improper venue that otherwise will go uncorrected for reasons described in this opinion. See *id*. at 594 (CORRIGAN, J., concurring). This case illustrates that the precise problem Justice CORRIGAN described in 2010 persists until today and that absent reform of the sort she advocated, the problem will not abate.

First, some background. The majority correctly relies on *Houthoofd* for the proposition that we review a claim of improper venue to determine whether there was a miscarriage of justice or denial of a constitutional right, such as a deprivation of due process. *Id*. at 590-591 and 591 n 38 (opinion of the Court). And because venue is not constitutionally mandated, in the absence of a miscarriage of justice or deprivation of a constitutional right, MCL 600.1645 prohibits reversal of a conviction on the basis of a venue error alone. *Houthoofd* involved the interplay between MCL 600.1645 and MCL 769.26. MCL 769.26 provides:

> No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.

MCL 600.1645 provides that "[n]o order, judgment, or decree shall be void or voidable solely on the ground that there was improper venue." *Houthoofd* explained:

> MCL 769.26 and MCL 600.1645 both deal with the result of a procedural error in proceedings, the former with general procedural errors, and the latter with specific venue errors. Both mandate that a procedural error shall not result in a judgment or verdict being set aside or reversed. MCL 769.26 qualifies that a procedural error can only lead to a judgment or verdict being set aside or reversed if there is a miscarriage of justice. MCL 600.1645, on the other hand, does not contain a similar clause; rather, the statute does mandate that no judgment be void or voidable solely on the ground that there was improper venue. Venue is strictly procedural in nature and does not pertain to a court's jurisdiction over a case. As the Committee Comment to chapter 16 of the [Revised Judicature Act, MCL 600.101 *et seq*.] (Venue) states, the Legislature specifically adopted provisions to separate jurisdiction issues from venue issues, and indicated that venue is a matter of convenience that is governed by logic and sound policy considerations. Thus, improper venue alone does not necessarily result in a miscarriage of justice because matters of venue are matters of convenience. However, if an improper venue choice led to other more serious errors, such as deprivation of a defendant's right to due process or trial by a fair and impartial jury, the alleged errors would not "solely" be for improper venue, and MCL 600.1645 would not apply. [*Houthoofd*, 487 Mich at 591 n 38.]

Justice CORRIGAN's concurring opinion in *Houthoofd* noted that "[e]ffective appellate review of a venue ruling can be granted only from an appeal from an interlocutory order because MCL 600.1645 precludes appellate relief based solely upon improper venue." *Id*. at 595 (CORRIGAN, J., concurring) (quotation marks and citation omitted). Given that Justice CORRIGAN joined the majority opinion in full, she obviously did not include "a venue choice [that] led to other more serious errors, such as

deprivation of a defendant's right to due process or trial by a fair and impartial jury," *id*. at 592 n 38 (opinion of the Court), as being covered by MCL 600.1645. *Id*. at 595 (CORRIGAN, J., concurring). But those types of issues will rarely result from a mere venue error, as both *Houthoofd* and this case demonstrate.

In *Houthoofd*, the defendant was tried in Saginaw County, which on appeal was determined not to be the proper county for purposes of venue. Nevertheless, the majority held that the "[d]efendant received a fair trial before an impartial jury, and it cannot be argued that there was a miscarriage of justice simply because the trial was in Saginaw County." *Id*. at 590 (opinion of the Court). Here, the majority holds, correctly in my opinion, that defendant failed to prove prejudice:

> Defendant merely suggests that the jury was impermissibly swayed to find against him on the Lapeer County crimes because it had been influenced by what it heard related to the Macomb County crimes . . . . The evidence against defendant was overwhelming with respect to his Lapeer County convictions. . . . In short, because the evidence of defendant's guilt of these crimes was overwhelming, he has not shown that the result would have been different had he been tried in Lapeer County.

The same analyses will hold in almost every case. Absent some special circumstance, such as prejudicial pretrial publicity (which is not an issue relating to improper venue in the sense it is discussed here, but rather involves a *change* of venue from the proper county to another county for a permissible reason, see *id*. at 589 (opinion of the Court)), there will in general be no basis for finding a prejudicial error. That is because there will ordinarily, if not universally, be no reason for concluding that a jury impaneled in a county in which venue was proper would have reached a different result than did the actual jury in a county in

which venue was improper, and thus there could have been no miscarriage of justice in terms of the verdict. In that regard, Justice CORRIGAN's *Houthoofd* concurrence noted, "As the majority opinion explains, a venue error is neither jurisdictional nor constitutional. Accordingly, no verdict in any case should be overturned solely on the ground that the trial was held in an improper venue." *Id*. at 595 (CORRIGAN, J., concurring).

On the basis of MCL 600.1645, and the rarity of improper venue leading to a miscarriage of justice or a constitutional error, Justice CORRIGAN "urge[d] her colleagues to consider adopting a court rule" requiring a defendant to raise a venue issue by interlocutory appeal. *Id*. Justice CORRIGAN also noted that "I would consider adopting a court rule or recommending legislation to codify" the requirement that venue challenges be made through interlocutory appeal, *id*. at 596, and noted that the Supreme Court had "opened an administrative file, ADM File No. 2009-24, to address this deficiency in the criminal law as it relates to venue and to consider whether to recommend legislative action," *id*. at 596 n 5.

I have been unable to determine exactly what happened with the administrative file, but obviously no court rule or legislation was adopted to address challenges to venue. This case demonstrates the persistence of the problem Justice CORRIGAN noted, viz., that postjudgment challenges to venue are effectively unreviewable. To illustrate that point: we have concluded, unanimously, that the trial court erred by denying defendant's pretrial motion to dismiss the Lapeer County charges as being improperly brought in Macomb County. Defendant sought interlocutory review of some of the trial court's pretrial rulings, apparently not including the venue issue; in any event, this Court

denied leave to appeal. Now, on appeal of right from his convictions, defendant's venue argument—which correctly asserted that venue was not proper in Macomb County as to a number of charges—can afford him no avenue for relief. Yet if defendant had been able to appeal the venue motion on an interlocutory basis, either by right or by leave, those counts necessarily would have been dismissed. Thus, the issue raised by Justice CORRIGAN almost 11 years ago remains unresolved; as did Justice CORRIGAN, I also urge either the Supreme Court to consider a court rule to address this problem or for the Legislature to fashion a remedy.

VHS OF MICHIGAN, INC v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Docket No. 352881. Submitted March 3, 2021, at Detroit. Decided April 1, 2021. Approved for publication May 20, 2021, at 9:00 a.m.

VHS of Michigan, Inc., doing business as The Detroit Medical Center, filed an action in the Oakland Circuit Court against State Farm Mutual Automobile Insurance Company seeking a judgment declaring defendant liable for payment of no-fault benefits. Defendant's insured, Ferlita Reyes, was involved in a motor vehicle collision on December 2, 2018. Reyes was driving a GMC Yukon with five passengers at the time of the collision. After the collision, Reyes sought medical treatment with plaintiff, and under MCL 500.3143 of the no-fault act, MCL 500.3101 *et seq*., Reyes executed an assignment to plaintiff of all personal protection insurance (PIP) benefits to which she was entitled under the act and under her insurance policy. Plaintiff filed its action after defendant refused to pay plaintiff. Defendant asserted various affirmative defenses in its answer, including that Reyes had made false statements in connection with the claim for benefits, and stated that it would seek leave to amend its affirmative defenses to plead fraud with particularity if discovery revealed actionable fraud. Defendant later moved to amend its affirmative defenses to plead fraud with particularity after discovery revealed inconsistencies between Reyes's account of the collision and the accounts of her passengers and after defendant's expert inspected the vehicle and concluded that the Yukon had sustained only minor damage that was inconsistent with the 30-mph collision reported by Reyes and her passengers. The expert also found social media posts by Reyes's passengers indicating a plan to make money by staging fake vehicle crashes and obtaining and selling pain medication. The trial court, Leo Bowman, J., denied defendant's motion for leave to amend, finding that it was not timely and would severely prejudice plaintiff. Defendant appealed.

The Court of Appeals *held*:

Amendment is generally a matter of right, and MCR 2.118(A)(2) provides that leave to amend shall be freely given

when justice so requires. A motion to amend a complaint should only be denied when (1) there was undue delay by the movant in waiting to file the motion to amend, (2) there was bad faith or dilatory motive by the movant, (3) there has been repeated failure to cure deficiencies by previously allowed amendments, (4) granting the motion would cause undue prejudice to the opposing party, or (5) the amendment would be futile. In allegations of fraud, the circumstances constituting fraud must be stated with particularity, but Michigan's procedural rules recognize and account for the fact that it may not be possible to plead fraud with particularity at the commencement of a case. Defendant moved to amend its affirmative defenses following the close of its investigation of Reyes's claim, and the trial court abused its discretion by denying the motion on the basis that it was untimely. Delay, by itself, does not warrant denial of a motion to amend; rather, the court must also find that the delay was the result of bad faith or that the nonmoving party would suffer prejudice. In this case, the trial court did not make a finding that defendant had acted in bad faith, but concluded that plaintiff would suffer prejudice if the motion were granted. In contrast to the court's finding, defendant provided plaintiff with notice in its first responsive pleading that defendant planned to pursue a fraud defense. Moreover, plaintiff had counsel present at the depositions of Reyes and the other occupants of the Yukon. Finally, contrary to plaintiff's argument, the amendment would not have been futile. The cases on which plaintiff relied to support its futility argument were procedurally and factually distinguishable from the present case. In those cases, the pleadings had been completed when the motion to amend was filed, and the litigation had proceeded to the summary-disposition phase. Comparatively, in this case, the discovery period had not yet expired when defendant moved to amend its affirmative defenses, and neither party had moved for summary disposition. Additionally, in the caselaw cited by plaintiff, the insurers sought to rescind or void the insurance policies at issue on the basis of allegations of fraud on the part of the insured. In this case, defendant did not seek to rescind its policy, but rather to plead fraud with particularity in order to justify its denial of claimed benefits.

Judgment reversed, order vacated, and case remanded.

Miller & Tischler, PC (by *Andrew J. Horne*) for VHS of Michigan, Inc., doing business as The Detroit Medical Center.

Miller, Canfield, Paddock and Stone, PLC (by *Paul D. Hudson* and *Amanda Rauh-Bieri*) for State Farm Mutual Automobile Insurance Company.

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

PER CURIAM. In this no-fault action, defendant, State Farm Mutual Automobile Insurance company, appeals by leave granted[1] the trial court's order denying its motion for leave to amend its affirmative defenses to plead fraud with particularity. We reverse, vacate the trial court's February 10, 2020 order denying defendant's motion to amend its affirmative defenses to plead fraud with particularity, and remand for further proceedings consistent with this opinion.

I. FACTUAL AND PROCEDURAL BACKGROUND

This case arises out of a motor vehicle collision that occurred on December 2, 2018, near the intersection of Evergreen Road and Seven Mile Road in Detroit, Michigan. At the time of the collision, defendant's insured, Ferlita Reyes, was driving a 2009 GMC Yukon XL, and there were five other passengers in the vehicle. At some point following the collision, Reyes sought medical treatment with plaintiff, VHS of Michigan, Inc., doing business as The Detroit Medical Center (the DMC), in the emergency room. Under MCL 500.3143, Reyes executed an assignment to plaintiff of all her rights, privileges, and remedies for payment of the personal protection insurance (PIP) benefits to which she might be entitled under the no-fault act, MCL 500.3101 *et seq*., and under her insurance contract with defendant.

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[1] *VHS of Mich, Inc v State Farm Mut Auto Ins Co*, unpublished order of the Court of Appeals, entered June 17, 2020 (Docket No. 352881).

On June 20, 2019, plaintiff filed the complaint in the instant action, asserting that it had submitted reasonable proof of charges incurred to defendant and demanded payment but that defendant had unreasonably delayed or refused payment for the balance of benefits due. Plaintiff claimed that defendant had breached its contractual and statutory obligation to provide no-fault benefits by unreasonably delaying or refusing payment and sought a judgment under MCR 2.605 declaring defendant liable for no-fault benefits and a judgment in the amount of the total liability due, plus costs, interest, and attorney fees.

Defendant timely answered the complaint, denying most of the allegations contained therein, and *inter alia*, asserted the following affirmative defenses:

> 1. Plaintiff's patient has made statements which do not comport with known facts. She has made, caused to be made, or submitted false statements in connection with this [claim] that would, therefore, bar her from recovering benefits. If discovery reveals any actionable fraud, [d]efendant will seek leave to amend its affirmative defenses to state a fraud or rescission defense with more particularity.
>
> 2. Even if [p]laintiff's patient did not intentionally make false representations, [d]efendant may be entitled to void coverage as a non-intentional or innocent misrepresentation of material fact. *Wiemayer v Midland Mutual Ins*, 414 Mich 369 (1992).

The parties engaged in written and oral discovery, and on January 22, 2020, before the expiration of the discovery period on February 4, 2020, defendant moved to amend its affirmative defenses to plead fraud with particularity. Defendant argued that discovery had revealed inconsistencies between Reyes's account of the collision, the five other passengers' accounts of the collision, medical documentation, and the opinion of defendant's expert, Don Parker, who had reviewed

the initial photographs of the vehicle, inspected the vehicle, downloaded the vehicle's information from the event data recorder (EDR), and reviewed the occupants' testimony.

At the time of the collision, Reyes was driving five passengers in the Yukon: Curtis Houston, FaQuan Houston, Darrell Nickerson, Jermaine Dixon, and Kirshean Nelson. Reyes recalled that she had picked up the passengers in order to meet other friends for dinner at a restaurant. At her deposition, Reyes testified that while driving on Evergreen Road around 9:30 p.m., she looked into her rearview mirror and became aware of a red Ford F-150 driving "crazy" behind her. At some point, the F-150 began to pass Reyes on the left and made contact with the Yukon. Reyes could not remember if the F-150 made contact with the side or rear of the Yukon, but she was certain that impact had occurred. Reyes then lost control of the Yukon and swerved to the right and into a parked Chevrolet Impala. According to Reyes, the F-150 fled the scene. Reyes further testified that she never saw the damage to the Yukon because it was towed from the scene and repaired by defendant. The five other occupants of the Yukon had similar recollections of the collision: that the F-150 had been traveling behind the Yukon in the same direction. Medical records also indicated that the passengers of the Yukon initially reported that the Yukon had been rear-ended by another vehicle.

However, defendant argued, the Michigan Traffic Crash Report was inconsistent with the occupants' recollection of the collision. The report detailed:

> Per a witness at the scene, Unit 1, a red Ford F-150, crossed left of center while southbound on Evergreen. Unit 1 was driving at a high rate of speed and sideswiped Unit 2

> [the Yukon]. Unit 2 then rear-ended Unit 3 [the Impala], which was also northbound on Evergreen. Unit 1 left the scene.

The expert report created by Parker also called into question the occupants' version of events. In support of its motion to amend, defendant attached a copy of the collision damage analysis performed by Parker. Parker wrote in his report that he performed the analysis "to quantify the nature and severity of the subject collision." Parker reviewed the traffic crash report, the CARFAX[2] vehicle history for the subject Yukon, the repair estimate for the Yukon, deposition transcripts from occupants of the Yukon, industry information for both the Yukon and the Chevrolet Impala involved in the secondary collision, and aerial and street-view photographs of the claimed collision site. Parker also inspected the Yukon in person at a car dealership after the vehicle had been repaired. During this inspection, Parker accessed the airbag control module, which contained an EDR that was "capable of capturing certain pre-crash and crash information[.]" The EDR was imaged by Parker using a "Bosch Crash Data Retrieval (CDR) tool for retained data relevant to the subject incident." Parker also wrote that "[i]n addition to the above-mentioned materials and activities, I have relied on my education and training and my experience in vehicle design, crash testing, crash analysis, and crash reconstruction" in formulating opinions regarding the collision.

Parker first addressed certain inconsistencies in the deposition transcripts he had reviewed and asserted that those inconsistencies challenged the ve-

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[2] CARFAX is a company that provides vehicle history information for buyers and sellers of used vehicles. See <https://www.carfax.com/company/about> [https://perma.cc/EA7H-D4FG].

racity of the testimony. For example, Reyes had testified that Nickerson was a "childhood friend" of hers, but Nickerson testified that he had only known Reyes for "maybe a couple of years." Parker also noted inconsistencies across the testimony regarding who had been picked up first by Reyes and whether the occupants had stayed in the vehicle after the collision, or had gotten out and waited for the police and EMS while sitting on the curb.

Parker next wrote that the repair estimate of the Yukon included photographs of the Yukon that had been taken at the time the estimate was created. These photographs showed damage to the front bumper cover, the plastic lower shield panel, the front grille, the rear bumper cover, and the right tail lamp. All of the aforementioned parts required replacement. There was no structural damage to the Yukon, and no adjacent components such as the radiator, the air conditioning condenser, or the headlights required replacement or repair. Parker opined that there was "little discernable damage to the front end of the Yukon. The hood and grille appear undisturbed, with no buckling of the hood as designed for a frontal impact. Only some minor disruption is visible at the lower central section of the front bumper cover." The rear bumper cover and the right rear quarter panel had some minor longitudinal scratching and shallow denting visible; however, this damage was not consistent with any kind of collision, and because of the location of the damage, it was not consistent with the "claimed collision scenario." There were no repairs to be made on the left side of the Yukon. Parker went on to opine that the "lack of damage to the front end of the Yukon is consistent with at most a minor impact or bump into another vehicle or object. It is not

consistent with a 30+ mph impact into another vehicle such as the subject Chevrolet Impala."

Finally, Parker addressed the CDR report for the Yukon's EDR. The EDR was imaged on July 8, 2019, and there were no collision events stored in its memory. Parker submitted that "[f]rom comparison to the extent and nature of physical damage," it is likely that "[t]he incident that caused the damage to the Yukon was not of sufficient severity to induce a 5 mph" change in vehicle velocity so as to register a collision event in the EDR; alternatively, "[i]n the 3,157 miles of usage subsequent to the repair estimate, the ignition had been cycled at least 250 times," which would have reset the EDR. However, Parker opined that "from the combination of physical evidence and imaged EDR data, there is no evidence of a hit-and-run impact to the left rear or side of the subject Yukon. Any frontal impact into another object, such as the subject Chevrolet Impala, was very minor . . . ." Ultimately, Parker offered four opinions:

> With a reasonable degree of scientific certainty, my opinions regarding the above-captioned matter are as follows:
>
> 1. On December 2, 2018, Ms. Ferlita Reyes was reportedly operating the subject 2009 GMC Yukon SUV northbound on Evergreen Road in Detroit, Michigan, when the Yukon was impacted in the left rear side by another vehicle, which left the scene.
>
> 2. There was no evidence of damage, as documented in post-collision photographs and repair documents, and as confirmed during my inspection of the vehicle, to the rear or left side of the Yukon to support the claim of a first impact by a hit-and-run vehicle, causing a loss of control.
>
> 3. The minor level of relevant front-end damage to the subject GMC Yukon SUV, as documented in post-collision photographs and repair documents, and as confirmed

during my inspection of the vehicle, is consistent with at most a minor frontal impact with another object.

4. Significant discrepancies in vehicle occupant testimony reduces the veracity of that testimony.

Finally, defendant attached two Social Media Investigation Reports for two of the passengers: Curtis Houston and Kirshean Nelson. With respect to Houston, the investigation revealed:

On December 12, 2018, the subject posted a Facebook live video of himself in his car eating tacos. At the time stamp of approximately 3:07[,] he gets out of the vehicle and drops the phone. At the time stamp of approximately 5:30, he reentered the vehicle with an unknown male. During a conversation, the unknown male asked him "what was that --- you was talking about, that insurance shit?" He replied that he was trying to get a rental and put full insurance on it and stage a car accident and put 3 or 4 people in it. He stated that they all had to have the same story and make a claim and get a claim number and start taking them to therapy. Get $100 every Friday in pills. The unknown male said something that was unclear, and the subject replied, "bro done took me through it, I mean we done did it." He said, "this was the plan from the get-go, bro showed me the circles and give me the sauce and I get off his coattails and start making my own." He went on to discuss what exactly to say to the doctor to get stronger pills. He discussed how he has a girlfriend on the side, and he told her he needs an address with no car registered to it. He further stated he needs to find somewhere to get a cheap rental. He said get a 2014 with full coverage and "flip that bitch." He said he want[s] to try and keep it for two days and then roll it

> over. He then makes a joke "hit and run" with sound effects. He said how he gives someone $50.00 to smash a car. . . .
>
> * * *
>
> . . . On September 14, 2018, he posted "OK I got something good for y'all if anyone has been in a car accident in the past year inbox me asap. It's money in it 4 us." . . .

With respect to Nelson, the investigation revealed:

> Mr. Nelson bragged about money from selling drugs on multiple occasions. In a Facebook live video on March 12, 2019, he was seen counting out one-hundred[-]dollar bills and fanning the money. He then put a pill bottle up to the camera and stated over and over "they going to get me rich dumb ---." On March 5, 2018, the subject posted a Facebook live video and stated he was on his way to [the] city and would be "------- with those doctors in the morning." . . . On January 7, 2019, he posted "Who got good license an[d] wanna make ah 1000$$ hit by nbox No bs."

Defendant argued that these videos were evidence of a scheme or plan to defraud defendant by staging fake car crashes in order to defraud insurance companies, particularly in light of Parker's opinion that the collision at issue did not occur as stated by Reyes or the other occupants of the vehicle.

Moreover, defendant submitted that it had been tipped off that the collision was fraudulent by a pain-management doctor who had treated all of the occupants of the Yukon. Dr. Vinod Sharma, M.D., wrote a letter to defendant in March 2019 "indicating that he believed this was a fraudulent accident." Dr. Sharma also gave a statement on the record, in which he testified that he eventually discharged all six patients who had been in the Yukon because he had learned through the Michigan Automated Prescription System

that they were also treating with another pain-management physician. Dr. Sharma described the patients as "drug seeking" and "doctor shopping," meaning they were looking for doctors to prescribe them pain medications. Dr. Sharma recalled that when the patients were drug tested, all usually tested "negative for all medicines," and therefore, Dr. Sharma opined that they were not taking the prescribed pain medication, but selling it.

Defendant argued that the foregoing evidence, revealed through the discovery process, prompted its motion to amend its affirmative defenses under MCR 2.118(2) so that it could plead fraud with particularity. Defendant argued that its motion was timely and that plaintiff could not be surprised by its motion, given that that defendant had pleaded "cautionary affirmative defenses . . . from the outset," and therefore, "nobody involved in this case can be surprised or will be unfairly prejudiced by the amendment." Moreover, defendant argued, the amendment would not be futile: given the evidence, there could be little doubt that the collision had been staged, and Dr. Sharma's testimony revealed a clear motive.

Plaintiff opposed defendant's motion to amend, arguing that the trial court should find defendant waived fraud as an affirmative defense because defendant had failed to plead fraud with particularity in a responsive pleading (here, its answer to the complaint) as is required under MCR 2.111(F)(2).[3] First, plaintiff noted

[3] Plaintiff also argued that the interview of Dr. Sharma qualified as an ex parte interview, and under *Holman v Rasak*, 486 Mich 429, 442; 785 NW2d 98 (2010), defendant was required to give notice of the interview to plaintiff and seek entry of a HIPAA-compliant qualified protective order before attaching the interview transcript to its motion. See also MCL 600.2157; 45 CFR 164.512(e). Therefore, plaintiff argued, the trial court should strike defendant's motion to amend for failure to comply

that the majority of the documents relied on by defendant had been produced to plaintiff for the first time as exhibits to the motion to amend. Moreover, plaintiff argued, defendant's motion was untimely. Defendant had all the evidence it needed to move to amend several months earlier, but strategically chose to wait until right before the close of discovery. Plaintiff argued that the timing of defendant's motion showed bad faith because the delay denied plaintiff "the fair and reasonable notice necessary to rebut this defense."

The trial court held a hearing on defendant's motion where the parties argued consistently with their briefs. The trial court ultimately denied defendant's motion, reasoning:

> Based on the Court's review of the motion, the briefs attached there, I don't find that the defendant . . . has established a reasonable basis for their undue delay in bringing this motion before the Court. I was satisfied initially that they were at least put on notice in March of 2019 of the potential that fraud existed, and while I accept what's offered by counsel that Judge, it wasn't specific enough, and yes, we got this information, but it's not specific enough, so I'd assume from what's presented they started the investigation along those lines, but then in September of 2019, they do a deposition and I get that this is a treating physician, he was a treating physician when he sent the letter to [defendant] that said in my opinion, this person — he said a number of things, he even referred about drug-seeking, but more importantly, as it relates to the accident, that it was his opinion that this accident was staged, and that this may be a fraudulent claim. The

with federal and state privacy laws. The trial court did acknowledge that Dr. Sharma's interview qualified as an ex parte interview and thus falls within the purview of our Supreme Court's holding in *Holman*; however, the motion to amend was not denied on this basis.

> deposition happens in September of 2019, and what's one of the subject matters that's covered, this very correspondence.
>
> So the Court views that as this is a physician, who's a treating physician of one of the plaintiffs, who first brings this to [defendant's] attention in March of 2019, they subsequently depose this physician, and in the interim, they're not just doing nothing, they're starting to investigate in detail what's raised by this same physician, and then they depose him, and under oath, subject to perjury, he elicits — they elicit the same information or generally the same information.
>
> What I hear here today is that Judge, we were still investigating, we were determining and establishing with particularity that fraud existed. Well, I'm satisfied that on the information provided in March, and surely by the time they took the deposition in September and the information under oath coming forth again, that they had a basis to file at that time a motion to amend their affirmative defense, and they didn't do that.
>
> * * *
>
> I find that there was undue delay in this case. This motion is not timely. It would bring and be severely prejudiced to the plaintiffs at this point, and I haven't heard any reasonable excuse for more timely bringing this motion, and therefore this motion is denied.

An order denying defendant's motion for the reasons stated on the record was entered on February 10, 2020. This appeal followed.

II. STANDARD OF REVIEW

This Court reviews a trial court's decision on a motion to amend affirmative defenses for an abuse of discretion. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997). An abuse of discretion occurs when

the trial court's decision falls outside the range of reasonable and principled outcomes, or when the trial court makes an error of law. *Pioneer State Mut Ins Co v Wright*, 331 Mich App 396, 405; 952 NW2d 586 (2020).

III. ANALYSIS

Defendant's sole argument on appeal is that the trial court abused its discretion by denying its motion to amend its affirmative defenses to plead fraud with particularity. We agree.

Leave to amend "shall be freely given when justice so requires." MCR 2.118(A)(2). Amendment is generally a matter of right. *In re Kostin Estate*, 278 Mich App 47, 51-52; 748 NW2d 583 (2008).

> Ordinarily, a motion to amend a complaint should be granted, and should be denied only for the following particularized reasons: (1) undue delay, (2) bad faith or dilatory motive on the part of the movant, (3) repeated failure to cure deficiencies by amendments previously allowed, (4) undue prejudice to the opposing party by virtue of allowance of the amendment, or (5) futility of the amendment. [*Lane v KinderCare Learning Ctrs, Inc*, 231 Mich App 689, 697; 588 NW2d 715 (1998).]

"Michigan's procedural rules recognize and account for the fact that it may not be possible to plead fraud, or indeed anything else, with particularity at the commencement of a case. A party may move to amend its affirmative defenses at any time, and leave should be granted freely unless doing so would prejudice the other party." *Glasker-Davis v Auvenshine*, 333 Mich App 222, 230; 964 NW2d 809 (2020), citing *Southeast Mich Surgical Hosp, LLC v Allstate Ins Co*, 316 Mich App 657, 663; 892 NW2d 434 (2016); see also *Stanke v State Farm Mut Auto Ins Co*, 200 Mich App 307,

320-321; 503 NW2d 758 (1993). Indeed, MCR 2.118(C)(1) provides that amendments to conform to the evidence "may be made on motion of a party at any time, even after judgment," and MCR 2.111(F)(3) confirms that "[a]ffirmative defenses must be stated in a party's responsive pleading, either as originally filed or *as amended* in accordance with MCR 2.118." (Emphasis added.)

Here, defendant sought to amend its affirmative defenses to plead fraud with particularity with respect to fraud allegedly committed by Reyes, defendant's insured, when making the underlying claim for PIP benefits, in violation of an antifraud provision in the insurance contract between Reyes and defendant.

> A defense premised on an alleged violation of an antifraud provision in an insurance policy constitutes an affirmative fraud defense. *Baker v Marshall*, 323 Mich App 590, 597-598; 919 NW2d 407 (2018). "In allegations of fraud . . . , the circumstances constituting fraud . . . must be stated with particularity." MCR 2.112(B)(1). Thus, it is insufficient simply to state that a plaintiff's conduct was fraudulent. *Southeast Mich Surgical Hosp*, 316 Mich App [at] 663. [*Glasker-Davis*, 333 Mich App at 232.]

Being aware of this requirement, defendant moved to amend its affirmative defenses following the close of its investigation into Reyes's claim.

We conclude that the trial court abused its discretion by denying defendant's motion to amend its affirmative defenses to plead fraud with particularity on the basis that defendant's motion was untimely. "Delay, alone, does not warrant denial of a motion to amend." *Weymers*, 454 Mich at 659. A trial court must also find that the delay was the result of bad faith, or the opposing party suffered prejudice. *Id*. " 'Prejudice' within the meaning of MCR 2.118(C)(2) does not mean

the opposing party might lose on the merits or might incur some additional costs; rather, it means the opposing party would suffer an inability to respond that the party would not otherwise have suffered if the affirmative defense had been validly raised earlier." *Glasker-Davis*, 333 Mich App at 231, citing *Ostroth v Warren Regency, GP, LLC*, 263 Mich App 1, 5; 687 NW2d 309 (2004); *Southeast Mich Surgical Hosp*, 316 Mich App at 663-664; *Stanke*, 200 Mich App at 321-322.

In denying defendant's motion to amend as untimely, the trial court did not make a finding that defendant acted in bad faith; rather, the trial court found that defendant's delay resulted in prejudice to plaintiff. We cannot agree. In its original answer to the complaint, defendant did assert a fraud defense, pleading:

> Plaintiff's patient has made statements which do not comport with known facts. She has made, caused to be made, or submitted false statements in connection with this claim [that] would, therefore, bar her from recovering benefits. If discovery reveals any actionable fraud, [d]efendant will seek leave to amend its affirmative defenses to state a fraud or rescission defense with more particularity.

Indeed, in its first responsive pleading, defendant provided plaintiff with reasonable notice that it would be pursuing a fraud defense. Plaintiff claims that it suffered prejudice because the delayed motion to amend affected its "ability to address [defendant's] allegations of fraud" when it deposed those who allegedly committed the fraud. However, not only was plaintiff on notice that defendant would be pursuing a fraud defense, but it had counsel present at the depositions of Reyes and the other occupants of the Yukon. Notably, plaintiff does not claim that the proposed

amendment would prevent it from receiving a fair trial. *Weymers*, 454 Mich at 659. We conclude that plaintiff has not claimed prejudice sufficient to deny defendant's motion for leave to amend, and the trial court abused its discretion by finding otherwise.

We also briefly note that plaintiff argues that any amendment of defendant's affirmative defenses to plead fraud with particularity would be futile in light of *Haydaw v Farm Bureau Ins Co*, 332 Mich App 719, 723; 957 NW2d 858 (2020), in which this Court concluded that a fraud provision in a policy does "not apply to statements made during the course of litigation," and *Meemic Ins Co v Fortson*, 506 Mich 287; 954 NW2d 115 (2020), in which our Supreme Court held that fraud defenses are now limited to what is covered in the no-fault act and defenses available under common law. Plaintiff argues that this line of Michigan jurisprudence establishes that once an insurance policy is in place, fraud committed by the insured no longer may be grounds for rescinding the entire policy. Thus, defendant's "request for leave is now undisputedly futile as the defense it sought to employ is no longer available based upon the latest Supreme Court precedent." Plaintiff also submits that *Williams v Farm Bureau Mut Ins Co*, 335 Mich App 574; 967 NW2d 869 (2021) establishes the futility of any amendment to defendant's affirmative defenses. In *Williams*, this Court concluded: "*Meemic* held that antifraud provisions in no-fault policies apply to fraud in the inducement but not to allegations of postprocurement fraud. Accordingly, the policy provision on which [the] defendant and the trial court relied is 'invalid and unenforceable' to the degree a no-fault insurer seeks to apply it to allegations of postprocurement fraud in a claim under mandatory coverage[.]" *Id*. at 586-587.

Plaintiff's futility argument fails for two reasons. First, the line of cases on which plaintiff relies is procedurally distinguishable from this case. In *Haydaw*, *Meemic*, and *Williams*, the pleadings had been completed and litigation had proceeded to the summary-disposition phase. Comparatively, in this case, the discovery period had not yet expired when defendant moved to amend its affirmative defenses, and no motion for summary disposition had been filed by either party. Second, this case is factually distinguishable from *Haydaw*, *Meemic*, and *Williams*; in those cases, the insurers sought to rescind or void the subject insurance policies on the basis of allegations of fraud on the part of the insured. Here, defendant has not sought to rescind its policy. Rather, it is seeking to plead fraud with particularity in order to justify denial of claimed benefits. Unlike the insurer in *Williams*, in this case, defendant claims that "the evidence concerning the accident, injury, and treatment, . . . would be insufficient to qualify for PIP benefits." *Williams*, 335 Mich App at 577. Indeed, in *Williams*, this Court reiterated that "[a] fact-finder is free, and has always been free, to conclude that some or all of plaintiff's claimed benefits were properly denied by a defendant insurer." *Id*. at 586.

We reverse, vacate the trial court's February 10, 2020 order denying defendant's motion to amend its affirmative defenses to plead fraud with particularity, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

TUKEL, P.J., and JANSEN and CAMERON, JJ., concurred.

BARTALSKY v OSBORN

Docket No. 349317. Submitted October 7, 2020, at Detroit. Decided May 27, 2021, at 9:00 a.m. Leave to appeal denied 509 Mich 855 (2022).

Donald Bartalsky brought an action in the Oakland Circuit Court against Zachary Osborn, Kaitlyn Moug, Community Emergency Medical Services, Inc. (CEMS), and others, alleging claims of ordinary negligence and medical malpractice in connection with injuries he suffered when the stretcher on which he was being transported by emergency medical technicians Osborn and Moug fell over. The parties disagreed about the details of the incident, but they agreed that it occurred after the stretcher hit a piece of debris in the hospital parking lot while Osborn and Moug were transporting him to an ambulance in order to bring him to a rehabilitation clinic. Osborn, Moug, and CEMS moved for summary disposition under MCR 2.116(7), (8), and (10), arguing that under the emergency medical services act (EMSA), MCL 333.20901 *et seq*., unless defendants' acts or omissions were the result of gross negligence or willful misconduct, no liability would be imposed on them for providing services consistent with their licensure or training. The only other named defendant—William Beaumont Hospital—moved separately for summary disposition. The trial court, Shalina D. Kumar, J., granted Beaumont Hospital's motion, which plaintiff did not appeal, and also granted the remaining defendants' motion on the ground that these defendants were not subject to claims of negligence short of gross negligence under the EMSA, which plaintiff appealed.

The Court of Appeals *held*:

1. Under MCL 333.20965(1), unless an act or omission is the result of gross negligence or willful misconduct, the acts or omissions of certain individuals (including medical first responders, emergency medical technicians, emergency medical technician specialists, and paramedics) while those individuals are providing services to a patient under specified circumstances, do not impose liability in the treatment of a patient on those individuals or the life-support agency or an officer, member of the staff, or other employee of the life-support agency. It was uncon-

tested on appeal that Osborn and Moug were engaged in a covered occupation, that CEMS was covered as a life-support agency, and that plaintiff's injury occurred as Osborn and Moug were transporting plaintiff outside a hospital. The questions were whether defendants' acts or omissions occurred while providing services to a patient and in the treatment of a patient.

2. The EMSA does not define the term "services," but it does define "emergency medical services" in MCL 333.20904(4) to include the emergency medical services personnel, ambulances, medical first response vehicles, and equipment required for transport or treatment of an individual requiring medical first response life support, basic life support, limited advanced life support, or advanced life support. "Emergency medical services" is encompassed within the more general term "services," and as defined, it includes services involved in the transport or treatment of an individual. Because defendants provided transportation to plaintiff, they satisfied the "while providing services" condition of MCL 333.20965(1).

3. The term "treatment" does not include the transportation of a patient under MCL 333.20965(1). As persuasively explained in the dissenting opinion in *Griffin v Swartz Ambulance Serv*, unpublished per curiam opinion of the Court of Appeals, issued November 29, 2018 (Docket No. 340480), and the dissenting statements from the denial of leave to appeal that decision, 506 Mich 894 (2020), the EMSA uses the words "treatment" and "transport" repeatedly and in close conjunction to denote separate and distinct concepts. If the word "treatment" had been meant to include "transportation," the Legislature would not have used these words as separate terms in multiple places throughout the EMSA. To interpret the word "treatment" to include mere "transportation" for purposes of MCL 333.20965(1) would render the latter term meaningless and redundant in other parts of the EMSA. Under the EMSA, a covered individual must be, among other things, engaged "in the treatment of a patient" for the immunity provision to apply. Because plaintiff's ordinary-negligence and medical malpractice claims were premised on defendants' acts or omissions involved with his transportation in the hospital parking lot and not any treatment provided to him, the immunity for negligent acts or omissions under MCL 333.20965(1) did not apply to those claims.

Reversed and remanded for further proceedings.

JANSEN, J., dissenting, agreed that the issue in this case was whether the liability protection of MCL 333.20965(1) applies in settings involving nonemergency transportation, and she also

agreed that "emergency medical services" includes the "transport or treatment" of an individual. However, she would have concluded that, viewing MCL 333.20965(1) and MCL 333.20908(6) together, the liability protection in the EMSA applies to service providers such as defendants even if no emergency exists, and therefore she would have affirmed.

STATUTES — EMERGENCY MEDICAL SERVICES ACT — IMMUNITY FROM LIABILITY — TRANSPORTATION OF A PATIENT.

The emergency medical services act, MCL 333.20901 *et seq*., provides that unless an act or omission is the result of gross negligence or willful misconduct, the acts or omissions of certain individuals (including medical first responders, emergency medical technicians, emergency medical technician specialists, and paramedics) while those individuals are providing services to a patient under specified circumstances, do not impose liability in the treatment of a patient on those individuals or the life-support agency or an officer, member of the staff, or other employee of the life-support agency; transporting a patient qualifies as providing a service for purposes of MCL 333.20965(1) but does not qualify as treatment of that patient.

Wigod & Falzon, PC (by *Eric J. Rosenberg*) for plaintiff.

Blanco Wilczynski, PLLC (by *Orlando L. Blanco* and *Derek S. Wilczynski*) for defendants.

Before: SWARTZLE, P.J., and JANSEN and BORRELLO, JJ.

SWARTZLE, P.J. Defendants Zachary Osborn and Kaitlyn Moug are emergency medical technicians (EMTs) who work for defendant Community Emergency Medical Services, Inc. (CEMS). The two EMTs were transporting plaintiff Donald Bartalsky on a stretcher in a hospital parking lot, and plaintiff injured his hip when the stretcher fell over. Plaintiff sued defendants under theories of ordinary negligence and medical malpractice, but the trial court dismissed the claims under the immunity provision of the emergency medical services act (EMSA), MCL 333.20901 *et seq*.

On appeal, we conclude that the mere transportation of a patient is not sufficient to meet the requirement that the act or omission causing the injury occur "in the treatment of a patient" under MCL 333.20965(1). Accordingly, the EMSA's immunity for acts or omissions that do not rise to the level of gross negligence or willful misconduct does not apply here, and we reverse and remand for further proceedings consistent with this opinion.

I. BACKGROUND

This case arises from an injury that occurred in the parking lot of William Beaumont Hospital. Plaintiff needed transportation to the hospital for evaluation of a nonemergency condition. Osborn and Moug transported him to the hospital, where he was evaluated and discharged. After discharge, the EMTs began the process of returning plaintiff to his rehabilitation clinic. Defendants claim that, consistent with their training, the EMTs secured plaintiff "with a 5-point restraint system" and moved the stretcher in a "semi-Fowler" position. A semi-Fowler position is a clinical position in which a patient is placed on an ambulance stretcher or hospital bed on their back with the head and trunk raised to an angle between 15 and 45 degrees.

According to plaintiff, Osborn and Moug began to wheel him out, but "[w]hile still in the Beaumont parking lot," Osborn and Moug "caused the wheels on the stretcher to hit some debris," causing the stretcher to "tip over" and plaintiff's left shoulder and hip to strike the pavement. Plaintiff alleges that Osborn and Moug "were further negligent in somehow (unwittingly) enabling the already injured Plaintiff to fall a second time on the concrete." In contrast, defendants

claim that "as the two EMTs were transferring their patient from the ER to the ambulance on a stretcher, one of the stretcher wheels came in contact with debris in the ambulance bay and began to tip." Defendants assert that "the EMTs were able to maintain a grip of the stretcher when it tipped, mitigating the impact with the pavement," but that "[a]fter Plaintiff disregarded the instructions of the two EMTs to remain on the ground while they attended to the stretcher, he stood up and fell to the ground, striking his left side on the pavement" and breaking his left hip. The parties' differing factual accounts of the incident were not resolved below and are not pertinent to the critical issue on appeal.

Plaintiff sued defendants, alleging both negligence and professional malpractice, but not gross negligence. Defendants moved for summary disposition based on the argument that, under MCL 333.20965(1) and (1)(d), unless the acts or omissions of a licensed EMT and life-support agency are the result of gross negligence or willful misconduct, no liability will be imposed on them for providing services consistent with their licensure or training. The trial court agreed and dismissed plaintiff's claims against defendants, and plaintiff appealed. The trial court also dismissed several claims against other defendants, though these are not the subject of this appeal.

II. ANALYSIS

A. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999). Defendants moved the trial court for summary disposition

under MCR 2.116(C)(7) (immunity), (8) (failure to state a claim), and (10) (no genuine issue of material fact). The trial court granted the motion on the ground that defendants were not subject to claims of negligence short of gross negligence under the EMSA, thus indicating that it granted summary disposition under MCR 2.116(C)(7) or (8).

In reviewing a trial court's decision under MCR 2.116(C)(7), we consider the record evidence to determine whether the defendant is entitled to immunity. *Poppen v Tovey*, 256 Mich App 351, 353-354; 664 NW2d 269 (2003). In contrast, "[a] motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone." *Smith v Stolberg*, 231 Mich App 256, 258; 586 NW2d 103 (1998). In this appeal, however, the specific facts necessary to resolve the matter are not in dispute, and therefore the question before us focuses on the legal meaning of the immunity provision of the EMSA.

When construing a statute, we do not defer to the construction adopted by a trial court or administrative agency. *Stirling v Leelanau Co*, 336 Mich App 575, 578 & n 2; 970 NW2d 910 (2021). Rather, we review the matter de novo. *Id*. at 578 n 2, 579. When doing so, we are required to give effect to the Legislature's intent. *Van Buren Co Ed Ass'n v Decatur Pub Sch*, 309 Mich App 630, 643; 872 NW2d 710 (2015). "The Legislature is presumed to intend the meaning clearly expressed, and this Court must give effect to the plain, ordinary, or generally accepted meaning of the Legislature's terms." *D'Agostini Land Co LLC v Dep't of Treasury*, 322 Mich App 545, 554; 912 NW2d 593 (2018). "Only when ambiguity exists does the Court turn to common canons of construction for aid in construing a statute's meaning." *Id*. at 554-555.

B. PURPOSE AND SCOPE OF THE IMMUNITY PROVISION OF THE EMSA

The focus of our review on appeal is the immunity provision found in MCL 333.20965(1) of the EMSA. The provision reads in relevant part:

> Unless an act or omission is the result of gross negligence or willful misconduct, the acts or omissions of a medical first responder, emergency medical technician, emergency medical technician specialist, paramedic, medical director of a medical control authority or his or her designee, or . . . an individual acting as a clinical preceptor of a department-approved education program sponsor while providing services to a patient outside a hospital, in a hospital before transferring patient care to hospital personnel, or in a clinical setting that are consistent with the individual's licensure or additional training required by the medical control authority . . . or consistent with an approved procedure for that particular education program do not impose liability in the treatment of a patient on those individuals or any of the following persons:
>
> * * *
>
> (d) The life support agency or an officer, member of the staff, or other employee of the life support agency.

Our Supreme Court has recognized that the Legislature enacted the EMSA "to (1) provide for the uniform regulation of emergency medical services, and (2) limit emergency personnel's exposure to liability." *Jennings v Southwood*, 446 Mich 125, 133; 521 NW2d 230 (1994). As the Court elaborated in *Jennings*, "Before the statutory immunity, emergency personnel were liable for their ordinary negligence. The Legislature, dissatisfied with this situation, enacted the EMSA limiting liability to situations of gross negligence or wilful misconduct." *Id*. at 134. Thus, by enacting the EMSA, "the Legisla-

ture intended to shield emergency medical personnel from the very liability they were previously exposed to—liability for ordinary negligence." *Id*.

Plaintiff does not dispute that Osborn and Moug qualify as EMTs under MCL 333.20965(1) and that CEMS qualifies as a life-support agency under Subdivision (d). Moreover, the parties contend, and we agree, that Osborn and Moug were transporting plaintiff when they wheeled him on the stretcher from the hospital toward the ambulance. The parties disagree, however, on whether immunity applies to covered persons and entities even in situations involving "nonemergency transportation" of a patient. Related to this, the parties spend considerable time and resources focused on whether plaintiff's injury occurred during an emergency or nonemergency circumstance. And yet, as we explain, the key question on appeal is whether "transportation" alone—emergency or otherwise—qualifies for immunity under MCL 333.20965(1) of the EMSA.

We begin with the specific text of MCL 333.20965(1). The provision lists the occupations that are subject to immunity: "a medical first responder, emergency medical technician, emergency medical technician specialist, paramedic, medical director of a medical control authority or his or her designee, or . . . an individual acting as a clinical preceptor of a department-approved education program sponsor." This list of covered occupations is followed by a description of the location where services are provided: "outside a hospital, in a hospital before transferring patient care to hospital personnel, or in a clinical setting." The statute sets forth two additional, necessary conditions before immunity will attach: the act or omission must occur "while providing services to a patient" and "in the treatment of a patient."

As noted, there is no question on appeal that Osborn and Moug were engaged in a covered occupation, nor is there a question that CEMS is likewise covered as a life-support agency. Similarly, it is not contested that plaintiff's injury occurred as Osborn and Moug were transporting plaintiff outside a hospital. Our focus thus turns to whether defendants have satisfied the remaining two relevant conditions for immunity here—did their acts or omissions occur (1) "while providing services to a patient" and (2) "in the treatment of a patient"?

Considering the first of these two conditions, the term "services" is not defined in the EMSA. The act does, however, include a definition for "emergency medical services." MCL 333.20904(4). A fair reading of the statute leads to the conclusion that the more specific term "emergency medical services" is encompassed within the more general term "services." The EMSA defines "emergency medical services" to include "the emergency medical services personnel, ambulances, . . . medical first response vehicles, and equipment required for *transport or treatment* of an individual requiring medical first response life support, basic life support, limited advanced life support, or advanced life support." MCL 333.20904(4) (emphasis added). Assuming for purposes of this appeal that there is at least a question of fact whether plaintiff would qualify as an "individual requiring medical first response life support, basic life support, limited advanced life support, or advanced life support," it is clear from the statutory definition that "emergency medical services" includes services involved in the "transport or treatment" of that individual. Because defendants unquestionably provided transportation to plaintiff, they would appear to have satisfied the "while providing services" condition of MCL 333.20965(1). Thus, if the statute provided that covered

persons and entities (like defendants) were immune from liability for acts or omissions involving ordinary negligence solely "while providing services" to a patient in a covered location, then immunity would appear to extend to acts or omissions involving transportation of a patient (like plaintiff).

But as previously noted, the statute does not stop at the requirement that the covered individual be engaged in "providing services." The statute further limits immunity to only the acts or omissions of a covered person "in the treatment of a patient." MCL 333.20965(1). Therefore, even though defendants may have engaged in acts or omissions "while providing services" to plaintiff, we must consider whether these acts or omissions further qualify as "treatment" under MCL 333.20965(1).

C. DOES "TREATMENT" ENCOMPASS "TRANSPORT" UNDER THE EMSA?

Neither the term "treatment" nor the term "transport" is defined in the EMSA, nor is there a relevant definition for either term elsewhere in the Public Health Code, MCL 333.1101 *et seq*. See, e.g., MCL 333.13807(10) (defining "transport" solely in the context of medical waste). "When terms are not expressly defined anywhere in the statute, they must be interpreted on the basis of their ordinary meaning and the context in which they are used." *Bloomfield Twp v Kane*, 302 Mich App 170, 174-175; 839 NW2d 505 (2013) (cleaned up). A dictionary may be consulted as one tool in the interpreter's toolbox; "[h]owever, recourse to dictionary definitions is unnecessary when the Legislature's intent can be determined from reading the statute itself." *Id*. at 175 (cleaned up). In other words, if the meaning of a statutory term is plain from the text and context of the statute itself, resort to a dictionary is unnecessary.

During the proceedings before the trial court, defense counsel urged that court to take instruction about the meaning of MCL 333.20965(1) from several unpublished decisions of this Court, including *Griffin v Swartz Ambulance Serv*, unpublished per curiam opinion of the Court of Appeals, issued November 29, 2018 (Docket No. 340480). Although we do not ordinarily consider unpublished opinions, see MCR 7.215(C)(1), we do so here because we find *Griffin* to be especially instructive, see *Hicks v EPI Printers, Inc*, 267 Mich App 79, 87 n 1; 702 NW2d 883 (2005).

In *Griffin*, an EMT who was driving an ambulance was involved in an auto accident while transporting the plaintiff to a hospital for medical treatment. *Griffin*, unpub op at 1. The auto accident caused a delay in treating the plaintiff's original injury, and that delay resulted in the need to amputate a portion of the plaintiff's leg. *Id*. at 1-2. The panel majority observed that "MCL 333.20965(1) does not distinguish between emergency and nonemergency situations," noted that "MCL 333.20908(6) defines a 'patient' as 'an emergency patient or a nonemergency patient,' " and concluded that the EMSA does not "impose a condition that only services offered by first responders in emergency situations are entitled to immunity." *Id*. at 4. The panel additionally noted that "MCL 333.20965(1)(d) extends the immunity granted by the act to an ambulance service." *Id*. at 3. The majority considered a dictionary definition of the term "treatment" and concluded that the meaning of the term was not "limited to actual medical services rendered to patients being transported by ambulance," but included "the handling of a patient in an ambulance or techniques customarily applied when caring for ambulance patients, consistent with the training of first responders," including an ambulance driver. *Id*. at 4.

Judge MICHAEL J. KELLY dissented from the majority opinion in *Griffin*. In his dissent, Judge M. J. KELLY consulted a different dictionary and determined that the term "treatment" did not include the transport of a patient. *Id*. (M. J. KELLY, J., dissenting) at 2. He noted that the immunity provided by the statute applies only to actions taken "in the treatment of a patient," and he observed that, when the plaintiff in that case was injured, the ambulance driver was not actively attending to the plaintiff, but was merely driving the ambulance. *Id*. Because no negligent "treatment" was alleged in that case, Judge M. J. KELLY concluded that the immunity provided in MCL 333.20965(1) did not apply. *Id*.

The plaintiff in *Griffin* subsequently filed an application for leave to appeal in our Supreme Court, which held oral arguments on the application. Ultimately, the Supreme Court denied the application for leave to appeal. *Griffin v Swartz Ambulance Serv*, 506 Mich 894 (2020). Justice ZAHRA (joined by Justice MARKMAN) and Justice VIVIANO issued dissenting statements to the order denying the application for leave to appeal. Justice ZAHRA expressed the opinion that transportation of a patient is not included in the scope of the term "treatment" as contemplated by MCL 333.20965(1), *id*. (ZAHRA, J., dissenting) at 897-899, and Justice VIVIANO would have granted leave to consider whether the term "treatment" is ambiguous, *id*. (VIVIANO, J., dissenting) at 899. Neither of these positions, however, was adopted by a majority of the Supreme Court, which declined to express an opinion regarding the extent of the immunity from liability granted by the statute. *See id*. (order of the Court) at 894.

We need not delineate comprehensive, exhaustive meanings of the terms "treatment" and "transport" to

resolve the current appeal. We agree with the parties that defendants were transporting plaintiff within the meaning of the EMSA, and, therefore, we need go no further with that term. As for the term "treatment," we agree with the observations of Justices ZAHRA and VIVIANO that, were we to consult various dictionaries, it is possible that the term might include some form of transportation. See *id*. (ZAHRA, J., dissenting) at 897; *id*. (VIVIANO, J., dissenting) at 900-901. We decline to rely on dictionary definitions, however, for two reasons. First, as Justice ZAHRA noted, "the use of lay dictionaries on this subject is not helpful." *Id*. (ZAHRA, J., dissenting) at 897. Generally speaking, "[a] dictionary definition states the core meanings of a term. It cannot delineate the periphery." Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), p 418. None of the dictionary definitions of the term "treatment" cited in the various *Griffin* analyses explicitly includes the word "transport" or a related term. Even if the term "treatment"—commonly understood to include "all the steps taken to effect a cure of an injury or disease," *Black's Law Dictionary* (5th ed)—could be construed to encompass some kind of transportation in some circumstance, the kind and circumstance would be, at best, near the periphery of any ordinary understanding of the term "treatment."

Second and more importantly for this appeal, a fair reading of the EMSA confirms that the term "transport" means something different than the term "treatment" under the act. As Justice ZAHRA noted in his dissent, the EMSA repeatedly "uses the words 'treatment' and 'transport' in close conjunction, yet clearly denoting *separate and distinct* concepts." *Id*. (ZAHRA, J.,

dissenting) at 897. For example,

> [a]n "ambulance operation," as defined by MCL 333.20902(5), "means a person licensed under this part to provide *emergency medical services and patient transport*, for profit or otherwise." "Emergency medical services" are defined under MCL 333.20904(4) as "the emergency medical services personnel, ambulances, nontransport prehospital life support vehicles, aircraft transport vehicles, medical first response vehicles, *and equipment required for transport or treatment of an individual* requiring medical first response life support, basic life support, limited advanced life support, or advanced life support." In this way, the EMSA uses the word "treatment" and then, *separately*, uses the word "transport" to describe different functions of equipment used to provide varying degrees of life support. Thus, as far as "emergency medical services" under MCL 333.20902(5) are concerned, "treatment" is not synonymous with "transport"—even if neither term is defined by statute. Turning back to the statutory definition provided for "ambulance operations," one should note that "emergency medical services"—which includes the equipment *used for* treatment and transport of individuals—is separate from "patient transport." [*Id*. at 897.]

There are other instances where "transport" and "treatment" are used to denote separate and distinct concepts in the EMSA. See MCL 333.20969 (discussing whether an individual has the capacity to object "to treatment or transportation"); MCL 333.20925 (distinguishing between treatment and transportation with regard to police dogs); cf. MCL 333.20921(4)(b) (discussing "patient transport" as distinct from a form of treatment, "life support to that patient"). As Justice ZAHRA summarized in his dissent:

> If the word "treatment" had been meant to include "transportation," the two would not have been used as separate terms in multiple places throughout the EMSA. To interpret the word "treatment" to include mere "transportation" for purposes of MCL 333.20965(1) would render the

> latter term meaningless and redundant in other parts of the EMSA. [*Griffin*, 506 Mich at 899 (citations omitted).]

Based on our review of the EMSA, we agree with the analyses of Judge M. J. KELLY and Justice ZAHRA in their respective *Griffin* dissents that the act uses the terms "treatment" and "transport" to mean different activities. The activities could occur at the same time, e.g., a patient could be transported in an ambulance while being provided with medical treatment, but the activities remain conceptually separate. Under the EMSA, a covered individual must be, among other things, engaged "in the treatment of a patient" for the immunity provision to apply. MCL 333.20965(1). Therefore, because plaintiff's ordinary-negligence and medical malpractice claims are premised on defendants' acts or omissions involved with his transportation in the hospital parking lot and not any treatment provided to him, the immunity for negligent acts or omissions under MCL 333.20965(1) does not apply to those claims.

III. CONCLUSION

With the EMSA, the Legislature provided immunity to EMTs and other covered persons and entities for certain acts or omissions that do not rise to the level of gross negligence or willful misconduct. But to qualify for immunity, a defendant must show, among other things, that the act or omission occurred "in the treatment of a patient." MCL 333.20965(1). This requirement is fatal to defendants' claim of immunity here because, as the record makes clear, the EMTs were merely transporting plaintiff in a stretcher across a hospital parking lot. While defendants argue that public policy supports a broader meaning of the term "treatment," the EMSA treats the term "transport" as

separate and distinct from the term "treatment." It is for the Legislature, not this Court, to decide whether defendants have the better public-policy argument.

Reversed and remanded for further proceedings. We do not retain jurisdiction. Plaintiff, having prevailed in full, may tax costs under MCR 7.219(F).

BORRELLO, J., concurred with SWARTZLE, P.J.

JANSEN, J. (*dissenting*). I would conclude that the trial court correctly granted summary disposition in favor of defendants because they came under the Emergency Medical Service Act's (EMSA) provision for immunity from negligence claims, even though the activities underlying plaintiff's claims involved no emergency, and thus I respectfully dissent.

There is no factual dispute in this case regarding whether an emergency existed at the time of the accident underlying plaintiff's claim. Therefore, I agree with the majority that the issue in this case is whether the liability protection of MCL 333.20965(1) applies in settings involving nonemergency transportation. I also agree with the majority's reading of MCL 333.20965(1) that "emergency medical services" includes the "transport or treatment" of an individual. However, I would conclude that the next question becomes whether the EMSA applies to service providers, such as defendants, when no emergency exists.

In my view, where MCL 333.20965(1) lays out protections for "a medical first responder, emergency medical technician, emergency medical technician specialist," or a "paramedic," it is not describing protected activities, but rather protected occupations. The express or implied references to emergency responders refer to those practitioners generally, including their

nonemergency duties. MCL 333.20965(1) then goes on to specify covered activities, beginning with "providing services to a patient outside a hospital." The parties agree that "providing services" for the purposes of MCL 333.20965(1) means providing "emergency medical services," which is defined by MCL 333.20904(4) to include "the emergency medical services personnel, ambulances, . . . medical first response vehicles, and equipment required for transport or treatment of an individual requiring medical first response life support, basic life support, limited advanced life support, or advanced life support."

Plaintiff maintains that he did not require life support during the time in question. However, MCL 333.20902(6) broadly defines the term "basic life support" as "patient care that may include any care an emergency medical technician is qualified to provide by emergency medical technician education that meets the educational requirements established by the [Department of Licensing and Regulatory Affairs] . . . or is authorized to provide by the protocols established by the local medical control authority . . . for an emergency medical technician." This definition covers the gamut of what an EMT might be required to do in their profession, when responding to emergencies or otherwise, including transportation of patients.[1] Moreover, MCL 333.20908(6) defines "patient" as "an emergency patient or a nonemergency patient." Like this Court concluded in *Griffin v Swartz Ambulance Serv*, unpub-

[1] In my view, because so many of defendants' duties involve transportation of patients in various scenarios, emergency or otherwise, to draw a hard line between "transportation" and "treatment" rewrites the statute and creates distinctions that do not exist and were not intended by our Legislature. The treatment of a patient encompasses the transportation of that patient, and thus transportation in both emergency and nonemergency situations is covered by the EMSA.

lished per curiam opinion of the Court of Appeals, issued November 29, 2018 (Docket No. 340480), p 4, I would conclude that when MCL 333.20965(1) and MCL 333.20908(6) are viewed together, the Legislature did not "impose a condition that only services offered by first responders in emergency situations are entitled to immunity." Therefore, I would affirm.

GOVERNOR v BOARD OF STATE CANVASSERS

Docket Nos. 354474, 354475, 354582, 354583, 354794, 354795, and 354878. Submitted April 14, 2021, at Lansing. Decided May 27, 2021, at 9:05 a.m. Leave to appeal denied 508 Mich 980 (2021).

These consolidated cases arose when the Board of State Canvassers approved six petitions seeking the recall of Governor Gretchen Whitmer and one petition seeking to recall Lieutenant Governor Garlin Gilchrist II. The petitions to recall the Governor were chiefly based on her signing of several executive orders intended to minimize the effects of the COVID-19 pandemic in Michigan, and the petition to recall the Lieutenant Governor was based on his having signed a bill in the Governor's absence that amended a law relating to insurance producer licenses. The Governor and Lieutenant Governor appealed the approval of these petitions.

The Court of Appeals *held*:

1. Recall petitions are governed in part by Const 1963, art 2, § 8, which requires the Legislature to enact laws to provide for recalling elective officers and also specifies that the sufficiency of any statement of reasons or grounds procedurally required is a political rather than a judicial question. Before 2012, Michigan appellate courts generally held that the reasons supporting a recall petition had to be stated with adequate clarity to prevent abuse of the elective franchise, but the standard of review for clarity of recall petitions was lenient, a detailed statement of the charges against an officeholder was not required, and truth was not a consideration in determining the clarity of recall petition language because that determination was a political consideration for the voters. Subsequently, the Legislature enacted 2012 PA 417, which modified some existing provisions of the Michigan Election Law, MCL 168.1 *et seq*., and added MCL 168.951a. This provision requires that a recall petition state factually and clearly each reason for the recall, that each reason be based on the officer's conduct during their current term of office, and that recall petitions be submitted to the Board of State Canvassers for a determination whether each reason for the recall stated in the petition is factual and of sufficient clarity to enable the officer whose recall is sought and the electors to identify the course of

conduct that is the basis for the recall. In *Hooker v Moore*, 326 Mich App 552 (2018), the Court of Appeals held that the Legislature used the term "factually" in MCL 168.951a to ensure that the grounds set forth in a recall petition are stated in terms of a factual occurrence, but noted that the Legislature did not specify that the reason for the recall stated in the petition must be truthful and that Const 1963, art 2, § 8 reserves the determination of the sufficiency or validity of the stated reason for recall to the electors.

2. Whether the reasons presented in recall petitions are sufficiently clear under the 2012 amendments to the Michigan Election Law is reviewed de novo, which is consistent with the appellate standard of review for the existence of ambiguity in statutory and contractual language. Whether a recall petition misrepresents legislation or other textual authority presents a factual question that is reviewed for clear error under MCR 2.613(C).

3. In Docket No. 354474, the Board of State Canvassers did not err by approving the recall petition based on the Governor's issuance of Executive Order 2020-143 on July 1, 2020, closing indoor service at bars. First, the reference to "bars" did not render the petition unclear. Any person invited to sign the petition would likely have envisioned a reference to establishments like nightclubs and restaurants that serve alcoholic beverages. Second, MCL 168.951a(1)(c), which prohibits the misrepresentation of the content of specific legislation that forms the basis of a recall petition, applies only to legislation, not to executive orders. Although certain executive orders effectively become legislation if the Legislature does not timely object, the executive order at issue in this appeal was not in this category and therefore was not subject to the requirements of MCL 168.951a(1)(c). Third, the board did not err by approving the petition because it describes only a single act and not a course of conduct. MCL 168.951a(3) provides that the board must determine whether each reason for the recall stated in the petition is sufficiently clear to enable the officer whose recall is sought and the electors to identify the course of conduct that is the basis for the recall. Although a "course of conduct" is statutorily defined in the context of criminal stalking to require two or more separate noncontinuous acts evidencing a continuity of purpose, this definition was not instructive or conclusive when applied to the relevant provisions of the Michigan Election Law. MCL 168.951a(1)(c) recognizes that the reason for a proposed recall may be based on the officer's conduct in connection with specific legislation, implying no need

to distinguish an isolated act from a series of actions. Accordingly, "conduct" in this context may be a course of conduct or a single action.

4. In Docket No. 354475, the board did not err by approving the petition to recall the Governor on the basis that she signed Executive Order 2020-38, which temporarily extended certain statutory deadlines to facilitate COVID-19 emergency response efforts. The petition was not required to name more than a single act to meet the "course of conduct" requirement of 168.951a(3), and the prohibition in MCL 168.951a(1)(c) on misrepresenting the content of legislation that forms the basis of a recall petition does not apply to executive orders. Further, the fact that the petition stated that the order was signed on April 1, 2020, when it was actually signed on April 5, 2020, did not render the petition so unclear as to require its invalidation. This case was remanded to the Board of State Canvassers to allow appellee Brenda LaChapelle to correct the error.

5. In Docket No. 354583, the board did not err by approving the petition to recall the Governor on the ground that she had signed Executive Orders 2020-04 and 2020-67, relating to declarations of emergency. The executive orders were not subject to the requirements of MCL 168.951a(1)(c). Further, the fact that the Governor's name and title were not repeated within the wording of the reason for the recall did not constitute a reason to reject the petition because her name and office appeared in the space for that information provided on the petition form approved by the Director of Elections.

6. In Docket No. 354794, the board did not err by approving the petition to recall the Governor on the ground that she had signed Executive Order 2020-50, which related to COVID-19 protocols in nursing homes. The petition was not required to name more than a single act to meet the "course of conduct" requirement of 168.951a(3), and the prohibition in MCL 168.951a(1)(c) on misrepresenting the content of legislation that forms the basis of a recall petition does not apply to executive orders. Further, the Governor's screenshot of the petition that contained a random series of characters as the result of a word-processing irregularity was not persuasive given that the normal characters appeared when the image size was increased and that the Governor's own brief attached a copy of the petition with no irregular characters included.

7. In Docket No. 354795, the board did not err by approving the petition to recall the Governor on the grounds that she had signed Executive Order 2020-50, which related to protecting

residents and staff of long-term care facilities from COVID-19; that she had signed Executive Order 2020-17, which temporarily restricted nonessential medical and dental procedures; and that during a news conference she had made certain comments about a rally. The petition was not required to describe a course of conduct rather than a single act, restate the name of the officer whose recall was sought, or conform to the requirements of MCL 168.951a(1)(c). Further, the accuracy of the Governor's statement was a matter for the electorate to decide; the allegedly indiscernible description of Executive Order 2020-50 was actually the order's own subtitle; and the use of the term "long-term care facility" did not render the petition unclear, nor did the inadvertent repetition of the word "on."

8. In Docket No. 354878, the board did not err by approving the petition to recall the Governor on the ground that she had signed Executive Orders 2020-11, 2020-160, and 2020-69. The petition was not required to describe a course of conduct rather than the individual acts of signing the executive orders, nor was it required to describe the content of the executive orders named in the petition.

9. In Docket No. 354582, the board did not err by approving the petition to recall the Lieutenant Governor on the ground that he had signed a certain law while the Governor was out of the country. The petition was not required to describe a course of conduct as opposed to an individual act, restate the name of the officer whose recall was sought, or describe the contents of the bill that the Lieutenant Governor signed.

Docket Nos. 354474, 354475, 354583, 354794, 354795, and 354878 affirmed; Docket No. 354475 affirmed but remanded for the ministerial purpose of allowing appellee to correct a scrivener's error.

RONAYNE KRAUSE, J., concurring, agreed with the results reached by the majority in each case as well as most of the majority's reasoning. However, she believed that *Hooker* was wrongly decided because its interpretation of MCL 168.951a violated the plain language of the statute, contravened the spirit of Const 1963, art 2, § 8, undermined the Supreme Court's historical analysis of the purposes to be served by recall statements, and rendered the Legislature's enactment almost entirely nugatory. She would instead have construed MCL 168.951a as imposing a mandate to ensure that statements in recall petitions are not untruthful, which she stated was consistent with the constitutional reservation of the sufficiency of a recall petition to the electors and the historical goal of ensuring that the electors

are able to make intelligent and informed decisions. Accordingly, she would have decided Docket No. 354795 on different grounds and would have declared a conflict with *Hooker* pursuant to MCR 7.215(J)(2).

1. STATUTES — MICHIGAN ELECTION LAW — RECALL PETITIONS — STANDARDS OF REVIEW.

Whether the reasons presented in a petition to recall an elective officer pursuant to MCL 168.951 are sufficiently clear under MCL 168.951a is reviewed de novo; whether a recall petition misrepresents legislation or other textual authority presents a factual question that is reviewed for clear error under MCR 2.613(C).

2. STATUTES — MICHIGAN ELECTION LAW — RECALL PETITIONS — EXECUTIVE ORDERS.

MCL 168.951a(1)(c), which prohibits the misrepresentation of the content of specific legislation that forms the basis of a petition to recall an elective officer pursuant to MCL 168.951, applies only to legislation; it does not apply to executive orders.

3. STATUTES — MICHIGAN ELECTION LAW — RECALL PETITIONS — WORDS AND PHRASES — "COURSE OF CONDUCT."

MCL 168.951a(3) provides that the Board of State Canvassers must determine whether each reason stated in a petition to recall an elective officer pursuant to MCL 168.951 is sufficiently clear to enable the officer whose recall is sought and the electors to identify the course of conduct that is the basis for the recall; "course of conduct" for purposes of this provision may consist of a single action.

4. STATUTES — MICHIGAN ELECTION LAW — RECALL PETITIONS — NAME AND OFFICE OF OFFICIAL.

A petition to recall an elective official pursuant to MCL 168.951 need not repeat the name and office of that official within the wording of the reason for the recall if the name and office appear in the space for that information provided on the petition form approved by the Director of Elections.

5. STATUTES — MICHIGAN ELECTION LAW — RECALL PETITIONS.

A petition to recall an elective official pursuant to MCL 168.951 on the ground that they signed legislation or an executive order need not describe the contents of the legislation or order at issue.

Clark Hill PLC (by *Christopher M. Trebilcock* and *Vincent C. Sallan*) and *Dykema Gossett PLLC* (by *Steven C. Liedel* and *Gary P. Gordon*) for Governor Gretchen Whitmer and Lieutenant Governor Garlin Gilchrist II.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Erik A. Grill* and *Heather S. Meingast*, Assistant Attorneys General, for the Board of State Canvassers.

Before: JANSEN, P.J., and RONAYNE KRAUSE and GADOLA, JJ.

JANSEN, P.J. Each of these seven consolidated by-right appeals[1] calls for judicial review, in accordance with the Michigan Election Law, MCL 168.1 *et seq*., as amended by 2012 PA 417. In each case, the Board of State Canvassers approved for circulation petitions calling for the recall of appellants, Governor Gretchen Whitmer and Lieutenant Governor Garlin Gilchrist II.

In Docket Nos. 354474, 354475, 354583, 354794, 354795, and 354878, Governor Whitmer challenges petitions calling for her recall because of executive orders that she signed that were intended to minimize the impact of the COVID-19 pandemic on the state of Michigan. We affirm the Board of State Canvassers in these six cases. However, in Docket No. 354475, we remand for the ministerial purpose of allowing appellee, Brenda LaChappelle, to correct the scrivener's error in setting forth the date on which the executive order at issue was signed.

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[1] See *Governor v Bd of State Canvassers*, unpublished order of the Court of Appeals, entered January 8, 2021 (Docket Nos. 354474, 354475, 354582, 354583, 354794, 354795, and 354878).

In Docket No. 354582, Lieutenant Governor Gilchrist challenges a petition prepared in response to his having signed, while the Governor was abroad, 2019 HB 4044, resulting in the enactment of 2019 PA 124, which, among other things, amended the criteria for denying, suspending, or placing on probation insurance producer licenses set forth in MCL 500.1239. We affirm the Board of State Canvassers in this appeal.

I. BACKGROUND

We will address each of the petitions filed in turn. However, we find it necessary to first give a brief overview of the relevant jurisprudence concerning recall petitions. Const 1963, art 2, § 8, states:

> Laws shall be enacted to provide for the recall of all elective officers except judges of courts of record upon petition of electors equal in number to 25 percent of the number of persons voting in the last preceding election for the office of governor in the electoral district of the officer sought to be recalled. The sufficiency of any statement of reasons or grounds procedurally required shall be a political rather than a judicial question.

The Governor and Lieutenant Governor argue generally that the challenged petitions in these cases did not adequately describe the authorities cited as reasons for the recall. Those parties rely on *Wallace v Tripp*, 358 Mich 668; 101 NW2d 312 (1960), and *Noel v Oakland Co Clerk*, 92 Mich App 181, 187-188; 284 NW2d 761 (1979). In *Noel*, this Court, citing *Wallace*, stated that, although "the sufficiency of the reasons in a recall petition is an electoral rather than a justiciable question, . . . the reasons . . . must be stated with adequate clarity . . . to prevent abuse of the elective franchise by ensuring deliberate and *informed* action by those called upon to sign . . . , while . . . affording the

official . . . some minimal due process . . . ." *Noel*, 92 Mich App at 187-188, citing *Wallace*, 358 Mich at 676-678, and MCL 168.966, repealed by 2012 PA 417.

In *Dimas v Macomb Co Election Comm*, 248 Mich App 624, 627-628; 639 NW2d 850 (2001), this Court, citing then-current provisions of the Michigan Election Law, stated:

> The standard of review for clarity of recall petitions has been described as both "lenient," and "very lenient." Thus, recall review by the courts should be very, very limited. A meticulous and detailed statement of the charges against an officeholder is not required. It is sufficient if an officeholder is apprised of the course of conduct in office that is the basis of the recall drive, so that a defense can be mounted regarding that conduct. Where the clarity of the reasons stated in the petition is a close question, doubt should be resolved in favor of the individual formulating the petition. [Quotation marks and citations omitted.]

