# STATE OF MICHIGAN

# COURT OF APPEALS

TONETTA WHITE-ATLEY, as Personal Representative of the ESTATE OF MAURICE WHITE,

Plaintiff-Appellant,

v

DANIEL CORNELIUS BULLOCK and CITY OF DETROIT,

Defendants-Appellees,

UNPUBLISHED
January 11, 2024

No. 364317
Wayne Circuit Court
LC No. 21-011406-NI

Before: K. F. KELLY, P.J., and JANSEN and HOOD, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition to defendant, the City of Detroit (the City), and the order dismissing plaintiff's claims against the City with prejudice. We conclude that the compulsory joinder rule, MCR 2.203(A), did not bar plaintiff's tort claims against the City, and thus, the trial court erred in dismissing them on that basis. We reverse and remand for further proceedings.

## I. PERTINENT FACTS

This case arose out of a motor-vehicle accident involving a city bus on September 6, 2018, driven by a city employee, defendant Daniel Bullock. Maurice White was a passenger, and allegedly sustained serious injuries. He sought personal protection insurance (PIP) benefits for his accident-related injuries from the City, the responsible no-fault insurer. After initially paying White's PIP benefits, the City denied further payment, prompting White to commence action

against the City on September 4, 2019, to recover PIP benefits. White died during the pendency of this PIP action.[1]

On September 2, 2021, while White's lawsuit for PIP benefits was pending, and almost three years after the accident, plaintiff, on behalf of White's estate, commenced the instant tort action against Bullock and the City, alleging that Bullock's negligent operation of the bus resulted in White's injuries, and that the City was legally responsible as the owner of the bus and as Bullock's employer under theories of owner's liability, negligent entrustment, and respondeat superior. Plaintiff alleged that, as a result of the accident, White suffered "severe, serious, painful, permanent, and disabling injuries" and "serious impairments of important body function(s)."

In lieu of filing an answer, the City moved for summary disposition under MCR 2.116(C)(7) and (C)(10), arguing that, under MCR 2.203(A), plaintiff was obliged to join the tort claims with the PIP claim asserted in White's earlier lawsuit because both arose out of one transaction or occurrence—the bus accident. Alternatively, the City argued that plaintiff's tort claims were barred under the equitable doctrine of laches. According to the City, the almost three-year delay in asserting the tort claims prejudiced its ability to defend those claims because White was now deceased.

Plaintiff objected, arguing that there was no legal authority to support the City's claim that a third-party tort claim and a first-party PIP claim were subject to mandatory joinder under MCR 2.203(A), and emphasized that plaintiff filed the tort claims within the applicable three-year limitations period.

The trial court, without conducting a hearing, granted summary disposition to the City, citing MCR 2.203(A). Plaintiff now appeals.[2]

## II. STANDARDS OF REVIEW

The review of a trial court's decision on a motion for summary disposition is de novo. *Laster v Henry Ford Health Sys*, 316 Mich App 726, 733; 892 NW2d 442 (2016). Summary disposition is appropriate under MCR 2.116(C)(10) when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law."

> When reviewing a motion for summary disposition under MCR 2.116(C)(10), this Court considers the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion to determine whether a genuine issue of material fact exists. The motion

[1] The record does not indicate the exact date of White's death, but plaintiff was appointed personal representative of his estate on March 12, 2021. It is not alleged that White's death was the result of his accident-related injuries.

[2] The trial court's subsequent entry of a default judgment in plaintiff's favor against Bullock was the final order closing the case and permitting plaintiff to appeal by right the court's earlier orders granting summary disposition to the City. See MCR 7.203(A)(1).

> is properly granted if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. [*Laster*, 316 Mich App at 734 (quotation marks and citations omitted).]

Summary disposition is appropriate under MCR 2.116(C)(7) when relief is appropriate because of "immunity granted by law." Similarly, "[w]hen reviewing a motion for summary disposition under MCR 2.116(C)(7), this Court considers all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them." *Adam v Bell*, 311 Mich App 528, 530; 879 NW2d 879 (2015) (quotation marks and citation omitted).

