MICHIGAN APPEALS REPORTS

CASES DECIDED

IN THE

MICHIGAN

COURT OF APPEALS

FROM

July 1, 2021 through September 2, 2021

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[1] The Michigan Court of Appeals mourns the loss of Judge Karen Fort Hood, who died on August 15, 2021.

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[1] To August 6, 2021.

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COURT OF APPEALS CASES

SCHAAF v FORBES (ON REMAND)

Docket No. 343630. Submitted June 12, 2019, at Lansing. Decided August 6, 2019. Vacated and remanded 506 Mich 948 (2020). Resubmitted November 24, 2020, at Lansing. Decided July 1, 2021, at 9:00 a.m. Leave to appeal denied 510 Mich 1101 (2022).

Cindy Schaaf, Collen M. Fryer, and Gwen Mason brought an action in the Antrim Circuit Court against Charlene Forbes, seeking to compel the sale of property on Torch Lake that was owned jointly by the parties. Leo Bussa and Mae Fitzpatrick previously owned the property as joint tenants with rights of survivorship; in 1998, they transferred the property to the Mae E. Fitzpatrick Trust and the Leo Bussa Trust, granting to each an undivided one-half interest as tenants in common. In 2004, Mae passed away and Leo became trustee of the Fitzpatrick Trust. In 2010, Leo transferred his undivided 50% interest in the property to the parties here as joint tenants with rights of survivorship. In 2011, acting as trustee of the Fitzpatrick Trust, Leo transferred to Leo (as trustee of that trust) and to Mason as joint tenants with rights of survivorship an undivided 50% interest in the Fitzpatrick Trust's undivided 50% interest in the property. Simultaneously, Leo transferred the remaining undivided 50% interest in the property that was held by the Fitzpatrick Trust to Leo (as trustee of the trust) and to Schaaf, Fryer, and Forbes as joint tenants with rights of survivorship. As successor trustee to the Fitzpatrick Trust, Mason thereafter drew up and filed deeds confirming the transfers from Leo to the remaindermen. The parties ultimately disagreed on whether to sell the property, and plaintiffs challenged the validity of the conveyances that purported to have the Fitzpatrick Trust as a joint tenant with rights of survivorship, arguing (1) that the conveyances transferring the property from the Fitzpatrick Trust to Mason and from the Fitzpatrick Trust to Schaaf, Fryer, and Forbes as joint tenants with full rights of survivorship did not effectively transfer the property with full rights of survivorships and (2) that as a result, the transfers were actually as tenants in common. The court, Kevin A. Elsenheimer, J., agreed with plaintiffs and vacated the conveyances on the basis that a trust could not hold property as a joint tenant with rights of survivorship. The court ordered that the interests in the

Fitzpatrick Trust's half of the property pass in accordance with the terms of the trust itself. As a result, one-half of the property was held by all the parties as tenants in common and the other one-half of the property was held by Schaff, Fryer, and Forbes as joint tenants with rights of survivorship. The court ordered (1) that the property be sold intact because it could not be equitably partitioned and (2) that defendant, as a cotenant, was jointly responsible for the costs and attorney fees associated with earlier litigation related to the property and for the real estate taxes and expenses associated with maintaining the property, the amount of which was to come from defendant's share of the sale proceeds. Defendant appealed. The Court of Appeals, TUKEL, P.J., and RIORDAN, J. (SERVITTO, J., dissenting), reversed in part, affirmed in part, vacated in part, and remanded in an unpublished per curiam opinion issued August 6, 2019 (Docket No. 343630). Specifically, the Court reversed the trial court's order regarding a trust's inability to hold and convey property as joint tenants with rights of survivorship; vacated the trial court's order regarding partition; affirmed plaintiffs' request for contribution; affirmed the trial court's receipt and consideration of more than 300 documents regarding the issue of contribution; and remanded for proceedings consistent with the opinion, including consideration of whether, in light of its holdings, the circuit court had subject-matter jurisdiction to hear the case. In lieu of granting plaintiffs' application for leave to appeal, the Supreme Court vacated the Court of Appeals' judgment and remanded for consideration, in the first instance, of whether the trial court had subject-matter jurisdiction of the case and, if necessary, consideration of the legal issues raised by defendant in her appeal. 506 Mich 948 (2020).

On remand, the Court of Appeals *held*:

1. Subject-matter jurisdiction is the right of the court to exercise judicial power over a class of cases, not the case before it, and to exercise the abstract power to try a case of the kind or character of the one pending. Under MCL 600.605, circuit courts are courts of general jurisdiction, which jurisdiction extends to all civil claims and remedies, except where exclusive jurisdiction is given in Michigan's 1963 Constitution or by statute to a different court. MCL 700.1302 limits the jurisdiction of circuit courts by vesting probate courts with jurisdiction over matters that relate to the settlement of a deceased individual's estate. The statute also vests the probate court with jurisdiction over proceedings that concern the validity, internal affairs, or settlement of a trust; the administration, distribution, modification, reformation, or termination of a trust; or the declaration of rights that involve a

trust, trustee, or trust beneficiary. Under MCL 700.1302(b), probate courts do not have exclusive jurisdiction over every cause of action that might incidentally touch on such issues as a settlor's intentions but, instead, the grant of jurisdiction is confined to proceedings that concern the distribution of a trust or the declaration of rights that involve a trust, trustee, or trust beneficiary. Relevant here, under MCL 700.1303, the probate court has concurrent jurisdiction with the circuit court over certain matters concerning the estate of a decedent, protected individual, ward, or trust. That includes concurrent jurisdiction to determine a property right or interest, to authorize partition of property, to hear and decide claims by or against a fiduciary or trustee for the return of property, and to hear and decide a contract proceeding or action by or against an estate, trust, or ward. This is because circuit courts have authority under MCL 600.2932(1) and MCL 600.3301 to hear and decide matters concerning real property; thus, the Legislature's grant of exclusive jurisdiction to probate courts over the administration and distribution of trusts does not extend to real-property claims. In this case, plaintiffs' complaint alleged claims to determine interests in real property, for sale of the property, and for defendant's monetary contribution to the ownership responsibilities of the property. Under these facts, the probate court did not have exclusive jurisdiction over plaintiff's claims, and the trial court did not err by exercising subject-matter jurisdiction over the case.

2. Michigan recognizes five common types of concurrent ownership relative to the ownership of real property: tenancies in common, joint tenancies, joint tenancies with full rights of survivorship, tenancies by entireties, and tenancies in partnership. With regard to a joint tenancy with full rights of survivorship, no act of a cotenant can defeat the other cotenant's right of survivorship in a joint tenancy with rights of survivorship. MCL 554.44 creates a presumption in favor of tenancies in common, and all presumptions are against estates in joint tenancy. The principal characteristic of the joint tenancy is the right of survivorship; parties holding property as joint tenants with full rights of survivorship hold joint life estates with contingent remainders. Thus, when one joint tenant dies, the surviving tenant or tenants take the whole estate. A "life estate" is an estate held only for the duration of a specified natural person's life. The key word is "life" in that the duration of a life estate is determined by a particular person's life. Thus, survivorship rights address the interest of natural persons, including the uncertainties normally attendant to natural persons' lifespans. In contrast, a trust is as an artificial

entity that does not have a lifetime; rather, as set forth in MCL 700.7410 through MCL 700.7414, a trust terminates only through specifically required actions of a nonbiological character. Although a trust cannot exist in perpetuity, it can exist far beyond the lifespan of a natural person. Because of that, a trust holding property as a joint tenant with rights of survivorship could potentially make the right of survivorship illusory. MCL 565.48 provides, in part, that a register of deeds shall not record a deed or other instrument in writing that purports to convey an interest in land by the survivor or survivors under a deed to joint tenants by the entirety, unless, for each joint tenant who is indicated in the deed or instrument to be deceased, a certified copy of the death certificate is shown to have been recorded in the register's office. This statute supports the conclusion that the literal, physical death of a joint tenant is the key to the law's purpose in having created a joint tenancy with rights of survivorship. Because a trust does not die but, instead, terminates and because MCL 554.44 creates a presumption in favor of tenants in common, the definition of death cannot be conflated beyond its practical meaning as applied to a joint tenancy with rights of survivorship. Thus, common sense and relevant law establish that a trust may not hold real property as a joint tenant with rights of survivorship. In this case, the trial court correctly determined, as a matter of law, that a trust may not hold real property as a joint tenant with rights of survivorship.

3. Under MCL 600.3301, a court must exercise its equitable powers when deciding whether or how to partition real property. In tandem with that statute, MCR 3.401(A)(1) provides that in a partition action, a court must determine whether the premises can be partitioned without great prejudice to the parties. If it cannot, MCR 3.401(B) allows a court to order the premises sold in lieu of partition. In this case, the trial court concluded that given the existence of the survivorship rights resulting from the valid conveyance of the property from the Bussa Trust, and the property's reliance on an easement for access to and from the nearest public road that could not be further burdened, partition in kind would unduly prejudice plaintiffs. The trial court did not clearly err by making that determination.

4. Because defendant failed to address the trial court's reasoned ruling on the issue, defendant abandoned her claim that the trial court abused its discretion by relying on 305 pages of documents relevant to the issue of contribution that were untimely submitted to the court.

5. The general rule of contribution is that one who is compelled to pay or satisfy the whole or to bear more than their

definite fractional share of the common burden or obligation, upon which several persons are equally liable or for which they are bound to discharge, is entitled to contribution against the others to obtain payment of their respective shares. The doctrine of contribution between cotenants is based upon purely equitable considerations; it is premised on the simple proposition that equality is equity. It is not, however, enforced unless reason and justice require that each of the cotenants contribute their proportionate share of the common burden. In this case, the trial court did not abuse its discretion by ordering defendant to contribute to the costs and attorney fees related to earlier litigation involving the property, to pay the expenses incurred to maintain the property, and to pay for the real estate taxes.

Affirmed.

RIORDAN, J., concurring in part and dissenting in part, agreed with the majority that the trial court had subject-matter jurisdiction over the case, that the court did not abuse its discretion by considering the relevant documents submitted by defendant on the issue of contribution, and that the court did not err by ordering defendant to pay contribution to plaintiffs. Judge RIORDAN wrote separately because he disagreed with the conclusion that a trust cannot hold title to real property as a joint tenant with rights of survivorship. Under the common law, because a corporation can never die, which is contrary to the right of survival of a joint tenancy, a corporation may not hold title as a joint tenant. The basis for the common-law rule precluding corporations from holding title as a joint tenant did not apply to trusts because a trust could not exist in perpetuity under the common law. Common law and statutory law supported the conclusion that a trust may hold title as a joint tenant. Specifically, under the common law, a trustee may hold title as a joint tenant. It follows that if a trustee may hold title as a joint tenant that the trust itself may be deemed as holding title as a joint tenant to the same extent. Regardless, even if that were not true under the common law, any common-law rule forbidding a trust from holding title to real property as a joint tenant with rights of survivorship was superseded by the Michigan Trust Code, MCL 700.7101 *et seq*. The Michigan Trust Code comprehensively addresses matters related to trusts and supersedes and replaces the common law when dealing with trusts. As relevant here, the Michigan Trust Code does not preclude a trust from holding title to real property in the same manner as a natural person. Moreover, the code includes several provisions conferring broad powers upon trusts and trustees to hold, manage, and distribute

trust property, further evidencing the Legislature's intent to supersede and replace any common-law rule that may have prohibited a trust from holding title as a joint tenant. Judge RIORDAN would have reversed the trial court's ruling that a trust cannot hold property as a joint tenant with rights of survivorship as well as its corresponding partition ruling.

TRUSTS — OWNERSHIP OF REAL PROPERTY — JOINT TENANCY WITH RIGHTS OF SURVIVORSHIP NOT ALLOWED.

A trust may not hold real property as a joint tenant with rights of survivorship.

Alward Fisher Rice Rowe & Graf, PLC (by *Thomas R. Alward* and *Jennifer L. Whitten*) for plaintiffs.

BEK Law, PLC (by *Brace Kern*) for defendant.

ON REMAND

Before: TUKEL, P.J., and SERVITTO and RIORDAN, JJ.

SERVITTO, J. This case is again before us following an order by our Supreme Court which vacated our judgment in *Schaaf v Forbes*, unpublished opinion of the Court of Appeals, issued August, 6, 2019 (Docket No. 343630) (*Schaaf I*), and remanded the case with the directive that we first consider defendant's challenge regarding the circuit court's subject-matter jurisdiction before we consider any remaining legal issues, *Schaaf v Forbes*, 506 Mich 948 (2020) (*Schaaf II*). We now hold that the circuit court had subject-matter jurisdiction to hear and decide this case, and on the merits, we conclude that the circuit court properly held as a matter of law that a trust cannot hold and convey real property as a joint tenant with rights of survivorship. We also reject defendant's arguments that the circuit court abused its discretion by receiving and considering more than 300 pages of documentation that plaintiffs offered regarding the issue of contribu-

tion as the case proceeded and conclude that the trial court properly ordered defendant to contribute to prior easement litigation expenses concerning the property. Accordingly, because we find no error in any of the trial court's rulings, we affirm its judgment.

I. FACTS & PROCEDURAL HISTORY

We previously summarized the pertinent facts as follows:

> Mae Fitzpatrick and Leo Bussa, mother and son, jointly owned property on the west shoreline of Torch Lake, located in Milton Township, Michigan, and the associated littoral rights. In the 1980s and 1990s, a portion of the waterfront property was divided into seven separate parcels for residential development. Access to the seven lots was through the subject parcel by an easement on a private road, Bussa Lane. After the division, the remaining Bussa/Fitzpatrick property was an 80-acre northern parcel, which was sold in 2015, and a 60-acre southern parcel. Bussa Lane provided the only means of access to the latter parcel as well.
>
> Fitzpatrick died in 2004, leaving Bussa as the trustee of the Fitzpatrick Trust. Bussa endeavored to restructure ownership of the subject 60-acre parcel by executing five conveyances. First, he, as trustee of the Bussa Trust, conveyed to himself, as an individual, the trust's half interest. He then conveyed that interest to himself, defendant, and plaintiffs Schaaf and Fryer, "as Joint Tenants with Rights of Survivorship," while retaining his own enhanced life estate.[2] This left the Fitzpatrick Trust retaining its half interest in the subject parcel as a tenant in common, and the other half, formerly that of the Bussa Trust, shared by Bussa personally, along with defendant and plaintiffs Schaaf and Fryer, as joint tenants with rights of survivorship.
>
> Bussa then, as trustee of the Fitzpatrick Trust, simultaneously conveyed half of the latter trust's interest to himself as trustee of the Fitzpatrick Trust, and to plaintiff

Mason, "as Joint Tenants with Rights of Survivorship," while retaining his own personal enhanced life estate, and the other half of that interest to himself, again as trustee of the Fitzpatrick Trust, and to defendant, and plaintiffs Schaaf and Fryer, "as Joint Tenants with Rights of Survivorship," while again retaining his own enhanced life estate.

Shortly before he died, Bussa commenced litigation relating to a proposed subdivision of the parcel and use of the Bussa Lane easement. The owners of the seven adjacent parcels objected to any increased burden on that easement, and they contested the litigation. Upon Bussa's death, the instant parties were substituted as plaintiffs in the case, who continued the litigation. That case ended in a ruling that acknowledged that the 60-acre parcel had the right to use the easement, but prohibited the further burdening of the easement by allowing additional owners or newly created parcels to use it.

Plaintiff Mason, as successor trustee of the Fitzpatrick Trust, drew up and filed deeds confirming the transfers from Bussa to the remaindermen. Plaintiffs contested the validity of the conveyances that purport to have the Fitzpatrick Trust as a joint tenant with rights of survivorship. The circuit court agreed that "a Trust cannot hold Property as a joint tenant with rights of survivorship," and thus that the Fitzpatrick Trust "had no authority to convey the Property as joint tenants with rights of survivorship." The court voided the attendant conveyances, which left the interests in the Fitzpatrick Trust's half of the subject parcel to pass in accord with the terms of the trust itself. The circuit court recognized the resulting interests in the subject property as follows:

Gwen Mason (Plaintiff)	An undivided one-half interest in a one-half undivided interest in the entire Parcel as a tenant in common with the other parties;

Cindy Schaaf (Plaintiff)	An undivided 16⅔ percent interest in a one-half undivided interest in the entire Parcel as a tenant in common, and An undivided one-third interest in a one-half undivided interest in the entire Parcel as a joint tenant with right of survivorship as to the other interests in that one-half;
Colleen Fryer (Plaintiff)	An undivided 16⅔ percent interest in a one-half undivided interest in the entire Parcel as a tenant in common, and An undivided one-third interest in a one-half undivided interest in the entire Parcel as a joint tenant with rights of survivorship as to the other interests in that one-half;
Charlene Forbes (Defendant)	An undivided 16⅔ percent interest in a one-half undivided interest in the entire Parcel as a tenant in common, and An undivided one-third interest in a one-half undivided interest in the entire Parcel as a joint tenant with rights of survivorship as to the other interests in that one-half.

The court summarized the ownership situation as "an undivided one-half of the Parcel . . . held by the Parties as tenants in common" and "[t]he other undivided

half . . . owned by Plaintiff Schaaf, Plaintiff Fryer and Defendant Forbes as joint tenants with full rights of survivorship." The parties do not dispute that the circuit court correctly identified the interests of the parties if indeed Bussa's and Mason's conveyances of the Fitzpatrick Trust's real property are set aside.

The circuit court concluded that given the existence of the survivorship rights resulting from the valid conveyances of the real property from the Bussa Trust, and the subject parcel's reliance on an easement for access to and from the nearest public road, which easement could not be further burdened, "partition in kind would result in undue prejudice to the Plaintiffs and an equitable physical division of the Parcel cannot be achieved." Accordingly, the court ordered that the property be sold intact.

The circuit court further held that the parties, "[a]s cotenants and beneficiaries of Leo Bussa," were "jointly and equally responsible for the costs and attorney fees" associated with the earlier litigation concerning the easement, and also "for the real estate taxes and expenses associated with maintenance of the Property." The court set forth detailed findings and calculations, and concluded that plaintiffs were "entitled to $30,000.86 of Defendant's share from the sales proceeds of the Property." [*Schaaf I*, unpub op at 1-3.]

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[2] An enhanced life estate is "a life estate reserved in the grantor and enhanced by the grantor's reserved power to convey." Frank, *Ladybird Deeds*, [95] Mich BJ 30, 30 (June, 2016).

Defendant appealed as of right in this Court.

In a split, unpublished decision this Court rejected defendant's claims of error related to the more than 300 pages of documentation but held that the trial court had committed error requiring reversal when it concluded, as a matter of law, that a trust may not hold land as a joint tenant with rights of survivorship. Regarding defendant's jurisdictional challenge, we concluded that

it was appropriate for the circuit court to make the initial determination on remand. Accordingly, we reversed in part, vacated in part, affirmed in part, and remanded the case to the circuit court for further proceedings. *Schaaf I*, unpub op at 3-9.

Plaintiffs sought leave to appeal in the Michigan Supreme Court, raising the sole question of whether a trust can own property as a joint tenant with rights of survivorship. In lieu of granting the application, the Supreme Court vacated our judgment in *Schaaf I* and remanded the case to this Court to consider, in the first instance, plaintiff's jurisdictional challenge before reaching the merits of the remaining legal issues. *Schaaf II*, 506 Mich at 948.

II. JURISDICTION

Defendant contends on appeal that the circuit court exceeded its jurisdiction, and encroached on the exclusive jurisdiction of the probate court, when it voided the deeds executed by the Fitzgerald Trust's trustee and reallocated trust distributions in accordance with its own interpretation of the terms of the trust. We disagree.

The existence of jurisdiction is a question of law that may be raised at any time and that this Court reviews de novo. *Adams v Adams (On Reconsideration)*, 276 Mich App 704, 708-709; 742 NW2d 399 (2007). Because the jurisdiction of the probate court is entirely a matter of statute, the question of the scope of the probate court's exclusive jurisdiction is an issue of statutory interpretation, calling for review de novo. See *Thompson v Thompson*, 261 Mich App 353, 358; 683 NW2d 250 (2004).

"Jurisdiction of the subject matter is the right of the court to exercise judicial power over a class of cases,

not the particular case before it; to exercise the abstract power to try a case of the kind or character of the one pending." *Altman v Nelson*, 197 Mich App 467, 472; 495 NW2d 826 (1992). "When a court is without jurisdiction of the subject matter, any action with respect to such a cause, other than to dismiss it, is absolutely void." *Fox v Bd of Regents of the Univ of Mich*, 375 Mich 238, 242; 134 NW2d 146 (1965).

The circuit court is a court of general jurisdiction, which jurisdiction extends to "all civil claims and remedies, except where exclusive jurisdiction is given in the constitution or by statute to some other court or where the circuit courts are denied jurisdiction by the constitution or statutes of this state." MCL 600.605. See also Const 1963, art 6, § 1. The Legislature exercised its prerogative to limit the jurisdiction of the circuit court when, in MCL 700.1302, it vested the probate court with "exclusive legal and equitable jurisdiction" over the following relevant matters:

> (a) A matter that relates to the settlement of a deceased individual's estate, whether testate or intestate, who was at the time of death domiciled in the county or was at the time of death domiciled out of state leaving an estate within the county to be administered, including, but not limited to, all of the following proceedings:
>
> (*i*) The internal affairs of the estate.
>
> (*ii*) Estate administration, settlement, and distribution.
>
> (*iii*) Declaration of rights that involve an estate, devisee, heir, or fiduciary.
>
> (*iv*) Construction of a will.
>
> (*v*) Determination of heirs.
>
> (*vi*) Determination of death of an accident or disaster victim under section 1208.
>
> (b) A proceeding that concerns the validity, internal affairs, or settlement of a trust; the administration, dis-

> tribution, modification, reformation, or termination of a trust; or the declaration of rights that involve a trust, trustee, or trust beneficiary, including, but not limited to, proceedings to do all of the following:
>
> (*i*) Appoint or remove a trustee.
>
> (*ii*) Review the fees of a trustee.
>
> (*iii*) Require, hear, and settle interim or final accounts.
>
> (*iv*) Ascertain beneficiaries.
>
> (*v*) Determine a question that arises in the administration or distribution of a trust, including a question of construction of a will or trust.
>
> (*vi*) Instruct a trustee and determine relative to a trustee the existence or nonexistence of an immunity, power, privilege, duty, or right.
>
> (*vii*) Release registration of a trust.
>
> (*viii*) Determine an action or proceeding that involves settlement of an irrevocable trust.