Similarly, in *Donigan v Oakland Co Election Comm*, 279 Mich App 80; 755 NW2d 209 (2008), this Court held that "truth itself is not a consideration in determining the clarity of recall petition language" because "[s]uch a determination is a political question for the voters, not the courts," and it further held that the "same principle applies with regard to whether the language of the petition sufficiently explains the nature of any legislation referred to within it," *id*. at 83-84 (quotation marks and citations omitted).

After *Dimas* and *Donigan* were issued, the Legislature enacted 2012 PA 417, which modified various provisions of the Michigan Election Law and added to it MCL 168.951a. The latter's Subsection (1) sets forth the requirements for a recall petition, including, under Subdivision (c), that it "[s]tate factually and clearly each reason for the recall" and that each reason "be based upon the officer's conduct during his or her current term

of office," and it adds that "[i]f any reason for the recall is based on the officer's conduct in connection with specific legislation, the reason for the recall must not misrepresent the content of the specific legislation." Subsection (2) requires submission of a recall petition to the Board of State Canvassers. Subsection (3) calls for the Board to meet and "determine . . . whether each reason for the recall stated in the petition is factual and of sufficient clarity to enable the officer whose recall is sought and the electors to identify the course of conduct that is the basis for the recall," and, if answering any of those questions negatively, to reject the entire petition. Subsection (6) states that "[t]he determination by the board of state canvassers may be appealed" in this Court "by the officer whose recall is sought or by the sponsors of the recall petition drive . . . ."

An article in the Michigan Bar Journal summarized some of the effects of the new legislation:

> On December 27, 2012, Public Act 417 took immediate effect, substantially changing the way in which elected officials are recalled in Michigan. The amendments clarify and make more uniform the process for recalling elected officials. Uniformity is accomplished by creating consistency in interpretation, placing recalls for all statewide (and some county) officeholders before the same body, requiring that the reasons stated for the recall be factual, and specifying the periods during which a recall petition may be circulated, precluding multiple, simultaneous recall petitions, etc.
>
> To address concerns regarding inconsistent application of the Michigan Election Law, the 2012 amendments now require petitions seeking the recall of public officials to be submitted to the Board of State Canvassers before being circulated. The board is a constitutionally created commission responsible for canvassing petitions and election results, conducting recounts, and administering elections in Michigan. . . .

> The 2012 amendments also added a factuality requirement so that a petition must now state the reasons for recall both "factually and clearly." Although the grounds for recall remain a political question, for the sake of avoiding voter confusion in the present climate of relentless (and often intentionally misleading) political advertisements, the legislature commanded that the ballot language itself must be both factual and clear. [Hanselman, *Total Recall: Balancing the Right to Recall Elected Officials with the Orderly Operation of Government*, 93 Mich Bar J 34, 36 (January 2014) (citations and footnote omitted).]

This Court has held that "the Legislature included the terms 'factual' and 'factually' in MCL 168.951a to ensure that the grounds set forth in a recall petition are stated in terms of a factual occurrence." *Hooker v Moore*, 326 Mich App 552, 559; 928 NW2d 287 (2018). Although the statute requires that a reason for recall "be stated in the form of a factual assertion about the official's conduct," it "does not specify . . . that the reason for the recall stated in the petition must be truthful." *Id*. This is because such a requirement would involve an inquiry into the sufficiency or validity of the reason stated, which our state Constitution "plainly reserves . . . to the electors . . . ." *Id*., citing Const 1963, art 2, § 8.

These consolidated appeals occasion further application of the Michigan Election Law, as amended by 2012 PA 417.[2]

II. STANDARD OF REVIEW

"[A]n elected officer whose recall is sought may appeal a determination by the Board [of State Canvassers] in this Court for a determination concerning

[2] The Michigan Election Law, including certain provisions of 2012 PA 417, was also amended by 2018 PA 190, but not in ways bearing on any of the issues raised in these appeals.

whether the reasons stated in the petition are factual and of sufficient clarity." *Hooker*, 326 Mich App at 555, citing MCL 168.951a(6). We acknowledge that the Governor and the Lieutenant Governor have asked this Court to "clarify and confirm the standard of review applicable to recall petitions after the 2012 amendments to the Michigan Election Law[.]" We agree that the standard of review requires clarification, and we now confirm that this Court reviews questions of clarity of reasons presented in recall petitions de novo, which is consistent with the appellate standard of review for the existence of ambiguity in statutory language, *Hooker*, 326 Mich App at 558-559, or in contractual language, see *Barton-Spencer v Farm Bureau Life Ins Co of Mich*, 500 Mich 32, 39; 892 NW2d 794 (2017). Additionally, we confirm that the issue of misrepresentation of legislation, or other textual authority, presents a factual question that we review for clear error. See MCR 2.613(C).

III. ANALYSIS

A. DOCKET NO. 354474

In Docket No. 354474, James Makowski submitted a recall petition to the Board of State Canvassers to recall the Governor, citing the fact that "Gretchen Whitmer issued Executive Order 2020-143 on July 1, 2020 closing indoor service at bars." On appeal, the Governor argues that "while the reason in the Petition is stated as a fact, the Board [of State Canvassers] erred in concluding that the stated reason was . . . sufficiently clear, did not misrepresent the content of the executive order referenced in the Petition, and described a course of conduct by Governor Whitmer." Thus, according to the Governor, the Board of State Canvassers erred by approving the subject recall petition for circulation.

Executive Order 2020-143 is subtitled "Closing indoor service at bars." It summarizes the history of related executive orders, including judicial challenges; invokes statutory and constitutional authority for each executive action; and recites continuing concerns for the spread of COVID-19. The order then states:

> [T]his order closes bars and nightclubs for indoor service in those regions that are in Phase 4 of the Michigan Safe Start Plan. Restaurants can remain open for indoor service, but alcohol can be served only to patrons who are seated at socially distanced tables. Common areas where people stand and congregate within restaurants must be closed. Restaurants and bars may remain open for outdoor seating, but only for seated customers at socially distanced tables.

The order then sets forth several enumerated paragraphs of particulars regarding restrictions imposed and facilities or services implicated. Executive Order 2020-143 was rescinded by Executive Order 2020-160 effective July 31, 2020.

The Governor first argues that the petition lacks clarity because it uses ambiguous and undefined terms, particularly with its reference to "bars." The Governor argues that the word "bars" is ambiguous because dictionaries define a "bar" not only as an establishment that sells alcoholic beverages, but also as a counter at which food or beverages are served, or a shop that sells nonalcoholic beverages, such as coffee. The Governor maintains that where "electors are left to guess at [the] type of 'bar' the Petition refers to, the Petition lack[s] sufficient clarity and is noncompliant with the Michigan Election Law." We reject this argument. Any person invited to sign the petition would very likely envision a reference to conventional taverns, where people can purchase and consume alcoholic beverages, when faced with the wording "closing

indoor service at bars." This is particularly so when the word is taken in context, used as it is in connection with the related terms "nightclubs" and "restaurants," strongly suggesting that the term "bars" refers to establishments, like nightclubs and many restaurants, that serve alcoholic beverages.

The Governor next argues that the petition language misrepresents Executive Order 2020-143 by stating only generally that the order closed indoor service at bars, when in fact the order was much more particular in its scope. Indeed, MCL 168.951a(1)(c) states that "[i]f any reason for the recall is based on the officer's conduct in connection with specific legislation, the reason for the recall must not misrepresent the content of the specific legislation." However, this appeal—and, with the exception of Docket No. 354582, all the other consolidated appeals—involves executive orders, not legislation.

Recently, albeit in an unpublished and thus nonbinding opinion,[3] this Court concluded as follows: "We hold that MCL 168.951a(1)(c) does not apply to the executive order descriptions because they are not legislation." *Governor v Bd of State Canvassers*, unpublished per curiam opinion of the Court of Appeals, issued December 3, 2020 (Docket No. 353878), p 4. We agree with this Court's previous determination and affirm it now. We specifically affirm the following conclusion of this Court:

> Although certain limited executive orders effectively become legislation when the Legislature does not timely object, *Aguirre v Michigan*, 315 Mich App 706, 715 n 4; 891

[3] See MCR 7.215(C)(1), which provides that unpublished decisions of this Court are not precedentially binding under principles of stare decisis. They may, however, be consulted as persuasive authority. *Hicks v EPI Printers, Inc*, 267 Mich App 79, 87 n 1; 702 NW2d 883 (2005).

> NW2d 516 (2016), those are limited to executive orders transferring powers between executive branch departments, or creating new departments. Const 1963, art 5, § 2. See *Mich Mut Ins Co v Dir, Dep't of Consumer and Indus Servs*, 246 Mich App 227, 236-237; 632 NW2d 500 (2001). The listed executive orders did not transfer statutory duties amongst executive departments, and were not issued pursuant to Const 1963, art 5, § 2. [*Bd of State Canvassers*, unpub op at 4 n 1.]

Thus, we conclude that Executive Order 2020-143 is not legislation, and therefore it is not subject to the requirements found in MCL 168.951a(1)(c). Accordingly, we reject the Governor's challenge to the petition on the basis that the petition contains misrepresentations of the scope of Executive Order 2020-143.

Finally, the Governor argues that the petition fails to put forth a valid reason for the recall because it describes only a single act and not a course of conduct. Again, we disagree. MCL 168.951a(3) provides, in relevant part, that the Board of State Canvassers must "determine . . . whether each reason for the recall stated in the petition is . . . of sufficient clarity to enable the officer whose recall is sought and the electors to identify the course of conduct that is the basis for the recall." The Governor argues that "the Legislature did not require mere 'conduct'," but rather "a 'course of conduct' with respect to recall petitions, meaning that a single action (such as the signing of one executive order) would not meet the requirements of the Michigan Election Law."

In support of her position, the Governor cites the aggravated stalking statute, MCL 750.411i(1)(a), which defines a "course of conduct" as "a pattern of conduct composed of a series of 2 or more separate noncontinuous acts evidencing a continuity of purpose." However, we conclude that the definition of stalking in the Michi-

gan Penal Code, MCL 750.1 *et seq*., which by its nature involves more than an isolated unwelcome gesture, is not instructive or conclusive in the present application.

Indeed, MCL 168.951a(1)(c) includes, among the requirements for a recall petition, that each stated reason for recall must be "based upon the officer's conduct during his or her current term of office" and recognizes that the reason may be "based on the officer's conduct in connection with specific legislation," implying no need to distinguish an isolated act from a series of actions. Accordingly, we conclude that targeted "conduct" for that purpose may be a course of conduct or a single action. Further, because MCL 168.951a(3) refers to Subsection (1) in the course of directing the Board of State Canvassers to review petitions for conformance with Subsection (3), we will not add to those requirements. See *Ally Fin Inc v State Treasurer*, 502 Mich 484, 493; 918 NW2d 662 (2018) (stating that statutory interpretation requires examination of the statute "as a whole, reading individual words and phrases in the context of the entire legislative scheme," and that therefore this Court must consider the text "in view of its structure and of the physical and logical relation of its many parts") (quotation marks and citations omitted). On the basis of the foregoing, we conclude that the term "course of conduct" as used in Subsection (3) is neither a limitation on grounds for recall nor a requirement for petition language. Rather, the requirement that the Board of State Canvassers review the reasons stated in recall petitions for clarity is broadly worded in order to cover a succession of related actions along with individual actions.

Moreover, we briefly note the Governor's argument that the signing of a single executive order constitutes a single act, as opposed to a course of conduct, and thus

cannot be the basis for a recall petition, would mean reading the challenged petition language so literally as to exclude from consideration any action that the Governor took in connection with the issuance of the order cited but for signing her name (e.g., research, consultations, or deliberations leading up to the signing of the order). If the use of the term "course of conduct" in MCL 168.951a(3) disqualifies isolated actions as legitimate reasons for a recall, presumably few of a Governor's official acts would qualify, and such a result cannot stand.[4]

On the basis of the foregoing, we conclude that the Board of State Canvassers correctly approved the petition at issue in this appeal.

B. DOCKET NO. 354475

In Docket No. 354475, Brenda LaChappelle submitted a recall petition to the Board of State Canvassers to recall the Governor, citing Executive Order 2020-38. The sole reason provided by LaChappelle for recalling the Governor was that "Gretchen Whitmer signed [E]xecutive [O]rder 2020-38 (Covid-19) on April 1, 2020." On appeal, the Governor raises several of the same arguments we rejected in Docket No. 354474.

Executive Order 2020-38 was signed by the Governor on April 5, 2020, and is subtitled "Temporary extensions of certain FOIA deadlines to facilitate COVID-19 emergency response efforts." Executive Or-

[4] Additionally, were we to accept the Governor's position that a single act does not constitute a "course of conduct" that may form the basis of a recall petition, this would, for example, immunize an elected official who might accept a single bribe from being recalled for that conduct. That cannot be a plausible understanding of the relevant constitutional and statutory provisions.

der 2020-38 was rescinded by Executive Order 2020-112 effective June 11, 2020.

Citing MCL 168.951a(3), the Governor argues that the challenged petition is deficient because it mentions the signing of a single executive order, failing to describe a "course of conduct." The parties also disagree on whether the requirement in MCL 168.951a(1)(c) that a petition referencing specific legislation must not misrepresent that specific legislation extends to executive orders. For the reasons previously stated, we reject the Governor's argument that a petition must describe a course of conduct as opposed to an individual act, and we conclude that MCL 168.951a(1)(c) does not extend to the executive orders at issue in these appeals.

We do, however, find it necessary to address the Governor's argument that LaChappelle's failure to list the correct signing date of Executive Order 2020-38 violates the requirement of MCL 168.951a(1)(c) that recall reasons be stated "factually." This issue is unpreserved because it was not raised below. However, this Court retains the authority to decide an unpreserved issue if it concerns a question of law and all the facts necessary for its resolution have been presented. *Vushaj v Farm Bureau Gen Ins Co of Mich*, 284 Mich App 513, 519; 773 NW2d 758 (2009). Unpreserved claims of error are reviewed for plain error affecting substantial rights. *Cove Creek Condo Ass'n v Vistal Land & Home Dev, LLC*, 330 Mich App 679, 696; 950 NW2d 502 (2019).

Indeed, the statute requires that a reason for a recall "be stated in the form of a factual assertion about the official's conduct," but "not . . . that the reason . . . be truthful." *Hooker*, 326 Mich App at 559. Stating that the Governor signed an executive order on a specified date is a factual assertion, whether or not the date specified

is correct. The Governor argues that "[t]he effective dates of laws and regulations are a material term," and because the sole reason for recall misstates the signing date of the executive order cited in the petition, it must "be rejected as non-compliant under the Michigan Election Law." We disagree and conclude that mistaking the date as the first day, instead of the fifth day, of a particular month was not sufficiently wayward to invalidate the petition on the ground that the reason for recall is not clear. Indeed, if the petition had said "on *or about* April 1" instead of "on April 1, 2020," few would be concerned that referring to a date four days ahead of the mark would cause any confusion for the electors or the Governor concerning which executive order, an order that was correctly identified by its number, prompted the recall petition.

Because a plain error has been exposed, we remand this matter to the Board of State Canvassers for the ministerial task of allowing LaChappelle to correct what should be deemed a mere scrivener's error. See *People v Gioglio (On Remand)*, 296 Mich App 12, 17; 815 NW2d 589 (2012), vacated in part on other grounds 493 Mich 864 (2012) ("This Court is an error-correcting court that has broad authority to take corrective action with regard to lower court proceedings."); MCR 7.216(A)(1) (this Court may "exercise any or all of the powers of amendment of the trial court or tribunal"); MCR 7.216(A)(4) (this Court may permit corrections or additions to the transcript or record); and MCR 7.216(A)(7) (this Court may "enter any judgment or order or grant further or different relief as the case may require").

On the basis of the foregoing, we conclude that the Board of State Canvassers correctly approved the petition at issue in this appeal.

C. DOCKET NO. 354583

In Docket No. 354583, Chad Baase submitted a petition to the Board of State Canvassers to recall the Governor, providing as reasons for the recall that the Governor had "sign[ed] Executive Order 2020-04, Declaration of Emergency, on March 10, 2020, and also for signing Executive Order 2020-67, Declaration of state of emergency under the Emergency Powers of the Governor Act, 1945 PA 302, on April 30, 2020." On appeal, the Governor claims that the Board of State Canvassers erred by approving the petition for circulation, arguing that the recall reasons provided do not name the officer whose recall is sought, and do not adequately describe the legislation to which they refer.

First, we reject the Governor's argument that the petition does not adequately describe the legislation to which it refers, because we concluded in Docket No. 354474 that MCL 168.951a(1)(c) does not extend to the executive orders at issue in these appeals.

We also reject the Governor's argument that the petition did not adequately identify the officer whose recall is sought. The Governor argues that the provision in MCL 168.951a(1)(c) that "[e]ach reason for the recall must be based upon the officer's conduct during his or her current term of office" and the requirement in MCL 168.951a(3) that the Board of State Canvassers determine "whether each reason for the recall stated in the petition is factual and of sufficient clarity to enable the officer whose recall is sought and the electors to identify the course of conduct that is the basis for the recall" require that each reason set forth in a recall petition must independently identify the officer involved. The Governor argues that the petition should have been invalidated because, although she was identified by name and title in the petition form

where it called for that information, Baase did not repeat her name and title within the wording of the reason for the recall. We reject this argument as it is unpersuasive.

Baase used the petition form approved by the Director of Elections. As this Court has previously noted, "[n]othing within MCL 168.951a(3) precludes the Board [of State Canvassers] from considering the information before the word 'reason(s)' when deciding whether the reasons for recall are clear," and "[e]lectors will read the entire sentence, which includes the officer's name and title," when considering the petition. *Bd of State Canvassers*, unpub op at 3. Indeed, the approved form was designed to highlight the name and office involved in the recall effort, and not to require unnecessary repetition of that basic information within each separately stated reason for recall. We therefore conclude that the petition is not to be reviewed as narrowly as the Governor suggests and that the Board of State Canvassers did not err by considering the entire petition when considering whether to approve it.

On the basis of the foregoing, we conclude that the Board of State Canvassers correctly approved the petition at issue in this appeal.

D. DOCKET NO. 354794

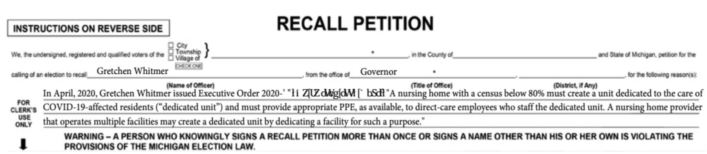
In Docket No. 354794, James Makowski submitted a petition to the Board of State Canvassers to recall the Governor, giving as a reason for the recall:

> In April, 2020, Gretchen Whitmer issued Executive Order 2020-50, which required, in part, "A nursing home with a census below 80% must create a unit dedicated to the care of COVID-19-affected residents ("dedicated unit") and must provide appropriate PPE, as available, to direct-

> care employees who staff the dedicated unit. A nursing home provider that operates multiple facilities may create a dedicated unit by dedicating a facility for such a purpose."

The salient feature of this appeal is that the Governor asserts that some nonsensical or indecipherable characters appear within the petition language: "The Petition, as submitted, only states that Governor Whitmer 'issued Executive Order 2020.' What follows is a series of indiscernible ellipses/dots followed by a quote[.]" The Governor follows this assertion with a graphic representing a detail of her reproduction of the petition, featuring what appears to be a random array of gray dots separating "Gretchen Whitmer issued Executive Order 2020-" and " 'A nursing home.' " The Board of State Canvassers retorts that "[t]he copy of the recall petition attached to her brief as Exhibit 1, however, does identify the order by number and does not include any ellipses."

For context, we provide a screenshot of the document in question:


INSTRUCTIONS ON REVERSE SIDE

RECALL PETITION

We, the undersigned, registered and qualified voters of the ☐ City ☐ Township ☐ Village of (CHECK ONE) } ________ , in the County of ________ and State of Michigan, petition for the calling of an election to recall Gretchen Whitmer (Name of Officer), from the office of Governor (Title of Office), ________ (District, if Any), for the following reason(s):

In April, 2020, Gretchen Whitmer issued Executive Order 2020-' "li Z[UZ dWg[dM [` bSdl "A nursing home with a census below 80% must create a unit dedicated to the care of COVID-19-affected residents ("dedicated unit") and must provide appropriate PPE, as available, to direct-care employees who staff the dedicated unit. A nursing home provider that operates multiple facilities may create a dedicated unit by dedicating a facility for such a purpose."

FOR CLERK'S USE ONLY

WARNING – A PERSON WHO KNOWINGLY SIGNS A RECALL PETITION MORE THAN ONCE OR SIGNS A NAME OTHER THAN HIS OR HER OWN IS VIOLATING THE PROVISIONS OF THE MICHIGAN ELECTION LAW.

It appears that the gibberish of which the Governor complains is but an occasional irregularity bound up with the processing of electronic documents. The Board of Canvassers' own advocacy suggests that it never encountered the puzzling stray characters, and our review of the record in this case turned up no indication that the Board's deliberations were hampered by, or even included any acknowledgment of, any such irregularity. Indeed, when tasked with experimenting with

the zoom level, this Court determined that normal prose came into view where gibberish had earlier appeared.

We conclude that although the Governor relied on the appearance of a string of nonsensical characters to support her challenge to the clarity of the petition language, the Governor's hasty conclusion about this word-processing irregularity does not compel reading the petition as featuring some gibberish in place of several normal characters that appear the rest of the time.

The Governor further argues that the petition at issue is deficient because it mentions the signing of a single executive order rather than a course of conduct. The parties also again disagree on whether the requirement in MCL 168.951a(1)(c) that a petition referring to specific legislation must not misrepresent that specific legislation extends to executive orders. For the reasons stated earlier, we reject the Governor's argument that a petition must describe a course of conduct as opposed to an individual act, and we conclude that MCL 168.951a(1)(c) does not extend to the executive orders at issue in these appeals.

On the basis of the foregoing, we conclude that the Board of State Canvassers correctly approved the petition at issue in this appeal.

E. DOCKET NO. 354795

In Docket No. 354795, Michael Garabelli submitted a petition to the Board of State Canvassers to recall the Governor, giving the following as a reason for the recall:

> 1) For signing in April of 2020, Executive Order 2020-50, Enhanced protections for residents and staff of long-term care facilities during the COVID-19 pandemic 2) For

> saying the following regarding a question about the April 15, 2020 rally, "Operation Gridlock," during an April 13, 2020 News Conference on COVID-19: "I hope that as people are looking at social media they are dispelling and taking on the dissemination of demonstrably inaccurate information. I also would just say, I think it is this group is funded in a large part by the DeVos family and I think it's really inappropriate for a sitting member of the United States President's cabinet to be waging political attacks on any governor, but obviously on me here at home." 3) For signing in March of 2020, Executive Order 2020-17, Temporary restrictions on on [sic] non-essential medical and dental procedures, which included the following language: "A plan for a covered facility that performs medical procedures should exclude from postponement surgeries related to advanced cardiovascular disease (including coronary artery disease, heart failure, and arrhythmias) that would prolong life; oncological testing, treatment, and related procedures; pregnancy-related visits and procedures; labor and delivery; organ transplantation; and procedures related to dialysis."

On appeal, the Governor claims the Board of State Canvassers erred by approving the petition for circulation because the recall reasons provided do not themselves name the officer whose recall is sought, the petition does not describe a course of conduct, the second reason stated in the petition presents a misquotation and otherwise lacks clarity, and the first and third reasons do not adequately describe the legislation to which they refer.

First, for the reasons stated earlier, we reject the Governor's arguments that a petition must describe a course of conduct and that the petition did not adequately identify the officer whose recall is sought, and we conclude that MCL 168.951a(1)(c) does not extend to the executive order at issue in this appeal. Next, we address the Governor's argument that the petition includes misquotations and otherwise lacks clarity.

The Governor attacks the reasons for the recall petition on the grounds that the petition misquotes what she said at a press conference. The Governor offers this side-by-side comparison:

Quote from Transcript	*Text Included in the Petition*
"I also would just say I think this group is funded in large part by the DeVos family. I think it's really inappropriate to, for a sitting number of the United States President's Cabinet, to be waging political tax on any governor. Obviously, I'm me here at home."	I also would just say, I think it is this group is funded in a large part by the DeVos family and I think it's really inappropriate for a sitting member of the United States president's cabinet to be waging political attacks on any governor, but obviously on me here at home.

The Governor also invites the reader to search for the pertinent audio at <https://www.rev.com/blog/transcripts/michigan-governor-gretchen-whitmer-press-conference-transcript-april-13> [https://perma.cc/D6GB-TDHE]. However, the Governor thus encourages this Court to engage in precisely the sort of review for accuracy that our state Constitution reserves to the electorate. See *Hooker*, 326 Mich App at 559-560, citing Const 1963, art 2, § 8. Accordingly, we decline to entertain this argument on the ground that only the electorate is legally competent to decide such things.[5]

Next, the Governor challenges the clarity of the first recall reason on the ground that, after specifying an executive order and its approximate signing date, "What follows is an indiscernible series of words" such that "[i]t is not clear . . . whether these words are the Petition sponsor's attempts at summarizing the content of Executive Order 2020-50 or something else entirely." In fact, the words thus challenged, "Enhanced protections for residents and staff of long-term care facilities during the COVID-19 pandemic," quote

[5] It furthermore appears obvious to us that the written transcript of the Governor's remarks is error-riddled—"number" vs "member" and "political tax" vs "political attacks"—and that the petition is very likely a more accurate representation of what the Governor actually said.

the subtitle of the order verbatim. We conclude that contrary to the Governor's position, the context of those words suggests that they describe the executive order just cited. The Governor additionally argues that this wording lacks clarity because it uses technical terms defined in the specified order, but not in the reason itself—namely, "long-term care facility," for which Executive Order 2020-50 incorporates by reference a statutory definition, which in turn implicates "home for the aged" and "adult foster care facility" as statutorily defined. We conclude that a reference to the familiar concept of "long-term care facilities" is not rendered unclear when offered as part of the general description of the impact of an executive order, even though the actual legal implementation of the order naturally requires carefully defining the particulars of that general term. Indeed, "long-term care facility" joins such familiar terms as "driving under the influence," "child abuse," and "power of attorney" as not being rendered unclear by the existence of precise statutory definitions that comport with common understandings while refining the terminology for legal application.

The Governor argues that the third reason for recall lacks clarity because of the repetition of the word "on" in its introductory sentence, on the ground that "[i]t is unclear to electors whether the use of 'on' twice is mere accident by the Petition's sponsor or whether it is part of the Executive Order referenced." However, it appears to this Court that the repeated "on" was obviously mere inadvertence, and the typographical error was acknowledged in the proceedings below. Moreover, because in the original petition the sentence wraps around to the next line after the first "on," we cannot conclude that many readers would even notice the repetition. It is likely that any reader who might notice

would recognize the obvious inadvertence, without concern for whether the stenographic mishap originated with the petitioner or with the executive order at issue. Regardless, the Governor does not suggest any alternative and misleading reading that would result from thinking the repeated "on" intentional, and we cannot think of any. Accordingly, any reader who might think the repeated "on" intentional might ponder the peculiar usage, but would not glean from it any misapprehension of what is actually being conveyed.[6]

On the basis of the foregoing, we conclude that the Board of State Canvassers correctly approved the petition at issue in this appeal.

F. DOCKET NO 354878

In Docket No. 354878, John Parkinson submitted three petitions to the Board of State Canvassers to recall the Governor, giving as reasons for the recall that the Governor "signed [E]xecutive [O]rder 2020-11 on March 16, 2020," that the Governor "signed [E]xecutive [O]rder 2020-160 on July 29, 2020," and that the Governor "signed [E]xecutive [O]rder 2020-69 on April 30, 2020." On appeal, the Governor claims the Board of State Canvassers erred by approving the petitions for circulation because none of the petitions describe a course of conduct and the petitions misrepresent by omission the executive orders specified because the petitions only cite the executive orders at issue rather than describing the contents of the orders.

[6] The Governor further protests that "without either fixing the error or clarifying that this is part of the Executive Order, the third reason for recall is not sufficiently clear and should result in the entire Petition being rejected." We admit to feeling some astonishment that the Governor's advocate would endeavor to attach so much significance to a repeated preposition.

On the basis of the reasons provided earlier, we first reject the Governor's argument that the petitions were deficient for failing to describe a course of conduct. Next, the Governor argues that the petitions failed to describe the executive orders in sufficient detail because they provide only the executive order numbers and no information regarding the content of the executive orders. It is possible that some potential signers would decline to sign the petitions in light of the complete lack of information about the substance of the targeted executive orders. However, neither the members of the Board of State Canvassers nor this Court have been asked to decide whether they personally would be satisfied to sign a petition of such weighty significance when it bears such limited information. In MCL 168.951a(1)(c), the Legislature demanded only that the reasons for recall be presented factually and clearly and that attendant legislation must not be misrepresented. Accordingly, just as Const 1963, art 2, § 8 leaves the truth behind reasons for recall to the voters to decide, the Legislature has left the sufficiency of the information provided for the potential petition signers to decide. By adding MCL 168.951a to the Michigan Election Law, the Legislature only minimally expanded the information requirements for recall petitions. MCL 168.951a(1)(c) does not call on petitioners to describe the pertinent legislation or executive order in detail, and therefore occasions no revision of the rule that a petition need not "fully explain the nature and effect" of the matter at issue. *Donigan*, 279 Mich App at 84. The Governor's insistence that more information is needed than a bare citation of the executive orders at issue implies a duty of elaboration that is without statutory foundation.

On the basis of the foregoing, we conclude that the Board of State Canvassers correctly approved the petitions at issue in this appeal.

G. DOCKET NO. 354582

In Docket No. 354582, Chad Baase submitted to the Board of State Canvassers a petition to recall the Lieutenant Governor, giving as a reason for the recall that the Lieutenant Governor "SIGN[ED] HOUSE BILL 4044 INTO LAW ON NOVEMBER 21, 2019 WHILE GOVERNOR GRETCHEN WHITMER WAS IN ISRAEL." On appeal, the Lieutenant Governor argues that the Board of State Canvassers erred by approving the petition for circulation because the petition does not identify the officer whose recall is sought, the petition fails to describe a "course of conduct" because it only refers to the singular act of signing a piece of legislation, and the petition does not adequately describe the legislation to which it refers. We disagree.

For context, we note that "HOUSE BILL 4044" refers to 2019 HB 4044, which was signed and enacted into law as 2019 PA 124. Among other things, it amended the criteria for denying, suspending, or placing on probation insurance producer licenses set forth in MCL 500.1239. It also limited the consideration of felony convictions for this purpose to those committed "within 10 years before the uniform application was filed," MCL 500.1239(1)(d), with certain exceptions, and added the criteria now set forth in Subsection (1)(i) and Subsection (2). Thus, the recall petition at issue in Docket No. 354582 does not pertain to the Governor's or the Lieutenant Governor's response to the COVID-19 pandemic.

For the reasons stated earlier, we reject the Lieutenant Governor's argument that a petition must describe a course of conduct as opposed to an individual act. Likewise, for the reasons stated earlier, we reject the Lieutenant Governor's arguments that the petition for his recall is deficient because he was only identified in the petition form where it called for that information but not in the wording of the reason for the recall and that the petition was deficient for failing to describe the contents of 2019 HB 4044.

On the basis of the foregoing, we conclude that the Board of State Canvassers correctly approved the petition at issue in this appeal.

IV. CONCLUSION

In Docket Nos. 354474, 354475, 354583, 354794, 354795, 354878, and 354582, we affirm. However, in Docket No. 354475, we remand for the ministerial task of allowing LaChappelle to correct the scrivener's error in setting forth the date on which the executive order at issue was signed. We do not retain jurisdiction.

GADOLA, J., concurred with JANSEN, P.J.

RONAYNE KRAUSE, J. (*concurring*). I concur in the result reached by the majority, and for the most part, I also concur with the majority's reasoning. I write separately because, with respect to my esteemed colleagues, I believe that *Hooker v Moore*, 326 Mich App 552; 928 NW2d 287 (2018), was wrongly decided in part. Were I not constrained by MCR 7.215(J)(1) to follow *Hooker*, I would disagree with the manner in which the majority addresses the petition in Docket No. 354795. I would declare a conflict with *Hooker* pursuant to MCR 7.215(J)(2). Nonetheless, even if I

were free not to follow *Hooker*, I would independently arrive at the same outcome, because I do not find the quotation from the Governor's press conference untruthful within the meaning of my reading of MCL 168.951a. Furthermore, I would also continue to agree with the majority as to the petition in Docket No. 354475, because I would not consider an obvious scrivener's error to be the kind of inaccuracy that should invalidate a petition.

I. LEGAL BACKGROUND

As the majority thoroughly and thoughtfully outlines, Const 1963, art 2, § 8 reserves to the electors whether any stated basis for a recall is a *sufficient* basis. Our Supreme Court held, in an early case, that the purpose of stating the reason or reasons for a recall was to "furnish information to the electors on which they may form a judgment when called upon to vote." *Newberg v Donnelly*, 235 Mich 531, 534; 209 NW 572 (1926). Our Supreme Court further explained that although the statement needed to be "sufficiently clear," it did not need "technical proof." *Eaton v Baker*, 334 Mich 521, 525; 55 NW2d 77 (1952). Our Supreme Court later overruled these decisions in part, explaining that its past decisions had erroneously created other restrictions that did not comport with the language of the Constitution or any extant statute, but it reaffirmed that the purpose of the statement in a recall petition "was to have the issue over the conduct of the officer informatively presented to both prospective petition signers and recall voters" pursuant to the importance placed upon "the proper functioning of an intelligent and informed electorate." *Wallace v Tripp*, 358 Mich 668, 676, 680; 101 NW2d 312 (1960).

This Court's jurisprudence, however, did not seem to entirely follow that mandate. It was generally understood that recall petitions needed to be stated with a reasonable degree of clarity when read as a whole, and the laypersons drafting such petitions were not obligated to provide extensive detail. See *Schmidt v Genesee Co Clerk*, 127 Mich App 694, 699-700; 339 NW2d 526 (1983). However, this Court emphasized that the clarity of a petition did not turn on its truthfulness, and the courts were only to review a petition's clarity. See *Mastin v Oakland Co Elections Comm*, 128 Mich App 789, 793-794; 341 NW2d 797 (1983); *Meyers v Patchkowski*, 216 Mich App 513, 517-518; 549 NW2d 602 (1996).

My concern with the foregoing analysis from this Court is that "sufficiency" and "accuracy" are wholly different concepts. According to *Merriam-Webster's Collegiate Dictionary* (11th ed), "sufficiency" refers to adequacy or being "enough to meet the needs of a situation or a proposed end." Similarly, *Black's Law Dictionary* (8th ed) also defines "sufficiency" as pertaining to adequacy or being "of such quality, number, force, or value as is necessary for a given purpose." Neither definition pertains to whether something is true or false. It appears to me that prohibiting consideration of whether a statement in a petition is demonstrably untrue conflicts with the plain language of Const 1963, art 2, § 8, and it also conflicts with our Supreme Court's emphasis on the electors being *informed*. It also appears to conflict with an earlier decision from this Court opining that the clarity requirement in recall petitions was, in part, to ensure "deliberate and informed action" and "afford[] the official sought to be recalled at least some minimal due process guarantees." *Noel v Oakland Co Clerk*, 92 Mich App 181, 187-188; 284 NW2d 761 (1979) (emphasis omitted).

Nevertheless, the preceding cases predate the enactment of MCL 168.951a, pursuant to 2012 PA 417, and they form an important backdrop for understanding 2012 PA 417. As the majority explains, the enactment of MCL 168.951a expressly imposed a new requirement: the stated reasons for a recall must not only be clear, but also "factual." Likewise, the statements must now be reviewed to ensure that they are both "factual" and "of sufficient clarity." I respectfully disagree with the majority as to what a review for "factualness" entails.

II. DISAGREEMENT WITH *HOOKER*

This Court's obligation when considering the meaning of a statute is to give effect to the intent of the Legislature by applying the plain and ordinary meaning of the words and language used. *Pohutski v City of Allen Park*, 465 Mich 675, 683; 641 NW2d 219 (2002). As this Court observed in *Hooker*, and I agree, "[i]n ordinary usage, the word 'factual' can mean 'restricted to or based on fact,' while the word 'fact' can be understood to mean 'an actual occurrence' and 'a piece of information presented as having objective reality[.]' " *Hooker*, 326 Mich App at 559, quoting *Merriam-Webster's Collegiate Dictionary* (11th ed) (second alteration by the *Hooker* Court). The *Hooker* Court then determined that "the plainest construction" of MCL 168.951a was that "factual" and "factually" referred to setting forth grounds in a recall petition "stated in terms of a factual occurrence." *Id*. The *Hooker* Court explained that this meant "stated in the form of a factual assertion about the official's conduct," and it did not require the petition to be truthful. In other words, the *Hooker* Court concluded that "factual" only pertains to the superficial manner in which a recall

petition is phrased and has nothing to do with its substance. *Id*. at 559-560. I respectfully conclude that this was incorrect.

Nowhere in the statute did the Legislature use any phrasing like "stated as a fact" or "presented in a factual manner." Rather, the statute is concerned with whether a statement "is factual," and the statute once uses the word "factualness." The plainest reading of the face of the statute is not that a statement must look like it describes a fact, but rather that the statement must actually be *true*.

I am mindful that we should not look outside the unambiguous language of a statute, and "courts may not speculate about an unstated purpose where the unambiguous text plainly reflects the intent of the Legislature." *Pohutski*, 465 Mich at 683. Similarly, courts should not consider whether an unambiguous statute is wise or fair. See *People v McIntire*, 461 Mich 147, 159; 599 NW2d 102 (1999). Courts should construe statutes "to prevent absurd results, injustice, or prejudice to the public interest," *Rafferty v Markovitz*, 461 Mich 265, 270; 602 NW2d 367 (1999), but not if doing so would depart from the plain language of the statute, *McIntire*, 461 Mich at 155-159, 155 n 8. Nevertheless, I observe that the unambiguous language as I read it is supported both by historical context and by considering what different interpretations of MCL 168.951a would actually achieve.

Much of this Court's jurisprudence emphasizes that "clarity" has nothing to do with "truth." Nevertheless, our Supreme Court emphasized that the goal is to ensure that electors are *informed*. The Constitution unambiguously reserves to the electors only the determination of whether a stated reason is, essentially, "good enough." Thus, the plain language of the Consti-

tution does not exclusively reserve to the electors the determination of whether a stated reason is founded in reality. There is obvious tension between ensuring that the electors can make an informed decision and allowing petitions to lie with impunity. By analogy, juries are generally the sole deciders of fact in trials, are expected to work from their own memories of the evidence, and are instructed that statements by attorneys are not evidence—but even so, attorneys may not lie or misrepresent the evidence during closing arguments. Elected officials might be uncomfortable with the prospect of recall petitions freely advancing lies.

Furthermore, little would be achieved by merely requiring recall petition statements to be formatted in a particular way. It is difficult to understand how a "clear" statement of the reason or reasons why an elected official should be recalled would not almost necessarily be phrased as a factual assertion in any event. Merely requiring a change to the outward, superficial manner in which a statement is phrased would not seem to result in any meaningfully different analysis from what was in place before 2012 PA 417. In general, we should presume that the Legislature intended its words to have a purpose. *Pohutski*, 465 Mich at 683-684. Furthermore, the law favors consideration of substance, irrespective of how that substance is presented. *Hurtford v Holmes*, 3 Mich 460, 463 (1855); *Wilcox v Moore*, 354 Mich 499, 504; 93 NW2d 288 (1958); *John Deere Co v Wonderland Realty Corp*, 38 Mich App 88, 91; 195 NW2d 871 (1972). The imposition of a new inquiry into the truth or falsity of a statement, however, would leave intact this Court's precedent regarding how to analyze clarity, and it would further the goal of ensuring that the electorate is informed.

I would hold that the *Hooker* Court's interpretation of MCL 168.951a violates the plain language of the statute. However, assuming the language of the statute is in any way ambiguous, the *Hooker* Court's interpretation also contravenes the spirit of Const 1963, art 2, § 8, undermines our Supreme Court's historical analysis of the purposes to be served by recall statements, and renders the Legislature's enactment almost entirely nugatory. Clearly, it has always been understood that doubts should be resolved in favor of the drafters of a petition. Nevertheless, I would conclude that MCL 168.951a now expands the review of petitions to at least inquire into whether any part of the petition is demonstrably false. Under the Constitution, the stated reason for a recall may be arbitrary.[1] However, the stated reason must be sufficiently clear to be comprehended, and it must not be a work of fiction or imagination. I am bound to follow *Hooker* pursuant to MCR 7.215(J)(1), but I would declare a conflict pursuant to MCR 7.215(J)(2).

III. ALTERNATIVE ANALYSIS

For the most part, my disagreement with *Hooker* does not affect the petitions at issue before this Court. However, the majority expressly declines to consider whether the recall petition in Docket No. 354795[2] faithfully quoted what the Governor actually said at

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[1] As stated in the majority opinion, "[t]he sufficiency of any statement of reasons or grounds procedurally required shall be a political rather than a judicial question." Const 1963, art 2, § 8.

[2] I find it unclear whether the majority considers the truthfulness of the petition in Docket No. 354475, notwithstanding *Hooker*. In any event, however, I agree with the majority's substantive analysis as to that petition. Under what I consider a proper reading of MCL 168.951a, obvious scrivener's errors would not render a statement "false," and the proper response is to permit correction of any such errors.

her April 13, 2020, press conference. I do not agree with the majority's supposition that "the petition is very likely a more accurate representation of what the Governor actually said" than is the transcript proffered by the Governor. Nevertheless, I concur with the majority's ultimate conclusion.

In relevant part, the petition quotes the press conference as follows:

> I hope that as people are looking at social media they are dispelling and taking on the dissemination of demonstrably inaccurate information. I also would just say, I think it is this group is funded in a large part by the DeVos family and I think it's really inappropriate for a sitting member of the United States President's cabinet to be waging political attacks on any governor, but obviously on me here at home.

The Governor's transcript of the press conference presents slightly different phrasing:

> I hope that as people are looking at social media, they are dispelling and taking on the dissemination of demonstrably inaccurate information. I also would just say I think this group is funded in large part by the DeVos family. I think it's really inappropriate to, for a sitting number of the United States President's Cabinet, to be waging political tax on any governor. Obviously, I'm me here at home.

Rather than engaging in speculation, I have reviewed the press conference itself, and it appears that what the Governor actually said is:

> I hope that as people are looking at social media they are, um, dispelling, you know, the, and and [sic] taking on the dissemination of demonstrably inaccurate information. Ah, I also would just say, I think it is, um, this group is funded in large part by the DeVos family, and I think it's really inappropriate to, for a sitting member of the United

> States President's Cabinet to be waging political attacks on, on any governor, but obviously on me here at home.

As discussed, I construe MCL 168.951a as imposing a mandate to ensure that statements in recall petitions are not untruthful. However, as also discussed, review of such statements is deferential and eschews hypertechnicality. Finally, once again, the law favors consideration of substance over obsession with superficial or trivial details.

Ultimately, it appears the majority guessed correctly: both the Governor's transcript and the statement in the petition take some insignificant liberties with the Governor's actual words, but the petition is certainly no less accurate than the transcript. More importantly, the statement in the petition is grounded in objective reality, and none of its technical inaccuracies amounts to a substantive misrepresentation of the Governor's actual words.

IV. CONCLUSION

In summary, I would hold that the Legislature, in enacting MCL 168.951a, imposed a new requirement that statements in recall petitions must not be substantively untruthful, which is consistent with the constitutional reservation of the *sufficiency* of a recall petition to the electors and the historical goal of ensuring that the electors are able to make intelligent and informed decisions. I would hold that *Hooker* was wrongly decided insofar as it held that MCL 168.951a imposed a requirement that recall petition statements must be phrased in a certain way. I conclude that under MCL 168.951a it is necessary to consider whether the petition in Docket No. 354795 was untruthful. However, I would also hold that the inquiry is not a hunt for technicalities. Therefore, having com-

pared the petition, the Governor's proffered transcript of her April 13, 2020, press conference, and the Governor's actually spoken words, I am unable to find the petition untruthful. I therefore concur in affirming.

BUSUITO v BARNHILL

Docket No. 353424. Submitted April 13, 2021, at Lansing. Decided May 27, 2021, at 9:10 a.m.

Michael Busuito, Anil Kumar, Sandra Hughes O'Brien, and Dana Thompson filed an action and motion for a temporary restraining order and preliminary injunction against Bryan C. Barnhill, II; Mark Gaffney; Marilyn Kelly; Kim Trent; M. Roy Wilson; Wayne State University (WSU); and the Wayne State University Board of Governors (the Board) in the Court of Claims. Plaintiffs were all elected members of the Board, as were Barnhill, Gaffney, Kelly, and Trent. Wilson was the president of WSU and an ex officio member of the Board. During a meeting of the Board on April 5, 2019, the Board considered purchasing certain real estate property. Plaintiffs voted "no" to the acquisition, but consideration of the property moved forward, and whether to sublease the property with an option to purchase it was added to the Board's executive meeting agenda for June 21, 2019. Busuito, O'Brien, and Thompson boycotted the June 21, 2019 meeting (Kumar was unable to attend) in an effort to prevent the Board from establishing a quorum to transact business. Defendant Board members attended the June 21, 2019 meeting, and Wilson was counted as a Board member to establish a quorum, although he did not vote at the meeting. During an open session, the Board approved a tuition increase for the 2019-2020 academic year. The Board then moved into a closed executive session, during which it approved the sublease of the property. In their motion, plaintiffs argued that defendants had acted without a quorum during the June 21, 2019 meeting, so all actions taken during the meeting were null, void, and without effect. Plaintiffs asked the Court of Claims to enter a temporary order under MCR 3.310(B) restraining defendants from taking any action with regard to the decisions made at the June 21, 2019 meeting. In their complaint, plaintiffs argued that Wilson was improperly counted as a Board member to establish a quorum at the June 21, 2019 meeting, that the Board had violated the Open Meetings Act (OMA), MCL 15.261 *et seq*., and asked the court to enter an injunction enjoining defendants from acting on any decisions made at the June 21, 2019 meeting. The

Court of Claims, CYNTHIA DIANE STEPHENS, J., denied plaintiffs' motion for a temporary restraining order and preliminary injunction and granted summary disposition in favor of defendants under MCR 2.116(I)(1) regarding plaintiffs' OMA claim. Defendants later moved for summary disposition on the remaining portions of the complaint and argued that the only remaining issue was whether Wilson, as an ex officio member of the Board, should have been counted for purposes of establishing a quorum. The court granted summary disposition pursuant to MCR 2.116(C)(10) in favor of defendants and found that Wilson was properly counted to establish a quorum. Plaintiffs appealed.

The Court of Appeals *held*:

1. The Court of Claims concluded that plaintiffs' OMA claim could not serve as the basis for injunctive relief and that defendants were entitled to summary disposition of this claim because it could not be asserted against the Board as a matter of law. The court's decision was not an abuse of its discretion in light of our Supreme Court's conclusions that Const 1963, art 8, §§ 5 and 6, confer a unique constitutional status on public universities and their governing boards and that application of the OMA to such governing boards is beyond the realm of legislative authority because boards have the constitutional authority to supervise their institutions. Therefore, although Const 1963, art 8, § 4, provides that formal sessions of governing boards of public institutions shall be open to the public, the Legislature is not delegated the task of defining the phrase "formal sessions" for purposes of Const 1963, art 8, § 4. Plaintiffs also failed to meet their burden of a particularized showing of irreparable harm and failed to address why, if they were to succeed on the merits of their quorum claim, canceling the sublease or issuing a tuition refund would have been inadequate legal remedies.

2. Const 1963, art 8, § 5, grants the boards of public universities the power and responsibility of general supervision of their institutions and the control and direction of all expenditures from the institutions' funds. The Constitution also provides that the principal executive officer of an institution shall be an ex officio board member who presides at meetings, without the right to vote. The statutes establishing WSU as a state institution of higher education and establishing its board of governors, MCL 390.641 and MCL 390.643, also provide that the president of the university shall be an ex officio member of the Board without the right to vote and shall preside at meetings. "Ex officio" is not defined by the Constitution or the applicable statutes, but it does not follow that the term is ambiguous.

Because the legal definition of ex officio is "by virtue of the authority implied by an office," Wilson, as an unelected ex officio Board member, was a member of the Board by virtue of his office. Under the plain language of MCL 390.645(2), Wilson was properly counted to establish a quorum. Neither the statute nor the WSU Bylaws limit a quorum to a majority of the voting or elected members of the Board. It followed that Wilson counted as a member of the Board for purposes of establishing a quorum, and that the June 21, 2019 meeting was conducted with a quorum present; therefore, all actions taken by the Board during that meeting had full effect.

Affirmed.

RONAYNE KRAUSE, J., concurred in the result only.

1. PUBLIC UNIVERSITIES AND COLLEGES — GOVERNING BOARDS — OPEN MEETINGS ACT.

The governing board of a public institution of higher learning established under Const 1963, art 8, § 5, is required by the Constitution to hold its formal meetings in public and is permitted to hold its informal meetings in private; the constitutional requirement to hold formal meetings in public does not bring the board under the purview of the Open Meetings Act (OMA), MCL 15.261 *et seq*.; Const 1963, art 8, §§ 5 and 6, give governing boards the authority to supervise the institution generally, and application of the OMA to the board is beyond the realm of legislative authority.

2. PUBLIC UNIVERSITIES AND COLLEGES — GOVERNING BOARDS — ESTABLISHING A QUORUM — EX OFFICIO BOARD MEMBERS.

Const 1963, art 8, § 5, establishes that the principal executive officer of a public institution shall be an ex officio member of the institution's board of governors who presides over meetings and who does not have the right to vote; this ex officio board member may be counted for purposes of establishing a quorum for the transaction of business.

Howard & Howard Attorneys PLLC (by *H. William Burdett, Jr.*, and *Jon R. Steiger*) for Michael Busuito, Anil Kumar, Sandra Hughes O'Brien, and Dana Thompson.

Barris, Sott, Denn & Driker, PLLC (by *Todd R. Mendel*, *Eugene Driker*, and *Dennis M. Barnes*) for

Bryan C. Barnhill, II, Mark Gaffney, Marilyn Kelly, Kim Trent, M. Roy Wilson, Wayne State University, and the Wayne State University Board of Governors.

Before: JANSEN, P.J., and RONAYNE KRAUSE and GADOLA, JJ.

JANSEN, P.J. Plaintiffs, Michael Busuito, Anil Kumar, Sandra Hughes O'Brien, and Dana Thompson, appeal as of right the order of the Court of Claims granting summary disposition in favor of defendants, Bryan C. Barnhill, II, Mark Gaffney, Marilyn Kelly, Kim Trent, M. Roy Wilson, Wayne State University, and the Wayne State University Board of Governors, under MCR 2.116(C)(10). On appeal, plaintiffs also challenge a prior order of the Court of Claims denying plaintiffs' request for injunctive relief and granting summary disposition in favor of defendants under MCR 2.116(I)(1). We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

All individual plaintiffs and defendants, with the exceptions of Wilson, Wayne State University (WSU), and the Wayne State University Board of Governors (the Board), are elected members of the Board. The Board has general supervision of WSU, as afforded by the Michigan Constitution. See Const 1963, art 8, § 5. The Board is comprised of "8 members who shall be nominated and elected in accordance with the election laws of this state." MCL 390.643. Wilson, the President of WSU, is "the principal executive officer" of WSU; President Wilson is considered an "ex officio member of the [B]oard without the right to vote," and he presides over meetings of the Board. See Const 1963, art 8, § 5; MCL 390.643.

During a Board meeting on April 5, 2019, the Board considered the purchase of real property located at 400 Mack Avenue in Detroit, Michigan (400 Mack Avenue). Plaintiffs voted "no" to the acquisition of that property. However, on June 19, 2019, the sublease of the 400 Mack Avenue property, with an option to purchase, was added to the Board's executive meeting agenda for its upcoming June 21, 2019 meeting. Plaintiffs maintain that this last-minute addition to the agenda was made because Governor Kumar would not be able to attend the meeting and, therefore, defendants believed that they would be able to outvote plaintiffs 4-3 in favor of entering into the sublease for the 400 Mack Avenue property. In response, Governors Busuito, O'Brien, and Thompson boycotted the June 21, 2019 meeting in hopes that the Board would be unable to establish a quorum to transact business.

The June 21, 2019 meeting went forward with defendant Board members in attendance. Additionally, President Wilson was counted as a member of the Board to establish a quorum. During the open session, the Board approved a tuition increase for the upcoming 2019-2020 academic year. President Wilson, despite being counted for a quorum, did not vote. Plaintiffs maintain that the Board violated the Open Meetings Act (OMA), MCL 15.261 *et seq*., specifically MCL 15.267(1), by then moving into a closed executive session without holding a roll-call vote or a ⅔ majority vote. During the closed executive session, the sublease for the 400 Mack Avenue property was approved.

Plaintiffs originally filed a three-count complaint in Ingham Circuit Court. The case was removed to the Court of Claims and subsequently dismissed without prejudice because plaintiffs had failed to strictly comply with the notice and verification requirements contained

in MCL 600.6431. Plaintiffs subsequently refiled the instant action: a verified three-count complaint and a motion for a temporary restraining order and a preliminary injunction. In their motion, plaintiffs argued that "[a]s a result of the individual [d]efendants' actions in both determining [a] quorum where none existed, and in holding a closed session without the necessary Board approval, the entire June 21, 2019, meeting of the Board of Governors of Wayne State University is null, void, and without effect." Plaintiffs asked the Court of Claims to enter an order under MCR 3.310(B) temporarily restraining defendants from taking any action with regard to the decisions made at the June 21, 2019 meeting.

In their complaint, plaintiffs alleged that neither President "Wilson, nor any of his predecessors, had ever been counted as a member of the Board to determine [a] quorum previous to June 21, 2019." Plaintiffs went on to offer the opinion that it was "nonsensical to count a non-voting, unelected ex-officio member for that purpose" and that doing so violated the Michigan Constitution, the WSU Bylaws, and "longstanding principles of democracy." Therefore, in Count I, plaintiffs argued they were entitled to a declaration that the Board did not have a quorum sufficient to hold the June 21, 2019 meeting and that without a quorum, any decisions made at the June 21, 2019 meeting are null, void, and without effect. In Count II, plaintiffs sought injunctive relief, specifically an order under MCL 15.271, enjoining defendants from acting upon any decisions made in the closed session of June 21, 2019. Finally, in Count III, plaintiffs alleged a violation of the OMA. Specifically, plaintiffs alleged that by entering into a closed executive session without a ⅔ majority vote or a roll-call vote, defendants had violated MCL 15.267(1) and that no exception exists when consider-

ing a purchase or lease of real property under MCL 15.267(1) and MCL 15.268(d). Defendant Board members alleged plaintiffs were therefore liable for actual and exemplary damages of not more than $500 total, plus costs and attorney fees, under MCL 15.273.

On August 2, 2019, the Court of Claims issued an opinion and order denying plaintiffs' motion for a temporary restraining order and preliminary injunction and granting summary disposition in favor of defendants under MCR 2.116(I)(1), finding that plaintiffs' OMA claim fails as a matter of law. With respect to whether plaintiffs were entitled to injunctive relief, the Court of Claims explained:

> As it concerns plaintiffs' ability to prevail on the merits, there are two issues to be examined: (1) Whether Wilson should have been counted as a member of the Board of Governors for purposes of establishing a quorum and, if the answer to that question is "no," whether any resulting decision of the Board is void for the reason that no quorum was achieved? (2) Whether any decisions reached in the "closed session" of the June 21, 2019 meeting were reached in violation of the OMA?

First, the Court of Claims found that plaintiffs "cannot demonstrate any likelihood of success on the merits of the OMA claim" because "[t]he OMA does not apply to meetings of university boards," citing *Federated Publications, Inc v Mich State Univ Bd of Trustees*, 460 Mich 75, 84; 594 NW2d 491 (1999); *Detroit Free Press, Inc v Univ of Mich Regents*, 315 Mich App 294, 298; 889 NW2d 717 (2016). Although Const 1963, art 8, § 4, requires "[f]ormal sessions of governing boards of [public] institutions" of higher education to be open to the public, the Court of Claims determined that this requirement "is not the equivalent of, nor does it invoke the application of, the OMA." Quoting *Federated Publications*, the Court of Claims explained that " '[g]iven the

constitutional authority to supervise the institution generally, application of the OMA to the governing boards of our public universities is . . . beyond the realm of legislative authority.' " *Federated Publications*, 460 Mich at 89.

The Court of Claims further relied on *Detroit Free Press*, 315 Mich App at 298, in which this Court "explained that the holding in *Federated Publications* defined the 'scope of the Legislature's power to regulate public universities' in general." The Court of Claims concluded that "the scope of that power does not permit the Legislature to apply the OMA to the boards of public universities, regardless of . . . the circumstances . . . ." Additionally, the court noted that

> [i]n *Detroit Free Press*, the Court of Appeals recognized that "[t]he Constitution permits defendant to hold informal meetings in private; defendant is only required to hold its formal meetings in public." *Id*. [at 298-299.] But the constitutional requirement to hold formal meetings in public does not bring about application of the OMA. *Id*.
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> In light of the above, plaintiffs' OMA claim cannot serve as the basis for injunctive relief. The OMA claim will be dismissed pursuant to MCR 2.116(I)(1) because an OMA claim cannot be asserted against the . . . Board as a matter of law.[1]

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[1] In a footnote, the Court of Claims stated as follows:

> Although not noted by the parties' briefing, MCL 390.645(2), which discusses the WSU Board of Governors and its meetings, expressly states that the "business which the board may perform *shall be conducted in compliance with Act No. 267 of the Public Acts of 1976, being sections 15.261 to 15.275 of the Michigan Compiled Laws*," i.e., the OMA. This provision of the statute, which does not appear to have ever been the subject of challenge, is inconsistent with the constitutional authority of the Board discussed above. In addition, the statute appears to be in . . . conflict with the holdings in *Federated Publications* and *Detroit Free Press*. Indeed, the universities at issue in those cases — Michigan

The Court of Claims next addressed the likelihood of plaintiffs' ability to succeed on the claim arising out of defendant Board members' determination that President Wilson could be counted to establish a quorum. The Court of Claims found constitutional and statutory support for and against counting President Wilson when determining a quorum. The court

> acknowledge[d] that the plaintiffs' case on quorum as plead[ed] is neither frivolous nor lacking any support. If the doctrine of expressio unius est exclusio alterius[2] is deemed inapplicable because of the numerous instances in statute and by-laws where the board membership and presidential duties are addressed separately[,] there is an ambiguity best determined on the merits[,] not preliminarily. The burden on a plaintiff to establish the likelihood of success on the merits is not the burden of proving the claim before the court. However, the court on the record before it does not believe that the plaintiff's likelihood of

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> State University and the University of Michigan — were subject to similar statutory authority purporting to subject Board meetings to the OMA. See MCL 390.20 (applying the OMA to the University of Michigan Board of Regents meetings); MCL 390.104 (applying the OMA to Michigan State University Board of Trustee meetings). This apparent conflict between MCL 390.645(2) and the Constitution can be resolved by recognizing the preeminence of the Constitution over conflicting legislative enactments. See *Mays v Snyder*, 323 Mich App 1, 33; 916 NW2d 227 (2018). Moreover, this Court is bound by the Supreme Court's interpretation of nearly the same issue and same authorities in *Federated Publications* and *Detroit Free Press*. Thus, the provision in MCL 390.645(2) purporting to subject WSU Board of Governors meetings to the OMA cannot be enforced and does not change the analysis of the instant issues.

We agree with the Court of Claims' analysis recognizing the preeminence of the Constitution over conflicting legislative enactments and adopt it herein.

[2] "*Expressio unius est exclusio alterius* means express mention . . . of one thing implies the exclusion of other similar things." *Bronner v Detroit*, 507 Mich 158, 173 n 11; 968 NW2d 310 (2021) (quotation marks, citation, and brackets omitted).

> success for the proposition that the inclusion of President Wilson in a quorum is erroneous is substantial nor the harm of such magnitude that the rare remedy of injunctive relief should apply.

Finally, the Court of Claims determined that plaintiffs had failed to establish irreparable harm, and therefore, "[a]s a result, injunctive relief will not issue in this case." Plaintiffs applied for leave to appeal the Court of Claims' order in this Court, but the application was denied for "failure to persuade th[is] Court of the need for immediate appellate review." See *Busuito v Barnhill*, unpublished order of the Court of Appeals, entered September 11, 2019 (Docket No. 350111).

On January 30, 2020, defendants moved for summary disposition on the remaining portions of the complaint under MCR 2.116(C)(8) and (10), MCR 2.116(I)(1), and MCR 2.605(F). Defendants argued that the only remaining issue in this case was "whether President Wilson, as an *ex officio* member of the board, is counted for a quorum." Defendants argued that the Court of Claims had already concluded that "plaintiffs did not have a likelihood of success on the merits of this issue, and failed to show irreparable harm necessary for an injunction." Therefore, the Court of Claims should conclude that "[t]here was a quorum as a matter of Michigan law; the events which plaintiffs seek to enjoin have already occurred, making the complaint legally moot; and the elements for an injunction do not exist."

In support of their position that President Wilson could be counted for purposes of establishing a quorum, defendants noted that § 1.3 of the WSU Bylaws provide that "[a] quorum for business shall be five members of the Board." Similarly, MCL 390.645(2) provides that "[a] majority of the members of the board

shall form a quorum for the transaction of business." Defendants noted that Const 1963, art 8, § 5, provides that the Board is to "elect a president of the institution under its supervision" and that the president "shall be the principal executive officer of the institution, be ex-officio a member of the board without the right to vote and preside at meetings of the board." Likewise, MCL 390.643 provides that the "president of the university shall be ex officio a member of the board without the right to vote and shall preside at meetings of the board." The WSU Bylaws, in § 2.2, also classify the president as an ex officio member of the Board.

Therefore, defendants argued, "[s]ince President Wilson is a member of the board, the plain language of these authorities compels the conclusion that he is counted to determine a quorum for business." No constitutional or statutory authority and no provision in the WSU Bylaws conclude that a quorum for business shall be comprised of five voting members. Nor do they provide that an ex officio member of the Board cannot count for quorum purposes. If the Legislature or the university wished to limit a quorum to five voting members of the Board, it could have done so.

Further, defendants argued, a quorum existed under Robert's Rules of Order, which govern under the WSU Bylaws. Indeed, § 4.1 of the WSU Bylaws provides that "[i]n the absence of specific provisions to the contrary, the rules of parliamentary procedure which shall be followed by the Board and its committees shall be the procedure prescribed in Robert's Rules of Order." Under Robert's Rules, there are two classes of ex officio board members, and defendants argued that because President Wilson is an employee of WSU, was elected by the Board, and has an obligation to preside over Board meetings, he qualifies as an ex officio Board

member "under the authority of" WSU. Therefore, defendants argued, there is no distinction between President Wilson and the other elected Board members when determining a quorum. Accordingly, President Wilson was properly considered in determining whether a quorum existed to hold the June 21, 2019 Board meetings, and because all actions at such meetings required only a majority vote of the Board members in attendance, under § 1.3 of the WSU Bylaws, all "requisites were met for valid board and executive committee meetings and valid actions were taken at such meetings."

On January 30, 2020, plaintiffs filed a cross-motion for summary disposition under MCR 2.116(C)(10) asking the Court of Claims to enter a judgment declaring that the decisions made by the Board during the June 21, 2019 meeting were without a quorum and therefore null, void, and without effect. Plaintiffs argued that the Board is a public body authorized by Const 1963, art 8, § 5, to have eight members, determined by the electorate. The Board is further authorized by the Constitution to "elect a president of the institution" who shall be "the principal executive officer of the institution, be ex officio a member of the board without the right to vote and preside at meetings of the board." Const 1963, art 8, § 5. However, the Constitution does not then count the total number of board members at nine, but maintains that the board is made up of "eight members . . . elected as provided by law." *Id*. Thus, plaintiffs argued, the Constitution is clear that the president of the university is "not elected, and does not have any voting rights."

Plaintiffs went on to argue that § 1.3 of the WSU Bylaws requires that five members of the Board be present to establish a quorum for business, and al-

though the quorum provision "does not differentiate between elected or ex officio members of the Board, other areas of the Bylaws clearly differentiate between the President and the elected members of the Board." In support of their position, plaintiffs cited § 3.2 of the WSU Bylaws, which provides that the "Executive Committee" of the Board is comprised of all Board members then in office and the WSU President. Similarly, § 3.4 provides that membership of special committees is to be determined by the Board and the President. Plaintiffs argued that the WSU Bylaws would not make a distinction between the Board, its members, and the President "unless there was a meaningful distinction." Accordingly, President Wilson, an unelected, ex officio member of the Board, should not be counted for the purposes of establishing a quorum. With only four voting members of the Board present at the June 21, 2019 meeting, the Board did not have a sufficient quorum to transact business and any decisions made at that meeting are rendered null and void, according to plaintiffs.

The Court of Claims considered the cross-motions, and in an opinion and order dated March 25, 2020, the court granted defendants' motion for summary disposition pursuant to MCR 2.116(C)(10). Looking to constitutional and statutory authority, as well as the WSU Bylaws, the court found that President Wilson was a member of the Board, in an ex officio capacity, who was properly counted for the purposes of establishing a quorum. The court reiterated that under MCL 390.645(2), "[a] majority of the members of the board shall form a quorum for the transaction of business." The court went on to find that

> [a] plain reading of MCL 390.645(2) does not exclude [President Wilson] from being counted for purposes of

> establishing a quorum. Indeed, the phrase "members of the board" is not subject to additional qualification or explanation. To that end, the Court finds significant that the phrase "members of the board" is not expressly limited to voting members, nor is the phrase expressly limited to only the eight elected members of the Board.

The court further explained that because "the Legislature did not state that the phrase 'members of the board' was to be limited to only voting members or that it was to exclude ex officio members, this [c]ourt should be cautious about reading such a restriction into the statute," particularly where the Legislature has enacted other limitations. Indeed, the court explained, "[t]he Legislature is aware of how to exclude ex officio members from being counted for purposes of establishing a quorum, but it did not take those steps to expressly exclude ex officio members in the instant statutory scheme."

Similarly, the Court of Claims noted that the WSU Bylaws mirror the language found in the statutory scheme by "declaring that the President of the University is 'an ex officio member of the Board without vote' who 'shall preside at the meetings of the Board.' " The court further noted that while the WSU Bylaws are silent as to who exactly makes up the five-member quorum, they also do not restrict the members who can be counted for purposes of establishing a quorum to only voting members. The WSU Bylaws, in § 4.1, expressly provide that in the "absence of specific provisions to the contrary," Robert's Rules of Order should be followed. Accordingly, the court relied on Robert's Rules of Order when finding that

> [t]he only ex officio board members who should not . . . be counted for purposes of establishing a quorum are those who have no obligation to participate in board matters. By contrast, and by implication, ex officio board members who

> are under authority and who do have obligations are to be counted for purposes of establishing a quorum. In the instant case, President Wilson possesses two attributes of the class of ex-officio members who are deductively entitled to be counted in the quorum: (1) he is under the authority of the Board by virtue of being hired by the Board; and (2) he is obligated to preside at its meetings. . . .
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> . . . Like the Legislature, the Board could have chosen to enact bylaws containing this exclusion, but it did not do so. Instead, the Board adopted bylaws that expressly incorporate authority which declares that President Wilson *is* to be counted for purposes of establishing a quorum. Giving effect to the plain meaning of the bylaws and to the authorities incorporated therein, it is apparent to the Court that President Wilson, by virtue of his ex officio membership, is to be included for purposes of establishing a quorum of the Board.

Thus, the Court of Claims affirmatively concluded that the WSU President can be counted for purposes of establishing a quorum under the WSU Bylaws, and therefore, plaintiffs' arguments for invalidating the Board's actions at the June 21, 2019 meeting are without merit, and defendants were entitled to summary disposition in their favor, as well as dismissal of plaintiffs' complaint. This appeal followed.

II. STANDARD OF REVIEW

"We review a trial court's decision concerning a preliminary injunction for an abuse of discretion. *Dep't of Environmental Quality v Gomez*, 318 Mich App 1, 32; 896 NW2d 39 (2016). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *Id*. at 33-34." *Sandstone Creek Solar, LLC v Benton Twp*, 335 Mich App 683, 705; 967 NW2d 890 (2021).

Summary disposition is appropriate under MCR 2.116(I)(1) "[i]f the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs show that there is no genuine issue of material fact . . . ." "Under this rule, a trial court has authority to grant summary disposition sua sponte, as long as one of the two conditions of the rule is satisfied." *Al-Maliki v LaGrant*, 286 Mich App 483, 485; 781 NW2d 853 (2009). "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 and citation omitted).

Similarly,

> [a] motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of a complaint and is reviewed de novo. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 205-206; 815 NW2d 412 (2012). This Court reviews a motion brought under MCR 2.116(C)(10) "by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Patrick v Turkelson*, 322 Mich App 595, 605; 913 NW2d 369 (2018). "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)." *Barnes v 21st Century Premier Ins Co*, 334 Mich App 531, 540; 965 NW2d 121 (2020). 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." *Patrick*, 322 Mich App at 605. . . . "Only the substantively admissible evidence actually proffered may be considered." *1300 LaFayette East Coop, Inc v Savoy*, 284 Mich App at 522, 525; 773 NW2d 57 (2009) (quotation marks and citation omitted). [*Ahmed v Tokio Marine America Ins Co*, 337 Mich App 1, 7; 972 NW2d 860 (2021).]

This Court reviews de novo questions of statutory interpretation. *Id*.

III. ANALYSIS

A. AUGUST 1, 2019 OPINION AND ORDER

On appeal, plaintiffs first challenge the Court of Claims' August 1, 2019 order denying their motion for a preliminary injunction and granting summary disposition under MCR 2.116(I)(1) in favor of defendants regarding plaintiffs' OMA claims. With respect to the August 1, 2019 opinion and order, plaintiffs argue that the June 21, 2019 meeting of the Board violated the OMA because that meeting was a "formal session" where decisions were made that required public scrutiny. Plaintiffs maintain that a preliminary injunction should have been granted in order to prevent the decisions made at that meeting from taking effect. We disagree.

Under MCR 3.310(A)(4), the party requesting injunctive relief bears the burden of establishing that a preliminary injunction is warranted. This Court recently articulated the preliminary-injunction analysis:

> A preliminary injunction generally is considered a form of equitable relief intended to maintain the status quo pending a final hearing determining the rights of the parties, and is considered an extraordinary remedy. When determining whether to grant the extraordinary remedy of a preliminary injunction, the trial court must consider:
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> > (1) whether the applicant has demonstrated that irreparable harm will occur without the issuance of an injunction, (2) whether the applicant is likely to prevail on the merits, (3) whether the harm to the applicant absent an injunction outweighs the harm an injunction

> would cause to the adverse party, and (4) whether the public interest will be harmed if a preliminary injunction is issued.
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> A preliminary injunction should not be issued if an adequate legal remedy is available. Economic injuries generally are not sufficient to demonstrate irreparable injury because such injuries typically can be remedied by damages at law. In addition, the mere apprehension of future injury or damage cannot be the basis for injunctive relief. [*Sandstone Creek Solar, LLC*, 335 Mich App at 706 (citations omitted).]

Moreover, a preliminary injunction should only issue to preserve the status quo, not to change it. *Pharm Research & Mfr of America v Dep't of Community Health*, 254 Mich App 397, 402; 657 NW2d 162 (2002). Only after the matter has been resolved on the merits is it appropriate to alter the status quo, being the "last actual, peaceable, noncontested status which preceded the pending controversy." *Buck v Thomas M Cooley Law Sch*, 272 Mich App 93, 98 n 4; 725 NW2d 485 (2006) (citation and quotation marks omitted).

The Court of Claims found that with respect to plaintiffs' ability to prevail on the merits of their claims, there were two issues:

> (1) Whether Wilson should have been counted as a member of the Board of Governors for purposes of establishing a quorum and, if the answer to that question is "no," whether any resulting decision of the Board is void for the reason that no quorum was achieved? (2) Whether any decisions reached in the "closed session" of the June 21, 2019 meeting were reached in violation of the OMA?

The Court of Claims first concluded that plaintiffs did not have a likelihood of success on the merits of their OMA claim. In *Federated Publications*, 460 Mich at 83-84, our Supreme Court addressed "the question of the scope of the Legislature's power to regulate

public universities." The Court concluded that Const 1963, art 8, §§ 5 and 6, confer "a unique constitutional status on our public universities and their governing boards," and that because the governing boards have the "constitutional authority to supervise the institution generally, application of the OMA to the governing boards of our public universities is . . . beyond the realm of legislative authority." *Federated Publications*, 460 Mich at 84, 89, citing Const 1963, art 8, § 5.

Indeed, a public university's board is given "exclusive authority over the management and control of its institution . . . ." *Wade v Univ of Mich*, 320 Mich App 1, 16; 905 NW2d 439 (2017). Although Const 1963, art 8, § 4, provides that "[f]ormal sessions of governing boards of such institutions shall be open to the public," what constitutes a "formal session" is not defined by the Michigan Constitution, and the "application of the OMA [cannot] rest on the absence of a definition of 'formal sessions' in the constitution. Unlike other provisions of the constitution, the Legislature is not delegated the task of defining the phrase 'formal sessions' for purposes of Const 1963, art 8, § 4." *Federated Publications*, 460 Mich at 90. See also *Detroit Free Press*, 315 Mich App at 298-299 (concluding that our Supreme Court's holding in *Federated Publications* broadly defined the scope of the Legislature's power to regulate public universities generally and that public universities do not have "*completely* unfettered discretion" because a "governing board's determination of what constitutes formal and informal is not *wholly* insulated from judicial review").