Whether plaintiff's tort claims are barred under the compulsory joinder rule presents a question of law, which this Court reviews de novo. *Id.* Likewise, this Court reviews "de novo the proper interpretation and application of a court rule." *Garrett v Washington*, 314 Mich App 436, 438, 450; 886 NW2d 762 (2016).

## III. ANALYSIS

MCR 2.203(A), provides as follows:

> In a pleading that states a claim against an opposing party, the pleader must join every claim that the pleader has against that opposing party at the time of serving the pleading, if it arises out of the transaction or occurrence that is the subject matter of the action and does not require for its adjudication the presence of third parties over whom the court cannot acquire jurisdiction.

"In determining whether two claims arise out of the same transaction or occurrence for purposes of MCR 2.203(A), res judicata principles should be applied." *Garrett*, 314 Mich App at 451. As this Court explained in *Adam*, 311 Mich App at 532-533,

> Michigan's broad interpretation of the third element of the res judicata doctrine has been referred to as a "same transaction test," as distinguished from a "same evidence test." Under the same-evidence test, the issue is whether the same evidence is required to prove the claimed theory of relief. Under the same-transaction test, the question is more pragmatic, with claims viewed in factual terms regardless of the number of variant legal theories that might support relief. The fact that differing claims may require different evidence might be relevant to deciding if the claims arise from the same transaction, but it is not dispositive. . . . Whether a factual grouping constitutes a "transaction" for purposes of res judicata is to be determined pragmatically, by considering whether the facts are related in *time, space, origin or motivation*, and whether they form a convenient trial unit. [Quotation marks, citations, and alterations omitted; emphasis in original.]

Plaintiff relies on *Adam* to support her argument that, despite arising from the same accident, the PIP and tort claims were not subject to mandatory joinder under MCR 2.203(A). In

*Adam*, the plaintiff sustained injuries in an accident that occurred in July 2011. *Adam*, 311 Mich App at 530. Eight months later, the plaintiff filed a first-party lawsuit against her no-fault insurer to recover PIP benefits for her accident-related injuries. *Id*. In January 2013, after the plaintiff's PIP claim settled, she filed a third-party lawsuit alleging negligence against the driver, statutory owner's liability against the owner of the vehicle involved, and breach of contract against her no-fault insurer for uninsured motorist (UM) benefits.[3] *Id*. at 530-531, 533-534. The insurer moved for summary disposition on the basis that the UM claim was barred by res judicata because it could have been brought in the earlier action for PIP benefits. *Id*. at 531. The trial court agreed and granted the motion. *Id*. This Court reversed, concluding as follows:

> [W]e conclude that although plaintiff's PIP action and her tort and contract action both arose from the same automobile accident, the actions also have significant differences in the motivation and in the timing of asserting the claims, and they would not have formed a convenient trial unit. Further, applying res judicata to the facts of this case would not promote fairness and would be inconsistent with the Legislature's intent expressed through the no-fault act. The no-fault act provides for the swift payment of no-fault PIP benefits. On the other hand, it severely restricts the right to bring third-party tort claims that would form the basis for a UM contract claim. [*Id.* at 533.]

The *Adam* panel expressly adopted the reasoning of *Miles v State Farm Mut Auto Ins Co*, unpublished per curiam opinion of the Court of Appeals, issued May 6, 2014 (Docket No. 311699), quoting it at length:

> It is plain that both Miles' claim for PIP benefits and his claim for uninsured motorist benefits arise from the same accident and involve the same injuries and insurance policy. For that reason, there is a substantial overlap between the facts involved with both claims. But that being said, there are also significant differences between the two types of claims.
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> A person injured in an accident arising from the ownership, operation, or maintenance of a motor vehicle as a motor vehicle is immediately entitled to PIP benefits without the need to prove fault. See MCL 500.3105(2); MCL 500.3107. The PIP benefits are