In addition to the probate court's exclusive jurisdiction under MCL 700.1302, the probate court also has concurrent jurisdiction over certain matters concerning the estate of a decedent, protected individual, ward, or trust. These include concurrent jurisdiction to determine a property right or interest, to authorize partition of property, to hear and decide claims by or against a fiduciary or trustee for the return of property, and to hear and decide a contract proceeding or action by or against an estate, trust, or ward. MCL 700.1303.

Notably, by having set forth and retaining specific statutory authorization for the circuit court to hear and decide matters concerning rights to real property, the Legislature provided that its grant of exclusive jurisdiction to the probate court over the administration and distribution of trusts did not extend to plaintiffs' real-property claims. See MCL 600.2932(1) (providing that a person "who claims any right in, title to,

equitable title to, interest in, or right to possession of land, may bring an action in the circuit courts against any other person who claims or might claim any interest inconsistent with the interest claimed by the plaintiff"); MCL 600.3301 ("Actions containing claims for the partition of lands may be brought in the circuit courts . . . . Such actions are equitable in nature.").

Further, the Legislature declined to grant the probate court exclusive jurisdiction over *every* cause of action that might incidentally touch on such issues as a settlor's intentions but, instead, confined that grant of exclusive jurisdiction to "[a] *proceeding* that concerns the . . . distribution . . . of a trust; or the declaration of rights that involve a trust, trustee, or trust beneficiary . . . ." MCL 700.1302(b) (emphasis added). "[T]he meaning of the Legislature is to be found in the terms and arrangement of the statute without straining or refinement, and the expressions used are to be taken in their natural and ordinary sense." *Gross v Gen Motors Corp*, 448 Mich. 147, 160; 528 NW2d 707 (1995). The statutory reference to "a proceeding" that "concerns" trust matters suggests that the exclusive jurisdiction of the probate court under MCL 700.1302(b)(*vi*) covers not every issue that might arise from involvement of a trust, but rather to whole causes of action fundamentally arising from issues concerning the distribution of trusts or the rights and duties of affected persons.

In this case, plaintiffs did not ask the circuit court to construe, invalidate, or modify the Fitzpatrick Trust, or any other testamentary instrument, involved in the chain of title in the subject property. The parties brought to the circuit court disputes among living co-owners of real property over identification and resolution of their respective but overlapping interests, not issues concerning the distribution of, or rights under, the trusts that largely engendered those

interests. Specifically, plaintiffs' complaint contained claims to determine interests in real property, for sale of the property, and for defendant's monetary contribution to the ownership responsibilities of the property. Defendant does not suggest that plaintiffs' claims for determining interests in real property, for sale of the property, and contribution were not actionable in the circuit court. Indeed, she could not validly make such a suggestion. Given the above, none of plaintiffs' claims falls within the exclusive jurisdiction of the probate court, and the circuit court thus did not err by exercising subject-matter jurisdiction in the present matter.

III. TRUST AS JOINT TENANT WITH RIGHTS OF SURVIVORSHIP

Defendant next argues that a trust may hold property as a joint tenant in common with rights of survivorship and that the trial court erred by finding otherwise and by thereafter voiding certain conveyances to the parties from the Fitzpatrick Trust. We disagree.

In Michigan, there are five common types of concurrent ownership that are recognized relative to the ownership of real property: tenancies in common, joint tenancies, joint tenancies with full rights of survivorship, tenancies by the entireties, and tenancies in partnership. *Wengel v Wengel*, 270 Mich App 86, 93; 714 NW2d 371 (2006) (quotation marks omitted). Although an ordinary joint tenancy may be destroyed by an act that severs the joint tenancy (such as a conveyance of interest by one of the joint tenants), no act of a cotenant can defeat the other cotenant's right of survivorship in a joint tenancy with rights of survivorship. *Townsend v Chase Manhattan Mtg Corp*, 254 Mich App 133, 136; 657 NW2d 741 (2002).

Relevant to the instant matter, MCL 554.44 states that all grants and devises of lands

> made to 2 or more persons, except as provided in the following section, shall be construed to create estates in common, and not in joint tenancy, unless expressly declared to be in joint tenancy.

This statute thus creates a presumption in favor of tenancies in common. Because estates in joint tenancy are not favored, all presumptions are against them. *Atha v Atha*, 303 Mich 611, 615; 6 NW2d 897 (1942).

In arguing that a trust may hold property as a joint tenant with rights of survivorship, defendant leans heavily upon the fact that the language used to convey the property interest to the trust specifically stated that the trust was to hold its property rights in that manner. However, simply saying something is intended or shall be does not necessarily make the intended act permissible or lawful. Common sense and relevant law establish that, contrary to defendant's position, a trust may not hold property as a joint tenant with rights of survivorship.

Under MCL 554.43, estates "are divided into estates in severalty, in joint tenancy, and in common; the nature and properties of which respectively, shall continue to be such as are now established by law . . . ." Since the earliest recognition in Michigan of a joint tenancy with rights of survivorship in *Schultz v Brohl*, 116 Mich 603; 74 NW 1012 (1898), both this Court and our Supreme Court have consistently defined and applied the right of survivorship as it relates to the *life* and *death* of one joint tenant. "[T]he principal characteristic of the joint tenancy is the right of survivorship. Upon the death of one joint tenant, the surviving tenant or tenants take the whole estate." *Jackson v Green Estate*, 484 Mich 209, 213; 771 NW2d 675 (2009)

(opinion by CORRIGAN, J.) (quotation marks and citation omitted). A right of survivorship, which means that a surviving tenant takes ownership of the whole estate upon the death of the other joint tenant, does not exist in tenancies in common. *Wengel*, 270 Mich App at 94 & n 4. See also *Walters v Leech*, 279 Mich App 707, 711; 761 NW2d 143 (2008) ("[A]t the heart of a tenancy by the entirety is the right of survivorship, meaning that when one party dies, the other party automatically owns the whole property."), citing 1 Cameron, Michigan Real Property Law (3d ed), § 9.14, p 328.

It has long been recognized that parties holding property as joint tenants with full rights of survivorship hold joint life estates with contingent remainders. *Albro v Allen,* 434 Mich 271, 275; 454 NW2d 85 (1990). "Life estate" is defined as "[a]n estate held only for the duration of a specified person's life[.]" *Black's Law Dictionary* (11th ed), p 689. The key word in the definition is "life." The duration of a life estate is determined by a particular person's life, and a trust, as an artificial entity, does not have a lifetime. With life comes the expectation of its antonym, death. "[T]he contingency is surviving the cotenants, and at the moment of death, the decedent's interest in the property passes to the survivor or survivors." *Klooster v Charlevoix*, 488 Mich 289, 303-304; 795 NW2d 578 (2011), citing *Albro*, 434 Mich at 274-275. A trust, however does not and cannot die. Rather, it terminates only through specifically required actions of a nonbiological character. MCL 700.7410 through MCL 700.7414.

Survivorship rights address the interests of natural persons, including the uncertainties normally attendant to natural persons' life spans. A trust, not being a natural person, has no actual residential needs, cannot

occupy real property, and does not die. It is true that a trust cannot exist in perpetuity. A trust can, however, exist far beyond the lifespan of a natural person.[1] A trust holding property as a joint tenant with rights of survivorship thus potentially renders any such right of survivorship illusory.

MCL 565.48 provides further support for the premise that literal, physical death of a joint tenant is the key to the law's purpose in having created a joint tenancy with rights of survivorship. That statute provides:

> A register of deeds shall not record a deed or other instrument in writing that purports to convey an interest in land by the survivor or survivors under a deed to joint tenants or tenants by the entirety, unless, for each joint tenant or tenant by the entirety who is indicated in the deed or instrument to be deceased, a certified copy of the death certificate or other proof of death that is permitted by the laws of this state to be received for record by the register, is shown to have been recorded in the register's office by liber and page reference or is filed concurrently with the deed or other instrument and recorded as a separate document. [*Id*.]

Because a trust does not die but instead terminates, MCL 554.44 (which creates a presumption in favor of tenants in common) leaves no room to conflate the definition of death beyond its practical meaning for purposes of joint tenancy with rights of survivorship. In short, we hold that the trial court properly concluded that, as a matter of law, a trust may not hold real property as a joint tenant with rights of survivorship.

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[1] The dissent points out that at common law, a trustee may hold title as a joint tenant. While that may be true, a trustee is different than a trust itself. The powers of a trustee are thus irrelevant for our purposes today. Moreover, a trustee may be a trustee for a natural person.

IV. PARTITION

Defendant asserts that the trial court erred by finding that the property was not fairly capable of being partitioned in kind. We disagree.

In deciding whether or how to partition real property, a court exercises its equitable powers. See MCL 600.3301 (stating that actions containing claims for the partition of lands are equitable in nature). When reviewing equitable matters, this Court reviews for clear error the findings of fact in support of the equitable decision rendered and reviews de novo the ultimate decision. *LaFond v Rumler*, 226 Mich App 447, 450; 574 NW2d 40 (1997).

Defendant asserts that, under MCL 600.3304, " '[a]ll persons holding lands as joint tenants or as tenants in common may have those lands partitioned,' " but that, according to MCL 600.3308, " 'a person who has only an estate in reversion or remainder in the lands may not maintain a claim for their partition.' " However, the limitation in MCL 600.3308 applies to persons having "*only* an estate in reversion or remainder" and, thus, does not apply to holders of current possessory rights, whether or not those holders of existing possessory rights also happen to hold rights of reversion or remainder. (Emphasis added.)

Moreover, a court entertaining an action for partition is obliged to determine "whether the premises can be partitioned without great prejudice to the parties[.]" MCR 3.401(A)(1). If the court determines that partition cannot be achieved "without undue prejudice to the owners, it may order the premises sold in lieu of partition . . . ." MCR 3.401(B). The trial court specifically and carefully considered whether partition could be achieved without undue prejudice to the owners. It concluded that given the existence of the survivorship

rights resulting from the valid conveyances of the real property from the Bussa Trust, and the subject parcel's reliance on an easement for access to and from the nearest public road, which easement could not be further burdened, "partition in kind would result in undue prejudice to the Plaintiffs and an equitable physical division of the Parcel cannot be achieved."

We find no clear error in the trial court's determination regarding partition and prejudice to plaintiffs. Partition in kind of the subject parcel is not entirely practical in light of the attendant survivorship rights, and partition to the extent possible likely would engender further burdening of the use of Bussa Lane.

V. DOCUMENTATION

Defendant asserts that the trial court's decision on plaintiffs' contribution claim was flawed because the court relied on 305 pages of documents that plaintiffs withheld from discovery then suddenly produced less than 24 hours before trial. We disagree.

This Court reviews for an abuse of discretion the trial court's evidentiary rulings, including those concerning discovery. *Price v Long Realty, Inc*, 199 Mich App 461, 466; 502 NW2d 337 (1993); *Baker v Oakwood Hosp Corp*, 239 Mich App 461, 478; 608 NW2d 823 (2000). An abuse of discretion occurs when a trial court makes an error of law or its decision falls outside the range of principled outcomes. *Ronnisch Constr Group, Inc v Lofts on the Nine, LLC*, 499 Mich 544, 552; 886 NW2d 113 (2016).

We first note that defendant claims plaintiffs' late submission of the challenged documents occurred less than 24 hours before trial. However, the documents were submitted 24 hours prior to the date *originally scheduled for trial* on the issue of contribution. The

matter did not actually proceed to trial at that time given that the parties agreed to have the trial court decide the question of contribution on the basis of briefing to be completed several weeks later.

In ruling on defendant's motion to disallow the documentation, the trial court specifically considered, among other things, the fact that a decision concerning the contribution issue was still several weeks away. Defendant fails to meaningfully address the trial court's reasoned ruling or the fact that the trial court stated it would evaluate previously unidentified documents and thereafter issue decisions concerning admissibility on a document-by-document basis. Defendant has therefore abandoned this issue on appeal. *Thompson*, 261 Mich App at 356.

VI. CONTRIBUTION

Defendant contends that the trial court erred by granting plaintiffs' claim for full-share contribution from defendant for litigation that concluded in 2012 concerning the Bussa Lane easement. We disagree.

As noted, a court deciding whether or how to partition real property exercises its equitable powers. See MCL 600.3301. This includes its decisions concerning how to divide the proceeds of any sale to account for the equities of the situation. MCL 600.3336(2). "When partitioning the premises or dividing the money received from a sale of the premises among the parties the court may take into consideration the equities of the situation, such as the value of the use of the premises by a party or the benefits which a party has conferred upon the premises." MCL 600.3336(2).

"The general rule of contribution is that one who is compelled to pay or satisfy the whole or to bear more than his aliquot share of the common burden or obliga-

tion, upon which several persons are equally liable or which they are bound to discharge, is entitled to contribution against the others to obtain from them payment of their respective shares." *Caldwell v Fox*, 394 Mich 401, 417; 231 NW2d 46 (1975). As explained in *Strohm v Koepke*, 352 Mich 659, 662; 90 NW2d 495 (1958):

> The doctrine of contribution between cotenants is based upon purely equitable considerations. It is premised upon the simple proposition that equality is equity. It is not, however, enforced unless reason and justice require that each of the cotenants contribute his proportionate share of the common burden.

Such equitable relief should be granted at the court's discretion " 'according to the circumstances and exigencies of each particular case,' " as suggested by the evidence and guided by " 'the fixed principles and precedents of equity jurisprudence[.]' " *Youngs v West*, 317 Mich 538, 545; 27 NW2d 88 (1947), quoting 30 CJS, pp 328-329.

In this case, the trial court held that, "[a]s cotenants and beneficiaries of Leo Bussa, the Parties are jointly and equally responsible for the costs and attorney fees associated with Antrim County File No. 2011[-]008633[-]CH, and for the real estate taxes and expenses associated with maintenance of the Property" and, thus, that "Plaintiffs are entitled to contribution by the Defendant in this matter," including "for one-quarter of the costs and attorney fees" associated with the earlier litigation. While defendant contends that the prior litigation was elective and conferred no benefit on the property, she admits that she was among the parties who were substituted for Leo Bussa in the prior litigation upon his death and makes no claim that she did not agree with plaintiffs' position in the matter.

Moreover, defendant's assertion that MCL 600.3336(2) does not authorize a court "to consider a failed attempt to increase the property's value" has no merit. The ultimate merits or outcome of litigation bears no impact on the question of responsibility for maintaining it. And litigation intended to benefit an interest in real property does not necessarily cease to be beneficial, for purposes of determining responsibility for its costs, even if it is ultimately unsuccessful. As recognized by the trial court, the prior litigation was initiated to establish the scope of the easement and, ultimately, whether the scope of the easement prevented subdivision development of the property. The outcome of the prior easement litigation was necessary and relevant to each co-owner of the property such that the litigation was a common burden among them. Although the several easement litigants had substantial, if unequal, affected property interests, the presumption that "equality is equity" remains valid and defendant has failed to show that the trial court erred by ordering her to contribute equally to the expenses attendant to the earlier easement litigation.

Affirmed.

TUKEL, P.J., concurred with SERVITTO, J.

RIORDAN, J. (*concurring in part and dissenting in part*). I concur with the majority that the circuit court had subject-matter jurisdiction over this case, that it did not abuse its discretion by considering more than 300 pages of documentation offered by plaintiffs, and that it did not err by requiring contribution to plaintiffs. However, I respectfully dissent from the majority's conclusion that the circuit court did not err by ruling that a trust cannot hold title to real property as a joint tenant with rights of survivorship.[1]

[1] Because I would conclude that the circuit court erred in this regard, I also disagree with the majority that the circuit court's corresponding partition ruling should be affirmed.

"The common law, which has been adopted as part of our jurisprudence, remains in force until amended or repealed." *Wold Architects & Engineers v Strat*, 474 Mich 223, 233; 713 NW2d 750 (2006). See also MCL 554.43 ("Estates, in respect to the number and connection of their owners, are divided into estates in severalty, in joint tenancy, and in common; the nature and properties of which respectively, shall continue to be such as are now established by law, except so far as the same may be modified by the provisions of this chapter."). It is true that the common law provided that neither corporations nor sovereigns may hold title as a joint tenant because "the king and the corporation can never die." 2 Blackstone, Commentaries on the Laws of England, p *184. That is, "because a corporation can survive indefinitely, which is contrary to the right of survival of a joint tenancy," a corporation may not hold title as a joint tenant under the common-law rule. 6A Fletcher, Cyclopedia of the Law of Corporations, § 2816.

However, as the majority acknowledges, a trust could not exist in perpetuity under the common law. See *Scudder v Security Trust Co*, 238 Mich 318, 320; 213 NW 131 (1927). Thus, the basis for the common-law rule precluding a corporation from holding title as a joint tenant is inapplicable here. Indeed, the majority does not cite any authority providing that a trust may not hold title as a joint tenant under the common law. Rather, the majority offers "common sense" arguments to reach its conclusion. In my view, the common law and statutory framework provide to the contrary, and that is what we should follow to resolve the matter before us.

"A trust is a right, enforceable solely in equity, to the beneficial enjoyment of property the legal title to which is vested in another." *Fox v Greene*, 289 Mich 179, 183;

286 NW 203 (1939). " 'Trusts,' in the broadest sense of the definition, embrace, not only technical trusts, but also obligations arising from numerous fiduciary relationships, such as agents, partners, bailees, et cetera." *Id*. (cleaned up). See also 1 Restatement Trusts, 3d, § 2, p 17 ("A trust . . . is a fiduciary relationship with respect to property, arising from a manifestation of intention to create that relationship and subjecting the person who holds title to the property to duties to deal with it for the benefit of charity or for one or more persons . . . .") (emphasis omitted).

Our common law recognizes that a trustee may hold title as a joint tenant. See, e.g., *Norris v Hall*, 124 Mich 170, 176; 82 NW 832 (1900) ("The deed from Dyson to the five trustees expressly stated that they were to hold 'as joint tenants, and not as tenants in common.' "); *Fox*, 289 Mich at 184 ("[P]roperty held by a trustee who is a joint tenant, or tenant in common with another, may be partitioned at the instance of the trustee, or of any person beneficially interested in the trust.").[2] If a trustee may hold title as a joint tenant, it seemingly follows that the trust itself may be deemed as holding title as a joint tenant to the same extent. See *Ford v Wright*, 114 Mich 122, 124; 72 NW 197 (1897) (explaining that a trustee holds trust property). The conclusion that a trust may hold title as a joint tenant is consistent with the 2 Restatement Trusts, 3d, § 40, p 171, which explains that "a trustee may hold in trust any interest in any type of property." (Emphasis omitted.) Comment *b* to that section further explains:

[2] I acknowledge that *Norris* and *Fox* concerned properties in which the joint tenants were all trustees. Nonetheless, these cases illustrate that there was no blanket common-law prohibition against a trustee holding title as a joint tenant.

> [L]egal or equitable present interests in real or personal property for life or for a term of years, and presently existing future interests, whether legal or equitable, whether reversionary interests, executory interests, or remainders (contingent, vested, or vested subject to being divested), may be held in trust. [*Id*. at p 172.]

Accordingly, in my view, the cited common-law authorities weigh in favor of a rule that a trust may hold title as a joint tenant or, at a minimum, fail to establish a contrary rule.

Alternatively, even if there was a common-law rule providing that a trust may not hold title as a joint tenant, I would conclude that such a rule has been superseded and replaced by statute. The Michigan Trust Code, MCL 700.7101 *et seq*., which is set forth as Article VII of the Estates and Protected Individuals Code, MCL 700.1101 *et seq*., is a comprehensive scheme with dozens of provisions addressing virtually every aspect of trust law. "In general, where comprehensive legislation prescribes in detail a course of conduct to pursue and the parties and things affected, and designates specific limitations and exceptions, the Legislature will be found to have intended that the statute supersede and replace the common law dealing with the subject matter." *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378, 390; 738 NW2d 664 (2007) (quotation marks and citations omitted). Thus, for example, this Court has held that the Michigan Trust Code sets forth the exclusive grounds for removal of a trustee and that a trustee cannot be removed for additional grounds at common law. *In re Pollack Trust*, 309 Mich App 125, 161-163; 867 NW2d 884 (2015).

Relevant to this case, there is no provision within the Michigan Trust Code that precludes a trust from holding title to real property in the same manner as a natural person. This absence is noteworthy because

the Michigan Trust Code includes several provisions otherwise limiting trusts and trustees. See, e.g., MCL 700.7404 ("A trust may be created only to the extent its purposes are lawful, not contrary to public policy, and possible to achieve."); MCL 700.7815(3)(b) ("A trustee may not exercise a power to make distributions pursuant to a discretionary trust provision in a manner to satisfy a legal obligation of support that the trustee personally owes another person."). Further, the Michigan Trust Code includes several provisions conferring broad powers upon trusts and trustees to hold, manage, and distribute trust property. See, e.g., MCL 700.7816(1)(b)(*ii*) ("A trustee, without authorization by the court, may exercise all of the . . . [p]owers appropriate to achieve the proper investment, management, and distribution of the trust property."); MCL 700.7817(g) ("[A] trustee has . . . [the power to] acquire property, including property in this or another state or country, in any manner for cash or on credit, at public or private sale; and to manage, develop, improve, exchange, partition, or change the character of trust property."). In my view, the express conferral of such powers, coupled with the absence of any express limitation that would be controlling here, shows the Legislature's intent to supersede and replace any common-law rule that may have existed to prohibit a trust from holding title as a joint tenant.

I respectfully disagree with the majority that "[c]ommon sense and relevant law establish that . . . a trust may not hold property as a joint tenant with rights of survivorship." The common-law rule against a corporation holding title as a joint tenant—which the majority extends here to trusts—is, according to one court, "universally criticized and generally ignored in the United States." *Bank of Delaware v Bancroft*, 269 A2d

254, 255 n 1 (Del Ch, 1970).[3] Indeed, the rule was revoked in England in 1899 by the Bodies Corporate (Joint Tenancy) Act, 1899, 62 & 63 Vict C 20. *Bank of Delaware*, 269 A2d at 255 n 1. As illustrated by this case itself, application of the rule results in a division of interests that, in all likelihood, was completely unforeseeable by both the grantor and the grantees at the time of the trust's creation. Even if such a peculiar outcome is compelled by the common law applicable to corporations and joint tenancies, our Legislature has sensibly abrogated that common law with respect to trusts in order to provide stability and certainty to trustees and those who engage with them.

Accordingly, I respectfully dissent from the majority's conclusion that a trust cannot hold title to real property as a joint tenant with rights of survivorship.