In the Court of Claims, and again here on appeal, plaintiffs argue that the June 21, 2019 meeting should have been considered a "formal session" that was required to be publicly held because the decisions made

during that meeting related to the transaction of university business. Therefore, plaintiffs argue, the fact that the June 21, 2019 meeting was not publicly held constituted a violation of the OMA. However, in light of our Supreme Court's holding in *Federated Publications*, and this Court's conclusions in *Detroit Free Press*, we conclude that the Court of Claims did not abuse its discretion by finding that plaintiffs' OMA claim could not serve as the basis for injunctive relief and further finding that defendants were entitled to summary disposition of the OMA claim because the OMA claim could not be asserted against the Board as a matter of law.

In the August 1, 2019 opinion and order, the Court of Claims also engaged in an extensive discussion regarding whether plaintiffs had any likelihood of success on the merits on the quorum issue, specifically whether President Wilson could be counted to establish a quorum. The Court of Claims found legal support for and against counting President Wilson to establish a quorum; the court ultimately concluded that plaintiffs' "case on quorum as plead[ed] is neither frivolous nor lacking any support" and that this issue should be decided on the merits, not preliminarily. Plaintiffs do not challenge this finding as it relates to the August 1, 2019 opinion and order, and therefore we do not address it. Rather, we address the quorum issue in Part III(B) as it relates to the court's March 25, 2020 opinion and order.

Finally, the Court of Claims evaluated whether plaintiffs would suffer irreparable harm if a preliminary injunction did not issue. Michigan jurisprudence adheres to the

> longstanding principle that a particularized showing of irreparable harm . . . is . . . an indispensable requirement

> to obtain a preliminary injunction. The mere apprehension of further injury or damage cannot be the basis for injunctive relief. Equally important is that a preliminary injunction should not issue where an adequate legal remedy is available. [*Pontiac Fire Fighters Union Local 376 v City of Pontiac*, 482 Mich 1, 9; 753 NW2d 595 (2008) (quotation marks and citations omitted).]

The Court of Claims found that plaintiffs' argument that the "public will be harmed by the Board's decision to operate in secret, in violation of the OMA," lacked merit because the OMA does not apply. Therefore, plaintiffs could not establish any harm, "let alone irreparable harm." The Court of Claims further found that plaintiffs had failed to demonstrate that a legal remedy was unavailable or inadequate.

Indeed, following our review of the record, we conclude that plaintiffs failed to meet their burden of a particularized showing of irreparable harm. Plaintiffs failed to address why, should they succeed on the merits of their quorum claim, canceling the sublease or issuing a tuition refund would constitute inadequate legal remedies. Therefore, we conclude that the Court of Claims did not abuse its discretion by denying plaintiffs the requested injunctive relief.

B. MARCH 25, 2020 OPINION AND ORDER

Next, plaintiffs challenge the Court of Claims' March 25, 2020 opinion and order granting summary disposition in favor of defendants under MCR 2.116(C)(10). Plaintiffs argue that the Court of Claims erred by finding President Wilson could be counted for purposes of establishing a quorum. Plaintiffs maintain that they are entitled to a declaration that the decisions made by the Board during the June 21, 2019 meeting were made without a quorum and therefore

are null, void, and without effect. While we are troubled by the behavior of all parties involved, particularly as it relates to their responsibilities to the electorate and the institution that they have been elected to manage and protect as fiduciaries, we cannot agree that declaratory relief is appropriate in this case.

The resolution of this issue involves the interpretation of various statutory and constitutional provisions. In examining the relevant constitutional provisions, this Court's objective is to "determine the text's original meaning to the ratifiers, the people, at the time of ratification. The primary rule is that of common understanding," which requires this Court to examine the intent of the ratifiers. *Citizens Protecting Michigan's Constitution v Secretary of State*, 503 Mich 42, 61; 921 NW2d 247 (2018) (quotation marks and citations omitted). Moreover,

> [w]hen interpreting statutory language, we begin with the plain language of the statute. *Driver v Naini*, 490 Mich 239, 246-247; 802 NW2d 311 (2011). "We must give effect to the Legislature's intent, and the best indicator of the Legislature's intent is the words used." *Johnson v Pastoriza*, 491 Mich 417, 436; 818 NW2d 279 (2012). Additionally, when determining this intent we "must give effect to every word, phrase, and clause in a statute and avoid an interpretation that renders nugatory or surplusage any part of a statute." *Hannay v Dep't of Transp*, 497 Mich 45, 57; 860 NW2d 67 (2014) (quotation marks and citation omitted). [*Jesperson v Auto Club Ins Ass'n*, 499 Mich 29, 34; 878 NW2d 799 (2016).]

The Michigan Constitution grants to the Board the power and responsibility of "general supervision of its institution and the control and direction of all expenditures from the institution's funds." Const 1963, art 8, § 5. Article 8, § 5 goes on to provide, in relevant part:

> Each board shall, as often as necessary, elect a president of the institution under its supervision. He shall be the principal executive officer of the institution, be ex-officio a member of the board without the right to vote and preside at meetings of the board. The board of each institution shall consist of eight members who shall hold office for terms of eight years and who shall be elected as provided by law.

Likewise, MCL 390.641 establishes WSU as a "state institution of higher education" that is to be "maintained by the state of Michigan." Further, "[t]he conduct of its affairs and control of its property shall be vested in a board of governors, the members of which shall constitute a body corporate known as the 'board of governors of Wayne state university,' hereinafter referred to as 'the board . . . .' " MCL 390.643 provides that the Board is to be comprised of "8 members who shall be nominated and elected in accordance with the election laws of this state. The president of the university shall be ex officio a member of the board without the right to vote and shall preside at meetings of the board."

Neither the Constitution nor the applicable statutes define the term "ex officio" as it relates to President Wilson's status as an ex officio member of the Board. However, the term "ex officio" is not ambiguous simply because it is undefined. *Diallo v LaRochelle*, 310 Mich App 411, 418; 871 NW2d 724 (2015). Because "ex officio" is a legal term of art, it is appropriate for us to construe the term "in accordance with its peculiar and appropriate legal meaning." *Brackett v Focus Hope, Inc*, 482 Mich 269, 276; 753 NW2d 207 (2008). We refrain, however, from reading anything "into a statute that is not within the intent of the Legislature apparent from the language of the statute itself." *Detroit Pub Sch v Conn*, 308 Mich App 234, 248; 863 NW2d 373

(2014). "In other words, we must not judicially legislate by adding into a statute provisions that the Legislature did not include." *Comerica, Inc v Dep't of Treasury*, 332 Mich App 155, 166; 955 NW2d 593 (2020). *Black's Law Dictionary* (10th ed) defines "ex officio" as "[b]y virtue or because of an office" or "by virtue of the authority implied by office." See also Robert, *Robert's Rules of Order, Newly Revised*, § 49, p 466 (Boston: Da Capo Press, 2000), explaining that "[f]requently boards include ex-officio members–that is, persons who are members of the board by virtue of an office . . . ." On the basis of the foregoing, we conclude that President Wilson, while not one of the eight elected Board members, is a member of the Board by virtue of his office.

The next question becomes whether, as an ex officio member of the Board, President Wilson can be counted for purposes of establishing a quorum to transact business. Looking to the plain language of MCL 390.645(2), we answer that question in the affirmative. Indeed, MCL 390.645(2) requires that "[a] majority of the members of the board shall form a quorum for the transaction of business." Likewise, § 1.3 of the WSU Bylaws requires a majority or "five members of the Board" to establish a quorum. President Wilson is a member of the Board, and MCL 390.645(2) and the WSU Bylaws do not limit a quorum to a majority of the *voting* or *elected* members of the Board. To be clear, that President Wilson is not a voting member of the Board is of no consequence under a plain reading of the applicable statute and the WSU Bylaws, and should WSU wish to limit which type of members qualify for purposes of establishing a quorum, they are free to amend their bylaws.

Like the Court of Claims, we find persuasive that § 4.1 of the WSU Bylaws incorporates "the procedure

prescribed in Robert's Rules of Order" "[i]n the absence of specific provisions to the contrary." *Robert's Rules of Order* does discuss ex officio board members, and provides the following guidance:

> In the executive board of a society, if the ex-officio member of the board is under the authority of the society (that is, if he is a member, an employee, or an elected or appointed officer of the society), there is no distinction between him and the other board members. If the ex-officio member is not under the authority of the society, he has all the privileges of board membership, including the right to make motions and to vote, but none of the obligations. . . . The latter class of ex-officio board members, who has no obligation to participate, should not be counted in determining the number required for a quorum or whether a quorum is present at a meeting. [Robert, *Robert's Rules of Order, Newly Revised*, pp 483-484 (Boston: Da Capo Press, 2011).]

The Court of Claims found, and we agree, that President Wilson falls into the first category of ex officio board members because he is under the authority of the Board by virtue of being hired by the Board, and he is constitutionally required to preside over Board meetings.

On the basis of the foregoing, we conclude that President Wilson is an ex officio member of the Board, who, despite being constitutionally divested of the right to vote, does count as a member of the Board for purposes of establishing a quorum. Pertinent statutory authority, as well as the WSU Bylaws, provide further support for our conclusion. It follows that the June 21, 2019 meeting of the Board was conducted with a quorum present, and therefore the actions taken by the Board during that meeting are to have full effect. The Court of Claims did not err by granting summary

disposition in favor of defendants on this issue; plaintiffs are not entitled to declaratory relief.[3]

Affirmed.

GADOLA, J., concurred with JANSEN, P.J.

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

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[3] We again note, however, that the conduct of the Board and President Wilson leave much to be desired. Plaintiffs admit in their pleadings that they purposefully boycotted the June 21, 2019 meeting to avoid establishing a quorum so that the sublease and the tuition increase could not be voted on after those items were added to the meeting agenda at the last minute. Additionally, the Board approved a sublease of significant real estate behind closed doors. It is the nature of the beast, so to speak, that Board members will disagree on university business. Disagreements, or differing viewpoints, regarding the management and control of the institution should not be an excuse to conduct business the way the parties have in this case. The Board and President Wilson, as elected officials and fiduciaries of WSU, owe the institution, the students, the university alumni, and the electorate a greater duty to maintain decorum than has been displayed.

PETERSEN FINANCIAL LLC v KENTWOOD

Docket No. 350208. Submitted April 9, 2021, at Grand Rapids. Decided April 22, 2021. Approved for publication May 27, 2021, at 9:15 a.m. Leave to appeal denied ___ Mich ___ (2023).

Petersen Financial LLC brought an action in the Kent Circuit Court against the city of Kentwood and the Kent County Treasurer, alleging that under the General Property Tax Act (GPTA), MCL 211.1 *et seq*., its purchase of real property at a tax-foreclosure sale was free from all liens except any future installments of special assessments and that all previously owed special-assessment installments were extinguished by the judgment of foreclosure. Beginning in 2004, the city entered into various special-assessment agreements with the previous property owner regarding several infrastructure improvements that were to benefit the property for purposes of a planned unit development. The agreements included a voluntary special-assessment/development agreement (VSADA), and the agreements indicated that the contractual obligations constituted covenants that ran with the land and bound all successors in title. After entering into the VSADA, the city commission adopted Resolution 96-04, which established the special-assessment-district roll, set the amount and terms of the special assessment, and apportioned the special assessment among the parcels in the special-assessment district. The special-assessment resolution was due, in full, in September 2014. In July 2014, the city adopted Resolution 50-14, purporting to extend the special-assessment payment deadline from September 2014 to September 2015. The previous property owner failed to pay the special assessments connected to the property; a tax-foreclosure action was commenced; a tax-foreclosure judgment was entered; the property owner failed to redeem the property or appeal the judgment; and title vested in March 2015 in the county treasurer as the foreclosing governmental unit. After the foreclosure judgment was entered but before the foreclosure sale, the city amended the VSADA, extending the final deadline for payment of the special assessment from September 2014 to 2024. In addition, the city also adopted Resolution 31-15, which also extended the payment deadline on the assessment to 2024. Plaintiff subsequently purchased

the property at a tax-foreclosure sale. In 2016, plaintiff filed suit, seeking a declaratory judgment that certain assessments were extinguished by the foreclosure judgment and that plaintiff owned the property free from any obligation. In addition, plaintiff sought a refund of money it had paid toward the assessment. Both parties moved for summary disposition. The court, George J. Quist, J., granted summary disposition in favor of defendants, primarily on the basis that plaintiff's claims fell within the exclusive jurisdiction of the Michigan Tax Tribunal. Plaintiff appealed, and the Court of Appeals, MURPHY, P.J., and O'CONNELL and BECKERING, JJ., reversed the trial court's jurisdictional ruling and remanded for further proceedings. 326 Mich App 433 (2018). On remand, the parties filed competing motions for summary disposition, and the trial court again granted summary disposition to defendants, reasoning that the obligation at issue involved future installments of a special assessment, which survived foreclosure under MCL 211.78k(5)(c) of the GPTA. Plaintiff appealed.

The Court of Appeals *held*:

1. The GPTA provides that a governmental unit may seize and sell real property to satisfy the unpaid delinquent real-property taxes as well as any interest, penalties, and fees associated with the foreclosure and sale of the property. Under MCL 211.78a(1), the term "taxes" includes unpaid special assessments or other assessments that are due and payable up to and including the date of the foreclosure hearing. In turn, a special assessment is a levy upon property within a specified district; it is a specific levy designed to recover the costs of improvements that confer local and peculiar benefits upon property within a defined area. Special assessments may be levied as permitted by statute, municipal charter, and applicable ordinances, and a governmental unit has authority to enter into contracts and to enact a valid special assessment at the same time regarding proposed improvements. Thus, a special assessment created by a resolution is not invalid simply because a contract exists relating to the same improvements encompassed by the special assessment. Once a tax assessment becomes final, a taxing authority, like a taxpayer, must abide by the rules and procedures applicable for challenging the assessment. The GPTA and caselaw contain clear rules that special assessments, except for future installments, are extinguished by foreclosure and that, once extinguished, the obligations cannot be revived by the taxing authority following foreclosure. Thus, a taxing authority's sole means to recoup any portion of the delinquent assessment is through reimbursement from the

sale proceeds, not by again encumbering the property with an extinguished obligation; that is, the taxing unit bears any loss associated with cancellation of past-due taxes, assessments, and liens. The purpose of that rule is to ultimately restore the unencumbered property to the tax rolls. Once a special assessment has been extinguished, a governmental entity lacks power to revive it. To obtain foreclosure, the foreclosing governmental unit must file a petition of foreclosure in circuit court, requesting that a judgment be entered vesting absolute title to each parcel of property in the foreclosing governmental unit without right of redemption. Under MCL 211.78k(6), fee simple title vests in the governmental unit's treasurer when delinquent taxes, interest, penalties, and fees are not paid 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; the foreclosure judgment extinguishes all liens and existing interests in the property except as provided in MCL 211.78k(5)(c) and (e). In that regard, MCL 211.78k(5)(c) provides that all liens against the property, including any lien for unpaid taxes or special assessments, except for future installments of special assessments and liens, are extinguished if the forfeited delinquent taxes, interest, penalties, and fees are not paid on or before the March 31 immediately succeeding the foreclosure judgment. In turn, MCL 211.78k(5)(e) provides that a foreclosure judgment must specify that all existing recorded and unrecorded interests in that property are extinguished, except, among other things, a visible recorded easement or right-of-way, or private deed restrictions.

2. In this case, the VSADA was simply a contract between the city and the previous property owners, not a special assessment levied in accordance with the statutes, municipal charter, and ordinances that govern special assessments in Kentwood. While contracts between a governmental entity and a property owner regarding improvements to property are valid and enforceable, it did not follow that a contractual obligation under the VSADA to pay for certain improvements was a special assessment. Because the VSADA was not a special assessment, it did not survive the foreclosure under the MCL 211.78k(5)(e) exception for future installments of a special assessment. Defendants abandoned their argument that the VSADA constituted a covenant running with the land that survived foreclosure as a private deed restriction under MCL 211.78k(5)(e); even if the argument were preserved, it lacked merit. The city had authority to enter into the VSADA (a contract) and enact a valid special assessment at the

same time. While the VSADA was a contract, Resolution 96-04 was a valid special assessment. The special assessment became due in September 2014, *before* the foreclosure became final in March 2015; therefore, there was no future installment left on that assessment for purposes of MCL 211.78k(5)(c). The city did not follow its procedures for reconfirming a special-assessment role when it adopted Resolution 50-14, and it did not have authority under the city's ordinances and charter to adopt Resolution 50-14 to amend the terms of the special assessment once it became final and conclusive under Kentwood Code of Ordinances, § 50.10. Thus, the statutes, the city charter, and code of ordinances governed the lawfulness of Resolution 50-14, and those did not grant the city authority to legally extend the term of the special assessment. As a result, the special assessment created by Resolution 96-04, which became due in September 2014, was not extended by Resolution 50-14, and because there was no future installment of a special assessment owing at the time of foreclosure, the assessment was extinguished at that time under MCL 211.78k(5)(c), with title passing to the city treasurer free from any obligation. The amended VSADA and Resolution 31-15, both of which purported to extend the payment term for the extinguished special assessment to 2024, were void as against public policy because they attempted to extend or revive an extinguished assessment. Accordingly, the trial court erred by concluding that the special assessment survived foreclosure and by granting summary disposition in favor of defendants; on remand, the trial court was to enter judgment in favor of plaintiff on this issue.

3. Although the VSADA and the amended VSADA contained waiver provisions prohibiting property owners from challenging the validity of the special assessment, the waivers did not apply to the lawsuit because plaintiff did not challenge the terms of the special assessments or amounts, but instead, challenged whether the assessments could be enforced under MCL 211.78k(5)(c) after the foreclosure. Accordingly, defendants' waiver claim lacked merit.

4. The trial court did not address plaintiff's refund claim because it granted summary disposition in favor of defendants. On remand, the trial court was to address plaintiff's request for a refund.

Judgment reversed and case remanded for further proceedings.

Visser and Associates, PLLC (by *Donald R. Visser*) for plaintiff.

Craig A. Paul and *Plunkett Cooney* (by *Josephine A. DeLorenzo* and *David K. Otis*) for defendants.

Before: MURRAY, C.J., and MARKEY and LETICA, JJ.

PER CURIAM. This case involves the issue whether plaintiff, Petersen Financial LLC (Petersen), as the purchaser of property following a tax foreclosure, became liable for the previous owner's obligations connected to public improvements benefiting the property or whether those obligations were extinguished by the judgment of foreclosure. Petersen filed the current action, seeking a declaratory judgment that any obligations had been extinguished by the foreclosure judgment. In 2017, the trial court granted summary disposition to defendants, the city of Kentwood (the City) and the Kent County Treasurer (the Treasurer), primarily on the basis that Petersen's claims fell within the exclusive jurisdiction of the Michigan Tax Tribunal. Petersen appealed, and this Court reversed the trial court's jurisdictional ruling and remanded for further proceedings. See *Petersen Fin LLC v Kentwood*, 326 Mich App 433; 928 NW2d 245 (2018). On remand, the parties filed cross-motions for summary disposition, and the trial court again granted summary disposition in favor of defendants, this time under MCR 2.116(C)(8) and (I)(2). Briefly stated, the trial court concluded that the obligation still at issue on remand involved "future installments" of a "special assessment," which survived foreclosure under MCL 211.78k(5)(c) of the General Property Tax Act (GPTA), MCL 211.1 *et seq*. Petersen appeals by right.

On appeal, we hold that although the City levied a special assessment through adoption of a resolution, efforts to extend the terms for payment of this assessment were invalid; consequently, the special assessment

was extinguished by the foreclosure because there were no future installments owing at the time of foreclosure. We also conclude that postforeclosure efforts to revive the extinguished assessment either by contract or resolution were void. Accordingly, we reverse the grant of summary disposition to defendants and remand the case for entry of judgment in Petersen's favor, thereby removing the liens on the property.

I. FACTS

In our previous decision, we summarized the basic facts of this case as follows:

> This case concerns real property located within the city. Starting in 2004, the city and the property owner, along with others, entered into various special assessment agreements relative to several infrastructure improvements that were to benefit the property for purposes of a planned unit development. These agreements, which were recorded and involved the property owner making installment payments to the city, indicated that the contractual obligations contained therein constituted covenants that ran with the land and bound all successors in title. The city commission adopted multiple resolutions associated with the agreements and prepared and confirmed special assessment rolls for the improvements. Eventually, the property owner failed to pay the special assessments, a tax foreclosure action was commenced, a judgment of foreclosure was entered, the property owner failed to redeem the property or appeal the judgment, and title vested absolutely in the county treasurer as the foreclosing governmental unit. Subsequently, at a tax foreclosure sale, the county treasurer conveyed the property to [Petersen] pursuant to a quitclaim deed. [*Petersen Fin*, 326 Mich App at 437.]

Procedurally, in 2016, Petersen filed the current action seeking a declaratory judgment to the effect that certain assessments had been extinguished by the foreclosure judgment and that Petersen owned the property

free of any obligations. Relevant to the current appeal, in Count II of the complaint, Petersen specifically challenged the continued existence and validity of a voluntary special-assessment/development agreement (VSADA) and related resolutions. In Count IV of the complaint, Petersen challenged the validity of an amendment to the VSADA (the amended VSADA) and related resolutions.[1] Monetarily, the outstanding obligation on the special assessment challenged by Petersen totaled $403,620. Later, Petersen also added Count V, a claim for a refund in the amount of $23,421.13, which Petersen asserted it had paid toward the assessment.

Following an appeal in this Court and remand for further proceedings regarding Counts II and IV, the parties filed cross-motions for summary disposition; the trial court denied Petersen's motion for summary disposition while granting summary disposition to defendants under MCR 2.116(C)(8) and (I)(2). The trial court concluded that the City levied a valid special assessment and that future installments remained owing as a result of an extension of the payment terms. Accordingly, the trial court ruled that the assessment obligation survived foreclosure under MCL 211.78k(5)(c). Additionally, the trial court rejected Petersen's arguments that the amended VSADA, signed after the foreclosure judgment was entered but before the foreclosure sale, was void as against public policy and for lack of consideration. In short, the trial court determined that the special assessment remained a valid encumbrance on the property. Petersen now appeals.

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[1] In our previous decision, we concluded that Petersen was entitled to judgment on Counts I and III of the complaint, which concerned two other assessments. See *Petersen Fin*, 326 Mich App at 447.

II. ANALYSIS

On appeal, Petersen argues that the trial court erred by denying its motion for summary disposition and granting summary disposition in favor of defendants. According to Petersen, the obligation in this case did not survive foreclosure under MCL 211.78k(5)(c) because there was no special assessment, merely a contractual agreement. And even if there were a special assessment, Petersen asserts that there were no future installments because efforts to extend the final deadline for payment of the special assessment were invalid, and the special assessment was, therefore, past due at the time of the foreclosure judgment. On the basis of its assertion that the obligation was extinguished, Petersen also argues that postforeclosure efforts—while the property was owned by the Treasurer—to contractually revive the assessment were void as against public policy and for lack of consideration. Petersen asks that we remand for entry of judgment in its favor, removing any liens from the property and ordering a monetary refund to Petersen.

In contrast, defendants contend that the trial court's decision should be affirmed. According to defendants, the City levied a valid special assessment that survived foreclosure under MCL 211.78k(5)(c). Alternatively, defendants make the unpreserved argument that the obligation survived foreclosure as a "private deed restriction" under MCL 211.78k(5)(e). In either case, defendants assert that the obligation survived foreclosure and that a postforeclosure contract between the City and the Treasurer, as well as an additional resolution adopted by the City, were valid and enforceable. As an alternative basis to affirm, which was raised but not decided below, defendants also maintain that contractual waiver provisions preclude Petersen's challenges of the assessment.

A. STANDARDS OF REVIEW

We review de novo a trial court's ruling on a motion for summary disposition. *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 507; 667 NW2d 379 (2003). This Court also reviews de novo legal questions involving statutory interpretation, the construction of a contract, and the interpretation of a municipal resolution. *46th Circuit Trial Court v Crawford Co*, 476 Mich 131, 140; 719 NW2d 553 (2006) (opinion by MARKMAN, J.).

B. OVERVIEW OF THE GPTA

Under the GPTA, a governmental unit may seize and sell real property to "satisfy the unpaid delinquent real-property taxes as well as any interest, penalties, and fees associated with the foreclosure and sale of [the property]." *Rafaeli, LLC v Oakland Co*, 505 Mich 429, 474; 952 NW2d 434 (2020); see also MCL 211.78a(1). In this context, the term "taxes" also includes "unpaid special assessments or other assessments that are due and payable up to and including the date of the foreclosure hearing . . . ." MCL 211.78a(1). Briefly stated, under the GPTA's tax-foreclosure process, "tax-delinquent properties are forfeited to the county treasurers; foreclosed on after a judicial foreclosure hearing; and, if not timely redeemed, sold at a public auction." *Rafaeli, LLC*, 505 Mich at 442.

At issue in this case is the effect of a foreclosure on encumbrances to the property, such as a special assessment. When seeking foreclosure, the foreclosing governmental unit must file a petition of foreclosure in circuit court, requesting "that a judgment be entered vesting absolute title to each parcel of property in the

foreclosing governmental unit, without right of redemption." MCL 211.78h(1). See also *Rafaeli, LLC*, 505 Mich at 445. After filing of the petition and a judicial foreclosure hearing, a judgment of foreclosure must be entered by March 30. *Rafaeli, LLC*, 505 Mich at 445. "Unless the delinquent taxes, interest, penalties, and fees are paid on or before March 31, fee simple title to the property vests absolutely in the foreclosing governmental unit without any further redemption rights available to the delinquent taxpayer." *Id*. "Thereafter, the foreclosing governmental unit's title to the property is not subject to any recorded or unrecorded lien." *Id*.

In more detail, MCL 211.78k sets forth the requirements of a judgment of foreclosure and generally proclaims that title vests in the foreclosing governmental unit:

> (5) The circuit court shall enter final judgment on a petition for foreclosure filed under section 78h at any time after the hearing under this section but not later than the March 30 immediately succeeding the hearing with the judgment effective on the March 31 immediately succeeding the hearing for uncontested cases or 10 days after the conclusion of the hearing for contested cases. All redemption rights to the property expire on the March 31 immediately succeeding the entry of a judgment foreclosing the property under this section, or in a contested case 21 days after the entry of a judgment foreclosing the property under this section. The circuit court's judgment must specify all of the following:
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> * * *
>
> (b) That fee simple title to property foreclosed by the judgment will vest absolutely in the foreclosing governmental unit, except as otherwise provided in subdivisions (c) and (e), without any further rights of redemption, if all forfeited delinquent taxes, interest, penalties, and fees,

which delinquent taxes, interest, penalties, and fees may be reduced by the foreclosing governmental unit in accordance with section 78g(8), are not paid 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.

(c) *That all liens against the property, including any lien for unpaid taxes or special assessments, except future installments of special assessments* and liens recorded by this state or the foreclosing governmental unit under the natural resources and environmental protection act, 1994 PA 451, MCL 324.101 to 324.90106, *are extinguished*, if all forfeited delinquent taxes, interest, penalties, and fees are not paid 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.

(d) That, except as otherwise provided in subdivisions (c) and (e), the foreclosing governmental unit has good and marketable fee simple title to the property, if all forfeited delinquent taxes, interest, penalties, and fees are not paid 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.

(e) That all existing recorded and unrecorded interests in that property are extinguished, *except* a visible or recorded easement or right-of-way, *private deed restrictions*, interests of a lessee or an assignee of an interest of a lessee under a recorded oil or gas lease, interests in oil or gas in that property that are owned by a person other than the owner of the surface that have been preserved as provided in section 1(3) of 1963 PA 42, MCL 554.291, interests in property assessable as personal property under section 8(g), or restrictions or other governmental interests imposed under the natural resources and environmental protection act, 1994 PA 451, MCL 324.101 to 324.90106, if all forfeited delinquent taxes, interest, pen-

> alties, and fees are not paid 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.
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> * * *
>
> (6) Except as otherwise provided in subsection (5)(c) and (e), fee simple title to property set forth in a petition for foreclosure filed under section 78h on which forfeited delinquent taxes, interest, penalties, and fees are not paid 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, will vest absolutely in the foreclosing governmental unit, and the foreclosing governmental unit will have absolute title to the property . . . . The foreclosing governmental unit's title is not subject to any recorded or unrecorded lien and must not be stayed or held invalid except as provided in subsection (7) or (9). [Emphasis added.]

"After foreclosure, and assuming the state, city, village, township, or county where the property is located does not purchase the property, the GPTA provides for one or more auction sales beginning on the third Tuesday in July immediately succeeding the entry of the judgment of foreclosure." *Rafaeli, LLC*, 505 Mich at 446 (citation omitted).

C. PREFORECLOSURE OBLIGATIONS

In this case, the property at issue was seized under the GPTA, and a judgment of foreclosure was entered for the satisfaction of all taxes, including special assessments due and payable up to the date of the foreclosure hearing. See MCL 211.78h; see also MCL 211.78a(1). Under MCL 211.78k(6), fee simple title vested abso-

lutely in the Treasurer at the time of foreclosure, extinguishing all liens and existing interests in the property except as provided in MCL 211.78k(5)(c) and (e). As relevant to the arguments on appeal, MCL 211.78k(5)(c) and (e) provide that "future installments of special assessments" and "private deed restrictions" are not extinguished by foreclosure. In light of these exceptions, the parties dispute whether Petersen, as the purchaser of the property at auction following foreclosure, became liable for the previous property owner's assessment obligation. There are three documents—(1) the VSADA, (2) Resolution 96-04, and (3) Resolution 50-14—relevant to this initial question whether there was a preforeclosure obligation relative to the property that survived foreclosure under MCL 211.78k.

1. THE VSADA

The first document, the VSADA, is a contract, and as a contract rather than a special assessment, the VSADA did not survive foreclosure under MCL 211.78k(5)(c), which only creates an exception for (1) future installments of (2) a special assessment.

The term "special assessment" refers to "a levy upon property within a specified district. Although it resembles a tax, a special assessment is not a tax." *Kadzban v Grandville*, 442 Mich 495, 500; 502 NW2d 299 (1993). Unlike a tax to raise revenue for general governmental purposes, "a special assessment can be seen as remunerative; it is a specific levy designed to recover the costs of improvements that confer local and peculiar benefits upon property within a defined area." *Id*. Special assessments may be levied as permitted by statute, municipal charter, and applicable ordinances. *Wikman v Novi*, 413 Mich 617, 636-637; 322 NW2d 103 (1982). See also MCL 117.4d(1)(a). "They may be col-

lected at the same time and in the same manner as other property taxes. If unpaid, they may become a lien on the property like other property taxes, or may be collected by an action against the owner of the property." *Wikman*, 413 Mich at 635 (citations omitted).

Considering the definition of "special assessment" and the manner in which it must be levied, it is clear that the VSADA is simply a contract between the City and the previous property owners. It is not a special assessment levied in accordance with the statutes, municipal charter, and ordinances that govern special assessments in the City. On appeal, in disputing the assertion that foreclosure extinguished the VSADA under MCL 211.78k(5)(c), defendants emphasize that contracts between a governmental entity and a property owner regarding payment for improvements to the property are valid and enforceable. See *Grosse Ile Twp v New York Indemnity Co*, 260 Mich 643, 646; 245 NW 791 (1932). Certainly, such a contract may be valid and enforceable. See *id*. Nonetheless, it does not follow that a contractual obligation to pay for property improvements constitutes a special assessment, i.e., a levy upon property within a specified district to recover costs for improvements benefiting the property as permitted by statute, municipal charter, and applicable ordinances. See *Kadzban*, 442 Mich at 500; *Wikman*, 413 Mich at 636-637. To survive foreclosure under MCL 211.78k(5)(c), the obligation in question must be a special assessment. Because the VSADA was not a special assessment, it did not survive foreclosure under MCL 211.78k(5)(c)'s exception for future installments of a special assessment.

Alternatively, defendants argue that the VSADA constituted a private deed restriction that survived foreclosure under MCL 211.78k(5)(e). The VSADA con-

tained a provision indicating that it would be recorded with the Register of Deeds and that the obligations under the VSADA were "covenants that run with the land" and "bind all successors in title." Relying on *Lakes of the North Ass'n v TWIGA Ltd Partnership*, 241 Mich App 91; 614 NW2d 682 (2000), defendants contend that the VSADA's creation of an assessment as a covenant that ran with the land amounted to a private deed restriction that survived foreclosure under MCL 211.78k(5)(e). This argument is, however, unpreserved. See *In re Int'l Transmission Co Application*, 304 Mich App 561, 566-567; 847 NW2d 684 (2014).[2] Further, although defendants offer the conclusory assertion on appeal that covenants running with the land were created by the VSADA, defendants fail to address the requirements for establishing covenants that run with the land.[3] By failing to brief the merits of the issue,

[2] In a footnote in a summary disposition brief, defendants made a cursory reference to MCL 211.78k(5)(e), stating, "Although Petersen's complaint focuses on future installments of special assessments, the City preserves the right to enforce any other obligation set forth in the VSADA or Amendment because such properly recorded private deed restrictions are not extinguished by foreclosure. MCL 211.78k[5](e)." Although purporting to have preserved the issue, defendants did not develop an argument related to MCL 211.78k(5)(e) and did not ask the trial court for a ruling on this question. As a result, the trial court did not address or decide the issue. On these facts, defendants' perfunctory citation of MCL 211.78k(5)(e) was insufficient to preserve defendants' arguments regarding the statutory provision. See *Int'l Transmission Co*, 304 Mich App at 566-567 (finding that "cursory reference" to an issue in the footnote of a trial brief without "actually" making an argument was insufficient to preserve an issue for appeal).

[3] This Court has explained:

> The essentials of such a covenant [i.e., a covenant running with the land] have been stated to be that the grantor and grantee must have intended that the covenant run with the land; the covenant must affect or concern the land with which it runs; and there must be privity of estate between the party claiming the

defendants have abandoned the claim that the VSADA constituted a covenant running with the land that survived foreclosure as a private deed restriction under MCL 211.78k(5)(e). See *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999).

Moreover, defendants' argument lacks merit. As stated in MCL 211.78k(5)(e), "all existing recorded and unrecorded interests in th[e] property are extinguished, except . . . private deed restrictions" and other exceptions not relevant to this case. In general, "[a] deed restriction represents a contract between the buyer and the seller of property." *Bloomfield Estates Improvement Ass'n, Inc v Birmingham*, 479 Mich 206, 212; 737 NW2d 670 (2007). In *Lakes of the North*, 241 Mich App at 93-94, 100, this Court more specifically concluded that for purposes of MCL 211.78k(5)(e),[4] private deed restrictions encompassed a maintenance assessment established by a developer pursuant to a restrictive covenant that was recorded when the developer owned all of the lots in the subdivision. Given the panel's conclusion that the assessment constituted a private deed restriction, this Court determined that the obligation to pay prospective maintenance assess

benefit and the party who rests under the burden. [*Greenspan v Rehberg*, 56 Mich App 310, 320-321; 224 NW2d 67 (1974) (quotation marks and citation omitted; alteration in original).]

[4] Much of the analysis in *Lakes of the North*, 241 Mich App at 96-100, involved former MCL 211.67, which governed the case and provided that "encumbrances" on property were extinguished by foreclosure. The GPTA, however, had been recently amended, replacing MCL 211.67 with MCL 211.78k, and the Court in *Lakes of the North* decided to also take note of the "private deed restriction" language in MCL 211.78k(5)(e). The comments on private deed restrictions were thus obiter dicta. See *Wold Architects & Engineers v Strat*, 474 Mich 223, 232 n 3; 713 NW2d 750 (2006) ("Statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand, are, however illuminating, but *obiter dicta* and lack the force of an adjudication.") (quotation marks and citations omitted).

ments survived foreclosure. *Lakes of the North*, 241 Mich App at 99-100. We note that the covenant in *Lakes of the North* specifically provided that " '[t]he developer being the owner of all the properties hereby covenants and each subsequent owner by acceptance of a land contract and/or a deed therefor, whether or not it shall be expressed in any such deed or contract is deemed to covenant and agree to pay to the Association' " a maintenance assessment. *Id*. at 94.

Analogizing the special assessment here to the maintenance assessment in *Lakes of the North*, defendants argue that the obligation to pay the special assessment, as stated in the VSADA, constituted a covenant, i.e., a private deed restriction, that survived foreclosure under MCL 211.78k(5)(e). Simply put, we conclude that the VSADA did not constitute or include a private deed restriction. The VSADA was a contract, effectively containing a condition precedent to the developers' obligation to perform, which condition did occur by way of resolution, with a *public* entity as one of the parties to the contract and absent any entanglement with or connection to a *deed*. There was no document of conveyance associated with the VSADA, unlike in *Lakes of the North* where the maintenance-assessment covenants arose and became enforceable upon the purchase of real property by land contract or deed. The dicta in *Lakes of the North* provides no aid to defendants' position.

2. RESOLUTION 96-04

Although the VSADA did not create an assessment, the City Commission established a special assessment with the adoption of Resolution 96-04. Chapter X of the Kentwood City Charter authorized the City Commission to enact special assessments for public improvements, and Chapter 50 of the Kentwood Code of

Ordinances (KCO) provided the procedures for levying a special assessment by resolution of the City Commission. In keeping with this authority, the City Commission adopted Resolution 96-04 to recover the costs for public improvements that conferred a peculiar benefit on the properties in the Ravines special-assessment district. See *Kadzban*, 442 Mich at 500. Resolution 96-04 established the special-assessment-district roll, set the amount and terms of the special assessment, and apportioned the special assessment among the parcels in the special-assessment district. In short, acting within its authority as provided by law, the City Commission adopted Resolution 96-04. In so doing, it levied a special assessment.

A special assessment is presumed to be valid. See *Kane v Williamstown Twp*, 301 Mich App 582, 586; 836 NW2d 868 (2013). And Petersen offered nothing in the trial court, or on appeal, to overcome this presumption or to demonstrate that Resolution 96-04 was invalid. In particular, Petersen mainly challenges the validity of the assessment on the basis that the obligation created by Resolution 96-04 could not actually be a special assessment because the City and the developers first entered into a contract—the VSADA—regarding the proposed improvements. But Petersen offers no authority for the proposition that the City cannot enter into a contract and also enact a valid special assessment. Clearly, the City has the authority to enter into contracts, see *Grosse Ile Twp*, 260 Mich at 646, and the City also has the power to levy special assessments, see *Wikman*, 413 Mich at 636-637. Caselaw also demonstrates that a special assessment created by resolution is not invalid simply because there also exists a contract relating to the same improvements encompassed by the special assessment. See, e.g., *Thayer Lumber Co v Muskegon*, 157 Mich 424, 430-432; 122 NW 189 (1909)

(finding valid a reassessment involving a resolution that specifically referred to a contract). In sum, there is no merit to Petersen's assertion that in light of the VSADA, Resolution 96-04 somehow created only a contractual obligation rather than a special assessment.[5]

Instead, Resolution 96-04 created a "special assessment," and whether this obligation survived foreclosure under MCL 211.78k(5)(c) requires a determination whether there remained "future installments" of the special assessment. Relevant to this future-installment question, Resolution 96-04 set a 10-year term for the special assessment. Annual interest-only payments were due beginning in September 2005, and the final balloon payment, including principal and interest, was due in September 2014. The foreclosure in this case occurred in March 2015, which was *after* the final payment set by Resolution 96-04 came due. If Resolution 96-04 controlled the time for payment of the special assessment, it is clear that there was no future installment for purposes of MCL 211.78k(5)(c) because the assessment came due in full in September 2014, before the March 2015 foreclosure.

3. RESOLUTION 50-14

In our view, the pivotal question in this case is whether the City properly adopted Resolution 50-14,

[5] In challenging the special assessment created by Resolution 96-04, Petersen, relying on an opinion from the Office of the Attorney General, OAG, 2001-2002, No. 7110 (June 17, 2002), also makes a cursory argument that the resolution could not have established a special assessment because special assessments are not recorded and the VSADA was recorded. In making this argument, Petersen again conflates the VSADA and Resolution 96-04. Even if a special assessment cannot be recorded, there is no indication that Resolution 96-04 was recorded. The existence and recording of the VSADA does not alter the validity of the special assessment created by Resolution 96-04.

which purported to extend the final payment deadline from September 2014 to September 2015. The City Commission adopted Resolution 50-14 in July 2014, before the final payment came due in September 2014 and before the foreclosure in March 2015. Accordingly, if Resolution 50-14 validly extended the payment deadline to September 2015, then at the time of the foreclosure in March 2015 there remained a future installment on the special assessment.

The City Commission's authority relating to special assessments is defined by statute, ordinance, and city charter. See *Wikman*, 413 Mich at 636-637; see also *Whitney v Common Council of the Village of Hudson*, 69 Mich 189, 197; 37 NW 184 (1888) ("That the action of the common council must be within the power conferred, and when the mode is prescribed, either by charter or ordinance, that mode constitutes the measure of the power[.]"). As noted, the Kentwood City Charter and KCO authorized the City Commission to adopt resolutions to levy special assessments. The procedures provided for a hearing, review of the assessment roll and changes thereto by the City Commission, and, ultimately, confirmation of the assessment roll. See KCO, Ch 50. Notably, following the City Commission's review and any changes to the assessment roll that the Commission might make, KCO, § 50.10 provided for the City Commission's examination and confirmation of the assessment roll, stating as follows:

> The City Commission shall meet at the time and place designated for the review of such special assessment roll, and at such meeting, or a proper adjournment thereof, shall consider all objections thereto submitted in writing. The City Commission may correct such roll as to any special assessment or description of any lot or parcel of land or other errors appearing therein, or it may by

> resolution annul such assessment roll and direct that new proceedings be instituted. The same proceedings shall be followed in the making of the new roll as in the making of the original roll. If, after hearing all objections and making a record of such changes as the City Commission deems justified, the City Commission determines that it is satisfied with the special assessment roll and that assessments are in proportion to benefits received, it shall thereupon pass a resolution reciting such determinations, confirming such roll, placing it on file in the office of the clerk and directing the clerk to attach his warrant to a certified copy thereof within ten days, therein commanding the assessor to spread, and the treasurer to collect, the various sums and amounts appearing thereon as directed by the City Commission. Such roll shall have the date of confirmation endorsed thereon and *shall, from that date, be final and conclusive for the purpose of the improvement to which it applies*, subject only to adjustment to conform to the actual cost of the improvement, as provided in section 50-14. [Emphasis added.]

As discussed, a valid special assessment was created by Resolution 96-04. Under KCO, § 50.10, once confirmed by the City Commission, the special assessment established by Resolution 96-04 became "final and conclusive" for purposes of the improvements related to the property in question. Once an assessment becomes final, a taxing authority, like a taxpayer, must abide by the rules and procedures applicable for challenging the assessment. See *Detroit Edison Co v Detroit*, 297 Mich 583, 591; 298 NW 290 (1941) ("Any action attacking the assessment, whether by the taxpayer, the taxing authorities, or the State tax commission, must be seasonably taken."). But in this case, defendants have not identified any legal basis for altering the payment terms of the assessment.

We note that the KCO provides for reassessment of or adjustments to a special assessment in particular

circumstances, but none of the circumstances applied to the special assessment created by Resolution 96-04. For example, under KCO, § 50.14, adjustments can be made to increase an assessment or issue refunds if, after completion of the improvements, it is determined that the actual costs differed from the amount of the special assessment. But this provision did not apply to Resolution 50-14, which did not alter the amount of the special assessment to conform to actual costs. Alternatively, KCO, § 50.10 allows for the correction of errors or the annulment of the roll *before* confirmation of the roll; it does not provide for alterations after the assessment becomes final and conclusive. Finally, KCO, § 50.16 allows for "a new assessment" if the City Commission deems a special assessment "invalid or defective for any reason whatsoever" or if a court finds the assessment to be "illegal for any reason whatsoever[.]" But even when KCO, § 50.16 applies, it requires that "[a]ll proceedings on such reassessment and for the collection thereof shall be made in the manner as provided for the original assessment." The procedures for confirming a special-assessment roll were *not* followed when adopting Resolution 50-14. To the contrary, Resolution 50-14 provided that it was made "[w]ithout re-confirming" the special assessment roll. In short, the KCO and City Charter, while generally authorizing the City Commission to establish a special assessment, did not provide authority for the City Commission's adoption of Resolution 50-14 to amend the terms of the special assessment once it became "final and conclusive" under KCO, § 50.10.[6] Cf.

[6] Under the GPTA, in specified circumstances, to avoid foreclosure, a foreclosing governmental unit may enter into a payment plan or a foreclosure agreement. See generally MCL 211.78q. But it does not appear that Resolution 50-14 constituted a plan under MCL 211.78q. And defendants do not even refer to MCL 211.78q, let alone present an

Hudson Motor Car Co v Detroit, 282 Mich 69, 81; 275 NW 770 (1937) ("After the tax rolls have been passed upon by local boards of review and are properly certified by them, no change may be made therein by the local board of review of by any local assessing officer.").

Rather than identify a statute or a provision in the City Charter or KCO that would have supported the City Commission's adoption of Resolution 50-14, the City argues on appeal that the VSADA authorized Resolution 50-14 because the VSADA indicated that the City Commission had discretion to set the terms of the special assessment. But, as discussed, the City Commission's authority to establish the special assessment did not derive from contract; rather, the power derived from statute, the municipal charter, and applicable ordinances. See *Wikman*, 413 Mich at 636-637. Indeed, the VSADA expressly acknowledged that "consistent with" the City's ordinances, the special assessment would be "determined by resolution of the City Commission in its discretion," and the VSADA did not purport to alter that discretion. In other words, the VSADA did not provide any independent authority for Resolution 50-14; instead, it merely recognized that the City Commission could exercise its discretion "consistent with" the City's ordinances. The fact remains that statutes, the City Charter, and the KCO governed the lawfulness of Resolution 50-14, and defendants have not advanced an argument under those authorities to justify the modification of the special assess-

argument under the statute. Indeed, it appears that MCL 211.78q would have been the appropriate statute to invoke for purposes of altering the assessment payment plan for the financially distressed developers. Defendants have not otherwise identified, nor are we aware of, any statutory authority that would have permitted the City Commission to modify the special assessment after confirmation of the assessment roll.

ment's terms after the special assessment became final and conclusive.

In sum, absent a legal basis for the adoption of Resolution 50-14, defendants' arguments that the City Commission legally extended the term of the special assessment lack merit. Without the extension in Resolution 50-14, the special assessment validly created by Resolution 96-04 came due in September 2014. Accordingly, all installments of the special assessment were due and payable before the foreclosure in March 2015. See MCL 211.78a(1). Thus, because there was no future installment of a special assessment owing at the time of foreclosure, the assessment did not survive foreclosure under MCL 211.78k(5)(c). The special assessment was extinguished, and the property passed to the Treasurer free from any assessment obligation. See MCL 211.78k(5).

D. POSTFORECLOSURE OBLIGATIONS

Following the foreclosure and while the Treasurer held title to the property, the City and the Treasurer entered into the amended VSADA, which sought to further extend the payment term for the now-extinguished special assessment to 2024. In addition, the City also adopted Resolution 31-15,[7] which likewise sought to extend the payment deadline on the assessment to 2024. Given the extinguishment of the special assessment, Petersen argues on appeal that the amended VSADA was void as against public policy and for lack of consideration. We agree and further conclude that Resolution 31-15 was invalid.

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[7] Resolution 31-15 does not appear to be part of the lower court record. Nevertheless, because it involves a public record, we may take judicial notice of it. See *Johnson v Dep't of Natural Resources*, 310 Mich App 635, 649; 873 NW2d 842 (2015); MRE 201 and MRE 202.

It is a "bedrock principle of American contract law that parties are free to contract as they see fit, and the courts are to enforce the agreement as written absent some highly unusual circumstance, such as a contract in violation of law or public policy." *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51; 664 NW2d 776 (2003).

> [T]he determination of Michigan's public policy is not merely the equivalent of the personal preferences of a majority of this Court; rather, such a policy must ultimately be clearly rooted in the law. In ascertaining the parameters of our public policy, [the Court] must look to policies that, in fact, have been adopted by the public through our various legal processes, and are reflected in our state and federal constitutions, our statutes, and the common law. [*Rory v Continental Ins Co*, 473 Mich 457, 470-471; 703 NW2d 23 (2005) (quotation marks and citations omitted).]

To warrant invalidating a contract, the public policy must be "explicit," "well defined[,] and dominant." *Terrien v Zwit*, 467 Mich 56, 67-68; 648 NW2d 602 (2002) (quotation marks and citation omitted).

In this case, the GPTA as well as judicial decisions determining the effect of a tax foreclosure provide very definite rules that special assessments, except for future installments, are extinguished by foreclosure and that, once extinguished, the obligations cannot be revived by the taxing authority following foreclosure. To begin with, the fact that special assessments, except future installments, are extinguished by foreclosure is expressly stated in MCL 211.78k(5)(c). The GPTA also provides that as a result of foreclosure, fee simple title to the property vests "absolutely" in the foreclosing governmental unit, free from any recorded or unrecorded lien. MCL 211.78k(6). The foreclosure judgment encompasses "the forfeited unpaid delinquent taxes, interest, penalties, and fees due on each parcel of property,"

including "unpaid special assessments or other assessments that are due and payable up to and including the date of the foreclosure hearing . . . ." MCL 211.78k(5)(a); MCL 211.78a(1). Following foreclosure, the property may be sold by auction, and the proceeds are placed in an account for distribution by the foreclosing governmental unit in a manner provided by the GPTA, with the first priority being "to reimburse the delinquent tax revolving fund for the full amount of unpaid taxes, interest, and fees owed on the property." *Rafaeli, LLC*, 505 Mich at 446-447. In other words, the statutory scheme provides for the extinguishment of a special assessment, and the taxing authority's sole means to recoup any portion of the delinquent assessment is provided for through reimbursement from the sale proceeds, *not* by again encumbering the property with an extinguished obligation.

The Legislature is empowered to set the terms for tax-foreclosure sales. See *Baker v State Land Office Bd*, 294 Mich 587, 602; 293 NW 763 (1940). And, as stated in MCL 211.78(1), by enacting the tax-foreclosure procedures set forth in the GPTA, the Legislature recognized "a continuing need to strengthen and revitalize the economy of this state and its municipalities by encouraging the efficient and expeditious return to productive use of property returned for delinquent taxes." The Michigan Supreme Court has similarly explained that foreclosure and sale for delinquent taxes serve "to secure a portion of the unpaid taxes, rather than nothing, and to restore lands to a taxpaying basis, instead of supinely allowing them to accumulate tax delinquencies with no hope of ever recovering them." See *Baker*, 294 Mich at 606. In this context, "the purpose for canceling past due taxes, assessments, and liens against foreclosed property is to attract prospective buyers and ultimately restore the

property to the tax rolls." *Lakes of the North*, 241 Mich App at 98 (quotation marks and citation omitted). With regard to extinguished obligations, we note that it is the taxing unit that must bear any loss associated with cancellation of past-due taxes, assessments, and liens. *Wayne Co Chief Executive v Mayor of Detroit*, 211 Mich App 243, 244; 535 NW2d 199 (1995).

Notably, it is well settled by caselaw that once a special assessment has been extinguished by foreclosure, a governmental entity lacks the power to revive it. See *Wood v Rockwood*, 328 Mich 507, 512-513; 44 NW2d 163 (1950); *Oakland Co Drain Comm'r v Royal Oak*, 325 Mich 298, 310; 38 NW2d 413 (1949); *Keefe v Oakland Co Drain Comm'r*, 306 Mich 503, 511-512; 11 NW2d 220 (1943), aff'd 322 US 393 (1944); *Muni Investors Ass'n v Birmingham*, 298 Mich 314, 325; 299 NW 90 (1941), aff'd 316 US 153 (1942). As recognized by the Michigan Supreme Court, to allow reassessment following foreclosure would defeat the purpose of the "remedial" tax-foreclosure legislation, and it "would once again give rise to the vicious circle of assessment based upon inflated valuation; refusal or inability of the owner to pay; followed by a sale of the premises pursuant to the State's sovereign power of enforcing the collection of taxes." *Muni Investors*, 298 Mich at 325. Indeed, the possibility of restoring foreclosed property "to the tax rolls would be considerably lessened because prospective buyers might well hesitate to assume such an obligation." *Keefe*, 306 Mich at 512. For these reasons, to effectuate the "obvious intent and purpose of the legislature to relieve owners from the weight of accumulated obligations," *Muni Investors*, 298 Mich at 325, as a result of a tax foreclosure, the property is "freed of the possibility of further assessments for benefits to the land by public improvements made prior to the [fore-

closing governmental unit's] acquiring title," *Oakland Co Drain Comm'r*, 325 Mich at 310.

In this case, recognizing that the special assessment created by Resolution 96-04 was extinguished by foreclosure under MCL 211.78k(5)(c), it follows that the amended VSADA effectively sought to extend or revive an extinguished assessment. But because the City cannot legally revive an extinguished assessment, see *Clark*, 325 Mich at 310, the amended VSADA must be declared void as against public policy. That is, by entering into a contract to extend the terms of an extinguished special assessment, the City violated the Legislature's mandate for the extinguishment of special assessments under MCL 211.78k(5)(c). The City in effect sought to contravene decisions from the Michigan Supreme Court expressly recognizing that an extinguished assessment may not be revived following foreclosure. The legal reality at this juncture is that the extinguished special assessment could not lawfully be revived by any means. The City's attempt to contract for the unlawful revival of an extinguished special assessment was therefore void as a violation of public policy. See *Rory*, 473 Mich at 470-471.

In arguing to the contrary, defendants make several arguments. First, they assert that there was no violation of public policy because the special assessment in fact survived foreclosure under MCL 211.78k(5)(c). This argument lacks merit for the reasons already discussed. Second, defendants note that in addition to the amended VSADA, the City Commission adopted Resolution 31-15 in June 2015. Like the amended VSADA, Resolution 31-15 extended the term of the special assessment through September 2024. Resolution 31-15, however, does not aid defendants' position because the special assessment did not survive foreclosure, and the

fact remains that the City could not reassess the property. See *Clark*, 325 Mich at 310, and cases therein. Third, defendants emphasize that the City is a home-rule city with generally broad powers to contract and adopt resolutions regarding municipal concerns. That may be, but the City's powers are constitutionally limited by laws enacted by the Legislature.[8] See *Wayne Co Chief Executive*, 211 Mich App at 245, citing Const 1963, art 7, §§ 21 and 22. In other words, the fact that one of the contracting parties is a home-rule city does not excuse the parties from adhering to the laws of this state, nor does it allow the City to enter into contracts in violation of public policy. Instead, as a contract to revive an extinguished special assessment contrary to the directives and public policy embodied in the GPTA, the amended VSADA was void. See *Rory*, 473 Mich at 470-471.

E. WAIVERS

On appeal, defendants also assert that the trial court's decision should be affirmed because, regardless of the merits of Petersen's arguments, Petersen may not challenge the validity of the special assessment at this time because both the VSADA and amended VSADA contained waiver provisions in which the property owners agreed to waive challenges to the special assessment. We disagree.

Relevant to defendants' arguments, the VSADA provided:

> The Owner represents, covenants, and agrees that the property will benefit and be enhanced in value by at least

[8] Indeed, the amended VSADA in fact recognized that the power to extend the special assessment would be exercised "consistent with" the KCO.

> the amount to be specially assessed . . . . The Owner hereby releases, waives, and relinquishes, on behalf of itself, its successors, and assigns any claims it may have against the City, its officers or employees based on or arising out of the nature of the special assessment proceedings provided for herein, any defects in notice or other procedure associated with the special assessments, or whether the owner contracted infrastructure improvements proportionately increase (relative to the amount of the special assessment) the value of the 44th LLC Property.

Elsewhere, the VSADA stated: "The City's willingness to proceed with the establishment of a special assessment district is in reliance on the Owner's request for the same and agreement to waive any challenges to the special assessment and special assessment roll."

Even if we set aside the question whether the VSADA survived foreclosure (or whether the amended VSADA was void), defendants' reliance on the waiver provisions is misplaced in light of this Court's decision in *Petersen* regarding the nature of Petersen's claims at issue in this case. This Court observed that the case fundamentally involves "a legal question regarding the effect of a tax foreclosure judgment on overdue special assessment installment payments; it is a pure issue of statutory construction." *Petersen Fin LLC*, 326 Mich App at 444. In other words:

> [Petersen] is not challenging the factual basis or the amount of the underlying assessments arising from the special assessment agreements; rather, [Petersen] takes issue with the continuing enforceability of the assessments, at least in regard to outstanding past-due installments, in light of the tax foreclosure, arguing that past debt was extinguished by the judgment of foreclosure. [*Id*. at 445-446.]

Resolution of that issue required "construction of the GPTA and the law of tax foreclosure, which has noth-

ing to do with the factual underpinnings of the special assessment." *Id*. at 446.

In *Petersen*, we discussed the nature of Petersen's claims and concluded that the case was not within the exclusive jurisdiction of the Tax Tribunal. *Id*. at 436. But given what is covered by the contractual waiver provisions, this same reasoning supports the conclusion that Petersen's challenges did not fall within the ambit of the contractual waiver provisions. This is so because Petersen's claims did not involve a challenge to the special-assessment terms or amounts; rather, they pertained to the continued enforceability of the special assessment under MCL 211.78k(5)(c) in light of the foreclosure. These arguments were not claims regarding notice or special-assessment procedures, the amount of the assessment, or the benefit the property received from the improvements. Instead, they were assertions that MCL 211.78k(5)(c) extinguished the special assessment. As written, the waiver provisions did not encompass claims under MCL 211.78k(5)(c). Indeed, in our view, an attempt to contractually prevent extinguishment of a special assessment contrary to MCL 211.78k(5)(c) would be considered void as against public policy. See *Rory*, 473 Mich at 470-471. Defendants' waiver arguments lack merit.

F. REFUND REQUEST

Finally, Petersen asserts that the trial court erred by failing to order a refund in the amount of $23,421.13, which Petersen had paid toward the assessment. The trial court did not substantively reach this issue on its merits in light of the court's ruling that the special assessment survived foreclosure. We conclude that the appropriate course of action is to have the trial court address the issue in the first instance, now in the

context of a judgment entered in Petersen's favor and that extinguishes the assessment.

III. CONCLUSION

In sum, although the City levied a valid special assessment with the passage of Resolution 96-04, its attempts to extend the payment deadline were invalid, and there was no legitimate future installment of a special assessment owing at the time of foreclosure. Accordingly, the special assessment was extinguished by foreclosure under MCL 211.78k(5)(c), and once extinguished, the assessment could not be revived by contract or resolution. The trial court, therefore, erred by concluding that the special assessment survived foreclosure. As a result, we reverse the grant of summary disposition to defendants as well as the denial of summary disposition to Petersen with respect to the continued existence of a special assessment. We remand for entry of judgment in Petersen's favor, thereby removing any liens or encumbrances on the property related to the special assessment.[9] On remand, the trial court shall also entertain Petersen's request for a refund.

We reverse and remand for proceedings consistent with this opinion. We do not retain jurisdiction. As the prevailing party, Petersen may tax costs pursuant to MCR 7.219.

MURRAY, C.J., and MARKEY and LETICA, JJ., concurred.

[9] Given our resolution of these issues, we find it unnecessary to address Petersen's remaining arguments regarding summary disposition and law of the case.

SHEFFIELD v DETROIT CITY CLERK
LEWIS v DETROIT CITY CLERK

Docket Nos. 357298 and 357299. Submitted June 3, 2021, at Lansing. Decided June 3, 2021, at 9:00 a.m. Reversed and remanded 508 Mich 851 (2021).

In 2018, Detroit voters approved a proposal to create a Detroit Charter Revision Commission (DCRC) to begin revising the Detroit City Charter and elected nine members to the DCRC. On March 5, 2021, the DCRC presented its proposed revisions to the Governor for review under MCL 117.22. The Governor responded on April 30, 2021, without signing the proposed revisions. Instead, she informed the DCRC that its draft had substantial and extensive legal deficiencies and that given those defects, she did not approve the proposed revised charter. The DCRC did not immediately respond to the Governor, though it did draft some additional revisions based on her April 30, 2021 objections. On May 6, 2021, the DCRC dubbed its proposed revised city charter "Proposal P" and adopted a resolution to submit it to the Detroit City Clerk for inclusion on the primary ballot. The City Clerk twice refused to include Proposal P on the ballot, contending that § 22 of the Home Rule City Act (HRCA), MCL 117.1a *et seq.*, required the Governor's approval before any commission-approved city charter revision could be placed on the ballot. On May 11, 2018, the deadline for submitting ballot wording to the clerk, the Detroit Election Commission voted to place Proposal P on the primary ballot. Two days later, on May 13, 2018, the DCRC transmitted a new draft of its proposed city charter revisions to the Governor. The Governor declined to review the new draft, noting that the deadline for submitting ballot wording to the clerk had passed. Thereafter, groups of Detroit residents filed two separate lawsuits the same day seeking mandamus and other relief against the Detroit City Clerk and the Detroit Election Commission. The Wayne Circuit Court, Timothy M. Kenny, C.J., consolidated the cases, allowed the DCRC to intervene as a defendant, and, after briefing and a hearing, granted mandamus relief to the plaintiffs and ordered defendants to remove Proposal P from the ballot. The DCRC appealed and filed a bypass application in the Michigan Supreme Court, which denied the

bypass motion but granted a stay and directed the Court of Appeals to expedite the appeal. 507 Mich 956 (2021).

The Court of Appeals *held*:

1. The Michigan Constitution does not grant cities the power to submit a proposed city charter revision to the voters regardless of statutory restrictions. Notwithstanding the language of art 7, §§ 22 and 34, which clearly shows an intent to give cities broad powers to conduct their own governmental affairs, § 22 expressly limits their power to adopt resolutions and ordinances "subject to the constitution and law." Moreover, § 22 limits a city's power to adopt and amend its charter under "general laws," including the HRCA.

2. While the HRCA has provisions for getting certain charter amendments before the voting public after they have been rejected by the Governor, it has no similar provisions for charter revisions, and the Court will not create such a provision when it cannot reasonably be inferred from the statutory language. Neither does the lack of a specific prohibition in § 22 of the HRCA allow a proposed city charter revision to proceed to a vote by the electors without the Governor's approval.

3. MCL 117.22 does not permit the DCRC to continually redraft its proposed charter revisions beyond the May 11, 2021 filing deadline. If that were so, then the language in MCL 117.22 that requires transmission to the Governor of the revisions "before the final adjournment of the commission," which was to occur August 6, 2021—three days after the primary election, would mean that the DCRC could transmit its final proposed revisions three days after the electorate voted to adopt them. MCL 117.23(1) specifically requires a charter commission to publish its proposed revised city charter "before submission to the electors." That deadline was May 11, 2021. Plaintiffs were entitled to mandamus relief and the order requiring defendants to remove Proposal P from the August primary ballot.

Affirmed.

FORT HOOD, J., dissenting, disagreed that the lack of a procedure for presenting proposed city charter revisions to the electorate after the Governor objects to them in § 22 of the HRCA should be interpreted to provide for a gubernatorial veto. Judge FORT HOOD took no issue with the majority's interpretation of the "general laws" or its conclusion that city charter revisions are subject to the constitution and law. Rather, Judge FORT HOOD agreed with the defendants' position that although a city's authority may be constrained, the HRCA does not constrain it in the

manner plaintiffs suggested. Nothing in the HRCA purports to say that gubernatorial approval is a prerequisite to voters having the opportunity to approve or disapprove of a charter revision.

Honigman, LLP (by *Mark A. Burton* and *Andrew M. Pauwels*) for plaintiffs.

Varnum, LLP (by *Aaron M. Phelps, Kyle P. Konwinski, Regan A. Gibson, and Jailah D. Emerson*) and *Lamont D. Satchel* for the Detroit Charter Revision Commission.

Amici Curiae:

Sugar Law Center for Economic & Social Justice (by *John C. Philo* and *Tonya Myers Phillips*) for legal scholars.

Before: CAMERON, P.J., and FORT HOOD and LETICA, JJ.

CAMERON, P.J. In these consolidated appeals, intervening defendant-appellant, the Detroit Charter Revision Commission, appeals as of right the trial court's opinion and order granting mandamus relief to plaintiffs and compelling defendants, the Detroit City Clerk and the Detroit Election Commission, to remove Proposal P from the ballot for the upcoming primary election.[1] We affirm.

I

In 2018, Detroit voters approved a ballot proposal to create a Charter Review Commission to consider revising the 2012 Detroit City Charter, and they subsequently elected the original nine members of the Detroit Charter Revision Commission (DCRC). The

[1] Consideration of this appeal has been expedited pursuant to the Michigan Supreme Court's order of June 1, 2021.

DCRC started meeting in November 2018 and, on March 5, 2021, presented its proposed revised charter to the Governor for review under MCL 117.22. Following an expedited review assisted by the Attorney General, the Governor informed the DCRC in writing on April 30, 2021, that "the current draft has substantial and extensive legal deficiencies" and that given those defects, she did not approve the proposed revised charter. The Governor notified the DCRC of her objections and included the Attorney General review explaining the legal deficiencies in detail. The DCRC made some revisions based on the Governor's objections but did not submit the new draft of the proposed revised charter to the Governor for approval.

On May 6, 2021, the DCRC resolved to submit adoption of the proposed revised charter to the voters designated as Proposal P, which read "*Shall the City of Detroit Home Rule Charter proposed by the Detroit Charter Revision Commission be adopted?*" The DCRC then submitted Proposal P to the Detroit City Clerk, who twice refused to place it on the ballot because "Section 22 of the HRCA (Home Rule City Act) does not contemplate a path to the ballot for any commission proposed revision that does not have the Governor's approval." Despite that rejection, on May 11, 2021, the deadline for placing Proposal P on the ballot, the Detroit Election Commission voted to place the proposal on the ballot. Two days after the deadline, on May 13, 2021, the DCRC submitted the new draft of the proposed revised charter to the Governor for approval. The Governor declined to conduct further review, pointing out that this new version of the proposed revised charter was presented to her after her prior disapproval—and after the May 11, 2021 deadline to submit ballot wording to the Detroit City Clerk under MCL 168.646a(2).

In two complaints filed the same day, plaintiffs sued defendants for declaratory, injunctive, and mandamus relief, arguing that because the proposed revised charter had not been approved by the Governor as required by MCL 117.22, it could not be placed on the ballot for voter approval. Plaintiffs argued that since the deadline for placing approval of the proposed revised charter on the August 3, 2021 primary ballot had passed, the DCRC could not put Proposal P on the ballot even if it were to obtain the Governor's approval of its latest version of the proposed revised charter. Thus, plaintiffs argued that Proposal P must be stricken from the ballot.

The trial court granted the DCRC's motion to intervene, held two hearings on the matter, and issued a written opinion and order that granted plaintiffs the requested mandamus relief. The court explained that "[a] writ of mandamus is an extraordinary remedy that will only issue if 1) the party seeking the writ has a clear legal right to the performance of the duties sought to be compelled 2) the defendant has a clear legal duty to perform the act requested 3) the act is ministerial, that is it does not involve discretion of judgment and 4) no other legal or equitable remedy exists that might achieve the same result." The main question before the trial court was whether defendants improperly authorized placement of Proposal P on the ballot for the upcoming primary. The court rejected the DCRC's argument that the Michigan Constitution allowed it to present a charter revision to Detroit voters without the Governor's approval, noting that while Const 1963, art 7, § 22 gave city electors the power to adopt and amend their charters, the same section stated that those powers were "subject to the constitution and law." That is, while § 22 gave home-rule cities full power over their property and government, the court found that they still had to abide by statutes and

caselaw. Citing *Northrup v City of Jackson*, 273 Mich 20, 26; 262 NW2d 641 (1935), the court noted that since at least 1935, home-rule cities had to obtain the Governor's approval of a charter provision before it could be enacted into law. Under MCL 117.22, which is a provision of the HRCA, MCL 117.1 *et seq*., a revised city charter must have the Governor's approval before it can be presented to the voters. The HRCA and caselaw distinguish between charter revisions—which involve major changes—and charter amendments that involve fewer substantive changes. The trial court concluded that while MCL 117.22 contained language providing for a means to submit an *amendment* to the voters despite the Governor's rejection, "MCL 117.22 does not provide for a mechanism whereby a *revision* of the Charter can be submitted to the voters without the approval of the Governor." (Emphasis added.)

The trial court rejected the DCRC's argument that it could continually revise the content of the proposed revised charter beyond the filing deadline, finding that position untenable because "absentee voters could vote on a proposed revision containing one version and voters who went to the poll on August 3, 2021 would be voting on a different substantive proposed revision to the Detroit City Charter." The court determined that "[n]o Michigan law authorizes such power to a Charter Revision Commission" and "that plaintiffs have a clear legal right to performance of the duty sought to be compelled." MCL 117.23 requires the language of the proposed charter revision to be published before the election so the voters can examine the proposed revision before they vote. The DCRC had two versions of the proposed revised charter, and it had not provided the voting public with a clear understanding of which proposed charter revision they were being asked to approve. The court concluded that "[i]rreparable harm

will come to the voters of Detroit if they do not have sufficient time to review the proposed Charter revision or know which version they are being asked to review." The trial court concluded that because the DCRC's proposed revised charter had not been approved by the Governor under MCL 117.22, it could not properly be placed on the ballot and submitted to the voters at the August 3, 2021 primary.

The court concluded that plaintiffs had a clear legal right to have the Detroit City Clerk and the Detroit Election Commission comply with the requirements of MCL 117.22, that the clerk and the commission had a clear legal duty not to place Proposal P on the ballot, and that it was a ministerial act for them to refuse to submit Proposal P for placement on the ballot for the upcoming primary. The court granted plaintiffs' petition for mandamus and ordered the Detroit City Clerk and the Detroit Election Commission to remove Proposal P from the August 3, 2021 ballot. Because the court was granting mandamus relief, it declined to address plaintiffs' motion for injunctive relief or the Detroit City Clerk's motion for summary disposition.

II

The DCRC asserts that the trial court erred by granting plaintiffs the requested mandamus relief, raising the following arguments: (1) that the city has the constitutional power to place the charter to a popular vote; (2) that MCL 117.22 allows it to present the proposed revised charter to the voters for approval regardless of the Governor's rejection of the proposed charter revision; (3) that the proposed charter revision did not need to be complete before its approval was placed on the ballot by Proposal P; (4) that the trial court had no basis to enter a final judgment granting

mandamus relief; (5) that removal of Proposal P from the ballot was not a ministerial act; (6) that the trial court correctly denied injunctive relief; and (7) that the substance of the revised charter cannot be at issue. We find no errors of legal interpretation or abuse of discretion and so affirm the trial court.

A trial court's decision whether to grant mandamus relief is reviewed for an abuse of discretion. *Berry v Garrett*, 316 Mich App 37, 41; 890 NW2d 882 (2016). Whether a plaintiff has a clear legal right to performance of a duty and whether the defendant has a clear legal duty to perform present questions of law that are reviewed de novo. *Id*. Questions of constitutional and statutory interpretation also present issues of law that are reviewed de novo. *Makowski v Governor*, 495 Mich 465, 470; 852 NW2d 61 (2014).

Mandamus is an extraordinary remedy used to enforce duties required of governmental actors by law. *Stand Up for Democracy v Secretary of State*, 492 Mich 588, 618; 822 NW2d 159 (2012); *Mercer v Lansing*, 274 Mich App 329, 333; 733 NW2d 89 (2007). The plaintiff seeking a writ of mandamus has the burden to establish four requirements

> (1) the party seeking the writ has a clear legal right to the performance of the duty sought to be compelled, (2) the defendant has a clear legal duty to perform the act requested, (3) the act is ministerial, that is, it does not involve discretion or judgment, and (4) no other legal or equitable remedy exists that might achieve the same result. [*Southfield Ed Ass'n v Bd of Ed of the Southfield Pub Sch*, 320 Mich App 353, 378; 909 NW2d 1 (2017) (quotation marks and citation omitted).]

III

We first reject the DCRC's argument that the Michigan Constitution grants it the power to submit a

proposed charter revision to the voters regardless of statutory restrictions. The DCRC relies on Const 1963, art 7, § 22, which reads:

> *Under general laws* the electors of each city and village shall have the power and authority to frame, adopt and amend its charter, and to amend an existing charter of the city or village heretofore granted or enacted by the legislature for the government of the city or village. Each such city and village shall have power to adopt resolutions and ordinances relating to its municipal concerns, property and government, *subject to the constitution and law*. No enumeration of powers granted to cities and villages in this constitution shall limit or restrict the general grant of authority conferred by this section. [Emphasis added.]

Furthermore, the first sentence of Const 1963, art 7, § 34 states "[t]he provisions of this constitution and law concerning counties, townships, cities and villages shall be liberally construed in their favor."

Constitutional language is analyzed consistently with the rules of statutory interpretation. *In re Boynton*, 302 Mich App 632, 639; 840 NW2d 762 (2013). When interpreting provisions of the Michigan Constitution, this Court should give constitutional language "the meaning that reasonable minds, the great mass of people themselves, would give it." *Aguirre v Dep't of Corrections*, 307 Mich App 315, 320; 859 NW2d 267 (2014) (citation and quotation marks omitted). But this Court must also consider "the circumstances surrounding the adoption of the constitutional provision and the purpose sought to be accomplished . . . ." *Id*. (citation and quotation marks omitted). The language of art 7, §§ 22 and 34 clearly shows an intent to give cities broad powers to conduct their government affairs. See *Associated Builders & Contractors v Lansing*, 499 Mich 177, 185-188; 880 NW2d 765 (2016). However, § 22 expressly states that a city's power to adopt resolutions and

ordinances relating to its government is "*subject to the constitution and law*." More significantly, the first sentence of § 22 states that the electors of each city have the power and authority to adopt and amend its charter "[*u*]*nder general laws*." Reasonable minds would interpret the phrases "under general laws" and "subject to the constitution and law" to mean that city voters have the power to adopt a new charter or amend its charter within the prescriptions of Michigan law, including the HRCA. See *Detroit v Walker*, 445 Mich 682, 688-689; 520 NW2d 135 (1994).