[3] "Uninsured motorist benefits are distinct from personal protection insurance benefits." *Citizens Ins Co of America v Buck*, 216 Mich App 217, 224; 548 NW2d 680 (1996). "Uninsured motorist coverage is not required by statute but may be purchased to provide the insured with a source of recovery for excess economic loss and noneconomic loss if the tortfeasor is uninsured." *Id*. "[U]ninsured motorists are subject to tort liability for noneconomic loss only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement"—the threshold injury required under MCL 500.3135(1) to subject a person to tort liability for noneconomic loss resulting from the ownership, maintenance, or use of a motor vehicle. *Auto Club Ins Ass'n v Hill*, 431 Mich 449, 451, 466; 430 NW2d 636 (1988).

designed to ensure that the injured person receives timely payment of benefits so that he or she may be properly cared for during recovery. Moreover, the injured person has a limited period within which to sue an insurer for wrongfully refusing to pay PIP benefits. See MCL 500.3145(1). Because an injured person is immediately entitled to PIP benefits without regard to fault, requires those benefits for his or her immediate needs, and may lose the benefits if he or she does not timely sue to recover when those benefits are wrongfully withheld, the injured person has a strong incentive to bring PIP claims immediately after an insurer denies the injured person's claim for PIP benefits.

In contrast to a claim for PIP benefits, in order to establish his or her right to uninsured motorist benefits, an injured person must—as provided in the insurance agreement—be able to prove fault: he or she must be able to establish that the uninsured motorist caused his or her injuries and would be liable in tort for the resulting damages. Significantly, this means that the injured person must plead and be able to prove that he or she suffered a threshold injury. Except in accidents involving death or permanent serious disfigurement, an injured person will therefore be required to show that his or her injuries impaired an important body function that affects the injured person's general ability to lead his or her normal life in order to meet the threshold. MCL 500.3135(1) and (5). This in turn will often require proof of the nature and extent of the injured person's injuries, the injured person's prognosis over time, and proof that the injuries have had an adverse effect on the injured person's ability to lead his or her normal life. Thus, while an injured person will likely have all the facts necessary to make a meaningful decision to pursue a PIP claim within a relatively short time after an accident, the same cannot be said for the injured person's ability to pursue a claim for uninsured motorist benefits. Finally, an injured person's claim for uninsured motorist benefits involves compensation for past and future pain and suffering and other economic and noneconomic losses rather than compensation for immediate expenses related to the injured person's care and recovery. Consequently, a claim for PIP benefits differs fundamentally from a claim for uninsured motorist benefits both in the nature of the proofs and the motivation for the claim.

The record shows that within a short time of [the] accident State Farm took the position that [Miles'] medical ailments were not causally related to the accident at issue and denied his request for PIP benefits on that basis. Because Miles could assert a PIP claim without the need to prove fault and without having to establish the full extent of his injuries, he could assert his PIP claim within a short time of State Farm's decision to deny his claims. Indeed,

> because he required those benefits for his care and recovery, he had a powerful motivation to bring the claims as soon as practical. Further, in order to establish those claims, he only had to present evidence that his claims arose from the accident and met the other criteria provided under MCL 500.3107.
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> Miles, however, could not establish his claim for uninsured motorist benefits without being able to prove that [the driver of the vehicle that struck him] would be liable in tort for his injuries and that he met the serious impairment threshold. Because his claim for uninsured motorist benefits required evidence to establish the nature and extent of his injuries and proof that the injury affected his ability to lead his normal life and the original dispute involved only whether Miles' injuries were causally related to the accident at issue, we conclude that it was not practical for Miles to bring his claim for uninsured motorist benefits in his original suit.
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> Because Miles' claim for uninsured motorist benefits was not one that could have been litigated during the time of his original lawsuit, his failure to bring his claim for uninsured motorist benefits did not implicate the doctrine of res judicata.

[*Adam*, 311 Mich App at 534-536 (alterations in original; case citations omitted), quoting *Miles*, unpub op at 4-5.]

The *Adam* Court further observed that "PIP claims have a base one-year limitations period," which has been found to be unreasonable in claims for UM benefits, *Adam*, 311 Mich App at 536; "a UM claim may not yet be ripe for litigation until after a PIP claim must be filed," *id*. at 537. "Consequently, applying res judicata to essentially require mandatory joinder of a mere potential UM claim with a PIP claim would be inconsistent with the very divergent statutory treatment of these two very different types of no-fault claims." *Id*. at 537-538. This Court thus concluded that res judicata did not bar the plaintiff's UM claim. *Id*. at 533, 538.