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[3] In *Bancroft*, the Delaware Court of Chancery ruled that a trust company may hold title as a joint tenant with rights of survivorship because a Delaware statute conferring the powers of "a legally qualified individual" upon such companies superseded the common-law rule to the contrary. *Bank of Delaware*, 269 A2d at 256.

See also Bogert, Trusts & Trustees (2d ed), § 145 ("In the United States, where a trust company or bank is made co-trustee with an individual, it is usual to provide in the trust instrument for survivorship in the corporate trustee. If such a provision is not made, . . . the ancient law with regard to the inability of corporations to act as joint tenants is deemed to be still in force . . . .").

PEOPLE v MONTAGUE

Docket No. 352089. Submitted May 4, 2021, at Grand Rapids. Decided July 1, 2021, at 9:05 a.m. Leave to appeal denied 509 Mich 984 (2022).

Alize Montague was charged in the Luce Circuit Court with escape from prison, MCL 750.193, and, in a separate case, with being a prisoner and taking a hostage, MCL 750.349a; armed robbery, MCL 750.529; kidnapping, MCL 750.249; and assault with a dangerous weapon (felonious assault), MCL 750.82. Defendant had escaped from prison and run to a nearby motel, where he accosted the night clerk, Heather Thornton, with a box cutter he found on a windowsill; demanded her cell phone; and took her car keys and some cash from her purse. Thornton told defendant he could take her car, but defendant insisted that she go with him. As they left the motel, Thornton escaped when she saw the police arrive and directed them to defendant, who was then apprehended. The two cases were joined for trial, and a jury found defendant guilty of being a prisoner and taking a hostage, kidnapping, and escape from prison, and not guilty of armed robbery and felonious assault. The court, William W. Carmody, J., sentenced defendant as a fourth-offense habitual offender to 30 to 60 years' imprisonment for both taking a hostage and kidnapping and 6 to 20 years' imprisonment for escaping from prison. Defendant appealed.

The Court of Appeals *held*:

1. The trial court erred when instructing the jury in relation to the charge of being a prisoner and taking a hostage by failing to instruct the jury in accordance with the definition of "hostage" established in *People v Cousins*, 139 Mich App 583 (1984). The jury found defendant guilty of violating MCL 750.349a, which makes it a felony for a person imprisoned in any penal or correctional institution located in Michigan who takes, holds, carries away, decoys, entices away or secretes another person as a hostage by means of threats, coercion, intimidation or physical force. Unlike the dictionary definition that the trial court used, which stated that a "hostage" is "a person taken by force to secure the taker's demands," *Cousins* defines "taking a hostage" for purposes of MCL 750.349a as "the unlawful taking, restraining, or confining of a person with the intent that the person, or victim,

be held as security for the performance, or forbearance, of some act by a third person." The trial court was bound to follow *Cousins*, and its failure to do so was an abuse of discretion. However, this error was harmless because, in light of the facts presented to the jury, the only reasonable conclusion was that defendant took Thornton into the parking area at knifepoint as a shield to ensure his escape should authorities appear, which fits both the more narrow *Cousins* definition of taking a hostage and the broader dictionary definition.

2. The trial court did not err by not including the *Cousins* definition of "hostage" in the jury instruction on kidnapping. The *Cousins* definition applied specifically to MCL 750.349a, and it has not been applied to the kidnapping statute, MCL 750.349. Further, the portion of the model criminal jury instruction that the court provided correctly stated that the prosecution was required to prove that when defendant knowingly restrained another person, he intended to do "one or more of the following," including "use that person as a shield or hostage."

3. Viewed in the light most favorable to the prosecution, the evidence was sufficient to support defendant's convictions of violating MCL 750.349 and MCL 750.349a. Thornton testified that defendant had her cell phone, car keys, money, and a box cutter in his possession, yet he still insisted that she come with him despite her protestations. Therefore, the evidence was sufficient for purposes of MCL 750.349a that defendant had the intent to use Thornton as a hostage if the need arose. With regard to the kidnapping statute, the evidence was likewise sufficient that defendant intended to use Thornton as a hostage based on the same reasoning, but also that defendant used Thornton as a shield under MCL 750.349(1)(b). The evidence showed that defendant broke down the door to the back office of the motel while Thornton was on the phone, threw Thornton to the ground, and ripped the landline telephone out of the wall. Knowing that Thornton had called 911, defendant gestured with a box cutter for Thornton to come with him while exiting the motel, and Thornton testified that defendant walked behind her so he could watch her and ensure that she obeyed his directions. Accordingly, the evidence was also sufficient under the kidnapping statute for the jury to find beyond a reasonable doubt that defendant had the intent to use Thornton as a shield or hostage.

4. The trial court did not abuse its discretion by denying defendant's motion to quash the information with respect to the charge of violating MCL 750.349a on the ground that defendant was not "a person imprisoned" when he allegedly took Thornton hostage because he had escaped the facility at the time. For

purposes of MCL 750.349a, "imprisoned" means that the person is confined within a prison or subject to an order of imprisonment wherein the individual is not at liberty to be outside the confines of the prison or outside the control of a prison employee when the kidnapping occurs. At the time of his actions against Thornton, defendant had no authority to be outside the prison facility and therefore was not at liberty.

5. Defendant was not entitled to relief on the ground that the jury rendered inconsistent verdicts when it acquitted him of armed robbery and felonious assault, but convicted him of kidnapping and violating MCL 750.349a predicated on his having taken Thornton at knifepoint. Verdicts are considered inconsistent when the verdicts cannot rationally be reconciled. Inconsistent verdicts within a single jury trial are permissible and do not require reversal absent a showing of confusion by the jury, a misunderstanding of the instructions, or impermissible compromises. Defendant did not meet his burden of showing that one of these three conditions was met, and the standard on which defendant relied was outdated and no longer applied.

6. The trial court did not err in its scoring of Offense Variable (OV) 2, which involves the lethal potential of the weapon possessed or used. Under OV 2, MCL 777.32, five points are assessed if the offender possessed or used a pistol, rifle, shotgun, or knife or other cutting or stabbing weapon, and zero points are assessed if the offender possessed or used no weapon. Although the trial court scored zero points for OV 1 because the jury did not find the aggravated use of a weapon, the trial court determined that a preponderance of the evidence proved that defendant possessed a box cutter and so scored OV 2 at five points. This was not clearly erroneous.

7. The trial court did not err in its scoring of OV 10, which involves the exploitation of a vulnerable victim. Under OV 10, MCL 777.40, five points are assessed if the offender exploited a victim by a difference in size or strength, or both. MCL 777.40(3)(c) defines "vulnerability" as "the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation." Trial testimony indicated that defendant pushed or threw Thornton to the floor at least twice, and although testimony indicated that Thornton was taller than average, one witness testified that she did not appear to be strong. Thornton herself stated that defendant overpowered her, that she was at his mercy, and that she feared for her life. Accordingly, the trial court did not clearly err when it concluded that defendant exploited Thornton because she was a vulnerable victim, and a score of five points for OV 10 was proper.

8. The trial court did not err in its scoring of OV 12, which is scored for contemporaneous felonious criminal acts. Under MCL 777.42, 10 points are assessed for three or more contemporaneous felonious criminal acts involving other crimes. A felonious criminal act is contemporaneous if it occurred within 24 hours of the sentencing offense and does not result in a separate conviction. Defendant argued that because he did not break in to the motel, which was open to the public and which he had a right to enter, there was no evidence to find a third contemporaneous felonious criminal act. This argument was misplaced, given that the statute clearly applies when a defendant enters certain buildings without breaking, and even if a breaking was required, the evidence established that one occurred when defendant kicked down the locked door to the back office of the motel. Therefore, the trial court did not clearly err by determining that defendant committed breaking and entering with intent as a contemporaneous felonious criminal act for the purposes of OV 12 and properly assessed defendant 10 points.

9. OV 19 is scored for the "threat to the security of a penal institution or court or interference with the administration of justice or the rendering of emergency services." Under MCL 777.49, 10 points are assessed if the offender otherwise interfered with or attempted to interfere with the administration of justice, or directly or indirectly violated a personal protection order. A defendant interferes with the administration of justice by opposing so as to hamper, hinder, or obstruct the act or process of administering judgment of individuals or causes by judicial process. OV 19 is generally scored for conduct that constitutes an attempt to avoid being caught and held accountable for the sentencing offense. In this case, evidence indicated that upon exiting the motel, defendant ran toward Thornton's car, for which he had the keys. The police gave defendant loud verbal commands to freeze, but he was still fumbling inside the vehicle as if trying to get it to start as the police surrounded him. This evidence supported the trial court's assessment of 10 points for OV 19.

Affirmed.

GLEICHER, J., dissenting, agreed that the trial court incorrectly defined the word "hostage" when instructing the jury, but disagreed with the majority's conclusion that this error was harmless. She explained that the court's error fundamentally altered the intent element of the crimes and did not fairly present the issues to be tried or permit defendant to pursue a potentially viable defense. While the correct definition of "hostage" conveys that a hostage is a person who is being held as security for an act

or forbearance by a third person, the given instruction eliminated the third-person requirement altogether, despite the fact that defense counsel specifically requested that the jury be informed of the correct definition. The trial court instead gave the prosecution's version of the instruction, which permitted the jury to convict if it found that defendant intended only that the victim would acquiesce to his demands. Because the instruction as given negated an intent element required under the law, it did not fairly present the issue to be tried regarding the charges of violating MCL 750.349a, which prohibits a prisoner from taking a hostage, and MCL 750.349, which prohibits kidnapping. Given that there was no evidence to indicate that defendant intended to hold the victim as security for an act by a third person, Judge GLEICHER would have vacated defendant's conviction for taking a hostage under MCL 750.349a and remanded for a new trial regarding the kidnapping charge under MCL 750.349.

1. CRIMINAL LAW — BEING A PRISONER AND TAKING A HOSTAGE — JURY INSTRUCTIONS — DEFINITIONS — "HOSTAGE."

Under MCL 750.349a, it is a felony for a person imprisoned in any penal or correctional institution located in Michigan to take, hold, carry away, decoy, entice away, or secrete another person as a hostage by means of threats, coercion, intimidation or physical force; for purposes of MCL 750.349a, a "hostage" is a person who was unlawfully taken, restrained, or confined with the intent that the person be held as security for the performance or forbearance of some act by a third person; a trial court errs by failing to instruct the jury accordingly upon request.

2. CRIMINAL LAW — KIDNAPPING — DEFINITIONS — "HOSTAGE."

Under MCL 750.349(1)(b), a person commits the crime of kidnapping if they knowingly restrain another person with the intent to use that person as a shield or hostage; the definition of "hostage" that applies to MCL 750.349a, which requires that a person be taken for the performance or forbearance of an act by a third person, does not apply to MCL 750.349(1)(b).

3. CRIMINAL LAW — BEING A PRISONER AND TAKING A HOSTAGE — JURY INSTRUCTIONS — DEFINITIONS — "IMPRISONED."

Under MCL 750.349a, it is a felony for a person imprisoned in any penal or correctional institution located in Michigan to take, hold, carry away, decoy, entice away, or secrete another person as a hostage by means of threats, coercion, intimidation or physical force; for purposes of MCL 750.349a, "imprisoned" means that the person is confined within a prison or subject to an order of

> imprisonment wherein the individual is not at liberty to be outside the confines of the prison or outside the control of a prison employee when the kidnapping occurs; a person who meets this definition but has escaped from a prison facility is nevertheless imprisoned for purposes of MCL 750.349a.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Joshua Freed*, Prosecuting Attorney, and *Autumn A. Gruss*, Assistant Attorney General, for the people.

F. Mark Hugger for defendant.

Before: MURRAY, C.J., and FORT HOOD and GLEICHER, JJ.

MURRAY, C.J. In Docket No. 352089, defendant appeals as of right his jury trial convictions of prisoner taking a hostage, MCL 750.349a; and kidnapping, MCL 750.249. In Docket No. 352090, defendant appeals as of right his conviction of escaping from prison, MCL 750.193, rendered by the same jury. Defendant was sentenced as a fourth-offense habitual offender, MCL 769.12, to 30 to 60 years' imprisonment for both prisoner taking a hostage and kidnapping, and 6 to 20 years' imprisonment for escaping from prison. We affirm.

I. STATEMENT OF FACTS

Defendant was imprisoned at the Newberry Correctional Facility on August 15 and 16, 2016. Sometime after 11:00 p.m. on August 15, he climbed out a window, boosted himself onto the roof, and jumped to the ground of the outside recreational facility. He then proceeded to climb the two barbed wire fences surrounding the facility, setting off an alarm, and ran into the woods. Michigan State Police troopers Nathan Grenfell and Adam Laninga were dispatched to the

prison and, once there, were able to follow a blood trail until they were dispatched to a nearby motel. Heather Thornton was working the night shift at the motel's front desk, and around 1:30 a.m. she went into a back office to rest on a rollaway bed.

About an hour later, Thornton heard talking in the lobby, so she exited the back office and saw defendant behind the front desk talking on the phone. Defendant was bleeding profusely, and Thornton said that they should call 911, but defendant did not want to because he said that his cousin cut him, and he did not want his cousin to get in trouble. Defendant needed a ride, and Thornton directed him to go back into the lobby and around the other side of the front desk. When defendant complied, Thornton tried to shut the door separating the area behind the front desk from the lobby, but defendant stopped the door from closing with his foot. Thornton told defendant that he was making her feel threatened, defendant removed his foot, and the door shut and locked automatically. Defendant tried opening it, but then walked into the lobby and met Thornton at the front desk. Thornton dialed a number for defendant, and when someone answered, she handed defendant the phone.

As defendant was talking, Thornton ran to the back office to call the police from a landline telephone on a desk. As she was calling for help, defendant kicked down the locked door to the back office. Thornton tried to move behind the desk, but defendant threw her to the side, and she fell and dropped the phone. Defendant took a box cutter off the windowsill and Thornton's cell phone off the rollaway bed. As Thornton tried to get her cell phone back from defendant, they pushed each other, and she ended up on the ground. Thornton ultimately retrieved her cell phone and threw it under the bed.

Defendant gestured with the box cutter, blade open, for Thornton to get her cell phone, which she did and gave it to him. Defendant pulled the landline phone out of the socket and threw it. Defendant asked for Thornton's car keys, and he grabbed them from her purse as well as about $15 in cash from the top of the desk.

Defendant started telling Thornton that she had to go with him while gesturing with the box cutter. Thornton repeatedly told defendant that he could take her car, and she would get him more money and unlock her cell phone for him, but he kept insisting that she go with him. They left the back office, with Thornton walking in front of defendant, toward the main entrance doors in the lobby. As Thornton exited the motel, she saw police entering the parking lot, so she ran away from defendant and toward other parked cars.

En route to the motel, Grenfell and Laninga met the other dispatched troopers, Jeffrey Rogers and Zachary Drogowski. When the troopers pulled in to the motel lot, they all saw Thornton running across the parking lot waving her hands and pointing toward defendant, who was approaching a vehicle and trying to get inside. The troopers exited their vehicles with guns drawn, giving loud verbal commands for defendant to surrender and put his hands up. Defendant opened the car door, got in the driver's seat, and was fumbling in an attempt to start the car. Defendant ultimately surrendered, and was taken to the hospital. On the ground near the driver's side door, police found the box cutter, keys, and Thornton's cell phone. Subsequent tests revealed that the DNA on the box cutter and money found in defendant's waistband matched each other and matched defendant's DNA.

Defendant was charged with escape from prison, MCL 750.193, in Case No. 2017-001314-FC, and pris-

oner taking a hostage; armed robbery, MCL 750.529; kidnapping; and assault with a dangerous weapon (felonious assault), MCL 750.82, in Case No. 2017-001315-FC. The two cases were joined for trial, and the jury found defendant guilty of prisoner taking a hostage, kidnapping, and escape from prison, and not guilty of armed robbery and felonious assault.

II. ANALYSIS

A. JURY INSTRUCTIONS

Defendant first argues that he was denied due process because the trial court did not, within the instructions for both prisoner taking a hostage and kidnapping, include in its definition of "hostage" the key element of influence on a third party.

Claims of instructional error are reviewed de novo. *People v Perez*, 469 Mich 415, 418; 670 NW2d 655 (2003). This Court reviews the trial court's "determination whether a jury instruction is applicable to the facts of the case" for an abuse of discretion. *People v Heikkinen*, 250 Mich App 322, 327; 646 NW2d 190 (2002). "An abuse of discretion occurs when the trial court's decision is outside the range of principled outcomes." *People v Russell*, 297 Mich App 707, 715; 825 NW2d 623 (2012) (quotation marks and citation omitted).

A criminal defendant has the right to "a properly instructed jury . . . ." *People v Mills*, 450 Mich 61, 80-81; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995). "[T]he trial court is required to instruct the jury concerning the law applicable to the case and fully and fairly present the case to the jury in an understandable manner." *Id*. The jury instructions "must include all the elements of the charged offenses and any material issues, defenses, and theories that are supported by

the evidence." *People v McKinney*, 258 Mich App 157, 162-163; 670 NW2d 254 (2003). There is no error when the instructions "fairly presented the issues to be tried and sufficiently protected the defendant's rights." *People v McFall*, 224 Mich App 403, 412-413; 569 NW2d 828 (1997) (quotation marks and citation omitted). Finally, jury instructions are reviewed in their entirety, and there is no error requiring reversal if the instructions sufficiently protected the rights of the defendant and fairly presented the triable issues to the jury. *People v Holt*, 207 Mich App 113, 116; 523 NW2d 856 (1994). "The reviewing court must balance the general tenor of the instructions in their entirety against the potentially misleading effect of a single isolated sentence." *People v Waclawski*, 286 Mich App 634, 675; 780 NW2d 321 (2009), citing *People v Freedland*, 178 Mich App 761, 766; 444 NW2d 250 (1989).

The prisoner taking a hostage statute, MCL 750.349a, provides that "[a] person imprisoned in any penal or correctional institution located in this state who takes, holds, carries away, decoys, entices away or secretes another person as a hostage by means of threats, coercion, intimidation or physical force is guilty of a felony and shall be imprisoned in the state prison for life, or any term of years, which shall be served as a consecutive sentence." MCL 750.349(1)(b) provides that a person commits kidnapping when that person "knowingly restrains another person with the intent to . . . [u]se that person as a shield or hostage." Neither statute provides a definition of the term "hostage."

The "pertinent model jury instructions 'must be given in each action in which jury instructions are given' if the model instructions 'are applicable,' 'accurately state the applicable law,' and 'are requested by a party.' " *People v Bush*, 315 Mich App 237, 243; 890 NW2d 370 (2016), quoting MCR 2.512(D)(2). "The Michigan Court Rules

do not limit the power of trial courts to give 'additional instructions on applicable law not covered by the model instructions' as long as the additional instructions are 'concise, understandable, conversational, unslanted, and nonargumentative' and are 'patterned as nearly as practicable after the style of the model instructions.' " *Bush*, 315 Mich App at 243, quoting MCR 2.512(D)(4). See also *Bouverette v Westinghouse Electric Corp*, 245 Mich App 391, 401-402; 628 NW2d 86 (2001) ("When the standard jury instructions do not adequately cover an area, the trial court is obligated to give additional instructions when requested, if the supplemental instructions properly inform the jury of the applicable law and are supported by the evidence.").

1. PRISONER TAKING A HOSTAGE

Because there is no model criminal jury instruction pertaining to the prisoner taking a hostage statute, see M Crim JI 19.1 *et seq*.,[1] both parties requested a special jury instruction in their trial briefs for Count I, which included a definition of the term "hostage." Defendant requested that "taking a hostage" be defined as " 'the unlawful taking, restraining, or confining of a person with the intent that the person, or victim, be held as security for the performance, or forbearance, of some act by a third person,' " the definition provided in *People v Cousins*, 139 Mich App 583, 590; 363 NW2d 285 (1984) (citation omitted). The prosecution requested a jury instruction defining "hostage" as "a person taken by force to secure the taker's demands."[2] The court never placed its ruling on this issue on the

[1] Chapter 19 of the Model Criminal Jury Instructions pertains to kidnapping.

[2] This is the definition of "hostage" provided in *Merriam-Webster's Collegiate Dictionary* (11th ed).

record, but used the definition offered by the prosecution at trial during preliminary and final jury instructions.

The meaning of "hostage" in the prisoner taking a hostage statute, MCL 750.349a, was first and only considered in *Cousins*, 139 Mich App at 590. The *Cousins* Court looked to outside jurisdictions, namely, *State v Crump*, 82 NM 487; 484 P2d 329 (1971), which defined "hostage" under New Mexico's kidnapping statute as "impl[ying] the unlawful taking, restraining or confining of a person with the intent that the person, or victim, be held as security for the performance, or forbearance, of some act by a third person." *Cousins*, 139 Mich App at 590 (quotation marks omitted). This Court adopted that definition. *Id*. Even though we are not required to follow the pre-1990 decision in *Cousins*, see MCR 7.215(J)(1), it was binding on the trial court under stare decisis, see MCR 7.215(C)(2) and *Tebo v Havlik*, 418 Mich 350, 362; 343 NW2d 181 (1984). Consequently, the trial court abused its discretion when it failed to give the definition of "hostage" as provided by *Cousins*, and requested by defendant in his trial brief, to the jury in its instructions on prisoner taking a hostage.[3]

Nonetheless, any error by the trial court was harmless. An error is presumed to be harmless, and defendant bears the burden of proving otherwise. MCL 769.26; *People v Lukity*, 460 Mich 484, 493-495; 596 NW2d 607 (1999). Under the harmless-error doctrine, this Court will only reverse if " 'after an examination of the entire cause, it shall affirmatively appear' that it is more probable than not that the error was outcome

[3] In essence, the definition provided by the trial court was a more condensed definition of what *Cousins* provided as the meaning of hostage.

determinative." *Lukity*, 460 Mich at 495-496, quoting MCL 769.26.

There are several reasons why we conclude that it was harmless error to provide the jury with this dictionary definition of hostage, as opposed to the one approved in *Cousins*. First, in conducting a harmless-error review, it is both obvious and critical that we remain focused on the facts presented to the jury. *People v Gillis*, 474 Mich 105, 140 n 18; 712 NW2d 419 (2006) (instructional error is nonconstitutional and 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") (quotation marks omitted);[4] *People v Roberson*, 167 Mich App 501, 517; 423 NW2d 245 (1988) (instructional error was harmless in light of overwhelming evidence of defendant's guilt). Here, those facts establish that defendant had that night escaped from a state prison, and when he entered the motel, he was cut and bleeding significantly. During the encounter inside the motel, defendant stopped Thornton from continuing her call to the 911 operator, realized he needed to get farther away from authorities, and was ultimately violent towards Thornton when trying to obtain her phone and car keys. Importantly, prior to making Thornton leave the motel office with him, defendant *already had* the car keys and phone, yet defendant *still* forced her to go ahead of him while proceeding into the parking area and to her car. And, while doing so, Thornton told defendant that he would be committing kidnapping if he made her leave, to which he replied "I already have one of those. I don't care."