IV

We also reject the DCRC's argument that it can submit the proposed revision to the voters regardless of whether the Governor approved the revision. Section 22 of the HRCA, MCL 117.22, states:

> Every amendment to a city charter whether passed pursuant to the provisions of this act or heretofore granted or passed by the state legislature for the government of such city, before its submission to the electors, *and every charter before the final adjournment of the commission,* shall be transmitted to the governor of the state. *If he shall approve it, he shall sign it; if not, he shall return the charter to the commission* and the amendment to the legislative body of the city, with his objections thereto, which shall be spread at large on the journal of the body receiving them, and *if it be an amendment proposed by the legislative body, such body shall re-consider it, and if* 2/3 *of the members-elect agree to pass it, it shall be submitted to the electors. If it be an amendment proposed by initiatory petition, it shall be submitted to the electors notwithstanding such objections.* [Emphasis added.]

"The primary goal of statutory interpretation is to ascertain the legislative intent that may be reasonably inferred from the words expressed in the stat-

ute." *Epps v 4 Quarters Restoration LLC*, 498 Mich 518, 529; 872 NW2d 412 (2015) (quotation marks and citations omitted). Courts " 'must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory.' " *Johnson v Recca*, 492 Mich 169, 177; 821 NW2d 520 (2012), quoting *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146; 644 NW2d 715 (2002). Courts should not supply provisions omitted by the Legislature, because " '[i]t is to be assumed that the legislature . . . had full knowledge of the provisions . . . and we have no right to enter the legislative field and, upon assumption of unintentional omission . . . supply what we may think might well have been incorporated.' " *Johnson*, 492 Mich at 187, quoting *Reichert v Peoples State Bank*, 265 Mich 668, 672; 252 NW 484 (1934). "The use of the word 'shall' denotes mandatory action." *Wolfenbarger v Wright*, 336 Mich App 1, 30; 969 NW2d 518 (2021).

The language of HRCA § 22 states that before an amendment to a city charter or new or revised city charter is submitted to the voters for approval, it must be presented to the Governor, who can either approve it by signing it or decline to approve it while stating specific objections. The use of the word "approve" clearly denotes that the Governor is to exercise judgment as to the quality of the proposal, as opposed to merely providing gratuitous support of the proposed charter or amendment. See *Merriam-Webster's Collegiate Dictionary* (11th ed) (defining "approve" as "to give formal or official sanction to").

The DCRC does not take issue with the trial court's conclusion that the HRCA and Michigan law distinguish between amendments to city charters and revi-

sions presenting a new charter for adoption.[2] While MCL 117.22 requires that both amendments to city charters and charter revisions proposed by charter commissions be presented to the Governor for approval and provides a way for certain amendments to be presented to the voters despite the Governor's veto, the statute contains no similar provisions for passage of charter revisions following their rejection by the Governor. If things expressed in statutory language are members of an associated group or series, then courts should infer that the unmentioned things were excluded by deliberate choice rather than through inadvertence. *Esurance Prop & Cas Ins Co v Mich Assigned Claims Plan*, 330 Mich App 584, 591; 950 NW2d 528 (2019). The Legislature has made no provision for the revised charter to be submitted to the voters after the Governor's express rejection, and this Court will not create such a provision where it cannot reasonably be inferred from the statutory language. *Byker v Mannes*, 465 Mich 637, 646-647; 641 NW2d 210 (2002) (holding that courts will not read words into a statute that the Legislature has excluded).

Additionally, even if the proposed revised charter is considered an amendment, the last two sentences of § 22 state only two situations that allow a charter amendment to proceed to a vote following the Governor's rejection: (1) when the charter amendment is passed by the legislative body (i.e., the city council), the city council can override the veto with a two-thirds vote of its members and submit the amendment to the electors; and (2) when the amendment is proposed by a

[2] In effect, revision of a charter means the fundamental change of creating an entirely new charter, whereas an amendment means a correction of detail. *Kelly v Laing*, 259 Mich 212, 217; 242 NW 891 (1932). See also *Midland v Arbury*, 38 Mich App 771, 775; 197 NW2d 134 (1972).

voter initiative, it shall be submitted regardless of the Governor's objections.[3] The DCRC's proposed revised charter falls outside the scope of either type of amendment that can be submitted to the voters over the Governor's rejection. The statute contains no provisions for overriding or ignoring the Governor's veto when the voters approve a general, unspecified revision of a charter and subsequently select a commission to draft a new charter.[4]

Furthermore, we are not convinced by the DCRC's argument that the proposed revised charter can simply proceed to a vote by the electors without the Governor's approval because the express language of § 22 does not forbid it. We agree with the trial court that defendants' interpretation would make submission of the draft revision to the Governor for approval an "empty and useless gesture." When interpreting statutory language, courts should presume that the Legislature did not intend to do a useless thing and attempt to give effect to all statutory language. *People v Cunningham*, 496 Mich 145, 157; 852 NW2d 118 (2014); *Klopfenstein v Rohlfing*, 356 Mich 197, 202; 96 NW2d 782 (1959). The language of § 22 states that if the Governor does not approve the charter, she "shall return the charter to the commission and the amendment to the legislative body with [her] objections thereto, which shall be spread at large on the journal of the body receiving them . . . ." That same sentence then states the means

[3] This is consistent with 1963 Const, art 2, § 9, which provides as follows: "No law initiated or adopted by the people shall be subject to the veto power of the governor[.]"

[4] There is also no indication that the nine-member city charter commission described in MCL 117.18 reviewed the Governor's objections and nonetheless agreed to pass the proposed amendment. Consequently, no matter how the changes are construed, there was not compliance with MCL 117.22.

for overriding the rejection of "an amendment proposed by the legislative body" without any reference to a means for submitting a revised charter proposed by a charter commission. The statutory language does not merely provide for public commentary by the Governor, but instead provides for rejection based on specific objections with the apparent assumption that the commission will act on those objections, correct the charter accordingly, and submit the proposed revised charter to the Governor before the final adjournment of the commission and in time to have the proposed revised charter presented to the voters. The DCRC did not do that, therefore its proposed revised charter should not be placed before the voters for approval by way of Proposal P.

V

We agree with the trial court's rejection of the DCRC's claim that under MCL 117.22 it can continually redraft the proposed charter provision beyond the May 11, 2021 filing deadline. The relevant language of MCL 117.22 states that a proposed revised charter shall be transmitted to the governor of the state "before the final adjournment of the commission." The final adjournment of the DCRC is to occur August 6, 2021, three days after the primary when the voters are supposed to approve or deny the proposed revised charter. Following the DCRC's logic, it could submit the final proposed revised charter to the Governor any time up until August 6, 2021, which would be three days after the voters have voted on it. We must assume that the Legislature did not intend to require the Governor to engage in a useless act. *Cunningham*, 496 Mich at 157; *Klopfenstein*, 356 Mich at 202. MCL 117.23(1) specifically requires a charter commission to

publish the proposed revised city charter "before submission to the electors." The deadline for placing Proposal P on the ballot was May 11, 2021. According to the DCRC, absentee ballots for the August 3, 2021 primary election will be available to the voters on June 19, 2021. It is important to inform voters of what they are actually voting for and not confuse them. *Advisory Opinion on Constitutionality of 1982 PA 47*, 418 Mich 49, 90 n 10; 340 NW2d 817 (1983) (WILLIAMS, C.J., dissenting). The DCRC's interpretation of § 22 would likely do neither and could result in a bait and switch in that some absentee voters might vote to adopt one version of the proposed revision while later voters adopt a later-proposed revision containing different substantive provisions. In effect, the DCRC could be asking the voters to vote for a revision of the DCRC's later choosing. As noted by the trial court, "No Michigan law authorizes such power to a charter review commission."

VI

The DCRC's brief on appeal argues that plaintiffs were not entitled to mandamus relief because the trial court had no basis to enter a final judgment in the actions. However, the DCRC has provided no legal argument or authority in support of this assertion. It is well-established that an appellant may not simply "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." *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). Appellant has abandoned this argument by failing to brief it. *Johnson v Johnson*, 329 Mich App 110, 126; 940 NW2d 807 (2019).

VII

The trial court did not err by finding that removal of Proposal P from the ballot is a ministerial task.

An act is ministerial when " 'the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment.' " *Berry*, 316 Mich App at 42, quoting *Hillsdale Co Senior Servs, Inc* v *Hillsdale Co*, 494 Mich 46, 58 n 11; 832 NW2d 728 (2013). When a candidate for public office does not meet the qualifications for that office and must be removed from the ballot, removal of that name from the public ballot is a ministerial act because it would not require the exercise of judgment. See *Berdy v Buffa*, 504 Mich 876, 879; 928 NW2d 204 (2019); *Barrow v City of Detroit Election Comm*, 301 Mich App 404, 412-413; 836 NW2d 498 (2013). The same principles should be applied to a ballot proposal that should not have been placed on the ballot. The trial court ruled that Proposal P was placed on the ballot illegally in violation of MCL 117.22. Its removal leaves nothing to the exercise of defendants' judgment or discretion and so is a ministerial act.

VIII

Finally, the DCRC argues that the trial court correctly denied injunctive relief and that the substance of the revised charter is not at issue at this time. The trial court declined to address the issue of injunctive relief because it was unnecessary to do so after granting mandamus relief to plaintiffs. The trial court's written opinion specifically stated that it did "not consider the substantive merits of the contents of Proposal P" and contained nothing to suggest that the court was influenced by the contents of the proposed revised charter. Because addressing these arguments would have no practical legal effect on the controversy before us, they

present moot points that will not be addressed. *Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 386; 803 NW2d 698 (2010).

The trial court's May 26, 2021 opinion and order granting mandamus is affirmed. With this decision, the stay directed by the Supreme Court during this Court's consideration of these matters now expires. This opinion shall have immediate effect pursuant to MCR 7.215(F)(2).

LETICA, J., concurred with CAMERON, P.J.

FORT HOOD, J. (*dissenting*). I take no issue with Parts IV through VI of the majority's opinion. However, because I believe the Detroit Charter Revision Commission (DCRC) has the authority to place Proposal P on the ballots—and voters have the right to consider it—I respectfully dissent.

I first note that our Constitution grants considerable authority to cities to frame and amend their operative charters:

> Under general laws the electors of each city and village shall have the power and authority to frame, adopt and amend its charter, and to amend an existing charter of the city or village heretofore granted or enacted by the legislature for the government of the city or village. Each such city and village shall have power to adopt resolutions and ordinances relating to its municipal concerns, property and government, subject to the constitution and law. No enumeration of powers granted to cities and villages in this constitution shall limit or restrict the general grant of authority conferred by this section. [Const 1963, art 7, § 22.]

Our Constitution further provides:

> The provisions of this constitution and law concerning counties, townships, cities and villages shall be liberally

> construed in their favor. Powers granted to counties and townships by this constitution and by law shall include those fairly implied and not prohibited by this constitution. [Const 1963, art 7, § 34.]

Pursuant to the plain language of the text, cities have "broad powers over 'municipal concerns, property and government' whether those powers are enumerated or not." *Associated Builders & Contractors v Lansing*, 499 Mich 177, 188; 880 NW2d 765 (2016).

I take no issue with the majority's interpretation of the "general laws" and "subject to the constitution and law" provisions of § 22. These provisions clearly indicate that the authority of a city to revise or amend its charter may be constrained to some extent by statute, including statutes such as the Home Rule City Act (HRCA), MCL 117.1a *et seq*. However, I do not read the DCRC's argument as suggesting otherwise; rather, the DCRC argues that although a city's authority may be constrained, the HRCA does not constrain it in the manner plaintiffs have suggested in this case. I agree with that position.

The HRCA provides that a city may initiate the process of revising its charter either by a 3/5 vote of its legislative body or by an initiatory petition. MCL 117.18. I note that Detroit voters approved a general charter revision and elected members to the DCRC in 2018. MCL 117.21 provides a similar process where cities seek to *amend* their active charter.[1] Primarily at issue in this case is MCL 117.22, which provides:

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[1] The differences between revising and amending a charter are undisputed in this case. And, although the majority opines about the result of this case were the issue to be considered a charter amendment, I think it safe to say that all parties agree that this case involves a charter revision.

> Every amendment to a city charter whether passed pursuant to the provisions of this act or heretofore granted or passed by the state legislature for the government of such city, before its submission to the electors, and every charter before the final adjournment of the commission, shall be transmitted to the governor of the state. If he shall approve it, he shall sign it; if not, he shall return the charter to the commission and the amendment to the legislative body of the city, with his objections thereto, which shall be spread at large on the journal of the body receiving them, and if it be an amendment proposed by the legislative body, such body shall re-consider it, and if ⅔ of the members-elect agree to pass it, it shall be submitted to the electors. If it be an amendment proposed by initiatory petition, it shall be submitted to the electors notwithstanding such objections.

Notably absent from this statute is any reference to charter revisions other than the fact that charters should be transmitted to the Governor "before the final adjournment of the commission." MCL 117.22.[2] There is no statute in the HRCA indicating what effect or subsequent process may be initiated where the Governor declines to approve a charter revision rather than an amendment.

With that in mind, I am inclined to agree with DCRC that nothing in the HRCA purports to say that approval by the Governor is prerequisite to voters having the opportunity to approve or disapprove of a charter revision.[3] See *Associated Builders*, 499 Mich at 189

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[2] In *Warren City Council v Buffa*, 333 Mich App 422, 432; 960 NW2d 166 (2020), we noted that "MCL 117.22 relates solely to the procedure for *amending* a city charter, and more specifically, to a particular procedure that is one part of the process.") (emphasis added).

[3] As the DCRC notes, although the Governor declined to take a position on the matter in her letters to the DCRC, this was also the conclusion of the Attorney General after reviewing the DCRC's proposed charter.

n 29 (indicating that home-rule cities enjoy powers specifically granted to them and "may also exercise all powers not expressly denied") (quotation marks and citation omitted). See also *Warren City Council v Buffa*, 333 Mich App 422, 432; 960 NW2d 166 (2020) (noting that "MCL 117.22 concerns only a narrow category, proposed amendments to city charters," and "[t]his Court cannot impose additional requirements in . . . MCL 117.22 . . . that were not placed there by the Legislature"); *Esurance Prop & Cas Ins Co v Mich Assigned Claims Plan*, 330 Mich App 584, 591; 950 NW2d 528 (2019) (indicating that where things are expressed by statute as members of an associated group, courts should infer that things otherwise excluded from the group were excluded by deliberate choice rather than inadvertence). Because the HRCA is silent as to the effect and operation of the Governor's failure to approve a charter revision, I do not think it appropriate that we read MCL 117.22 as creating a veto power in the Governor that is not more explicitly prescribed. See *Lakeshore Group v Dep't of Environmental Quality*, 507 Mich 52, 66; 968 NW2d 251 (2021) ("Courts can't add requirements to the text of the statute."); *Mich Ambulatory Surgical Ctr v Farm Bureau Gen Ins Co of Mich*, 334 Mich App 622, 632; 965 NW2d 650 (2020) (indicating that the *casus omissus pro omisso habendus est* canon of construction provides that "nothing is to be added to what the text states or reasonably implies," and "prohibits courts from supplying provisions omitted by the Legislature"); *Pike v Northern Mich Univ*, 327 Mich App 683, 697; 935 NW2d 86 (2019) ("[A] court must not judicially legislate by adding into a statute provisions that the Legislature did not include.") (quotation marks and citation omitted); *Detroit City Council v Detroit Mayor*, 283 Mich App 442, 451; 770 NW2d 117 (2009) (refusing

to interpret the Legislature's silence as creating a mayoral veto power over the city council's resolution).

I understand that it is the majority's position that it is the DCRC and not plaintiffs who would have us read words into the HRCA that are not there. The majority notes that "[t]he Legislature has made no provision for the revised charter to be submitted to the voters over the Governor's express rejection, and this Court will not create such a provision where it cannot reasonably be inferred from the statutory language." However, I would put forth that the Legislature has made no provision suggesting that the Governor's rejection of a revision may impact whether the revision may be placed on a ballot in the first instance. MCL 117.22, which undoubtedly focuses on amendments, says only the following about the process after a revision or amendment is transmitted to the Governor:

> If he shall approve it, he shall sign it; if not, he shall return the charter to the commission and the amendment to the legislative body of the city, with his objections thereto, which shall be spread at large on the journal of the body receiving them, and *if it be an amendment* proposed by the legislative body, such body shall reconsider it, and if 2/3 of the members-elect agree to pass it, it shall be submitted to the electors. [Emphasis added.]

There is simply nothing in the HRCA indicating that the commission must reconsider and decline to submit charter *revisions* to electors that the Governor has not approved.[4]

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[4] As an aside, it is worth noting that amendments initiated by petition need not be approved by the Governor to be submitted to electors. MCL 117.22. Applying plaintiffs' logic that what expressly applies to amendments from MCL 117.22 also implicitly applies to revisions, any revision initiated by petition clearly would not be subject to preapproval by the Governor prior to submission to electors. Here, however, I note that the

I further note that the majority and trial court indicate that the DCRC's interpretation of MCL 117.22 would render transmission of proposed revisions to the Governor an "empty and useless gesture." I agree with the DCRC that portions of the statute are not rendered nugatory by our application of the plain language. There remains value in working with the Governor on charter revisions, but more importantly, while we strive to give effect to all statutory language and we presume that the Legislature did not intend to do a useless thing, *People v Cunningham*, 496 Mich 145, 157; 852 NW2d 118 (2014), we also simply cannot read words into a statute that are not there, *Lakeshore Group*, 507 Mich at 66. See also *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."). Again, MCL 117.22 explicitly provides that amendments proposed by a legislative body and not approved by the Governor must be reconsidered. The statute contains no corollary provision with respect to revisions.

Finally, while I do not take issue with the majority's conclusion that permitting the DCRC to continually revise the charter up to August 6, 2021 could pose problems where absentee voters vote on an earlier version of the revision, I think it can be implied from the DCRC's brief on appeal that it understands that issue. I find the distinction laid out by the DCRC between the ballot wording and the revised charter itself to be apt, and I am less confident than the majority that the final revised charter would be untimely were it not completed contemporaneously with

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2018 ballot question was posed by operation of the current charter and neither a legislative action nor an initiatory petition. Detroit Charter, art 9, ch 4, § 9-403.

the May 11, 2021 deadline for the proposed ballot language. MCL 168.646a(2) provides the deadline for the certification of the wording of the ballot question. MCL 117.23 provides that the DCRC must finalize the revised charter "before submission to the electors." I would not conclude that certifying the ballot language was the equivalent of submission of the issue to voters for the purposes of MCL 117.23 and would be more inclined to agree with the DCRC that the issue is submitted to voters when they are given the opportunity to consider it, i.e., when ballots become available on June 19, 2021. That having been said, I believe the central dispositive issue in this case is our interpretation of MCL 117.22, and I proffer my opinion as to the timing issue only to the extent that it might be implied from the trial court's opinion that it was pertinent to the relief that was granted.

With all of the above in mind, I respectfully dissent from the majority's conclusion that the HRCA prevents the DCRC from submitting their proposed charter revision to electors. Keeping in mind that we construe the constitutional provisions broadly in favor of the commission, I would decline to read the HRCA as creating an unspoken obligation on the part of the commission that limits their constitutional authority. I would conclude that Proposal P should remain on the ballot and voters should have the opportunity to consider it.

In re MORICONI

Docket No. 356037. Submitted June 3, 2021, at Detroit. Decided June 10, 2021, at 9:00 a.m.

Donna Seely filed a petition in the Oakland Probate Court seeking involuntary mental health treatment for her sister, Ann Marie Moriconi. At the beginning of the hearing, before any witnesses had testified, Moriconi informed the court that she did not agree to the hearing and that she wanted a deferral. Moriconi stated further that she had previously tried to obtain a deferral and had expressed a desire to voluntarily receive mental health treatment. The court, Linda S. Hallmark, J., told Moriconi that the opportunity for deferral had passed and proceeded with the hearing. The court determined that Moriconi was a person requiring treatment under the Mental Health Code, MCL 330.1001 *et seq*., granted the petition, and ordered Moriconi to undergo up to 180 days of assisted outpatient treatment and up to 60 days of hospitalization. The court subsequently denied Moriconi's motion for reconsideration, noting that Moriconi had not filed the requisite form with the court to trigger deferral. Moriconi appealed.

The Court of Appeals *held*:

MCL 330.1455 sets forth the process for deferring a hearing on a petition for involuntary mental health treatment. The statute provides that the subject of a petition who is hospitalized pending a hearing on the petition shall meet with legal counsel, a treatment team member assigned by the hospital director, and other persons specified in MCL 330.1455(3). One of the purposes of this mandatory meeting is to inform the subject of the petition of his or her right to request a temporary deferral of the hearing. MCL 330.1455(6) further provides that the subject of a petition must file a request to defer with the court, submitted on a form provided "by the department," signed in the presence of legal counsel, and filed with the court by counsel. There was no indication in the record that the mandatory meeting required by MCL 330.1455(3) actually occurred, and Moriconi testified that on the day that the meeting was to occur, she had become ill and would have been unable to sign any paperwork. Moriconi's

testimony was supported by the testimony of another witness, a psychologist who had examined Moriconi. The psychologist testified that hospital staff was supposed to "do a deferral" with Moriconi, but Moriconi left when she became unwell and did not return. The testimony of Moriconi and the psychologist should have caused the court to question whether MCL 330.1455(3) had been complied with in this case and whether Moriconi was apprised of mandatory procedure regarding the right to defer the hearing. Moreover, contrary to the court's statement to Moriconi that the opportunity to seek a deferral had passed, MCL 330.1455 does not contain any temporal limitations regarding when the subject of a petition may request a deferral. Additionally, because an individual who is subjected to involuntary mental health treatment will be significantly affected by the order, including through treatment decisions and the potential limitation of freedom (if inpatient treatment is ordered), failure to follow the procedures embodied in the Mental Health Code raises due-process concerns. In light of the notice that proper procedures may not have been followed in this case, the court should have inquired into whether Moriconi was denied her statutory right to the required meeting. Therefore, the court's decision to dismiss Moriconi's deferral arguments outright and proceed with the hearing was an abuse of its discretion.

Decision vacated and case remanded.

Speaker Law Firm (by *Jordan M. Ahlers* and *Liisa R. Speaker*) for Ann Marie Moriconi.

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

PER CURIAM. Appellant, Ann Marie Moriconi, appeals as of right the probate court's order requiring Moriconi to undergo involuntary mental health treatment. MCL 330.1455 sets forth the rights and procedure afforded the subject of a petition for mental health treatment, including information gathering, clinical reports, legal representation, team members, and proposed treatment plans. The subject of a mental health petition may file a request with the probate court to temporarily defer a hearing by voluntarily remaining hospital-

ized, choosing outpatient treatment, or pursuing a combination of hospitalization and outpatient treatment. MCL 330.1455(6). When Moriconi advised the probate court of her intent to exercise a deferral and voluntarily agree to treatment, the court apprised Moriconi that the deferral period had passed. After a motion for reconsideration was filed, the probate court denied the motion, citing Moriconi's failure to execute and submit the appropriate form. Because there is no time limitation imposed on the right to request a deferral and record evidence was lacking regarding Moriconi's notice of her deferral rights, the probate court erred in refusing to address Moriconi's request. We vacate the probate court's order for involuntary mental health treatment and remand for proceedings consistent with this opinion.

I. BASIC FACTS AND PROCEDURAL HISTORY

Moriconi's sister, Donna Seely, filed a petition seeking involuntary mental health treatment for Moriconi. Moriconi was hospitalized pending a hearing on the petition. At the start of the hearing, the probate court requested confirmation from all parties that they agreed to handle the hearing via Zoom conference. Counsel for Moriconi expressed agreement on her behalf. However, after the witnesses had been sworn but before any witnesses had testified, the following colloquy occurred between Moriconi and the probate court:

> [*Moriconi*]: Before — I want to interrupt, please. I'd like to interrupt, please.
>
> I do not agree to this hearing. I want a deferral. I want [the probate court] to explain to me a deferral. I have been requesting a deferral and they did not give me PCM Form 235. I want the judge to explain to me what a deferral is.

> That is what I am requesting. I am requesting — I am not agreeing to the stipulation. I want a deferral. I have been asking for a deferral — I have been asking to sign in voluntarily since day one. I want a deferral. Please, Judge, explain to me . . . what a deferral is.
>
> *The Court*: Ma'am, there was already a deferral opportunity. Once that's —
>
> [*Moriconi*]: No.
>
> *The Court*: Excuse me.
>
> [*Moriconi*]: Judge.
>
> *The Court*: Ma'am, ma'am, once that has passed, the hospital can opt to go to hearing. That way if you're a non-voluntary patient they can keep you even if you decide to sign yourself out. So, we can proceed with the hearing.
>
> [*Moriconi*]: Judge . . . .
>
> *The Court*: Ma'am, ma'am, I'm not going to debate it with you. Counsel has called —
>
> [*Moriconi*]: I was sick at the time they asked me.
>
> *The Court*: Ma'am, ma'am, that may be, but now we're at the hearing phase . . . .

The probate court did not ask Moriconi's counsel whether there was an explanation or discussion of the deferral period with her before the date of the hearing. Rather, the court proceeded with the hearing and the testimony from witnesses. Seely, Moriconi's sister, testified that she had not been in Moriconi's home for several months because of the pandemic. However, during a recent visit to Moriconi's home, Seely had found that Moriconi had no consumable food, water, or toilet paper in the home. There was trash all over the floor. Although Moriconi had a dog, there was no indication that she was feeding the dog. Instead, it appeared that the dog had rummaged through the trash in search of food. Seely expressed that Moriconi

had lost weight, did not seem to be taking her medications, and was extremely paranoid. Moriconi was concerned with "the election" and conspiracy theories and believed that people were trying to break into her home. She did not appear to be managing her household and had not opened her mail for months.

Dr. Leonard Swistak, a licensed psychologist employed by Havenwyck Hospital, examined Moriconi and reviewed her record. His impression was that she suffered from a delusional disorder or "could be a schizophrenic paranoid type." Dr. Swistak described Moriconi as "quite paranoid and delusional in her thinking and behavior." He noted that she was easily agitated, took notes on everything said, and did not trust others. Dr. Swistak opined that Moriconi's behavior interfered with her ability to interact with the world. In light of the petition and testimony by Seely, Dr. Swistak concluded that Moriconi was not eating properly, left her home in disarray, and was previously hospitalized. Yet, Moriconi did not believe that she suffered from a significant mental illness. Dr. Swistak recommended a 60-day inpatient hospitalization with medication management and individual and group counseling.

On cross-examination, Dr. Swistak described Moriconi's demeanor while hospitalized as angry and controlling. In support of his opinion, the doctor noted that Moriconi represented that she had to use the bathroom, but made him wait 10 to 15 minutes before she returned. Additionally, Dr. Swistak seemingly testified that the hospital staff spoke with Moriconi about a deferral,[1] but she expressed that she was not

[1] In the transcript, all of Dr. Swistak's answer to this question could not be transcribed. Thus, his statement addressing any deferral meeting was not completely clear from the record.

feeling well, went to her room, and never came back. He concluded that Moriconi was "very hostile and angry" about her hospitalization, believed that her sisters were conspiring against her, and did not believe that she needed "any type of treatment."

Moriconi testified that she suffered from mental illness, including attention deficit disorders, depression, and anxiety. She admitted that she was last hospitalized in August 2018. Moriconi was taking most, but not all of her medications. She needed to see a psychiatrist, but she had not received a recommendation for a doctor near her Southfield home. Moriconi testified that she had not been to the grocery store and did not like to go out at night. Moriconi had attempted to sign up for a grocery delivery service, but had not completed the process. Nonetheless, she ate soup, crackers, and frozen meals that she had in her home. Moriconi testified that there was a dead bird on her sidewalk that she considered to be "like a threat."

Moriconi again expressed that she objected to the hearing. She denied that she refused to take medication or that she refused to voluntarily agree to her hospitalization. Rather, Moriconi expressed that she was sick when presented with the deferral information. Specifically, she was sweating and experiencing digestive distress for hours. Therefore, she had not refused to complete paperwork to enter herself into treatment voluntarily; rather, she had been so physically sick on that day that she would have been unable to sign any such paperwork. Moriconi expressed that she did not need a court order to comply with outpatient health instructions because she would voluntarily follow a treatment plan. At the conclusion of her testimony, Moriconi's counsel did not address a deferral or present a closing argument.

The probate court found that Moriconi was a person requiring treatment, granted the petition, and ordered Moriconi to undergo up to 180 days of assisted outpatient treatment and up to 60 days of hospitalization. Counsel for Moriconi at the hearing petition was later released from further representation. Successor counsel subsequently filed a motion for reconsideration on Moriconi's behalf, alleging that the probate court had deprived Moriconi of her right to a deferral. The probate court denied the motion for reconsideration, faulting Moriconi for her failure to "sign the required form in the presence of counsel and file it with the [c]ourt." Further, the court concluded that deferral is triggered by a court's receipt of form PCM 235, but Moriconi did not execute or file that form, and the expression of a desire to defer by Moriconi did not perfect the requirements to defer the hearing. Moriconi now appeals.

II. STANDARD OF REVIEW

We "review[] de novo a matter of statutory interpretation." *In re Tchakarova*, 328 Mich App 172, 182; 936 NW2d 863 (2019). The most reliable evidence of legislative 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). If the language of the statute is clear and unambiguous, it is presumed that the Legislature intended the meaning plainly expressed in the statute. *Gardner v Dep't of Treasury*, 498 Mich 1, 6; 869 NW2d 199 (2015).

Additionally, we "review[] for an abuse of discretion a probate court's dispositional rulings and review[] for clear error the factual findings underlying a probate court's decision." *In re Portus*, 325 Mich App 374, 381;

926 NW2d 33 (2018) (quotation marks and citation omitted). "A probate court abuses its discretion when it chooses an outcome outside the range of reasonable and principled outcomes." *In re Tchakarova*, 328 Mich App at 182 (quotation marks and citation omitted). "The probate court necessarily abuses its discretion when it makes an error of law." *In re Portus*, 325 Mich App at 381 (quotation marks and citation omitted). "A probate court's finding is clearly erroneous when a reviewing court is left with a definite and firm conviction that a mistake has been made, even if there is evidence to support the finding." *Id*. (quotation marks and citation omitted). "An error is harmless if it did not affect the outcome of the proceeding." *Id*. at 396. "A lower court's error is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice." *Id*. (quotation marks and citation omitted).

III. ANALYSIS

Moriconi alleges the probate court abused its discretion by granting the petition for involuntary mental health treatment after Moriconi clearly indicated her desire to defer the hearing. We agree.

The process for deferring a hearing on a petition for involuntary mental health treatment is addressed in MCL 330.1455. MCL 330.1455(3) provides, in relevant part, that the subject of a petition who is hospitalized pending a hearing on the petition "shall meet with legal counsel, a treatment team member assigned by the hospital director, a person assigned by the executive director of the responsible community mental health services program or other program as desig-

nated by the department, and, if possible, a person designated by the subject of the petition . . . ." One of the purposes of this meeting is to inform the subject of the petition of his or her right to request a temporary deferral of the hearing. MCL 330.1455(3)(d).

MCL 330.1455(6) governs the filing of a request to defer the hearing and provides:

> The subject of a petition under [MCL 330.1434] may file with the court a request to temporarily defer the hearing for not longer than 60 days if the individual chooses to remain hospitalized, or 180 days if the individual chooses outpatient treatment or a combination of hospitalization and outpatient treatment. The request shall include a stipulation that the individual agrees to remain hospitalized and to accept treatment as may be prescribed for the deferral period, to accept and follow the proposed plan of treatment . . . for the deferral period, or to accept and follow the proposed plan for outpatient treatment, and further agrees that at any time the individual may refuse treatment and demand a hearing under [MCL 330.1452].

Significantly, "[t]he request to temporarily defer the hearing shall be on a form provided by the department and signed by the individual in the presence of his or her legal counsel and shall be filed with the court by legal counsel." MCL 330.1455(6). "Upon receipt of the request and stipulation under subsection (6), the court shall temporarily defer the hearing." MCL 330.1455(7).

In the present case, Moriconi interrupted the hearing on the petition for involuntary mental health treatment before any of the witnesses testified. She expressly requested a deferral and sought an explanation from the probate court regarding a deferral. Moriconi further stated that she had "been requesting a deferral" but the necessary form had not been provided to her. Moriconi stated that she had been asking to participate in the treatment voluntarily since the outset of the proceed-

ings. In response, the probate court stated that "there was already a deferral opportunity" and indicated that that opportunity had passed. Later in the hearing, Moriconi testified that she had not refused to sign paperwork to admit herself into treatment voluntarily; rather, she was extremely sick on the day that the meeting was scheduled to occur and would have been unable to sign any paperwork. The only other reference to a deferral seemingly occurred during Dr. Swistak's testimony. Dr. Swistak appeared to testify that hospital staff was supposed to "do a deferral" with Moriconi, but Moriconi left because she was not feeling well and did not return. Although Dr. Swistak's testimony did not explicitly address whether Moriconi received the required meeting, it supported Moriconi's testimony that the meeting was not completed because Moriconi became ill at that time.

MCL 330.1455(3) dictates that the subject of a petition *shall* meet with several people, including counsel, to be informed, in relevant part, of his or her right to defer the hearing on the petition. "Our Supreme Court has explained that courts should give the ordinary and accepted meaning to the mandatory word 'shall' . . . unless to do so would clearly frustrate legislative intent as evidenced by other statutory language or by reading the statute as a whole." *In re Portus*, 325 Mich App at 391 (some quotation marks and citation omitted). On the available record, there is no indication that this mandatory meeting actually took place, even if one had been scheduled or attempted.[2] Regardless of Moriconi's initial objection to the hearing occurring, Moriconi's and

[2] During the hearing, Moriconi referred to the required deferral form by its specific name—"PCM Form 235." This implies that she did learn about the deferral procedure at some point. However, she indicated, under oath, that the required meeting did not occur. No other witnesses

Dr. Swistak's testimony should have caused the probate court to question whether there was compliance with MCL 330.1455(3) and whether the mental health team members apprised Moriconi of mandatory procedure governing the right to defer the hearing.

Indeed, MCL 330.1455(6) sets forth the particular procedure that the subject of a petition seeking a deferral must follow. Specifically, the individual's request must include a stipulation that the individual will remain hospitalized, accept treatment, make the deferral request on a specified form, and that legal counsel must file the deferral. MCL 330.1455(6). The court, upon receiving the stipulation and request, "*shall* temporarily defer the hearing." MCL 330.1455(7) (emphasis added). Again, nothing indicates that "shall" was not meant to be given its mandatory meaning in MCL 330.1455(7). The court therefore does not have discretion regarding whether to defer the hearing once it has received the stipulation and request. In light of Moriconi's initial objection and the testimony elicited at the hearing, the trial court erred by granting the petition for involuntary mental health treatment without determining whether Moriconi met with and was apprised of the right to defer by the team of mental health professionals and her legal counsel, MCL 330.1455(3)(a) through (d).

When notified of Moriconi's objection to the hearing, the probate court rejected the challenge, stating that the opportunity for a deferral had passed. However, MCL 330.1455 does not contain any temporal limitations regarding when the subject of the petition may request a deferral. Indeed, the plain language of MCL 330.1455(6) only requires that the request for a tem-

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contradicted this testimony. Again, Dr. Swistak's testimony seemingly supports Moriconi's contention that the meeting was not completed because of illness.

porary deferral shall: (1) be on a form provided by the department; (2) signed by the subject of the petition in the presence of her legal counsel; and (3) filed with the court by legal counsel. This is in contrast with other provisions of Chapter 4 of the Mental Health Code, MCL 330.1400 to MCL 330.1497, such as that governing the process for requesting an independent clinical evaluation. That statute, MCL 330.1463(1), states:

> If requested before the first scheduled hearing or at the first scheduled hearing before the first witness has been sworn on a petition, the subject of a petition in a hearing under this chapter has the right . . . to secure an independent clinical evaluation . . . .

We note that Moriconi's statements at the outset of the hearing did not meet the deferral requirements set forth in MCL 330.1455(6). However, the trial court erred by concluding that Moriconi could not request the opportunity to file her request for a deferral at the commencement of the hearing because the plain language of the statute contained no time limitation. As noted, Moriconi made clear at the outset of the proceeding that she wanted a deferral, requested a deferral, was willing to participate in treatment voluntarily, and was not given the appropriate deferral form. Pursuant to MCL 330.1455(6), the form was to be provided to Moriconi "by the department" and completed in the presence of her counsel. Considering the issue that Moriconi's statements raised regarding whether the required meeting—at which deferral was to be discussed—actually occurred, the court should have at least sought more information on the topic, rather than dismissing Moriconi's request outright.

In its opinion and order denying Moriconi's motion for reconsideration, the probate court reasoned that it had not erred by proceeding with the hearing after Moriconi

raised the issue of deferral because "deferral is triggered by the [c]ourt's receipt of the deferral form," and Moriconi "had not perfected any of the requirements for the [c]ourt to defer the hearing" at the time of her request. However, it was apparent at the start of the hearing that Moriconi sought to meet the requirements of MCL 330.1455(6), mentioned the necessary form, and requested further guidance from the probate court regarding the filing of a deferral. Under the circumstances, the court's reasoning was mistaken.

This Court has held that "the procedures embodied in the Mental Health Code satisfy due process guarantees." *In re KB*, 221 Mich App 414, 421; 562 NW2d 208 (1997). Due process of law requires that before a deprivation of life, liberty, or property by adjudication, there must be notice and an opportunity to be heard. *Lamkin v Hamburg Twp Bd of Trustees*, 318 Mich App 546, 550; 899 NW2d 408 (2017). Here, the court was on notice that the procedures specified in the applicable portion of the Mental Health Code were apparently not followed. This raises due process concerns, especially when dealing with involuntary mental health treatment. Significantly, an order granting a petition for involuntary mental health treatment creates "collateral legal consequences" flowing from the individual's involuntary commitment. See *In re Tchakarova*, 328 Mich App at 179-181 (discussing, in the context of mootness, the legal consequences that flow from an order for involuntary mental health treatment, such as ineligibility to possess firearms pursuant to federal regulations). Moreover, "[i]t is axiomatic that an individual subjected to involuntary mental health treatment will be significantly affected by the order because treatment decisions will be made for the individual and, if inpatient treatment is ordered, his or her freedom of movement will be limited." *Id*. at 181.

In light of the notice that the proper procedures may not have been followed, the court should have at least inquired into whether Moriconi had in fact been denied her statutory right to the required meeting. The failure to conduct such a meeting would call into question whether Moriconi had a meaningful opportunity to request a deferral. Although Moriconi's request for a deferral at the hearing did not meet the statutory procedure, Moriconi made clear that she desired a deferral and sought guidance from the court regarding the form and the means necessary to comply. Considering the serious consequences associated with an order granting involuntary mental health treatment and Moriconi's explicit indication that she sought a deferral, the probate court's decision to dismiss Moriconi's deferral arguments outright and proceed with the hearing fell outside the range of reasonable and principled outcomes such that it constituted an abuse of discretion. *In re Tchakarova*, 328 Mich App at 182. While the court was not statutorily required to grant a deferral until Moriconi had followed the procedure set forth in MCL 330.1455(6), this does not mean that Moriconi should have been denied a meaningful opportunity to request a deferral.[3]

Vacated and remanded to the probate court to examine whether the proper deferral procedures were followed or to permit Moriconi to file a deferral in compliance with the statute. We do not retain jurisdiction.

K. F. KELLY, P.J., and SHAPIRO and SWARTZLE, JJ., concurred.

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[3] When Moriconi initially objected at the hearing and requested a deferral, she was not given the opportunity to confer with her counsel, and he was not given the opportunity to answer Moriconi's questions that she posed to the probate court. It is unclear if the nature of the proceedings, via Zoom conference, had any bearing on the failure to allow for a consultation between attorney and client.

SOARING PINE CAPITAL REAL ESTATE AND DEBT FUND II, LLC v PARK STREET GROUP REALTY SERVICES, LLC

Docket Nos. 349909 and 350159. Submitted February 2, 2021, at Detroit. Decided June 10, 2021, at 9:05 a.m. Oral argument ordered on the application 509 Mich 875 (2022).

Soaring Pine Capital Real Estate and Debt Fund II, LLC, lender, brought an action against its borrower and guarantors, Park Street Group Realty Services, LLC (PSGRS); Park Street Group, LLC (PSG); and Dean J. Groulx for breach of contract and fraud arising from loans to defendants to provide operating capital for defendants' business flipping tax-foreclosed houses. Defendants counterclaimed for breach of contract and fraud and moved for summary disposition. Defendants alleged that the wrongful-conduct rule precluded plaintiff's breach-of-contract claims because the mortgage note was facially usurious in violation of public policy and the Michigan criminal-usury statute, MCL 438.41. Defendants specifically alleged that the actual interest rate that they were charged exceeded the legal maximum rate of 25% simple interest per annum when "hidden interest" including commitment fees, success fees, and two months of compound interest were included in the calculation. Plaintiff argued that the criminal-usury statute was not applicable, that the contract contained a usury-savings clause (which provided that if the interest rate under the contract was determined to be usurious, it would revert to the maximum legal interest rate), that the usury-savings clause had to be enforced as written, and that the claimed instances of hidden interest should not be included in calculating the interest rate. Plaintiff also contended that even if the mortgage note was criminally usurious, the remedy was to bar plaintiff from collecting interest while allowing plaintiff to collect the unpaid principal of the loan. The circuit court, Martha D. Anderson, J., granted defendants' motion in part and denied it in part, ruling that the actual interest rate was usurious and that the plaintiff could not collect interest on the loan; however, the court declined to apply the wrongful-conduct rule to bar plaintiff from collecting the principal of the loan. The court held that there was not a sufficient causal nexus between plaintiff's illegal behavior and the claims to support application of the wrongful-

conduct rule. The court ordered a trial to determine the amount of principal owed on the loan, but it held that plaintiff would not be permitted to introduce evidence of defendants' alleged fraud. Both parties appealed, and the appeals were consolidated.

The Court of Appeals *held*:

1. Michigan generally follows the raise-or-waive rule for appellate review, meaning that a party's failure to preserve an issue by raising it and arguing it in the trial court constitutes waiver and precludes appellate review of the issue. Because plaintiff failed to raise either the issue of an exception in MCL 438.31c(11) that makes the criminal-usury statute inapplicable or the inapplicability of the criminal-usury statute to plaintiff because the statute uses the word "person" and plaintiff is not a "person," these issues were waived, and the Court declined to consider them.

2. A contract containing a usury-savings clause coupled with a stated interest rate at or below the statutory maximum is not usurious on its face. The presence of a usury-savings clause in a contract necessarily means that the interest charged under the contract cannot exceed the statutory maximum. And because the parties agreed not to charge or collect interest above that permitted by MCL 438.41, the contract was not usurious on its face because the parties evinced a clear intent not to charge or pay an interest rate not allowed by law. By enforcing a usury-savings clause, the Court gives effect to the parties' express intentions and enforces the public policy in the usury laws.

3. The trial court properly looked beyond the simple interest rate per annum stated in the contract to include other contractual fees to determine the actual interest rate that plaintiff was seeking to receive from defendants. In this regard, a commitment fee that involves a preloan transaction that is separate and distinct from the loan is not hidden or disguised interest. However, a commitment fee that is paid with the loan, and not in advance of it to bind the lender to give the loan at a future date, would be considered hidden interest. In this case, the parties did not dispute that defendants paid the commitment fee at the time the loan proceeds were disbursed, so it did not bind plaintiff to give the loan in the future at a distinct interest rate, and it was not a separate transaction from the loan itself. Therefore, the commitment fee was properly included in calculating the actual interest rate. Plaintiff's argument that this was an acceptable fee under MCL 438.31a was unpersuasive. MCL 438.31a lists specific "reasonable and necessary charges" that include recording fees; title examination or title insurance fees; fees for the preparation

of a deed, appraisal, or credit report; plus a loan-processing fee. None of those are considered interest, and in fact, defendants were charged and paid mor than $14,000 in closing costs that included charges for title searches, title insurance, and recording fees—plus an additional $14,000 for legal fees. Nothing in the record suggested that the commitment fee charged at the time of the loan was used to pay any of those fees. When the added 5% interest from the commitment fee was added to the already stated rate of 20% per annum—that when calculated according to the contractual 360-day year is slightly above 20%—the effective interest rate exceeds the 25% statutory maximum. Therefore, plaintiff acted contrary to the criminal-usury statute in seeking to take interest from defendants through the collection of the interest and hidden interest, and the circuit court did not err when granted summary disposition for defendants. The decision on this issue rendered moot the question whether the success fees and two months of compound interest were also hidden interest, and for that reason, the Court did not consider them.

4. The wrongful-conduct rule does not apply to the contract, which included a usury-savings clause limiting plaintiff to charging no more than the legal maximum interest rate. However, when plaintiff filed this lawsuit to collect an effective interest rate above the statutory maximum, plaintiff violated the criminal-usury statute prohibiting a party from "taking or receiving" interest at a rate above the statutory maximum. Thus, even though the contract itself was not facially usurious, plaintiff's attempt to collect an actual interest rate above the statutory maximum violated MCL 438.41. For that reason, the circuit court properly applied the wrongful-conduct rule to preclude plaintiff from collecting any interest but permit plaintiff to collect the principal on the loan. The wrongful-conduct rule is a common-law maxim—as opposed to an equitable doctrine—that can be employed when a plaintiff's action is based in whole or in part on the plaintiff's own conduct or when both parties have equally participated in the illegal conduct. For the wrongful-conduct rule to apply, the plaintiff's conduct must be prohibited or almost entirely prohibited under a penal or criminal statute. However, it is not axiomatic that a plaintiff's illegal act at the time of the plaintiff's injury will preclude the plaintiff's recovery under the wrongful-conduct rule. The illegal act must rise to the level of serious misconduct sufficient to bar a cause of action under the rule. This means that an illegal act along the lines of violating a safety statute, like a traffic or speed law or safe-workplace rule, would not suffice. Moreover, there must be a sufficient nexus between the plaintiff's illegal conduct and the plaintiff's asserted

damages before the wrongful-conduct rule can be applied. There is no genuine issue of fact in this case whether plaintiff knew it intended to collect an interest rate greater than the statutory maximum as evidenced by plaintiff's own internal communications indicating that the loan was "projected to yield a cash-on-cash return of 31.4% and an [internal rate of return] of 29.6%" and the filing of this lawsuit. But the requisite nexus between the plaintiff's illegal act and asserted injuries was lacking. The loan was clearly related to plaintiff's attempt to collect the usury interest, but it was only incidentally related because the usury rate was not authorized by the contact when the usury-savings clause was given effect. It was only the additional fees sought by plaintiff, now determined to be interest, that transformed what was a legal interest rate into an illegal interest rate. The circuit court did not err by concluding that the wrongful-conduct rule did not preclude plaintiff from recovering the loan principal but that it did preclude plaintiff from recovering any interest. And plaintiff's argument that MCL 438.41 precluded any punishment other than a criminal punishment was without merit. The wrongful-conduct rule requires proof that a criminal statute has been violated, but it provides for a remedy that is not criminal in nature. Finally, plaintiff's argument that the wrongful-conduct rule should not have been applied because the defendants were more culpable was likewise meritless because plaintiff failed to allege that defendants acted in a criminal manner, which is a requirement for that exception to the wrongful-conduct rule.

Affirmed.

1. CONTRACTS — USURY — EFFECT OF A SAVINGS CLAUSE.

MCL 438.41, the Michigan criminal-usury statute, makes it illegal for a person to knowingly charge or receive interest on a loan at a rate exceeding 25% simple interest per annum; a contractual usury-savings clause evinces the parties' clear intent not to charge or pay an interest rate not allowed by law; a contract that contains a usury-savings clause in which the parties agree not to charge or receive any interest above that legally permitted in MCL 438.41 is not usurious on its face.

2. CONTRACTS — USURY — SAVINGS CLAUSE — BREACH-OF-CONTRACT ACTION — WRONGFUL-CONDUCT RULE.

A contract that contains a usury-savings clause in which the parties agree not to charge or receive any interest above that legally permitted in MCL 438.41 is not usurious on its face; however, when a lender seeks to collect an effective interest rate above the statutory maximum through a breach-of-contract lawsuit, that

attempt to collect interest at a rate above the statutory maximum violates MCL 438.41, and a court may properly apply the wrongful-conduct rule to that attempt to preclude the lender from collecting any interest on the loan.

3. CONTRACTS — USURY — CALCULATING ACTUAL INTEREST RATE — HIDDEN FEES AS INTEREST.

MCL 438.41, the Michigan criminal-usury statute, makes it illegal for a person to knowingly charge or receive interest on a loan at a rate exceeding 25% simple interest per annum; courts may properly look beyond the simple interest rate per annum stated in a contract to include other contractual fees to determine the actual interest rate; preloan fees that commit the lender to make the loan in the future that involve a transaction that is separate and distinct from the loan are generally not interest and should not be considered in calculating the actual interest rate; but a commitment fee that is paid with the loan and not in advance of it to bind the lender to give the loan at a future date and is not charged against reasonable and necessary charges listed in MCL 438.31a (such as recording fees; title examination or title insurance; or the preparation of a deed, appraisal, or credit report) is not a separate and distinct transaction from the loan itself and, therefore, would be considered hidden interest and properly included in calculating the actual interest rate.

Conlin, McKenney & Philbrick, PC (by *W. Daniel Troyka*) and *Mark Granzotto PC* (by *Mark R. Granzotto*) for plaintiff.

Plunkett Cooney (by *Mary Massaron*) for defendants.

Before: MURRAY, C.J., and JANSEN and STEPHENS, JJ.

MURRAY, C.J. In these consolidated appeals[1] involving a contract dispute and allegations of usury, in

[1] *Soaring Pine Capital Real Estate & Debt Fund II, LLC v Park Street Group Realty Servs, LLC*, unpublished order of the Court of Appeals, entered October 30, 2019 (Docket No. 349909); *Soaring Pine Capital Real Estate & Debt Fund II, LLC v Park Street Group Realty Servs, LLC*, unpublished order of the Court of Appeals, entered October 30, 2019 (Docket No. 350159).

Docket No. 349909, defendants, Park Street Group Realty Services, LLC (PSGRS), Park Street Group, LLC (PSG), and Dean J. Groulx, appeal by leave granted[2] the June 27, 2019 order of the trial court granting in part and denying in part defendants' motion for summary disposition under MCR 2.116(C)(10). In Docket No. 350159, plaintiff, Soaring Pine Capital Real Estate and Debt Fund II, LLC, also appeals by leave granted[3] the same order of the trial court. We affirm.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Groulx, the sole owner of PSGRS and an operating member of PSG, is a licensed attorney. In 2015, he began discussions with plaintiff about receiving a loan that would provide defendants operating capital for their business flipping tax-foreclosed homes. In July 2016, plaintiff prepared a presentation to convince its investors that the loan would be profitable, noting that plaintiff planned to obtain a 5% "upfront fee," 20% interest, and success fees of $1,000 per sale. Plaintiff projected that the loan would "yield a cash-on-cash return of 37.4% and an [internal rate of return (IRR)] of 36.5%."

Plaintiff agreed to loan $500,000 to PSGRS, which was guaranteed by PSG and Groulx, personally. On September 23, 2016, a second tranche of $500,000 was disbursed to PSGRS, an amended loan agreement was signed, and an updated mortgage was provided on

[2] *Soaring Pine Capital Real Estate & Debt Fund II, LLC v Park Street Group Realty Servs, LLC*, unpublished order of the Court of Appeals, entered October 30, 2019 (Docket No. 349909).

[3] *Soaring Pine Capital Real Estate & Debt Fund II, LLC v Park Street Group Realty Servs, LLC*, unpublished order of the Court of Appeals, entered October 30, 2019 (Docket No. 350159).

properties owned by PSG to secure repayment of the loan. Before that occurred, though, plaintiff issued another proposal to its investors reflecting that the total $1 million loan was "projected to yield a cash-on-cash return of 31.4% and an IRR of 29.6%." Despite there being two separate tranches of loan money, and two sets of documents, the terms relevant to this appeal were the same in all of the documents.

The mortgage note stated that "[i]nterest on the outstanding principal amount of the Loan shall accrue interest [sic] at the Interest Rate of Twenty Percent (20.00%) ('Interest') per annum[.]" PSGRS was also required to pay a "Commitment Fee," listed as $25,000 and due at each closing—$50,000 in total. PSGRS had the responsibility to pay "all closing costs, including by way of description and not limitation, reasonable attorneys' fees incurred by [plaintiff] in connection with the consummation and closing of the Loan." As part of repayment, PSGRS was not required to pay anything for the first two months, but the interest still accrued and would "be capitalized and added to the loan balance . . . ." After that, PSGRS was to make monthly payments on the principal of the loan, with a final "balloon payment of the remaining outstanding principal balance of the Loan, plus all accrued and unpaid Interest," due one year after the loan agreement and mortgage note were signed. Because the loan proceeds were to be used by PSGRS to purchase homes, renovate them, and sell them, the loan agreement contained a clause requiring that, "[u]pon consummation of a Home Sale, [PSGRS] shall to pay to [sic] [plaintiff] a success fee in the amount of One Thousand and 00/100 Dollars ($1,000.00) per home or lot sold ('Success Fee')." Importantly, the last relevant term of the contract was a usury-savings clause, which provided that if the interest rate under the contract was deter-

mined to be usurious, it would revert to the maximum legal interest rate. Groulx signed all of the mortgages, notes, and guaranties on behalf of PSGRS, PSG, and himself.

After paying plaintiff more than $140,000 in interest, defendants stopped paying on the loans in July or August 2017. In December 2017, plaintiff issued Groulx a demand for payment with the threat of a lawsuit. The demand contained a summary of the amounts still owed—$1,029,811.74 in principal; $34,337.06 in interest through the date of maturity; $67,223.82 in default interest, which would continue to accrue at $715.15 per day; $70,000 in success fees; and $6,153.86 in attorney fees. That gave a total due of $1,207,562.48 as of December 26, 2017, with the interest paid to date and the interest sought in the demand letter constituting 23.4% interest.

When defendants still did not pay, plaintiff filed suit in January 2018. After a lengthy procedural history and discovery period, plaintiff's second amended complaint contained three breach-of-contract claims (one each against PSGRS, PSG, and Groulx) and two claims of fraud. Plaintiff alleged that defendants had made misrepresentations about the businesses and the people involved in the businesses to fraudulently induce plaintiff into giving the loan. Defendants, meanwhile, counterclaimed that plaintiff breached a contract to give $2 million by only providing $1 million and committed fraud.

After considering a number of different motions for summary disposition, the trial court heard defendants' motion that the wrongful-conduct rule precluded the breach-of-contract claims where the contracts violated the criminal-usury statute, MCL 438.41, by charging

an effective interest rate above 25% simple interest per annum. Defendants' arguments relied on allegations that the "commitment fees," "success fees," and two months of compound interest should be considered hidden interest and incorporated to determine the actual interest charged. Defendants supported that argument with an affidavit from an accounting expert, John Fiorrito, C.P.A., in which he averred that the planned rate of return for plaintiff corresponded with a rate of 36.5% simple interest per annum.

Plaintiff argued that the criminal-usury statute was not applicable for a variety of reasons, including that the usury-savings clause had to be enforced as written, and that the claimed instances of hidden interest should not be included in the calculation of interest. Plaintiff insisted that the trial court was required only to consider that the contract stated a rate of 20% simple interest per annum, which was not criminally usurious. Lastly, plaintiff contended that, even if the contract was determined to be criminally usurious, the remedy was to bar plaintiff from collecting interest only. In other words, plaintiff argued that it should still be permitted to collect the $1 million principal of the loan.

The trial court ultimately agreed with defendants that the contract provided for a criminally usurious interest rate. However, the trial court declined to apply the wrongful-conduct rule to bar plaintiff's collection of the principal of the loan, holding that there was not a sufficient causal nexus between plaintiff's illegal behavior and the claims. The trial court ordered that an upcoming trial would take place on the amount owed, but that plaintiff would not be permitted to introduce evidence of defendants' alleged fraud. These appeals followed.

II. SUMMARY DISPOSITION

A. STANDARD OF REVIEW

During the trial court proceedings, the parties presented arguments under both MCR 2.116(C)(8) and (C)(10). Because the trial court did not specifically state under which rule the motions were being decided and relied on evidence outside of the pleadings, this issue is appropriately reviewed under (C)(10). "This Court . . . reviews de novo decisions on motions for summary disposition brought under MCR 2.116(C)(10)." *Pace v Edel-Harrelson*, 499 Mich 1, 5; 878 NW2d 784 (2016). A motion for summary disposition under MCR 2.116(C)(10) "tests the factual sufficiency of the complaint . . . ." *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). "In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion." *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). Summary disposition is proper where there is no "genuine issue regarding any material fact." *Id*. "A genuine issue of material fact exists when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Auto-Owners Ins Co v Campbell-Durocher Group Painting & Gen Contracting, LLC*, 322 Mich App 218, 224; 911 NW2d 493 (2017) (quotation marks and citation omitted).

"Questions of statutory interpretation are also reviewed de novo." *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 202; 731 NW2d 41 (2007). "Insofar as the motion for summary disposition involves questions

regarding the proper interpretation of a contract, this Court's review is de novo." *Johnson v USA Underwriters*, 328 Mich App 223, 233; 936 NW2d 834 (2019).

B. CRIMINAL-USURY STATUTE AND USURY-SAVINGS CLAUSE

Plaintiff argues that the criminal-usury statute, MCL 438.41, does not apply because of a certain statutory exception, the language of the criminal-usury statute itself, and the existence of the usury-savings clause. Only the latter argument is properly before us.

1. WAIVED ARGUMENTS

Plaintiff's first argument is that the trial court's decision must be reversed because the exception in MCL 438.31c(11) makes the criminal-usury statute inapplicable. Plaintiff, however, did not make that argument in any of its briefs regarding summary disposition, so the issue is unpreserved. "Generally, an issue is not properly preserved if it is not raised before, addressed, or decided by the circuit court or administrative tribunal." *Marik v Marik*, 325 Mich App 353, 358; 925 NW2d 885 (2018) (quotation marks and citation omitted). Second, plaintiff asserts that the criminal-usury statute does not apply to it because it uses the word "person" to describe who could be guilty of the crime, MCL 438.41, and plaintiff is not a "person." But, as before, plaintiff did not make this argument to the trial court, and therefore it is not preserved for our review. *Marik*, 325 Mich App at 358.

Plaintiff's failure to preserve those arguments results in their waiver. "Michigan generally follows the 'raise or waive' rule of appellate review." *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008),

citing *Napier v Jacobs*, 429 Mich 222, 227-229; 414 NW2d 862 (1987). "Although this Court has inherent power to review an issue not raised in the trial court to prevent a miscarriage of justice, generally a failure to timely raise an issue waives review of that issue on appeal." *Walters*, 481 Mich at 387 (quotation marks and citations omitted). "By limiting appellate review to those issues raised and argued in the trial court, and holding all other issues waived, appellate courts require litigants to raise and frame their arguments at a time when their opponents may respond to them factually." *Id*. at 388. "Generally, a party may not remain silent in the trial court, only to prevail on an issue that was not called to the trial court's attention." *Id*., citing *Kinney v Folkerts*, 84 Mich 616, 625; 48 NW 283 (1891). Thus, because plaintiff failed to raise those arguments to the trial court, they are waived and we decline to consider them.[4]

2. APPLICABILITY AND ENFORCEABILITY OF THE USURY-SAVINGS CLAUSE

Turning now to plaintiff's preserved argument, plaintiff argues that the criminal-usury statute was not violated because the usury-savings clause precluded the contract from having an unlawful interest rate. Stated differently, this argument presents a simple question: does a contract that essentially states "we agree not to charge or receive any interest above that legally permitted" prevent a court from invalidating that contract as

[4] Separately, plaintiff's argument regarding MCL 438.31c(11) is not properly before this Court because plaintiff did not raise it in its application for leave to appeal or the supporting brief, and our order granting leave limited the issues to those raised in the application and supporting brief. We therefore decline to consider the issue. MCR 7.205(E)(4); *Ketchum Estate v Dep't of Health & Human Servs*, 314 Mich App 485, 506-507; 887 NW2d 226 (2016).

violative of public policy (the criminal-usury statute) when the actual interest rate exceeds the statutory maximum?[5]

The question presented is simple, and given the contract language and Michigan law, so too is the answer. On the one hand, we have well-settled law that contracts that require performance of an act in violation of public policy (as announced by the Legislature or, at times, the executive) cannot be enforced by the courts. See *Morris & Doherty, PC v Lockwood*, 259 Mich App 38, 54-55; 672 NW2d 884 (2003). And pertinent to this case, MCL 438.41 makes it a crime (with limited exceptions) if a person charges, takes, or receives interest at a rate above 25% per annum:

> A person is guilty of criminal usury when, not being authorized or permitted by law to do so, he knowingly charges, takes or receives any money or other property as interest on the loan or forbearance of any money or other property, at a rate exceeding 25% at simple interest per annum or the equivalent rate for a longer or shorter period. Any person guilty of criminal usury may be imprisoned for a term not to exceed 5 years or fined not more than $10,000.00, or both.

The purpose of Michigan's usury statute "is to protect the necessitous borrower from extortion." *People v Lee*, 447 Mich 552, 556-557; 526 NW2d 882 (1994) (quotation marks and citation omitted). "In the accomplishment of this purpose a court must look squarely at the real nature of the transaction, thus avoiding, so far as lies within its power, the betrayal of justice by the cloak of

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[5] Whether the criminal-usury statute is rendered inapplicable by a usury-savings clause has not been addressed by this Court in a published opinion. But see *Karel v JRCK Corp*, unpublished per curiam opinion of the Court of Appeals, issued May 10, 2012 (Docket No. 304415), pp 3-4 (wrongful-conduct rule did not bar claim based on a promissory note that contained a usurious rate, but was not facially usurious).

words, the contrivances of form, or the paper tigers of the crafty. We are interested not in form or color but in nature and substance." *Wilcox v Moore*, 354 Mich 499, 504; 93 NW2d 288 (1958).

On the other hand, it is equally settled that courts must enforce the language adopted by the parties to a contract and give effect to all parts of that contract. As was recently restated in *Barshaw v Allegheny Performance Plastics, LLC*, 334 Mich App 741, 748; 965 NW2d 729 (2020) (citations omitted):

> Therefore, we begin our analysis by examination of the core principles of contract interpretation:
>
> > In interpreting a contract, our obligation is to determine the intent of the contracting parties. If the language of the contract is unambiguous, we construe and enforce the contract as written. Thus, an unambiguous contractual provision is reflective of the parties' intent as a matter of law. Once discerned, the intent of the parties will be enforced unless it is contrary to public policy.

See also *Law Offices of Jeffrey Sherbow, PC v Fieger & Fieger, PC*, 326 Mich App 684, 695; 930 NW2d 416 (2019). When enforcing the unambiguous language of a contract, we must "give effect to every word or phrase as far as practicable," *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 467; 663 NW2d 447 (2003) (quotation marks and citations omitted), so as to "avoid an interpretation that would render any part of the contract surplusage or nugatory," *id*. at 468 (quotation marks and citation omitted).

The usury-savings clause appears in the mortgage notes, and states:

> **5. <u>Interest Limitation</u>**.
>
> Nothing herein contained, nor any transaction relating thereto, or hereto, shall be construed or so operate as to

> require [PSGRS] to pay, or be charged, interest at a greater rate than the maximum allowed by the applicable law relating to this Note. Should any interest or other charges, charged, paid or payable by [PSGRS] in connection with this Note, or any other document delivered in connection herewith, result in the charging, compensation, payment or earning of interest in excess of the maximum allowed by the applicable law as aforesaid, then any and all such excess shall be and the same is hereby waived by the holder, and any and all such excess paid shall be automatically credited against and in reduction of the principal due under this Note. If [plaintiff] shall reasonably determine that the interest rate applicable to this Note (together with all other charges or payments related hereto that may be deemed interest) stipulated under this Note is, or may be, usurious or otherwise limited by law, the unpaid balance of this Note, with accrued interest at the highest rate then permitted to be charged by stipulation in writing between [plaintiff] and [PSGRS], at the option of [plaintiff], shall become due and payable thirty (30) days from the date of such determination.

The language of this clause is unambiguous, and it will be enforced as written. See *Barshaw*, 334 Mich App at 748. So too will the remainder of the mortgage note, which neither party suggests is otherwise ambiguous. And, under that contract, it is undisputed that the interest rate to be charged and paid is specified to be 20%, well below the statutory maximum. Additionally, the plain language of the savings clause expresses the parties' intention *not* to have defendants charged with, or pay, interest above the maximum rate allowed by law. In other words, they agreed to abide by Michigan law. It likewise provides that if the "interest or other charges" are determined to exceed "the maximum allowed by the applicable law," then all of the excess charges are "waived by [plaintiff]," and those that had already been collected would be applied to the principal of the loan. To conclude that the mortgage

note was facially usurious, when it plainly states a 20% rate and an intention not to charge or collect a rate above that allowed by law, would render the usury-savings clause surplusage. This we cannot do. *Klapp*, 468 Mich at 468. Consequently, on its face, the mortgage note is not violative of the public policy stated in MCL 438.41.

The federal bankruptcy court sitting in Detroit came to the same conclusion under similar circumstances in *In re Skymark Properties II, LLC*, 597 BR 363 (Bankr ED Mich, 2019). There, an allegation was made that a promissory note contained an unlawful interest rate because, when combined, the charging interest and default interest exceeded 25%. *Id*. at 390. The court disagreed, concluding that a usury-savings clause in the note "necessarily means that the interest charged under the Promissory Note cannot exceed the maximum amount permitted by law." *Id*. Because the parties agreed to never charge or collect interest above that permitted by MCL 438.41, the note was not usurious. *Id*. We agree with this conclusion and hold that the note was not usurious on its face because the parties evinced a clear intent not to charge or pay a rate of interest above that allowed by law.

Other courts have likewise concluded that a contract containing a usury-savings clause, coupled with a stated interest rate at or below the statutory maximum, is not usurious on its face. See, e.g., *In re Dominguez*, 995 F2d 883, 886 (CA 9, 1993) ("Because the interest rate required to be paid under the extension agreement was determined in part by the savings clause, we cannot conclude that the agreement is usurious on its face."); *Woodcrest Assoc, Ltd v Commonwealth Mtg Corp*, 775 SW2d 434, 437-438 (Tex App, 1989) (usury-savings clauses are enforced to

defeat a violation of usury laws, but the terms must be construed as a whole and in light of all the circumstances); *Jersey Palm-Gross, Inc v Paper*, 658 So 2d 531, 535-536 (Fla, 1995) (usury-savings clauses should be enforced in appropriate circumstances); *Video Trax, Inc v NationsBank, NA*, 33 F Supp 2d 1041, 1058 (SD Fla, 1998) (presence of usury-savings clause established that lender lacked intent to assess a usurious interest rate). But see *NV One, LLC v Potomac Realty Capital, LLC*, 84 A3d 800, 810 (RI, 2014) (declaring usury-savings clauses "unenforceable as against the well-established public policy of preventing usurious transactions").

As recognized by the *Jersey Palm-Gross* court, there are legitimate purposes of a usury-savings clause:

> However, we also believe that savings clauses serve a legitimate function in commercial loan transactions and should be enforced in appropriate circumstances. For instance, we agree with Judge Pariente's illustration, in the majority opinion below, of the proper utilization of a savings clause:
>
> > Where the actual interest charged is close to the legal rate, or where the transaction is not clearly usurious at the outset but only becomes usurious upon the happening of a future contingency, the clause may be determinative on the issue of intent. [*Jersey Palm-Gross, Inc*, 658 So 2d at 535 (citation omitted).]

By enforcing the usury-savings clause, we give effect to the express intentions of the parties, while enforcing the public policy as outlined in the usury laws. Because of the savings clause, the contract does not "charge" a usurious rate of interest. Nonetheless, as discussed below, the trial court properly found that some of the "fees" within the contract were in actuality additional interest charges, placing at issue whether plaintiff was

seeking to "take or receive" monies from defendants as interest that exceeds the statutory maximum, despite (and contrary to) the savings clause.[6]

3. CALCULATION OF INTEREST AND APPLICATION OF MCL 438.41

Although the parties contractually agreed to comply with state usury laws, the trial court found that plaintiff had, in fact, attempted, through this lawsuit, to collect more than a 25% interest rate, contrary to the contract and state law. Plaintiff argues that the trial court improperly calculated the interest rate and, therefore, improperly applied the criminal-usury statute to preclude the collection of interest.

The parties do not dispute that the loan, mortgage, and guaranty documents show mutual assent for defendants to repay the $1 million loan to plaintiff, plus interest and fees. See *Law Offices of Jeffrey Sherbow, PC*, 326 Mich App at 695. Instead, the disagreement exists regarding whether plaintiff sought to recover certain fees set forth in the contract that were actually

[6] It is certainly possible that unscrupulous lenders could take advantage of borrowers by including within a contract a usury-savings clause while still seeking to collect unlawful interest, with the hope (and perhaps expectation) that the unlawful rates will be paid by the borrower and not be challenged in court. But under the common law of contracts and the statute as written, these clauses are permissible. Moreover, even though the parties to this contract were of equal bargaining power, the plain language of MCL 438.41 and MCL 438.61(2) and (3) is clear—plaintiff was not excused from the criminal-usury statute because it made the loan to a business entity. These statutes do not contain an exception for the parties under this contract. Moreover, the Legislature, under the Michigan Limited Liability Company (LLC) Act, MCL 450.4101 *et seq*., also refused to allow entities formed as LLCs to be excused from the criminal-usury statute. See MCL 450.4212 ("A domestic or foreign limited liability company, whether or not formed at the request of a lender, may agree in writing to pay any rate of interest as long as that rate of interest is not in excess of the rate set forth in [MCL 438.41 to MCL 438.42.]").

interest charges that, when combined with the 20% interest figure, exceeded the criminally usurious interest rate.

As noted, MCL 438.41 proscribes a person from "knowingly charg[ing], tak[ing] or receiv[ing] any money or other property as interest on the loan . . . at a rate exceeding 25% at simple interest per annum or the equivalent rate for a longer or shorter period." *Id*. The Legislature did not define the term "interest," but caselaw has provided some guidance. "Interest is compensation allowed by law or fixed by the respective parties for the use or forbearance of money, a charge for the loan or forbearance of money, or a sum paid for the use of money, or for the delay in payment of money." *Town & Country Dodge, Inc v Dep't of Treasury*, 420 Mich 226, 242; 362 NW2d 618 (1984) (quotation marks and citations omitted). "Under generally understood and applied principles, [interest] is merely an incident of the principal and must be accounted for." *Balch v Detroit Trust Co*, 312 Mich 146, 152; 20 NW2d 138 (1945) (quotation marks and citation omitted). In the simplest terms, "[i]nterest is paid for the use of money." *Coon v Schlimme Dairy Co*, 294 Mich 51, 56; 292 NW 560 (1940).

Turning now to whether the trial court properly calculated the actual interest rate, the parties agree that the contract states that the interest rate on the $1 million total loan was 20% simple interest per annum. Plaintiff insists that the trial court's analysis should have stopped there, because that was the only interest amount agreed to be charged. For their part, defendants argue that the trial court properly looked beyond the specified rate of "interest" in the contract and considered certain fees charged by plaintiff to be interest charges.

In deciding this issue, we first examine the meaning of "per annum." Notably, under the statute, the term 25% "per annum" relates to an interest rate *per year*, but it also applies to calculations of "the equivalent rate for a longer or shorter period." MCL 438.41. The contract, like the statute, also uses the term "per annum," but the contract defines the time period by which that "per annum" would be calculated as "the actual number of days elapsed *on the basis of a three hundred sixty (360) day year . . . .*" Considering the contract provides for a time period shorter than an actual year, the rate of 20% must be adjusted under the statute to determine "the equivalent rate for a longer or shorter period." MCL 438.41. It is a mathematical certainty that a 20% rate charged for 360 days would be higher than for a 365-day period, as the entire 20% would be incurred after 360 days, leaving five additional days on which interest would accrue. Although there may be cases where the actual calculation of that rate is relevant, this case is not one of them. It is enough, as will be explained shortly, that the effective interest rate for the purposes of MCL 438.41 is slightly above 20%.[7]

With that background, we next address the parties' disagreement over whether other contractual fees should be considered interest for purposes of the criminal-usury statute. As noted earlier, interest is "a charge for the loan or forbearance of money, or a sum paid for the use of money, or for the delay in payment of money." *Town & Country Dodge*, 420 Mich at 242 (quotation marks and citations omitted). In determining what constitutes such a charge, we are not bound by the contract's description, as "a court must look

[7] As noted, the interest sought in the December 2017 demand letter reflected a 23.4% rate.

squarely at the real nature of the transaction, thus avoiding, so far as lies within its power, the betrayal of justice by the cloak of words, the contrivances of form, or the paper tigers of the crafty." *Wilcox*, 354 Mich at 504. Michigan courts "are interested not in form or color but in nature and substance." *Id*. And that is why this Court has recognized that Michigan courts "must look beyond form to characterize the real nature of the transaction in order to determine whether the transaction falls within the usury statute." *Paul v US Mut Fin Corp*, 150 Mich App 773, 780; 389 NW2d 487 (1986). Under these decisions, the trial court properly looked beyond the simple interest rate per annum stated in the contract to determine the *actual* interest rate that plaintiff was seeking to receive from defendants.