Later, in *Garrett*, this Court, deferring to *Adam*, held that a plaintiff's claims for PIP and UM benefits do not arise from the same transaction for res judicata purposes, and thus are not subject to mandatory joinder under MCR 2.203(A). *Garrett*, 314 Mich App at 451-452. As noted by the City, the panel in *Garrett* expressed disagreement with *Adam*'s holding, indicating that, if not bound to follow *Adam*, the panel would conclude that such claims arose from the same transaction and thus had to be joined in one action. *Garrett*, 314 Mich App at 440, 446-447, 451-452. This Court, however, declined to convene a special panel under MCR 7.215(J)(3) to resolve the conflict between *Garrett* and *Adam*. *Garrett v Washington*, unpublished order of the Court of Appeals, entered March 14, 2016 (Docket No. 323705). Thus, *Adam* and *Garrett* remain good law.

For the same reasons identified in *Adam* and applied in *Garrett*, we hold that the PIP and tort claims at issue here are fundamentally different in the nature of proofs, and the timing and

motivation, involved in asserting the claims. Thus, plaintiff's PIP and tort claims were not subject to mandatory joinder under MCR 2.203(A).

White's first lawsuit was a claim for PIP benefits against the responsible no-fault insurer, here, the City. Under the no-fault act, a person injured in an accident "arising out of the ownership, operation, maintenance, or use of a motor vehicle" is entitled to PIP benefits from the responsible no-fault insurer. MCL 500.3105(1). PIP benefits are due without regard to fault. MCL 500.3105(2); *Travelers Ins v U-Haul of Mich, Inc*, 235 Mich App 273, 283; 597 NW2d 235 (1999). Damages recoverable in a PIP claim are purely economic. *Id*. at 282. See also MCL 500.3107; *Johnson v Recca*, 492 Mich 169, 173; 821 NW2d 520 (2012) ("PIP benefits are payable for four general categories of expenses and losses: survivor's loss, allowable expenses, work loss, and replacement services."). Further, an injured person generally has only one year after the accident to bring a PIP claim. MCL 500.3145(1).

White's PIP claim thus necessarily centered around the City's obligation, as the responsible no-fault insurer, to pay PIP benefits without regard to fault. Like the injured person in *Adam*, White likely had all the facts necessary to bring his PIP claim shortly after the City refused to pay his benefits. And, he was strongly motivated to do so as soon as practical after that denial, because he had an immediate need for the benefits to treat his accident-related injuries, and limited time to recover them. See *Adam*, 311 Mich App at 533-534.

Almost two years after White filed his PIP action, plaintiff filed the instant lawsuit asserting tort claims against Bullock and the City. Again, there is no dispute that plaintiff's tort claims and White's PIP action arose out of the same automobile accident and resulting injuries. Specifically, plaintiff alleged that the City was liable in tort under MCL 257.401(1), which imposes liability on the vehicle owner for injuries caused by the negligent operation of the vehicle if driven with the owner's permission. *Travelers Ins*, 235 Mich App at 281. Relatedly, plaintiff also alleged negligent entrustment, which "imposes liability on the basis of a defendant's negligence in permitting the use of a chattel by a person who is likely to handle it in a manner that will cause harm to others." *Bennett v Russell*, 322 Mich App 638, 644; 913 NW2d 364 (2018). Plaintiff also alleged a claim under the doctrine of respondeat superior, which imposes tort liability on an employer "for the negligent acts of its employee if the employee was acting within the scope of his employment." *Laster*, 316 Mich App at 734. Further, plaintiff pleaded in avoidance of governmental immunity under the motor-vehicle exception, MCL 691.1405, which excepts from immunity liability for bodily injury "resulting from a governmental employee's negligent operation of a government-owned motor vehicle." *Wesche v Mecosta Co Rd Comm*, 480 Mich 75, 84; 746 NW2d 847 (2008).