These facts overwhelmingly support that defendant used Thornton as a hostage as defined in *Cousins*, and

[4] Quoting *Lukity*, 460 Mich at 495.

as commonly understood.[5] For one, defendant recognized that was what he was doing, but proceeded anyway. Additionally, why else would defendant force Thornton at knifepoint to leave the building with him if he wasn't doing it as protection in case authorities show up? Given his current state of affairs (escaping prison a couple hours earlier, Thornton calling authorities, and thus his knowing that authorities were surely out to get him), and his already possessing the car keys and cell phone (and cash), it really could be only one thing: to avoid capture if authorities appeared to apprehend him. It's the only conclusion the jury could have made under this scenario, and fits squarely within the *Cousins* definition of hostage, which is the common understanding of that term. The same conclusion fits within the definition provided by the trial court and eliminates any concern that the jury convicted defendant for holding Thornton hostage to secure demands placed upon her. Consequently, although under the dictionary definition of hostage used by the trial court it is theoretically possible for a defendant to be convicted without the intent to force a third party to do or not do some act, under *these* facts *this* jury could not reasonably come to that conclusion. In other words, whether under the more narrow *Cousins* definition or the broader dictionary definition, given these facts, the only reasonable conclusion was that defendant took Thornton into the parking area at knifepoint as a shield to ensure his escape should authorities appear. The error is therefore harmless.

The dissent disagrees with this point, and posits that not even the prosecutor theorized that this is why

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[5] The *Cousins* Court held that the term "hostage" was "generally familiar to and comprehensible by lay persons, and therefore the trial court's failure to instruct on the *Crump* definition did not constitute a miscarriage of justice requiring reversal." *Cousins*, 139 Mich App at 593.

defendant forced Thornton to leave at knifepoint, as he only argued it was to obtain the car and phone. We don't read the record so exclusively, and nor do we see the importance of this point. As to the record, during opening statements the prosecutor forecasted for the jury that no *direct* evidence would be submitted regarding defendant's actual motivation for forcing Thornton at knifepoint out of the motel and into the parking lot, but that the evidence would show his motivation could have been to "keep the authorities away." So too in closing argument, where he mentioned that defendant "is taking Ms. Thornton to secure his demands. What he needs done, to aid in his escape." Though, as the dissent correctly states, this was not the only focus of the prosecutor, as he also discussed at length defendant's need to obtain the phone and car, both his opening statement and closing arguments referenced the theory that defendant did what he did to aid in his escape, including keeping the authorities away. In any event, the trial court properly instructed the jury that what the attorneys argue is not evidence, *People v Unger*, 278 Mich App 210, 240-241; 749 NW2d 272 (2008), and what they posit as a theory cannot undermine the verdict itself, which has overwhelming support in the record.

2. KIDNAPPING

Defendant also argues that the *Crump* definition of "hostage" should be applied to, and have been included within, the jury instruction on kidnapping. We reject this argument for two reasons. First, the analysis in *Cousins* makes clear that the adoption of this definition of "hostage" specifically applied to the prisoner taking a hostage statute, MCL 750.349a, *Cousins*, 139 Mich App at 590-591, and it was not and has not been applied to the kidnapping statute, MCL 750.349. Sec-

ond, the trial court provided the model criminal jury instruction for kidnapping, M Crim JI 19.1, which provides that when the defendant knowingly restrained another person, he intended to do "one or more of the following," including "use that person as a shield or hostage." M Crim JI 19.1(3)(b).[6] The trial court's instruction mirrors the model instruction and only provided Subsection (b) as the other scenarios did not apply. Thus, the trial court did not abuse its discretion by providing the model jury instruction for kidnapping, and defendant is not entitled to any relief in this regard.

B. SUFFICIENCY OF THE EVIDENCE

Defendant argues that the evidence was insufficient to support his convictions of prisoner taking a hostage and kidnapping because there was no evidence establishing that defendant intended to take Thornton as a hostage, or use her as security to influence a third party.

This Court will review a challenge to the sufficiency of the evidence de novo. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). The evidence is reviewed "in a light most favorable to the prosecutor to determine whether any trier of fact could find the essential elements of the crime were proven beyond a reasonable doubt." *People v Robinson*, 475 Mich 1, 5; 715 NW2d 44 (2006). The standard this Court uses to review the sufficiency of the evidence is "not whether there was any evidence to support the conviction, but whether there was sufficient evidence to justify a rational trier of fact in finding guilt beyond a reason-

[6] The Model Criminal Jury Instructions are mandatory if applicable, accurate, and requested. MCR 2.512(D)(2); *People v Traver*, 316 Mich App 588, 596; 894 NW2d 89 (2016), reversed in part on other grounds 502 Mich 23 (2018).

able doubt." *People v Hampton*, 407 Mich 354, 356; 285 NW2d 284 (1979). When reviewing the evidence, factual conflicts are to be viewed in a light most favorable to the prosecution. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1993). Furthermore, it is up to the jury to weigh the evidence presented and evaluate the credibility of witnesses. *People v Kanaan*, 278 Mich App 594, 618-619; 751 NW2d 57 (2008).

Again, we look to *Cousins* as instructive. In *Cousins*, the defendant was being transported by a deputy from the courthouse back to the jail through a security elevator and tunnel. *Cousins*, 139 Mich App at 586-587. When the elevator opened in the basement to the tunnel, the defendant physically assaulted the deputy and demanded the deputy's gun, which went off and injured the deputy. *Id*. at 587. The two exited the elevator, and the defendant hit the deputy over the head with the gun. *Id*. The next thing the deputy could recall was being on the second floor lying next to a wall with the defendant standing near him, and then being in a courtroom to announce that the defendant escaped. *Id*. The only way the deputy could have been on the second floor was by way of the elevator, but he had no recollection of it. *Id*. The defendant testified that he took the elevator to the second floor and fled the building but did not take the deputy with him. *Id*. at 588. After fleeing the courthouse, the defendant shot a postal worker, and then entered a woman's home and demanded at gunpoint that she drive him to Detroit. *Id*. at 588-589.

The *Cousins* Court had to determine whether the evidence was sufficient that the defendant took the deputy in the elevator and to the second floor with the intent to use the deputy as a hostage, i.e., "as security for the performance or forbearance of some act by a

third person." *Id*. at 591. Viewing the evidence in the light most favorable to the prosecution, the Court determined that the jury could have inferred beyond a reasonable doubt that the defendant took the deputy into the elevator with the intent to use the deputy as a hostage "if necessary," noting that the defendant would have had to go through a public area to leave the building. *Id*. The Court noted that testimony by the defendant indicating his readiness to use the woman as a hostage supported an inference that he intended to use the deputy as a hostage if needed. *Id*. at 592. Lastly, although the jury could have found that the defendant took the deputy into the elevator to prevent the deputy from sounding an alarm, "the evidence did not preclude the jury from finding otherwise." *Id*.

Here, viewing the evidence in the light most favorable to the prosecution, the evidence was sufficient for the jury to infer beyond a reasonable doubt that defendant had the intent to use Thornton as a hostage "if necessary," *id*. at 591, which he did not have the opportunity to do. Although defendant was off the prison property at the time, he still needed to get to a place of safe haven, and he repeatedly told Thornton that he needed a ride. He clearly wanted to get farther away from the prison facility, which would necessitate travel along public highways. The fact that there was no testimony by defendant indicating an intent to use Thornton as a hostage, as there was in *Cousins*, does not sufficiently distinguish *Cousins*. Although the jury could have found that defendant directed Thornton to accompany him merely to obtain access to Thornton's cell phone and car keys, this "evidence did not preclude the jury from finding otherwise." *Id*. at 592. Thornton testified that defendant had her cell phone, car keys, money, and the box cutter in his possession, yet he still insisted that she come with him despite her many

protestations. Therefore, the evidence was sufficient that defendant had the intent to use Thornton as a hostage "if the need arose." *Id*.

In regards to the kidnapping statute, the evidence was likewise sufficient that defendant intended to use Thornton as a hostage based on the same reasoning, but also that defendant used Thornton as a shield. MCL 750.349(1)(b). Defendant knew that Thornton had called 911. He broke down the door to the back office while Thornton was on the phone, threw Thornton to the ground, and ripped the landline telephone out of the wall. Knowing that 911 was called, defendant gestured with the box cutter for Thornton to come with him while exiting the motel, and she walked ahead of him "so he could watch [her]." Thornton said, "You know, he was threatening me. So, he was kind of behind me. To make sure I was doing what I was—what he wanted me to do." Thus, the evidence was also sufficient under the kidnapping statute for the jury to find beyond a reasonable doubt that defendant had the intent to use Thornton as a shield or hostage. MCL 750.349(1)(b).

C. MOTION TO QUASH

We next turn to defendant's argument that the trial court abused its discretion when it denied his motion to quash based on its incorrect interpretation of the prisoner taking a hostage statute, MCL 750.349a. Specifically, defendant argued in his motion to quash that he was not "imprisoned" under the statute, having escaped from the facility when the incident with Thornton occurred.

"A trial court's decision regarding a motion to quash an information is reviewed for an abuse of discretion." *People v Zitka*, 325 Mich App 38, 43; 922 NW2d 696 (2018). An abuse of discretion occurs when

the trial court's decision falls outside the range of reasonable and principled outcomes. *Id*. (quotation marks and citation omitted). "To the extent that a lower court's decision on a motion to quash the information is based on an interpretation of the law, appellate review of the interpretation is de novo." *Id*. at 44 (quotation marks and citation omitted). As noted more fully above, defendant's challenge to the sufficiency of the evidence is also reviewed de novo. *Hawkins*, 245 Mich App at 457.

When interpreting the meaning of a statute, the Court's primary goal is "to ascertain and give effect to the intent of the Legislature." *People v Thomas*, 263 Mich App 70, 73; 687 NW2d 598 (2004) (quotation marks and citations omitted). When a statute is clear, it must be enforced as written. *Id*. When a statute is susceptible to multiple interpretations, "judicial construction is proper to determine legislative intent." *Id*. (quotation marks and citation omitted).

> Statutory language should be construed reasonably, keeping in mind the purpose of the act. When terms are not expressly defined by statute, a court may consult dictionary definitions. Words should be given their common, generally accepted meaning, if consistent with the legislative aim in enacting the statute. [*Id*. (quotation marks and citations omitted).]

The court denied defendant's motion to quash, reasoning that defendant's status as a person imprisoned and subject to an order of incarceration did not change when he was away from the facility without permission. What was determinative was defendant's legal status at the time, ergo he was a prisoner away without leave. The court noted that defendant's reasoning would "have a prisoner while being transported to another facility or receiving medical treatment outside his normal location to be determined not

a person imprisoned at the time. The Court seriously doubts this was the intention of the Legislature."

The trial court did not abuse its discretion in denying defendant's motion to quash by concluding that defendant was a "person imprisoned" for the purposes of MCL 750.349a. The statute does not define the term "imprisoned," nor does any caselaw for the purpose of this statute.[7] Thus, we turn to the dictionary to determine its ordinary usage. *Brackett v Focus Hope, Inc*, 482 Mich 269, 276; 753 NW2d 207 (2008). "Imprisonment" is defined as "[t]he act of confining a person, esp. in a prison," "[t]he quality, state, or condition of being confined," and "[t]he period during which a person is not at liberty[.]" *Black's Law Dictionary* (11th ed). "Imprison" is defined as "to put in or as if in prison: CONFINE[.]" *Merriam-Webster's Collegiate Dictionary* (11th ed).

Considering these definitions in conjunction with the purposes of the prisoner taking a hostage statute, we conclude that "imprisoned" means that the person is confined within a prison or subject to an order of imprisonment wherein the individual is not at liberty to be outside the confines of the prison or outside the

[7] In most cases citing this statute, the defendant prisoner committed the crime by taking a hostage within the confines of a prison. See *People v Hobbs*, unpublished per curiam opinion of the Court of Appeals, issued April 2, 2013 (Docket No. 308477) (the defendant inmate used a shank to take a prison secretary hostage), *People v Rhinehart (On Rehearing)*, unpublished per curiam opinion of the Court of Appeals, issued May 13, 1997 (Docket No. 193654) (the defendant inmate held a prison employee hostage for hours holding scissors to her neck), *People v Travis*, 182 Mich App 389; 451 NW2d 641 (1990), overruled by *People v Reichard*, 505 Mich 81 (2020) (the defendant and another inmate took several prison employees hostage). In *Cousins*, this Court upheld the defendant's conviction under MCL 750.349a, although on other grounds, where the defendant prisoner took the deputy as a hostage outside the prison grounds. *Cousins*, 139 Mich App at 589-593, 599.

control of a prison employee when the kidnapping occurs. Based on these dictionary definitions, it was not an abuse of discretion for the trial court to deny defendant's motion to quash, as it properly concluded that a "person imprisoned" includes those prisoners whose legal status is subject to an order of imprisonment, but who take a hostage outside the actual confines of the prison facility. And here, at the time of his actions against Thornton, defendant was certainly in a state "of being confined," and "not at liberty," *Black's Law Dictionary* (11th ed), as he had no authority to be outside the facility at the time of these crimes. As such, the trial court did not abuse its discretion.

D. INCONSISTENT VERDICTS

Defendant next argues that the jury rendered inconsistent verdicts when it acquitted him of armed robbery and felonious assault, but convicted him of prisoner taking a hostage and kidnapping predicated on his taking Thornton at knifepoint.

To properly preserve most issues for appeal, a party must object in the trial court. *People v Pipes*, 475 Mich 267, 277; 715 NW2d 290 (2006). Defendant's argument that the trial court rendered inconsistent verdicts was raised for the first time in defendant's brief on appeal. Therefore, the issue is not preserved, *id*., and is reviewed for plain error affecting substantial rights, *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Defendant must demonstrate that an error occurred, the error was plain, and the plain error affected his substantial rights. *Id*. at 763. "The third prong requires a showing of prejudice, which occurs when the error affected the outcome of the lower court proceedings." *People v Putman*, 309 Mich App 240, 243; 870 NW2d 593 (2015).

Verdicts are considered "inconsistent" when the verdicts "cannot rationally be reconciled." *People v Garcia*, 448 Mich 442, 464; 531 NW2d 683 (1995) (quotation marks and citation omitted). Inconsistent verdicts within a single jury trial are permissible, and do not require reversal absent a showing of confusion by the jury, a misunderstanding of the instructions, or impermissible compromises. *Putman*, 309 Mich App at 251. The burden is on the defendant to prove evidence of one of these three things. *Id*. The defendant may not merely rely on the alleged inconsistency itself to support such an argument. *People v McKinley*, 168 Mich App 496, 510-511; 425 NW2d 460 (1988). "[J]uries are not held to any rules of logic nor are they required to explain their decisions." *Putman*, 309 Mich App at 251 (quotation marks and citation omitted).

Because juries may reach inconsistent verdicts, defendant is not entitled to relief. *Id*. Moreover, defendant does not even argue, let alone meet his burden of proof, that there was juror confusion, misunderstood instructions, or impermissible compromise. *Id*. Defendant merely relies on an alleged inconsistency, *McKinley*, 168 Mich App at 510-511, and defendant asks the Court to use the outdated standard that inconsistent verdicts cannot stand unless explained on a rational basis under *People v Goodchild*, 68 Mich App 226, 237; 242 NW2d 465 (1976). This is no longer the standard. See *People v Vaughn*, 409 Mich 463, 466; 295 NW2d 354 (1980). Therefore, because defendant has failed to meet his burden under the proper standard, he is not entitled to relief.

E. SENTENCING

For his final arguments, defendant argues that the trial court erred in its scoring of several offense vari-

ables (OVs) at sentencing. This Court reviews de novo the proper interpretation and application of the statutory guidelines. MCL 777.11 *et seq*.; *People v Francisco*, 474 Mich 82, 85; 711 NW2d 44 (2006).

> Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence. Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo. [*People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013).]

1. OV 2

Defendant argues that the trial court improperly scored OV 2 at five points because the jury acquitted him of armed robbery and felonious assault, and the court agreed that OV 1 should not be scored for aggravated use of a weapon, but still scored five points for OV 2 having found that defendant possessed the weapon.

OV 2 is scored for the "lethal potential of the weapon possessed or used." MCL 777.32(1). Five points are assessed if "[t]he offender possessed or used a pistol, rifle, shotgun, or knife or other cutting or stabbing weapon," and zero points are assessed if "[t]he offender possessed or used no weapon[.]" MCL 777.32(1)(d), (f). Defendant argued that OV 2 should be scored at zero points based on the reasoning employed by the trial court in scoring OV 1, i.e., that the jury did not find aggravated use of a weapon, and therefore scored zero points for OV 1.[8] The trial court, however, determined

[8] OV 1 is scored for "aggravated use of a weapon." MCL 777.31(1). Defendant argued that OV 1 should be scored zero points because he was acquitted of armed robbery and felonious assault, and the prosecution argued that it should be scored five points because "[a] weapon was displayed or implied[.]" MCL 777.31(1)(e). The trial court, relying on

that a preponderance of the evidence proved that defendant possessed the box cutter, including testimony and the proximity of the box cutter to the vehicle, and so scored OV 2 at five points. This was not clearly erroneous.

Thornton testified that defendant grabbed the box cutter from the windowsill in the back office and kept gesturing at her holding the box cutter, saying that she had to come with him. The box cutter was found on the ground near the driver's side of the vehicle that defendant entered in the parking lot as the police approached. The box cutter was tested for DNA, and the sample on the box cutter matched defendant's DNA.[9] Therefore, the trial court properly determined that defendant possessed the box cutter by a preponderance of the evidence, and appropriately scored five points for OV 2. See *People v Bosca*, 310 Mich App 1, 50; 871 NW2d 307 (2015) (OV 2 properly scored at five points where associate of the defendant possessed a samurai sword and hatchet). It is of no import that the trial court scored OV 1 at zero points. OV 2 pertains to the "lethal potential of the weapon *possessed* or used," MCL 777.32(1) (emphasis added), whereas OV 1 addresses the "aggravated use of a weapon," MCL 777.31(1). While the jury may have acquitted defendant of armed robbery and felonious assault, thereby

People v Beck, 504 Mich 605, 629; 939 NW2d 213 (2019) ("[D]ue process bars sentencing courts from finding by a preponderance of the evidence that a defendant engaged in conduct of which he was acquitted."), determined that the jury did not find aggravated use of a weapon, and therefore scored zero points for OV 1. Defendant does not challenge the scoring of OV 1 on appeal.

[9] Defendant asserts that the blood on the knife was by mere transference that occurred when the police handled the evidence. Laninga testified that he could have transferred blood from one item to another when collecting the evidence, but he did not think there was any cross-contamination in this case.

precluding scoring for such under OV 1, this did not preclude the jury from determining that defendant possessed the box cutter when he committed prisoner taking a hostage and kidnapping. Thus, OV 2 was properly scored at five points.

2. OV 10

With respect to OV 10, defendant argues that the trial court improperly scored five points because Thornton was not a vulnerable victim—she fought defendant for her cell phone and only stopped when he obtained the box cutter, not because of a difference in their size.

OV 10 is scored for the "exploitation of a vulnerable victim." MCL 777.40(1). Five points are assessed if "[t]he offender exploited a victim by his or her difference in size or strength, or both . . . ." MCL 777.40(1)(c). "The mere existence of 1 or more factors described in subsection (1) does not automatically equate with victim vulnerability." MCL 777.40(2). "Vulnerability" is defined in the statute as "the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation." MCL 777.40(3)(c). Defendant argued in his sentencing memorandum that OV 10 should not have been scored at five points because there was not enough evidence at trial to conclude that defendant overpowered Thornton. The prosecution argued that OV 10 was properly scored at five points because defendant kicked his way through the locked door to the back office, threw Thornton across the room, engaged in further physical contact, and was muscular and more physically imposing than Thornton. At sentencing, the trial court determined that OV 10 was properly scored at five points because defendant broke through the door and physically accosted Thornton, and the difference in size and strength between defendant and Thornton were factors.

As recounted earlier, trial testimony indicates that defendant pushed or threw Thornton to the floor at least twice in the back office. Trooper Justin Clark testified that Thornton was "taller than an average lady"; however, Grenfell testified that upon seeing Thornton for the first time in the parking lot, one could tell that she was "not strong." When calculating sentencing guidelines, the trial court may consider all record evidence, including the presentence investigation report (PSIR), plea admissions, and testimony. *People v McChester*, 310 Mich App 354, 358; 873 NW2d 646 (2015). The trial court may also consider victim-impact statements, and may make reasonable inferences from evidence in the record. *People v Earl*, 297 Mich App 104, 109-110; 822 NW2d 271 (2012), aff'd 495 Mich 33 (2014). In Thornton's victim-impact statement in the PSIR, she stated, " 'I thought he was going to kill me. He had complete control of the situation and overpowered me. I was completely helpless and at his mercy.' " It was therefore reasonable for the trial court to infer that defendant took advantage of his difference in size and strength, and the trial court did not clearly err when it concluded that defendant exploited Thornton because she was a vulnerable victim. A score of five points for OV 10 was proper.

3. OV 12

Defendant argues that the trial court improperly assessed 10 points for OV 12 because the trial court counted breaking and entering with intent as a contemporaneous felonious act, but since he entered a motel that was open to the public, defendant argues there was no breaking, and OV 12 should have been scored at five points instead of 10.

OV 12 is scored for contemporaneous felonious criminal acts. MCL 777.42(1). Ten points are assessed

for "[t]hree or more contemporaneous felonious criminal acts involving other crimes[.]" MCL 777.42(1)(c). Five points are assessed when "two contemporaneous felonious criminal acts involving other crimes were committed[.]" MCL 777.42(1)(e). A felonious criminal act is contemporaneous if it occurred within 24 hours of the sentencing offense, and does not result in a separate conviction. MCL 777.42(2)(a)(*i*) and (*ii*). "[W]hen scoring OV 12, a court must look beyond the sentencing offense and consider only those separate acts or behavior that did not establish the sentencing offense." *People v Abbott (On Remand)*, 330 Mich App 648, 654-655; 950 NW2d 478 (2019) (quotation marks and citation omitted).