Of particular importance to this calculation was plaintiff's charge of a $50,000 fee, disbursed in two $25,000 payments when each of the $500,000 tranches were released to PSGRS. Plaintiff argues that the $50,000 fee should not be counted as interest because it was a commitment fee. We held in *Fed Deposit Ins Corp v Kramer*, 100 Mich App 495, 497; 298 NW2d 755 (1980), that a commitment fee was not interest when it "was paid more than 3 weeks prior to the loan," and "[i]n consideration of that fee, the lender bound itself for 115 days to loan to the defendants $110,000 at 6¾% interest if defendants applied therefor." The Court reasoned that, because the fee "was a separate transaction distinct from the loan," it was not hidden or disguised interest. *Id*. The implication, though, is that a "commitment fee" that was not paid in advance of the loan, did not bind the lender to give the loan at a future date, and was not a separate transaction from the actual loan would be considered hidden interest. *Id*.

Such was the case here, where it is not disputed that the $50,000 "commitment fee" was paid by defendants at the time the loan principal was disbursed, did not bind plaintiff to give the loan at a distinct interest rate, and was not a separate transaction from the loan itself. Indeed, in plaintiff's proposal to investors, the $50,000 fees were referred to as a 5% "upfront fee." Therefore, in looking beyond the use of the term "commitment fee" in order to determine the actual nature of the transaction, *Wilcox*, 354 Mich at 504, we conclude that the $50,000 fee was interest at a rate of 5% simple per annum.

Plaintiff attempts to escape this conclusion by arguing that the $50,000 was actually for acceptable fees and costs under the civil-usury statute. MCL 438.31a. Under that statute, "[r]easonable and necessary charges" that "consist of recording fees; title examination or title insurance; the preparation of a deed, appraisal, or credit report; plus a loan processing fee" are not considered interest. *Id*. The problem with this argument is that the contract already required PSGRS to pay all of those fees, and plaintiff actually charged them. In fact, the loan agreement provides that PSGRS was responsible for the closing costs which were made up of title searches, title insurance, and recording fees and amounted to over $14,000 according to Fioritto's uncontroverted analysis of the loan documents. There was also a separate charge for plaintiff's legal fees of $14,000. Nothing in the record suggests that the $50,000 fee charged at the time the loan was made was used to pay those fees. Instead, as reflected in plaintiff's own internal documentation, the $50,000 amounted to a profit intended to be earned by plaintiff in the form of an upfront fee. Thus, plaintiff's arguments that the $50,000 should be considered a "commitment fee" or a charge for fees and costs arising out

of the loan are without merit. Consequently, the $50,000 fee was actually interest.

When taking the $50,000 fee into account as interest, as explained by Fioritto, the rate sought by plaintiff moves to over 25% simple interest per annum, as proscribed by the criminal-usury statute. MCL 438.41. Thus, considering the earlier conclusion that the stated rate of 20% per annum in the contract was actually *slightly above* 20% in light of the fact that the contract used 360 days as the length of a year, the additional 5% from the "commitment fees" puts the total effective rate above 25%.

Therefore, there is no material factual dispute that in seeking to "take or receive" interest from defendants through collection of the interest and hidden interest, plaintiff acted contrary to the criminal-usury statute, and the trial court did not err when it granted summary disposition in favor of defendants.[8]

C. WRONGFUL-CONDUCT RULE

The contract itself—with the 20% interest rate and associated fees that were, in fact, also interest—did not allow the court to invoke the wrongful-conduct rule, as the savings clause limited plaintiff to charging no more than the legal maximum rate. Where plaintiff went astray, however, was seeking to collect ("take or receive") through this lawsuit an effective interest rate above the statutory maximum. In other words, although the contract was not facially unlawful as it stated the parties' intent to limit the interest rate

[8] This conclusion renders moot the arguments about the remaining fees and whether the trial court properly considered them as interest. Consequently, we decline to address those issues. See *TM v MZ*, 501 Mich 312, 317; 916 NW2d 473 (2018).

charged or collected to no more than 25%, plaintiff's attempt to collect an actual interest rate above the statutory maximum violated MCL 438.41. In light of that fact, and for the reasons set forth below, we hold that the trial court properly applied the wrongful-conduct rule by precluding plaintiff from collecting any interest but allowing plaintiff to recover the principal of the loan.

"Michigan courts have long recognized the existence of the wrongful-conduct rule." *Orzel v Scott Drug Co*, 449 Mich 550, 558-559; 537 NW2d 208 (1995). "The wrongful-conduct rule provides that when a plaintiff's action is based, in whole or in part, on his own illegal conduct, his claim is generally barred." *Hashem v Les Stanford Oldsmobile, Inc*, 266 Mich App 61, 89; 697 NW2d 558 (2005) (quotation marks and citation omitted). The wrongful-conduct rule is not an equitable doctrine, *Varela v Spanski*, 329 Mich App 58, 83; 941 NW2d 60 (2019), but is instead a common-law maxim that can be applied in two separate ways. *Orzel*, 449 Mich at 558. The first way the rule can be invoked is when the plaintiff's action is based, in whole or in part, on his own illegal conduct, and provides:

> [A] person cannot maintain an action if, in order to establish his cause of action, he must rely, in whole or in part, on an illegal or immoral act or transaction to which he is a party. (1A CJS, Actions, § 29, p 386. See also 1 Am Jur 2d, Actions, § 45, p 752.) [*Orzel*, 449 Mich at 558 (quotation marks omitted; alteration in original).]

The second way in which the wrongful-conduct rule can apply is when both parties have equally participated in the illegal conduct:

> When a plaintiff's action is based on his own illegal conduct, and the defendant has participated equally in the

> illegal activity, a similar common-law maxim, known as the "doctrine of in pari delicto" generally applies to also bar the plaintiff's claim:
>
> > [A]s between parties in pari delicto, that is equally in the wrong, the law will not lend itself to afford relief to one as against the other, but will leave them as it finds them. (1A CJS, Actions, § 29, p 388. See also 1 Am Jur 2d, Actions, § 46, p 753.) [*Orzel*, 449 Mich at 558 (alteration in original).]

For the wrongful-conduct rule to apply to a given case, "plaintiff's conduct must be prohibited or almost entirely prohibited under a penal or criminal statute." *Id*. at 561. "The rule rests on the public policy premise that courts should not, directly or indirectly, encourage or tolerate illegal activities." *Hashem*, 266 Mich App at 89. However, "[t]he mere fact that a plaintiff engaged in illegal conduct at the time of his injury does not mean that his claim is automatically barred under the wrongful-conduct rule." *Orzel*, 449 Mich at 561. Where an act "amounts to a violation of a safety statute, such as traffic and speed laws or requirements for a safe workplace, the plaintiff's act, while illegal, does not rise to the level of serious misconduct sufficient to bar a cause of action by application of the wrongful-conduct rule." *Id*. Additionally, "[f]or the wrongful-conduct rule to apply, a sufficient causal nexus must exist between the plaintiff's illegal conduct and the plaintiff's asserted damages." *Id*. at 564.

As these cases illustrate, the first question we must consider is whether "plaintiff's conduct [is] prohibited or almost entirely prohibited under a penal or criminal statute." *Id*. at 561. As analyzed above, plaintiff violated MCL 438.41, a criminal statute, by seeking to recover interest in an amount exceeding the statutory maximum. Plaintiff contends, however, that the wrongful-conduct rule does not apply because MCL 438.41 has an

intent requirement, in that the guilty entity must have "knowingly" violated the statute, and plaintiff believed it was only charging a 20% interest rate and provided security against violating the statute with the usury-savings clause. This argument relies on a misunderstanding of the statutory language, which must be applied as written. *Barshaw*, 334 Mich App at 748.

Although the statute does use the word "knowingly," it does not suggest that the individual violating the statute must know that they are violating the criminal-usury statute. Instead, the statute proscribes "*knowingly* charg[ing], tak[ing] or receiv[ing] any money or other property as interest on the loan or forbearance of any money or other property, at a rate exceeding 25% at simple interest per annum or the equivalent rate for a longer or shorter period." MCL 438.41 (emphasis added). Thus, the statute pertains to whether plaintiff knew that it was charging or receiving an amount of interest that was higher than the effective rate of 25% simple interest per annum. As we just concluded, there is no genuine issue of material fact that plaintiff knew it intended to collect such a rate when it sought to recover interest at a rate of more than 25% per annum. Indeed, plaintiff's own internal communications showed that the total $1 million loan was "projected to yield a cash-on-cash return of 31.4% and an IRR of 29.6%," and the filing of this lawsuit reflected plaintiff's intent to recover more than what was allowed by contract and statute. Therefore, plaintiff's argument that it did not intend to violate MCL 438.41 fails.

Whether plaintiff should be precluded from collecting all of the money owed under the contract is, however, a different question. As noted, "[f]or the wrongful-conduct rule to apply, a sufficient causal nexus must exist between the plaintiff's illegal conduct and the plaintiff's

asserted damages." *Orzel*, 449 Mich at 564. When "the illegal act is the source of both the civil right and plaintiff's criminal responsibility, a causal nexus is not lacking." *Varela*, 329 Mich App at 82.

Here, the illegal act was the attempted collection through this lawsuit of fees and interest that resulted in a rate that was effectively above 25% simple interest per annum.[9] The mortgage note is clearly related to plaintiff's attempt to collect usurious interest, as the note contains the interest rate (as well as the savings clause). However, it is only incidentally related, as there is no "sufficient causal nexus" between the two, *Orzel*, 449 Mich at 564, because the usurious interest rate was not authorized under the terms of the mortgage note, when giving effect to the usury-savings clause. And, the subject matter of the contract was clearly legal, as was the stated interest rate of 20% per annum. Thus, it was only the additional fees sought by plaintiff, now determined to be interest, that took what was legal and turned it into an illegal interest rate. Because the "punishment should fit the crime," the trial court did not err in concluding that the wrongful-conduct rule did not preclude plaintiff from recovering the principal of the loan, but did preclude it from collecting any interest.

We also reject plaintiff's contention that the criminal punishment within MCL 438.41 precludes application of any other punishment. This argument overlooks the fact that the wrongful-conduct rule requires proof of a violation of a criminal statute, but provides for a remedy that is not criminal in nature. *Orzel*, 449 Mich at 561.

[9] As stated above, the usury-savings clause in the mortgage note it is not against public policy. Consequently, if plaintiff had sued and explicitly sought to recover no more than the principal and 25% interest, no illegality would be apparent.

Undoubtedly, a criminal statute will have a criminal punishment, but the *Orzel* Court provided that, in addition to that potential criminal penalty, a party is also not permitted to obtain civil damages on the basis of that criminal conduct. Indeed, if plaintiff's argument about the exclusivity of the criminal penalty was correct, then the wrongful-conduct rule would necessarily cease to exist.

Plaintiff's argument that the wrongful-conduct rule should not apply because defendants were more culpable than plaintiff also misses the mark. "An exception to the wrongful-conduct rule may apply where both the plaintiff and defendant have engaged in illegal conduct, but the parties do not stand in pari delicti [sic]." *Id*. at 569. "In other words, even though a plaintiff has engaged in serious illegal conduct and the illegal conduct has proximately caused the plaintiff's injuries, a plaintiff may still seek recovery against the defendant if the defendant's culpability is greater than the plaintiff's culpability for the injuries . . . ." *Id*. Plaintiff contends that defendants' culpability is greater because they engaged in fraud when inducing plaintiff to come to the agreement. Plaintiff has not, however, alleged that defendants acted in a criminal manner, but only tortiously. Notably, in analyzing the exception to the wrongful-conduct rule, the Court in *Orzel*, *id*. at 569, began with the premise that both "the plaintiff and defendant have engaged in illegal conduct . . . ." Considering that plaintiff has not alleged "illegal" conduct by defendants, but plaintiff has violated a criminal statute, this exception does not apply.[10] *Id*.

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[10] Although plaintiff argues that the trial court erred by summarily disposing of its fraud claims, the record shows that the trial court did not summarily dispose of those claims, but merely did not schedule a trial for them. Thus, this argument is not ripe for review. See *Van Buren*

Affirmed.

JANSEN and STEPHENS, JJ., concurred with MURRAY, C.J.

Charter Twp v Visteon Corp, 319 Mich App 538, 553-554; 904 NW2d 192 (2017). Additionally, plaintiff asserts that the trial court should have allowed it to present evidence of that fraudulent behavior at the scheduled trial. Because the trial on plaintiff's breach-of-contract claims is no longer necessary, that argument is moot. See *TM*, 501 Mich at 317.

PEOPLE v WHITE

Docket No. 352999. Submitted June 2, 2021, at Grand Rapids. Decided June 17, 2021, at 9:00 a.m.

In 2014, Paul E. White pleaded guilty of two counts of armed robbery, MCL 750.529, and one count of tampering with a witness, MCL 750.122(7)(b). At the time defendant committed the offenses, he was on parole from his previous conviction of second-degree murder, MCL 750.317. At the plea hearing on the current charges, the court, Mark A. Trusock, J., informed defendant of its discretion under MCL 750.122(11) to order consecutive sentences for the armed-robbery and witness-tampering convictions. The court did not, however, inform defendant that, because he had violated parole, MCL 768.7a(2) mandated that the robbery sentences be consecutive to (i.e., begin after) defendant's completion of the remainder of the sentence imposed for the previous second-degree murder conviction. In 2015, defendant moved to withdraw his plea to the robbery and witness-tampering convictions, but the issues he raised in that appeal did not include a claim that the court or his attorney were legally obligated to advise defendant of the mandatory consecutive sentencing as related to the parole violation. In an unpublished per curiam opinion issued July 21, 2016, the Court of Appeals, MURRAY, P.J., and SAWYER and METER, JJ., rejected defendant's arguments and affirmed his convictions. The Supreme Court denied defendant's application for leave to appeal. 500 Mich 959 (2017). Defendant thereafter filed a motion in the trial court, seeking postappeal relief from judgment under MCR 6.500 *et seq*. Defendant argued that the trial court erred by failing to advise him at the plea hearing that any sentence for the current offenses would be served consecutively to the completion of the second-degree murder sentence. Defendant also asserted that his plea was defective and that he was denied effective assistance because trial counsel had failed to advise him about the mandatory consecutive sentencing, that his appellate counsel was ineffective because counsel had failed to raise the issue regarding the trial court's failure to inform defendant of the mandatory consecutive sentence, and that trial counsel was similarly ineffective because he had failed to raise that issue before defendant pleaded guilty. The

trial court denied the motion, reasoning that it had no obligation to advise defendant of the consecutive nature of the sentences to be imposed and that defendant had accordingly failed to demonstrate the good cause or actual prejudice necessary under MCR 6.508(3) to obtain relief; the trial court did not address defendant's ineffective-assistance-of-counsel claims. The court denied defendant's motion for reconsideration, and defendant appealed by leave granted.

The Court of Appeals *held*:

1. Under MCR 6.302(A), a defendant's plea must be understanding, voluntary, and accurate. Former MCR 6.302(B)(2), in effect at the time of defendant's plea, required a trial court to advise a defendant, before accepting a plea of guilty or no contest, of the maximum possible prison sentence for the offense and any mandatory minimum sentence required by law. A guilty plea is involuntary if the defendant pleading guilty is not informed of the maximum sentence that could be imposed. The "understanding, voluntary, and accurate" components of MCR 6.302(A) are derived from the requirements of constitutional due process, which might not be entirely satisfied by complying with MCR 6.302(B) and other provisions in MCR 6.302. The voluntary requirement means that a defendant must be fully aware of the direct, but not the collateral, consequences of a plea; a consequence is direct when the result represents a definite, immediate, and largely automatic effect on the range of the defendant's punishment. The most obvious direct consequence of a conviction is the sentence imposed. Thus, a defendant must be apprised of the maximum sentence that they will be forced to serve as the result of a guilty plea; an enhanced sentence for a habitual offender is part of the maximum sentence described in MCR 6.302(B)(2). When relevant, a trial court must also advise a defendant of its discretionary consecutive-sentencing authority and the possible consequences of that authority for the defendant's sentence before accepting a plea of guilty or *nolo contendere*. Accordingly, a trial court must inform a defendant of both discretionary and mandatory consecutive sentencing as between sentences for crimes to which a defendant will plead guilty. MCL 768.7a(2) requires that if a person is convicted and sentenced to a term of imprisonment for a felony committed while the person was on parole from a sentence for a previous offense, the term of imprisonment imposed for the later offense shall begin to run at the expiration of the remaining portion of the term of imprisonment imposed for the previous offense. This mandatory consecutive sentence is a direct consequence of pleading guilty to new offenses, and the

result constitutes a definite, immediate, and automatic effect on the range of a defendant's punishment. Accordingly, before accepting a plea, the trial court must inform the defendant of any consecutive sentencing required by MCL 768.7a(2).

2. MCR 6.508(D) provides that in postappeal proceedings, the defendant has the burden of establishing entitlement to the relief requested. Under MCR 6.508(3), the trial court may not grant relief to the defendant if the motion alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under the subchapter unless the defendant demonstrates (1) good cause for failure to raise such grounds on appeal or in the prior motion and (2) actual prejudice from the alleged irregularities that support the claim for relief. The phrase "actual prejudice" means that, in a conviction entered on a guilty plea, guilty by mentally ill, or *nolo contendere*, the defect in the proceedings was such that it renders the plea an involuntary one to a degree that it would be manifestly unfair to allow the conviction or, in any case, the irregularity was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case. Alternatively, the court may waive the good-cause requirement if it concludes that there is a significant possibility that the defendant is innocent of the crime. The good-cause requirement of MCR 6.508 can be satisfied when appellate counsel is ineffective for failing to raise a meritorious issue on direct appeal.

3. In this case, the trial court erred when it failed to advise defendant at the plea hearing of the mandatory consecutive sentencing that would arise from his decision to plead guilty to the new charges. As a result, there was a defect in the proceeding when defendant pleaded guilty. Although the trial court erred by failing to advise defendant of the mandatory consecutive sentencing, defendant was not automatically entitled to postappeal relief under MCR 6.500 *et seq*. On remand, the trial was to determine under MCR 6.508(3) whether (1) defendant had demonstrated good cause for not having argued in his direct appeal that the trial court erred by failing to advise him at the plea proceeding of the mandatory consecutive sentencing, (2) defendant was actually innocent such that the good-cause requirement could be waived, and (3) the defect in the proceedings rendered defendant's plea involuntary to the degree that it would be manifestly unjust to allow the convictions to stand. The trial court was also to address defendant's ineffective-assistance-of-counsel claims related to his trial counsel's representation.

Reversed and remanded.

CRIMINAL LAW — PLEAS — UNDERSTANDING PLEAS — POSSIBILITY OF CONSECUTIVE SENTENCES ARISING FROM A PAROLE VIOLATION.

MCL 768.7a(2) requires that if a person is convicted and sentenced to a term of imprisonment for a felony committed while the person was on parole from a sentence for a previous offense, the term of imprisonment imposed for the later offense shall begin to run at the expiration of the remaining portion of the term of imprisonment imposed for the previous offense; a no-contest or guilty plea must be voluntarily and understandingly made for purposes of MCR 6.302(A) and constitutional due process; for a plea to be voluntary, the defendant must be fully aware of the direct consequences of the plea; application of the consecutive-sentencing requirement of MCL 768.7a(2) is a direct consequence of pleading guilty or no contest to a crime committed while on parole; accordingly before accepting a guilty or no-contest plea, the trial court must inform the defendant of any consecutive sentencing required by MCL 768.7a(2).

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Christopher R. Becker*, Prosecuting Attorney, and *James K. Benison*, Chief Appellate Attorney, for the people.

Susan K. Walsh for defendant.

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

MARKEY, J. Defendant appeals by delayed leave granted the trial court's order denying his postappeal motion for relief from judgment, MCR 6.500 *et seq*. Defendant sought to withdraw guilty pleas entered several years earlier on the basis that neither the trial court nor his attorney had advised him that he would first have to complete a sentence for a crime for which he was on parole before he would begin to serve the sentences imposed for the offenses to which he pleaded guilty. The trial court ruled that defendant failed to demonstrate good cause or actual prejudice for purposes of MCR 6.508 because the court was not required to advise defendant about the consequences of his parole

violation on his guilty-plea sentences. The trial court, however, failed to address defendant's argument that trial counsel was ineffective because counsel did not advise defendant of the consequences of the parole violation on the sentences. We reverse and remand for further proceedings.

In 2014, defendant pleaded guilty to two counts of armed robbery, MCL 750.529, and one count of tampering with a witness, MCL 750.122(7)(b). He was subsequently sentenced as a fourth-offense habitual offender, MCL 769.12, to 30 to 90 years' imprisonment for each of the robbery convictions and 10 to 30 years' imprisonment for the witness-tampering conviction, with the latter sentence to be served consecutively to the concurrent robbery sentences. At the plea hearing, the trial court had informed defendant of its discretion to order consecutive sentencing. See MCL 750.122(11). Additionally, and particularly relevant to this appeal, defendant committed the offenses while on parole for a conviction of second-degree murder, MCL 750.317, and the robbery sentences were made consecutive to the completion of the remaining portion of the term of imprisonment imposed on defendant for second-degree murder.[1] See MCL 768.7a(2) ("If a person is convicted and sentenced to a term of imprisonment for a felony committed while the person was on parole from a sentence for a previous offense, the term of imprisonment imposed for the later offense shall begin to run at the expiration of the remaining portion of the term of imprisonment im-

[1] The conviction for second-degree murder and an associated conviction for possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, were rendered by a jury in March 1997. Defendant was sentenced to a prison term of 18 to 30 years for the murder conviction and to two years' imprisonment for the felony-firearm conviction. Defendant was paroled in September 2013 and committed the two armed robberies involved in this case in April 2014.

posed for the previous offense."). At the plea hearing, the trial court did not advise defendant of the mandatory consecutive sentencing relative to the parole violation and completion of the murder sentence. Although defendant moved to withdraw his guilty pleas in the trial court in 2015, his argument was not premised on a claim that the court or defendant's attorney was legally obligated to advise him of the mandatory consecutive sentencing and failed to do so.[2]

On direct appeal, this Court rejected defendant's arguments that his pleas were coerced, that defense

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[2] At the September 11, 2014 sentencing hearing, defendant's trial counsel reported that he and defendant had read the presentence investigation report (PSIR) and had "no additions or corrections to make to the report itself." Counsel further stated that the sentencing guidelines for defendant on the robbery convictions were 120 to 450 months or life and that "[t]here's an agreement . . . that he accept a minimum of—of 300 months." After a bench conference, the trial court clarified, and both parties agreed, that there was no sentencing agreement. After defendant explained how desperation led to his criminal conduct, the trial court imposed sentence:

> Sir, you pled guilty to two counts of armed robbery, being a fourth felony offender. Both of those carry a maximum penalty of life or any term of years. You also pled guilty to . . . witness bribing, which—as a fourth felony offender, which also carries a maximum penalty of life or any term of years.
>
> You're 37 years old. You have four prior felonies; five prior misdemeanors, a juvenile court record. What's of great concern to me is that you had a conviction in 1997 for second degree murder. You've been in prison for a long time. You just got out of prison and only a few months after being out on parole, you started over with another life of crime. You basically, were a one-man crime spree for a while here in Grand Rapids.
>
> There was a . . . robbery that occurred in April at the 7-Eleven, which was an armed robbery. Whether it was a toy gun or not, I can tell you the cashier didn't think that.
>
> Also, there was another in April at the Butterworth Party Store. . . . [T]hat was, again, a situation where whether it was a toy gun or not, . . . the victims did not know that.

counsel was ineffective for failing to raise that particular issue and for not seeking suppression of a letter that defendant had written to his fiancée that served as the basis for the witness-tampering charge, and that the trial court erred by not granting his request for substitute counsel. *People v White*, unpublished per curiam opinion of the Court of Appeals, issued July 21, 2016 (Docket No. 327249). As part of that appeal, defendant submitted supplemental Standard 4 briefs. Despite knowing that the trial court had imposed mandatory consecutive sentences because of the parole violation, defendant at no point in his briefs contended that he should have been informed about the mandatory consecutive sentencing at the plea hearing, that he did not know about such sentencing when entering his plea, or that he would not have pleaded guilty to

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> Then, once you were in jail on these and other crimes, then you contacted a female friend, and tried to get her to bribe some of these victims to change their testimony and say that it wasn't you.
>
> Sir, based on everything I see here, and your prior record, I don't believe that you can live in free society. And I am convinced that you are a very severe danger to the people of this county and the State of Michigan.
>
> Your Sentencing Guidelines on the armed robberies call for a minimum sentence on each of those between 126 months and 420 months. That's a range of 10½ years to 35 years. And . . . on the witness bribing, the range is 34 months to 134 months.
>
> Accordingly, sir, it is the sentence of this Court that you be committed to the Michigan Department of Corrections to first serve, concurrent terms of 30 years to 90 years on the two armed robberies. *Those must be, by law, consecutive to your case for murder that you're on parole*.
>
> Once you get done with those, and this is at my discretion, you will then serve 10 to 30 years on the witness bribing.
>
> I am aware that I have designed this, quite frankly, sir, so that you will not be eligible for parole until you're at least 77 years old. [Emphasis added.]

the three offenses had he known about the mandatory consecutive sentencing. Our Supreme Court denied defendant's application for leave to appeal. *People v White*, 500 Mich 959 (2017).

Subsequently, defendant filed a motion seeking postappeal relief from judgment under MCR 6.500 *et seq*. Defendant argued that the trial court abused its discretion by failing to advise him at the plea proceeding about the mandatory consecutive sentencing required by the parole violation. Defendant further contended that his trial counsel was ineffective for also having failed to advise him about the mandatory consecutive sentencing, which resulted in a defective plea. Finally, defendant maintained that appellate counsel was ineffective for failing to raise an issue regarding the trial court's abuse of discretion in not informing defendant of the mandatory consecutive sentencing and for failing to raise an issue concerning trial counsel's similar act of nonfeasance.

The trial court denied the motion in a written opinion and order, explaining that it had "no obligation to advise a defendant of the consecutive nature of the sentences to be imposed." The court additionally indicated that "while a trial court errs when it misinforms a defendant as to the nature of the consecutive penalty, no error occurs when the court remains silent on the issue." The trial court determined, therefore, that defendant failed to demonstrate good cause or actual prejudice as necessary to obtain postappeal relief. The trial court did not address defendant's arguments that trial counsel was ineffective for failing to advise defendant of the mandatory consecutive sentencing and that appellate counsel was ineffective for failing to argue that trial counsel was ineffective for not informing defendant of the mandatory consecutive sentencing. In

the opening paragraph of the analysis portion of the opinion and order, the trial court had stated the following:

> The defendant's motion raises three issues, all of which rely on the premise that this Court's failure to advise the defendant of the requirement for consecutive sentencing as to the armed robbery charges constituted reversible error. This premise is incorrect.

Indeed, the trial court's premise that all of the issues concerned the soundness of how it had advised defendant was incorrect because the issues also included trial counsel's alleged failure to advise defendant about the mandatory consecutive sentencing.

Defendant moved for reconsideration. Defendant stated, in part, that "[t]his motion is based upon [the] trial court only addressing the consecutive sentencing part of the grounds raised in Mr. White's first argument and not the complete issue itself." The trial court denied the motion for reconsideration, simply indicating that defendant presented the same issues already ruled upon by the court and failed to demonstrate a palpable error by which the court and the parties had been misled.

Defendant filed a delayed application for leave to appeal in this Court, essentially raising the same issues presented in his motion for relief from judgment. This Court granted the application, "limited to the issues raised in the application." *People v White*, unpublished order of the Court of Appeals, entered June 9, 2020 (Docket No. 352999).

On appeal, defendant argues that he was not properly advised by the trial court at the plea hearing of the mandatory consecutive sentencing and that his trial

and appellate attorneys were ineffective. Defendant maintains that trial counsel "never told him that he could be subject to further consecutive sentencing due to his parole violation" and that had defendant known that he would be subject to mandatory consecutive sentencing because of his parole status, he "would not have pled guilty." Defendant further argues that appellate counsel was ineffective for not raising issues regarding the trial court and trial counsel's failures to advise defendant concerning the mandatory consecutive sentencing.[3]

With respect to motions for postappeal relief, this Court reviews for an abuse of discretion a trial court's decision on the motion and reviews for clear error its underlying findings of fact. *People v Kasben*, 324 Mich App 1, 7; 919 NW2d 463 (2018). "A trial court necessarily abuses its discretion when it makes an error of law." *People v Everett*, 318 Mich App 511, 516; 899 NW2d 94 (2017). "The proper interpretation and application of a court rule is a question of law that is reviewed de novo[,]" and "[t]o the extent that this case implicates constitutional issues, they are likewise reviewed de novo." *People v Cole*, 491 Mich 325, 330; 817 NW2d 497 (2012). Court rules are to be construed to effectuate the intent of the Michigan Supreme Court, which drafts and amends the rules. *In re Mota, Minors*, 334 Mich App 300, 311; 964 NW2d 881 (2020). "Clear and unambiguous language contained in a

[3] Defendant also contends that he is entitled to a remand before a different judge, that the PSIR contained inaccurate information, and that Prior Record Variable 5 was improperly assessed 15 points. All these issues exceed the scope of this Court's order granting the delayed application for leave to appeal, which limited defendant's arguments to those raised in the application. Accordingly, these issues will not be considered. See MCR 7.205(E)(4).

court rule must be given its plain meaning and is enforced as written." *Id*. MCR 6.508(D) provides, in pertinent part:

> The defendant has the burden of establishing entitlement to the relief requested. The court may not grant relief to the defendant if the motion
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> * * *
>
> (3) alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates
>
> (a) good cause for failure to raise such grounds on appeal or in the prior motion, and
>
> (b) actual prejudice from the alleged irregularities that support the claim for relief. As used in this subrule, "actual prejudice" means that,
>
> * * *
>
> (ii) in a conviction entered on a plea of guilty, guilty but mentally ill, or nolo contendere, the defect in the proceedings was such that it renders the plea an involuntary one to a degree that it would be manifestly unjust to allow the conviction to stand; [or]
>
> (iii) in any case, the irregularity was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case[.]
>
> * * *
>
> The court may waive the "good cause" requirement . . . if it concludes that there is a significant possibility that the defendant is innocent of the crime.

Ineffective assistance of appellate counsel—specifically, counsel's failure to raise a meritorious issue on direct

appeal—can satisfy the "good cause" requirement of MCR 6.508. *People v Reed*, 449 Mich 375, 382; 535 NW2d 496 (1995) (opinion by BOYLE, J.).

"The court may not accept a plea of guilty or nolo contendere unless it is convinced that the plea is understanding, voluntary, and accurate." MCR 6.302(A). At the time of defendant's plea hearing, MCR 6.302(B)(2) stated that a trial court "must advise" a defendant of "the maximum possible prison sentence for the offense and any mandatory minimum sentence required by law[.]"[4] The "understanding, voluntary, and accurate" components of MCR 6.302(A) are derived from the requirements of constitutional due process, which might not be entirely satisfied by complying with MCR 6.302(B) and other provisions in MCR 6.302. *People v Brown*, 492 Mich 684, 694 n 35; 822 NW2d 208 (2012). The requirement that a plea be voluntary means that a defendant must be made fully aware of the direct consequences of his or her plea. *Id*. The penalty imposed by a court is the most obvious direct consequence of a conviction. *Cole*, 491 Mich at 334. "It is, therefore, well-recognized that the defendant must be apprised of the sentence that he will be forced to serve as the result of his guilty plea and conviction." *Id*. (quotation marks and citation omitted).

In *Brown*, the defendant pleaded guilty as a second-offense habitual offender to second-degree home inva-

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[4] The Michigan Supreme Court recently amended MCR 6.302(B)(2). 506 Mich cvi, cvi-cvii (2020). It now provides that a court must advise a defendant of

> the maximum possible prison sentence for the offense, including, if applicable, whether the law permits or requires consecutive sentences, and any mandatory minimum sentence required by law . . . [.] [*Id*.]

The amendment was made effective immediately, September 16, 2020. *Id*.

sion, and he argued that the trial court had failed to advise him of the enhanced maximum sentence before the court accepted his guilty plea. *Brown*, 492 Mich at 687-688. The *Brown* Court ruled:

> MCR 6.302(B) specifically gives defendants who plead guilty of a crime the right to know beforehand the maximum possible sentence that will result from their plea. We hold that when a defendant is subject to an enhanced sentence as an habitual offender, that enhanced sentence is part of the maximum prison sentence described in MCR 6.302(B)(2). . . . To hold otherwise would allow a defendant to plead guilty without knowing the true consequences of his or her plea. It would also prevent the defendant from making an understanding plea. [*Id*. at 701-702.]

Recently, our Supreme Court in *People v Warren*, 505 Mich 196, 200; 949 NW2d 125 (2020), addressed MCR 6.302(B) in the context of a plea entered by the defendant back in 2015:

> At issue is whether, prior to accepting a guilty or no-contest plea, the trial court, in cases in which such advice is relevant, is required to advise a defendant that the court possesses discretionary consecutive-sentencing authority and to apprise the defendant as to the potential consequences of that authority for his or her sentence. We conclude that the trial court is required to do so under MCR 6.302(B)(2). As a result, the trial court here erred when it denied defendant's motion to withdraw his plea because the court failed to apprise him of both this authority and its potential consequences. We therefore reverse the judgment of the Court of Appeals and remand to the trial court to allow defendant to either withdraw his guilty plea or to reaffirm this plea.[5]

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[5] The staff comment to the amendment of MCR 6.302(B)(2) indicates that the amendment "makes the rule consistent with the Supreme Court's ruling in *People v Warren* . . . ." 506 Mich cvi, cvi-cvii (staff comment). We believe that the amendment simply reflected a clarifica-

In *People v Blanton*, 317 Mich App 107, 110-115; 894 NW2d 613 (2016), the defendant pleaded guilty to various offenses, including felony-firearm, and he had successfully argued in favor of withdrawing the pleas on the basis that he had not been advised at the plea hearing of the consecutive sentencing stemming from the felony-firearm conviction. On the prosecution's appeal, this Court affirmed, ruling as follows:

> The plain language of MCL 750.227b . . . makes clear that when a defendant carries a firearm during the commission of a felony, he or she is subject to a *mandatory* two-year term of imprisonment to be served consecutively with and preceding any term of imprisonment imposed for the underlying felony. Accordingly, to comply with MCR 6.302(B), the trial court, as part of the plea colloquy in this case, should have advised defendant that by pleading guilty to felony-firearm (1) he would be sentenced to a mandatory two-year term of imprisonment, (2) this term of imprisonment would be served first, and (3) the concurrent sentences for armed robbery and assault with intent to commit great bodily harm would be served consecutively to the felony-firearm sentence. There is no dispute that the trial court failed to do so. Consequently, there was a clear defect in the plea proceeding because defendant, unaware of the full nature of the penalty for felony-firearm, could not make an understanding and voluntary plea as required by MCR 6.302. [*Id*. at 120 (quotation marks and citations omitted).]

The *Blanton* panel, recognizing the relationship between MCR 6.302(B) and due process and that constitutional due process might mandate more than that required by MCR 6.302(B), stated that "although not explicitly required by MCR 6.302(B), it is well settled that a trial court must inform the defendant of any consecutive and/or mandatory sentencing require-

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tion regarding the true reach of the court rule pursuant to the *Warren* Court's construction of MCR 6.302(B)(2).

ments." *Id*. at 119 (quotation marks and citation omitted). The Supreme Court in *Warren* acknowledged this statement in *Blanton*, noting that *Blanton* concerned mandatory consecutive sentencing and "is consistent with our ruling today that trial courts must advise defendants, when applicable, of even discretionary authority" to impose consecutive sentences. *Warren*, 505 Mich at 207 n 3.

MCR 6.302(B)(2) refers to "the offense" in the context of informing a defendant of the "maximum possible prison sentence" and of "any mandatory minimum sentence required by law." In other words, MCR 6.302(B)(2) focuses on the minimum and maximum sentences with respect to the offense or offenses to which a defendant pleads guilty. Moreover, the caselaw discussed earlier addressed circumstances in which there was discretionary or mandatory consecutive sentencing as between sentences for crimes *to which a defendant pleaded guilty*, along with habitual enhancement of a sentence for a crime *to which a defendant pleaded guilty*. In this case, the mandatory consecutive sentencing relates to a *past* offense for which defendant was on parole and resurrection of the original sentence for that offense, which must be completed before defendant starts serving the sentences on crimes to which he pleaded guilty. See MCL 768.7a(2). Thus, the instant circumstances do not fall squarely within the particular parameters of MCR 6.302(B)(2), even, perhaps, as recently amended, which issue we need not and do not resolve.

Defendant's reliance on *In re Guilty Plea Cases*, 395 Mich 96; 235 NW2d 132 (1975), is misplaced. There, the Supreme Court construed the language of GCR 1963, 785.7, which was a predecessor to MCR 6.302, and which expressly required a trial court to advise a

defendant " 'that, if the defendant is on probation or parole, the entry of his plea in the present action admits violation of probation or parole, and may subject him to a sentence of imprisonment for the offense under which he was paroled or placed on probation.' " *Guilty Plea Cases*, 395 Mich at 118, quoting GCR 1963, 785.7(1)(c). The Supreme Court noted that the purpose of the provision was "to impart to the defendant that he may be sentenced as a probation or parole violator" and that it did "not require literal or rote compliance." *Id*. at 119. The language in GCR 1963, 785.7(1)(c) did not survive and is not found in MCR 6.302 or anywhere in the Michigan Court Rules of 1985. The opinion in *Guilty Plea Cases* is therefore not instructive to our interpretation of MCR 6.302(B)(2). We also note that GCR 1963, 785.7(1)(c) did not speak to advising a defendant that a potential sentence as a probation or parole violator *would be served consecutively*.

In addition to the mandates of MCR 6.302(B)(2), a plea must be voluntarily and understandingly made for purposes of MCR 6.302(A) and constitutional due process. As briefly touched on earlier, in *Cole*, 491 Mich at 332-334, the Supreme Court explained:

> While we agree that MCR 6.302(B) through (E) constitute explicit requirements imposed on a trial court conducting a plea hearing, the broader directive of MCR 6.302(A) that the plea must be "understanding, voluntary, and accurate" might, in a given proceeding, encompass more than the explicit requirements of the remainder of the court rule. Specifically, the "understanding, voluntary, and accurate" components of subrule (A) are premised on the requirements of constitutional due process, which might not be entirely satisfied by compliance with subrules (B) through (D). . . .
>
> * * *

> A no-contest or a guilty plea constitutes a waiver of several constitutional rights, including the privilege against compulsory self-incrimination, the right to a trial by jury, and the right to confront one's accusers. For a plea to constitute an effective waiver of these rights, the Due Process Clause of the Fourteenth Amendment requires that the plea be voluntary and knowing. . . . In *Brady v United States*, 397 US 742, 748; 90 S Ct 1463; 25 L Ed 2d 747 (1970), the United States Supreme Court held that waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences. In assessing voluntariness, the Court stated that a defendant entering a plea must be fully aware of the direct consequences of the plea.
>
> Given the difficulty of determining which of the numerous consequences of a conviction are encompassed within the meaning of "direct consequences," a distinction has developed in the post-*Brady* caselaw between "direct" and "collateral" consequences of a plea. See, e.g., *Meyer v Branker*, 506 F3d 358, 367-368 (CA 4, 2007) ("For a guilty plea to be constitutionally valid, a defendant must be made aware of all the direct, but not the collateral, consequences of his plea."). While courts have relied on different tests to distinguish direct from collateral consequences, the prevailing distinction relied on by a majority of courts turns on whether the result represents a definite, immediate and largely automatic effect on the range of the defendant's punishment. . . . The most obvious direct consequence of a conviction is the penalty to be imposed. It is, therefore, well-recognized that the defendant must be apprised of the sentence that he will be forced to serve as the result of his guilty plea and conviction. [Quotation marks, citations, and brackets omitted; formatting altered.]

A defendant's ignorance of the collateral consequences of a guilty plea does not render the plea involuntary. *People v Fonville*, 291 Mich App 363, 385; 804 NW2d 878 (2011). The *Fonville* panel stated:

> Examples of collateral or incidental consequences include the loss of employment, loss of the right to vote, loss of the right to travel freely abroad, loss of the right to a driver's license, loss of the right to possess firearms, a plea's possible enhancing effects on a subsequent sentence, institution of separate civil proceedings against the defendant for commitment to a mental-health facility, loss of good-time credit, . . . possibility of undesirable discharge from the armed forces, disqualification from public benefits, and loss of business or professional licenses. [*Id*.]

Accordingly, for our purposes, the question becomes whether the requirement that defendant complete his sentence for second-degree murder before beginning the armed-robbery sentences—such that the murder and robbery sentences run consecutively—is a *direct* consequence or a *collateral* consequence of his guilty pleas. We conclude that the mandatory consecutive sentencing that resulted was a direct consequence of defendant's pleading guilty to the charges of armed robbery and tampering with a witness: The result constituted a definite, immediate, and automatic effect on the range of defendant's punishment. *Cole*, 491 Mich at 334. Again, MCL 768.7a(2) provides that "[i]f a person is convicted and sentenced to a term of imprisonment for a felony committed while the person was on parole from a sentence for a previous offense, the term of imprisonment imposed for the later offense shall begin to run at the expiration of the remaining portion of the term of imprisonment imposed for the previous offense." Having to complete the murder sentence before defendant begins serving the concurrent robbery sentences effectively and necessarily extended the range of his punishment, increasing the minimum amount of time defendant must serve in prison and increasing the maximum amount of time that he may have to serve in confinement. Indeed, the trial court

relied, in part, on the mandatory consecutive sentencing when calculating a period of imprisonment that would not allow for defendant's release until he was elderly.[6]

Although we have determined that the trial court was required to advise defendant of the mandatory consecutive sentencing at the plea hearing under MCR 6.302(A) and due-process principles, this does not mean that defendant is automatically entitled to post-appeal relief under MCR 6.500 *et seq*. We are not addressing a direct appeal, and the additional hurdles put in place by MCR 6.508 must be satisfied. MCR 6.508(D)(3)(a) requires a showing of "good cause" for having failed to raise a particular issue on direct appeal, which mandate can be waived by a court upon determination that there exists a significant possibility that a defendant is innocent of the charged crime. The trial court in this case found that good cause was not established because the court was not obligated to advise defendant with respect to mandatory consecutive sentencing tethered to the parole violation. This conclusion essentially confuses "good cause" with the "actual prejudice" requirement of MCR 6.508(D)(3)(b). On remand, the trial court is to determine whether defendant has demonstrated good cause for not having argued in his direct appeal that the trial court erred by failing to advise defendant at the plea proceeding of

[6] We recognize that some jurisdictions have found that parole-violation implications constitute collateral consequences of a guilty plea. See, e.g., *Sanchez v United States*, 572 F2d 210, 211 (CA 9, 1977) ("We hold that revocation of parole is a collateral rather than a direct consequence of a defendant's guilty plea."). But we conclude that MCL 768.7a(2)'s definite, immediate, and automatic effect on the range of a defendant's punishment, which occurs upon conviction by plea or otherwise, compels us to hold that mandatory consecutive sentencing connected to a parole violation is a direct consequence of a guilty plea.

the mandatory consecutive sentencing.[7] The court may also consider the possibility-of-innocence exception.

Furthermore, with respect to actual prejudice, we note that MCR 6.508(D)(3)(b)(ii) requires a showing in guilty-plea cases of a "defect in the proceedings . . . that . . . renders the plea an involuntary one to a degree that it would be manifestly unjust to allow the conviction to stand[.]" Our ruling has established that there was a defect in the proceedings, i.e., the failure to advise defendant of the mandatory consecutive sentencing arising from the parole violation, but we remand the case for a determination whether the defect rendered defendant's plea involuntary to the degree that it would be manifestly unjust to allow the convictions to stand. For example, if there is adequate evidence that defendant was fully aware of the mandatory consecutive sentencing when pleading guilty of the charges despite the court's failure to so advise defendant, it would strain credulity to conclude that the pleas were involuntary or that manifest injustice would occur by allowing the convictions to stand. In other words, actual prejudice could not be established.

Alternatively, MCR 6.508(D)(3)(b)(iii) provides that "actual prejudice" can be demonstrated when an "irregularity was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case[.]" We have established that an irregularity

[7] The prosecution devotes a great deal of attention in its brief on appeal to its view that good cause was not demonstrated. We believe that the trial court, and not this panel, should determine that issue in the first instance, especially considering that the trial court has the authority to expand the record and assess evidentiary materials, including "letters, affidavits, documents, exhibits, and answers under oath to interrogatories propounded by the court[,]" MCR 6.507(A), along with conducting an evidentiary hearing, MCR 6.508(C).

occurred in the form of a failure to properly advise defendant of the mandatory consecutive sentencing, but it is for the trial court to assess on remand whether the irregularity was sufficiently offensive to the maintenance of a sound judicial process irrespective of defendant's guilt or innocence.

Because an appeal of the trial court's decision on remand will likely occur, whether it be by defendant or the prosecutor, and because we wish to prevent the necessity of a potential third appeal, we direct that the trial court address and rule on the issues of good cause and actual prejudice even if it concludes that ruling on only one of those issues suffices to render a decision on defendant's postappeal motion for relief from judgment. Moreover, for the same reasons and in light of the trial court's failure to address the issue as originally presented, we direct the trial court to rule on defendant's argument that trial counsel was ineffective for failing to advise him of the mandatory consecutive sentencing, and to do so by employing the "good cause" and "actual prejudice" analyses set forth in MCR 6.508(D) and as construed in this opinion.

We reverse and remand for proceedings consistent with this opinion. We do not retain jurisdiction.

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

EMPIRE IRON MINING PARTNERSHIP v TILDEN TOWNSHIP

Docket No. 353098. Submitted June 9, 2021, at Lansing. Decided June 17, 2021, at 9:05 a.m.

Empire Iron Mining Partnership and Cleveland-Cliffs Iron Company appealed an assessment of taxes on low-grade iron ore mining property for tax years 2018 and 2019 in the Michigan Tax Tribunal. Petitioners owned Empire Mine, which was located in respondent townships, Tilden Township and the Township of Richmond. Petitioners idled the mine in August 2016 for an indefinite period, and no mining or production of mining products occurred during tax years 2018 and 2019. Before the mine was idled, it produced low-grade iron ore, and the property on which the mine was located was subject to the tax on low-grade iron ore mining property, MCL 211.621 *et seq*. In May 2018, the Michigan Department of Environmental Quality (DEQ) informed respondents that because the mine would be idle throughout the 2018 tax year, the tax was not collectible. However, respondents determined that the tax was collectible because, after the production of ore, the act permitted taxation on the basis of a five-year average of annual production. For the 2018 tax year, Tilden Township assessed petitioners $118,372 for the tax, and Richmond Township assessed petitioners $1,250,108. In April 2019, the DEQ informed respondents that the tax was also not collectible for tax year 2019 because the mine remained idle. Nevertheless, respondents again determined that the tax was collectible, and for the 2019 tax year Tilden Township assessed petitioners $105,961.59 and Richmond Township assessed petitioners $1,124,841.01. The tribunal denied summary disposition for respondents, granted summary disposition for petitioners, and issued a final judgment canceling the tax assessments. Respondents appealed.

The Court of Appeals *held*:

Under the low-grade iron ore mining property tax act, a property may be subject to the tax before production of merchantable ore, MCL 211.622, or after production of merchantable ore, MCL 211.623. The act further provides that "low grade iron ore mining property" is subject to the tax and defines such property as "mineral bearing land from which low grade iron ore

is mined," MCL 211.621(b). The fact that the present tense is used in the definition of "low grade iron ore mining property" indicates that the tax may only be assessed against properties that are actively being mined during the tax year at issue. The statutory definition does not include property that was mined in the past or property that could be mined in the future. Under MCL 211.622, which provides for taxation before the first calendar year in which production of merchantable ore has been established, and MCL 211.623, which permits calculation of the tax on the basis of a five-year rolling production average, the tax may be calculated during years when no activity takes place at the mine. Contrary to respondents' assertions, however, MCL 211.622 and MCL 211.623 are not rendered nugatory by requiring that the property be mined during the tax year in question. Both MCL 211.622 and MCL 211.623 allow taxation when no *production* occurs on the property. Neither statute directly addresses the application of the tax when no *mining* occurs on the property, but "mining" and "production" do not have the same meaning under the act. Because the language of MCL 211.622 and MCL 211.623 relates to production, not mining, it is not rendered nugatory by interpreting the act to limit application of the tax to properties that are currently being mined. Because it was undisputed that the property in question was not mined during tax years 2018 and 2019, the tribunal properly determined that the assessment of the tax against petitioners should be canceled and that petitioners were entitled to summary disposition.

Affirmed.

TAXATION — TAX ON LOW-GRADE IRON ORE MINING PROPERTY.

The tax on low-grade iron ore mining property may not be assessed for tax years in which no mining has occurred on the property being taxed (MCL 211.621 *et seq*.).

Taft Stettinius & Hollister LLP (by *Nathan J. Hagerman*) and *Honigman LLP* (by *Michael B. Shapiro* and *Daniel L. Stanley*) for Empire Iron Mining Partnership and Cleveland-Cliffs Iron Company.

Foster Swift Collins & Smith, PC (by *Jack L. Van Coevering* and *Thomas K. Dillon*) for Tilden Township and Township of Richmond.

Before: JANSEN, P.J., and M. J. KELLY and RONAYNE KRAUSE, JJ.

PER CURIAM. In this action regarding the construction and application of the tax on low-grade iron ore mining property, MCL 211.621 *et seq*., respondents, Tilden Township and the Township of Richmond, appeal as of right the final judgment of Michigan Tax Tribunal in favor of petitioners, Empire Iron Mining Partnership and Cleveland-Cliffs Iron Company. On appeal, respondents contend that the Tribunal erred by concluding that petitioners' Empire Mine was not subject to the low-grade iron ore mining property tax (the iron ore tax). Alternatively, respondents argue that the Tribunal erred by dismissing the case before considering and allowing discovery regarding the issue of valuation of the property that was now subject to taxation under the General Property Tax Act (GPTA), MCL 211.1 *et seq*. For the reasons stated in this opinion, we affirm.

I. BASIC FACTS

The Empire Mine is partially located in each of the respondent townships. From its opening in 1963 until August 2016, low-grade iron ore was mined on the property at an average of 5.5 million tons per year. During that period of time, the property on which the Empire Mine existed was subject to the iron ore tax, which is assessed in lieu of ad valorem property taxes. In August 2016, petitioners idled Empire Mine for an indefinite period of time. During the tax years at issue in this case, 2018 and 2019, no mining or production of mining products occurred at the Empire Mine. Despite the lack of production, respondents submitted evidence that petitioners were considering reopening, while peti-

tioners presented evidence showing that it was physically impossible for mining to occur at the site.

On May 30, 2018, Michigan's Department of Environmental Quality (DEQ) issued letters to respondents, which indicated that because the Empire Mine had been, and would remain, idled during the 2018 tax year, the iron ore tax was not collectible. Respondents, however, reached the opposite conclusion and sent letters informing petitioners that the iron ore tax would still be assessed and collected for 2018. Respondents contended that, despite the fact that no iron ore was mined during those years, the statutory scheme permitted taxation on the basis of a five-year average, so there was still a basis for assessing a tax. Respondent Tilden Township calculated that the iron ore tax for 2018 would be $118,372, and respondent Richmond Township calculated the tax for that same year at $1,250,108. Petitioners appealed respondents' decision to collect the iron ore tax, arguing that the iron ore tax was not applicable to the Empire Mine for the tax year in question because the mine was idled for that entire year.[1]

Thereafter, on April 30, 2019, the DEQ wrote another letter to respondents, again stating that the idling of the Empire Mine meant that the iron ore tax should not be assessed against petitioners. Once more, respondents concluded that the iron ore tax was still statutorily required to be assessed in lieu of standard ad valorem property taxes under the GPTA. For 2019,

[1] The case number being appealed, 18-003877-TT, originally only applied to petitioners' appeal of respondent Tilden Township's assessment of the iron ore tax. Petitioners appealed respondent Richmond Township's assessment of the tax in Case No. 18-003878-TT. The Tribunal consolidated the two appeals in an order on June 25, 2019, and ordered that all documents in both cases be filed under the case number now before this Court on appeal.

Tilden Township calculated that petitioners owed $105,961.59 in iron ore taxes, while Richmond Township found that it was owed $1,124,841.01 for the same year. In response, petitioners appealed the assessment of iron ore taxes in 2019. The Tribunal consolidated the cases for both respondents and both tax years.

On August 9, 2019, respondents moved for summary disposition under MCR 2.116(C)(8) and (C)(10). Respondents asserted that there was no factual dispute in the case because it was clear that the Empire Mine had been idled temporarily and that no mining had been conducted during the tax years in question. Respondents believed, however, that the lack of mining did not preclude the iron ore tax from being assessed against petitioners. Because the iron ore tax permitted taxation on the basis of a five-year rolling average, and mining occurred in 2014, 2015, and 2016, there was still a tax base under the statute. Therefore, while the lack of mining in the subsequent years would reduce the five-year average, it did not eliminate the tax. Respondents argued that the temporary status of the idling was an important distinction under the law because it meant there was still merchantable iron ore on the property, which was a reason for subjecting petitioners to the tax. Respondents argued that for petitioners to escape the iron ore tax before the five-year average expired, petitioners would have to prove that there was no more merchantable low-grade iron ore on the property. Considering the documentary evidence suggesting that the Empire Mine would be reopening imminently, respondents contended that there was obviously still iron ore on the property.

In response, petitioners argued that respondents had overlooked whether the iron ore tax *applied* to petitioners, and instead, had improperly focused on how the tax

should be *calculated*. Before reaching the issue of how to calculate the tax, petitioners contended, one must first consider whether they were subject to the tax. In order to do so, respondents were required to prove that there was specific statutory authority for assessing the iron ore tax. The act relied on by respondents in this case, creating the iron ore tax, provides that it is applicable to "low grade iron ore mining property." MCL 211.621 *et seq*. Despite that language, respondents did not provide any explanation regarding whether the property in question was a "low grade iron ore mining property." If they had, they would have found that the statute defines a "low grade iron ore mining property" as "mineral bearing land from which low grade iron ore is mined," MCL 211.621(b). Petitioners noted that the statute is written in the present tense, so it does not apply to property that was previously mined but was not presently being mined. Because the record showed that the property in question was not mined for the tax years in question, petitioners asserted that the iron ore tax was wholly inapplicable to the property. Further, because the tax did not apply, petitioners asserted that the method of calculation was irrelevant, the assessment of the tax must be canceled, respondents' motion for summary disposition should be denied, and the Tribunal should grant summary disposition in favor of petitioners under MCR 2.116(I)(2).

Respondents countered that under the rules of statutory interpretation, the phrase "is mined" was not properly read as the present-tense form of a verb. Rather, it is merely a phrase describing the land subject to the statute. When considering the language of the statute in that light, it is clear that the Legislature intended the iron ore tax to apply to property that had been mined, is currently mined, or would imminently be mined in the future. Citing other statutes

that pertain to mining, respondents argued that the Legislature had shown that when it wanted to refer only to property actively being mined, it would use phrases expressly stating that, such as "is being mined," "currently being mined," and "presently being mined." Alternatively, relying on caselaw, respondents argued that the Legislature's use of the present tense has often been construed to include the past tense as well. Finally, respondents argued that their interpretation of the phrase "is mined" avoided absurd results and did not render any part of the statute nugatory.

On November 14, 2019, an Administrative Law Judge (ALJ) issued a proposed opinion denying respondents' motion for summary disposition, granting petitioners' motion for summary disposition, and awarding a final judgment canceling the iron ore tax for petitioners. Respondents filed exceptions to the proposed orders and judgment in favor of petitioners. Thereafter, adopting the conclusion of the ALJ, the Tribunal denied respondents' motion for summary disposition, granted summary disposition in favor of petitioners, canceled respondents' assessment of the iron ore tax, and ordered respondents to cure the issues within 28 days. Respondents moved for reconsideration, which the Tribunal denied.

II. IRON ORE TAX

A. STANDARD OF REVIEW

"Unless there is fraud, this Court's review of [Tribunal] decisions is limited to determining whether the [Tribunal] erred in applying the law or adopted a wrong legal principle." *West Mich Annual Conference of United Methodist Church v Grand Rapids*, 336 Mich App 132, 137; 969 NW2d 813 (2021) (quotation marks

and citation omitted). "Issues of statutory interpretation are reviewed de novo." *Emagine Entertainment, Inc v Dep't of Treasury*, 334 Mich App 658, 663; 965 NW2d 720 (2020). Although agency interpretations of a statute are entitled to "respectful consideration," "they are not binding on courts and cannot conflict with the plain meaning of the statute." *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 117-118; 754 NW2d 259 (2008). "Additionally, we review de novo a decision on summary disposition." *Emagine Entertainment*, 334 Mich App at 663. It is proper to grant summary disposition to the opposing party under MCR 2.116(I)(2) "if it appears to the court that that party, rather than the moving party, is entitled to judgment." *West Mich Annual Conference of United Methodist Church*, 336 Mich App at 138 (quotation marks and citation omitted).

B. ANALYSIS

Respondents argue that the Tribunal erred by interpreting the iron ore tax act to include a requirement that the property in question be actively mined during a given tax year. "When interpreting a statute, our goal is to discern and give effect to the Legislature's intent." *Foster v Van Buren Co*, 332 Mich App 273, 280; 956 NW2d 554 (2020). As recently reiterated by this Court:

> To do so, we begin with the statute's language. If the statute's language is clear and unambiguous, we assume that the Legislature intended its plain meaning, and we enforce the statute as written. In reviewing the statute's language, every word should be given meaning, and we should avoid a construction that would render any part of the statute surplusage or nugatory. [*West Mich Annual Conference of United Methodist Church*, 336 Mich App at 140 (quotation marks and citations omitted).]

"It is well settled that ambiguities in the language of a tax statute are to be resolved in favor of the taxpayer," but "that tax *exemptions* are to be 'strictly construed' against the taxpayer." *Honigman Miller Schwartz & Cohn, LLP v Detroit*, 505 Mich 284, 291 n 3; 952 NW2d 358 (2020) (quotation marks and citation omitted). Those principles, however, do not apply if the statute is unambiguous because, as noted above, the language of the statute controls when the statute's meaning is plain. See *West Mich Annual Conference of United Methodist Church*, 336 Mich App at 140.

MCL 211.624(3)(b) provides that "[t]he tax provided in this act shall be in lieu of an ad valorem tax on" "[t]he low grade iron ore mining property." In that regard, "[t]he township supervisor shall remove from the list of land descriptions assessed and taxed under the [GPTA] the land descriptions of property taxed under this act, and shall enter the land descriptions on a separate roll." MCL 211.624(2). Because of the preclusion of ad valorem property taxes under the GPTA, the iron ore tax act states that "[a] valuation shall not be determined for a description listed under this act and the property shall not be considered by the county board of commissioners or by the state board of equalization in connection with county or state equalization for taxation purposes." MCL 211.624(2).

The act provides for two different calculations of the tax owed by those properties subject to the tax. One section addresses taxation before "production of merchantable ore," MCL 211.622, and the other section addresses taxation "after production of merchantable ore," MCL 211.623(1). The statutory scheme specifically identifies production of "merchantable ore" because " '[l]ow grade iron ore' means iron-bearing rock, also known as iron formation, jasper, ferruginous

chert, or ferruginous slate, that is not merchantable as ore in its natural state and from which a merchantable product can be produced only by beneficiation or treatment involving fine grinding." MCL 211.621(a). With that understanding in mind, MCL 211.622 provides:

> Before the first calendar year *in which production of merchantable ore* from a low grade iron ore mining property has been established on a commercial basis, or before the period of construction of the plants for the beneficiation or treatment of low grade iron ore and the period of experimental operation of the plants, the low grade iron ore mining property shall be subject to a specific tax equal to the rated annual capacity of the plant in gross tons multiplied by .55% of the mine value per gross ton, based upon the projected natural iron analysis of the iron ore pellets or of the concentrated and/or agglomerated products, multiplied by the percent of construction completion of the low grade iron ore mining property. [Emphasis added.]

Whereas MCL 211.623(1) provides:

> Beginning with the first calendar year *after production of merchantable ore* from a low grade iron ore mining property has been established on a commercial basis, the low grade iron ore mining property shall be subject to a specific tax equal to the average annual production in gross tons during the preceding 5-year period, multiplied by 1.1% or beginning December 31, 2001 through December 31, 2006 0.75% of the mine value per gross ton, based on the average natural iron analysis of shipments for that year of the iron ore pellets or of the concentrated or agglomerated products. A year in which production did not take place shall be excluded in computing the average production but only until the property has a 5-year record of commercial production. Mine value is determined by subtracting from the published lower lake price of Lake Superior iron ore pellets, or the particular concentrated or agglomerated products as of December 31, for the subsequent calendar year, all the transportation and handling

> costs, including any tax charged for transporting or handling the iron ore pellets or products, from the mining property to Lake Erie ports. [Emphasis added.]

Considering the plain and unambiguous language of these statutes, MCL 211.622 provides for taxation before production of merchantable ore takes place, and MCL 211.623(1) provides for taxation after production of merchantable ore begins. However, even after production of merchantable iron ore begins, "[i]f the specific tax determined under [MCL 211.623] is less than the specific tax determined under [MCL 211.622], then [MCL 211.622] shall govern." MCL 211.624(1).

In addition to addressing how the iron ore tax should be calculated on the basis of whether production of merchantable iron ore has begun, the statutes also address what properties are subject to the tax. MCL 211.622 provides that "low grade iron ore mining property shall be subject to" the iron ore tax. MCL 211.623(1) also provides that "low grade iron ore mining property shall be subject to" the iron ore tax. The statutory scheme provides the following definition of such property:

> "Low grade iron ore mining property" means mineral bearing land from which low grade iron ore *is mined*, and includes the beneficiation or treatment plants, and other necessary land, buildings, facilities, equipment, tools, and supplies used in connection with the mining, transportation, and beneficiation or treatment of the low grade iron ore in producing merchantable iron ore pellets or other concentrated or agglomerated products. [MCL 211.621(b) (emphasis added).]

Petitioners and the Tribunal determined that the use of the present tense in the definition, "mineral bearing land from which low grade iron ore is mined," means that the tax only applies to properties on which

active mining is occurring during the tax year in question. Respondents, however, argue that the phrase "from which low grade iron ore is mined," is adjectival in nature and specifically modified the term "mineral bearing land." On the basis of that reading of the statutory language, respondents contend that the iron ore tax applies to property from which low-grade iron ore is, was, could be, or has been mined.

This Court's duty is "to effect the intent of the Legislature," and "[i]f the statute's language is clear and unambiguous, we assume that the Legislature intended its plain meaning, and we enforce the statute as written." *West Mich Annual Conference of United Methodist Church*, 336 Mich App at 140 (quotation marks and citations omitted). If the Legislature intended the iron ore tax to apply to mineral-bearing land from which low-grade iron ore could be, is, was, or has been mined, the Legislature could have written the statute in that manner. As it stands, though, the statute provides that it only applies to land from which low-grade iron ore "is mined." MCL 211.621(b). The word "is" is the third-person singular present-tense form of the verb "to be." *Merriam-Webster's Collegiate Dictionary* (11th ed), p 105. Consequently, the Legislature's use of the present tense must be considered when interpreting the phrase "is mined." See *Michalski v Bar-Levav*, 463 Mich 723, 733; 625 NW2d 754 (2001). And we may not rewrite the statutory definition to include property that was mined in the past or property that could be mined in the future. Instead, applying the Legislature's chosen language as written, only property that is presently mined satisfies the definition of "low grade iron ore mining property."

In an attempt to escape that conclusion, respondents have raised a number of different arguments regarding why the property in question need not be mined in

order to be subject to the iron ore tax. First, respondents insist that other sections of the statutory scheme would be rendered nugatory if the statute was read according to the Tribunal's interpretation. When interpreting a statute, this Court "should avoid a construction that would render any part of the statute surplusage or nugatory." *West Mich Annual Conference of United Methodist Church*, 336 Mich App at 140 (quotation marks and citations omitted). However, respondents' argument that parts of the statutory scheme would be rendered nugatory relies on respondents' misreading of the statutes in question. Pertinently, respondents argue that MCL 211.622 and MCL 211.623(1) specifically allow taxation under the iron ore tax for years when the mine was idled. Respondents rely on the portion of MCL 211.622 that provides for taxation "[b]efore the first calendar year in which production of merchantable ore from a low grade iron ore mining property has been established on a commercial basis . . . ." Similarly, MCL 211.623(1), which permits calculation of the iron ore tax on the basis of a five-year rolling average, states that "[a] year in which production did not take place shall be excluded in computing the average production but only until the property has a 5-year record of commercial production." Respondents insist that because those sections permit calculation of the tax during years when no activity takes place at the mine, they would be rendered nugatory by requiring that the property be mined during the tax year in question.

Yet, MCL 211.622 allows taxation under the iron ore tax before *production* of merchantable ore occurs. Likewise, MCL 211.623(1) permits the tax to be calculated by simply leaving out years when *production* does not occur until the five-year average is established. The

implication, then, is that after establishing the five-year average, years without *production* will be included in the five-year average, resulting in a lower tax, but not entirely eliminating the tax. Notably, both of those statutes address years when *production does not occur*, but they do not explicitly address application of the tax when *mining does not occur*.[2] In context, the lack of reference to years when mining does not occur is logical because, as explained above, the definition of low-grade iron ore mining property only accounts for property that is mined, not property that was mined in the past or could be mined in the future. Because the language in both MCL 211.622 and MCL 211.623(1) relates to production, not mining, it is not rendered nugatory by an interpretation of the statutory scheme that limits application of the iron ore tax to properties that are presently being mined.

Next, respondents contend that the Tribunal's construction of the statute was improper because it was

[2] "Mining" and "production" do not mean the same thing under the statutory language. Again, the tax in question only applies to "mineral bearing land from which low grade iron ore is mined . . . ." MCL 211.621(b). Under MCL 211.621(a), " '[l]ow grade iron ore' means iron-bearing rock . . . that is not merchantable as ore in its natural state and *from which a merchantable product can be produced only by beneficiation or treatment* involving fine grinding." (Emphasis added.) In considering just these two definitions, it is apparent that "low grade iron ore" is mined from property, and that merchantable iron ore is then produced. As a result, for the purposes of this statute as related to this case, "mining" relates to removing the low-grade iron ore from the ground, while "production" relates to beneficiating or treating low-grade iron ore so that it becomes merchantable iron ore. As it is apparent that the terms do not share a meaning, and because the precise definitions of the terms are unnecessary for resolution of this case, we need not address whether the Tribunal erred by not consulting a technical dictionary. See *TM v MZ*, 501 Mich 312, 317; 916 NW2d 473 (2018) (noting that our Supreme Court, and by extension, this Court, will generally not entertain moot issues).

overly reliant on the statute's use of the present-tense form of the verb "is mined." MCL 211.621(b). More specifically, respondents assert that Michigan appellate caselaw has construed the Legislature's use of the present-tense form of verbs to also include past and future usage. Respondents rely on our Supreme Court's decision in *Shinholster v Annapolis Hosp*, 471 Mich 540; 685 NW2d 275 (2004). In that case, the Court considered MCL 600.1483, which provides a damages cap for noneconomic damages as a result of medical malpractice. *Shinholster*, 471 Mich at 560. The statute provides for the damages cap to be raised when "[t]he plaintiff *is* hemiplegic, paraplegic, or quadriplegic resulting in a total permanent functional loss of 1 or more limbs caused by" "[i]njury to the brain" or "[i]njury to the spinal cord." MCL 600.1483(1)(a)(*i*) and (*ii*) (emphasis added). The Court considered whether the Legislature's use of the word "is" meant that the plaintiff had to be hemiplegic, paraplegic, or quadriplegic at the time of judgment to benefit from the raised cap on noneconomic damages. *Shinholster*, 471 Mich at 560-563. The Court declined to adopt that reading of the statute, reasoning that the argument gave "extraordinary and undue weight to the fact that the Legislature has used the present tense of the verb[] . . . ." *Id*. at 565. The Court noted that the Legislature, in a different subsection of the same statute, used the past-tense form of the verb to raise the noneconomic damages cap when "[t]here has been permanent loss of or damage to a reproductive organ resulting in the inability to procreate," MCL 600.1483(1)(c). *Shinholster*, 471 Mich at 565-566. Rather than hold that the statute required a plaintiff to be hemiplegic, paraplegic, or quadriplegic at the time of judgment, the Court opined that "we believe that the better interpretation of the statute is that, as

long as a plaintiff suffers, while still living and as a result of a defendant's negligent conduct, one of the enumerated conditions set forth in [MCL 600.1483], the statute's higher damages cap applies." *Id*. at 567.

The analysis in *Shinholster* does not apply to this case because the legal issue presented is different. The argument in *Shinholster* was that the Legislature's use of the present-tense "is" meant that the circumstances considered by the statute had to exist at the time of judgment. That, plainly, is not the same argument as this case. Rather, under the plain language of the statute, the property had to be mined during the tax year in question for it to be subject to the iron ore tax. In other words, respondents do not argue that the term "is mined" meant that the property had to be actively mined at the time the Tribunal rendered its judgment. Consequently, *Shinholster*'s analysis simply does not apply to this case.

Next, respondents argue that the Tribunal's interpretation of the statute as having an active mining requirement would cause absurd results. Respondents suggest that a mine could shut down on December 31st of each year—the day when applicable taxes are determined—and entirely avoid the iron ore tax for the entire existence of the mine. It is true that "[s]tatutes must be construed reasonably, 'keeping in mind the purpose of the act, and to avoid absurd results.' " *Bauer v Saginaw Co*, 332 Mich App 174, 193; 955 NW2d 553 (2020), quoting *Rogers v Wcisel*, 312 Mich App 79, 87; 877 NW2d 169 (2015). However, the absurd-results rule "applies only when statutes are ambiguous." *Taylor v Lansing Bd of Water & Light*, 272 Mich App 200, 207; 725 NW2d 84 (2006). Therefore, "if the language is plain and unambiguous, we may not depart from a literal construction even to avoid an absurd or unjust result,

lest we engage in impermissible judicial lawmaking[.]" *Id*. at 207 (citation omitted). Here, because the statutory language is plain and unambiguous, respondents' argument is without merit.

In sum, the iron ore tax only applies to "low grade iron ore mining property," which the statute defines as "mineral bearing land from which low grade iron ore is mined . . . ." MCL 211.621(b). Under the plain and unambiguous meaning of that statutory language, the iron ore tax can only be levied against properties that were mined during the tax years in question. Because it is undisputed that, in the present case, the property in question was not mined, the Tribunal properly determined that assessment of the iron ore tax against petitioners should be canceled and summary disposition granted to petitioners under MCR 2.116(I)(2).

III. VALUATION UNDER THE GPTA

Next, respondents argue that the Tribunal abused its discretion by closing the case when issues remained that required discovery and additional rulings from the Tribunal. Specifically, respondents believe that they should have been allowed discovery to determine valuation under the GPTA and that the Tribunal reversibly erred by canceling the iron ore tax and closing the case without deciding anything related to valuation under the GPTA.

Generally, issues regarding the decision of the Tribunal are preserved for review by this Court when they are raised, addressed, and decided by the Tribunal. See *Toaz v Dep't of Treasury*, 280 Mich App 457, 463; 760 NW2d 325 (2008). Here, respondents contend that they raised the issue of whether discovery regarding valuation and its ultimate calculation would be required. In support of that argument, respondents cite "Respon-

dents' Prehearing Statement, p 4." A review of the Tribunal's electronic record does not reveal any document fitting that description. Further, respondents have not provided a copy of the purported document to this Court on appeal.

Respondents also insist that they raised the issue in a prehearing conference summary. The summary includes the following sentence: "The property's [true-cash value] and [taxable value] are at issue for each tax year under appeal." While that document does appear in the Tribunal's record, it is a single sentence in an eight-page document, and it appears immediately after several statements regarding respondents' insistence that the true-cash value and taxable value of the properties in question were never calculated because they were subject to the iron ore tax, not general ad valorem taxes under the GPTA. The sentence is also contrary to the respondents' assertions in a "Notice of No Valuation Disclosure" that was filed with the Tribunal. As a result, it is unclear if the sentence at issue was included by mistake. In any event, the single sentence, unsupported by any factual or legal analysis, is insufficient to raise the issue. The Tribunal "was not obligated under MCR 2.116(G)(5) to scour the record to determine whether there exists a genuine issue of fact to preclude summary disposition." *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 381; 775 NW2d 618 (2009) (quotation marks and citation omitted). Instead, respondents "had the obligation to 'set forth specific facts showing that there is a genuine issue for trial,' MCR 2.116(G)(4), which they did not do." *Id*. Stated differently, the Tribunal was not required to go back in its records, find a single sentence in a summary of a prehearing conference or read a document which it did not have in its electronic

record and assist respondents in establishing that summary disposition was not warranted. See *id*.