Thus, in contrast to White's earlier-filed PIP action, which centered around the City's immediate obligation to pay PIP benefits, plaintiff's tort claims involved Bullock's allegedly negligent operation of the bus, causation, and the City's vicarious liability in tort for White's injuries.[4] Significantly, like the claim for UM benefits at issue in *Adam*, plaintiff's tort claims

[4] "In order to establish a prima facie negligence claim, a plaintiff must prove four elements: (1) duty, (2) breach of the duty, (3) causation, and (4) damages." *Seldon v Suburban Mobility Auth*

were based on fault, which, if proved, would entitle plaintiff to compensation for pain and suffering and other noneconomic losses, in contrast to compensation for immediate expenses related to the injured person's care and recovery.[5] *Adam*, 311 Mich App at 535. Further, unlike the one-year limitations period in which to file a PIP claim, MCL 500.3145(1), the limitations period for a tort claim is three years after the time of injury, see MCL 600.5805(2). Again, "a UM claim may not yet be ripe for litigation until after a PIP claim must be filed." *Adam*, 311 Mich App at 537. This reasoning equally applies to the PIP and tort claims at issue in the present case.

Further, unlike for a PIP claim, a third-party tort claim requires proof of a threshold injury. *Adam*, 311 Mich App at 535; MCL 500.3135(1) ("A person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement."). Because plaintiff's tort claims against the City arose out of the ownership and use of a motor vehicle, plaintiff must satisfy § 3135(5)'s threshold requirement.[6] Plaintiff did not plead that White died as a result of the accident, but alleged that he suffered serious, permanent, and disabling injuries and serious impairments of body function. Plaintiff must therefore prove not only that White suffered injuries in a motor-vehicle accident, but that his injuries impaired an

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*for Regional Transp*, 297 Mich App 427, 433; 824 NW2d 318 (2012). The operative facts pertinent to plaintiff's tort claims thus pertain to whether Bullock negligently operated the bus, and, if so, whether his negligence caused White's injuries. Also whether the City owned the bus and knew or should have known that Bullock was operating it, whether the City entrusted Bullock with the bus with knowledge that he was not a reasonably prudent driver, and whether Bullock was an agent of the City operating in the course of his employment. These operative facts relating to tort liability differ significantly from those supporting White's PIP claim, which involved the City's responsibility to pay White's PIP benefits without regard to fault, i.e., whether White suffered injuries in the accident necessitating medical treatment and care which the City, as the responsible PIP insurer, refused to pay.

[5] Consistent with this, plaintiff's tort action alleged that White suffered "severe, serious, painful, permanent, and disabling injuries," along with embarrassment, humiliation, mental anguish, depression, gross anxiety, and inconvenience," plus "diminishment of his earning capacity," and that White's "state of pain, stress, and/or discomfort" prevented him from engaging in his usual activities of life. In contrast, White's PIP action alleged that his accident-related injuries entitled him to benefits for necessary medical treatment, attendant care, wage loss, replacement services, medical transportation, and other allowable expenses under the no-fault act.

[6] When a governmental entity is being sued for noneconomic damages under the motor-vehicle exception to the governmental tort liability act, MCL 691.1401 *et seq.*, the plaintiff must make a threshold showing of a serious impairment of body function under MCL 500.3135(5). *Hardy v Oakland Co*, 461 Mich 561, 562-566; 607 NW2d 718 (2000). See also *Hannay v Dep't of Transp*, 497 Mich 45, 51; 860 NW2d 67 (2014) ("a plaintiff may bring a third-party tort action for economic damages, such as work-loss damages, and noneconomic damages, such as pain and suffering or emotional distress damages, against a governmental entity if the requirements under MCL 500.3135 have been met").

important body function that affected his ability to lead his normal life, which requires proof of the nature and extent of his injuries, his prognosis over time, and that his injuries adversely effected his ability to lead his normal life. See *Adam*, 311 Mich App at 535.

In sum, although plaintiff's tort and PIP claims arose from the same accident, they were distinct in the nature of proofs, and the timing and motivation, involved in asserting the claims, and would not form a convenient trial unit.[7] *Garrett*, 314 Mich App at 442. Our Supreme Court, in a different context, has recognized that "no-fault claims and fault-based tort claims are qualitatively different." *Atkins v Suburban Mobility Auth for Regional Transp*, 492 Mich 707, 719; 822 NW2d 522 (2012).