The prosecution asserted that defendant committed breaking and entering with intent under MCL 750.111, which provides that "[a]ny person who, without breaking, enters any . . . hotel . . . with intent to commit a felony or any larceny therein, is guilty of a felony . . . ." Defendant argues on appeal that because there was no breaking, there was no evidence to find the third contemporaneous felonious criminal act. Defendant's argument is misplaced as he focuses on the element of breaking, when the statute clearly applies when a defendant enters certain buildings "without breaking." *Id*.

Moreover, even if a "breaking" was required, the evidence established that one occurred. "Under Michigan law, any amount of force used to open a door or window to enter the building, no matter how slight, is sufficient to constitute a breaking," but "[t]here is no breaking if the defendant had the right to enter the building." *People v Toole*, 227 Mich App 656, 659; 576 NW2d 441 (1998). In *Toole*, the defendant took a computer from a storage room located off of a classroom on a college campus. *Id*. at 657-658. This Court

upheld his conviction of breaking and entering with intent to commit larceny on appeal. *Id*. at 661. The *Toole* Court provided:

> In the present case, the International Center was open to the public. Therefore, defendant had a right to enter the building. However, the storage room, which was unlocked, was posted "keep out," and access to the storage room was restricted to maintenance and security personnel. This Court has previously held that a breaking of an inner portion of a building constitutes the requisite element for burglary. *People v Clark*, 88 Mich App 88, 91; 276 NW2d 527 (1979). Therefore, because defendant was not lawfully permitted to enter the storage room, his opening the door from the classroom to the storage room was sufficient to satisfy the element of breaking. [*Toole*, 227 Mich App at 659.]

Defendant argues that the trial court should not have considered breaking and entering a building with intent to commit a felony as a contemporaneous felonious criminal act to be scored under OV 12 because he entered the motel, which was open to the public, and he had a right to enter. However, Thornton discovered defendant behind the front desk, and repeatedly told him that she could not help him unless he went back into the lobby and around to the other side of the front desk. When defendant finally went back to the lobby, a door closed and locked behind him. This area was clearly meant for motel employees only and not the general public. Thornton then ran to the back office, another area meant solely for employees, and made sure the door locked behind her. Defendant had to have traversed behind the front desk again to make his way to the locked door to the back office, which he kicked down. This satisfies the element of breaking. *Id*. Therefore, the trial court did not clearly err in determining that defendant committed breaking and entering with intent as a contemporaneous felonious criminal act for

the purposes of OV 12, and properly assessed defendant 10 points.

4. OV 19

In his last scoring challenge, defendant argues that the trial court improperly scored 10 points for OV 19 because the escape and flight occurred before the commission of the other felonies, and defendant was apprehended immediately when police arrived.

OV 19 is scored for the "threat to the security of a penal institution or court or interference with the administration of justice or the rendering of emergency services." MCL 777.49. Twenty-five points are assessed when the offender threatens the security of a penal institution or court, and 15 points are assessed when the offender "used force or the threat of force against another person or the property of another person to interfere with, attempt to interfere with, or that results in the interference with the administration of justice or the rendering of emergency services." MCL 777.49(a), (b). Ten points are assessed if "[t]he offender otherwise interfered with or attempted to interfere with the administration of justice, or directly or indirectly violated a personal protection order." MCL 777.49(c).

This Court recently explained that "[a] defendant interferes with the administration of justice by 'oppos[ing] so as to hamper, hinder, or obstruct the act or process of administering judgment of individuals or causes by judicial process.' " *People v Baskerville*, 333 Mich App 276, 301; 963 NW2d 620 (2020), quoting *People v Hershey*, 303 Mich App 330, 343; 844 NW2d 127 (2013). "In scoring OV 19, a court may consider the defendant's conduct after the completion of the sentencing offense." *Baskerville*, 333 Mich App at 301.

"OV 19 is generally scored for conduct that constitutes an attempt to avoid being caught and held accountable for the sentencing offense." *Id*. at 302 (quotation marks and citation omitted).

Here, the trial court properly considered defendant's conduct after completion of the sentencing offenses—kidnapping and prisoner taking a hostage. *Id*. Upon exiting the motel, Thornton ran away from defendant, and defendant ran toward Thornton's car, for which he had the keys. Grenfell testified seeing defendant standing outside the vehicle, look at the police, and then proceed to get inside the vehicle, although he did so only briefly. The police gave defendant loud verbal commands to freeze, but he was still fumbling inside the vehicle as if trying to get it to start as the police surrounded him. This demonstrates defendant's attempt to avoid getting caught. *Id*. Thus, the trial court properly assessed defendant 10 points for OV 19. Because defendant was unsuccessful in all of his challenges on appeal to the OV scoring, he is not entitled to a remand for resentencing. *Francisco*, 474 Mich at 89 n 8 ("Where a scoring error does not alter the appropriate guidelines, resentencing is not required.").[10]

Affirmed.

FORT HOOD, J., concurred with MURRAY, C.J.

GLEICHER, J. (*dissenting*). Defendant Alize Montague was convicted of two crimes that share a common

[10] "Resentencing is also not required where the trial court has clearly indicated that it would have imposed the same sentence regardless of the scoring error and the sentence falls within the appropriate guidelines range." *Francisco*, 474 Mich at 89 n 8. The trial court stated at sentencing that if the sentencing guidelines range were decreased based on a successful challenge by defendant to the OV scoring, the trial court would have imposed the same sentence, which still would have fallen within the decreased range.

element: taking a hostage. The trial court incorrectly defined the word "hostage" when instructing the jury. The majority acknowledges this error but deems it harmless, finding that the same result would have obtained had proper instructions been given. I respectfully disagree. The court's error fundamentally altered the intent element of the crimes and did not fairly present the issues to be tried or permit Montague to pursue a potentially viable defense.

The correct definition of "hostage" conveys that a hostage is a person who is being held as security for an act or forbearance *by a third person*. The given instruction eliminated the third-person requirement altogether, despite that defense counsel specifically requested that the jury be informed of the correct definition. The trial court instead gave the prosecution's version of the instruction, which permitted the jury to convict if it found that Montague intended only that the *victim* would acquiesce to his demands.

Because the instruction as given negated an intent ingredient required under the law, it did not fairly present the issue to be tried regarding the charges of violating MCL 750.349a, which prohibits a prisoner from taking a hostage, and MCL 750.349, which prohibits kidnapping. No evidence supports that Montague intended to hold the victim as security for an act by a third person. I would vacate Montague's conviction for prisoner taking a hostage, and remand for a new trial regarding the kidnapping charge.

I. FACTUAL AND PROCEDURAL BACKGROUND

Montague escaped from prison and fled to a hotel. Heather Thornton, the hotel night clerk, supplied the evidence used by the prosecutor to establish the crimes of prisoner taking a hostage and kidnapping. Thornton

testified that after discovering Montague in the hotel lobby in the middle of the night, she directed him to a lobby telephone and attempted to lock herself in a back office. Montague kicked down the door to the office, Thornton recounted, and threatened her with a box cutter. While wielding the box cutter, Montague took Thornton's cell phone, car keys, and some cash. Thornton described that with the box cutter still in hand, Montague instructed her to accompany him as he left the hotel and headed for Thornton's car. As she exited the hotel ahead of Montague, Thornton spotted police vehicles pulling into the driveway and sprinted toward them. Montague ran to Thornton's car, where he was apprehended.

The prosecutor charged Montague with escape from prison, MCL 750.193; prisoner taking a hostage, MCL 750.349a; kidnapping, MCL 750.349; armed robbery, MCL 750.529; and assault with a dangerous weapon, MCL 750.82. Montague admitted to the escape. And apparently the jury did not accept as true some portions of Thornton's testimony, given that despite her graphic description of her experience, the jurors acquitted Montague of having assaulted or robbed her.[1] More pertinently, at no point in her testimony did Thornton (or any other witness) claim that Montague had mentioned, hinted, or even inferred that he intended to hold her as security for the performance of an act by a third party.

Before trial, defense counsel moved to quash the charges of prisoner taking a hostage and kidnapping. He contended that as to both, no evidence supported that Montague intended to take Thornton as a hostage

[1] The jury's verdict calls into question the majority's factual finding that Montague "was . . . violent towards Thornton when trying to obtain her phone and car keys."

as that term was defined in *People v Cousins*, 139 Mich App 583; 363 NW2d 285 (1984). In *Cousins*, 139 Mich App at 590, this Court adopted the definition of taking a hostage provided in *State v Crump*, 82 NM 487, 493; 484 P2d 329 (1971): "the unlawful taking, restraining or confining of a person with the intent that the person, or victim, be held as security for the performance, or forbearance, of some act by a third person." In crafting this definition, the New Mexico Supreme Court canvassed several dictionaries. Although *Cousins* is not necessarily binding on this Court, I agree with the majority's unstated conclusion that it remains valid. A number of other courts have also adopted the *Crump* definition of "hostage." See *State v Garcia*, 179 Wash 2d 828, 840; 318 P3d 266 (2014); *Ingle v State*, 746 NE2d 927, 939 (Ind, 2001); *State v Moore*, 315 NC 738, 746; 340 SE2d 401 (NC, 1986); *State v Stone*, 122 Ariz 304, 309; 594 P2d 558 (1979); *State v Littlefield*, 389 A2d 16, 21 (Me, 1978).

As the majority points out, the trial court *was* bound by *Cousins*, and I concur that it abused its discretion by failing to correctly define "hostage" for the jury. But unlike the majority, I believe that this was not an inconsequential mistake. Taking a hostage is an essential element of both the prisoner-taking-a-hostage and kidnapping statutes, and the trial court's instruction allowed the jury to convict without proof of the integral element of intent to involve a third party.

The elements of the crime of prisoner taking a hostage, MCL 750.349a, are: (1) the defendant was imprisoned in a penal or correctional institution located in this state, (2) the defendant took, held, carried away, decoyed, enticed away, or secreted another person as a hostage, (3) the defendant intended to take the other person as a hostage, and (4) the defendant did so by means of threats, coercion, intimidation, or physical

force. Properly defined, a hostage is a person unlawfully taken, restrained, or confined with the intent that the person be held as security for the performance or forbearance or some other act by a third party. The prosecution had to prove that Montague intended to take, restrain, or confine Thornton so that a third party would do or not do something.

Defense counsel argued in the motion to quash that the evidence supported that Montague attempted to take Thornton with him so that he could have access to her cell phone, as the device did not have a personal identification number and apparently required that Thornton personally swipe it to activate it. Counsel argued, "There is not testimony in the record that he intended to take her as a hostage, when looking at *Cousins* for the definition of hostage." The trial court rejected this argument, ruling as follows:

> The charge in Count 1, Prisoner taking a hostage, this Court finds, under the facts presented, the clear inferences allowed satisfies the meaning that Ms. Thornton was a hostage. She was held by the Defendant against her will, controlled through threats and the presence of a weapon. To suggest, under these circumstances, that she was not a hostage flies in the face of the facts. What the Prisoner's intent was can only be a part of the picture, as the ultimate purposes of the Defendant may only have been determined by the ongoing series of events as they unfolded. Further, the Court finds, is that the impression of the victim cannot be discounted in this scenario. Suffice to say, this Court finds on the facts that the victim was a hostage.

The parties submitted proposed jury instructions to the court. Defense counsel offered a definition of hostage consistent with *Cousins*. The prosecution offered the definition adopted by the trial court: "Hostage means a person taken by force to secure the taker's

demands." The court gave the jury the prosecutor's instruction.

II. LEGAL ANALYSIS

A. PRISONER TAKING A HOSTAGE

Conviction under the prisoner-taking-a-hostage statute required proof that Montague intended to take Thornton as a hostage as security for an act or forbearance by a third party. Not only was the jury incorrectly instructed regarding the definition of "hostage"; no evidence supported that Montague intended to seize or hold Thornton for that purpose.

The majority holds that the trial court's instructional error was harmless, reasoning that the jury could have found that Montague took Thornton "as protection in case authorities showed up." This rationalization rests on pure speculation and conjecture and is unsupported by any actual evidence of record. The evidence demonstrates that the case was tried on the theory that Montague took Thornton to prevent *her* from contacting the police. Indeed, the prosecution's brief on appeal concedes that Montague "was trying to save his own skin, trying to use Thorton [sic] in any way possible, and trying to prevent her from reaching out for help and turning him in to law enforcement." But the "third party" aspect of the proper instruction denotes that the restrained person must be held to entice someone *else* to act. The defendant's intent must go well beyond restraining the victim and obtaining her submission to his demands, which is all that the instruction as given required. The correct instruction encompasses the use of the victim to compel or persuade a third party to become involved in a defendant's crime.

The trial court's instruction allowed the jury to conclude that Thornton was a "hostage" because she complied with "the taker's demands" and because Montague intended that she comply. A correct instruction would have highlighted that Montague had to intend to restrain Thornton so that he could (for example) use her as a bargaining chip with a third party. Restraining her and compelling her to comply with his demands was not enough.

The prosecutor made no effort to present evidence supporting that Montague intended to obtain some sort of a concession, forbearance, or assistance from a third party. Rather, the prosecutor vigorously *resisted* the *Cousins* approach, arguing in his closing that Montague's intent to take Thornton's cell phone and her car were enough to satisfy the prisoner-taking-a-hostage statute:

> The second element is that the Defendant took, carried away, decoyed, enticed, or secreted Heather Thornton as a hostage. Now, hostage is defined to you as: A person taken by force, to secure the taker's demands. *Now, we don't know exactly what those demands were*. The Defendant never verbalized those demands. At leas[t] we don't have any testimony of that. What we do know, is that Ms. Thornton testified that he said, you're coming with me. He had a knife in his hand. He motions with the knife, you're coming with me, or get the object out from under the bed. Did that a couple different times.
>
> We also know that he had Ms. Thornton's cellphone. And that cellphone, based on her testimony, is an item that could not be used, without a special swipe code. He didn't know what that was. She knew what that was. *He needed her, to open that cellphone, so he could call*. He had a phone in the lobby, that was dialed for him, and he actually started calling on [it]. But, for one reason or another, he decided that wasn't good enough. And he went back, and kicked the door in, where Ms. Thornton was. I

guess he didn't have time to finish that call. There were more pressing matters to him.

He also needed Ms. Thornton's car keys. And whether or not he thought he could get into the car without her, I don't know for sure. But, those are three reasons why, I would submit to you that he needed Ms. Thornton. He needed to take her to secure those three demands.

* * *

. . . He is taking Ms. Thornton to secure his demands. What he needs done, to aid in his escape. [Emphasis added.]

By omitting any reference to the role of a third party regarding Montague's intent, the trial court's instruction misinformed the jury of a critical component of the crime of prisoner taking a hostage. The intent requirement conveyed by the instruction, buttressed by the prosecutor's argument, was satisfied by Montague's intent to take Thornton's car or her phone. But that intent simply did not suffice under *Cousins*, because the word "hostage" contemplates something more than an intent to restrain Thornton's freedom of movement or take her possessions.

This Court has explained that "[j]ury instructions must include all the elements of the charged offense and must not exclude material issues, defenses, and theories if the evidence supports them." *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). In addition to supplying the jury with an incorrect element, the trial court eliminated Montague's defense that he had no intent to use Thornton to extract something from a third party. That defense became irrelevant when the court adopted the prosecution's version of the word "hostage." The denial of a defense constitutes a constitutional violation. See *People v Kurr*, 253 Mich App 317,

326-327; 654 NW2d 651 (2002) ("Instructional errors that directly affect a defendant's theory of defense can infringe a defendant's due process right to present a defense.").[2]

But I would not simply remand for a new trial on this charge. In my view, the prosecution failed to produce any evidence supporting—directly or inferentially—that Montague intended to use Thornton as a hostage. The prosecutor admitted as much during his closing argument ("Now, we don't know exactly what those demands were. The Defendant never verbalized those demands. At leas[t] we don't have any testimony of that."). There is simply no record evidence that

[2] The majority's valiant effort to salvage the prisoner-taking-a-hostage verdict conflates the standard for assessing evidentiary sufficiency with the standard for determining whether an erroneous instruction mandates a new trial. Here, the incorrect instruction omitted an essential part of the intent element of the crime. Therefore, it misled the jury and did not fairly present the issue to be tried. See *People v Dumas*, 454 Mich 390, 396, 407; 563 NW2d 31 (1997). A trial court must explain the law correctly so that the jury may "apply the law to [the] facts," *United States v Gaudin*, 515 US 506, 514; 115 S Ct 2310; 132 L Ed 2d 444 (1995), and determine the defendant's guilt as to every element of the crime charged, *id*. at 510. When an instruction omits an element of an offense, the harmless-error standard applies. "[A]n instructional error regarding one element of a crime, whether by misdescription or omission, is subject to a harmless error analysis." *People v Duncan*, 462 Mich 47, 54; 610 NW2d 551 (2000). Even if the error here was nonconstitutional in nature, "a preserved, nonconstitutional error is not a ground for 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." *People v Lukity*, 460 Mich 484, 496; 596 NW2d 607 (1999), quoting MCL 769.26. The "more probable than not" standard is easily met here. The trial court foreclosed Montague's ability to argue that he did not detain Thornton to compel a third party to act or refrain from acting; he detained her for her cell phone. Concomitantly, the trial court permitted the jury to convict based solely on the evidence that Montague had detained Thornton. As instructed, the jury had no alternative but to convict. Accordingly, I would hold that the error likely was outcome-determinative.

Montague intended to hold or detain Thornton as security for the performance, or the for bearance, of some act by a third person. Accordingly, his conviction for prisoner taking a hostage should be vacated.

B. KIDNAPPING

After being instructed that an element of the kidnapping charge required the prosecution to prove that Montague intended to "use [Thornton] as a shield of hostage," the jury convicted Montague of kidnapping Thornton under MCL 750.349. This instruction is accurate (see M Crim JI 19.1), but the jury was provided with no definition of "hostage" other than the one accompanying the prisoner-taking-a-hostage charge. The defect in that instruction infected the kidnapping conviction, in my view.

It is certainly possible that a jury could have determined that Montague intended to use Thornton as a shield as they exited the hotel, despite that the evidence of that specific intent would have been entirely inferential and speculative. But there is no way to determine whether some jurors decided that Montague did *not* intend to use Thornton as a shield, but rather intended to hold her as a hostage as that term was improperly defined by the trial court. "A criminal defendant is entitled to have a properly instructed jury consider the evidence against him." *People v Riddle*, 467 Mich 116, 124; 649 NW2d 30 (2002). The improper instruction regarding the meaning of "hostage" likely led the jury "to tie one conviction to another." *People v Duncan*, 462 Mich 47, 54; 610 NW2d 551 (2000).

The evidence of Montague's intent in ordering Thornton to accompany him as they exited the hotel is murky at best. I would hold that more probably than not, the trial court's failure to properly instruct the

jury regarding the meaning of the word "hostage" was outcome-determinative regarding the kidnapping conviction as well as the conviction for prisoner taking a hostage. The instructional error undermines the reliability of the jury's verdict; we have no way of knowing whether the jury convicted Montague of kidnapping based on an incorrect understanding of the meaning of "hostage" or because the jurors concluded that Montague used Thornton as a shield. This fundamental uncertainty undermines the reliability of the verdict. I would remand for a new trial on this charge.

PEOPLE v SIMMONS (ON RECONSIDERATION)

Docket No. 349547. Submitted April 7, 2021, at Detroit. Decided April 29, 2021. Reconsideration granted and opinion vacated. Opinion on reconsideration issued July 1, 2021, at 9:10 a.m. Reversed in part and remanded 509 Mich 918 (2022).

Latausha Simmons was charged in the 37th District Court, Suzanne L. Faunce, J., with resisting and obstructing a police officer in violation of MCL 750.81(d)(1). She moved to dismiss the charge and for an evidentiary hearing concerning the lawfulness of the officers' conduct. The court concluded that defendant was stopped lawfully. On the first day of trial, before the jury was empaneled, the district court ruled that because it had previously determined that defendant was lawfully stopped, no evidence could be presented at trial regarding the lawfulness of the officers' conduct or the legality of defendant's arrest and the jury was not to be instructed that the lawfulness of the officers' conduct was a factual issue for it to determine. The jury found defendant guilty of resisting or obstructing a police officer, and the district court sentenced her to six months' probation. Defendant appealed her conviction in the Macomb Circuit Court. The circuit court, Carl J. Marlinga, J., noting that the prosecution did not file a response and was not present at the hearing on the appeal, concluded that the district court erred by precluding the parties from presenting evidence regarding the lawfulness of the officers' conduct and by failing to instruct the jury that the lawfulness of the officer's conduct was an element of resisting or obstructing an officer. The circuit court concluded that defendant was innocent and was entitled to an acquittal, and it reversed the district court and entered a judgment of acquittal for defendant, noting that its order was final. Thirteen days later, the prosecution moved for reconsideration, asserting that it never was served with defendant's claim of appeal or any of the documents filed thereafter. The prosecution conceded the district court erred by excluding evidence of the legality of the officers' conduct but argued that the proper remedy was to remand the case to that court for a new trial. The circuit court concluded that the prosecution was never served with defendant's claim of appeal or any of the other documents. The circuit court reversed itself and remanded the matter to the district court

so defendant could be retried. Defendant filed an application for leave to appeal in the Court of Appeals, arguing that because she timely filed her appeal with the clerk of the circuit court, who waived her fees, the circuit court had jurisdiction to enter its acquittal order regardless of whether the prosecution was properly served with her claim of appeal. She also argued that a retrial would violate the constitutional prohibition against double jeopardy. Her application for leave to appeal was denied. Defendant then filed an application for leave to appeal in the Michigan Supreme Court. In lieu of granting leave to appeal, the Supreme Court remanded the case to the Court of Appeals for consideration as on leave granted. 506 Mich 912 (2020). The Court of Appeals issued an opinion on April 29, 2021, but later vacated that opinion and granted the prosecution's motion for reconsideration.