The record before this Court reveals that the first time that respondents raised the issue regarding valuation and discovery was in their motion for reconsideration of the Tribunal's final opinion and judgment. A claim before the Tribunal "was not preserved because it was first raised in a motion for reconsideration." *D'Agostini Land Co, LLC v Dep't of Treasury*, 322 Mich App 545, 561; 912 NW2d 593 (2018). When an issue is unpreserved, this Court need not consider it. *Id*. Consequently, by bringing the issue to the Tribunal's attention for the first time in a motion for reconsideration, respondents have failed to preserve this issue for this Court's review, and we decline to consider it.

Affirmed. Petitioners may tax costs. MCR 7.219(A).

JANSEN, P.J., and M. J. KELLY and RONAYNE KRAUSE, JJ., concurred.

PEOPLE v HAMMERLUND

Docket No. 355120. Submitted June 2, 2021, at Grand Rapids. Decided June 17, 2021, at 9:10 a.m.

Jennifer M. Hammerlund was convicted following a jury trial in the Kent Circuit Court of operating while intoxicated (OWI), third offense, MCL 257.625, and failure to report an accident resulting in damages to fixtures, MCL 257.621, after her involvement in a single-vehicle crash that she did not report to the police. Defendant appealed, arguing that the trial court erred when it denied her motion to suppress her post-arrest statements and breath-test results. She alleged that her state and federal constitutional rights against unreasonable searches and seizures were violated when she was arrested in her home without a warrant after she reached her hand outside her door to take back her ID and the officer grabbed her wrist to take her into custody and the two fell inside the house. In Docket No. 333827, the Court of Appeals, MURRAY, P.J., and SAWYER and MARKEY, JJ., affirmed in an unpublished per curiam opinion holding that the arrest was constitutional. Defendant sought leave to appeal in the Supreme Court, which ordered and heard oral argument on whether to grant the application or take other action. 501 Mich 1086 (2018). The Supreme Court, in lieu of granting leave, reversed after concluding that Hammerlund's arrest violated her Fourth Amendment rights against unreasonable searches and seizures. The Supreme Court remanded the case to the trial court for it to consider whether her post-arrest statements and breath-test results should be suppressed under the exclusionary rule. 504 Mich 442 (2019). On remand, defendant moved both to suppress the post-arrest evidence and for a new trial. The trial court, Paul J. Sullivan, J., granted the motion, suppressed the evidence, and ordered a new trial. The prosecution appealed.

The Court of Appeals *held*:

1. The Fourth Amendment of the United States Constitution protects against unreasonable searches and seizures, and the Michigan Constitution, Const 1963, art 1, § 11, provides coextensive protection. The exclusionary rule provides for the sup-

pression of evidence obtained as a result of an illegal search or seizure as well as evidence that is discovered later and found to be derivative of the illegality—that is, fruit of the poisonous tree. The United States Supreme Court created the exclusionary rule to deter future Fourth Amendment violations. The deterrence benefits of exclusion vary with the culpability of a police officer's conduct: when a police officer acts with a grossly negligent disregard for Fourth Amendment rights, the deterrent value of exclusion is strong; but when a police officer acts with an objectively reasonable good-faith belief that their conduct is legal or involves only simple, isolated negligence, then the deterrent value of exclusion is lacking.

2. The Fourth Amendment has drawn a firm line at the entrance to the house, and absent exigent circumstances, that threshold may not reasonably be crossed without a warrant. In this case, where defendant never stepped outside or beyond the entrance of her house and was arrested inside of her home—albeit after the arresting officer's unintentional entrance into her home—it is clear the officer intended to arrest defendant at her home without a warrant by engaging in a deliberate effort to draw her near the door where he could physically grab her and pull her out of the house. These actions exhibited deliberate disregard for defendant's Fourth Amendment rights. Accordingly, the deterrent value of exclusion was strong and outweighed the resulting cost to society.

3. The United States Supreme Court's decision in *New York v Harris*, 495 US 14 (1990) was distinguishable. In *Harris*, the United States Supreme Court declined to apply the exclusionary rule to evidence obtained after an unlawful arrest because the police had probable cause to arrest the defendant for committing a crime and the defendant was lawfully in custody when he was removed from his home to the station house, given his *Miranda*[1] rights and allowed to talk. In this case, as previously determined by the Michigan Supreme Court, the arresting officer lacked probable cause to arrest defendant for OWI or any other identified felony. And despite there being probable cause for the failure-to-report misdemeanor, the arresting officer was not statutorily authorized to arrest defendant under MCL 764.15(1)(d). The arresting officer lacked probable cause to arrest defendant for a felony and he lacked the legal authority to arrest defendant for the misdemeanor; therefore, this case fell into the

[1] *Miranda v Arizona*, 384 US 436 (1966).

class of cases that the *Harris* Court found distinguishable. In addition, the post-arrest statements and breath-test results bore a sufficiently close relationship to the underlying illegality because that evidence was the direct product of defendant being in unlawful custody. Accordingly, the trial court did not err when it applied the exclusionary rule.

4. MCR 6.431 governs motions for new trials in criminal cases and Subrule (B) allows a trial court to grant a new trial on any ground that would support appellate reversal or because it believes that the verdict has resulted in a miscarriage of justice. In this case, the prosecution relied on critical evidence that should have been suppressed. A verdict supported by critical evidence that should have been suppressed under the exclusionary rule constitutes a miscarriage of justice; therefore, a new trial was warranted.

Affirmed.

BOONSTRA, P.J., dissenting, wrote separately not because he necessarily disagreed with the majority's legal analysis but because in his judgment the Michigan Supreme Court had overstepped by deciding in the first instance whether there was probable cause to arrest for OWI and whether exigent circumstances existed and thereby constrained the trial court from developing the factual record and deciding the issue in the first instance and also constrained the Court of Appeals from considering and deciding the issue on appeal. In fact, the record suggested the trial court would have decided the issue differently. Should the case return to the Supreme Court, Judge BOONSTRA would encourage it to vacate the footnote in which it indicated that the officer did not have probable cause to arrest defendant for OWI and that there was no legitimate hot pursuit and to remand the case to the trial court for it to decide the issue.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Christopher R. Becker*, Prosecuting Attorney, and *James K. Benison*, Chief Appellate Attorney, for the people.

State Appellate Defender Office (by *Jason R. Eggert*) for defendant.

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

MARKEY, J. In this interlocutory appeal, the prosecution appeals by delayed leave granted[1] the trial court's order that suppressed evidence and granted defendant a new trial on the basis of a violation of the Fourth Amendment. On appeal, the prosecution argues that the relevant precedent does not support application of the exclusionary rule to the evidence in dispute, which is composed of defendant's statements to the police and two breath-test results that were obtained following her arrest. Defendant was arrested inside her home after a police officer grabbed defendant at the doorway of her house, and the two stumbled backward deeper into the interior of the home. The arresting officer acted without a search or arrest warrant or probable cause that a felony had been committed by defendant, and without the commission of a misdemeanor committed in his presence. Defendant never stepped outside or beyond the entrance of her home until after she was arrested and led away by the officer. The pertinent evidence was gathered after defendant exited her house. We conclude that this case demands application of the exclusionary rule to deter comparable deliberate conduct by the police in the future when contemplating making a warrantless arrest at a suspect's home. Accordingly, we affirm.

This case returns to this Court after a trip to our Supreme Court and a subsequent stop in the trial court. In *People v Hammerlund*, 504 Mich 442, 446-450; 939 NW2d 129 (2019), our Supreme Court summarized the facts of this case:

> Defendant, Jennifer Marie Hammerlund, was involved in a single-vehicle accident in the early morning hours of September 30, 2015, on a highway exit ramp in Wyoming,

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[1] *People v Hammerlund*, unpublished order of the Court of Appeals, entered December 16, 2020 (Docket No. 355120).

Michigan. According to defendant, another driver cut her off, causing her to overcorrect and lose control of her car. Her vehicle scraped a cement barrier and left a dent on a metal guardrail. Defendant suffered only minor injuries; however, the car was no longer drivable. She attempted to call her insurance company and then used a rideshare service to get home. She did not report the accident to police.

Soon after, Officer Erich Staman of the Wyoming Police Department was dispatched to the scene of a reported abandoned vehicle on the shoulder of the highway off-ramp. After observing the damage to the vehicle, as well as the guardrail and cement barrier, Officer Staman requested a tow truck and conducted an inventory search. He discovered that the vehicle was registered to defendant and that it contained paperwork bearing defendant's name, so he requested that officers from the Kentwood Police Department go to defendant's home to perform a welfare check.

In the meantime, according to defendant, she returned home, found that she was "really shaken up," and drank some alcohol. She then went into her room and went to bed. Only a few minutes later, the Kentwood officers arrived and told her roommate that they wished to speak with defendant. Defendant initially declined to leave her room; however, after her roommate spoke to the officers and reported back to defendant that the police would take her into custody and arrest the roommate for harboring a fugitive if she did not appear, defendant came to the door. After that, Officer Staman arrived at the home to "make contact" with defendant.

Officer Staman testified that when he arrived at defendant's home, he stood on her porch while she remained inside, approximately 15 to 20 feet away from the front door. He acknowledged that it "didn't appear that [defendant] wanted to come to the door . . . ." And, when asked whether defendant "made it pretty clear that she wasn't coming out of the home," he agreed, stating, "It seemed that she wasn't going to come out." During their short conversation, defendant admitted to driving the car that caused

the damage. When he asked defendant to produce her identification she was "reluctant" to give it to him so she passed it to him through a third party in the home. Officer Staman testified that defendant told him that she "thought [Officer Staman] might be trying to coax her out of the house."

After verifying her information, Officer Staman offered the identification card back to defendant. He explained:

> And then I had to give the I.D. back to her, so I made sure I gave it back to Ms. Hammerlund. In doing that she came to the door where I was standing and reached out to get the I.D. as I gave it back to her, at which point I grabbed her by the arm and attempted to take her into custody . . . [f]or the hit and run that she just admitted to.

He said that when defendant pulled away he grabbed her again and "the momentum" took him inside the home two to three steps where he handcuffed defendant and completed the arrest.

Following the arrest, Officer Staman placed defendant into the back of his patrol car. After she was advised of and waived her . . . rights [under *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966)], defendant provided further details about the crash, which she described to the officer as possibly a "road rage situation." Officer Staman detected a smell of intoxicants that was "moderate at best" and asked defendant if alcohol played a role in the crash. She opined that it had not, but did acknowledge drinking alcohol earlier in the night after finishing her shift as a bartender and later indicated that she thought her blood alcohol level may have been over the legal limit. When asked if she had any alcohol to drink after the accident, defendant replied, "Absolutely not." Once transported to the county jail, defendant was given two successive breath tests, which indicated a blood alcohol content over the legal limit at .22 and .21, respectively. Consequently, defendant was charged with operating while intoxicated (OWI), third offense, MCL 257.625, and failing

to report an accident resulting in damage to fixtures, MCL 257.621.

Defendant filed a pretrial motion to suppress evidence and dismiss the charges. In the motion, she argued that Officer Staman had violated her Fourth Amendment rights by arresting her inside her home without a warrant and that all the evidence gathered following that arrest was subject to the exclusionary rule. The trial court denied the suppression motion, concluding that the arrest was constitutionally valid pursuant to *United States v Santana*, 427 US 38, 96 S Ct 2406, 49 L Ed 2d 300 (1976). Specifically, it found that defendant was "in the middle of a consensual discussion with Officer Staman" when she "voluntarily approached him" and "voluntarily reached out of her door." Therefore, the court concluded that Officer Staman "was legitimately in that area and it did not violate the constitution for him to effectuate an arrest by grabbing her arm when she reached out of her doorway." The fact that the officer stepped inside defendant's home to complete the arrest did not change the result, according to the trial court, because the officer was "clearly in pursuit for the arrest at that point . . . ."

The case proceeded to trial. Defendant's theory of the case was that she became intoxicated only after the accident. However, she acknowledged that she did not tell any of the officers that she drank when she got home. Defendant's statements made to Officer Staman in his patrol car, as well as her blood-alcohol-content test results, were admitted at trial. After a jury trial, defendant was convicted as charged, and she was sentenced to five years' probation and four months in jail for violating MCL 257.625 and to a concurrent term of 60 days in jail for violating MCL 257.621.

Defendant appealed, continuing to challenge the trial court's denial of her motion to suppress. The Court of Appeals, like the trial court, concluded that the arrest was constitutional under *Santana*, 427 US at 42, and that the trial court had not erred by denying defendant's motion.

> *People v Hammerlund*, unpublished per curiam opinion of the Court of Appeals, issued October 17, 2017 (Docket No. 333827). [Citation omitted.]

The Michigan Supreme Court held that defendant's arrest violated her Fourth Amendment right to be free from unreasonable governmental intrusion into her home, summarizing its holding as follows:

> Officer Staman completed defendant's arrest inside her home, the place where the Constitution most protects her freedom from unreasonable governmental intrusion. Defendant was not subject to public arrest because she remained inside, she maintained her reasonable expectation of privacy, and her act of reaching out to retrieve her identification did not expose her to the public "as if she had been standing completely outside her house," *Santana*, 427 US at 42. In addition, the circumstances were insufficient to justify the hot-pursuit exception to the warrant requirement. Because the arrest was completed across the Fourth Amendment's "firm line at the entrance of the home," it was presumptively unreasonable. *Payton*[*v New York*], 445 US [573,] 586, 590[; 100 S Ct 1371; 63 L Ed 2d 639 (1980)]. It is the prosecution's burden to overcome this presumption, [*People v*] *Oliver*, 417 Mich [366,] 380[; 338 NW2d 167 (1983)], and when the government's interest is to arrest for a minor offense, the presumption that a warrantless entry into a home was unreasonable is difficult to rebut, *Welsh*[*v Wisconsin*], 466 US [740,] 750[; 104 S Ct 2091; 80 L Ed 2d 732 (1984)]. The prosecution failed to overcome this presumption, and the trial court and the Court of Appeals erred by concluding otherwise. [*Hammerlund*, 504 Mich at 463.]

On the basis of this conclusion, our Supreme Court remanded the case to the trial court with instructions that the court address the separate issue regarding whether to apply the exclusionary rule. *Id*. Relevant to our analysis, the Supreme Court noted that "the facts that were known to Officer Staman at the time of the

arrest were not sufficient to establish probable cause for OWI or any other identified felony." *Id*. at 453 n 5. The Court further noted that the "failure to report an accident resulting in damage to fixtures is a 90-day misdemeanor[;] . . . therefore, Officer Staman was not statutorily authorized to arrest defendant [under] . . . MCL 764.15(1)(d)." *Id*. at n 4.

Following the Supreme Court's decision and remand to the trial court, defendant moved both to suppress her statements and the breath-test results under the exclusionary rule and for a new trial. The trial court granted the motion, suppressing the evidence and ordering a new trial. The prosecution now appeals that order.

"Application of the exclusionary rule to a constitutional violation is a question of law that is reviewed de novo." *People v Frazier*, 478 Mich 231, 240; 733 NW2d 713 (2007). The Fourth Amendment of the United States Constitution provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Concerning the protection against unreasonable searches and seizures, "[t]he Michigan Constitution, Const 1963, art 1, § 11, provides coextensive protection to that of its federal counterpart." *Hammerlund*, 504 Mich at 451 n 3.

The exclusionary rule, which provides for the suppression of illegally seized evidence, reaches not only primary evidence that is obtained as a direct result of an illegal search or seizure, but also evidence that is discovered later and found to be derivative of the

illegality, i.e., fruit of the poisonous tree. *People v Randolph*, 502 Mich 1, 16 n 31; 917 NW2d 249 (2018). In other words, the exclusionary rule forbids the use of direct and indirect evidence acquired through governmental misconduct, such as an illegal search by the police. *Id*.

The Fourth Amendment says nothing about excluding evidence at trial when its commands are violated; rather, the exclusionary rule is a prudential doctrine created by the United States Supreme Court to compel respect for the prohibition against unreasonable searches and seizures. *Davis v United States*, 564 US 229, 236; 131 S Ct 2419; 180 L Ed 2d 285 (2011). The sole purpose of the exclusionary rule is to deter future Fourth Amendment violations. *Id*. at 236-237. Where suppression would fail to yield any appreciable deterrence, exclusion of the evidence is unwarranted. *Id*. at 237. The deterrence benefits of exclusion vary with the culpability of a police officer's conduct. *Id*. at 238. When the police exhibit deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs to society in excluding evidence of criminal wrongdoing. *Id*. When, however, the police act with an objectively reasonable good-faith belief that their conduct falls within the confines of the law or when their conduct involves only simple, isolated negligence, the deterrence rationale loses much of its force and exclusion serves no valid purpose. *Id*.

As discussed, our Supreme Court has already decided that defendant's arrest violated the Fourth Amendment. At issue in this appeal is whether evidence obtained following that arrest—namely, defendant's statements made to Officer Staman in his patrol car and the results of her breath tests—must be suppressed

under the exclusionary rule. The prosecution argues that suppression is foreclosed by the United States Supreme Court's decision in *New York v Harris*, 495 US 14; 110 S Ct 1640; 109 L Ed 2d 13 (1990), which we will address momentarily.

First, in *Payton*, 445 US at 576, the United States Supreme Court held "that the Fourth Amendment to the United States Constitution, made applicable to the States by the Fourteenth Amendment, prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest." (Citations omitted.) The Court emphasized that the right of a person to retreat into his or her home and there be free from unreasonable governmental intrusion stands at the very core of the Fourth Amendment. *Id*. at 589-590. "In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house [and,] [a]bsent exigent circumstances, that threshold may not reasonably be crossed without a warrant." *Id*. at 590.

In this case, defendant was standing at the entrance of her home in the doorway when she extended her hand beyond the threshold of the doorway solely to retrieve her identification card from Officer Staman. The record clearly indicated that defendant had no intention or desire whatsoever to voluntarily step outside of her home, and she even informed Officer Staman of her belief that he was trying to coax her out of the house. Officer Staman grabbed her arm in an attempt to arrest her, but defendant pulled away, forcing Officer Staman to again grab for her arm. The momentum of their movements carried Officer Staman two or three steps inside the home where he handcuffed defendant. We are thus addressing a situation in

which defendant never stepped outside or beyond the entrance of her house and was arrested inside of her home. Although, ostensibly, Officer Staman did not intentionally or deliberately enter the home, it is quite clear that he intended to arrest defendant at her home without a warrant by engaging in a deliberate effort to draw her near the door where he could physically grab her and pull her out of the house. And it was Officer Staman's actions that set into motion the events that led to defendant's arrest inside the home.

Under these circumstances, we conclude that Officer Staman exhibited deliberate disregard for defendant's Fourth Amendment rights. We also find that the deterrent value of exclusion is strong and outweighs the resulting cost to society. Absent application of the exclusionary rule, we would effectively be giving our approval to conduct in which, taken to its logical end, police officers grab and pull suspects through open doors and windows, even though the suspects are squarely inside their homes and regardless whether an officer ends up inside a home as a result of a tussle at the door or window. Were we to allow the admission of the evidence in this case, there would be no deterrence to such behavior. And the opinion in *Harris* does not demand a different result. Indeed, *Harris* fully supports our holding.

In *Harris*, the respondent, Bernard Harris, was suspected of having committed a murder, and the police entered his home without first procuring a warrant although the police did have probable cause to believe that Harris had indeed committed the murder. Inside the home, the police read Harris his *Miranda* rights and obtained a confession to the murder. Harris was arrested and taken to the police station, where he signed a written inculpatory statement after having been ad-

vised of his *Miranda* rights a second time. Subsequently, Harris was again advised of his *Miranda* rights before participating in a videotaped, incriminating interview even though he had indicated that he wanted the interview to end. The New York trial court, pursuant to *Payton*, suppressed the first statement made in the home, along with the third statement for reasons irrelevant to our analysis, but the court admitted the written statement made at the police station. Harris was convicted of second-degree murder. The New York Court of Appeals reversed, concluding that the second statement was inadmissible because its connection to the arrest was not sufficiently attenuated, thereby constituting indirect fruits of an illegal search or arrest that had to be suppressed. *Harris*, 495 US at 15-17.

The Supreme Court "decline[d] to apply the exclusionary rule . . . because the rule . . . was not intended to grant criminal suspects, like Harris, protection for statements made outside their premises where the police have probable cause to arrest the suspect for committing a crime." *Id*. at 17. The Court further indicated that "[b]ecause the officers had probable cause to arrest Harris for a crime, Harris was not unlawfully in custody when he was removed to the station house, given *Miranda* warnings, and allowed to talk." *Id*. at 18. The *Harris* Court observed:

> For Fourth Amendment purposes, the legal issue is the same as it would be had the police arrested Harris on his doorstep, illegally entered his home to search for evidence, and later interrogated Harris at the station house. Similarly, if the police had made a warrantless entry into Harris' home, not found him there, but arrested him on the street when he returned, a later statement made by him after proper warnings would no doubt be admissible. [*Id*.]

The Court distinguished several cases in which the evidence obtained from a criminal defendant following arrest was suppressed because the police lacked probable cause. *Id*. at 18-19. The Supreme Court explained that those cases stood "for the familiar proposition that the indirect fruits of an illegal search or arrest should be suppressed when they bear a sufficiently close relationship to the underlying illegality." *Id*. at 19. Stated otherwise, the challenged evidence was the product of illegal governmental activity. *Id*. And the illegality was the absence of probable cause, with the wrong consisting of the police exercising control of the defendant's person at the point when the challenged evidence came into existence, i.e., wrongful detention. *Id*. The Court noted that Harris's "statement taken at the police station was not the product of being in unlawful custody." *Id*. The Supreme Court reasoned that "the police had a justification to question Harris prior to his arrest; therefore, his subsequent statement was not an exploitation of the illegal entry into Harris' home." *Id*.

Harris's station house statement was deemed admissible "because Harris was in legal custody . . . and because the statement, while the product of an arrest and being in custody, was not the fruit of the fact that the arrest was made in the house rather than someplace else." *Id*. at 20. The United States Supreme Court, concluding its opinion, stated:

> The warrant requirement for an arrest in the home is imposed to protect the home, and anything incriminating the police gathered from arresting Harris in his home, rather than elsewhere, has been excluded, as it should have been; the purpose of the rule has thereby been vindicated. We are not required by the Constitution to go further and suppress statements later made by Harris in order to deter police from violating *Payton*. As cases

> considering the use of unlawfully obtained evidence in criminal trials themselves make clear, it does not follow from the emphasis on the exclusionary rule's deterrent value that anything which deters illegal searches is thereby commanded by the Fourth Amendment. Even though we decline to suppress statements made outside the home following a *Payton* violation, the principal incentive to obey *Payton* still obtains: the police know that a warrantless entry will lead to the suppression of any evidence found, or statements taken, inside the home. If we did suppress statements like Harris', moreover, the incremental deterrent value would be minimal. Given that the police have probable cause to arrest a suspect in Harris' position, they need not violate *Payton* in order to interrogate the suspect. It is doubtful therefore that the desire to secure a statement from a criminal suspect would motivate the police to violate *Payton*. As a result, suppressing a station house statement obtained after a *Payton* violation will have little effect on the officers' actions, one way or another.
>
> We hold that, where the police have probable cause to arrest a suspect, the exclusionary rule does not bar the State's use of a statement made by the defendant outside of his home, even though the statement is taken after an arrest made in the home in violation of *Payton*. [*Harris*, 495 US at 20-21 (quotation marks and citation omitted).][2]

As best we can construe *Harris*, we conclude that it stands for the proposition that evidence obtained or gathered inside a house is subject to the exclusionary rule when there has been an unlawful governmental intrusion under the Fourth Amendment. But if the evidence were subsequently obtained or gathered outside the house, exclusion is not appropriate if there existed probable cause to arrest the defendant or if the defendant was not illegally or wrongfully detained, as

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[2] This Court adopted *Harris* in *People v Dowdy*, 211 Mich App 562, 568-570; 536 NW2d 794 (1995).

assessed by information known to the police when arriving at a home. On the other hand, if probable cause is lacking or if a detention is otherwise unlawful or wrongful, the fruits of the search or arrest must be suppressed when they bear a sufficiently close relationship to the underlying illegality.

In this case, Officer Staman did not have probable cause to arrest defendant for OWI or any other felony. We are bound by our Supreme Court's determination that "the facts that were known to Officer Staman at the time of the arrest were not sufficient to establish probable cause for OWI or any other identified felony." *Hammerlund*, 504 Mich at 453 n 5. This was a legal determination by the Supreme Court, and one made by a body superior to this Court. "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." *People v Fisher*, 449 Mich 441, 444-445; 537 NW2d 577 (1995) (emphasis added; quotation marks, citation, and brackets omitted). Furthermore, "[w]hen a court of last resort intentionally takes up, discusses and decides a question germane to, though not necessarily decisive of, the controversy, such decision is not a dictum but is a judicial act of the court which it will thereafter recognize as a binding decision." *People v Kevorkian*, 447 Mich 436, 487 n 65; 527 NW2d 714 (1994) (quotation marks, citations, and emphasis omitted). The prosecution's arguments to the contrary are entirely unavailing.

Additionally, as observed earlier, the *Hammerlund* Court noted that the "failure to report an accident resulting in damage to fixtures is a 90-day misde-

meanor[;] . . . therefore, Officer Staman was not statutorily authorized to arrest defendant [under] . . . MCL 764.15(1)(d)." *Hammerlund*, 504 Mich at 453 n 4. MCL 764.15 provides, in relevant part, as follows:

> (1) A peace officer, without a warrant, may arrest a person in any of the following situations:
>
> (a) A felony, misdemeanor, or ordinance violation is committed in the peace officer's presence.
>
> * * *
>
> (d) The peace officer has reasonable cause to believe a misdemeanor punishable by imprisonment for more than 92 days . . . has been committed and reasonable cause to believe the person committed it.

Accordingly, Officer Staman did not have a legal basis to arrest defendant for a 90-day misdemeanor committed outside his presence. Thus, detaining defendant was wrongful and unlawful. We recognize that there was probable cause that defendant committed the misdemeanor and that the unlawfulness of the arrest relative to the misdemeanor was statutory and not constitutional. Nevertheless, the bottom line is that the arrest and detention were against the law. Defendant should not have been taken into custody.

In sum, probable cause was lacking, and the detention was otherwise unlawful or wrongful. Because Officer Staman lacked probable cause to arrest defendant for a felony and lacked the legal authority to arrest defendant for a misdemeanor, the case is easily distinguishable from *Harris*, falling into the class of cases that the *Harris* Court found distinguishable and that had properly applied the exclusionary rule. The statements defendant made to Officer Staman and the two breath tests bore a sufficiently close relationship to the underlying illegality, in that the evidence was the

direct product of defendant being in unlawful custody. Defendant was illegally arrested and almost immediately made statements to Officer Staman in the back of his patrol car. And soon thereafter she submitted to the two breath tests at the county jail. We hold that the trial court did not err when it applied the exclusionary rule.

The prosecution also argues that the trial court abused its discretion when it granted defendant a new trial. Again, we disagree. This Court reviews for an abuse of discretion a trial court's decision on a motion for a new trial. *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Bergman*, 312 Mich App 471, 483; 879 NW2d 278 (2015) (quotation marks and citation omitted).

MCR 6.431 governs motions for new trial in criminal cases and Subrule (B) provides as follows:

> On the defendant's motion, the court may order a new trial on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice. The court must state its reasons for granting or denying a new trial orally on the record or in a written ruling made a part of the record.

In the trial court's estimation, the breath-test results were critical to the issue of intoxication, and the statements defendant made denying drinking after the accident were vital to the issue of when she became intoxicated. The prosecution argues that the trial court failed to identify the particular ground that would have supported appellate reversal and did not state whether it believed that the verdict constituted a miscarriage of justice. It is unclear how the suppression of "critical" evidence would not, on appeal, have

warranted reversal. And a verdict supported by evidence deemed critical that should have been suppressed would certainly render the verdict a miscarriage of justice. Even in its argument that there was no miscarriage of justice, the prosecution explicitly relies on the suppressed evidence. If anything, the prosecution's argument appears to be an admission that the trial court's grant of a new trial was proper. Under the circumstances of this case wherein there was a Fourth Amendment violation and critical evidence was presented that should have been suppressed under the exclusionary rule, a new trial is wholly warranted.

We affirm.

SERVITTO, J., concurred with MARKEY, J.

BOONSTRA, P.J. (*dissenting*). I respectfully dissent. I do so not so much out of disagreement with the majority's legal analysis but because—in my judgment and with due respect to our Supreme Court—our Supreme Court overstepped in this case and the majority—as well as the trial court—not surprisingly, felt constrained as a result. Should this matter make its way back up to our Supreme Court, I would encourage the Court to rectify matters by vacating footnote 5 of its opinion in this case and by again remanding the case to the trial court for its determination, in the first instance, of issues that neither it nor this Court have ever decided but that appear to have been prematurely decided by the Supreme Court, albeit in passing in footnote 5, without ever having been previously raised in or decided by any court.

A brief procedural recap. The trial court initially denied defendant's motion to suppress evidence and to

dismiss the charges against her. The case proceeded to trial. A jury rendered a guilty verdict on charges of operating while intoxicated, third offense, (OWI), MCL 257.625, and failure to report an accident resulting in damage to fixtures, MCL 257.621. This Court affirmed.[1] Our Supreme Court scheduled oral argument on defendant's application for leave to appeal. It further directed the parties to file supplemental briefs addressing "whether it is constitutionally permissible for a police officer to compel, coerce, or otherwise entice a person located in his or her home to enter a public place to perform a warrantless arrest."[2] And it invited briefs amicus curiae.[3]

Defendant framed the issue before the Supreme Court in its application for leave to appeal as follows:

> BECAUSE OFFICER STAMAN UNLAWFULLY ENTERED DEFENDANT-APPELLANT JENNIFER HAMMERLUND'S HOME AND ARRESTED HER WITHOUT A WARRANT WHEN HE GRABBED HER ARM WHILE SHE ATTEMPTED TO RETRIEVE HER IDENTIFICATION, DID THE CIRCUIT COURT ERR BY DENYING MS. HAMMERLUND'S MOTION TO SUPPRESS?

The prosecution responded to the application by incorporating the arguments it presented in its brief on appeal to this Court. At the Supreme Court's direction, the parties filed supplemental briefs (including a reply brief filed by defendant) addressing the issue raised by the Supreme Court in its May 30, 2018 order. At the Supreme Court's invitation, the Prosecuting Attorneys

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[1] *People v Hammerlund*, unpublished per curiam opinion of the Court of Appeals, issued October 17, 2017 (Docket No 333827).

[2] *People v Hammerlund*, 501 Mich 1086, 1087 (2018).

[3] *Id*. at 1087.

Association of Michigan field a brief amicus curiae. The Supreme Court held oral argument on the application on April 24, 2019.

On July 23, 2019, the Supreme Court issued its opinion and order reversing the judgment of the Court of Appeals and remanding to the trial court "for further proceedings not inconsistent with this opinion." *People v Hammerlund*, 504 Mich 442, 446; 939 NW2d 129 (2019).[4] It noted that it was not deciding the issue that it had asked the parties to address by way of supplemental briefs but that its direction to the parties to address that issue did not mean that they were "imprudently or incorrectly deciding the very legal issues decided by the trial court and the Court of Appeals and briefed by the parties on appeal to this Court." *Id*. at 450 n 2.

That leads me to consider what legal issues were in fact decided by the trial court and the Court of Appeals and briefed by the parties. As this Court previously described the trial court's initial ruling, "[t]he trial court issued a written opinion denying defendant's motion [to suppress and dismiss], ruling that 'there was a constitutionally valid arrest and defendant's attempt to flee from that arrest did not render [the arrest] unconstitutional.' "[5] More specifically, the trial court assumed that the arrest on the misdemeanor failure to report charge *did* violate Michigan *statutory* law but found that the statute did not provide a basis for applying the exclusionary rule as a matter of *constitutional* law.

This Court affirmed. It agreed with the trial court

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[4] Justice ZAHRA, joined by Justice MARKMAN, dissented. *Hammerlund*, 504 Mich at 464 (ZAHRA, J. dissenting).

[5] *People v Hammerlund*, unpublished per curiam opinion of the Court of Appeals, issued October17, 2017 (Docket No. 333827), p 2.

that MCL 764.15[6] does not create a remedy of exclusion. It further agreed with the trial court that although the misdemeanor arrest was statutorily infirm, it was "constitutionally valid" because "[a] warrantless arrest does not offend the constitution when 'probable cause to arrest existed at the moment the arrest was made by the officer,' " and because "defendant does not dispute there was probable cause for the arrest."[7] This Court further clarified that its probable-cause assessment—like the trial court's—related solely to the misdemeanor charge of failure to report an accident resulting in damage to fixtures, MCL 257.621.[8] This Court—like the trial court—offered no analysis of whether there was probable cause for an arrest relating to the OWI charge, MCL 257.625.

Fast-forward now to defendant's application for leave to appeal in our Supreme Court. As noted, the issue raised by defendant in her application to the Supreme Court focused on the propriety of the police officer's conduct in entering her home after grabbing her arm as she reached toward him (while he was

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[6] MCL 764.15(1)(d) provides that a peace officer may make a warrantless arrest if the officer "has reasonable cause to believe a misdemeanor punishable by imprisonment for more than 92 days . . . has been committed and reasonable cause to believe the person committed it." *Id*. The offense of failure to report an accident resulting in damage to fixtures, MCL 257.621, of which defendant was convicted, is a misdemeanor punishable by "imprisonment for not more than 90 days[.]" MCL 257.901(2).

[7] *Hammerlund*, unpub op at 2.

[8] *Hammerlund*, unpub op at 2 n 3 ("While not in dispute, there was sufficient evidence in the record to demonstrate probable cause for an arrest. Officer Staman discovered an abandoned car registered to defendant that showed signs it had been the cause of damage to public road fixtures. Subsequently, defendant made pre-arrest statements that she was driving and that she had left the scene of the accident without reporting the damage.").

standing outside her home) and then arresting her in her home without a warrant. Defendant did not raise the issue of whether there was probable cause for an arrest relating to the OWI charge or how a determination of that issue would affect the analysis of the constitutionality of the arrest for purposes of applying (or not) the exclusionary rule with respect to evidence obtained after the arrest. And, from my review of the record, the only mention of the issue in the briefing before the Supreme Court was made by the prosecution, as an aside in a footnote, after noting that defendant did not contest the fact that there was probable cause to arrest defendant on the misdemeanor failure to report charge:

> Furthermore, Officer Staman testified that he observed Defendant who appeared to be intoxicated . . . . Given the short passage of time between when Officer Staman responded to the scene of the accident and his interaction with Defendant, and Defendant's admission that she had been operating the vehicle, there was also sufficient probable cause to arrest Defendant for operating a motor vehicle while intoxicated, which at best is a 93-day misdemeanor (MCL 257.625).

Further, from my review of the oral arguments before the Supreme Court on defendant's application for leave to appeal, not a single word was uttered on the subject by counsel for either party or by any of the Justices.

Yet, the Supreme Court, in its July 23, 2019 opinion, while devoting the lion's share of its analysis to the issue raised by defendant in its application (i.e., the propriety of the officer's entry into defendant's home under the particular factual circumstances presented), crossed beyond the issues raised by defendant and the issues actually decided in the trial court and in this Court to address and seemingly decide—in the first instance—whether there was probable cause for arrest

with respect to the OWI charge.[9] Indeed, both the Supreme Court majority and the Supreme Court dissent addressed that issue (albeit while reaching different conclusions).[10] The dissent would have held that there was probable cause for an OWI arrest (and that there therefore was no statutory violation in that regard):[11]

> Regardless of the propriety of an arrest for defendant's failure to report an accident causing damage to fixtures, Officer Staman *also* had probable cause to initiate an arrest for operating a vehicle under the influence of intoxicating liquor, third offense, in violation of MCL 257.625(9)(c). The felony information and affidavit of probable cause in the record state that defendant had been convicted of operating while intoxicated twice in the past—once in 1998 and once in 2006. Officer Staman testified at the evidentiary hearing that when he was

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[9] Generally, an appellate court will not decide an issue that the trial court was not presented with and did not decide. *People v Hamacher*, 432 Mich 157, 168; 438 NW2d 43 (1989). Moreover, when our Supreme Court grants a party's application for leave to appeal, the issues to be considered by the Court are generally limited to all or some of the issues raised in the application. See *People v Stanaway*, 446 Mich 643; 521 NW2d 557 (1994); see also MCR 7.305(H)(4)(a).

[10] The Supreme Court majority and the Supreme Court dissent agreed that there was probable cause for arrest relating to the misdemeanor failure to report charge (and that defendant did not contend otherwise), but differed about whether the statutory violation (in making a warrantless arrest for a 90-day misdemeanor not committed in the officer's presence) was appropriately remedied as a matter of constitutional law by the application of the exclusionary rule. *Hammerlund*, 504 Mich at 453-462 (opinion of the Court); *id*. at 473-483 (ZAHRA, J., dissenting).

[11] MCL 764.15(b) and (c) permit a police officer to arrest a person without a warrant if a felony has been committed and the officer has actual knowledge, or probable cause to believe, that the person committed it. MCL 764.15(h) specifically authorizes a police officer to arrest a person if the officer has probable cause to suspect that the person had been operating a motor vehicle while intoxicated when that vehicle was involved in an accident.

> dispatched to the scene of the accident, he found defendant's vehicle abandoned, facing the wrong direction on an exit ramp from US-131, and showing signs that it had struck both of the protective barriers on the exit ramp. Defendant, herself, did not report the accident to the police. After Officer Staman arrived at defendant's home, he observed defendant leaning against a wall as if to maintain balance. He also noticed that her speech was slurred prior to transporting her to the police station. A violation of MCL 257.625(9)(c) would constitute a felony. Thus, Officer Staman was statutorily authorized under MCL 764.15(1)(b) and (h) to arrest defendant, notwithstanding his mistaken belief that failure to report an accident to fixtures was a 93-day misdemeanor. [*Hammerlund*, 504 Mich at 476-479 (ZAHRA, J. dissenting).]

The Supreme Court majority also addressed the issue, albeit only in passing in footnote 5, a footnote that initially characterized the lower court record as vague and inadequate with respect to that issue, but which then seemingly reached a conclusion contrary to that of the dissent notwithstanding the majority's own characterizations of the deficiencies of the lower court record:

> The dissent concludes that Officer Staman also possessed probable cause to arrest defendant for OWI-3d because he observed that defendant was "leaning against a wall as if to maintain balance," "that her speech was slurred prior to transporting her to the police station," and that she had previous OWI convictions. There are multiple problems with this conclusion. First, that defendant was slurring her speech and unstable on her feet *could possibly provide probable cause* to believe that she was under the influence when the crash occurred; however, considering the fact that defendant was in an accident in which her head collided with a steering wheel and the intervening time between the accident and the police contact, *without more concrete facts* it is a stretch to conclude that any

unsteadiness or warped speech stemmed from intoxication that was present at the time she operated the vehicle. Second, *the record is vague* about when exactly Officer Staman noticed defendant slurring her speech, and it is unclear whether it was while she remained inside her home or only after she was arrested. Third, relatedly, *there is nothing in the record* to indicate that Officer Staman was aware of defendant's prior OWI convictions before he made the arrest. The dissent speculates that Officer Staman "may well have been aware of" the prior convictions, but cites nothing in the record that supports such a statement other than the fact that OWI convictions are reported to the secretary of state under MCL 257.625(21)(a).

Further, what Officer Staman observed or discovered *after* the arrest is not relevant to whether the officer had probable cause to arrest in the first place. Probable cause to arrest exists where the facts and circumstances *known* to the officer would warrant a person of reasonable caution to believe that the offense was committed by the suspect. [*People v*]*Champion*, 452 Mich [92, 115; 549 NW2d 849 (1994)]. The dissent's reliance on *Devenpeck v Alford*, 543 US 146; 125 S Ct 588; 160 L Ed 2d 537 (2004), is misplaced. *Devenpeck*, as the dissent acknowledges, states that an officer's "subjective reason for making the arrest need not be the criminal offense as to which the *known* facts provide probable cause." *Id*. at 153. *As we have discussed*, the facts that were *known* to Officer Staman at the time of the arrest *were not sufficient to establish probable cause for OWI* or any other identified felony. The dissent's position would allow the police to retroactively manufacture probable cause where none existed at the time the arrest was made. *Most important, however, is that even if we were to conclude that the officer possessed probable cause to arrest defendant for OWI, it would not render this a constitutional arrest because there was no legitimate hot pursuit*. [*Hammerlund*, 504 Mich at 453-454 n 5 (opinion of the Court) (emphasis altered).]

In my judgment, the Supreme Court jumped the gun in deciding this issue without the benefit of a fully

developed lower court record and without the benefit of a ruling by the trial court (or by this Court) on that issue. Neither of the lower courts ever opined on whether there was probable cause for an OWI arrest, or whether the exigent circumstances doctrine would apply with respect to the OWI charge, such that the officer's entry into defendant's home to effectuate an OWI arrest would be constitutionally valid. Instead, by bypassing the lower courts and the development of a factual record that would have enabled the lower courts to have opined on those issues, the Supreme Court jumped to a conclusion that was devoid of the requisite factual or legal analysis.

I note, for example, that the Supreme Court analyzed the "exigent circumstances" or "hot pursuit" issue solely in the context of the statutorily defective arrest of defendant on the misdemeanor failure to report charge (not the OWI charge). Specifically, the Supreme Court said:

> Here, *defendant was suspected of a 90-day misdemeanor and there was no evidence of that crime that she could destroy*. Indeed, all the elements of the crime were already known to the police. There is no suggestion that any emergency existed that would have entitled the police to enter defendant's home throughout the conversation up to the point when defendant reached out to retrieve her identification. We fail to see how defendant's interaction at the doorway created any kind of emergency, let alone one that would outweigh her expectation of privacy in her home. [*Id*. at 461 (emphasis added).]

Had the Supreme Court analyzed the issue in the context of the OWI charge, then it would have had to consider, for example, whether the dissipation over time of defendant's blood alcohol content, among other factors, would constitute exigent circumstances justi-

fying the officer's entry into defendant's home to effectuate the arrest on the OWI charge. As the Supreme Court dissent stated:

> The majority suggests that Officer Staman could not rely on the "hot pursuit" exception to the warrant requirement partly because there was no evidence that defendant could destroy; although it is worth noting that evidence in the form of defendant's measurable blood alcohol level would dissipate over time. Regardless, preventing the destruction of evidence is only *one* consideration in an analysis of exigent circumstances. See *Minnesota v Olson*, 495 US 91, 100; 110 S Ct 1684; 109 L Ed 2d 85 (1990). In *Olson*, the United States Supreme Court stated:
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> > The Minnesota Supreme Court applied essentially the correct standard in determining whether exigent circumstances existed. The court observed that "a warrantless intrusion may be justified by hot pursuit of a fleeing felon, *or* imminent destruction of evidence . . . , *or* the need to prevent a suspect's escape, *or* the risk of danger to the police or to other persons inside or outside the dwelling." [*Id*., quoting *State v Olson*, 436 NW2d 92, 97 (Minn, 1989) (emphasis added; citation omitted).]
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> Thus, while the arrest may not have been valid solely on the basis of an attempt to preserve evidence, entry into defendant's home was necessary to prevent the circumvention of a constitutionally proper arrest, which was initiated from a position outside the protected area inside the home. [*Hammerlund*, 504 Mich at 481 n 59 (ZAHRA, J., dissenting).]

So, why does all of this matter? Because in reaching a conclusion on ultimate issues that had never been decided by any lower court, and by reaching that conclusion without the development of an adequate factual record and while skipping important parts of the legal analysis, the Supreme Court put the cart before the horse, reached issues not raised by the

parties or developed in the briefing, constrained the trial court from performing its proper role to develop the factual record and to decide issues in the first instance, and constrained this Court from considering and deciding the issue on appeal.[12] Instead, the Supreme Court decided the issue in the first instance, with the lower courts then being bound to follow the conclusion of the Supreme Court, notwithstanding the fact that in my judgment the Supreme Court should not have reached or decided the issue in the first place at that stage of the proceedings.[13]

All of this becomes painfully evident when one reviews the record of what transpired following the Supreme Court's remand of this matter to the trial court. By opinion and order dated April 14, 2020 (O&O 4/14/20), the trial court, on remand from the Supreme Court, granted defendant's motion to suppress and for a new trial. It set the stage for its analysis by highlighting the Supreme Court's above-quoted footnote 5, noting:

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[12] Yet, the Supreme Court routinely declines to decide issues in the first instance, and instead remands matters to the lower courts in deference to their proper role in developing a factual record and in deciding issues in the first instance for review by the Supreme Court at an appropriate later time. See, e.g., *People v Hickey*, 504 Mich 975 (2019); *People v Sheena*, 497 Mich 1021 (2015).

[13] In its July 23, 2019 opinion, the Supreme Court noted that "[w]hether suppression of evidence under the exclusionary rule is appropriate is an issue separate from whether defendant's Fourth Amendment rights were violated by police conduct." *Hammerlund*, 504 Mich at 463 (opinion of the Court) (emphasis added). It therefore remanded this case to the trial court to consider that issue. In my judgment, it should have included within the scope of that remand the issues that I have discussed in this opinion, rather than deciding those issues in the first instance and then constraining the trial court (and this Court) in the further proceedings on remand.

> Additionally, *although this Court never directly addressed the issue, part of the Michigan Supreme Court majority's analysis was based on the conclusion that the initial arrest could only have been for the 90-day misdemeanor failure to report offense* because "the facts that were known to Officer Staman at the time of the arrest were not sufficient to establish probable cause for OWI or any other identified felony." [O&O 4/14/20 at 3 (emphasis added), quoting *Hammerlund*, 504 Mich at 453-454 n 5 (opinion of the Court).]

The trial court further reiterated that "*Again, based on the holding of the Michigan Supreme Court*, the illegality in this case was entry into defendant's home to arrest defendant *for the 90-day misdemeanor offense* for failure to report the accident." O&O 4/14/20 at 7 (emphasis added). In a lengthy footnote, the trial court explained:

> *As mentioned above, this Court had never decided the issue of whether there was probable cause to believe defendant committed any crime other than the 90-day misdemeanor* for failing to report an accident causing damage to fixtures. Rather, it was decided that, even assuming the arrest was only justified by the failure to report, it did not make the actions unconstitutional. *Still, the Michigan Supreme Court majority did explicitly rule that failing to report was the only legal justification for the arrest*. *See Hammerlund*, 504 Mich at 453 n 5. The minor nature of the crime was referenced multiple times in the opinion as part of the analysis and not as mere dicta, so *this Court is bound by this conclusion*. *See, e.g., id*. at 461 (discussing the minor nature of the failing to-report crime in relation to potential exigent circumstances). *However, respectfully, this Court notes that if it had been directly faced with the issue, the combination of facts known by Officer Staman at the time of the arrest (e.g., the accident, the abandoned vehicle facing the wrong way on a highway offramp, the late hour, defendant's decision to just get a ride home and abandon her car for the night rather than report the accident, defendant's slurred speech, and defendant's dif-*

> *ficulty balancing) would have likely led this Court to conclude there was at least also probable cause for the crime of operating while intoxicated in violation of MCL 257.625. See Devenpeck v Alford*, 543 US 146 (2004) (holding probable cause analysis related to an arrest is based on an objective analysis of the facts known to the officer at the time of an arrest, not the subjective intent of the officer). Even assuming Officer Staman did not know at the time about defendant's other convictions that made this violation a felony, it is still at least a 93-day misdemeanor, it involves different evidentiary and investigatory issues, and it implicates much more serious public safety concerns than merely failing to report an accident causing damage to fixtures. *Regardless, given the Michigan Supreme Court majority's clear holding that Officer Staman only had probable cause for the failure to report offense, this Court need not address whether or how probable cause related to operating while intoxicated might affect the application of the exclusionary rule*. [*Id*. at 7 n 3 (emphasis added).]

In concluding its opinion on remand, the trial court emphasized yet again the constraints that it felt as a result of the Supreme Court deciding an issue that the trial court itself had never addressed:

> *It should be remembered that the ruling today is based on the Michigan Supreme Court majority's conclusion that this case involves "a person suspected of a minor misdemeanor* [being] subjected to a warrantless arrest inside her home in the middle of the night." *Hammerlund*, 504 Mich at 459-460. *The arrest was held to have been unreasonable and solely based on the offense for failure to report the accident. Id. It was also held that there was no exigency to justify the timing and location of the arrest, at least in part because all the elements of that crime were already known to police at the time of the arrest and there was no evidence of that crime that could be destroyed. Id*. at 461-462. *In light of those holdings*, this Court finds application of the exclusionary rule to be required to protect the

> constitutional interests at stake. [*Id*. at 9-10 (emphasis added; alteration in original).]

For good measure, the trial court added the following additional footnote:

> *Again, to be clear, this Court expresses no opinion as to whether or how the existence of probable cause at the time of the arrest related to the offense of operating while intoxicated would impact this result. (See note 3 above.)* [*Id*. at 10 n 6 (emphasis added).]

One need not read very far between the lines to appreciate the extent to which the trial court felt that the Supreme Court had usurped the trial court's proper role as the fact-finder and as the court whose job it is to apply the facts in deciding legal issues in the first instance. The trial court further clearly expressed that it, as the fact-finder and initial decision-maker, likely would have decided the issue differently than the Supreme Court did, but that it was constrained from even reaching the issue because the Supreme Court had stepped in to decide it first. By rushing to judgment on that issue, the Supreme Court effectively dictated the result in the trial court and altered the posture of the case on further appeal. With respect to our Supreme Court, that is not how our judicial system is supposed to work.

So now, here we are again in the Court of Appeals. And here we are passing upon an outcome in the trial court that appears to be quite different from the outcome that the trial court would have reached had it properly been allowed to decide the issue in the first instance. Instead, we are reviewing a decision of the trial court that the trial court felt was dictated by the Supreme Court (even though it was contrary to what the trial court likely would have otherwise ruled). And this Court, unsurprisingly, feels equally constrained by

the Supreme Court's ruling. As the majority states, "We are bound by our Supreme Court's determination that 'the facts that were known to Officer Staman at the time of the arrest were not sufficient to establish probable cause for OWI or any other identified felony.' *Hammerlund*, 504 Mich at 453 n 5."

If this is indeed how our system of justice is going to operate, then one might fairly wonder why we don't simply skip the fact-finding and initial decision-making that by design take place in the trial courts of this state, and the deliberations that subsequently occur in this Court on an initial appeal, and instead simply "Advance to Go" in the Supreme Court.

For these reasons, I respectfully dissent.

PEOPLE v BURKETT

Docket No. 351882. Submitted June 8, 2021, at Detroit. Decided June 17, 2021, at 9:15 a.m. Leave to appeal denied 508 Mich 998 (2021).

Timothy J. Burkett was convicted following a jury trial in the Oakland Circuit Court of assault with intent to do great bodily harm less than murder (assault), MCL 750.84, for his stabbing of the victim. Before trial, the prosecution filed a notice of intent to seek a sentence enhancement under MCL 769.12(1)(a) on the basis of defendant's three prior felony convictions: operating a vehicle while intoxicated causing death, MCL 257.625(4); voluntary manslaughter, MCL 750.321; and assault, MCL 750.84. Defense counsel acknowledged receipt of the notice, and the parties also discussed the sentencing enhancement at a pretrial hearing, but the prosecution did not file proof of service of the notice as required by MCL 769.13. Defendant ultimately pleaded guilty of being a fourth-offense habitual offender under MCL 769.12(1)(a). After the jury found him guilty, the court, Michael D. Warren, Jr., J., sentenced defendant to a mandatory minimum term of 25 years in prison. Defendant appealed.

The Court of Appeals *held*:

1. MCL 769.12(1)(a) provides that if a person has been convicted of any combination of three or more felonies or attempts to commit felonies and that person commits a subsequent felony in Michigan, the person shall be punished upon conviction of the subsequent felony and sentencing under MCL 769.13; if the subsequent felony is a serious crime or a conspiracy to commit a serious crime, and one or more of the prior felony convictions are listed prior felonies, the court must sentence the person to imprisonment for not less than 25 years. Article 1, § 16 of Michigan's 1963 Constitution prohibits cruel or unusual punishment; the prohibition against cruel or unusual punishment prohibits grossly disproportionate sentences. When determining whether a punishment is cruel or unusual, a court must consider: (1) the severity of the sentence imposed and the gravity of the offense, (2) a comparison of the penalty to penalties for other crimes under Michigan law, and (3) a comparison between Michi-

gan's penalty and penalties imposed for the same offense in other states. Legislatively mandated sentences are presumed to be proportionate and valid, and to overcome the presumption, a defendant must present unusual circumstances that would render the presumptively proportionate sentence disproportionate. Habitual-offender statutes are constitutional, and the sentences under them are not cruel or unusual because the state has a right to protect itself from individuals who continue to engage in criminal activities. In this case, while the 25-year mandatory minimum sentence was harsh, it was not unduly harsh considering the gravity of defendant's present conviction and three previous felony convictions, two of which involved the death of individuals. Moreover, even though MCL 769.12(1)(a) only requires that at least one of the prior offenses be a listed felony under MCL 769.12(6)(a), all of defendant's prior felonies were listed felonies. Because MCL 769.12(1)(a) only applies to individuals convicted of a serious felony who have previously been convicted of the three or more felonies, the 25-year mandatory minimum sentence was not disproportionate considering the gravity of the offense and the harshness of the penalty. Further, defendant failed to support his assertion that the sentence was cruel or unusual with a comparison to other states' habitual-offender statutes. Michigan has an interest in incapacitating and deterring recidivist felons, and the 25-year mandatory minimum sentence did not constitute cruel or unusual punishment under Michigan's Constitution. Defendant also did not assert any unusual circumstances that could have rendered the presumptively proportionate legislatively mandated sentence disproportionate. Accordingly, the trial court did not plainly err by sentencing defendant in accordance with MCL 769.12(1)(a) to a mandatory minimum sentence of 25 years in prison.

2. Contrary to MCL 769.13, the prosecution failed to file the proof of service for its notice of intent to seek a sentence enhancement. The outcome of the issue was controlled by *People v Heard*, 323 Mich App 526 (2018). The error was harmless because defendant had actual notice of the prosecutor's intent to seek an enhanced sentence and defendant was not prejudiced in his ability to respond to the habitual-offender notification. Defendant failed to establish plain error affecting his substantial rights, and he was, therefore, not entitled to resentencing because of the prosecution's failure to file the proof of service.

Affirmed.

CONSTITUTIONAL LAW — SENTENCES — CRUEL OR UNUSUAL PUNISHMENT — THIRD-OFFENSE HABITUAL-OFFENDER STATUTE — MANDATORY MINIMUM SENTENCE.

MCL 769.12(1)(a) provides that a third-offense habitual offender must be sentenced to a mandatory minimum of 25 years in prison if the subsequent felony is a serious crime or a conspiracy to commit a serious crime and one or more of the prior convictions are listed prior felonies; the mandatory minimum sentence of 25 years in prison does not constitute cruel or unusual punishment under Michigan's Constitution (Const 1963, art 1, § 16).

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Jessica R. Cooper*, Prosecuting Attorney, *Thomas R. Grden*, Appellate Division Chief, and *Joshua J. Miller*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Douglas W. Baker*) for defendant.

Before: MURRAY, C.J., and FORT HOOD and RICK, JJ.

PER CURIAM. Defendant appeals as of right his jury-trial conviction of assault with intent to do great bodily harm less than murder (AWIGBH), MCL 750.84.[1] Defendant was sentenced, as a fourth-offense habitual offender, MCL 769.12(1)(a), to a term of 25 to 99 years' imprisonment. We affirm.

I. FACTUAL BACKGROUND

Defendant's AWIGBH conviction arose from a stabbing he perpetrated against Alicia Paris, during which he stabbed Paris eight times. On appeal, defen-

[1] The prosecution charged defendant with assault with intent to murder, MCL 750.83. The jury acquitted defendant of this charge but convicted him of the lesser included offense of AWIGBH.

dant does not challenge any aspect of the evidence against him at trial. Before trial, the prosecution filed a notice of intent to seek a sentence enhancement under MCL 769.12(1)(a) on the basis of defendant's three prior felony convictions: (1) operating while intoxicated causing death, MCL 257.625(4); (2) voluntary manslaughter, MCL 750.321; and (3) AWIGBH, MCL 750.84. At the arraignment, defense counsel acknowledged receipt of the notice. The parties again discussed the sentencing enhancement at a pretrial hearing. At sentencing, defendant pleaded guilty to being a fourth-offense habitual offender under MCL 769.12(1)(a).[2] In accordance with that sentence enhancement, the trial court sentenced defendant to a mandatory minimum term of 25 years' imprisonment.

After sentencing, defendant filed an appeal as of right in this Court. Defendant then moved to remand, arguing that the trial court should decide whether the 25-year mandatory minimum sentence it imposed violated the United States Constitution's prohibition against cruel and unusual punishment or the 1963 Michigan Constitution's prohibition against cruel or unusual punishment. A panel of this Court denied defendant's motion to remand without prejudice to a case call panel of this Court later determining that remand was necessary. *People v Burkett*, unpublished order of the Court of Appeals, entered November 30, 2020 (Docket No. 351882).

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[2] The court questioned defendant about his plea two separate times during the sentencing hearing. Although defendant appeared to express some confusion regarding the mandatory minimum sentence of 25 years' imprisonment, he twice affirmed that he had previously been convicted of and sentenced for AWIGBH, voluntary manslaughter, and operating while intoxicated causing death. Defendant does not challenge the propriety of the plea on appeal.

II. CONSTITUTIONALITY OF MCL 769.12(1)(a)

Defendant argues that the 25-year mandatory minimum sentence imposed by MCL 769.12(1)(a) consti tutes cruel and unusual punishment under the United States Constitution and cruel or unusual punishment under the Michigan Constitution. We disagree.

To preserve a claim that the defendant's sentences were unconstitutionally cruel or unusual, the defendant must raise the claim in the trial court. See *People v Bowling*, 299 Mich App 552, 557; 830 NW2d 800 (2013) ("Defendant did not advance a claim below that his sentences were unconstitutionally cruel or unusual, so this issue is unpreserved."). Defendant did not raise this claim below; therefore, this claim is unpreserved.

"This Court generally reviews constitutional questions de novo." *People v Brown*, 294 Mich App 377, 389; 811 NW2d 531 (2011). However, we "review unpreserved constitutional issues for plain error affecting substantial rights." *People v Posey*, 334 Mich App 338, 346; 964 NW2d 862 (2020), oral argument ordered on the application 508 Mich 940 (2021). "To establish entitlement to relief under plain-error review, the defendant must establish that an error occurred, that the error was plain, i.e., clear or obvious, and that the plain error affected substantial rights." *People v Lockridge*, 498 Mich 358, 392-393; 870 NW2d 502 (2015). "An error affects substantial rights when it impacts the outcome of the lower-court proceedings." *Posey*, 334 Mich App at 346-347. "Reversal is warranted only when the error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings independently of the defendant's innocence." *Lockridge*, 498 Mich at 393.

MCL 769.12 provides, in relevant part:

> (1) If a person has been convicted of any combination of 3 or more felonies or attempts to commit felonies . . . and that person commits a subsequent felony within this state, the person shall be punished upon conviction of the subsequent felony and sentencing under section 13 of this chapter as follows:
>
> (a) If the subsequent felony is a serious crime or a conspiracy to commit a serious crime, and 1 or more of the prior felony convictions are listed prior felonies, the court shall sentence the person to imprisonment for not less than 25 years. [MCL 769.12(1)(a).]

Defendant does not dispute that MCL 769.12(1)(a) applies to him. Rather, defendant argues that the 25-year mandatory minimum sentence imposed by MCL 769.12(1)(a) violates both the United States Constitution's prohibition against cruel and unusual punishment and the Michigan Constitution's prohibition against cruel or unusual punishment. This argument is unpersuasive.

"The Michigan Constitution prohibits cruel *or* unusual punishment, Const 1963, art 1, § 16, whereas the United States Constitution prohibits cruel *and* unusual punishment, US Const, Am VIII." *People v Benton*, 294 Mich App 191, 204; 817 NW2d 599 (2011). "If a punishment passes muster under the state constitution, then it necessarily passes muster under the federal constitution." *Id*. (cleaned up). "[U]nder the Michigan Constitution, the prohibition against cruel or unusual punishment include[s] a prohibition on grossly disproportionate sentences." *Id*.

This Court employs the following three-part test in determining whether a punishment is cruel or unusual: "(1) the severity of the sentence imposed and the gravity of the offense, (2) a comparison of the penalty to penalties for other crimes under Michigan law, and (3) a

comparison between Michigan's penalty and penalties imposed for the same offense in other states." *Id*. "Legislatively mandated sentences are presumptively proportional and presumptively valid." *Brown*, 294 Mich App at 390. "In order to overcome the presumption that the sentence is proportionate, a defendant must present unusual circumstances that would render the presumptively proportionate sentence disproportionate." *Bowling*, 299 Mich App at 558 (cleaned up). "Statutes are presumed to be constitutional, and the courts have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent." *Benton*, 294 Mich App at 203 (cleaned up). This Court has previously held that habitual-offender statutes "are constitutional and the sentences under them are not cruel and unusual, because the state has a right to protect itself from individuals who continue to engage in criminal activities." *People v Curry*, 142 Mich App 724, 732; 371 NW2d 854 (1985).[3]

As an initial matter, it is worth noting that defendant does not explicitly specify whether his challenge to MCL 769.12(1)(a) is a facial challenge or an as-applied challenge. "A facial challenge involves a claim that a legislative enactment is unconstitutional on its face, in that

[3] A prior version of MCL 769.12 was in effect when this Court decided *Curry*. See MCL 769.12, as amended by 1978 PA 77. However, the reasoning in *Curry* did not rely on the language of any particular habitual-offender statute. Rather, the *Curry* Court concluded that such statutes were constitutional and that the sentences imposed under them were neither cruel nor unusual "because the state has a right to protect itself from individuals who continue to engage in criminal activities." *Curry*, 142 Mich App at 732. According to the *Curry* Court, "[c]onvictions under the habitual offender statute are based upon additional, particular criminal acts and not upon the individual's status as [a] habitual criminal." *Id*. "Although not binding authority, decisions of this Court before November 1, 1990, may be persuasive." *People v Morrison*, 328 Mich App 647, 651 n 1; 939 NW2d 728 (2019).

there is no set of circumstances under which the enactment is constitutionally valid." *People v Wilder*, 307 Mich App 546, 556; 861 NW2d 645 (2014). By contrast, "[a]n 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*. (cleaned up). The nature of defendant's argument on appeal appears to raise a facial challenge to the statute.

Defendant has failed to overcome the presumption that the legislatively mandated sentence imposed was proportionate and valid. See *Brown*, 294 Mich App at 390. Moreover, defendant's argument lacks merit under the 3-part test enumerated earlier. Regarding the first prong of the test, we acknowledge that a 25-year mandatory minimum sentence is a harsh punishment. However, it is not an unduly harsh punishment considering the gravity of defendant's present conviction and three previous felony convictions. In the instant case, a jury found defendant guilty of AWIGBH. Paris testified that defendant stabbed her eight times. This undoubtedly constituted a serious and violent offense. Further, defendant does not dispute that he was previously convicted of three other felonies—AWIGBH, voluntary manslaughter, and operating while intoxicated causing death. While MCL 769.12(1)(a) requires that at least one of the defendant's prior offenses be a listed felony, all three of these prior convictions are listed felonies under MCL 769.12(6)(a). See MCL 769.12(6)(a)(*i*) and (*iii*). Moreover, two of these prior convictions involved the *death* of another human being.

In support of defendant's argument regarding the severity of the punishment at issue, he cites *People v Lorentzen*, 387 Mich 167; 194 NW2d 827 (1972), and

People v Bullock, 440 Mich 15; 485 NW2d 866 (1992). In *Lorentzen*, 387 Mich at 170-171, the defendant, who had no prior convictions, was convicted under a statute that prohibited the sale of any quantity of marijuana and imposed a 20-year mandatory minimum sentence. Our Supreme Court held that the sentence imposed by the statute constituted both cruel and unusual punishment under the federal Constitution and cruel or unusual punishment under the Michigan Constitution. *Id*. at 181. The Court reasoned, "A compulsory prison sentence of 20 years for a nonviolent crime imposed without consideration for defendant's individual personality and history is so excessive that it 'shocks the conscience.' " *Id*. In *Bullock*, our Supreme Court considered a statute that imposed a mandatory sentence of life in prison without possibility of parole for the possession of 650 grams or more of any mixture containing cocaine. *Bullock*, 440 Mich at 21. The statute in question applied even to first-time offenders. *Id*. at 37-38. The *Bullock* Court concluded that the penalty was "so grossly disproportionate as to be cruel or unusual." *Id*. at 37 (cleaned up). These cases are distinguishable from the sentence mandated by MCL 769.12(1)(a). Both *Lorentzen* and *Bullock* dealt with penalties imposed for nonviolent drug crimes, and the penalties in question did not require a showing of previous criminal activity. *Bullock*, 440 Mich at 21, 37-38; *Lorentzen*, 387 Mich at 170-171. By contrast, MCL 769.12(1)(a) only applies to individuals convicted of a serious felony who have previously been convicted of *three or more* felonies. Thus, we find defendant's comparison of the present case to the circumstances in *Lorentzen* and *Bullock* unpersuasive.[4] We conclude

[4] It appears as though defendant cites *Lorentzen* and *Bullock* to demonstrate the severity of the sentence for purposes of the first part of

that the sentence is not disproportionate considering the gravity of the offense and the harshness of the penalty. *Benton*, 294 Mich App at 204.

Regarding the third prong, defendant acknowledges that similar habitual-offender statutes have been upheld in other jurisdictions. However, defendant claims that one such habitual-offender statute, California's "Three Strike's Law," is distinguishable from MCL 769.12(1)(a). Specifically, defendant argues that, unlike MCL 769.12, the California law requires at least one of the defendant's prior offenses to be a violent offense, requires the jury to find the fact of the prior offense beyond a reasonable doubt, and allows California trial courts to vacate allegations of prior serious or violent felony convictions. However, these differences do not compel the conclusion that MCL 769.12(1)(a) is unconstitutional, and defendant has not pointed to any other states' habitual-offender schemes that would indicate that the penalty imposed by MCL 769.12 is abnormally harsh in comparison.

Moreover, when finding California's three-strikes law constitutional in *Ewing v California*, 538 US 11,

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the test. However, it is possible that he cited these cases for the second part of the test, i.e., to compare the penalty imposed under MCL 769.12(1)(a) to penalties for other crimes under Michigan law. If defendant cited these cases for the first part of the test, then he failed to compare this penalty to that imposed in Michigan for other crimes, and we decline to do so for him. "[A]n appellant may not simply 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." *Bowling*, 299 Mich App at 559-560 (cleaned up). If defendant cited these cases for the second part of the test, however, we still find the comparison equally unpersuasive. We note that this Court has upheld the imposition of the 25-year mandatory minimum sentence for the offense of sexual penetration of a preteen victim by an adult "[e]ven when there is no palpable physical injury or overtly coercive act . . . ." *Benton*, 294 Mich App at 206.

29-31; 123 S Ct 1179; 155 L Ed 2d 108 (2003) (opinion by O'Connor, J.), the Supreme Court did not focus on the aspects of the statute emphasized by defendant. Rather, the Supreme Court concluded that "[i]t is enough that the State of California has a reasonable basis for believing that dramatically enhanced sentences for habitual felons advances the goals of its criminal justice system in any substantial way." *Id*. at 28 (cleaned up). The Supreme Court further stated:

> In weighing the gravity of [the defendant's] offense, we must place on the scales not only his current felony, but also his long history of felony recidivism. Any other approach would fail to accord proper deference to the policy judgments that find expression in the legislature's choice of sanctions. In imposing a three strikes sentence, the State's interest is not merely punishing the offense of conviction, or the "triggering" offense: It is in addition the interest in dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law. To give full effect to the State's choice of this legitimate penological goal, our proportionality review of [the defendant's] sentence must take that goal into account.
>
> [The defendant's] sentence is justified by the State's public-safety interest in incapacitating and deterring recidivist felons, and amply supported by his own long, serious criminal record. [The defendant] has been convicted of numerous misdemeanor and felony offenses, served nine separate terms of incarceration, and committed most of his crimes while on probation or parole. His prior "strikes" were serious felonies including robbery and three residential burglaries. To be sure, [the defendant's] sentence is a long one. But it reflects a rational legislative judgment, entitled to deference, that offenders who have committed serious or violent felonies and who continue to commit felonies must be incapacitated. [*Id*. at 29-30 (cleaned up).]

These considerations also apply to MCL 769.12(1)(a) and support the conclusion that the penalty mandated by the statute does not constitute cruel or unusual punishment. Michigan, like California, has an interest in "incapacitating and deterring recidivist felons[.]" *Ewing*, 538 US at 29. MCL 769.12(1)(a) only applies to individuals convicted of a serious felony who have previously been convicted of three or more felonies, at least one of which is a listed prior felony. Defendant's present conviction was for a serious felony—AWIGBH—during the commission of which he stabbed Paris eight times. As discussed earlier, all three of his prior felony convictions involved serious felonies, two of which even involved the death of the victims. Defendant's presentence investigation report indicates that his prior criminal record included three felony convictions and three misdemeanor convictions. Although the mandatory 25-year minimum sentence is long, it likewise "reflects a rational legislative judgment, entitled to deference, that offenders who have committed serious or violent felonies and who continue to commit felonies must be incapacitated." *Ewing*, 538 US at 30.

Consideration of the three-part test leads to the conclusion that the minimum sentence mandated by MCL 769.12(1)(a) is neither cruel nor unusual. Moreover, defendant has not presented this Court with any unusual circumstances that render the presumptively proportionate legislatively mandated sentence disproportionate. *Bowling*, 299 Mich App at 558; *Brown*, 294 Mich App at 390. Considering this, the trial court did not plainly err by sentencing defendant in accordance with MCL 769.12(1)(a), thus imposing a 25-year minimum sentence.

III. NOTICE OF SENTENCE ENHANCEMENT

Defendant argues that he is entitled to resentencing without the habitual-offender enhancement as a result of the prosecution's failure to file a proof of service for its notice of intent to seek a sentence enhancement. We disagree.

"To preserve a sentencing issue for appeal, a defendant must raise the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals." *People v Anderson*, 322 Mich App 622, 634; 912 NW2d 607 (2018) (cleaned up). Defendant did not challenge the prosecution's failure to file a proof of service for the notice of intent to seek a sentence enhancement at sentencing or in a motion for resentencing. Although defendant filed a motion to remand in this Court, he did not raise this issue in that motion either.[5] Therefore, this issue is unpreserved.

Generally, whether the prosecution failed to file the proof of service related to a habitual-offender notice is an issue that this Court reviews "de novo as a question of law because it involves the interpretation and application of statutory provisions and court rules." *People v Head*, 323 Mich App 526, 542; 917 NW2d 752 (2018). However, we review unpreserved claims for plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). "To establish entitlement to relief under plain-error review, the defendant must establish that an error occurred, that the error was plain, i.e., clear or obvious, and that the plain error affected substantial rights."

[5] In the motion to remand, defendant noted in the statement of facts that the prosecution failed to file the proof of service. However, defendant did not actually make any arguments regarding this failure.

Lockridge, 498 Mich at 392-393. "An error affects substantial rights when it impacts the outcome of the lower-court proceedings." *Posey*, 334 Mich App at 346-347. "Reversal is warranted only when the error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings independently of the defendant's innocence." *Lockridge*, 498 Mich at 393. "Unambiguous language in a statute or court rule is enforced as written." *Head*, 323 Mich App at 542.

MCL 769.13 provides, in relevant part:

> (1) In a criminal action, the prosecuting attorney may seek to enhance the sentence of the defendant as provided under section 10, 11, or 12 of this chapter, by filing a written notice of his or her intent to do so within 21 days after the defendant's arraignment on the information charging the underlying offense or, if arraignment is waived, within 21 days after the filing of the information charging the underlying offense.
>
> (2) A notice of intent to seek an enhanced sentence filed under subsection (1) shall list the prior conviction or convictions that will or may be relied upon for purposes of sentence enhancement. The notice shall be filed with the court and served upon the defendant or his or her attorney within the time provided in subsection (1). The notice may be personally served upon the defendant or his or her attorney at the arraignment on the information charging the underlying offense, or may be served in the manner provided by law or court rule for service of written pleadings. The prosecuting attorney shall file a written proof of service with the clerk of the court.

"The purpose of the notice requirement is to provide the accused with notice, at an early stage in the proceedings, of the potential consequences should the accused be convicted of the underlying offense." *Head*, 323 Mich App at 543 (cleaned up). However, "[t]he failure to file a proof of service of the notice of intent to

enhance the defendant's sentence may be harmless if the defendant received the notice of the prosecutor's intent to seek an enhanced sentence and the defendant was not prejudiced in his ability to respond to the habitual-offender notification." *Id*. at 543-544. The *Head* Court ultimately concluded that the prosecution's failure to file the proof of service did not require resentencing because (1) the charging documents "apprised [the] defendant of his fourth-offense habitual-offender status," (2) the defendant received actual notice of the enhancement on the record at a preliminary examination, (3) the "defendant and defense counsel exhibited no surprise at sentencing when [the] defendant was sentenced as a fourth-offense habitual offender," (4) the prosecutor's intention to enhance the sentence "was acknowledged on the record by defendant and defense counsel at a pretrial hearing during the discussion of the prosecutor's final plea offer," and (5) and the defendant did not claim that he had "any viable challenge" to his status as a fourth-offense habitual offender. *Id*. at 544-545. Thus, the facts of the case demonstrated that the defendant received actual notice and the failure to file a proof of service did not prejudice the defendant's ability to respond to the habitual-offender notification such that any error was harmless. *Id*. at 544.