> Most notably, an application for first-party insurance benefits *recoverable without regard to fault* cannot be equated with a claim for *at-fault* tort liability. First-party benefits under the no-fault act are creations of, and thus only available pursuant to, statutory law. And [the Suburban Mobility Authority for Regional Transportation]'s insurer is *required* to pay no-fault personal protection insurance benefits to individuals injured in accidents involving their buses. A person who proves his entitlement to first-party benefits has proved none of the elements that would entitle him to tort damages. A third-party tort claim is distinct from a claim for first-party benefits because a third-party tort claim involves an adversarial process in which the plaintiff must prove fault in order to recover. [*Id.* at 718, citing MCL 500.3105(1).]

For the same reasons that the injured persons' claims for PIP and UM benefits did not arise from the same transactions for purposes of mandatory joinder in *Adam*, 311 Mich App at 533, and *Garrett*, 314 Mich App at 451-452, we conclude that plaintiff's PIP and tort claims were not subject to mandatory joinder under MCR 2.203(A). Like the PIP and UM claims at issue in *Adam* and *Garrett*, requiring joinder of tort and PIP claims in one lawsuit "would not promote fairness and would be inconsistent with the Legislature's intent expressed through the no-fault act." *Adam*, 311 Mich App at 533. Thus, we agree with plaintiff that MCR 2.203(A) did not bar plaintiff's tort claims against the City, and thus that the trial court erred in dismissing them on that basis.

The City distinguishes *Adam* from the present case on the basis that White was deceased when plaintiff filed the tort action, and thus the City has "forever lost its opportunity to test those claims" through discovery on critical issues, such as whether the accident caused White's injuries, or whether White suffered the requisite serious impairment of body function. Without citing any authority, the City argues that this is "precisely the type of issue the compulsory joinder rule is

[7] We note that the City is a defendant in both actions, but in different capacities. In the PIP action, White sued the City as the no-fault insurer responsible for payment of his PIP benefits for his accident-related injuries. In the second action, plaintiff sued the City as liable in tort for White's injuries.

meant to prevent,"[8] and that "[h]ad Plaintiff timely joined its claims, Defendant would have had the opportunity to conduct complete discovery on all issues." We disagree.

The determinative question is whether the PIP and tort claims arose out of the same transaction, i.e., whether they are related in time, space, origin, and motivation, and would form a convenient trial unit. *Garrett*, 314 Mich App at 442, 451. Accordingly, that White died before he asserted his tort claims against the City, and any resulting evidentiary inconvenience, does not bear on whether his tort and PIP claims arose out of the same transaction for purposes of mandatory joinder. Rather, "[t]he primary reason for the rule against splitting a cause of action is that the defendant should not be unreasonably harassed by a multiplicity of suits." *Chatham-Trenary Land Co v Swigart*, 245 Mich 430, 435; 222 NW 749 (1929). That is, mandatory joinder "is intended to relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and encourage reliance on adjudication, that is, to foster the finality of litigation." *Garrett*, 314 Mich App at 441 (quotation marks and citation omitted). The City's argument invoking White's death as a reason for barring his tort claims is better framed as one of laches. See *Yankee Springs Twp v Fox*, 264 Mich App 604, 612; 692 NW2d 728 (2004) ("The application of the doctrine of laches requires the passage of time combined with a change in condition that would make it inequitable to enforce the claim against the defendant.").

The trial court did not reach the City's alternative argument that plaintiff's tort claims were barred under the doctrine of laches. However, that issue is better reserved for the trial court to decide in the first instance, and we thus decline to decide it here. See *Mapp v Progressive Ins Co*, ___ Mich App ___, ___; ___ NW2d ___ (2023) (Docket Nos. 359889; 360828); slip op at 15.

For these reasons, we reverse the trial court's order granting summary disposition to the City and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Kathleen Jansen
/s/ Noah P. Hood

[8] A party "may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give issues cursory treatment with little or no citation of supporting authority." *Houghton v Keller*, 256 Mich App 336, 339, 662 NW2d 854 (2003) (citations omitted).