On reconsideration, the Court of Appeals *held*:

1. Under MCR 7.104(B), to vest a circuit court with jurisdiction in an appeal of right, an appellant must file the claim of appeal with the clerk of the circuit court and pay the circuit court's appeal fees, unless the appellant is indigent, within the time for taking an appeal. Under MCR 7.104(A), an appeal of right to a circuit court from a district court must be taken within 21 days or the time allowed by statute after entry of the judgment, order, or decision appealed, and the time limit for an appeal of right is jurisdictional. On June 26, 2018, defendant timely filed a claim of appeal with the clerk of the circuit court. On July 9, 2018, the circuit court waived defendant's appeal fees because she was indigent. Therefore, jurisdiction vested in the circuit court under MCR 7.104(A)(1) and (B) because defendant timely filed her claim of appeal and the fees were waived. The service-of-process provisions in the court rules are not intended to limit or expand the jurisdiction. Rather, they are intended to satisfy the due-process requirement that a defendant be informed of an action by the best means available under the circumstances. Therefore, even if defendant failed to properly serve the prosecution with her claim of appeal, that would not have divested the circuit court of jurisdiction to enter its judgment of acquittal.

2. The prohibition against double jeopardy includes protection against a second prosecution for the same offense after acquittal. The Double Jeopardy Clause applies only if there has been some event, such as an acquittal, which terminates the original jeopardy. This includes a court-decreed acquittal—even if it is premised upon an erroneous exclusion of evidence—as well as any ruling that relates to the ultimate question of guilt or innocence. The form of a judge's action does not control whether the judgment of a lower court is an acquittal for purposes of double jeopardy; the question

is whether the action, correct or not, represents a resolution of some or all the factual elements of the charged offense. In issuing the order of acquittal, the circuit court judge noted that "even if the instruction had been correct, I see no way that [defendant] could have been or should have been convicted on this evidence." This decision of the circuit court was an unequivocal determination that the evidence was insufficient to establish all the elements of resisting or obstructing a police officer beyond a reasonable doubt and therefore constituted an acquittal for purposes of double jeopardy. Moreover, the circuit court also stated on the record that defendant was "an innocent person," which also constitutes an acquittal for double-jeopardy purposes. Orders of acquittal that are "acquittals" for double-jeopardy purposes bar retrial in all cases except those in which the prosecution seeks to reinstate the jury's guilty verdict, which was not the situation in this case, in which the prosecution conceded that the jury was improperly instructed. The Double Jeopardy Clause applied here and barred retrial of defendant.

3. The circuit court's unequivocal decision on reconsideration to set aside its order of acquittal and instead remand to the district court for a new trial on the basis that the error in the original trial was merely instructional did not supersede its earlier order of acquittal for purposes of the Double Jeopardy Clause.

Reversed and remanded.

BECKERING, P.J., dissenting, disagreed that double jeopardy applied and that the circuit court erred on reconsideration in remanding for a new trial, but she agreed that defendant's defective service on the prosecution did not divest the circuit court of jurisdiction to enter an order related to her appeal. The majority conflated the circuit court's ruling to reverse its own order of acquittal with its separate ruling to remand the case for a new trial based on an evidentiary error. The prosecution was permitted to seek reconsideration of the former because the circuit court was sitting as an appellate court and its order of acquittal had not yet become final because the prosecution could have appealed it to a higher court. Because defendant was convicted by a jury and the verdict was set aside by the circuit court acting as an appellate court, double jeopardy did not preclude reinstatement of the jury verdict. Accordingly, the circuit court's remand for a new trial was the proper remedy.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Peter Lucido*, Prosecuting Attorney,

Joshua D. Abbott, Chief Appellate Attorney, and *Emil Semaan*, Assistant Prosecuting Attorney, for the people.

LaTausha Simmons *in propria persona*.

Amicus Curiae:

Mark Wiese, *Kym L. Worthy*, *Jon P. Wojtala*, and *Timothy A. Baughman*, for Prosecuting Attorneys Association of Michigan.

ON RECONSIDERATION

Before: BECKERING, P.J., and FORT HOOD and RIORDAN, JJ.

RIORDAN, J. Defendant appeals, as on leave granted from our Supreme Court,[1] the circuit court's order reversing her conviction of resisting or obstructing a police officer, MCL 750.81d(1), and remanding to the district court for a new trial. Defendant argues that the circuit court had jurisdiction to enter its earlier order and judgment of acquittal, and further, that entry of the order precludes retrial under the Double Jeopardy Clause of the United States Constitution, US Const, Am V.[2] We agree in both respects. Accordingly, we reverse the circuit court's order and remand to that court for further proceedings consistent with this opinion.[3]

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[1] *People v Simmons*, 506 Mich 912 (2020).

[2] As applied to the states through the Fourteenth Amendment of the United States Constitution, US Const, Am XIV. See *Benton v Maryland*, 395 US 784, 787; 89 S Ct 2056; 23 L Ed 2d 707 (1969). See also Const 1963, art 1, § 15.

[3] Our opinion on reconsideration is substantively identical to our original opinion but for the addition of this footnote and footnote 11. See *People v Simmons*, unpublished opinion of the Court of Appeals, issued April 29, 2021 (Docket No. 349547).

I. FACTS AND PROCEDURAL HISTORY

This case arises out of the arrest of defendant for her failure to comply with the directives of Warren police officers. Officer Sullivan observed defendant exit a grocery store through an opening not typically used by the public and walk to a car parked in an alley next to the grocery store. Defendant entered the car, drove a few feet, exited the car next to a dumpster or shipping container that was in the alley, and peeked around the corner of the dumpster or shipping container at Officer Sullivan. Officer Sullivan found her behavior to be suspicious and approached her to investigate. He requested her identification numerous times. Defendant did not respond to Officer Sullivan and did not present her identification to him. Officer Horlocker and Officer Sciullo were then dispatched to assist Officer Sullivan. Officer Horlocker and Officer Sciullo independently spoke to defendant and requested her identification. Defendant did not respond to either officer and never produced her identification. She was ultimately arrested and charged with resisting or obstructing a police officer.

Before trial, defendant filed a motion to dismiss and for an evidentiary hearing on the lawfulness of the officers' conduct. After a hearing, the district court concluded that the officers' conduct was lawful and the matter then proceeded to trial. On the first day of trial, before the jury was empaneled, the parties discussed the introduction of evidence regarding the lawfulness of the officers' conduct and whether the jury was to be instructed that the lawfulness of the officers' conduct was an element of resisting or obstructing a police officer. The district court ruled that it previously had determined that the officers' conduct was lawful, that no evidence could be presented at trial regarding the lawfulness of the officers' conduct or the legality of

defendant's arrest, and that the jury was not to be instructed that the lawfulness of the officers' conduct was a factual issue for it to determine. Consequently, no evidence was presented at trial on the lawfulness of the officers' conduct and the jury did not consider that as one of the elements of the criminal allegation before it. Thus, the jury did not consider the lawfulness of the police officers' conduct and it then found defendant guilty of resisting or obstructing a police officer.

Defendant appealed her conviction in the circuit court. The prosecution did not respond to her appeal or file an appearance. At the hearing on the appeal, the circuit court concluded that the district court erred by precluding the introduction of evidence on the lawfulness of the officers' conduct but, nonetheless, ruled that defendant must be acquitted:

> Even if the — somebody on behalf of the State of Michigan or the City of Warren did appear, on the merits, you win. This matter is reversed and a judgment of acquittal is entered in favor of the Defendant.
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> Congratulations and on behalf of the State of Michigan let me apologize to the Defendant for going through what you did go through. I mean, even if the instructions had been correct, I see no way that you could have been or should have been convicted on this evidence.
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> * * *
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> You're an innocent person. Finally the record caught up with that. Thank you. Okay.

The circuit court accordingly entered an order and judgment of acquittal, which stated as follows:

> For the reasons stated on the record, Defendant's motion is GRANTED, Defendant's conviction is reversed,

> and all arrest records and fingerprint cards shall be returned to Defendant forthwith. This order is a final order resolving all claims and closing the case.

Thirteen days later, the prosecution moved for reconsideration, asserting that it never was served with defendant's claim of appeal or any of the documents filed thereafter, and that the proper remedy for the district court's error was to remand to that court for a new trial, not to enter an order of acquittal.[4] After reviewing the record, the circuit court concluded that the prosecution was not served with defendant's claim of appeal or any of the documents filed thereafter and set aside the order of acquittal. Ultimately, the circuit court reversed itself by concluding that the district court erroneously removed the element of whether the officers acted lawfully from the province of the jury, and it remanded the matter to the district court so that defendant could be retried on the charge of resisting or obstructing a police officer.

Defendant filed an application for leave to appeal in this Court, which was denied for lack of merit on the grounds presented. *People v Simmons*, unpublished order of the Court of Appeals, entered July 30, 2019 (Docket No. 349547). Defendant then filed an application for leave to appeal in our Supreme Court. In lieu of granting leave to appeal, our Supreme Court remanded the case to this Court for consideration as on leave granted. *People v Simmons*, 506 Mich 912 (2020). We now address the merits of her appeal.

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[4] The prosecution conceded in both the circuit court and this Court that the district court erred by precluding the introduction of evidence on the lawfulness of the officers' conduct and by refusing to instruct the jury concerning that element of the charged offense. See *People v Moreno*, 491 Mich 38, 51-52; 814 NW2d 624 (2012) (concluding that whether the officer acted lawfully is an element of the crime of resisting or obstructing a police officer).

II. JURISDICTION

Defendant first argues that the circuit court erred by finding that she did not properly serve her claim of appeal on the prosecution, and alternatively, even if the circuit court did not err by so finding, that the circuit court nonetheless possessed jurisdiction to enter the order of acquittal. We need not address the former argument because we conclude that the circuit court possessed jurisdiction over her appeal in either event. This Court reviews jurisdictional questions de novo. *Teran v Rittley*, 313 Mich App 197, 205; 882 NW2d 181 (2015).

"To vest the circuit court with jurisdiction in an appeal of right, an appellant must file with the clerk of the circuit court within the time for taking an appeal: (1) the claim of appeal, and (2) the circuit court's appeal fees, unless the appellant is indigent." MCR 7.104(B). "An appeal of right to the circuit court must be taken within . . . 21 days or the time allowed by statute after entry of the judgment, order, or decision appealed[.]" MCR 7.104(A)(1). "The time limit for an appeal of right is jurisdictional." MCR 7.104(A).

On June 26, 2018, defendant timely filed a claim of appeal with the clerk of the circuit court. In addition, defendant filed a request for a fee waiver with her claim of appeal. On July 9, 2018, the circuit court waived her fees because of her indigency. Therefore, under MCR 7.104(A)(1) and (B), jurisdiction was vested in the circuit court because defendant timely filed her claim of appeal and her fees were waived. This is true regardless of whether defendant properly served the prosecution with her claim of appeal because the service-of-process provisions contained in the court rules "are intended to satisfy the due process requirement that a defendant be informed of an action by the best means available under the circumstances.

These rules are not intended to limit or expand the jurisdiction given the Michigan courts over a defendant." MCR 2.105(J)(1).[5] Thus, even if defendant did not properly serve her claim of appeal on the prosecution, it did not divest the circuit court of jurisdiction to enter its judgment of acquittal.[6] See MCL 600.611 ("Circuit courts have jurisdiction and power to make any order proper to fully effectuate the circuit courts' jurisdiction and judgments.").

III. DOUBLE JEOPARDY

Defendant next argues that retrial would violate the constitutional prohibition against double jeopardy. We agree. "A double jeopardy challenge involves a question of law that this Court reviews de novo." *People v Dillard*, 246 Mich App 163, 165; 631 NW2d 755 (2001). Likewise, "[t]his Court reviews de novo claims of instructional error." *People v Dupree*, 284 Mich App 89, 97; 771 NW2d 470 (2009).

"The United States and the Michigan Constitutions protect a person from being twice placed in jeopardy for the same offense." *People v Parker*, 230 Mich App 337, 342; 584 NW2d 336 (1998), citing US Const, Am V; Const 1963, art 1, § 15. "The prohibition against double jeopardy provides three related protections: (1) it pro-

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[5] At most, the alleged failure to properly serve the claim of appeal would perhaps result in a lack of personal jurisdiction over the prosecution. See *In re Koss Estate*, 340 Mich 185, 190; 65 NW2d 316 (1954) ("[S]ervice of the notice of claim of appeal is the means whereby the circuit court attains jurisdiction over the parties to the appeal (although filing claim of appeal vests jurisdiction of the subject matter in the circuit court)[.]"). But see *Mich Employment Security Comm v Wayne State Univ*, 66 Mich App 26, 30-31; 238 NW2d 191 (1975) (limiting *In re Koss Estate* to the court rule in effect when that case was decided). Regardless, the prosecution does not raise any personal-jurisdiction argument.

[6] We note that the prosecution concedes this point as well.

tects 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).

With regard to the first protection, "the Double Jeopardy Clause by its terms applies only if there has been some event, such as an acquittal, which terminates the original jeopardy." *Richardson v United States*, 468 US 317, 325; 104 S Ct 3081; 82 L Ed 2d 242 (1984). Therefore, "a verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offense." *Ball v United States*, 163 US 662, 671; 16 S Ct 1192; 41 L Ed 300 (1896). Similarly, "the Double Jeopardy Clause bars retrial following a court-decreed acquittal, even if the acquittal is 'based upon an egregiously erroneous foundation.' " *Evans v Michigan*, 568 US 313, 318; 133 S Ct 1069; 185 L Ed 2d 124 (2013), quoting *Fong Foo v United States*, 369 US 141, 143; 82 S Ct 671; 7 L Ed 2d 629 (1962). "[A]n acquittal precludes retrial even if it is premised upon an erroneous decision to exclude evidence, a mistaken understanding of what evidence would suffice to sustain a conviction, or a 'misconstruction of the statute' defining the requirements to convict." *Evans*, 568 US at 318 (citations omitted).[7] Consequently, "an acquittal is final even if it is based on an erroneous *evidentiary* ruling that pre-

[7] The United States Supreme Court has "made a single exception to the principle that acquittal by judge precludes reexamination of guilt no less than acquittal by jury: When a jury returns a verdict of guilty and a trial judge (or an appellate court) sets aside that verdict and enters a judgment of acquittal, the Double Jeopardy Clause does not preclude a prosecution appeal to reinstate the jury verdict of guilty." *Smith v Massachusetts*, 543 US 462, 467; 125 S Ct 1129; 160 L Ed 2d

cluded the prosecution from introducing evidence that would have been sufficient to convict the defendant." *People v Szalma*, 487 Mich 708, 717-718; 790 NW2d 662 (2010). See also *Webster v Duckworth*, 767 F2d 1206, 1214 (CA 7, 1985) ("The absence of competent substantive evidence to support a verdict of guilty beyond a reasonable doubt, whether the result of prosecutorial inability, judicial error or a recalcitrant witness, requires an acquittal either at trial or on appeal.").

The United States Supreme Court has "defined an acquittal to encompass any ruling that the prosecution's proof is insufficient to establish criminal liability for an offense." *Evans*, 568 US at 318. "Thus, an acquittal includes a ruling by the court that the evidence is insufficient to convict, a factual finding that necessarily establishes the criminal defendant's lack of criminal culpability, and any other ruling which relates to the ultimate question of guilt or innocence." *Id*. at 319 (cleaned up). On the other hand, "a defendant who has been released by a court for reasons required by the Constitution or laws, but which are unrelated to factual guilt or innocence, has not been determined to be innocent in any sense of that word, absolute or otherwise." *United States v Scott*, 437 US 82, 98 n 11; 98 S Ct 2187; 57 L Ed 2d 65 (1978). In these scenarios, the Double Jeopardy Clause generally does not bar retrial following such "procedural dismissals." See *Evans*, 568 US at 319.

"Whether a judgment of a lower court is an acquittal for purposes of double jeopardy 'is not to be controlled by the form of the judge's action.' " *Szalma*, 487 Mich at

914 (2005). See also *People v Jones*, 203 Mich App 74, 79 n 1; 512 NW2d 26 (1993) ("Although retrial following acquittal is barred under the Double Jeopardy Clause, the government may appeal if reinstatement of the jury's verdict of conviction, rather than retrial, is sought.").

721, quoting *United States v Martin Linen Supply Co*, 430 US 564, 571; 97 S Ct 1349; 51 L Ed 2d 642 (1977). "Rather, an appellate court 'must determine whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged.' " *Szalma*, 487 Mich at 721, quoting *Martin Linen*, 430 US at 571. That is, "[t]here is an acquittal and retrial is impermissible when the judge 'evaluated the government's evidence and determined that it was legally insufficient to sustain a conviction.' " *People v Anderson*, 409 Mich 474, 486; 295 NW2d 482 (1980), quoting *Martin Linen*, 430 US at 572.

Two cases illustrate the opposite ends of the spectrum of the double-jeopardy issue before us. In *Sanabria v United States*, 437 US 54; 98 S Ct 2170; 57 L Ed 2d 43 (1978), the petitioner was charged in federal district court with violating 18 USC 1955, a statute that prohibits operating an "illegal gambling business" in violation of state law. *Id*. at 56. The federal district court originally allowed the Government to introduce evidence of both "numbers betting" and "horse betting," but subsequently struck all evidence of numbers betting near the end of trial "because it believed such action to be required by the indictment's failure to set forth the proper section." *Id*. at 58-59. The federal district court then entered a judgment of acquittal in favor of the petitioner on the basis that the Government failed to introduce sufficient proof that the petitioner was connected to the "horse-betting activities." *Id*. at 59. Thereafter, the Government sought to retry the petitioner for numbers betting alone. *Id*. at 60-61. The United States Supreme Court ruled that the Double Jeopardy Clause barred retrial notwithstanding the federal district court's presumably erroneous interpretation of the indictment and accompanying decision to exclude evidence:

> We must assume that the trial court's interpretation of the indictment was erroneous. But not every erroneous interpretation of an indictment for purposes of deciding what evidence is admissible can be regarded as a "dismissal." Here the District Court did not find that the count failed to charge a necessary element of the offense; rather, it found the indictment's description of the offense too narrow to warrant the admission of certain evidence. To this extent, we believe the ruling below is properly to be characterized as an erroneous evidentiary ruling, which led to an acquittal for insufficient evidence. That judgment of acquittal, however erroneous, bars further prosecution on any aspect of the count and hence bars appellate review of the trial court's error. [*Id*. at 68-69 (citations omitted).]

In *United States v Houston*, 792 F3d 663 (CA 6, 2015), the defendant was charged in federal district court with violating 18 USC 875(c), a statute prohibiting the transmittal of a threat in interstate commerce. *Id*. at 665. The federal district court instructed the jury that " '[a] statement is a true threat if it was made under such circumstances that a reasonable person hearing the statement would understand it as a serious expression of intent to inflict injury.' " *Id*. at 666. The United States Court of Appeals for the Sixth Circuit reversed the defendant's conviction and remanded the matter to the federal district court for a new trial, explaining that the instruction was erroneous because "[i]t permitted the jury to return a criminal conviction based on a negligent state of mind[.]" *Id*. at 667. The Court then addressed his sufficiency-of-the-evidence challenge, stating as follows:

> Before addressing this argument, a brief digression is in order. Do we measure the sufficiency of the evidence to convict Houston under the wrong instruction (what was given) or the right one (what would otherwise be given on remand)? Oddly enough, it is the wrong instruction, at least when the instructions omit or inaccurately describe an element of the offense and the defendant fails to object—as

> here. Otherwise, we would be forced to measure the evidence introduced by the government against a standard it did not know it had to satisfy and potentially prevent it from ever introducing evidence on that element. Nor does this approach create Double Jeopardy problems. Consider this case: If we think about the sufficiency of the evidence with respect to correct jury instructions, the government would not be seeking a second bite at the apple but a *first* bite under the right legal test. . . . Other appellate courts have reached the same conclusion. [*Id*. at 669-670.]

In this case, the order of acquittal provided that it was granted "[f]or the reasons stated on the record." And the circuit court stated on the record that "even if the instructions had been correct, I see no way that [defendant] could have been or should have been convicted on this evidence." This was an unequivocal determination that the evidence was insufficient to establish all of the elements of resisting or obstructing a police officer beyond a reasonable doubt, and therefore the circuit court's action constituted an acquittal. See *Anderson*, 409 Mich at 486 (explaining that an acquittal occurs "when the judge 'evaluated the government's evidence and determined that it was legally insufficient to sustain a conviction' "), quoting *Martin Linen*, 430 US at 572. Further, the circuit court also stated that defendant was "an innocent person." Such an express finding of innocence also constitutes an acquittal. See *Evans*, 568 US at 319. Simply put, the circuit court's statements on the record may only be reasonably understood to be an acquittal for the purposes of the Double Jeopardy Clause.[8]

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[8] By analogy, MCR 6.419(A) provides that during a jury trial, at the close of the prosecution's case-in-chief or the close of evidence, "the court on the defendant's motion must direct a verdict of acquittal on any charged offense for which the evidence is insufficient to sustain a conviction. The court may on its own consider whether the evidence is insufficient to sustain a conviction." The finding of evidentiary insuffi-

Having concluded that the order of acquittal was an "acquittal" for the purposes of the Double Jeopardy Clause, retrial is barred. See *Fong Foo*, 369 US at 143; *Szalma*, 487 Mich at 717-718. The order of acquittal "precludes reexamination of guilt" in all cases except "a prosecution appeal to reinstate the . . . verdict of guilty." *Smith*, 543 US at 467. Here, however, the prosecution does not seek to reinstate the jury's guilty verdict because it has acknowledged, as it must under the factual and procedural history, that the underlying instructional error would require a new trial, not the reinstatement of a guilty verdict. Accordingly, the Fifth Amendment's Double Jeopardy Clause applies here and bars defendant's retrial as the prosecution seeks to do.[9]

Lastly, we acknowledge that the circuit court, on reconsideration, set aside its order of acquittal and instead remanded to the district court for a new trial on the basis that the error in the original trial was merely instructional.[10] Such reasoning is not without force. As *Houston* explains, when a trial court fails to instruct a jury on a particular element of the crime, a sufficiency-of-the-evidence challenge should be reviewed on the

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ciency in this case is akin to such a finding in a directed verdict of acquittal.

[9] We do not find the prosecution's citation of *People v Reed*, unpublished per curiam opinion of the Court of Appeals, issued November 21, 2013 (Docket No. 311067), persuasive. Notwithstanding that it is unpublished and therefore not precedentially binding, see MCR 7.215(C)(1), there is nothing in *Reed* to suggest that the jury had already been selected and sworn when the trial court dismissed the case "[o]n the day of defendant's trial." "Jeopardy attaches when a jury is selected and sworn . . . ." *People v Grace*, 258 Mich App 274, 279; 671 NW2d 554 (2003).