In this case, the prosecution concedes that it did not file the required proof of service, and defendant concedes that "the record shows defense counsel actually received the notice within the time permitted by statute for filing it." However, defendant argues that a conflict exists in this Court's decisions regarding whether a defendant's actual notice of the intent to seek a sentence enhancement renders harmless the prosecution's failure to file the proof of service. Specifically, defendant claims that a conflict exists between

Head and *People v Straughter*, unpublished per curiam opinion of the Court of Appeals, issued April 11, 2017, (Docket No. 328956). While acknowledging that this Court is bound by *Head*, defendant asks us to follow *Straughter* and remand for resentencing without the habitual-offender enhancement.

We are bound to follow *Head*, a published decision by this Court that has not been reversed or modified. MCR 7.215(J)(1). Here, like in *Head*, the prosecution's failure to file the proof of service for its notice of intent to seek a sentence enhancement constituted harmless error because defendant had timely actual notice and his ability to respond to the notice was not prejudiced. *Head*, 323 Mich App at 543-544. First, defendant had actual notice. The record indicates—and defendant concedes—that defense counsel acknowledged receipt of the notice of intent at the arraignment. The sentence enhancement was again discussed at a pretrial hearing on October 2, 2019. Therefore, defendant had actual notice of the prosecution's intent to seek a sentence enhancement within 21 days of the arraignment. MCL 769.13(2); *Head*, 323 Mich App at 543-544.

Second, defendant's ability to respond to the notice was not prejudiced by the prosecution's failure to file a proof of service. Defense counsel discussed the potential enhancement at the arraignment and again at a pretrial hearing. Although defendant expressed some confusion at sentencing regarding the imposition of a 25-year mandatory minimum, neither he nor defense counsel expressed surprise at sentencing when defendant was sentenced as a fourth-offense habitual offender. In fact, defendant pleaded guilty at sentencing to being a fourth-offense habitual offender. Finally, although defendant challenges the constitutionality of the specific sentencing enhancement on appeal, this claim is with-

out merit, as discussed earlier, and defendant has not otherwise claimed that the enhancement does not or should not apply to him. Because defendant had actual notice and the prosecution's failure to file a proof of service did not prejudice defendant's ability to respond to the notice, the prosecution's failure to file the statutorily required proof of service constituted harmless error. *Head*, 323 Mich App at 544. Defendant has not established plain error affecting his substantial rights. *Lockridge*, 498 Mich at 392-393. Therefore defendant is not entitled to resentencing.

Affirmed.

MURRAY, C.J., and FORT HOOD and RICK, JJ., concurred.

KOSTREVA v KOSTREVA

Docket Nos. 352029 and 353316. Submitted June 8, 2021, at Detroit. Decided June 24, 2021, at 9:00 a.m.

Plaintiff, Kinga Kostreva, filed an emergency motion in the Macomb Circuit Court seeking authorization to travel to Poland with the parties' daughter, LKK. Plaintiff also sought LKK's passport, which was in the custody of defendant, Michael Kostreva, and attorney fees. The parties entered a consent judgment of divorce in 2017, which provided, in part, for joint legal and physical custody of LKK and that defendant would retain LKK's passport. In July 2019, plaintiff's mother, who lived in Poland, died unexpectedly in Michigan while she was visiting plaintiff and LKK. Plaintiff sought consent from defendant to travel with LKK to Poland for two weeks for the funeral service, but defendant refused. The trial court granted plaintiff's emergency motion and authorized plaintiff to travel with LKK to Poland from July 20, 2019 to August 3, 2019. The court scheduled an August 5, 2019 hearing on plaintiff's request for possession of LKK's passport and for attorney fees. Following the August 5, 2019 hearing before a referee, the referee recommended that attorney fees be awarded to plaintiff and that defendant retain custody of LKK's passport. Defendant objected to the recommendation that plaintiff be awarded attorney fees, and an evidentiary hearing was held in November 2019 to hear defendant's objections. Following the hearing, the trial court, Tracey A. Yokich, J., denied defendant's request for attorney fees, awarded additional attorney fees to plaintiff, and revisited the issue of custodianship of LKK's passport and decided that plaintiff would be its custodian. Defendant moved for reconsideration, which the court denied. Defendant appealed.

The Court of Appeals *held*:

1. Defendant argued that the trial court erred when it modified the consent judgment of divorce without considering the factors outlined in the Uniform Child Abduction Prevention Act (UCAPA), MCL 722.1521 *et seq*., or the best-interest factors in the Child Custody Act, MCL 722.21 *et seq*. Under the UCAPA, a court may, on its own motion, order abduction-prevention measures in

a child-custody proceeding if the court finds that the evidence establishes a credible risk of abduction of the child. Because the record did not reveal any evidence establishing a credible risk of abduction of LKK, the trial court did not clearly err when it did not sua sponte invoke the UCAPA.

2. Under MCL 722.27(1)(c), a court may modify an existing child-custody order for proper cause shown or because of a change in circumstances. A party requesting a change to an existing condition on the exercise of parenting time must demonstrate proper cause or a change in circumstances that would justify a trial court's determination that the current condition no longer serves the child's best interests. In this case, which party had custody of LKK's passport had no bearing on LKK's custodial environment or on either party's parenting time. Therefore, the trial court did not commit a clear legal error or palpably abuse its discretion by changing custodianship of the passport from defendant to plaintiff without first determining that proper cause or changed circumstances warranted revisiting the issue.

3. Defendant argued that he was denied due process when the trial court granted plaintiff's emergency motion permitting plaintiff to travel to Poland with LKK. According to defendant, the parties' disagreement regarding the trip to Poland became apparent on July 1, 2019, but plaintiff waited until July 18, 2019, to file an emergency motion for the trip, which was scheduled to begin two days later, thus denying defendant a meaningful opportunity to oppose the motion. Defendant also asserted that the trial court should not have excused plaintiff's failure to support her emergency motion with verification or an affidavit and that the proposed order submitted by plaintiff and later signed by the court did not include notice of defendant's rights as required by MCR 3.207(B). There was no dispute that plaintiff's motion failed to satisfy MCR 3.207(B)(1) because it was not verified or accompanied by an affidavit and that the ex parte order did not include the notice requirements in MCR 3.207(B)(5). In affirming its decision to grant the ex parte order, the trial court excused plaintiff's failure to comply with MCR 3.207(B)(1) and noted that defendant had not established that the error was other than harmless or that it had resulted in any prejudice. The United States Supreme Court has noted that a court entertaining an emergency petition should be at liberty to recognize that sound procedure often requires discretion to excuse compliance with strict rules. In light of this principle, there was no evidentiary or clear legal error by the trial court in issuing the ex parte order.

4. Following the November 2019 evidentiary hearing in the trial court, the court awarded attorney fees and custodianship of LKK's passport to plaintiff. Defendant argued that this was improper because the referee had recommended that defendant retain custody of the passport, and because plaintiff did not object, she was not entitled to further consideration of the issue. However, the issue was not whether plaintiff was entitled to further consideration, but whether the trial court properly acted within its broad discretion under MCR 3.215(F) to choose to decide the passport issue. The trial court did not wholly introduce the issue of custody of LKK's passport, but cited the development of the issue at the August 2019 referee hearing and the evidence presented at the evidentiary hearing regarding the parties' problems sharing the passport. The court was thus exercising its broad discretion under MCR 3.215(F) in relying on the record from the referee hearing when it determined that it could properly consider the issue of which party would retain the passport in the future. Defendant further objected that the trial court erred by reaching the passport issue without providing notice pursuant to MCR 3.215(E)(4) and (5). However, defendant did not cite authority for the proposition that the objection and notice requirements set forth for the parties apply to the court as well. Moreover, under MCL 552.507(4), the trial court, on its own motion, was permitted to hold a de novo hearing on any matter that had been the subject of a referee hearing. Therefore, the court's de novo consideration of plaintiff's request for custody of the passport was proper.

5. Defendant objected to the court's determination that he was liable for plaintiff's attorney fees because his defense against plaintiff's emergency motion was frivolous. Under MCR 3.206(D)(2)(b), a party to a domestic-relations action may request attorney fees when the fees were incurred because the other party refused to comply with a previous court order, despite having the ability to do so. Attorney fees are also authorized under MCR 3.215(F)(3) following referee hearings if the party's position was frivolous. A position is frivolous, in part, if the party's primary purpose was to harass the prevailing party or the party's position was devoid of arguable legal merit. The trial court noted that the parties had a mutual obligation under the consent judgment of divorce to cooperate to the extent possible when one party desired to have LKK for a special occasion, as well as plaintiff's entitlement to two weeks' uninterrupted vacation time with LKK during the summer. The court further noted defendant's claim that he objected to LKK going to Poland for two weeks on the occasion of her grandmother's funeral because of his concern about LKK missing summer school was not supported by the record, which showed

that LKK's academic performance showed no cause for concern. Defendant failed to show that the court erred by concluding that defendant had acted unreasonably by refusing to cooperate with plaintiff and allow LKK to travel to Poland or that defendant's defenses to the ex parte order were ill-intentioned, not factually supported, and therefore frivolous. The court's decision to award attorney fees to plaintiff was not an abuse of its discretion.

6. Defendant was not entitled to attorney fees on the basis of plaintiff's failure to comply with MCR 3.207(B). Plaintiff's failures in this regard were largely due to time pressure caused by defendant's refusal to cooperate with plaintiff without litigation. Additionally, because defendant did not show that he was prejudiced by this procedural irregularity, the trial court reasonably overlooked plaintiff's lack of compliance. Defendant did not show that he was entitled to attorney fees for any other reason, and plaintiff was properly the prevailing party on all issues in this case, so defendant's request for attorney fees was properly rejected on this basis alone.

Affirmed.

Law Offices of Jeffery A. Cojocar, PC (by *Jeffery A. Cojocar*) for Kinga Kostreva.

Speaker Law Firm, PLLC (by *Liisa R. Speaker*) for Michael Kostreva.

Before: MURRAY, C.J., and FORT HOOD and RICK, JJ.

FORT HOOD, J. Defendant appeals as of right the trial court's orders granting plaintiff's request to take the parties' minor daughter, LKK, to Poland for two weeks, changing the custodianship of the child's passport from defendant to plaintiff, and granting plaintiff's request for attorney fees while denying defendant's request for the same. We affirm in all respects.

I. FACTUAL BACKGROUND

In 2017, the parties divorced and entered a consent judgment of divorce providing that the parties would share joint legal and physical custody of LKK but that

defendant would retain LKK's passport. On July 3, 2019, plaintiff's mother—LKK's grandmother—passed away unexpectedly while visiting plaintiff and LKK from Poland. In preparation to return the decedent to her home in Poland for a memorial service and burial, plaintiff sought consent from defendant to travel with LKK to Poland for two weeks. Defendant did not consent, leading plaintiff to file an emergency motion in the trial court on July 18, 2019, to authorize the travel. In the motion, plaintiff requested LKK's passport from defendant and attorney fees. The trial court granted the motion the following day, authorized plaintiff to travel with LKK to Poland from July 20, 2019 to August 3, 2019, and set a hearing on the permanency of the passport's custodian and attorney fees for August 5, 2019.

Following the hearing, a referee recommended that defendant retain custody of LKK's passport, but that defendant reimburse plaintiff for the $1,112.50 in attorney fees necessitated by the motion. Defendant filed objections to the fees. On that basis, a subsequent evidentiary hearing was held on November 1, 2017. Following that hearing, the trial court issued a written opinion and order denying a request by defendant for attorney fees and increasing the fees owed to plaintiff to $6,395. The court additionally, and apparently on its own motion, revisited the issue of permanent custody of LKK's passport and decided plaintiff would be the custodian of the passport. Defendant filed a motion for reconsideration, which the trial court denied. This appeal followed.

II. THE UNIFORM CHILD ABDUCTION PREVENTION ACT

Defendant first contends that the trial court erred in modifying the parties' consent judgment of divorce to

effectively reverse protective orders against parental kidnapping without first considering the factors outlined in the Uniform Child Abduction Prevention Act (UCAPA), MCL 722.1521 *et seq*., or the best-interest factors from the Child Custody Act, MCL 722.21 *et seq*. We disagree.

As a preliminary matter, we note that, under the circumstances, "[n]o exception need be taken to a finding or decision" in order to preserve the issue of whether the trial court erred by modifying the parties' consent judgment of divorce to change the custodianship of the child's passport from plaintiff to defendant. See MCR 2.517(A)(7). However, for the purposes of this appeal, we find it relevant to note that defendant failed to invoke any argument below concerning the UCAPA or the Child Custody Act. That is to say, defendant's argument on appeal necessarily implies that the trial court should have sua sponte considered provisions of the UCAPA, and in so doing the best-interest factors set forth in MCL 722.23 of the Child Custody Act, prior to awarding custody of the child's passport to plaintiff.

The same general standard of review applies to Parts II through V of this opinion: All custody orders must be affirmed on appeal unless the trial court's factual findings are against the great weight of the evidence, the court committed a palpable abuse of discretion,[1] or the court made a clear legal error on a

[1] "Although the 'outside the range of reasonable and principled outcomes' standard is now the 'default abuse of discretion standard,' . . . child custody cases specifically retain the historic *Spalding* standard . . . ." *Moote v Moote*, 329 Mich App 474, 478 n 2; 942 NW2d 660 (2019), citing *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). According to *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959), an abuse of discretion occurs when the result is "so palpably and grossly violative of fact and logic that it evidences not the exercise of will

major issue. MCL 722.28; *Fletcher v Fletcher*, 447 Mich 871, 876-877; 526 NW2d 889 (1994).

The UCAPA was enacted to "allow courts in this state to impose measures to prevent the abduction of children; to establish standards for determining whether a child is subject to a significant risk of abduction; and to provide remedies." 2014 PA 460, effective January 12, 2015. Under MCL 722.1524(1), "[a] court on its own motion may order abduction prevention measures in a child-custody proceeding if the court finds that the evidence establishes a credible risk of abduction of the child," and under Subsection (2), "[a] party to a child-custody determination . . . may file a petition seeking abduction prevention measures to protect the child under this act," MCL 722.1524(2). These provisions indicate that the provisions of the UCAPA are not applicable unless specifically invoked—either by the court or by a party. As specified in Subsection (1), a court's authority to invoke the UCAPA arises when there is evidence establishing "a credible risk of abduction of the child."

In this case, however, although defendant asserts that plaintiff's emergency motion occasioned "the first time a Michigan court was being asked to review an order entered based on the risk factors in the UCAPA," he claims incorrectly that he raised this issue in his response to plaintiff's emergency motion and in his motion for reconsideration. In arguing the issue in his brief on appeal, he nowhere otherwise asserts that the UCAPA was ever invoked by anyone throughout the proceedings below. Further, although defendant complains that plaintiff has at times taken some liberties with her time or travel with LKK, including by not

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but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias."

always providing defendant with satisfactory notice, he does not assert that plaintiff ever attempted any actual abduction in the sense of parental kidnapping in derogation of his own parental rights. Because the record does not reveal any evidence establishing "a credible risk of abduction of the child," the trial court did not commit clear legal error for not having sua sponte invoked the UCAPA during the proceedings below.

III. PROPER CAUSE AND CHANGE OF CIRCUMSTANCES

Related to the previous issue, defendant next contends that the trial court abused its discretion by changing the custodianship of the child's passport from defendant to plaintiff without first determining that proper cause or changed circumstances warranted revisiting the issue.

As with the framing of the UCAPA issue, in framing this issue defendant speaks to the trial court having reversed "protective orders" against "parental kidnapping." In fact, defendant calls attention to no specific protective orders, but asserts that in the parties' predivorce history "a Cook County, Illinois trial court issued protective orders designed to ensure against parental kidnapping." Defendant elaborates that "Appellee-Mother obtained an Emergency Order of Protection against him from the Cook County, Illinois, Domestic Relations Division" in January 2014, citing "01/22/2014 Disposition Order, Cook County, Illinois Case No. 13 OP 75578 (Cook County PPO Order)," and that "the Cook County trial court vacated the Emergency Order of Protection based on Appellee-Mother's motion on January 22, 2014." According to defendant, further such litigation had the result that "[o]n October 14, 2015, the Cook County trial court entered an Order for Visitation placing

restrictions on the requested travel, including that Appellant-Father travel to Poland with the minor child." Defendant otherwise refers to "protective language included in a Consent Judgment of Divorce to prevent international parental kidnapping."

Defendant does not specifically assert that the instant trial court failed to afford full faith and credit to any pertinent Illinois orders, all of which predated the parties' Macomb County divorce proceedings that culminated in a consent judgment. Defendant asserts, without citation of authority, that when "Cook County transferred (not dismissed) its custody case to Michigan because the parties and the courts determined that Michigan was the more convenient forum, the protective provisions went with them into the new state." But he adds that the instant trial court "never needed to review Cook County's findings because the parties reached a Consent Judgment of Divorce that included similar protective provisions[.]" At issue, then, is not the "reversal," or overruling, of specific protective orders originating in Illinois, but rather the enforcement or modification of certain particulars in the parties' Macomb County divorce judgment.

According to MCL 722.27(1)(c), a court may modify an existing child-custody order "for proper cause shown or because of change of circumstances . . . ." That subsection further states that a court may not change a child's established custodial environment except upon presentation of "clear and convincing evidence that it is in the best interest of the child" and sets forth criteria for determining the existence of an established custodial environment. "However, a lesser, more flexible, understanding of proper cause or change in circumstances is applicable to a request to modify parenting time" in ways that would not affect the child's established custodial environment. *Marik v Marik*, 325 Mich App 353,

367-368; 925 NW2d 885 (2018) (quotation marks and citation omitted). Further, if the proposed modification would not change the custodial environment, the proponent of the modification need show that the change is in the child's best interests on a mere preponderance of the evidence. *Shade v Wright*, 291 Mich App 17, 23; 805 NW2d 1 (2010). In this case, defendant concedes that plaintiff's motion for custody of the subject child's passport has no bearing on the child's established custodial environment.

"[A] party requesting a change to an existing condition on the exercise of parenting time must demonstrate proper cause or a change in circumstances that would justify a trial court's determination that the condition in its current form no longer serves the child's best interests." *Kaeb v Kaeb*, 309 Mich App 556, 571-572; 873 NW2d 319 (2015). However, because the modification of a mere condition on the exercise of parenting time "will generally not affect an established custodial environment or alter the frequency or duration of parenting time," the "lesser, more flexible, understanding of 'proper cause' or 'change in circumstances' " is the applicable one. *Id*. at 570-571. Accordingly, the proponent of such modification need show only "that there is an appropriate ground for taking legal action." *Id*. at 571.

Defendant, citing *Kaeb*, characterizes custody of the subject child's passport as a condition of the parenting-time provision of the parties' custody arrangement. That characterization is a strained one. At issue in *Kaeb* was the conditioning of a party's exercise of parenting time on his attending Alcoholics Anonymous meetings and continuing counseling. *Id*. at 572. In contrast, custodianship of a child's passport has no direct bearing on the apportionment of parenting time, including the

scheduling of it, but instead potentially bears on the balance of power, or opportunity to abuse authority, between parties to shared custody arrangements as concerns the child's international travel. Custody of the child's passport is a "condition" of parenting time only in that sense, not in the sense at issue in *Kaeb*, in which the father was ordered to participate in Alcoholics Anonymous and counseling in order to maintain his eligibility to exercise his parenting time.

In *Ludwig v Ludwig*, 322 Mich App 266, 274; 911 NW2d 213 (2017), rev'd 501 Mich 1075 (2018), this Court held that a court may enter an order that does not modify parenting time "without first holding an evidentiary hearing regarding the contested best interests of the children." That case concerned a reunification order whereby the defendant and the children, along with two therapists, were to participate in a video conference, after which the "frequency, duration, and method of continued contact will be at the therapists' discretion . . . ." *Ludwig*, 322 Mich App at 272. The trial court had declared that "therapeutic contact" in that form did not constitute parenting time and thus that the order effected no change in that regard. *Id*. This Court agreed that "a court-ordered videoconference between defendant, the children, [and two therapists] does not constitute the 'parenting time' envisioned under the Child Custody Act." *Id*. at 274.

Our Supreme Court reversed, holding, in an order entered in lieu of granting leave, that "the circuit court should have held an evidentiary hearing and considered the best interests of the children before entering the reunification order." *Ludwig*, 501 Mich at 1076. The Supreme Court noted that the order below "left up to the unfettered discretion of the therapists the 'frequency, duration, and method' of any additional contact between

the defendant and the children for a six-month period following the initial video conference," then stated that "the circumstances of this case warrant a hearing to determine whether the reunification process authorized by the circuit court's order is in the children's best interests." *Id*. The Court thus expressed disagreement not with this Court's declaration that a trial court need not conduct a best-interest hearing before issuing an order that does not modify parenting time, but rather with this Court's acceptance of the characterization of an order requiring video contact between parent and children and authorizing therapists to direct further such contact, as one not modifying parenting time.

Because this Court's decision in *Ludwig* was wholly reversed, no part of it remains binding authority. See MCR 7.215(J)(1). However, we note that, because the Supreme Court did not express disapproval of this Court's declaration that an order that does not modify parenting time need not follow from an evidentiary best-interest hearing, that facet of the case continues to offer useful instruction. Here, because which of the parties has custody of their daughter's passport has no direct bearing on the daughter's custodial environment or on any existing order's provisions for how much parenting time either parent is to have, including whether and when it is exercised, we hold that the trial court did not commit a clear legal error or palpably abuse its discretion by changing the custodianship of the child's passport from defendant to plaintiff without first determining that proper cause or changed circumstances warranted revisiting the issue.

IV. DUE PROCESS

Defendant next contends that the trial court deprived him of due process when it issued the ex parte

order permitting plaintiff to travel with LKK to Poland. We disagree.

Preliminarily, neither the court below nor either party on appeal has addressed the issue of mootness in conjunction with defendant's objections to the ex parte order. But plaintiff and the child had gone to, and returned from, Poland by the time defendant filed his written response to plaintiff's emergency motion. "An issue is deemed moot when an event occurs that renders it impossible for a reviewing court to grant relief." *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998). However, in light of the parties' history of failing to reach agreement over LKK's travels, we note the exception to our policy of declining to reach moot issues when the issue may recur between the parties while tending to evade timely appellate review. See *Contesti v Attorney General*, 164 Mich App 271, 278; 416 NW2d 410 (1987). We elect to address the issue.

Defendant contends that plaintiff did not seek judicial relief when their disagreement over LKK going to Poland became apparent, on July 10, 2019. Defendant notes that, had plaintiff filed a motion sooner, there might have been time for defendant to present his side of the argument. Instead, plaintiff filed for an ex parte order on an emergency basis on July 18, 2019, for a trip to begin just two days later, thus guaranteeing that defendant would have no meaningful opportunity to oppose the motion. Defendant further protests that the trial court overlooked plaintiff's failure to support her motion with verification or an affidavit, and that plaintiff's proposed order did not include notice of defendant's rights in the matter when the court signed and issued the order.

Defendant cites caselaw for the proposition that "[a] party has a constitutional right to due process—that is, notice that his or her rights will be affected and an opportunity to be heard prior to the determination affecting those rights." Indeed, "[b]oth the Michigan Constitution and the United States Constitution preclude the government from depriving a person of life, liberty, or property without due process of law." *Reed v Reed*, 265 Mich App 131, 159; 693 NW2d 825 (2005). See also US Const, Am XIV, § 1; Const 1963, art 1, § 17. "The purpose of any notice is to give the opposite party an opportunity to be heard." *White v Sadler*, 350 Mich 511, 518; 87 NW2d 192 (1957).

MCR 3.207 governs ex parte and temporary orders. Subrule (B) includes the following provisions:

> (1) Pending the entry of a temporary order, the court may enter an ex parte order if the court is satisfied by specific facts set forth in an affidavit or verified pleading[2] that irreparable injury, loss, or damage will result from the delay required to effect notice, or that notice itself will precipitate adverse action before an order can be issued.
>
> (2) The moving party must arrange for the service of true copies of the ex parte order on the friend of the court and the other party.
>
> (3) An ex parte order is effective upon entry and enforceable upon service.
>
> * * *
>
> (5) An ex parte order providing for child support, custody, or visitation . . . must include the following notice:

[2] Verification of a pleading may be accomplished by "oath or affirmation of the party or someone having knowledge of the facts stated," MCR 1.109(D)(3)(a), or a signed statement to the effect that the signer declares "under the penalties of perjury" that the signer has examined the document, and that "its contents are true" according to the signer's "best . . . information, knowledge, and belief," MCR 1.109(D)(3)(b).

> "NOTICE:
>
> "1. You may file a written objection to this order or a motion to modify or rescind this order. You must file the written objection or motion with the clerk of the court within 14 days after you were served with this order. You must serve a true copy of the objection or motion on the friend of the court and the party who obtained the order.
>
> "2. If you file a written objection, the friend of the court must try to resolve the dispute. If the friend of the court cannot resolve the dispute and if you wish to bring the matter before the court without the assistance of counsel, the friend of the court must provide you with form pleadings and written instructions and must schedule a hearing with the court.
>
> "3. The ex parte order will automatically become a temporary order if you do not file a written objection or motion to modify or rescind the ex parte order and a request for a hearing. Even if an objection is filed, the ex parte order will remain in effect and must be obeyed unless changed by a later court order."

Again, plaintiff filed her emergency motion to authorize out-of-country travel on July 18, 2019. With the motion, plaintiff provided three exhibits. Exhibit 1 was a copy of a death certificate indicating that plaintiff's mother died in Macomb County on July 2, 2019, and listing sites in Poland for the place or location of disposition of the body. Exhibit 2 was a copy of an e-mail from plaintiff to defendant, dated July 17, 2019, and stating, "This is my 2 weeks vacation time with [LKK]: July 20–August 3, 2019. We are going to Tarnow, Poland. Please provide me with [LKK's] passport ASAP." Exhibit 3 consisted of a proposed ex parte order. Plaintiff filed a proof of service indicating that a copy of the motion was "served upon the Defendant directly via First-Class Mail . . . as well as via email" on July 18, 2019.

On July 19, 2019, the day after plaintiff filed her emergency motion, the trial court entered the proposed ex parte order, which stated that "pursuant to the Judgment of Divorce and given the recent passing of the maternal grandmother, the Plaintiff shall be allowed to exercise uninterrupted summer parenting time to travel to Tarnow, Poland from July 20, 2019 through August 3, 2019," and that "Defendant shall immediately provide the minor child's passport to the Plaintiff for the purpose of this international travel."

Not in dispute is that plaintiff's motion engendering the subject ex parte order was neither verified nor accompanied by an affidavit, thereby failing to satisfy MCR 3.207(B)(1), and that plaintiff's proposed order, and thus the order the court entered, did not include the notice provisions spelled out under MCR 3.207(B)(5). In affirming the decision to grant the ex parte order, the trial court noted, in relation to plaintiff's failure to observe some of the particulars of MCR 3.207(B):

> Significantly, Defendant has not established the failure to procure an affidavit or verified statement in support of the motion was—in light of Plaintiff's counsel's schedule—other than harmless error or resulted in any prejudice. Therefore, Plaintiff's failure to comply with MCR 3.207(B)(1) is excused. Moreover, . . . Defendant's repeated unashamed refusals were unwarranted and the same outcome of the emergency motion would have resulted if defendant had appeared for a hearing on the motion.

The parties blame each other for plaintiff's last-minute resort to an emergency motion for an ex parte order: defendant on the ground that plaintiff could have initiated legal action several days earlier upon the emergence of the parties' disagreement, and plaintiff on the ground that defendant unreasonably rebuffed her repeated attempts to obtain his consent to the child's going abroad for two weeks. The trial court concluded

that defendant withheld his approval unreasonably and credited plaintiff with repeatedly attempting to obtain defendant's consent without resorting to litigation. Defendant recounts his stated reasons for objecting to a two-week absence, but does not assert that the trial court's factual conclusions were contrary to the great weight of the evidence. In any event, we note that, at the very least, the trial court and plaintiff seemed to appreciate better than defendant the policy preference for avoiding litigation in favor of negotiated resolutions. See *US Fidelity & Guaranty Co v Mich Catastrophic Claims Ass'n*, 484 Mich 1, 24; 795 NW2d 101 (2009) (recognizing the "compelling policy . . . to limit litigation and promote settlements"); *Neal v Oakwood Hosp Corp*, 226 Mich App 701, 705; 575 NW2d 68 (1997) (stating that "[t]he purpose of the notice requirement is to promote settlement without the need for formal litigation"); *Jackson v Barton Malow Co*, 131 Mich App 719, 722; 346 NW2d 591 (1984) (emphasizing that "this state has a very strong policy favoring settlements").

In arguing that the trial court was too forgiving of plaintiff's failure to satisfy some of the requirements of MCR 3.207, defendant relies on *Ryan v Ryan*, 260 Mich App 315; 677 NW2d 899 (2004). In that case, this Court noted that "our Supreme Court has determined, with respect to medical malpractice cases, that when a [statutorily] required affidavit is absent or defective, the complaint, standing alone, is insufficient to commence a medical malpractice action." *Id.* at 338. In light of that instruction, this Court held that "a petition for emancipation filed without the statutorily mandated affidavits and documents is insufficient to commence an emancipation action." *Id.* This Court further noted that the trial court had "excused the lack of affidavits and documents" and, before examining the trial court's reasons for doing so and finding them unsatisfactory, noted

that "the statute does not allow the filing of the affidavits and documents to be excused." *Id*., citing MCL 722.4a. Defendant thus suggests that this Court treat the requirement of MCR 3.207(B)(1) that a petition for an ex parte order be verified or supported by an affidavit as no more amenable to being excused by the court than similar statutory requirements relating to medical malpractice or emancipation actions.

However, the existence of avenues for obtaining ex parte orders results from the recognition that sometimes a party presents a court with a bona fide emergency compelling the court to issue an order without waiting for normal adversarial processes to play themselves out, and thus that a court entertaining a petition prompted by such unusual pressures should be at liberty to recognize the principle, as recited by the United States Supreme Court in a different context, that " 'sound procedure often requires discretion to exact *or excuse* compliance with strict rules,' " *Walker v Martin*, 562 US 307, 320; 131 S Ct 1120; 179 L Ed 2d 62 (2011) (emphasis added; alteration omitted), quoting 16B Wright, Miller, & Cooper, Federal Practice & Procedure (2d ed), § 4028, p 403. See also *Chisnell v Chisnell*, 99 Mich App 311, 321-324; 297 NW2d 909 (1980) (stating that failure to verify a pleading in a divorce action is a relatively minor procedural defect and thus, in the absence of manifest injustice, does not warrant reversal on appeal). With all of the above in mind, we discern no evidentiary or clear legal error on the trial court's part in issuing the ex parte order.

V. SUA SPONTE CONSIDERATION OF PARENTING TIME DETERMINATION

Defendant next argues that the trial court abused its discretion when it decided to consider the issue of

permanent custody of LKK's passport following the de novo evidentiary hearing. We disagree.

MCR 3.215 covers referee hearings. MCR 3.215(E)(4) states that "[a] party may obtain a judicial hearing on any matter that has been the subject of a referee hearing and that resulted in a statement of findings and a recommended order by filing a written objection," which must "include a clear and concise statement of the specific findings or application of law to which an objection is made." In the event of such judicial follow up, MCR 3.215(F)(2) provides:

> To the extent allowed by law, the court may conduct the judicial hearing by review of the record of the referee hearing, but the court must allow the parties to present live evidence at the judicial hearing. The court may, in its discretion:
>
> (a) prohibit a party from presenting evidence on findings of fact to which no objection was filed;
>
> (b) determine that the referee's finding was conclusive as to a fact to which no objection was filed;
>
> (c) prohibit a party from introducing new evidence or calling new witnesses unless there is an adequate showing that the evidence was not available at the referee hearing;
>
> (d) impose any other reasonable restrictions and conditions to conserve the resources of the parties and the court.

In this case, a referee hearing took place following plaintiff's and LKK's return from Poland on August 5, 2019. The result of the hearing was a proposed order from the referee with two enumerated recommendations. The second recommendation granted plaintiff $1,112.50 in attorney fees connected with obtaining the ex parte order. The first recommendation responded to plaintiff's request for permanent custody of the subject child's passport as follows:

> 1. With regard to the issue of the minor child's passport, the Judgment of Divorce is very clear. Listed under the parenting time provision in the Judgment of Divorce, it is an issue that is modifiable. Parties' current situation does not arise to a change of circumstances warranting a modification of the court's current order regarding the passport. Therefore, that request is denied.

Defendant, who obviously had no reason to object to the above recommendation, objected to only the recommendation that he pay plaintiff's attorney fees. Plaintiff filed no objections of her own, including over the recommendation that defendant retain custody of the passport.

At a subsequent November 1, 2019 evidentiary hearing, plaintiff's attorney elicited from plaintiff that LKK had a passport, that the consent judgment of divorce provided that defendant was the custodian of the passport, and that defendant was entitled to "48 hours['] notice for like Canada travel, and then 30 days['] notice for outside of U.S. travel." When counsel asked about passport problems in earlier years, defense counsel objected, stating, "I don't understand what the passport issue has [to] do with the matter at hand with respect to attorney fees." The trial court overruled the objection, noting that the passport was "the subject of a number of the emails which have been admitted as part of the joint exhibits, that the passport has to be provided so [LKK] could travel with her mother to Poland."[3] Plaintiff's counsel went on to elicit that plaintiff had to resort to retaining legal counsel in

[3] The court further indicated with some level of dissatisfaction that after it had ordered defendant to provide plaintiff with the passport, defendant proceeded to leave it for her under a planter. The court noted: "I would assume that's relevant at that point, because the child could not travel without her passport."

order to obtain access to the child's passport in 2018 and that plaintiff had had similar problems in connection with the instant case.

Later in the proceeding, while defense counsel was eliciting from defendant that he had agreed to a consent order to resolve an issue with the child's travel in 2018, the trial court stated, "I'm not sure how it's relevant to today's hearing, which is, you know, whether [plaintiff's attorney's] fees are reasonable and whether his refusal to allow [LKK] to travel and turn over the passport was frivolous or not." Thereafter, plaintiff's counsel elicited from defendant on cross-examination that the 2018 consent order came about only after plaintiff had filed a motion and that the order called on defendant to release the passport "[r]ight away," but that as of the day after the order was signed, plaintiff was still asking for it. When defendant stated that there were logistical problems involved, the trial court intervened:

> No, it sounds like logistics are pretty darn easy. You're all on this side of town. And so, . . . I don't know exactly what, when your daughter was going back and forth, that you just couldn't tuck it into her backpack when she's hopping out of the car, or getting in, if you were seeing her during this period of time. But, seems pretty straightforward. And I don't know when mom's plane, off the top of my head, was leaving, and why it was important to have the passport by a certain time. But, I mean, the fact that you're here arguing over this stuff does not make either of you look very responsible, because most parents don't argue about this kind of stuff. Most parents are more reasonable and work with each other.

In closing argument, plaintiff's counsel stated that, at a time when plaintiff should have been arranging for travel along with "family services and memorials and grieving," plaintiff was "battling back and forth for

eight days with her ex-husband on getting the passport and being able to take her daughter to Poland for two weeks" and that, "[w]hen someone should be grieving and dealing with family, she shouldn't be fighting with her ex-husband about travel to Poland with her daughter and getting a passport."

The trial court concluded the evidentiary hearing by announcing that it was taking the matter under advisement and that a written opinion would follow. As noted, the written opinion and order that followed not only awarded plaintiff attorney fees, but also awarded her custodianship of the child's passport.

Defendant moved for reconsideration in connection with both facets of the decision below, which the trial court denied. In the motion, defendant cited authority for the proposition that because plaintiff did not object to the referee's recommendation that defendant retain custody of the child's passport, she was not entitled to a judicial hearing on that question. But at issue here is not whether plaintiff was entitled to further consideration of that issue, but whether the trial court acted within its broad discretion under MCR 3.215(F) by choosing to reach and decide the question. Defendant argued that "[e]ven if Plaintiff was somehow allowed to 'piggy-back' her silent objections to the referee's denial of her motion . . . respecting control of the child's passport onto Defendant's objections to the referee's attorney fee decision, due process would require that a party not be surprised by a judicial ruling on an issue that was not articulated or argued . . . ."

In denying reconsideration, the trial court stated as follows:

> Significantly, Defendant acknowledges [the] Referee . . . addressed Plaintiff's request "to serve as the custodian of the minor child's passport moving forward." At the

evidentiary hearing held November 1, 2019, Plaintiff testified as to her difficulty in obtaining the minor child's passport from Defendant in both 2018 and 2019. On each occasion, Plaintiff stated she needed to retain counsel to obtain the minor child's passport from Defendant. Defendant objected to the relevancy of Plaintiff's testimony and the objection was overruled. Defendant subsequently testified to and was cross-examined on his claimed cooperation in providing the minor child's passport to Plaintiff on each occasion.

Inasmuch as both parties raised and argued the issue of compliance with the *Consent Judgment of Divorce* provision regarding the minor child's passport, the Court could properly consider and determine Plaintiff would henceforth have possession of the minor child's passport. See *Sturgis v Sturgis*, 302 Mich App 706, 708-709; 840 NW2d 408 (2013) (noting MCR 3.205(F)(2) allows a trial court to expand the scope of a de novo hearing to "impose any other reasonable restrictions and conditions to conserve the resources of the parties and the court") and MCL 552.507(4) (allowing trial court to sua sponte expand the de novo hearing to include "*any* matter that has been the subject of a referee hearing" [emphasis added]).

As noted, the *Consent Judgment of Divorce* provides that Defendant would retain the minor child's passport. However, the *Consent Judgment of Divorce* also required Defendant to provide the minor child's passport to Plaintiff for international travel and precluded either party from traveling to a country that is not party to the Hague Convention.[4] In light of these specific provisions *allowing* international travel, Defendant's argument (and proposed supporting evidence) that his continued possession of the

[4] "The Hague Convention seeks to protect children from the harmful effects of cross-border abductions (and wrongful retentions) by providing a procedure designed to bring about the prompt return of such children to the State of their habitual residence." Hightower, *Caught in the Middle: The Need for Uniformity in International Child Custody Dispute Cases*, 22 Mich St Int'l L Rev 637, 640 (2014) (quotation marks and citation omitted).

> minor child's passport would somehow preclude Plaintiff from absconding with the minor child wholly lacks merit.
>
> Therefore, the *Opinion and Order* dated November 12, 2019 properly awarded Plaintiff possession of the minor child's passport.

On appeal, defendant asserts that the parties were not allowed to present evidence on the passport issue at the referee hearing, citing the transcript of that hearing generally, but without specifying any page or pages. In fact, plaintiff's attorney announced at the start of the referee hearing the intention to address "who's going to be the custodian moving forward of the passport" and then went on to do so with reference to facts of record, or implied offers of proof, relating to the parties' history of problems managing the child's passport. Neither the referee nor defendant expressed any objections. Defense counsel argued in kind, asserting that "father tells me mother was deemed a flight risk" in Illinois proceedings, which was why the parties' consent judgment of divorce ended up "detailing the control of the passport being vested in father." Defense counsel further pointed out that plaintiff had dual citizenship, owned real property in Poland, and was now "married to a Polish National," and argued that those considerations and the parties' antagonistic relationship "creates a danger of a flight risk." The transcript includes no indication that either party wished to bring evidence beyond the existing record on the issue.

Further, the trial court did not wholly introduce the issue of custody of the child's passport, but rather cited the development of that issue at the referee hearing and also the evidence presented at the evidentiary hearing relating to the parties' problems sharing the passport. The court was thus exercising its broad prerogatives under MCR 3.215(F)(2) to rely on the record of the referee hearing, as supplemented at the court's discre-

tion, when it concluded that "the Court could properly consider and determine Plaintiff would henceforth have possession of the minor child's passport."

Defendant further protests that the trial court reached the passport issue "not on its own motion, but after the de novo hearing had already concluded," thus emphasizing that the latter hearing came about in response to the single objection to the referee's recommendations that the parties articulated, which was defendant's objection to the award of attorney fees. Thus, the trial court appeared to be open to entertaining arguments about passport management only as they related to the reasonableness of defendant's reluctance to consent to plaintiff's travel plans for the child. Defendant cites authority that stands for the proposition that parties seeking a judicial hearing on objections to referee recommendations are obliged to specify their objections and provide the opposition with notice, see MCR 3.215(E)(4) and (5), and suggests that the trial court erred in reaching the passport issue without providing such notice. However, defendant cites no authority for the proposition that the objection and notice requirements set forth for the parties apply to the court as well. Moreover, MCL 552.507(4) states as follows:

> The court shall hold a de novo hearing on any matter that has been the subject of a referee hearing, upon the written request of either party or upon motion of the court. The request of a party shall be made within 21 days after the recommendation of the referee is made available to that party.

Bearing directly on this issue is that the authorization to bring about "a de novo hearing on any matter that has been the subject of a referee hearing" extends to the court on its own motion, as the instant trial court noted. It is further instructive that the statutory timing constraint for such a motion applies only to parties, not

courts, thus suggesting that a court has greater flexibility with regard to such action.

For all of the above reasons, we reject defendant's claim that the trial court improperly considered and decided anew plaintiff's request for custody of the subject child's passport.

VI. PLAINTIFF'S REQUEST FOR ATTORNEY FEES

Defendant next contends that the trial court clearly erred and abused its discretion by finding that defendant's objections to plaintiff's requests to take the parties' daughter to Poland for two weeks were unreasonable, and thus that his defenses to her resort to legal process in the matter were frivolous and cause for a sanction of attorney fees. We disagree.

This Court reviews a trial court's award of attorney fees for an abuse of discretion. *In re Condemnation of Private Property for Highway Purposes*, 221 Mich App 136, 139-140; 561 NW2d 459 (1997). Where attorney fees are concerned, an abuse of discretion occurs where the result lies outside the range of reasonable and principled outcomes. See *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). "A trial court's finding that an action is frivolous is reviewed for clear error." *Kitchen v Kitchen*, 465 Mich 654, 661; 641 NW2d 245 (2002).

The parties' consent judgment of divorce includes the following provision:

> 8. The parents agree to abide by, and therefore this Court orders, the following Parenting Principles in connection with the custodial and parenting plan for their child:
>
> * * *

> b. The parents shall cooperate to the extent which may be appropriate under the circumstances in accommodating one another should one wish to have the minor child for some special event or occasion or an extended vacation.

Again, plaintiff filed her emergency motion to authorize out-of-country travel on July 18, 2019. The motion included a request that the trial court "entertain the imposition of attorney fees," while explaining that, because of time pressure, no specific amount was yet specified. The August 5, 2019 referee hearing resulted in a proposed order with two enumerated recommendations. The first recommendation opined that there had not been a sufficient change of circumstances to warrant granting plaintiff's request for permanent custody of the child's passport. The second recommendation responded to plaintiff's request for attorney fees as follows: "Plaintiff's request for attorney fees is granted. Plaintiff's attorney submitted his billing statements. The fees for obtaining the ex parte order were $1,112.50. Fees in that amount are granted to Plaintiff payable by Defendant." As noted, in the end, the trial court increased the amount of attorney fees charged to defendant to $6,395—now covering fees incurred since the original referee recommendation. As defendant emphasizes in his reply brief, he contests not the reasonableness of the amounts involved, but rather the trial court's determination that he was responsible for those amounts because of having maintained a frivolous position below.

"Michigan follows the 'American rule,' " according to which "attorney fees generally are not recoverable from the losing party as costs in the absence of an exception set forth in a statute or court rule expressly authorizing such an award." *Haliw v Sterling Hts*, 471 Mich 700, 706-707; 691 NW2d 753 (2005), citing MCL 600.2405(6).

MCR 3.206(D)(2)(b) specifically authorizes a party to a domestic-relations action to request attorney fees when "the attorney fees and expenses were incurred because the other party refused to comply with a previous court order, despite having the ability to comply . . . ." Further, the court rule that covers judicial hearings following referee hearings specifies that "[i]f the court determines that an objection is frivolous . . . , the court may assess reasonable costs and attorney fees." MCR 3.215(F)(3). A position is frivolous if "(1) the party's primary purpose was to harass, embarrass, or injure the prevailing party, or (2) the party had no reasonable basis upon which to believe the underlying facts were true, or (3) the party's position was devoid of arguable legal merit." *Cvengros v Farm Bureau Ins*, 216 Mich App 261, 266-267; 548 NW2d 698 (1996), citing MCL 600.2591(3)(a).

In this case, the trial court noted the parties' mutual obligation to cooperate to the extent appropriate under the circumstances when one of them wishes to have LKK in connection with a special occasion and also that plaintiff was entitled to two weeks' uninterrupted vacation with LKK each summer. The court further explained as follows:

> Plaintiff's mother unexpectedly died while visiting Plaintiff. Inasmuch as her mother was from Poland and all Plaintiff's family resides in Poland, she naturally sought to take her mother home for a memorial service and burial. To this end, Plaintiff immediately notified Defendant of her mother's death and requested to take the minor child to Poland for two weeks for the funeral services as soon as it could be arranged. Plaintiff would repeat her request several more times over the ensuing two weeks, including a request to utilize her summer parenting time.

> Defendant unreasonably refused Plaintiff's request. His purported justification, that removing the minor child from summer school would be detrimental, wholly lacks any merit. Indeed, he did not even try to contact the minor child's teachers until after the *Ex Parte Order* had already been procured. Defendant's justification is nothing more than [an] after-the-fact attempt to defend his groundless refusals. It is clear that his only reason in doing so was to harass Plaintiff. He was thinking only of himself and the additional pain he could inflict on Plaintiff and not what was in the minor child's best interest.
>
> The minor child's first-grade report card does not indicate *any* areas of concern. She was either meeting or approaching standards/expectations in each identified subject matter. She also successfully completed the Kumon Level 4A Reading Program on May 21, 2019. She is now in second grade and there is no evidence even suggesting she is having any problems at school. [Her first-grade teacher] testified that she only recommended summer school *as an option* so the minor child's progress would not regress[,] . . . [and that] she advised both parties that the minor child could also continue reading at home.
>
> Summer school only ran four days per week for three hours each day. The students only spent part of that time on reinforcing academic activities; the remainder was spent playing and having lunch.
>
> When Plaintiff contacted [the summer-school teacher] about missing summer school, [the teacher] understood the circumstances (something lost on Defendant) and said she could send the work to Plaintiff for the minor child to do on her own. In a moment of clarity, Defendant did finally acknowledge[] there were other alternatives available if the minor child missed summer school.
>
> Therefore, Defendant's actions in this matter were clearly frivolous and violated the *Consent Judgment of Divorce*.

On appeal, defendant takes issue with the trial court's findings only insofar as he insists that his lack of

cooperation over plaintiff's travel ambitions were in fact driven by the child's need for the academic and linguistic benefits of minimally interrupted summer school, but defendant does not challenge the court's finding that defendant "did not even try to contact the minor child's teachers until after the *Ex Parte Order* had already been procured." That finding, along with the court's detailed attention to the child's recent and unproblematic academic record and its recognition that even defendant acknowledged that there were alternative ways to gain the benefits of summer school, support the trial court's conclusion that defendant had other, more cynical motives for refusing to cooperate with plaintiff at that time.

For these reasons, defendant has failed to show that the trial court clearly erred by concluding that defendant's general lack of cooperation with plaintiff as the latter endeavored to arrange to travel with the child to Poland in order to attend funeral services for the child's grandmother was unreasonable. The trial court did not err in concluding that defendant violated his obligation under the divorce judgment to cooperate as appropriate in such a situation, that defendant's defenses to the ex parte order were ill-intentioned and not factually supported, and that they were therefore frivolous. Defendant has thus failed to show that the trial court's decision to hold him responsible for plaintiff's attendant attorney fees was an abuse of discretion.

VII. DEFENDANT'S REQUEST FOR ATTORNEY FEES

Defendant next contends that the trial court abused its discretion when it declined his request for attorney fees. We disagree.

Defendant bases his argument mainly on his having had to respond to an emergency motion for an ex parte

order to allow the parties' daughter to travel to Poland, when the motion was neither verified nor accompanied by an affidavit, thereby failing to satisfy MCR 3.207(B)(1), and the accompanying proposed order did not include the notice of rights set forth in MCR 3.207(B)(5). We concluded above that the trial court was within its rights when it expressly excused those deficiencies, or treated them as harmless error. Here, we reiterate that, because plaintiff's failures to comply perfectly with the dictates of MCR 3.207(B) were largely due to time pressures resulting from defendant's refusal to cooperate with plaintiff, and because defendant has not shown that he suffered any prejudice as a consequence of those procedural irregularities, the trial court reasonably overlooked the imperfect compliance with MCR 3.207(B) and proceeded with the case. Defendant's claim for attorney fees is otherwise largely a manifestation of his disagreement with the trial court's decision to award attorney fees instead to plaintiff, appellate objections we rejected above. Indeed, defendant having failed to bring any error on the part of the trial court to light, we can discern no entitlement to attorney fees on his part. On every issue, plaintiff is properly the prevailing party in this case, and this Court may reject defendant's claim for attorney fees on that basis alone. See *Johnson v USA Underwriters*, 328 Mich App 223, 248; 936 NW2d 834 (2019) ("[I]t is a fundamental principle that attorney fees and costs may only be awarded to the prevailing party."), citing MCL 600.2591(1) and MCR 2.625(A)(1).

VIII. CONCLUSION

We discern no clear legal error or palpable abuse of discretion on the trial court's part for modifying the consent judgment of divorce without consideration of

the UCAPA or best-interest factors from the Child Custody Act because the modification did not impact custody or parenting time. The same reasoning applies to defendant's argument that the trial court failed to consider whether there was proper cause or a change of circumstances to warrant the modification. We further discern no abuse of discretion or clear legal error on the trial court's part for granting plaintiff's ex parte order despite her failure to abide certain procedural formalities, nor for the court's decision to revisit custodianship of LKK's passport on its own initiative and on the basis of all of the evidence. Lastly, the trial court did not clearly err in concluding that defendant's objections to plaintiff's requests to travel with LKK were frivolous and in granting plaintiff's motion for attorney fees and denying defendant's motion for attorney fees on that basis.

Affirmed. As the prevailing party, plaintiff may tax costs. MCR 7.219(A).

MURRAY, C.J., and RICK, J., concurred with FORT HOOD, J.

PEOPLE v GERHARD

Docket No. 354369. Submitted June 9, 2021, at Lansing. Decided June 24, 2021, at 9:05 a.m. Leave to appeal denied 508 Mich 1006 (2021).

Lucas D. Gerhard was charged in the 91st District Court with making a threat of terrorism, MCL 750.543m, in connection with an image he posted to his story on Snapchat. Defendant was a student at Lake Superior State University; the university allowed students to bring weapons onto campus as long as they were registered and stored with the public-safety office. In August 2019, defendant posted an image of an AR-15 semiautomatic rifle with an attached bayonet; the image included text stating: "Takin this bad boy up, this outta make the snowflakes melt, aye? And I mean snowflakes as in snow [winking face emoji]." Two university students who saw the post reported it to public safety. Both students believed, and defendant later confirmed, that "snowflakes" referred to Democrats or liberals. According to defendant, the word "melt" meant that he wanted Democrats' minds to melt when they found out that he was bringing a gun to school. While one student testified that the post was just inappropriate, the other student testified that she thought defendant was going to use the rifle to shoot liberal students. Defendant removed the post after he heard that it could be interpreted as a threat. Defendant checked the rifle in at the public-safety office when he arrived on campus and was arrested the following day. At the preliminary examination, the district court found probable cause to bind defendant over to the Chippewa Circuit Court for trial on the charge. Defendant thereafter moved in the circuit court to quash the charge, arguing that the post was protected by his right of free speech under the First Amendment of the United States Constitution and that the district court had abused its discretion by binding him over for trial. The circuit court, James F. Lambros, J., denied the motion. Defendant appealed by leave granted.

The Court of Appeals *held*:

1. The First Amendment, applicable to the states through the Fourteenth Amendment, provides that the government shall make no law abridging the freedom of speech. Under this bedrock

principle, the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable. First Amendment protections are not absolute, however, and the government may regulate certain categories of expression consistently with the Constitution. In this way, the First Amendment permits some content-based restrictions with regard to speech, including advocacy intended, and likely, to incite imminent lawless action, obscenity, defamation, speech integral to criminal conduct, fighting words, child pornography, fraud, true threats, and speech presenting some grave and imminent threat the government has the power to prevent.

2. MCL 750.543m(1)(a) of the Michigan Anti-Terrorism Act, MCL 750.543a *et seq*., provides that a person is guilty of making a terrorist threat if the person threatens to commit an act of terrorism and communicates the threat to any other person; under MCL 750.543m(2), lack of an intent or capability of committing the act of terrorism is not a defense to prosecution under MCL 750.543m. In turn, MCL 750.543b(a) defines an "act of terrorism" as a willful and deliberate act that is (1) an act that would be a violent felony under the laws of this state, whether or not committed in this state, (2) an act that the person knows or has reason to know is dangerous to human life, and (3) an act that is intended to intimidate or coerce a civilian population or influence or affect the conduct of government or a unit of government through intimidation or coercion. MCL 750.543z specifically provides that notwithstanding any provision in the act, a prosecuting agency shall not prosecute any person or seize any property for conduct presumptively protected by the First Amendment in a manner that violates any constitutional provision. The Court in *People v Osantowski*, 274 Mich App 593 (2007), rev'd in part on other grounds 481 Mich 103 (2008), held that MCL 750.543m does not violate the First Amendment, especially in light of MCL 750.543z, which prohibits prosecution for presumptively constitutional speech; the provisions in the act, read together, prohibit only "true threats," which extend beyond the type of speech protected by the First Amendment. True threats encompass those statements in which 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. To constitute a true threat, a defendant must make the communication for the purpose of issuing a threat or with knowledge that the communication will be viewed as a threat.

3. In a preliminary examination, a district court must determine whether the evidence is sufficient to cause an individual

marked by discreetness and caution to have a reasonable belief that the defendant is guilty as charged; the inquiry is not into actual guilt or innocence, and the requisite quantum of proof is less than beyond a reasonable doubt. There must be evidence on each element of the crime charged or evidence from which those elements may be inferred, but reasonable doubts or conflicts in the evidence must be reserved to the trier of fact. To be bound over on the charge of making a threat of terrorism, the prosecution must provide some evidence that the defendant held a general intent to communicate a threat. Thus, the district court must make a preliminary finding that there was some evidence that the defendant intended to communicate a true threat. While the court must initially determine whether the speech at issue could not possibly be considered a true threat, this determination does not require the court to decide as a matter of law whether the speech actually is a true threat for purposes of MCL 750.543m. Instead, it is typically a question of fact for the fact-finder to determine whether a statement constitutes a true threat.

4. The outcome of the case was controlled by *Osantowski*, which the panel declined to revisit. On that basis, MCL 750.543 was constitutional, and the proscribed conduct did not violate the First Amendment. Under the facts of this case, there was probable cause that defendant knew, at the time he made his Snapchat post, that recipients who fell into the category of persons he considered "snowflakes" would receive and feel threatened by the post. The district court correctly determined that defendant's Snapchat post could have constituted a true threat, and the circuit court correctly affirmed that decision; the district court was not required to preliminarily determine, as a matter of law, whether the post was, as a matter of law, a true threat. Accordingly, the district court properly bound defendant over for trial on the charge, and the circuit court properly denied defendant's motion to quash.

Affirmed.

CRIMINAL LAW — MICHIGAN ANTI-TERRORISM ACT — PRELIMINARY EXAMINATION — DETERMINATION OF "TRUE THREAT" QUESTION OF FACT FOR FACT-FINDER.

MCL 750.543m(1)(a) of the Michigan Anti-Terrorism Act, MCL 750.543a *et seq*., provides that a person is guilty of making a terrorist threat if the person threatens to commit an act of terrorism and communicates the threat to any other person; together, the provisions of the statute prohibit only "true threats"; while a district court must initially determine at the preliminary examination whether the speech at issue could not possibly be

> considered a true threat, this determination does not require the court to decide as a matter of law whether the designated speech actually is a true threat for purposes of MCL 750.543m; it is typically a question of fact for the fact-finder to determine whether a statement constitutes a true threat.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Robert L. Stratton III*, Prosecuting Attorney, and *Jillian A. Sadler*, Chief Assistant Prosecuting Attorney, for the people.

Outside Legal Counsel PLC (by *Philip L. Ellison*) and *Matthew E. Gronda* for defendant.

Before: JANSEN, P.J., and M. J. KELLY and RONAYNE KRAUSE, JJ.

RONAYNE KRAUSE, J. In this interlocutory appeal, defendant appeals by leave granted[1] the order denying his motion to quash the charge of making a threat of terrorism, MCL 750.543m, on which he was bound over from the district court. Importantly, the issue is not whether defendant actually made a threat of terrorism, which would be a question for the trier of fact. Rather, the issue is whether, on these facts, defendant can be charged at all. The issue before us turns on whether a social-media post made by defendant can constitute a "true threat" for purposes of the statute. We affirm.

I. FACTUAL BACKGROUND

Defendant was a student at Lake Superior State University (LSSU), which allows students to bring weapons onto campus if the weapons are immediately

[1] *People v Gerhard*, unpublished order of the Court of Appeals, entered November 19, 2020 (Docket No. 354369).

registered and stored with the public-safety office. On August 22, 2019, defendant posted an image to his "story" on Snapchat—a social-media platform that allows users to send pictures, with or without text, that can be viewed by the user's registered "friends" for 24 hours before the image disappears. Defendant posted an image depicting an AR-15 semiautomatic rifle with an attached bayonet, along with text stating: "Takin this bad boy up, this outta make the snowflakes melt, aye? And I mean snowflakes as in snow [winking face emoji]." Two LSSU students saw the post and alerted public safety. Both students expressed the belief that the word "snowflakes" referred to Democrats or liberals, which defendant later confirmed was accurate. One student felt that the post was inappropriate, although not threatening, but the second student testified that the text made her believe that defendant intended to use the gun and shoot liberal students. Defendant reported that he took the post down after he learned that it could be interpreted as a threat.

Defendant arrived on campus the following day and checked in his AR-15 rifle with public safety at approximately 8:00 a.m. Two police officers questioned defendant about the post in his dormitory room later that afternoon. Defendant confirmed that "bringing this bad boy up" referred to his bringing the AR-15 to campus and that "snowflakes" referred to Democrats. However, defendant stated that by "melt" he meant that he wanted to make the Democrats' "minds melt" when they found out that he was bringing a gun to school. Defendant was arrested the following day and charged with making a threat of terrorism under MCL 750.543m.

At the preliminary examination, defense counsel argued that the charges were a violation of defendant's

rights under the First Amendment, that the antiterrorism statute was vague and overbroad, and that the statute did not apply because defendant's Snapchat post was not a threat of terrorism. The district court disagreed, holding that MCL 750.543m had been interpreted by higher courts as constitutionally valid and that the question of whether defendant's statement constituted a true threat was a question of fact for the jury. The district court found probable cause to believe that the elements of MCL 750.543m had been met, and it bound defendant over for trial on the charge. Defendant moved to quash the charge, arguing that the First Amendment protected his speech and that the district court therefore abused its discretion by binding defendant over for trial. The circuit court disagreed and denied defendant's motion.

II. STANDARDS OF REVIEW

"A district court magistrate's decision to bind over a defendant and a trial court's decision on a motion to quash an information are reviewed for an abuse of discretion." *People v Dowdy*, 489 Mich 373, 379; 802 NW2d 239 (2011). A trial court abuses its discretion by choosing an outcome that falls outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). "A trial court necessarily abuses its discretion when it makes an error of law." *People v Duncan*, 494 Mich 713, 723; 835 NW2d 399 (2013). "Whether conduct falls within the scope of a penal statute is a question of statutory interpretation," which we review de novo. *People v Flick*, 487 Mich 1, 8-9; 790 NW2d 295 (2010). "Questions involving the constitutionality of a statute are also reviewed de novo." *People v McKinley*, 496 Mich 410, 415; 852 NW2d 770 (2014).

III. CONSTITUTIONALITY OF MCL 750.543m

Defendant first asserts that MCL 750.543m is unconstitutional. We disagree.

Defendant was charged with making a threat of terrorism under MCL 750.543m of the Michigan Anti-Terrorism Act, MCL 750.543a *et seq*. MCL 750.543m provides:

> (1) A person is guilty of making a terrorist threat or of making a false report of terrorism if the person does either of the following:
>
> (a) Threatens to commit an act of terrorism and communicates the threat to any other person.
>
> (b) Knowingly makes a false report of an act of terrorism and communicates the false report to any other person, knowing the report is false.
>
> (2) It is not a defense to a prosecution under this section that the defendant did not have the intent or capability of committing the act of terrorism.
>
> (3) A person who violates this section is guilty of a felony punishable by imprisonment for not more than 20 years or a fine of not more than $20,000.00, or both.

MCL 750.543b(a) defines an "act of terrorism" as a

> willful and deliberate act that is all of the following:
>
> (*i*) An act that would be a violent felony under the laws of this state, whether or not committed in this state.
>
> (*ii*) An act that the person knows or has reason to know is dangerous to human life.
>
> (*iii*) An act that is intended to intimidate or coerce a civilian population or influence or affect the conduct of government or a unit of government through intimidation or coercion.

In turn, MCL 750.543z provides, "Notwithstanding any provision in this chapter, a prosecuting agency

shall not prosecute any person or seize any property for conduct presumptively protected by the first amendment to the constitution of the United States in a manner that violates any constitutional provision."

Defendant properly recognizes that this Court has already held MCL 750.543m to be constitutional, albeit with some clarification. In *People v Osantowski*, 274 Mich App 593, 601-605; 736 NW2d 289 (2007) (*Osantowski I*), rev'd in part on other grounds 481 Mich 103 (2008), this Court explained that the Legislature's use of the word "threat" was meant as a reference to what the United States Supreme Court has defined as "true threats," which are not constitutionally protected speech. A true threat "encompass[es] 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." *Virginia v Black*, 538 US 343, 359; 123 S Ct 1536; 155 L Ed 2d 535 (2003). This interpretation was "further bolstered by the existence of MCL 750.543z," which prohibits prosecution for presumptively constitutional speech. *Osantowski I*, 274 Mich App at 603-604.

Defendant contends that *Osantowski I* was wrongly decided and an exercise in judicial legislation. We disagree. The First Amendment, applicable to the states through the Fourteenth Amendment, provides that the government "shall make no law . . . abridging the freedom of speech[.]" US Const, Am I. See also *Black*, 538 US at 358. "If there is a bedrock principle underlying the First Amendment, it is that that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v Johnson*, 491 US 397, 414; 109 S Ct 2533; 105 L Ed 2d 342 (1989). Therefore, statutes that criminalize speech "must be interpreted with the com-

mands of the First Amendment clearly in mind." *Watts v United States*, 394 US 705, 707; 89 S Ct 1399; 22 L Ed 2d 664 (1969). "The protections afforded by the First Amendment, however, are not absolute, and we have long recognized that the government may regulate certain categories of expression consistent with the Constitution." *Black*, 538 US at 358. One of those categories is "true threats." *Id*. at 359-360. Furthermore, "a presumption exists that a statute is constitutionally sound, and this Court will construe it as such unless its unconstitutionality is clearly apparent." *People v Newton*, 257 Mich App 61, 65; 665 NW2d 504 (2003) (quotation marks and citation omitted).

We decline to revisit *Osantowski I*. See MCR 7.215(J). In any event, we are unpersuaded that doing so would be warranted. Our clarification in *Osantowski I*, 274 Mich App at 603, that MCL 750.543m applies only to "true threats" was a reasonable and supported interpretation of the existing language of the statute that rendered it consistent with the First Amendment and with MCL 750.543z. Further, because the definition of "act of terrorism" under MCL 750.543b(a) and the requirements of MCL 750.543m encompass the elements identified in the definition of a "true threat" expressed in *Black*, 538 US at 359-360, our interpretation in *Osantowski I* rendered MCL 750.543m constitutionally valid.

IV. APPLICABILITY OF THE FIRST AMENDMENT

Defendant next argues that the First Amendment applies to this matter. We agree, in part. As discussed, the First Amendment is applicable to the states and prohibits the states from punishing speech for being offensive or disagreeable. There is no doubt that defendant's charge arises out of "speech" that defendant

made, so the First Amendment applies to this matter. Nevertheless, as also discussed, the First Amendment's protections are not infinite. The First Amendment permits some content-based restrictions in a handful of categories of speech, including "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, although a restriction under the last category is most difficult to sustain[.]" *United States v Alvarez*, 567 US 709, 717; 132 S Ct 2537; 183 L Ed 2d 574 (2012) (opinion by Kennedy, J.). Therefore, although the First Amendment applies to this matter, its protections may not extend to the specific speech at issue.

V. PRELIMINARY ASSESSMENT OF TRUE THREAT

Defendant argues that, even if MCL 750.543m is constitutional, the requirements of the First Amendment, *Osantowski I*, and MCL 750.543z require the district court to make an initial determination, as a prerequisite to prosecution, that defendant made a "true threat." We agree, in part. He further argues that the lower courts erred as a matter of law by concluding that defendant was properly bound over for trial. We disagree.

"In a preliminary examination, a district court's function is to determine whether the evidence is sufficient to cause an individual marked by discreetness and caution to have a reasonable belief that the defendant is guilty as charged." *People v Justice (After Remand)*, 454 Mich 334, 343; 562 NW2d 652 (1997). Importantly, the inquiry is not into actual guilt or innocence, and the requisite quantum of proof is far less than "beyond a

reasonable doubt." *Id*. at 343-344. Rather, reasonable doubts or conflicts in the evidence must be reserved to the trier of fact. *People v Hill*, 433 Mich 464, 469; 446 NW2d 140 (1989). The only requirement is that "[t]here must be evidence on each element of the crime charged or evidence from which those elements may be inferred . . . ." *People v Doss*, 406 Mich 90, 101; 276 NW2d 9 (1979) (quotation marks, citation, and emphasis omitted). The prosecutor must, therefore, provide some evidence that defendant held a "general intent to communicate a 'true threat.' " *Osantowski I*, 274 Mich App at 605. Nevertheless, it is typically "a question of fact for a jury to determine whether a statement constitutes a true threat." *Id*. As defendant concedes, a "true threat" does not turn on whether the speaker intends to carry out the threat, but on whether the speaker intends to communicate the threat. *Black*, 538 US 359-360.

Defendant is correct insofar as the district court was required to make a preliminary finding that there was some evidence that defendant intended to communicate a true threat when he made his Snapchat post. However, defendant further argues that the district court was obligated to make an initial determination as a matter of law whether his speech constituted a true threat. Defendant is incorrect. Defendant observes that "[w]hen facts are found that establish the violation of a statute, the protection against conviction afforded by the First Amendment is a matter of law." *Dennis v United States*, 341 US 494, 513; 71 S Ct 857; 95 L Ed 1137 (1951) (opinion by Vinson, C.J.). However, defendant overlooks that whether his speech constituted a true threat is itself a question of fact; and if the trier of fact were to conclude that defendant did not make a true threat, it is already established as a matter of law that he could not be guilty of making a

threat of terrorism. Instead, defendant would put the cart before the horse and eliminate the protection of a jury evaluating whether particular speech constituted a true threat.

Although not binding upon us, we find persuasive that the United States federal courts have generally agreed. See *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004). In *United States v Baker*, 890 F Supp 1375, 1385 (ED Mich, 1995), the United States District Court for the Eastern District of Michigan held that whether a speech constituted a true threat was a question for the jury, unless the speech could not possibly constitute a true threat. This is consistent with the purpose of a preliminary examination to ensure that there is some evidence that the speech could be a true threat. The United States Court of Appeals for the Tenth Circuit explained that it is a question of law whether a reasonable jury could find a statement to be a true threat, but whether the speech actually is a true threat would generally be a question for the jury. *United States v Stevens*, 881 F3d 1249, 1252 (CA 10, 2018). The Second Circuit held that whether the First Amendment applies to a statute is a question of law for the court, *United States v Kelner*, 534 F2d 1020, 1028 (CA 2, 1976), but unless the trial court finds as a matter of law that particular speech could not be a true threat, whether the speech is a true threat "is a question generally best left to a jury," *United States v Malik*, 16 F3d 45, 51 (CA 2, 1994). The Third Circuit likewise explained that the trier of fact should generally decide whether a speech is a true threat, although the trial court is empowered to determine that the speech is so obviously not a threat that a charge should be dismissed as a matter of law. *United States v Stock*, 728 F3d 287, 297-298 (CA 3, 2013). Several other circuits have also held that whether a

particular speech constitutes a true threat is not a question of law for the court, but a question of fact for the jury. *Alexander v United States*, 135 US App DC; 418 F2d 1203, 1206 (1969); *Feminist Majority Foundation v Hurley*, 911 F3d 674, 692 (CA 4, 2018); *United States v Daughenbaugh*, 49 F3d 171, 173-174 (CA 5, 1995); *Melugin v Hames*, 38 F3d 1478, 1485 (CA 9, 1994).

The clear conclusion is that the preliminary examination for a charge of making a terrorist threat under MCL 750.543m should include consideration by the district court of whether the speech at issue could not possibly be considered a true threat. However, defendant is incorrect in asserting that the district court should decide as a matter of law whether it actually is a true threat. The district court properly carried out its duty by determining that the Snapchat post could constitute a true threat. The circuit court likewise properly concluded that although defendant had several "very good arguments" for why a jury should find him not guilty at trial, the bindover was proper because the post could be a true threat.

VI. PROBABLE CAUSE

Defendant finally argues that the district court erred by finding probable cause to bind him over for trial and that the circuit court erred by failing to quash the charge. We disagree.

We initially note that the student who reported feeling threatened by defendant's post was apparently not an intended recipient of the post. As a general matter, a person "may not be punished because [he or she] negligently overlooked the possibility that someone else would show [a person not intended as a recipient] the Snapchat contents." *In re JP*, 330 Mich

App 1, 18-19; 944 NW2d 422 (2019). However, the evidence at the preliminary examination indicated[2] that defendant had shared his Snapchat post with a large group of students, many of whom did not even know each other, and the student who felt threatened did not see the post only because she had intentionally removed herself from that group following an earlier disagreement with defendant. Furthermore, the post was widely shared on campus. This is clearly not a situation in which a person shares a private post with a limited number of known associates, only to discover that one of those associates breached his trust by sharing it further. Rather, defendant clearly intended his post to be essentially public. There is no evidence that the post was made accidentally or that defendant was unaware of its contents or its audience. The evidence establishes that defendant intended to communicate the contents of the post with "any other person," including the people he regarded as "snowflakes."

To constitute a true threat, defendant must have made the communication "for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat," rather than merely recklessly. *Elonis v United States*, 575 US 723, 740; 135 S Ct 2001; 192 L Ed 2d 1 (2015). Defendant appears to tacitly concede that his post was antisocial and ill-conceived but argues that it was merely a reference to his expectation that bringing his gun to campus would cause the minds of "snowflakes" to "melt." As the circuit court observed, a jury could choose to believe

[2] Evidence produced at trial may differ, but as discussed, the question at this stage of the proceedings is whether there is some evidence of each element of the charged offense, not whether defendant is actually guilty of the charged offense.

that argument, and nothing in this opinion should be taken as foreclosing defendant from making such an argument at trial. However, at the preliminary examination stage of proceedings, the question is whether it is impossible for a statement to constitute a true threat, not whether it is possible for the trier of fact to deem it not a true threat. We conclude that the lower courts both properly found the matter to be a question for the jury.

The meaning of a particular speech must be considered in its context. *Watts*, 394 US at 708. This may require consideration of current events and popular culture. *People v Byczek*, 337 Mich App 173, 187; 976 NW2d 7 (2021). Defendant argues that bringing guns to campus was not noteworthy; it is therefore incongruous that he would expect bringing a gun to campus to even raise an eyebrow, let alone "melt the brains" of people of a particular political orientation. Defendant also notes that guns are often brought to campus "for activities connected to hunting, sport shooting, outdoor firing ranges, and more." However, in addition to considering the wider social context, affixing a bayonet drastically changes the apparent context: bayonets are fundamentally used for hand-to-hand combat. See *Merriam-Webster's Collegiate Dictionary* (11th ed) (defining "bayonet"). The bayonet affixed to defendant's gun therefore implies that its intended use is against humans, not game animals or paper targets. The metaphor of "mak[ing] the snowflakes melt" is more consistent with placing "snowflakes" in fear, or possibly even killing them, than with causing them offense —especially if bringing guns to campus was otherwise not extraordinary. Conversely, school and other mass shootings currently receive significant media attention. Consequently, social-media posts referring to guns, schools, and intentionally obfuscated references

to any kind of implied ensuing harm will necessarily be considered in light of that media attention. We note that both students who testified, including the student who did not feel threatened, indicated a belief that other students on campus might feel targeted or intimidated by the post.

When all of these concerns are considered together and in context, there was ample basis for the district court to find probable cause that defendant knew, at the time he made his Snapchat post, that recipients who fell into the category of persons he considered "snowflakes" would receive and feel threatened by the post.[3]

VII. CONCLUSION

To the extent defendant argues that MCL 750.543m is unconstitutional, we disagree. To the extent defendant argues that the facts failed to establish that he made a true threat for purposes of whether the speech in his Snapchat post was protected by the First Amendment, we again disagree, but his arguments are appropriate for consideration by the jury. The district court properly bound defendant over for trial. Affirmed.

JANSEN, P.J., and M. J. KELLY, J., concurred with RONAYNE KRAUSE, J.