[10] Defendant argues that the circuit court did not possess jurisdiction to grant the prosecution's motion for reconsideration because the motion was filed more than 21 days after the order of acquittal was entered. See MCR 2.119(F)(1). The record, however, indicates that the motion was filed on January 10, 2019, only 13 days after the order of acquittal was entered.

basis of the wrong instructions. See *Houston*, 792 F3d at 669-670. And although the question is not before us today, we acknowledge that it is at least arguable that there was sufficient evidence to sustain defendant's conviction under the wrong instructions given to the jury. Nonetheless, the key factor which distinguishes the matter here from cases such as *Houston*, and brings it within the realm of cases such as *Sanabria*, is that the circuit court entered a judgment and order of acquittal.[11] While the same circuit court later tried to

[11] We agree with the dissent that the circuit court's order of acquittal was not "final" in the sense that it was subject to being set aside on reconsideration or on appeal to a higher court. However, we conclude that it was only subject to being set aside to the extent that doing so would not result in a second trial. That is, the prosecution was permitted to challenge the order of acquittal below and in this Court, and it may do so by seeking leave to appeal in our Supreme Court, but only to the extent that a successful challenge would reinstate the guilty verdict. This conclusion, in our view, is consistent with the decisions of the United States Supreme Court on the matter. See, e.g., *Burks v United States*, 437 US 1, 18; 98 S Ct 2141; 57 L Ed 2d 1 (1978) ("[T]he Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient . . . ."); *Tibbs v Florida*, 457 US 31, 41; 102 S Ct 2211; 72 L Ed 2d 652 (1982) ("A verdict of not guilty, whether rendered by the jury or directed by the trial judge, absolutely shields the defendant from retrial. A reversal based on the insufficiency of the evidence has the same effect because it means that no rational factfinder could have voted to convict the defendant."); *Lockhart v Nelson*, 488 US 33, 39; 109 S Ct 285; 102 L Ed 2d 265 (1988) ("Because the Double Jeopardy Clause affords the defendant who obtains a judgment of acquittal at the trial level absolute immunity from further prosecution for the same offense, it ought to do the same for the defendant who obtains an appellate determination that the trial court *should* have entered a judgment of acquittal."); *Monge v California*, 524 US 721, 729; 118 S Ct 2246; 141 L Ed 2d 615 (1998) ("We have held that where an appeals court overturns a conviction on the ground that the prosecution proffered insufficient evidence of guilt, that finding is comparable to an acquittal, and the Double Jeopardy Clause precludes a second trial."); *Bravo-Fernandez v United States*, 580 US 5, ___; 137 S Ct 352, 364; 196 L Ed 2d 242 (2016) ("Bravo and Martínez could not be retried on the bribery counts, of course, if the Court of Appeals had vacated their § 666 convictions because there was insufficient evidence to support those

reverse course, we conclude that its ruling on reconsideration cannot supersede its earlier order of acquittal for the purposes of the Double Jeopardy Clause because that earlier order, as evidenced by its unequivocal language, was not tentative in any respect. See *United States v Blount*, 34 F3d 865, 868 (CA 9, 1994) (holding that the federal district court could not reverse its earlier ruling of acquittal because "there is no suggestion in this case that the district court's oral grant of the motion for acquittal was tentative or subject to reconsideration"); *United States v Thompson*, 690 F3d 977, 996 (CA 8, 2012) ("When the district court initially granted Thompson's motion for judgment of acquittal, it did so unequivocally, without making any indication of any availability of reconsideration . . . . Once Thompson had rested his case, relying at least in part on the district court's judgment of acquittal, double jeopardy attached and the reversal of that judgment was a constitutional violation.").[12]

IV. CONCLUSION

We conclude that the circuit court had jurisdiction to enter the order of acquittal and that the Double Jeopardy Clause bars defendant's retrial on the charge of

convictions. For double jeopardy purposes, a court's evaluation of the evidence as insufficient to convict is equivalent to an acquittal and therefore bars a second prosecution for the same offense.").

[12] We acknowledge that these cases concerned midtrial judgments of acquittal, whereas this case concerns a posttrial order of acquittal. We nonetheless find them persuasive and believe that barring retrial here is consistent with the overarching general rule that acquittals cannot be set aside unless the fact-finder has already returned a verdict of guilty and the prosecution simply seeks to have that verdict reinstated. See *Smith*, 543 US at 467. Indeed, it would be a peculiar outcome if a judgment and order of acquittal resulting from a trial could not be set aside by a higher court on appeal, but an order and judgment of acquittal could be set aside on reconsideration by the same court which issued it.

resisting or obstructing a police officer, MCL 750.81d(1). Accordingly, we reverse the circuit court's order remanding to the district court for a new trial, and remand to the circuit court for further proceedings consistent with this opinion. We do not retain jurisdiction.

FORT HOOD, J., concurred with RIORDAN, J.

BECKERING, P.J. (*dissenting*). At the heart of this appeal is whether double jeopardy bars defendant, Latausha Simmons, from being retried in the district court after having been convicted by a jury, sentenced, successfully had her conviction thrown out on appeal in the circuit court, and then having that victory overturned by the circuit court due to a motion for reconsideration filed by the prosecution. Contrary to my colleagues, I conclude that double jeopardy does not apply here, and the circuit court did not err by remanding for a new trial. Consequently, I respectfully dissent.

I. BASIC FACTS AND PROCEDURAL HISTORY

As noted by the majority, defendant appeals as on leave granted the circuit court's order reversing her district court jury trial conviction for resisting or obstructing a police officer, MCL 750.81d(1), and remanding to the district court for a new trial. Defendant argues on appeal[1] that (1) the circuit court erred by concluding that the prosecution was not properly

[1] This Court denied defendant's application for leave to appeal. *People v Simmons*, unpublished order of the Court of Appeals, entered July 30, 2019 (Docket No. 349547). Defendant filed an application for leave to appeal with the Michigan Supreme Court. On September 23, 2020, in lieu of granting leave to appeal, the Supreme Court remanded the case to this Court for consideration as on leave granted. *People v Simmons*, 939 NW2d 268 (Mich, 2020). The case is also on reconsideration, as this Court issued an initial opinion but then granted the prosecution's

served with her claim of appeal, (2) the circuit court had jurisdiction to enter an order of acquittal, (3) the circuit court did not have jurisdiction to grant the prosecution's untimely motion for reconsideration, and (4) the circuit court erred by remanding the case for a new trial because double jeopardy barred retrial. I agree that the circuit court had jurisdiction to enter the order of acquittal, but I disagree with defendant's other arguments.

Warren Police Officer Sean Sullivan testified at trial that on May 24, 2016, he observed defendant exit a supermarket through a garage-like door that he believed was an employee-only entrance. Defendant looked at Officer Sullivan and walked toward a nearby alley. She entered a car, drove a few feet down the alley, then exited the car and peeked around the corner of a shipping container or dumpster at Officer Sullivan. Finding her conduct suspicious, Officer Sullivan drove toward defendant to investigate what she was doing.

As Officer Sullivan drove toward defendant, she got back into the car. Officer Sullivan parked in front of her, but he did not block the entire alleyway. He approached defendant and spoke to her through the driver's side window, asking her for identification and why she was parked in the alley. Defendant did not respond, and instead, she asked Officer Sullivan why he was harassing her. Officer Sullivan returned to his car to investigate his suspicion that her car may be stolen based on a crack he observed in the steering column. He determined that the car was registered to a Latausha Simmons, and that she did not have any

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motion for reconsideration, resulting in our vacation of the earlier opinion by way of order. While my colleagues have chosen to remain with their earlier analysis, I am persuaded by the arguments set forth in the prosecution's motion for reconsideration and the amicus curiae brief in support filed by the Prosecuting Attorneys Association of Michigan.

arrest warrants. Officer Sullivan returned to defendant's car, asked if she was Latausha Simmons, and advised her that she could be on her way if she showed him her identification. Defendant did not respond or produce her identification. Officer Sullivan requested backup, and Officers Robert Horlocker and Timothy Sciullo arrived to assist. Officer Horlocker and Officer Sciullo each asked defendant for her identification, and she did not respond. After explaining to her that she would be arrested for resisting or obstructing their investigation and receiving no response, Officer Horlocker broke defendant's passenger side window and defendant was arrested and charged with resisting and obstructing a police officer.

Before trial, defendant filed a motion to dismiss and for an evidentiary hearing concerning the lawfulness of the officers' conduct. Specifically, defendant argued that the charge had to be dismissed because Officer Sullivan unlawfully stopped her and, as a result, her arrest was illegal. The district court concluded that it was reasonable for Officer Sullivan to stop defendant because her actions were suspicious and not "normal behavior."

On the first day of trial, before the jury was empaneled, the parties discussed the introduction of evidence regarding the lawfulness of the officers' conduct and whether the jury was to be instructed that the lawfulness of the officers' conduct was an element of resisting or obstructing a police officer. The district court ruled that it previously had determined that the officers' conduct was lawful, that no evidence could be presented at trial regarding the lawfulness of the officers' conduct or the legality of defendant's arrest, and that the jury was not to be instructed that the lawfulness of the officers' conduct was a factual issue for it to determine. After hearing the evidence,

the jury found defendant guilty of resisting or obstructing a police officer. The district court sentenced defendant to six months' probation.

Acting *in propria persona*,[2] defendant appealed her conviction to the circuit court. She contended that the district court erred by concluding that Officer Sullivan's conduct was lawful, by precluding the parties from presenting evidence or making any arguments regarding the lawfulness of the officers' conduct, and by failing to instruct the jury that it was to determine whether the officers' conduct was lawful because it was an element of the offense. She also asserted that defense counsel was ineffective for failing to present evidence regarding the lawfulness of the officers' conduct. Defendant requested that the circuit court grant her a new trial. She later filed a supplemental brief, arguing that her trial counsel was also ineffective for failing to thoroughly cross-examine Officer Sullivan and for failing to obtain and introduce the police report concerning the incident. She requested that the case be dismissed.

At the hearing concerning the appeal, the circuit court noted that the prosecution did not file a response and was not present. The circuit court concluded that the district court erred by precluding the parties from presenting evidence regarding the lawfulness of the officers' conduct and by failing to instruct the jury that the lawfulness of the officers' conduct was an element of resisting or obstructing a police officer. The circuit court further ruled that defendant was entitled to an acquittal, stating the following:

> Even if the—somebody on behalf of the State of Michigan or the City of Warren did appear, on the merits, you win.

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[2] Defendant was represented by counsel at various points in the lower court proceedings, but she also represented herself on other occasions.

> This matter is reversed and a judgment of acquittal is entered in favor of the Defendant.
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> * * *
>
> Congratulations and on behalf of the State of Michigan let me apologize to the Defendant for going through what you did go through. I mean, even if the instructions had been correct, I see no way that you could have been or should have been convicted on this evidence.

The circuit court told defendant that she was "an innocent person" and stated, "Finally the record caught up with that." The corresponding order provided:

> For the reasons stated on the record, Defendant's motion is GRANTED, Defendant's conviction is reversed, and all arrest records and fingerprint cards shall be returned to Defendant forthwith. This order is a final order resolving all claims and closing the case.

The prosecution filed a motion for reconsideration, explaining that it was not served with defendant's claim of appeal or any other documents.[3] The prosecution agreed that the district court erred by not allowing the jury to determine the lawfulness of the officers' conduct, by precluding the parties from introducing evidence on or arguing about the lawfulness of the officers' conduct, and by failing to properly instruct the jury. The prosecution argued, however, that the proper remedy for the district court's error was to remand for a new trial, not acquittal. At a hearing held regarding the motion for reconsideration, the circuit court reviewed the record and concluded that the prosecution was never served with defendant's claim of appeal or any of the other documents. The court set aside its

[3] Additionally, the prosecution noted that the city of Warren was erroneously named as plaintiff on defendant's claim of appeal and on the circuit court's docket sheet.

order of acquittal and ordered defendant to file a delayed application for appeal.

Defendant filed a delayed application for appeal and properly served the prosecution. At the hearing regarding defendant's appeal, she argued that the proper remedy for the district court's error was acquittal because there was insufficient evidence presented to support her conviction and double jeopardy barred retrial. On the other hand, the prosecution submitted that the issue was not the sufficiency of the evidence, but rather that the district court concluded the officers' conduct was lawful, erroneously precluded the introduction of evidence and argument on an element of the offense, and failed to properly instruct the jury. The prosecution further noted that if the circuit court was to determine that there was insufficient evidence presented to support defendant's conviction, it would be making the same mistake as the district court because no evidence was presented on the element and the issue was not decided by the jury. Accordingly, the prosecution asserted that the proper remedy was remand for a new trial.

The circuit court issued a written opinion and order, concluding that the district court erroneously removed the element of whether the officers acted lawfully from the jury. The circuit court concluded that the proper remedy was to reverse and remand for a new trial because the jury verdict was overturned on the basis of an instructional error. Accordingly, the circuit court reversed defendant's conviction and remanded to the district court for a new trial.

II. ANALYSIS

A. SERVICE AND CIRCUIT COURT JURISDICTION

Defendant first argues that the circuit court erred by concluding that she failed to serve her claim of appeal and supporting documents on the prosecution. I disagree.

An appeal as of right to the circuit court is governed by MCR 7.104 and must be filed within 21 days of the entry of a judgment. MCR 7.104(A)(1); See MCR 6.625(A) (directing that an appeal from a misdemeanor case is governed by subchapter 7.100 of the court rules). "To vest the circuit court with jurisdiction in an appeal of right, an appellant must file with the clerk of the circuit court within the time for taking an appeal: (1) the claim of appeal, and (2) the circuit court's appeal fees, unless the appellant is indigent." MCR 7.104(B). The claim of appeal must "name the parties in the same order as they appear in the trial court, with the added designation 'appellant' or 'appellee.' " MCR 7.104(C)(1)(b). With the claim of appeal, the appellant must file, in relevant part, "proof that a copy of the claim of appeal and other documents required by this subrule were served on all parties, the trial court or agency, and any other person or officer entitled by law to notice of the appeal." MCR 7.104(D)(9). Additionally, the court rules require that an appellant "must file a brief conforming to MCR 7.212(C) and serve it on all other parties to the appeal." MCR 7.111(A)(1)(a).

On June 26, 2018, defendant timely filed a claim of appeal, a motion for a fee waiver, and a request for a hearing in the circuit court. The claim of appeal erroneously named both "The State of Michigan" and "The People of the City of Warren" as plaintiff and only

included the city of Warren's address. The proof of service on the claim of appeal was blank. The motion for a fee waiver and request for a hearing only named the "City of Warren" as plaintiff.[4]

A review of the lower court record shows that the prosecution was never served with defendant's claim of appeal or other documents. Despite defendant's claim that she served the prosecution via first-class mail, I agree with the circuit court that the record is void of any evidence supporting her claim. Additionally, this case is designated with the "AR" case code and was subject to the 16th Circuit Court's mandatory electronic-filing program, which requires that all court documents be electronically filed in lieu of traditional paper filings. Administrative Order 2010-6, 494 Mich lxvii (2010) (expanding the e-filing program to cover all cases with an "AR" designation). Accordingly, the circuit court did not err by concluding that the prosecution was not served with defendant's claim of appeal or any documents filed thereafter.

At any rate, as both parties agree, defendant's failure to properly serve her claim of appeal on the prosecution did not affect the circuit court's jurisdiction over the appeal. As stated earlier, defendant filed in the circuit court a claim of appeal and a motion to waive fees. The circuit court granted the motion to waive fees on July 9, 2018. Therefore, jurisdiction vested in the circuit court when defendant filed her claim of appeal and her fees

[4] The circuit court later determined that the city of Warren was not properly named as a party in this case. Subsequent electronic filings submitted in the case were served on the attorney representing the city of Warren, defendant's appointed counsel, defendant, the court reporter, and district court clerk. Defendant filed a brief on appeal in the circuit court. She attached two copies of her claim of appeal, which indicated that the prosecution was served with the claim of appeal via first-class mail.

were waived. See MCR 7.104(B). This is true regardless of whether defendant properly served the prosecution because the service-of-process provisions contained in the court rules are intended to satisfy due-process requirements that parties be notified of pending actions. See MCR 2.105(K)(1) (the service-of-process provisions "are intended to satisfy the due process requirement that a defendant be informed of an action by the best means available under the circumstances. These rules are not intended to limit or expand the jurisdiction given the Michigan courts over a defendant"). Therefore, defendant's defective service did not divest the circuit court of jurisdiction to enter an order related to her appeal.

Next, defendant contends that the circuit court did not have jurisdiction to consider the prosecution's motion for reconsideration because it was not timely filed. I disagree.

A motion for reconsideration "must be served and filed not later than 21 days after entry of an order deciding the motion." MCR 2.119(F)(1); See MCR 7.110 (providing that "[m]otion practice in a circuit court appeal is governed by MCR 2.119"). In this case, the circuit court entered an order of acquittal on December 26, 2018. Thirteen days later, on January 10, 2019, the prosecution filed a motion for reconsideration. The motion was entered into the register of actions on January 18, 2019. This discrepancy in the date of filing versus the date that the motion was entered into the register of actions was addressed by the circuit court. The circuit court concluded that, while the register of actions reflected that the prosecution's motion was filed on January 18, 2019, the prosecution timely filed the motion electronically on January 10, 2019. I agree because "[r]egardless of the date a filing is

accepted by the clerk of the court, the date of filing is the date submitted." MCR 1.109(G)(5)(b). Therefore, the circuit court properly concluded that the prosecution's motion was timely filed.

B. DOUBLE JEOPARDY

Defendant finally argues that double jeopardy bars retrial because the circuit court initially concluded that insufficient evidence was presented to support her conviction and entered an order of acquittal. I disagree.

"A double jeopardy challenge presents a question of law that we review de novo." *People v Herron*, 464 Mich 593, 599; 628 NW2d 528 (2001). Likewise, claims of instructional error and issues of law arising from jury instructions are reviewed de novo as a question of law. *People v Mitchell*, 301 Mich App 282, 285-286; 835 NW2d 615 (2013).

"The United States and Michigan Constitutions prohibit placing a defendant twice in jeopardy for a single offense." *People v Ackah-Essien*, 311 Mich App 13, 31; 874 NW2d 172 (2015); US Const, Am V; Const 1963, art 1, § 15. The Double Jeopardy Clauses in the United States and Michigan Constitutions are construed consistently with each other. *People v Szalma*, 487 Mich 708, 716; 790 NW2d 662 (2010). "The purpose of the double jeopardy provision is to prevent the state from making repeated attempts at convicting an individual for an alleged crime." *People v Torres*, 452 Mich 43, 63; 549 NW2d 540 (1996). Our Supreme Court explained that the Double Jeopardy Clause provides the following protections: (1) protection "against a second prosecution for the same offense after acquittal"; (2) protection "against a second prosecution for the same offense after conviction"; and (3) protection "against multiple punishments for the same offense." *Id*. at 64 (quotation

marks and citations omitted). "The interests underlying these protections are quite similar. When a defendant has been once convicted and punished for a particular crime, principles of fairness and finality require that he not be subjected to the possibility of further punishment by being again tried or sentenced for the same offense." *United States v Wilson*, 420 US 332, 343; 95 S Ct 1013; 43 L Ed 2d 232 (1975). "By contrast, where there is no threat of either multiple punishment or successive prosecutions, the Double Jeopardy Clause is not offended." *Id*. at 344.

Generally, the Double Jeopardy Clause does not prohibit the retrial of a defendant whose conviction was set aside as the result of an error that occurred at trial. *People v Setzler*, 210 Mich App 138, 139-140; 533 NW2d 18 (1995). However, if a defendant's conviction is reversed due to insufficient evidence, "double jeopardy bars reprosecution where the elements of the subsequent crime charged are identical to the elements of the original crime charged." *Id*. at 140. Moreover, the Double Jeopardy Clause bars retrial following a court-decreed midtrial acquittal, even if the acquittal is based upon an egregiously erroneous foundation. *Evans v Michigan*, 568 US 313, 318; 133 S Ct 1069; 185 L Ed 2d 124 (2013). In *Evans*, the trial court entered a midtrial directed verdict of acquittal based upon its view that the prosecution failed to present sufficient evidence of a particular element of the charged offense. *Id*. at 315. However, the "unproven 'element' was not actually" required for a conviction. *Id*. The United States Supreme Court held that the midtrial acquittal constituted an acquittal on the merits even though it was based on the "erroneous addition of a statutory element . . . ." *Id*. at 16. Nonetheless, and importantly to the instant case, the Supreme Court noted that "[i]f a court grants a

motion to acquit after the jury has convicted, there is no double jeopardy barrier to an appeal by the government from the court's acquittal, because reversal would result in reinstatement of the jury verdict of guilty, not a new trial." *Id*. at 330 n 9. The majority opinion, in its footnote 7, recognizes these principles, citing *Smith v Massachusetts*, 543 US 462, 467; 125 S Ct 1129; 160 L Ed 2d 914 (2005) and *People v Jones*, 203 Mich App 74, 79 n 1; 512 NW2d 26 (1993).

In this case, the Double Jeopardy Clause does not prohibit the prosecution from retrying defendant. There are two rulings in this case that require differentiation: the circuit court's reversal of its own order of acquittal, and its subsequent order remanding for a new trial based on evidentiary and instructional error. The majority appears to conflate these aspects of the case. Defendant was convicted by a jury for resisting or obstructing a police officer in the district court. She then appealed her conviction to the circuit court. The circuit court, acting as an intermediate appellate court, entered an order of acquittal after apparently concluding that the jury was improperly instructed and that the evidence was insufficient to support defendant's conviction. The prosecution moved for reconsideration of that order, arguing that it had not been served defendant's claim of appeal and that the proper remedy for instructional error was to remand for retrial. After determining that defendant failed to serve the claim of appeal on the prosecution, the circuit court vacated its order of acquittal. The prosecution was permitted to seek reconsideration of the order of acquittal because the circuit court was sitting as an appellate court reviewing defendant's jury conviction. See *Evans*, 568 US at 330 n 9. Moreover, the circuit court had the authority to reverse its prior order of acquittal on reconsideration. MCR 7.114(D); MCR

2.119(F). See also *People v Walters*, 266 Mich App 341, 349-350; 700 NW2d 424 (2005) (the circuit court, sitting as an appellate court, has the inherent ability to reconsider a judgment or order under MCR 2.119(F)). The acquittal had not yet become "final" because the prosecution could appeal to a higher appellate court. See *People v Oros*, 502 Mich 229, 234; 917 NW2d 559 (2018) (overruling this Court's decision concluding that the evidence was insufficient to support a conviction for first-degree premeditated murder and reinstating the defendant's first-degree murder conviction). Additionally, because defendant was convicted by a jury and the verdict was set aside by the circuit court acting as an appellate court, double jeopardy did not preclude reinstatement of the jury verdict. *Evans*, 568 US 330 n 9; *Smith*, 543 US 467.[5] In sum, after the circuit court properly set aside its order of acquittal on appeal and ordered defendant to file a delayed application to appeal, defendant's conviction was logically reinstated until the delayed application was considered and decided.