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[3] Defendant does not specifically challenge whether he threatened an "act of terrorism" as defined by MCL 750.543b(a) but, rather, only whether his speech constituted a "true threat" for First Amendment purposes. This Court's grant of leave to appeal was limited to the issues raised in defendant's application for leave, which likewise addressed his First Amendment challenge but did not specifically challenge whether the elements of MCL 750.543b(a) were sufficiently established. We therefore limit our analysis to defendant's First Amendment challenge.

DEPARTMENT OF ENVIRONMENTAL QUALITY v SANCRANT

Docket No. 351904. Submitted June 8, 2021, at Lansing. Decided June 24, 2021, at 9:10 a.m.

The Department of Environmental Quality (the DEQ) brought a civil action pursuant to MCL 324.30316 in the Ingham Circuit Court seeking a restoration order and fines against Gary and Tonya Sancrant, a married couple who jointly owned property in Schoolcraft County. The DEQ alleged that defendants violated MCL 324.30304 of the Natural Resources and Environmental Protection Act (the NREPA), MCL 324.101 *et seq*., when Gary installed a new road on defendants' property and dredged from a wetland and placed fill in a wetland. The civil action followed Gary's guilty plea in the 93rd District Court to a misdemeanor for violating the statute when he built the road without a permit. The district court imposed a three-month suspended sentence and ordered Gary to pay $1,000, plus fees, but it did not order, nor was it asked to order, restoration of the wetland. Defendants argued that the DEQ's civil action was barred under the doctrines of collateral estoppel, res judicata, and double jeopardy. Defendants contended that because Gary had already pleaded guilty to violating MCL 324.30304 after having been charged criminally by the county prosecutor, who Gary argued was in privity with the DEQ, the restoration order was unconstitutional under the Double Jeopardy Clause. Defendants further contended the trial court erred by finding that Tonya permitted Gary to build the road within the meaning of MCL 324.30304. Following a bench trial, the circuit court, Wanda M. Stokes, J., granted the DEQ's request for an order of restoration and a fine against Gary and Tonya. Defendants appealed.

The Court of Appeals *held*:

1. The Double Jeopardy Clauses of the United States and Michigan Constitutions protect a person from being twice placed in jeopardy for the same offense, which includes protection against multiple punishments for the same offense as well as protection against a second prosecution for the same offense after conviction. The multiple-punishments protection is not violated when a civil penalty serves a purpose distinct from any punitive purpose; one

consideration is whether the Legislature has designated a particular penalty as civil or criminal. MCL 324.30316(1) and (2) provide for civil and criminal actions, and MCL 324.30316(4) indicates that a civil or criminal court can issue an order of restoration. Therefore, an order to restore can be issued in either a criminal or a civil proceeding, and here, it was issued in a civil proceeding where its purpose was not *punitive* in nature but was instead related to ecological concerns and restoring the environment. When determining whether a remedy in a civil action should be considered a punishment for double-jeopardy purposes courts should also consider: (1) whether the remedy involves an affirmative disability or restraint, (2) whether the remedy has historically been regarded as a punishment, (3) whether the remedy requires a finding of scienter, (4) whether the remedy will promote the traditional aims of punishment—retribution and deterrence, (5) whether the behavior to which the remedy is applied was already a crime, (6) whether there an alternative purpose that may be assigned to the remedy, and (7) whether the remedy would be excessive in relation to the alternative purpose assigned. In this case, (1) the restoration order did not involve a disability or restraint, and the only affirmative action was to restore the wetland to its original state; (2) a restoration order has historically been considered an equitable remedy and not a punishment; and (3) a restoration order does not come into play only upon a finding of scienter. Regarding Factor (4), a restoration order can promote the traditional punishment goal of deterrence, which can promote both criminal and civil purposes, and disallowing the restoration order would undermine the DEQ's goal of protecting wetlands. As for Factor (7), the restoration order was not excessive in relation to the purpose of maintaining healthy wetlands. And although a violation of MCL 324.30316 is a crime for purposes of Factor (5), it is insufficient for double-jeopardy purposes to consider a penalty and sanction criminally punitive just because the conduct for which they were imposed may also be criminal. Accordingly, the wetland-restoration order did not violate the double-jeopardy protection against multiple punishments for the same offense. Nor did the DEQ's civil action violate the protection against a second prosecution for the same offense after conviction because there was no second criminal prosecution—the civil lawsuit was initiated after the criminal proceedings.

2. Collateral estoppel generally requires: (1) a question of fact essential to the judgment that was actually litigated and determined by a valid and final judgment; (2) the same parties who have had a full and fair opportunity to litigate the issue; and (3) mutuality of estoppel, which means that the party that wants to

estop an adversary from relitigating an issue must have also been a party or in privy to a party in the previous action. The Michigan Supreme Court has cautioned against the use of crossover estoppel, which involves preclusion of an issue in a civil proceeding after a criminal proceeding and vice versa. A matter has not been actually litigated and determined until it is put into issue by the pleadings, submitted to the trier of fact for a determination, and thereafter determined. During the criminal proceedings, the prosecutor stated that he was only seeking a suspended sentence and fine and that he was not seeking restoration. Because the wetlands-restoration issue was never subject to determination by the district court, there could be no subsequent collateral estoppel.

3. Res judicata prevents multiple lawsuits litigating the same cause of action. Res judicata will bar 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 action. To be in privity is to be so identified in interest with another party that the first litigant represents the same legal right that the later litigant is trying to assert; it requires that both parties have a functional working relationship with a substantial identity of interests such that the interests of the nonparty are presented and protected by the party in litigation. Generally, no privity exists between state and local governments absent specific circumstances under which a subordinate political subdivision is found to have been acting as a trustee for the state. Those circumstances were not present in this case. The prosecutor, who explicitly stated that the DEQ could seek restoration of the wetland in a separate proceeding, was not acting as a trustee for the DEQ, so they were not in privity.

4. MCL 324.30304 states, in part, that a person shall not "[d]redge, remove, or permit the removal of soil or minerals from a wetland." The statute does not define "permit" and there is no indication that it has a special, technical meaning beyond its plain and ordinary meaning. In the context of this civil action, there was no reason to interpret the word "permit" as requiring affirmative action by Tonya. *Merriam-Webster's Collegiate Dictionary* (11th ed) defines the term, in relevant part, as to consent to expressly or formally, to give leave, or to make possible. The trial court found that Tonya gave leave to Gary for the building of the road and made possible Gary's building of the road on their jointly owned property. A review of pertinent evidence failed to show clear error in the trial court's findings, and the complaint adequately stated the charge against her.

Affirmed.

RONAYNE KRAUSE, J., concurring in part and dissenting in part, agreed that the civil proceeding and restoration order were not precluded by the 2018 criminal proceeding and judgment, but she disagreed that Tonya could be found liable based only on her knowledge of and benefit from the project. A conviction for permitting the placement of material in a wetland or the removal of material from a wetland under MCL 324.30304 necessarily requires, at a minimum, that the person had the realistic power to prevent that placement or removal. The Legislature cannot generally punish a person for failing to undertake an act or failing to stop an act that the person had no power to effectuate. The trial court made no finding that Tonya had any practical ability to prevent Gary's road-construction and wetlands-destruction project, nor was such a finding warranted. Accordingly, Judge RONAYNE KRAUSE would have reversed as to Tonya.

1. ENVIRONMENT — RESTORATION ORDER — PRECLUSION — COLLATERAL ESTOPPEL — ACTUALLY LITIGATED AND DETERMINED.

A civil action seeking restoration of a wetland under the Natural Resources and Environmental Protection Act, MCL 324.101 *et seq*., is not barred under the doctrine of collateral estoppel by a previous criminal conviction for dredging and filling the wetland in violation of MCL 324.30304 when a restoration order was neither sought by the prosecution nor addressed by the trial court in the underlying criminal proceedings.

2. ENVIRONMENT — RESTORATION ORDER — PRECLUSION — RES JUDICATA — PRIVITY.

A civil action by a state department seeking restoration of a wetland under the Natural Resources and Environmental Protection Act, MCL 324.101 *et seq*., is not barred under the doctrine of res judicata by a previous criminal proceeding related to the dredging and filling of the wetland in violation of MCL 324.30304 if the prosecutor in the prior proceeding was not acting as a trustee for the state department; where the interests of the prosecutor and the department differed and the prosecutor specifically stated during the criminal proceedings that the department could seek restoration of the wetland in a separate proceeding, the prosecutor and the department were not in privity and res judicata was not applicable.

3. ENVIRONMENT — PROHIBITED ACTIVITIES — WORDS AND PHRASES — "PERMIT."

MCL 324.30304 states, in part, that a person shall not "[d]redge, remove, or permit the removal of soil or minerals from a wetland"; in a civil action seeking restoration for a violation of the statute,

the word "permit" does not require that an affirmative action have been taken by the defendant; giving leave to another for the removal of soil or minerals from a wetland can establish liability.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Elizabeth Morrisseau*, Assistant Attorney General, for the Department of Environmental Quality.

Fraser Trebilcock Davis & Dunlap, PC (by *Michael H. Perry*) for Gary and Tonya Sancrant.

Before: JANSEN, P.J., and M. J. KELLY and RONAYNE KRAUSE, JJ.

JANSEN, P.J. In this case involving the Natural Resources and Environmental Protection Act (the NREPA), MCL 324.101 *et seq*., defendants, Gary Sancrant (Gary) and Tonya Sancrant (Tonya), appeal as of right a judgment for plaintiff, the Department of Environmental Quality,[1] entered following a bench trial. We affirm.

I. BACKGROUND

Defendants, a married couple, live and work in West Branch but own property, including a hunting cabin, in Schoolcraft County in the Upper Peninsula. A road—often referred to in the record as the "easement road"—exists on defendants' property; it allows defendants and their neighbors to reach their respective cabins. It is undisputed that defendants had many problems with their neighbors and did not like that the easement road passes very close to defendants' cabin.

[1] Plaintiff's name is now the Department of Environment, Great Lakes, and Energy. However, the final order being appealed contains plaintiff's prior name.

The central issue in this case is that Gary installed a new road, and in doing so, he dredged from a wetland and placed fill in a wetland, contrary to Part 303 of the NREPA—specifically, MCL 324.30304. Plaintiff theorized that Gary installed the new road solely because of the neighbor issues,[2] although Gary claimed that he also needed the new road because the easement road was being repeatedly flooded by beavers. Gary pleaded guilty to a misdemeanor for violating the statute, but the plea agreement did not require restoration of the wetland. Plaintiff commenced this action and obtained an order of restoration and a fine. Defendants contend on appeal that, in light of Gary's criminal matter, the restoration order was barred by principles of double jeopardy, collateral estoppel, and res judicata. They also contend that the trial court erred by finding Tonya liable after the bench trial because she was not involved in building the road and did not "permit" Gary to build it under the language of MCL 324.30304(a) and (b).

II. DOUBLE JEOPARDY

First, defendants argue that plaintiff's lawsuit and the wetland-restoration order violated Gary's double-jeopardy protections. We review this constitutional issue de novo. *People v Miller*, 498 Mich 13, 16-17; 869 NW2d 204 (2015).

MCL 324.30304 states:

> Except as otherwise provided in this part or by a permit issued by the department under this part and pursuant to part 13, a person shall not do any of the following:
>
> (a) Deposit or permit the placing of fill material in a wetland.

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[2] Gary admitted that he wanted the neighbors to use the new road.

(b) Dredge, remove, or permit the removal of soil or minerals from a wetland.

(c) Construct, operate, or maintain any use or development in a wetland.

(d) Drain surface water from a wetland.[3]

MCL 324.30316 states, in part:

(1) The attorney general may commence a civil action for appropriate relief, including injunctive relief upon request of the department under section 30315(1). An action under this subsection may be brought in the circuit court for the county of Ingham or for a county in which the defendant is located, resides, or is doing business. The court has jurisdiction to restrain the violation and to require compliance with this part. In addition to any other relief granted under this section, the court may impose a civil fine of not more than $10,000.00 per day of violation. A person who violates an order of the court is subject to a civil fine not to exceed $10,000.00 for each day of violation.

(2) A person who violates this part is guilty of a misdemeanor punishable by a fine of not more than $2,500.00.

* * *

(4) In addition to the civil fines and penalties provided under subsections (1), (2), and (3), the court may order a person who violates this part to restore as nearly as possible the wetland that was affected by the violation to its original condition immediately before the violation. The restoration may include the removal of fill material deposited in the wetland or the replacement of soil, sand, or minerals.[4]

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[3] A minor amendment of this statute enacted by way of 2018 PA 631, effective March 29, 2019, did not materially impact the language pertinent to the present appeal.

[4] The amendment of this statute enacted by way of 2018 PA 631 did not materially impact the language pertinent to the present appeal.

Gary pleaded guilty to a misdemeanor violation of MCL 324.30304 on the basis of the building of the road in the wetland. The Schoolcraft County Prosecutor stated that he was only seeking a suspended sentence and fine and was not seeking restoration. The prosecutor said that the building of the road

> shouldn't have been done [the] way it was, but I understand why it was done. . . . If the [Department of Environmental Quality], who I've spoken with, wishes to get restoration . . . , they have options through the Attorney General's office, through the Court of Civil Claims, and stuff in Lansing, and or [sic] the option of filing here. But that's up to them. But from my perspective, I don't think that's the appropriate direction to proceed on this case . . . .

The district court imposed a three-month suspended sentence[5] and ordered Gary to pay $1,000, as well as a "state fee" of $125 and a probation oversight fee.

Defendants contend that, in light of these criminal proceedings, a double-jeopardy violation occurred. The United States Constitution and the Michigan Constitution protect a person from being twice placed in jeopardy for the same offense. US Const, Am V; Const 1963, art 1, § 15. Interpretations of the federal double-jeopardy clause also apply to the state double-jeopardy clause. See *Miller*, 498 Mich at 17 n 9. "The prohibition against double jeopardy provides three related protections: (1) it protects against a second prosecution for the same offense after acquittal; (2) it protects against a second prosecution for the same offense after conviction; and (3) it protects against multiple punishments for the same offense." *People v Nutt*, 469 Mich 565, 574; 677 NW2d 1 (2004).

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[5] The district court stated that, "at the end of 90 days, the [p]rosecutor will file a dismissal if there's [sic] no further violations."

Defendants contend that the restoration order violated the protection against multiple punishments for the same offense.[6] Double-jeopardy protections only apply to multiple *criminal* punishments. *Hudson v United States*, 522 US 93, 99; 118 S Ct 488; 139 L Ed 2d 450 (1997). This Court has stated that "the constitutional provision against double jeopardy is not violated when a civil penalty serves a purpose distinct from any punitive purpose." *People v Artman*, 218 Mich App 236, 246; 553 NW2d 673 (1996). One consideration is whether the Legislature has designated a particular penalty as civil or criminal. See generally *Dawson v Secretary of State*, 274 Mich App 723, 733; 739 NW2d 339 (2007). Defendants contend that MCL 324.30316 facially designates a restoration order as a criminal punishment. This is not the case, however. The statute provides for both civil actions, in Subsection (1), and criminal actions, in Subsection (2), and then, in Subsection (4), it indicates that "the court"—i.e., the civil or criminal court—can issue an order of restoration. MCL 324.30316.

Accordingly, an order to restore can be issued in either a criminal or a civil proceeding, and here, it was issued in a civil proceeding. In addition, an order to restore a wetland has been historically viewed as an equitable remedy. See *Dep't of Environmental Quality v Gomez*, 318 Mich App 1, 32; 896 NW2d 39 (2016). *Black's Law Dictionary* (11th ed) defines "equitable," in part, as "[e]xisting in equity; available or sustainable by an action in equity, or under the rules and principles of equity." It defines "equity," in part, as "[t]he body of principles constituting what is fair and right; natural law[.]" *Black's Law Dictionary* (11th ed). It seems clear

[6] Defendants are not making an argument about the fine imposed by the Ingham Circuit Court.

that the purpose of an order to restore issued in a civil proceeding is not *punitive* in nature but is related to ecological concerns and restoring the environment to what is "fair and right."

In *Hudson*, 522 US at 99-100, the United States Supreme Court set forth the following factors to analyze when determining whether a remedy in a civil case should be considered a punishment for double-jeopardy purposes:

> (1) whether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as a punishment; (3) whether it comes into play only on a finding of *scienter*; (4) whether its operation will promote the traditional aims of punishment—retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned. [Citation, quotation marks, and brackets omitted.]

As for Factor (1), the restoration order did not involve a "disability" or "restraint" approaching *something like imprisonment*. See *id*. at 104. It involved an affirmative action, but the action was merely to restore the wetland to its original state. Regarding Factor (2), there is no indication that a restoration order has historically been regarded as a punishment; instead, it has been viewed, as noted, as an equitable remedy. *Gomez*, 318 Mich App at 32. Regarding Factor (3), a restoration order does not come into play only on a finding of scienter. As for Factor (4), while a restoration order could promote the traditional "punishment" goal of deterrence, deterrence can promote both criminal and civil purposes. *Hudson*, 522 US at 105. In *Hudson*, the Court stated that the sanctions at issue in that case (a banking case) served to promote the stability of

the banking industry; it added, "To hold that the mere presence of a deterrent purpose renders such sanctions 'criminal' for double jeopardy purposes would severely undermine the Government's ability to engage in effective regulation of institutions such as banks." *Id*. Similarly, in the present case, disallowing the restoration order would undermine plaintiff's goal of protecting wetlands. Concerning Factor (6), there is very clearly an alternative purpose, aside from punishment, to assign to a restoration order—i.e., the maintenance of wetlands and the maintenance of a healthy ecological environment. As for Factor (7), in *Dawson*, 274 Mich App at 736, the Court, in evaluating an assessed fine for a driving offense, stated that the fine was not excessive in light of the alternative goal of raising revenue. Here, the restoration order was not excessive in light of the alternative purpose of maintaining healthy wetlands.

Factor (5) could be viewed in defendants' favor, because a violation of MCL 324.30316 is a crime. But in *Hudson*, 522 US at 105, the Court stated: "[T]he conduct for which . . . sanctions are imposed may also be criminal (and in this case formed the basis for petitioners' indictments). This fact is insufficient to render the money penalties and debarment sanctions criminally punitive, particularly in the double jeopardy context[.]" (Citations omitted.)

In sum, a review of all the factors and analogous caselaw reveals that the wetland-restoration order in the present civil proceeding did not violate the double-jeopardy protection against multiple punishments for the same offense.

Defendants also contend that plaintiff's lawsuit violated the protection against a second prosecution for the same offense after conviction. However, "[t]he prohibition against double jeopardy . . . protects against a sec-

ond *prosecution* for the same offense after conviction[.]" *Nutt*, 469 Mich at 574 (emphasis added). There was no second prosecution here. Plaintiff initiated a civil lawsuit after the criminal proceedings. Defendants refer to *People v Spicer*, 216 Mich App 270; 548 NW2d 245 (1996), but that case is inapposite because it involved an analysis of whether two *criminal prosecutions* related to the same transaction, see *id*. at 273. Defendants' reference to *Bravo-Fernandez v United States*, 580 US 5; 137 S Ct 352; 196 L Ed 2d 242 (2016), is similarly misplaced because that case involved whether the defendants could be *criminally retried* for certain issues, see generally 137 S Ct at 356-357.

III. COLLATERAL ESTOPPEL AND RES JUDICATA

Defendants contend that principles of collateral estoppel and res judicata indicate that Gary's criminal conviction barred the present lawsuit against Gary and the wetland-restoration order. We review these issues de novo. *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 379; 596 NW2d 153 (1999); *Barrow v Pritchard*, 235 Mich App 478, 480; 597 NW2d 853 (1999).

"Generally, for collateral estoppel to apply three elements must be satisfied: (1) a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment; (2) the same parties must have had a full and fair opportunity to litigate the issue; and (3) there must be mutuality of estoppel." *Monat v State Farm Ins Co*, 469 Mich 679, 682-684; 677 NW2d 843 (2004) (quotation marks, citation, and brackets omitted).[7] "Mutuality of estoppel

[7] There are some exceptions to the mutuality requirement. *Id*. at 687-688.

requires that in order for a party to estop an adversary from relitigating an issue that party must have been a party, or in privy to a party, in the previous action. In other words, the estoppel is mutual if the one taking advantage of the earlier adjudication would have been bound by it, had it gone against him." *Id*. at 684-685 (quotation marks, citations, and brackets omitted).

"Crossover estoppel, which involves the preclusion of an issue in a civil proceeding after a criminal proceeding and vice versa, is permissible." *Barrow v Pritchard*, 235 Mich App 478, 481; 597 NW2d 853 (1999). However, "there has never been anything close to a ringing endorsement of the concept by any Michigan court. Instead, the Supreme Court has cautioned against its use." *People v Ali*, 328 Mich App 538, 542; 938 NW2d 783 (2019) (emphasis omitted).

In *In re Application of Indiana Mich Power Co to Increase Rates*, 329 Mich App 397, 408; 942 NW2d 639 (2019), the Court stated that "[a] question has not been actually litigated until put into issue by the pleadings, submitted to the trier of fact for a determination, and thereafter determined." (Quotation marks and citation omitted.)

As noted, the Schoolcraft County Prosecutor stated that, under the terms of the plea agreement, he was only seeking a suspended sentence and fine and was not seeking restoration. The prosecutor said that the building of the road

> shouldn't have been done [the] way it was, but I understand why it was done. . . . If the [Department of Environmental Quality], who I've spoken with, wishes to get restoration . . . , they have options through the Attorney General's office, through the Court of Civil Claims, and stuff in Lansing, and or [sic] the option of filing here. But

> that's up to them. But from my perspective, I don't think that's the appropriate direction to proceed on this case . . . .

The issue of restoration of the wetlands was never subject to a determination by the district court because the prosecutor was not seeking restoration. Accordingly, under *In re Application of Indiana Mich Power Co*, 329 Mich App at 408, defendants' argument about collateral estoppel is not persuasive.[8]

As for res judicata, this doctrine

> 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. [*Adair v Michigan*, 470 Mich 105, 121; 680 NW2d 386 (2004) (citation omitted).]

In general, "[t]o be in privity is to be so identified in interest with another party that the first litigant represents the same legal right that the later litigant is trying to assert." *Id*. at 122. "The outer limit of the doctrine traditionally requires both a 'substantial identity of interests' and a 'working functional relationship' in which the interests of the nonparty are presented and protected by the party in the litigation." *Id*. (citations omitted).[9] Defendants contend that plaintiff and

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[8] In addition, as discussed *infra* in connection with res judicata, the parties were not the same in the criminal and civil proceedings.

[9] As discussed *infra*, these definitions of privity applicable to private parties are not necessarily applicable to divisions of the state.

the Schoolcraft County Prosecutor were either the same parties or were in privity with one another.

In *Baraga Co v State Tax Comm*, 466 Mich 264, 266-267; 645 NW2d 13 (2002), two townships entered into a consent judgment regarding a tax issue. Later, the State Tax Commission (STC) determined that certain tax exemptions allowed by way of the consent judgment were not, in fact, permissible, and litigation ensued. *Id*. at 268. The Court of Appeals concluded "that defendant [i.e., the STC] was in privity with the local units of government in regard to property tax appeals before the tribunal and, as such, the doctrine of res judicata applied to bind defendant to the terms of consent judgments entered by the Tax Tribunal in matters where defendant was not a party." *Id*.

The Michigan Supreme Court, addressing the issue of res judicata, stated, "Courts have . . . generally found that no privity exists between state and federal governments, between the governments of different states, or between state and local governments." *Id*. at 270 (quotation marks and citation omitted). The Court stated that "there may be specific circumstances under which the state may be bound by a judgment to which a subordinate political division was a party and the state was not, such as when the subordinate political subdivision is found to have been acting as a trustee for the state. Such circumstances are not present here." *Id*. at 270-271. The Court indicated that the general definition of privity applicable to private parties does not apply to state subdivisions. See *id*. The Court went on to state:

> [W]e fail to see, even using the definition of privity [for private parties] applied by the Court of Appeals, how the parties could have a "substantial identity of interests" and represent the same legal right when defendant is empow-

> ered to intervene if it concludes that municipalities have failed to place taxable property on the tax rolls and defendant is specifically charged with exercising general supervision over local assessors. [*Id*. at 272.]

It also stated:

> Further, we reject the Court of Appeals reasoning that this is all somewhat academic because "[t]he townships secured that interest [the interest in proper payment of taxes] when they negotiated to have the KBIC make payments in lieu of the taxes that normally would have been assessed." Whether the taxes effectively got paid is important, of course, but it is not to this alone that the statute is directed. . . . [D]efendant is charged with ensuring that all taxable properties are placed on the assessment rolls. Plaintiffs and defendant cannot be representing the same legal right or have a substantial identity of interests if the townships purposefully did not place taxable properties on the assessment rolls, an action that defendant is required to ensure. [*Id*. at 273 (citation omitted; first and second alterations in original).]

We find that *Baraga* is controlling in the present case. The most significant fact is that the Schoolcraft County Prosecutor was not acting as a trustee for plaintiff. Indeed, the prosecutor, as noted, explicitly stated that plaintiff could seek restoration of the wetland in a separate proceeding. If the prosecutor had been acting as plaintiff's trustee in setting forth the plea agreement, he would not have made this statement.

Moreover, MCL 324.30315(1) states, "If, on the basis of information available to the department, the department finds that a person is in violation of this part . . . , the department *shall issue an order requiring the person to comply with the prohibitions* or conditions or the department *shall request the attorney general to bring a civil action under section 30316(1)*." (Emphasis

added.) Again, MCL 324.30304 prohibits the placing of fill material in a wetland and prohibits dredging in a wetland. Plaintiff was required to take action to protect the wetland. This is further support for the finding that, under *Baraga*, plaintiff and the Schoolcraft County Prosecutor were not in privity for purposes of res judicata. The interests of plaintiff and the Schoolcraft County Prosecutor were not the same because plaintiff is specifically charged with protecting the environment and must take action if evidence of environmental damage is apparent, whereas the transcript of the plea proceeding makes clear that the prosecutor was more concerned with looking at Gary's subjective motivations in building the road.

Defendants contend that privity existed here under *People v Gates*, 434 Mich 146; 452 NW2d 627 (1990), overruled in part on other grounds by *Monat*, 469 Mich 679 (2004). In *Gates*, which involved whether a finding of "no jurisdiction" in a child-protective proceeding applied in a criminal prosecution,[10] the Court stated:

> Although the named-party plaintiff in the instant case is the People of the State of Michigan, in practical terms the party against whom collateral estoppel is asserted is the Jackson County Prosecutor, who also represented the Department of Social Services in the probate court proceeding. Defendant argues that even though the Department of Social Services was the nominal party in the earlier proceeding, both the department and the prosecutor's office are creatures of the state and thus should be considered to be the same party. We agree. A functional analysis of the role of the prosecutor in both proceedings is appropriate in this case, and leads us to conclude that privity is sufficient to satisfy the "same party" requirement. [*Id*. at 156.]

[10] The Court ruled that the defendant's guilt or innocence was not determined in the child-protective proceeding and that collateral estoppel did not apply. *Id*. at 165.

We conclude that *Gates* is distinguishable because (1) *Baraga*, setting forth the test for privity between state and local governments, was issued after *Gates* and (2) the present case is different from *Gates* in that in *Gates*, the county prosecutor was the attorney in both cases. As discussed above, in the present circumstances, the Schoolcraft County Prosecutor had different aims than plaintiff and was not involved in the present lawsuit.

Defendants cite MCL 324.1705(3) to argue that Michigan has a public policy to avoid multiple actions for a violation of environmental laws. MCL 324.1705 states:

> (1) If administrative, licensing, or other proceedings and judicial review of such proceedings are available by law, the agency or the court may permit the attorney general or any other person to intervene as a party on the filing of a pleading asserting that the proceeding or action for judicial review involves conduct that has, or is likely to have, the effect of polluting, impairing, or destroying the air, water, or other natural resources or the public trust in these resources.
>
> (2) In administrative, licensing, or other proceedings, and in any judicial review of such a proceeding, the alleged pollution, impairment, or destruction of the air, water, or other natural resources, or the public trust in these resources, shall be determined, and conduct shall not be authorized or approved that has or is likely to have such an effect if there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare.
>
> (3) The doctrines of collateral estoppel and res judicata may be applied by the court to prevent multiplicity of suits.

It seems clear that Subsection (3) is designed to prevent a multiplicity of lawsuits in light of the broad

language of Subsection (1). At any rate, even assuming, without deciding, that MCL 324.1705(3) applies to a violation of Part 303, all this subsection states is that collateral estoppel or res judicata "may be applied[.]" There may be some actions during which various plaintiffs have such a sharing of interests that the doctrines are, indeed, applicable. What the lower court did was analyze whether collateral estoppel or res judicata was applicable under the specific circumstances of the present case. Its finding that neither doctrine applied was not, as discussed, erroneous.

IV. TONYA'S LIABILITY

Defendants argue that the trial court erred by finding that Tonya "permitted" Gary to build the road within the meaning of MCL 324.30304.

"Findings of fact by the trial court may not be set aside unless clearly erroneous. A finding of fact is not clearly erroneous unless there is no evidence to support it or the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed." *Townsend v Brown Corp of Ionia, Inc*, 206 Mich App 257, 263; 521 NW2d 16 (1994) (citations omitted). To the extent this issue involves statutory construction, review is de novo. *Guardian Environmental Servs, Inc v Bureau of Construction Codes & Fire Safety, Dep't of Labor & Economic Growth*, 279 Mich App 1, 5; 755 NW2d 556 (2008).

Once again, MCL 324.30304 states, in part:

> Except as otherwise provided in this part or by a permit issued by the department under this part and pursuant to part 13, a person shall not do any of the following:
>
> (a) Deposit or permit the placing of fill material in a wetland.

> (b) Dredge, remove, or permit the removal of soil or minerals from a wetland.

The trial court, in its findings after the bench trial, stated, "Having observed the witness testimony and assessed the credibility of both Defendants, the Court finds that Mrs. Tonya Sancrant permitted [Gary] to carry out acts prohibited under the NREPA. This is sufficient to subject her to liability under MCL 324.30304(a) and (b)."

Defendants contend that to "permit" something must be construed to mean assist or otherwise take an active role. However, this Court "accord[s] to every word or phrase of a statute its plain and ordinary meaning, unless a term has a special, technical meaning or is defined in the statute. In ascertaining the plain and ordinary meaning of undefined statutory terms, we may rely on dictionary definitions." *Guardian Environmental Servs*, 279 Mich App at 6-7 (citations omitted).[11] "Permit" is not defined in the statute, and there is no indication that it has a special, technical meaning. *Merriam-Webster's Collegiate Dictionary* (11th ed) defines "permit," in part, as "to consent to expressly or formally," "to give leave," or "to make possible[.]"

Defendants contend that under *People v Tenerowicz*, 266 Mich 276, 282; 253 NW 296 (1934), and *People v O'Hara*, 278 Mich 281, 301; 270 NW 298 (1936), "permit" must be interpreted as requiring affirmative action. The former case involved interpreting the words in an indictment in a criminal case involving the maintenance of "houses of ill fame." *Tenerowicz*, 266 Mich at 282. The Court was concerned with whether "the crimi-

[11] This rule of construction belies defendants' argument that because the words surrounding "permit" in the statute involve affirmative action, "permit" must also involve affirmative action. The word is to be interpreted according to its plain meaning.

nality of the acts contemplated by the conspirators [was] clear" in a criminal-conspiracy indictment using the word "permit." *Id*. In *O'Hara*, the Court, relying on *Tenerowicz*, was again concerned with criminal scienter. *O'Hara*, 278 Mich at 301. The trial court in the present case concluded that these criminal cases were inapposite in this civil strict-liability case. We agree that because the present case was a civil proceeding involving a strict-liability statute, the cases cited by defendants provide no basis for interpreting the word "permit" differently from its ordinary dictionary definition. At any rate, we note that in *O'Hara*, the Court interpreted "permit" as meaning "assist" *or* "enable." *Id*. at 301. "Enable" is quite similar to the dictionary definition, noted above, of "make possible."

Defendants contend that plaintiff presented insufficient evidence to demonstrate Tonya's liability. A review of pertinent evidence, however, fails to show clear error in the trial court's findings.

A friend of Gary's, Kurt Zettel, testified about loaning a miniexcavator and a bulldozer to Gary because Gary was working on a road. Zettel testified, "I told him when he told me he was going to build a road, I said, [i]t would be cheaper to bake your neighbors a pie" to try to make peace with them. Gary had told Zettel that he built the road to get the neighbors to stop using the easement road. Tonya testified that she was "leery" of the neighbors passing by close to the cabin on the easement road because it made her feel unsafe.

Gary stated that what led him to buy, from a timber company, the land on which the new road was situated[12] was the need to have a new road to eliminate problems with the easement road. He *and Tonya*

[12] Defendants acquired their various parcels of property over time.

bought this property; it was owned jointly by them, and Tonya stated that defendants had joint bank accounts.

As early as July 2010, Gary knew that he was going to be needing equipment, such as an excavator, to build the road because he was in the planning stages of buying the property from the timber company. Zettel testified about loaning Gary equipment in exchange for work that Gary did on Zettel's truck. An invoice demonstrates that Gary's business did some work for Zettel, and it states, "(No charge) Exchange for use of equipment—U.P. Cabin." Zettel's signature on the invoice is dated July 23, 2010, and Zettel stated in his testimony that instead of paying for the work performed on his truck, he was going to loan equipment to Gary "over the next year or so." Zettel stated that Gary borrowed Zettel's miniexcavator "probably [in] 2011" and "said he was working on a road up there." Tonya admitted writing the invoice. Although she claimed that Gary told her to write it because he was busy and that she did not really understand it, the trial court's opinion makes clear that it did not find credible any allegations that Tonya had no knowledge of the building of the road. "This Court affords great deference to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." *Lumley v Bd of Regents for Univ of Mich*, 215 Mich App 125, 135; 544 NW2d 692 (1996).

All this evidence supports a finding that Tonya gave leave to Gary for the building of the road and made possible Gary's building of the road on their jointly owned property. Indeed, the evidence supported that defendants bought the property jointly to attempt to address problems with their neighbors. There is no basis for a definite and firm conclusion that the trial court made a mistake in its findings. *Townsend*, 206 Mich App at 263.

Defendants contend that the theory of Tonya's having permitted Gary to build the road in the wetland was not alleged in the complaint. However, defendants set forth no authorities to support their argument that the complaint was inadequate. As stated in *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998), "[A] mere statement without authority is insufficient to bring an issue before this Court. It 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." (Citation and quotation marks omitted.) At any rate, the complaint stated that "[d]efendants dredged and placed fill material in a regulated wetland on the [p]roperty without a permit or otherwise allowed by Part 303 of NREPA, in violation of MCL 324.30304." Because the complaint was addressed to both defendants, we conclude that the complaint was adequate. In other words, plaintiff was alleging that together, by way of Gary's physical work and Tonya's permitting Gary to do that work, defendants, as a couple, "dredged and placed fill material in a regulated wetland" contrary to MCL 324.30304. MCR 2.111(B)(1) states that a complaint must contain "[a] statement of the facts, without repetition, on which the pleader relies in stating the cause of action, with the specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend." The wording and the citation of MCL 324.30304 was adequate to inform defendants of the claim against Tonya.

Affirmed.

M. J. KELLY, J., concurred with JANSEN, P.J.

RONAYNE KRAUSE, J. (*concurring in part and dissenting in part*). I concur entirely with the majority's analysis and determination that this proceeding and order are not precluded by the 2018 criminal proceeding and misdemeanor judgment. I respectfully disagree with the majority that Tonya Sancrant can be found liable on this record. I would affirm as to Gary Sancrant and reverse as to Tonya.

I need not repeat most of the majority's discussion of the facts or the relevant law, because my disagreement pertains only to how the majority treats the word "permit" in the context of MCL 324.30304. As the majority observes, the word is not defined in the statute. The courts "generally give[] undefined terms their plain and ordinary meanings and may consult dictionary definitions in giving such meaning," but those words must also be considered in context and "in light of the overall statutory scheme." *Honigman Miller Schwartz & Cohn LLP v Detroit*, 505 Mich 284, 305-307; 952 NW2d 358 (2020). The statute unambiguously uses "permit" as a verb, which *Merriam-Webster's Collegiate Dictionary* (11th ed) defines as "to let through," "to let go," "to consent to expressly or formally," "to give leave," "to make possible," or "to give an opportunity." I do not necessarily disagree with the majority that the criminal cases upon which defendants rely are of doubtful applicability to MCL 324.30304. I also do not disagree with the majority that permitting something does not require actively facilitating it.

However, presuming the statute imposes "strict liability," under which an actor's *mens rea* is obviated, an *actus reus* remains mandatory. *People v Likine*, 492 Mich 367, 392-393; 823 NW2d 50 (2012). It is therefore not enough for Tonya to have known about the road

construction and wetlands destruction, nor is it enough for Tonya to have benefited. Implicitly, it was necessary for Tonya to do something more than merely fail to intercede. Even if MCL 324.30304 imposes strict liability for a mere failure to act, the principle of strict liability is founded upon the defendant having the actual power to engage in that act. *Likine*, 492 Mich at 393-398. Although *Likine* involved criminal penalties, I would find its reasoning equally applicable to a civil proceeding involving a nontrivial penalty. Therefore, "permitting" the placement of material in a wetland or the removal of material from a wetland under MCL 324.30304 necessarily requires, at a minimum, that the person had the realistic power to *prevent* that placement or removal.

Put simply, there is no evidence in this record that Tonya had the power to prevent Gary from engaging in the road-construction and wetlands-destruction project. Like the majority, I find no clear error in the trial court's findings that Tonya knew about the project and benefited from the project. Furthermore, it is inherently within the trial court's purview to evaluate the credibility of the witnesses who appeared before it. *McGonegal v McGonegal*, 46 Mich 66, 67; 8 NW 724 (1881); *In re Loyd*, 424 Mich 514, 535; 384 NW2d 9 (1986). Nevertheless, "doubt about credibility is not a substitute for evidence of guilt." *People v Wolfe*, 440 Mich 508, 519; 489 NW2d 748 (1992). Although the trial court correctly recognized that a husband and wife may both be found liable for violating the act, the trial court failed to note that in the case it cited, both the husband and wife engaged in filling the wetlands. *DEQ v Gomez*, 318 Mich App 1, 6-8; 896 NW2d 39 (2016). There is no dispute here that Tonya was not physically involved in any of the construction or de-

struction, and being married to someone confers no right of control over that person.

It appears that the evidence in fact revealed that Tonya was not involved in Gary's project at all, with the *sole* exception of drafting an invoice for West Branch Collision at Gary's request. The invoice, proclaiming itself a "Statement & Repair Order" with a West Branch Collision letterhead, reflects that several repairs were performed on a truck owned by Kurt Zettel in exchange for "use of equipment — U.P. Cabin." As the majority notes, this is a reference to Zettel having loaned Gary an excavator for construction of the road. As discussed, I take no issue with the trial court's credibility assessment and conclusion that Tonya understood the significance of the invoice. Nevertheless, Gary explained that West Branch Collision was his and his mother's business, not Tonya's. Tonya did some clerical work and ran errands for the shop, but also "t[ook] care of bowling and church stuff" while at the shop. There is no evidence Tonya had any control over Gary or how Gary ran his business; she was essentially just a scrivener. The invoice itself is merely a memorialization of a business decision made by Gary, and to hold otherwise would be the inverse of respondeat superior: holding a low-level employee liable for a decision made by the business owner.

Knowledge of an activity or proposal is a necessary prerequisite to being able to grant permission or to interfere with that activity or proposal. However, it is not enough. The Legislature can impose strict liability for a failure to act, but it cannot generally punish a person for failing to undertake an act, or failing to stop an act, that the person had no power to effectuate. The trial court made no finding that Tonya had any practical ability to prevent Gary's road-construction and

wetlands-destruction project, nor would any such finding appear warranted on this record. Therefore, I am definitely and firmly convinced that the trial court made a mistake by imposing liability upon Tonya based on her mere knowledge of and benefit from the project. I would reverse as to Tonya.

MOORE v GENESEE COUNTY

Docket No. 355291. Submitted June 8, 2021, at Lansing. Decided June 24, 2021, at 9:15 a.m.

Sherry A. Moore brought an action in the Genesee Circuit Court against Genesee County, John Gleason (the County Clerk), and the Genesee County Election Commission, seeking a writ of mandamus ordering defendants to allow plaintiff to correct errors on her affidavit of identity (AOI) and to certify her candidacy and include her name on the ballot for council person for the Village of Goodrich in the November 2020 general election. Plaintiff—a resident of the Village of Goodrich and a United States citizen—sought to run as a candidate for village counsel person and filed a timely AOI, but she failed to check a box to indicate that she was a United States citizen and met the statutory and constitutional requirements for village council person. Plaintiff also failed to include her zip code in her address on the AOI. Defendants refused to certify her name on the ballot. The circuit court, Mark W. Latchana, J., ordered defendants to allow plaintiff to amend her AOI, which they did, and her name was placed on the general election ballot. Defendants appealed. Before the appeal was heard, plaintiff was elected to a seat on the Village of Goodrich council. Defendants conceded on appeal that the issue of the validity of the AOI was moot but asked the Court to reach the merits of the case.

The Court of Appeals *held*:

1. An issue is moot if a court cannot grant relief with any practical effect. In this case, because the election was over and plaintiff was elected, the issue was presumptively moot. But a moot issue may be addressed if it is publicly significant, likely to recur, and likely to evade judicial review. Because the issue was likely to recur and affect candidacy applicants beyond this case, the matter was one of public significance. And because time constraints often affect election-ballot issues, the issue was likely to evade appellate review. Accordingly, the Court addressed the merits.

2. MCL 168.558 of the Michigan Election Law, MCL 168.1 *et seq*., requires candidacy applicants to provide an AOI. That AOI must include, among other things, the applicant's residential

address, a statement that the applicant is a United States citizen, and a statement that the applicant meets the statutory and constitutional requirements for the office sought. Notwithstanding the location of MCL 168.558 in Chapter XXIV of the Michigan Election Law and that Chapter XXIV is titled "PRIMARY ELECTIONS," because statutory chapter titles are nothing more than "navigational aids" with no effect on statutory language, courts have treated MCL 168.558 as applying to all elections. Therefore, plaintiff's candidacy application needed to comply with the AOI requirements in MCL 168.558. Although MCL 168.558(2) specifically requires candidacy applicants to provide their "residential address," it does not specifically require a zip code. And just because the AOI form produced by the Secretary of State includes a place for a zip code does not make the zip code a legal requirement: zip codes are simply a United States Postal Service mechanism to streamline mail delivery. For purposes of MCL 168.558(2), plaintiff supplied a sufficient "residential address" when she included her street number and municipality. But the same is not true regarding plaintiff's failure to check the box stating that she was a citizen of the United States and met the statutory and constitutional requirements for village council person. Those statements are explicitly required by MCL 168.558(2), and candidate applicants must strictly comply with those content requirements. Strict compliance can be met even if a form is filled out in an irregular or improper manner—and even by simply checking a box on a prepared form. But strict compliance is not met when a candidacy applicant fails to supply a required statement. Plaintiff's failure to check the box was a critical error that rendered plaintiff's AOI invalid. Therefore, defendants had a legal duty *not* to certify plaintiff's candidacy for village council person, and plaintiff had no right to appear on the ballot as a candidate for village council person.

3. A party seeking a writ of mandamus must show that the party has a clear legal right to performance of a specific duty and that the defendant has a clear legal duty to perform. To the extent the trial court's writ of mandamus ordered defendants to certify plaintiff's candidacy, the trial court abused its discretion because plaintiff's AOI was invalid, which meant she had no right to have defendants certify her candidacy and defendants had a clear legal duty *not* to certify her candidacy. But because the trial court's writ of mandamus only explicitly ordered defendants to permit plaintiff to amend her AOI—not to certify her candidacy—the proper questions to be addressed were: (1) whether plaintiff had a clear legal right to amend her AOI after the filing deadline had passed, and (2) whether defendants had a clear legal duty to accept

plaintiff's amended AOI after the filing deadline had passed. The Michigan Election Law does not include any procedure to resolve challenges to AOIs, nor does it provide candidacy applicants a right to amend AOIs after the filing deadline has passed. Rather, MCL 168.381(4) sets the deadline for filing nominating petitions for village offices at 4 p.m. on the fifteenth Tuesday before the general November election. Unfortunately for plaintiff, that deadline was July 21, 2020, which was the day after she filed her invalid AOI and about a week before the omissions on her AOI were discovered. Once the filing deadline has passed, either the candidate has complied with the requirements, or the candidate is disqualified—even if the candidate, like plaintiff, was qualified in fact for the office and even if the disqualifying error was easily made. Courts may not engraft a postdeadline AOI amendment process into the unambiguous statutory language, nor do they enjoy equitable power to order relief in contravention of applicable statutes. Plaintiff's AOI was invalid because she failed to check the box and supply the required statements. No statutory process existed for amending her AOI after the filing deadline has passed. Therefore, defendants were legally obligated not to certify plaintiff's candidacy, and plaintiff was without a clear legal right to amend her facially invalid AOI after the filing deadline. Nevertheless, because plaintiff had already been elected, no practical relief could be granted.

No relief.

ELECTION LAW — AFFIDAVIT OF IDENTITY — FAILURE TO INCLUDE REQUIRED STATEMENTS — EFFECT.

MCL 168.558 requires that a candidate for elected office file an affidavit of identity; among other requirements, the affidavit must include a statement that the candidate is a citizen of the United States and a statement that the candidate meets the statutory and constitutional qualifications for the office sought, which can be done by checking a box; failure to check a box to include these statements renders the affidavit invalid; there is no statutory provision for amending after the filing deadline an affidavit of identity that does not contain the required statements, and the courts do not have equitable power to order relief in contravention of the applicable statutes.

Brian MacMillan, Office of the Genesee County Prosecuting Attorney–Civil Division, for Genesee County, John J. Gleason, and the Genesee County Election Commission.

Before: JANSEN, P.J., and M. J. KELLY and RONAYNE KRAUSE, JJ.

RONAYNE KRAUSE, J. Defendants, Genesee County, John Gleason, and the Genesee County Election Commission, appeal by right the trial court's order granting plaintiff's motion for a writ of mandamus. Plaintiff, Sherry Ann Moore, sought to have her name placed on the election ballot for November 3, 2020, as a candidate for the Village of Goodrich council. However, defendants refused to certify her name on the ballot, because in her affidavit of identity (AOI), plaintiff failed to check a box stating that she was a citizen of the United States and met the statutory and constitutional requirements for the office she sought; she also omitted her zip code from her residential address. Plaintiff was, in fact, a citizen of the United States, and she resided in Goodrich at zip code 48438. Plaintiff did not correct these errors before the filing deadline had passed, and thereafter, defendants informed plaintiff that her AOI was invalid. The trial court granted plaintiff's request for mandamus and ordered defendants to accept an amended AOI. Plaintiff's name appeared on the ballot, and she was elected to a seat on the Village of Goodrich council. There is no dispute that this matter is moot; indeed, defendants expressly confirmed on the record that they are not seeking plaintiff's removal from office. However, we agree with defendants that the matter should nevertheless be addressed. We conclude that the trial court seriously misunderstood the nature of plaintiff's omission and the limits of its powers and that it erred by granting mandamus.

I. MOOTNESS

The courts will generally refrain from deciding issues that are moot, meaning it is impossible for the

court to craft an order with any practical effect on the issue. *Garrett v Washington*, 314 Mich App 436, 449-450; 886 NW2d 762 (2016). "We review de novo whether an issue is moot." *Id*. at 449. As noted, the election is over, and it appears that plaintiff was elected, rendering this matter presumptively moot. See *Barrow v Detroit Election Comm*, 305 Mich App 649, 659; 854 NW2d 489 (2014). However, moot issues may be addressed if the issue is a matter of public significance, the issue is likely to recur, and the issue is likely to evade judicial review. *Gleason v Kincaid*, 323 Mich App 308, 315; 917 NW2d 685 (2018). Defendants argue that it is common for candidacy applicants to make mistakes or omissions in their AOIs, and such mistakes or omissions have resulted in several other judicial proceedings. Accepted at face value, the issue in this matter appears likely to recur, and it affects candidacy applicants beyond the immediate parties to this action. See *id*. at 315-316. We conclude that the issue is a matter of public significance. Furthermore, it is well-recognized that issues affecting election ballots are particularly vulnerable to evading appellate review due to the time constraints typically involved. *Barrow*, 305 Mich App at 660; see also *Meyer v Grant*, 486 US 414, 417 n 2; 108 S Ct 1886; 100 L Ed 2d 425 (1988). Finally, it is clear that the trial court is in need of guidance. We are persuaded that the issue in this matter should be reviewed by this Court.

II. COMPLIANCE WITH STATUTORY AOI REQUIREMENTS

We first address whether plaintiff's AOI complied with the statutory requirements. We review de novo questions of statutory interpretation, as well as whether a party has a clear legal duty to perform or a clear legal right to that performance. *Christenson v*

Secretary of State, 336 Mich App 411, 421; 970 NW2d 417 (2021). If a statute is unambiguous, it must be applied as plainly written, and we may not read any unstated provisions into the statute. *McQueer v Perfect Fence Co*, 502 Mich 276, 286; 917 NW2d 584 (2018). We conclude that plaintiff's failure to include her zip code did not invalidate the AOI. However, her failure to check the box stating that she was a citizen of the United States and met the appropriate constitutional and statutory qualifications was a fatal defect.

In relevant part, MCL 168.558(2) provides as follows:

> An affidavit of identity must contain the candidate's name and residential address; a statement that the candidate is a citizen of the United States; the title of the office sought; a statement that the candidate meets the constitutional and statutory qualifications for the office sought; other information that may be required to satisfy the officer as to the identity of the candidate; and the manner in which the candidate wishes to have his or her name appear on the ballot.

As an initial matter, we note that MCL 168.558 is located within Chapter XXIV of the Michigan Election Law. The Legislature gave that chapter the title "PRIMARY ELECTIONS." 1954 PA 116. For purposes of interpreting our statutes, the words "general election" are specifically defined as not including primary elections, MCL 8.3s, and one might presume that the opposite would also be true and accordingly that MCL 168.558 applies only to primary elections and not to the general election at issue in this case. Chapter titles, however, are nothing more than navigational aids with no effect on the meaning of statutory language. *People v Bruce*, 504 Mich 555, 575-576; 939 NW2d 188 (2019). Therefore, the location of the statute within Chapter XXIV of the Michigan Election Law is of no consequence, and the courts have treated MCL 168.558 as

applying to all elections. *Gleason*, 323 Mich App at 320 n 5; see also *Citizens Protecting Michigan's Constitution v Secretary of State*, 503 Mich 42, 105 n 197; 921 NW2d 247 (2018). Consequently, plaintiff was required to comply with the AOI requirement in MCL 168.558.

The letter advising plaintiff that her AOI was invalid did not reference her zip code, so it does not appear that the omission of the zip code from her residential address was deemed invalidating. We note the matter only because it was discussed below. Insofar as we can determine, zip codes are not strictly mandatory; rather, they are simply a mechanism used by the United States Postal Service to streamline delivery of mail and improve the likelihood that a letter will not get lost on its way through the system.[1] It therefore appears that zip codes are not necessary to constitute a "residential address." Because the statute does not specifically mandate a zip code, the provision of a place on the AOI form for a zip code does not have the force of law and could not have been grounds for invalidating the AOI. See *Stumbo v Roe*, 332 Mich App 479, 488-489; 957 NW2d 830 (2020). Plaintiff's inclusion of her street number and municipality sufficiently set forth her "residential address" for purposes of MCL 168.558(2).

In contrast, the statute explicitly requires "a statement that the candidate is a citizen of the United States" and "a statement that the candidate meets the constitutional and statutory qualifications for the office sought[.]" MCL 168.558(2). Candidate applicants must "strictly comply with the preelection form and content requirements identified in the Michigan Elec-

[1] Unites States Postal Service, *ZIP Code — The Basics* <https://faq.usps.com/s/article/ZIP-Code-The-Basics> [https://perma.cc/F889-UNRA?type=image].

tion Law," which includes supplying "a facially proper affidavit of identity . . . ." *Stumbo*, 332 Mich App at 481. Notably, strict compliance with the content requirements may be achieved even if the applicant fills out the form in an irregular or improper manner. *Id*. at 482-483; *Nykoriak v Napoleon*, 334 Mich App 370, 380-382; 964 NW2d 895 (2020). Therefore, no reason exists why the statutorily required statements cannot be adequately made by marking a box on a prepared form stating, "I am a citizen of the United States and I meet the statutory and constitutional requirements for the office sought." However, the trial court erred by confusing the easy manner in which the statements may be made with the court's subjective, and mistaken, belief that the omission itself was trivial.

To the contrary, the simple fact is that failing to check the box means plaintiff's AOI lacked both a statement that she was a citizen of the United States and a statement that she met the constitutional and statutory qualifications for the office sought. The absence of those statements is not a mere irregularity in form. Unlike omitting a zip code, the failure to include the mandatory statements by checking the box is not a mere failure to fill in a blank provided by the Secretary of State with helpful but nonessential information. The trial court erred by characterizing plaintiff's omission as "a very small error." In fact, as the Michigan Election Law makes clear, it was a critical error that rendered plaintiff's AOI facially invalid. As a consequence, defendants were required by law to refrain from certifying plaintiff as a candidate for the Village of Goodrich council. MCL 168.558(4); see also *Berry v Garrett*, 316 Mich App 37, 43-44, 50-51; 890 NW2d 882 (2016). Under these circumstances, plaintiff had no right to appear on the ballot.

III. MANDAMUS

We review a trial court's decision whether to grant a writ of mandamus for an abuse of discretion. *Nykoriak*, 334 Mich App at 373. This Court also reviews a trial court's decision whether to grant injunctive or declaratory relief for an abuse of discretion. *Barrow*, 305 Mich App at 662. "An abuse of discretion occurs when the trial court chooses an outcome that falls outside the range of reasonable and principled outcomes." *Nykoriak*, 334 Mich App at 373 (quotation marks and citation omitted). "A trial court necessarily abuses its discretion when it makes an error of law." *Ronnisch Constr Group, Inc v Lofts on the Nine, LLC*, 499 Mich 544, 552; 886 NW2d 113 (2016). We review "de novo whether the trial court correctly selected, interpreted, and applied the relevant statutes." *Kincaid v Cardwell*, 300 Mich App 513, 522; 834 NW2d 122 (2013).

In relevant part, a party seeking a writ of mandamus must establish that the party has a clear legal right to performance of a specific duty and that the defendant has a clear legal duty to perform.[2] *Christenson*, 336 Mich App at 419. Plaintiff failed to include in her AOI statements that she was a citizen of the United States and that she met the constitutional and statutory qualifications for the office sought. The AOI was therefore facially invalid. As a consequence, rather than enjoying a clear legal right to defendants' certifying her as a candidate for the Village of Goodrich council, defendants in fact had a clear legal duty *not* to certify her as a candidate. To the extent the trial court granted plaintiff's requested writ of mandamus compelling defendants to certify plaintiff as a candidate, the trial court abused its discretion.

[2] We need not consider, so we do not discuss, the other requirements.

Nevertheless, the writ of mandamus at issue did not explicitly order defendants to certify plaintiff as a candidate; instead, it permitted plaintiff to amend her AOI. The questions therefore become (1) whether plaintiff had a clear legal right to amend her facially invalid AOI after the filing deadline had passed, and (2) whether defendants had a clear legal duty to accept plaintiff's amended AOI after the filing deadline had expired. We are unable to find any such right or duty.

As this Court has observed, the Michigan Election Law does not set forth any explicit procedure for resolving challenges to AOIs. *Berry*, 316 Mich App at 43. The Legislature has, however, set forth an unambiguous deadline: pursuant to MCL 168.381(4), "[n]ominating petitions for village offices must be filed with the appropriate township clerk by 4 p.m. on the fifteenth Tuesday before the general November election." In her complaint, plaintiff calculated that, counting back from the November 2020 general election, the deadline for correcting her AOI was July 21, 2020. We agree. Unfortunately for plaintiff, she filed her AOI one day before that deadline, and her fatal omission was not discovered until several days later.

There is simply no statutory provision for amending an AOI after the deadline has passed. Rather, if a candidacy applicant has failed to comply with the statutory requirements, the election officials have a clear legal duty not to certify the applicant. See *Berry*, 316 Mich App at 43-44. Candidacy applicants must strictly comply with the content requirements of the Michigan Election Law. *Nykoriak*, 334 Mich App at 377. Furthermore, "[w]ithin 4 days after the last day for filing nominating petitions or a filing fee, the township clerk shall deliver to the county clerk a list setting forth the name, address, and political affilia-

tion and office sought of each candidate *who has qualified* for a position on the primary ballot." MCL 168.349(3) (emphasis added). After this, the clerk "shall immediately certify to the proper board or boards of election commissioners in the city, county, district, or state the name and post office address of each party candidate whose petitions *meet the requirements of this act*, together with the name of the political party and the office for which he or she is a candidate." MCL 168.552(1) (emphasis added). These statutory provisions further show that, once the deadline has passed, either the candidacy applicant has complied with the requirements, or the candidacy applicant is disqualified, and any inquiry is over. The trial court abused its discretion by ignoring the plain statutory requirements and ordering defendants to accept an amended or corrected AOI after the expiration of the filing deadline.

The trial court appears to have been troubled by the fact that plaintiff actually was a United States citizen and fully qualified to hold the office she sought, by the fact that she was rushed filling out the AOI and had no notice that it was incomplete, and by the court's own belief that "it was a very small error." As discussed, the error might have been easily made, but no matter how large or small the checkbox, the error was, in fact, of critical and fatal significance; in other words, it was not a "small" error. The courts may not engraft a postdeadline AOI amendment process into an unambiguous statutory scheme. See *McQueer*, 502 Mich 286. It is well established that whether to address such policy concerns is a matter reserved to the Legislature. *Oakland Co Bd of Co Rd Comm'rs v Mich Prop & Cas Guaranty Ass'n*, 456 Mich 590, 612-613; 575 NW2d 751 (1998). The trial court did not have the equitable power to order relief in contravention of the applicable stat-

utes. See *Gleason*, 323 Mich App at 321-323. To the extent the trial court based its grant of mandamus on equity, the trial court abused its discretion.

Plaintiff's AOI was facially invalid because plaintiff failed to check the box that included a statement that she was a citizen of the United States and a statement that she met the constitutional and statutory qualifications for the office sought. Defendants were therefore legally obligated not to certify plaintiff to appear on the ballot, and no statutory process exists for amending an AOI after the filing deadline. The trial court erred by granting the writ of mandamus. Nevertheless, under the circumstances, we cannot grant any practical relief. We direct that the parties shall bear their own costs, a matter of public significance being involved. MCR 7.219(A).

JANSEN, P.J., and M. J. KELLY, J., concurred with RONAYNE KRAUSE, J.

ZARZYSKI v NIGRELLI

Docket No. 352169. Submitted June 3, 2021, at Grand Rapids. Decided June 24, 2021, at 9:20 a.m.

Stephanie A. Zarzyski brought a medical malpractice action in the Crawford Circuit Court against Joanna L. Nigrelli, D.O., and others. Plaintiff mailed a notice of intent (NOI) to defendants in February 2019, and defendants responded that same month with medical-record release authorizations and record-request forms for plaintiff's signature. Plaintiff did not complete those forms. On August 15, 2019, plaintiff filed her medical malpractice lawsuit without an affidavit of merit (AOM) and alleged that she was entitled to an additional 91 days to file the required affidavit under MCL 600.2912d(3), because the defendants failed to allow her access to all her medical records related to her claim. Defendants moved for summary judgment and argued that plaintiff's action was time-barred as of August 22, 2019, and that when plaintiff filed her complaint without the required affidavit, this did not toll the running of the applicable statutory limitations period. Plaintiff asserted that the written authorizations were irrelevant because MCL 600.2912d(5) obligated defendants to produce the records within 56 days of their receipt of the NOI. The circuit court, Colin G. Hunter, J., held that the defendants had provided plaintiff with timely access to all her medical records and that because plaintiff had failed to file an affidavit of merit, plaintiff's claim was time-barred under the statutory limitations period. Plaintiff appealed.

The Court of Appeals *held*:

1. A medical malpractice action is commenced when a claimant files both a complaint and an affidavit of merit as required under MCL 600.2912d(1). The filing of the complaint and the affidavit tolls the running of the applicable statutory limitations period. But if a medical malpractice claimant, like plaintiff in this case, wholly fails to file an affidavit, the filing of just a complaint is insufficient and the running of the limitations period is not tolled.

2. MCL 600.2192d(3) provides a medical malpractice plaintiff who has been denied access to the plaintiff's medical records with

an additional 91 days from the date of the filing of the complaint to file an affidavit of merit; however, the statute does not accommodate for any time the parties spend litigating its application. There is no tolling provision in the statute regarding the 91-day grace period in MCL 600.2912d(3). This means, excepting MCL 600.2912d(2) (under which a plaintiff may seek an additional 28 days to file the affidavit for good cause shown), a medical malpractice plaintiff must file an affidavit within 91 days of filing the complaint—even if a defendant has failed to provide the plaintiff with access to the medical records. This result may seem unfair, but it is commanded by the plain language of the statute; it is for the Legislature to address such problems that may arise under MCL 600.2912d(3). Therefore, a plaintiff in this situation is cautioned to file an affidavit of merit even while a challenge under MCL 600.2912d(3) is pending. Accordingly, it was incumbent on plaintiff to file her affidavit within 91 days of filing her complaint notwithstanding her allegation that defendants failed to comply with MCL 600.2912b(5).

3. Plaintiff did not comply with MCL 600.2912d(1) and file her affidavit with her complaint; nor did plaintiff comply with MCL 600.2912d(3) and file her affidavit within 91 days of filing her complaint. Therefore, plaintiff never properly commenced her medical malpractice action by the time the limitations period had elapsed, and the filing of her complaint without an affidavit did not toll the applicable limitations period. Summary disposition was appropriate under MCR 2.116(C)(7). Because the limitations period expired, the circuit court was required to dismiss plaintiff's complaint with prejudice.

Affirmed.

MEDICAL MALPRACTICE — AFFIDAVITS OF MERIT — MEDICAL-RECORD-ACCESS CHALLENGES — EFFECT ON TOLLING OF THE LIMITATIONS PERIOD.

Under MCL 600.2912d(1), a medical malpractice action is commenced and the running of the applicable statutory limitations period is tolled when a claimant files both a complaint and an affidavit of merit; if a medical malpractice claimant wholly fails to file the affidavit, the filing of just the complaint is insufficient to toll running of the limitations period; MCL 600.2192d(3) provides a medical malpractice plaintiff who has been denied access to their records an additional 91 days from the date of the filing of the complaint to file an affidavit of merit; MCL 600.2192d(3) does not accommodate for time the parties spend litigating its application, and there is no tolling provision regarding the 91-day grace period; a medical malpractice plaintiff must file an affidavit

> within 91 days of filing the complaint—regardless of whether there is a challenge pending under MCL 600.2912d(3) that contends the defendant has failed to provide the plaintiff with access to the plaintiff's medical records.

Thomas C. Miller for Stephanie A. Zarzyski.

Hall Matson, PLC (by *Marcy R. Matson* and *Sandra J. Lake*) for Joanna L. Nigrelli and Munson Healthcare Grayling, Inc.

Johnson & Wyngaarden, PC (by *Robert M. Wyngaarden* and *Michael L. Van Erp*) for Joanna L. Nigrelli, Munson Healthcare Grayling, Inc., and Munson Healthcare Grayling.

Foley, Baron, Metzger & Juip, PLLC (by *Brian J. Richtarcik*, *Enrico G. Tucciarone*, and *Sarah T. Berard*) for Shaun C. Ramsey and Emergency Physicians Medical Group, PC.

Plunkett Cooney (by *Robert G. Kamenec*) for StatRad Transcription and Medical Editing Services, Inc.

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

PER CURIAM. In this medical malpractice action, plaintiff appeals by right the trial court's orders granting summary disposition in favor of defendants on the basis that the action was time-barred after plaintiff failed to file an affidavit of merit (AOM) with her complaint. Plaintiff argued that she was entitled to file an AOM within 91 days of filing her complaint under MCL 600.2912d(3) because defendants, in violation of MCL 600.2912b(5), had failed to allow plaintiff access to all medical records related to her malpractice claims within 56 days after defendants received the notice of intent (NOI). The trial court concluded that defendants

had allowed timely access to plaintiff's medical records by providing the paperwork and information necessary for plaintiff to acquire the records, but plaintiff failed to follow through and take all the steps required to obtain the medical records. Plaintiff challenges that ruling on appeal. We hold that because plaintiff did not file an AOM within 91 days of filing her complaint, summary dismissal is the proper result regardless of whether defendants violated MCL 600.2912b(5). Accordingly, although our underlying reasoning differs from that proffered by the trial court, we affirm the orders granting summary disposition to defendants under MCR 2.116(C)(7) because the action was barred by the statute of limitations.

Plaintiff's medical malpractice action concerned medical treatment provided to her by defendants on several visits that spanned a few years. The gist of the malpractice case was that defendants' negligence and misdiagnoses resulted in pancreatic injury and dysfunction. In February 2019, plaintiff mailed an NOI to defendants, and defendants' agents responded by providing release authorizations and record-request forms in late February. Ultimately, plaintiff received some records but complained about not receiving billing and payment records, while defendants maintained that plaintiff did not complete or fully complete the paperwork necessary to obtain all her records. On August 15, 2019, plaintiff filed the medical malpractice lawsuit against defendants. The complaint contained the following allegation:

> Defendants did not provide ***"all medical records related to the claim that are in control of the health professional or health facility"*** (emphasis added) within 56 days from their receipt of the notice of intent as required by MCL 600.2912b(5). As a result, Plaintiff is not required to file an affidavit of merit with her Complaint.

> Instead, pursuant to MCL 600.2912d(3), Plaintiff is given an additional 9l days in which to file appropriate affidavits of merit.

We note that MCL 600.2912b(5), more fully stated, provides that "within 56 days after receipt of [the NOI] . . . , the health professional or health facility shall allow the claimant access to all medical records related to the claim that are in the control of the health professional or health facility." And MCL 600.2912d(3) provides that "[i]f the defendant in an action alleging medical malpractice fails to allow access to medical records within the time period set forth in section 2912b([5]), the [AOM] . . . may be filed within 91 days after the filing of the complaint."

Defendants moved for summary disposition, arguing that plaintiff's action was time-barred. They maintained that the filing of the complaint did not toll the running of the statutory limitations period because plaintiff failed to additionally file an AOM with the complaint. Defendants contended that the limitations period had elapsed and that plaintiff was not entitled to the 91-day grace period in MCL 600.2912d(3) because they had allowed the claimant—plaintiff—timely access to all her medical records for purposes of MCL 600.2912b(5). Defendants asserted that it was not their fault that plaintiff failed to take the steps necessary to obtain the records after defendants provided her with the appropriate preparatory paperwork, including written authorizations to release her medical records. Plaintiff countered that those written authorizations to release the medical records were not needed and that defendants were affirmatively obligated under MCL 600.2912b(5) to produce the records upon receipt of the NOI. Thus, the parties' arguments at the summary-disposition hearing focused on the

obligations that arise from the language in MCL 600.2912b(5). The trial court agreed with defendants' position and summarily dismissed the lawsuit, concluding that the statutory limitations period had expired.

On appeal, plaintiff argues that the trial court erred by finding, for purposes of MCL 600.2912b(5), that defendants had provided plaintiff with timely access to all medical records related to her claim that were in defendants' control. "The question whether a cause of action is barred by the applicable statute of limitations is one of law, which this Court reviews de novo." *Seyburn, Kahn, Ginn, Bess, Deitch & Serlin, PC v Bakshi*, 483 Mich 345, 354; 771 NW2d 411 (2009) (citation omitted). This Court also reviews de novo a trial court's ruling on a motion for summary disposition. *Id*. Summary dismissal is appropriate under MCR 2.116(C)(7) when an action is barred because of the "statute of limitations." In *RDM Holdings, Ltd v Continental Plastics Co*, 281 Mich App 678, 687; 762 NW2d 529 (2008), this Court recited the principles pertaining to a motion for summary disposition brought pursuant to MCR 2.116(C)(7):

> Under MCR 2.116(C)(7) . . . , this Court must consider not only the pleadings, but also any affidavits, depositions, admissions, or other documentary evidence filed or submitted by the parties. The contents of the complaint must be accepted as true unless contradicted by the documentary evidence. This Court must consider the documentary evidence in a light most favorable to the nonmoving party. If there is no factual dispute, whether a plaintiff's claim is barred under a principle set forth in MCR 2.116(C)(7) is a question of law for the court to decide. If a factual dispute exists, however, summary disposition is not appropriate. [Citations omitted.]

In *Slis v Michigan*, 332 Mich App 312, 335-336; 956 NW2d 569 (2020), this Court recited the well-established principles of statutory construction, observing:

> 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.]

"To commence a medical malpractice action, a plaintiff must file both a complaint and an [AOM]." *Young v Sellers*, 254 Mich App 447, 451; 657 NW2d 555 (2003); see MCL 600.2912d(1). The filing of a complaint and an AOM "toll[s] the period of limitations until the validity of the affidavit is successfully challenged in subsequent judicial proceedings." *Kirkaldy v Rim*, 478 Mich 581, 586; 734 NW2d 201 (2007) (quotation marks and citation omitted). But if a plaintiff in a medical malpractice action "wholly omits" to file an AOM under MCL 600.2912d(1), "the filing of the complaint is ineffective, and does not work a tolling of the applicable period of

limitation." *Scarsella v Pollak*, 461 Mich 547, 553; 607 NW2d 711 (2000).

Assuming, without deciding, that defendants failed to allow plaintiff access to all medical records related to her claim that were in their control within 56 days after receiving the NOI under MCL 600.2912b(5), plaintiff nevertheless failed to file an AOM within 91 days of the complaint for purposes of MCL 600.2912d(3). Again, MCL 600.2912d(3) provides that "[i]f the defendant in an action alleging medical malpractice fails to allow access to medical records within the time period set forth in section 2912b([5]), the [AOM] . . . may be filed within 91 days after the filing of the complaint." This language is plain and unambiguous. We fully recognize that the parties were litigating the issue whether MCL 600.2912d(3) was implicated in this case, but the clock began running on the 91-day period when the complaint was filed on August 15, 2019. On the day that the court ruled from the bench granting the motions for summary disposition, November 4, 2019, the 91 days had not yet passed, but the period had expired by the time the orders granting summary disposition were entered and reconsideration was denied. Had the court ruled in plaintiff's favor on November 4, 2019, it would have been necessary for plaintiff to file an AOM in very short fashion. Because the orders granting summary disposition had not yet been entered and an unsuccessful motion for reconsideration was forthcoming, the litigation was not over at that point and plaintiff still had the opportunity to file an AOM.

MCL 600.2912d(3) simply does not accommodate for time spent litigating its application; there is no tolling language with respect to the 91-day period.[1] We also

[1] We do note that "[u]pon motion of a party for good cause shown, the court in which the complaint is filed may grant the plaintiff or, if the

note that a medical malpractice plaintiff needs to file an AOM within 91 days—even if a defendant conclusively did not allow any access to medical records, subject, perhaps, to MCL 600.2912d(2). It appears that the Legislature may not have fully contemplated the possible problems that might arise under MCL 600.2912d(3).[2] Although our ruling may seem unfair, we are merely applying the plain language of the statute, and it is up to the Legislature to potentially amend the statutory language to address the circumstances presented in this case and other scenarios. As the statute currently provides, a plaintiff would be wise to procure an AOM, if feasible, during the period in which the parties are litigating whether MCL 600.2912d(3) is implicated. Indeed, when plaintiff filed her complaint and took the position that she was entitled to an additional 91 days to file an AOM because defendants had failed to comply with MCL 600.2912b(5), it was incumbent on her to file an AOM within 91 days, and she proceeded at her own peril in not doing so.[3]

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plaintiff is represented by an attorney, the plaintiff's attorney an additional 28 days in which to file the" AOM. MCL 600.2912d(2). Plaintiff did not invoke this provision. We take no position regarding whether the 28-day, good-cause provision in MCL 600.2912d(2) is available to extend the 91-day period in MCL 600.2912d(3).

[2] We surmise that the Legislature may have concluded that a 91-day period following the filing of a complaint would suffice to have the court address a failure to allow access to medical records, to have the court order access, to have the defendant provide access, and then to have the plaintiff procure an AOM. In this case, plaintiff did file a motion to compel production, but it was not filed until two months after the complaint was filed.

[3] This Court addressed similar circumstances and reached the same conclusion in *Raphael v Bennett*, unpublished per curiam opinion of the Court of Appeals, issued November 5, 2020 (Docket No. 349232), pp 4-5, a case that came from the same trial court as our case. Our Supreme

Plaintiff did not file an AOM consistent with MCL 600.2912d(1) (with complaint) or (3) (within 91 days of complaint). Therefore, plaintiff never properly commenced her medical malpractice action, and the filing of her complaint did not toll the running of the statutory limitations period. See *Scarsella*, 461 Mich at 553. Accordingly, summary disposition was appropriate under MCR 2.116(C)(7). And because the limitations period had expired, the trial court was required to dismiss plaintiff's complaint with prejudice. See *Ligons v Crittenton Hosp*, 490 Mich 61, 73; 803 NW2d 271 (2011). In sum, we affirm the orders granting summary disposition in favor of defendants under MCR 2.116(C)(7) because plaintiff's action was barred by the statute of limitations.

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

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

Court recently denied leave in the case on April 27, 2021. *Raphael v Bennett*, 507 Mich 932 (2021).