After defendant filed her delayed application to appeal, the circuit court ultimately agreed with the parties that the district court erred by prohibiting evidence related to the lawfulness of the officers' actions. See *People v Moreno*, 491 Mich 38, 52; 814 NW2d 624 (2012) (stating that the prosecution must establish

[5] In its written opinion on defendant's delayed application, the circuit court concluded that because the lawfulness of the officers' conduct was an element of the charged offense and the parties were prohibited from presenting evidence in that regard, "if this court determined the actions of the officers in this case were not lawful, this court would be committing the same error [as the district court] in usurping the jury's function." See *People v Kowalski*, 489 Mich 488, 501; 803 NW2d 200 (2011) ("A criminal defendant has a constitutional right to have a jury determine his or her guilt from its consideration of every essential element of the charged offense.").

that the officers' actions were lawful in a case in which the defendant is charged with resisting or obstructing a police officer). The circuit court then set aside defendant's conviction and remanded the case to the district court for retrial based on the evidentiary and instructional error. The Double Jeopardy Clause, as previously stated, does not prohibit the retrial of a defendant whose conviction was set aside as the result of an error that occurred at trial. *Setzler*, 210 Mich App at 139-140. Therefore, the circuit court's remand for a new trial was the proper remedy upon deciding defendant's delayed application for leave to appeal.

To summarize, I respectfully suggest that the majority conflated two separate principles: the circuit court appellate error in entering an order of acquittal, which was subsequently remedied by the circuit court itself, and the circuit court remanding for a new trial. Because postconviction orders of acquittal are subject to reversal and reconsideration, reversal of the order of acquittal was appropriate. And because pretrial legal errors entitle a defendant to a new trial, remand for a new trial was also appropriate.

PEOPLE v OWENS

Docket No. 352908. Submitted June 9, 2021, at Lansing. Decided July 8, 2021, at 9:00 a.m. Leave to appeal denied 508 Mich 1021 (2022).

Ronald E. Owens was convicted in the Saginaw Circuit Court in 2011, following a jury trial, of conspiracy to commit assault with intent to do great bodily harm less than murder, MCL 750.84; assault with intent to do great bodily harm less than murder, MCL 750.84; bribing, intimidating, or interfering with a witness in a criminal case, MCL 750.122(7)(b); and inciting or procuring one to commit perjury, MCL 750.425. Defendant was sentenced to serve 83 months to 15 years in prison for conspiracy, 5 to 15 years for assault, 83 months to 15 years for bribing or interfering with a witness, and 5 years to 90 months for procuring perjury. Defendant appealed his convictions in the Court of Appeals. The Court of Appeals, BECKERING, P.J., and STEPHENS and RIORDAN, JJ., affirmed in an unpublished, per curiam opinion, concluding that defendant's convictions were not against the great weight of the evidence. Defendant petitioned for habeas corpus in the United States District Court for the Eastern District of Michigan, which stayed defendant's habeas proceeding to allow him to exhaust his challenges to his sentences in the state court, pursuant to the Michigan Supreme Court's decision in *People v Lockridge*, 498 Mich 358 (2015). Defendant moved in the trial court for relief from judgment under MCR 6.500 *et seq*., arguing that *Lockridge* had retroactively changed Michigan's sentencing scheme and that therefore his sentencing guidelines had been incorrectly scored. The trial court, Andre R. Borrello, J., denied defendant's motion. The Court of Appeals denied defendant's delayed application for leave to appeal. The federal district court then reactivated defendant's habeas petition and granted it in part. The federal district court concluded that defendant's convictions for conspiracy and assault were not supported by sufficient evidence and vacated those convictions. However, the court rejected defendant's challenges to his other convictions and the remainder of his claims. After the trial court vacated defendant's convictions for conspiracy and assault, defendant, *in propria persona*, filed a successive motion for relief from judgment in the

trial court. Defendant argued that, because two of his convictions had been vacated, he was entitled to resentencing because the conduct underlying the vacated convictions could no longer be relied upon to increase the points assessed for the sentencing variables. The trial court granted defendant's motion on the basis of the federal district court's ruling, which the trial court categorized as a retroactive change in the law occurring after defendant's first motion for relief from judgment. Further, because defendant's sentence relied on guidelines that considered elements of his vacated convictions, the trial court ordered resentencing. The prosecution's motion for reconsideration was denied by the trial court. The prosecution appealed in the Court of Appeals.

The Court of Appeals *held*:

1. Under MCR 6.502(G), a defendant may only file one motion for relief from judgment with respect to a conviction; however, a defendant may file a subsequent motion on the basis of a retroactive change in law that occurred after the first motion for relief from judgment or on the basis of a claim of new evidence that had not been discovered before the first motion. Therefore, before a trial court may consider a successive motion for relief from judgment, the defendant must make a threshold showing that the motion was brought on the basis of a retroactive change in law or new evidence or that there is a significant possibility that the defendant is actually innocent. After the defendant meets this threshold, the defendant may be entitled to relief if good cause and prejudice so warrant. In this case, the prosecution argued that the trial court should not have granted defendant's motion on the basis of a change in law because defendant argued only that he was entitled to relief on the basis of new evidence. Because MCR 6.502(G) concerns only a threshold showing and not a defendant's ultimate burden, the prosecution's argument lacked merit. MCR 6.508(D) provides that the defendant has the burden of establishing entitlement to the relief requested, but this rule only becomes relevant after the defendant has made a preliminary showing under MCR 6.502(G). Contrary to the prosecution's argument, MCR 6.508(D) does not include any language that requires a defendant to particularly identify the exception to the rule against successive motions under which the defendant is requesting relief. Additionally, because defendant filed his motion *in propria persona*, he was entitled to greater lenity from the court in construing the motion than if it had been filed by an attorney. Finally, the trial court's decision to recharacterize defendant's argument and grant relief on that basis was not an abuse of the court's discretion. A court may

address an issue sua sponte if the court provides the parties with notice and an opportunity to be heard. The prosecution was not deprived of notice or an opportunity to be heard regarding whether defendant was entitled to file a successive motion for relief from judgment on the basis of a retroactive change in law. Indeed, the prosecution argued in response to defendant's motion that the federal district court's order granting habeas relief, in part, to defendant was not a change in the law and that a change in law did not refer to a change in the law of an individual case.

2. The trial court concluded that the order of the federal district court granting defendant habeas relief was a retroactive change in law under MCR 6.502(G). The court's decision was in error, because a retroactive change in law under MCR 6.502(G) can only be a retroactive change in a law of general application, not a change in the law of a defendant's case. A "retroactive change in law" is a legal term of art, and the trial court erred by breaking the phrase apart and separately defining the words that comprise it rather than construing the phrase in accordance with its legal meaning. There are tests in caselaw for determining whether something is a "retroactive change in law," including whether the new rule places individual conduct beyond criminal lawmaking authority and whether it requires the observance of procedures that are implicit in the concept of ordered liberty. To determine whether a new rule of criminal procedure is retroactive, the Court of Appeals considers (1) the purpose of the new rule, (2) the reliance on the old rule, and (3) the effect of retroactive application of the rule. These tests cannot be sensibly applied to a change in the law of an individual defendant's case. However, the trial court's error was harmless and did not require modification by the Court of Appeals.

3. The trial court also failed to consider the use of the phrase "new evidence" in MCR 6.502(G)(3) as a legal term of art when it concluded that the federal district court's habeas order was not new evidence. "Evidence" may be broadly defined as anything from which an inference can be drawn or that establishes or disproves an alleged fact. The federal court's decision that defendant should not have been found guilty of offenses on which his offense variable scores were based tends to disprove the factual accuracy of the presentence investigation report and would affect the trial court's findings at sentencing; therefore, it falls within the definition of "evidence." The language of MCR 6.502(G) also supports the conclusion that new evidence is not solely limited to evidence that could have been admitted at trial, given that under the court rule, new evidence includes shifts in

scientific consensus and the scientific method on which scientific evidence was based at trial. Given that a change in scientific consensus, which necessarily occurs after trial, may constitute new evidence, then the vacation of a conviction after trial may also constitute new evidence. A defendant seeking relief from judgment under MCR 6.502 on the basis of new evidence must satisfy the elements of the test for newly discovered evidence, including that (1) the evidence, and not just its materiality, was newly discovered; (2) the evidence was not cumulative; (3) the party could not, through reasonable diligence, have discovered and produced the evidence at trial; and (4) the evidence makes a different result probable on retrial. When a defendant's requested relief is resentencing, the prejudice portion of the test requires a court to consider whether the evidence would have been produced by the defendant at resentencing and whether the evidence would make a different result probable on resentencing. In this case, the order of the federal district court vacating defendant's convictions for conspiracy and assault met the test for newly discovered evidence, in that the court's conclusion that defendant should not have been convicted of any assault offenses and the fact that his sentences relied on facts related to his vacated sentences constituted newly discovered evidence. Therefore, the trial court erred by failing to rule that defendant's successive motion for relief from judgment should have been granted on the basis of newly discovered evidence, including the habeas relief granted to defendant by the federal district court.

4. Defendant argued that an alternative ground to affirm the trial court's decision was the high possibility that he was actually innocent. Whether defendant was actually innocent of witness intimidation or procuring perjury, which were the convictions for which he sought relief from judgment, was a separate issue from whether defendant was actually innocent of assault and conspiracy. Further, the federal district court did not conclude that defendant was actually innocent, but rather that the prosecution had not introduced sufficient evidence to support the assault and conspiracy charges. "Actual innocence" generally entails some new evidence that tends to affirmatively undermine confidence in the outcome of the proceedings. In this case, defendant sought relief because his sentencing guidelines for witness intimidation and procuring perjury were incorrectly assessed because they relied on acquitted conduct. The federal district court and the Court of Appeals had previously rejected defendant's arguments that there was insufficient evidence to support his convictions for witness intimidation or procuring perjury. Defendant was not

entitled to relief from the judgment regarding these convictions on the basis of actual innocence.

Affirmed.

1. CRIMINAL PROCEDURE — SUCCESSIVE MOTIONS FOR RELIEF FROM JUDGMENT — RETROACTIVE CHANGE IN LAW.

Under MCR 6.502(G), a defendant may only file one motion for relief from judgment with regard to a conviction; however, a defendant may file a successive motion for relief from judgment if there has been a retroactive change in the law since the first motion for relief from judgment or based on a claim of new evidence that was not discovered before the first motion was filed; a retroactive change in law means a change in the law of general application, not a change in the law of a case pertaining only to a specific defendant.

2. CRIMINAL PROCEDURE — SUCCESSIVE MOTIONS FOR RELIEF FROM JUDGMENT — NEW EVIDENCE.

Under MCR 6.502(G), a defendant may only file one motion for relief from judgment with regard to a conviction; however, a defendant may file a successive motion for relief from judgment if there has been a retroactive change in the law since the first motion for relief from judgment or based on a claim of new evidence that was not discovered before the first motion was filed; new evidence may include judicial opinions issued after the first motion for relief from judgment.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *John A. McColgan, Jr.*, Prosecuting Attorney, and *Heidi M. Williams*, Chief Appellate Attorney, for the people.

Robert J. Dunn for Ronald E. Owens, Jr.

Before: JANSEN, P.J., and M. J. KELLY and RONAYNE KRAUSE, JJ.

JANSEN, P.J. The prosecution appeals by leave granted[1] the January 15, 2020 order granting defen-

[1] *People v Owens*, unpublished order of the Court of Appeals, entered April 10, 2020 (Docket No. 352908).

dant, Ronald E. Owens, Jr., relief from his September 29, 2011 sentences. We affirm, and we further conclude that the trial court shall continue the appointment of appellate counsel for resentencing.

I. FACTUAL AND PROCEDURAL BACKGROUND

This is the third appeal in this matter. This Court previously summarized the facts of this case as follows:

> Cornelius Owens (Cornelius) was shot twice in the legs on April 24, 2009. Cornelius and another witness—Maurice Harris—identified the shooter as Dyterius Roby, although Cornelius believed defendant[] [and defendant's brother, codefendant Steven Owens] were behind the shooting. The prosecution presented evidence that in February 2009, a drug raid occurred at [defendant's] residence, and the police confiscated drug residue and paraphernalia, and approximately $60,000 hidden in air vents throughout the home. At a subsequent drug raid at [defendant's] residence in November, the police found a substantial amount of crack cocaine, $2,100 hidden in the walls, and drug packaging material.
>
> Cornelius, a member of the same gang as [defendant and Steven], participated in a DVD called "Prison Talk" in which he referenced certain gang affiliations and spoke negatively about [defendant and Steven]. After the February drug raid and the DVD, Cornelius began to hear rumors that [defendant and Steven] thought he was the snitch that led to the raid. Cornelius claimed that Steven called him a snitch and [defendant] yelled out "don't speak to the wire," which again was a reference to Cornelius being a "snitch," "rat" or the "police." About a week before the shooting, Cornelius confronted [defendant and Steven] at a fish fry. Cornelius and other men pointed guns at [defendant and Steven], but the confrontation deescalated with no shots fired.
>
> After Cornelius was shot, he eventually identified Roby as the shooter. Yet, Cornelius testified that both [defendant] and Steven approached him and offered him money

> and cocaine to recant his identification. Cornelius met with Roby's attorney and did as [defendant and Steven] asked, but after speaking with the police again, Cornelius admitted to the perjury scheme. A taped telephone call with Steven was admitted at trial, in which Steven discussed the scheme with Cornelius.
>
> . . . [Defendant] was convicted of conspiracy to [commit] assault with intent to do great bodily harm less than murder[, MCL 750.84], assault with intent to do great bodily harm less than murder[, MCL 750.84], bribing, intimidating, or interfering with a witness in a criminal case[, MCL 750.122(7)(b)], and inciting or procuring one to commit perjury[, MCL 750.425]. [*People v Owens*, unpublished per curiam opinion of the Court of Appeals, issued April 10, 2014 (Docket No. 307117), pp 2-3.]

Defendant was sentenced as a second-offense habitual offender, MCL 769.10, to 83 months to 15 years' imprisonment for conspiracy to commit assault with intent to do great bodily harm less than murder; 5 to 15 years' imprisonment for assault with intent to do great bodily harm less than murder; 83 months to 15 years' imprisonment for bribing, intimidating, or interfering with a witness in a criminal case; and 5 years to 90 months' imprisonment for inciting or procuring one to commit perjury.

This Court previously affirmed defendant's convictions and sentences, concluding that defendant's convictions were not against the great weight of the evidence presented by the prosecution. *Owens*, unpub op at 11-14. Relevant to this appeal, when considering defendant's assault and conspiracy convictions, this Court reasoned that a rational trier of fact could have found defendant guilty beyond a reasonable doubt because $60,000 was seized from defendant's home after a drug raid, Cornelius had testified that defendant and Steven called Cornelius a snitch, and Cornelius was shot one week after he had confronted defendant and Steven at a

fish fry. *Id*. at 13. This Court also reasoned that the shooter had been in frequent contact with Steven, and defendant had deposited money into the shooter's jail account. *Id*.

Considering the witness-interference and procuring-perjury convictions, this Court concluded that evidence supported convicting defendant beyond a reasonable doubt because Cornelius had testified that both defendant and Steven offered him money and cocaine to lie about who shot him. *Id*. at 13-14. Defendant had also accompanied Cornelius to meet with the shooter's attorney, where Cornelius recanted his confession. *Id*. at 14. Additionally, during a telephone conversation, Steven coached Cornelius to testify that he was confused about the shooter's identity. *Id*.

Defendant filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Michigan. The United States District Court stayed defendant's habeas proceedings to allow defendant to exhaust an additional challenge to his sentences in state court based upon the Michigan Supreme Court's decision in *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015).

On February 27, 2017, defendant moved in the trial court for relief from judgment under MCR 6.500 *et seq*. As part of his motion, defendant argued that his sentencing guidelines were incorrectly scored because the Michigan Supreme Court's decision in *Lockridge* had retroactively changed Michigan's sentencing scheme from mandatory to advisory. The trial court denied defendant's motion for relief from judgment, and defendant filed a delayed application for leave to appeal the order denying his motion for relief from judgment in this Court. However, this Court dismissed defendant's application for leave to appeal without prejudice "for failure to pursue the case in conformity with the rules.

MCR 7.201(B)(3)." *People v Owens*, unpublished order of the Court of Appeals, entered November 8, 2017 (Docket No. 340153). Subsequently, the United States District Court reactivated defendant's habeas petition on January 26, 2019.

On September 30, 2019, in a 49-page opinion and order, the United States District Court granted, in part, defendant's petition for a writ of habeas corpus. The district court ruled that defendant's convictions for conspiracy to commit assault with intent to do great bodily harm less than murder and assault with intent to do great bodily harm less than murder were not supported by sufficient evidence. Specifically, the court concluded that "[t]he jury had no basis on which to find [defendant] guilty of those offenses beyond a reasonable doubt, and the state appellate court's decision finding sufficient evidence to support those convictions involved an unreasonable application of clearly established federal law." The court further concluded that it could not "be certain *why* the jury was led astray, but it is certain that the jury *was* led astray—and that the jury returned a verdict on the assault and conspiracy charges that is plainly not supported by sufficient evidence." Accordingly, the court vacated those convictions. The court went on to reject defendant's challenge to his convictions of witness intimidation and procuring perjury. The court also rejected the remainder of defendant's claims either because they were procedurally barred as questions of state law, because this Court's decisions were not contrary to clearly established federal law, or because the issue underlying the claims had become moot after defendant's assault and conspiracy convictions were vacated.

On October 8, 2019, the trial court vacated defendant's convictions for assault with intent to do great bodily harm less than murder and conspiracy to commit

assault with intent to do great bodily harm less than murder. On October 14, 2019, defendant, *in propria persona*, filed a successive motion for relief from judgment. Defendant argued that, after two of his convictions were vacated, his prior record variables (PRVs) and offense variables (OVs) were drastically different. Because the convictions had been vacated, the facts of those convictions could not be relied on to increase the point values assessed for defendant's sentencing variables. Defendant asserted that he was entitled to relief on the basis of good cause under MCR 6.508(D)(3) or newly discovered evidence under MCR 6.502(G)(2). First, defendant argued that good cause supported granting him relief because no amount of diligence during his prior motion for relief could have granted him relief. Second, defendant argued that newly discovered evidence supported vacating his convictions. He argued that the federal order reversing his convictions was newly discovered evidence because it could not have been discovered through due diligence before his successive motion for relief from judgment.

The prosecution responded that the trial court should deny defendant's successive motion for relief from judgment because defendant had not established an exception to warrant granting the motion. The federal district court's decision was a legal determination, not evidence of any fact related to defendant's case. Further, a request for resentencing was not a form of relief on which new evidence could be asserted because the test for newly discovered evidence relied on whether the evidence made a different result probable on retrial. The prosecution also argued that, although defendant had not argued that the habeas order was a change in the law, an individual ruling was not a change in the law. Relying on *Black's Law Dictionary* (11th ed), the prosecution noted that "the law" represented a body of laws, the aggregate of

legislation, or the body of custom and practice. It did not include the application of law to an individual case. Finally, the prosecution argued that the trial court did not have the authority to recharacterize defendant's motion or sua sponte grant defendant relief. MCR 6.429(A) precluded the trial court from sua sponte modifying defendant's sentence, and defendant's motion was not timely if it was considered as a motion to correct an invalid sentence under MCR 6.429(B).

In an order entered January 15, 2020, the trial court granted defendant's motion for relief from judgment because of a retroactive change in the law of defendant's case and because his prior sentence was based on guidelines that considered elements of his vacated convictions. It ordered resentencing. The trial court determined that newly discovered evidence did not support defendant's motion. The court rule did not define "newly discovered evidence," though it clarified that "new evidence" included scientific evidence. The trial court determined that the word "evidence" did not include a judicial opinion. However, the trial court additionally determined that defendant's vacated convictions were a retroactive change in law occurring after his first motion for relief from judgment.

The trial court rejected the prosecution's argument that a change in law could not include a change in the law of defendant's case. It reasoned that the definitions of "law" in *Black's Law Dictionary* (11th ed) and the Merriam-Webster.com Dictionary were both very broad. The court ruled that interpreting the word "law" to include the law of the case was consistent with the purposes of MCR 6.502(G)(2), which limited a defendant's ability to bring a successive motion when the challenged error could have been raised in the initial motion. A retroactive change of the law of a defendant's case "would potentially have a similar impact on the

circumstances of his or her conviction or sentencing as the discovery of new evidence . . . ."

Additionally, the court noted that under MCR 6.508(D)(2), defendant could only bring a challenge if the retroactive change in the law undermined the court's prior decision. The calculation of defendant's sentencing variables included points attributable to the victim's shooting injury, which was related to defendant's vacated convictions. Additionally, due process barred courts from finding by a preponderance of the evidence that a defendant engaged in conduct for which he or she was acquitted. Although defendant was not acquitted, the federal court concluded that defendant should have been acquitted because insufficient evidence supported the convictions. The Michigan Supreme Court in *People v Beck*, 504 Mich 605, 626-627; 939 NW2d 213 (2019), reasoned that using an essential element of a greater offense as an aggravating factor when that element had not been proven at trial undermined a defendant's presumption of innocence. Because defendant's presumption of innocence related to the shooting of Cornelius had not been overcome, it would be improper for the sentencing court to rely on shooting-related conduct to support defendant's sentence. Both the federal court's ruling and the Michigan Supreme Court's recent ruling in *Beck* were changes in law that undermined the trial court's decisions on defendant's prior sentencing challenges.

On February 5, 2020, the prosecution moved for reconsideration. The trial court denied the prosecution's motion. This appeal followed.

II. STANDARD OF REVIEW

On appeal, the prosecution argues that the trial court erred by sua sponte recharacterizing the argu-

ments defendant made in his second motion for relief from judgment, filed *in propria persona*. The prosecution also argues that the trial court erred by ruling that the change in the law of defendant's case constituted a "retroactive change in the law."[2]

This Court reviews for an abuse of discretion a trial court's decision on a motion for relief from judgment. *People v Walker (On Remand)*, 328 Mich App 429, 436; 938 NW2d 31 (2019). The trial court abuses its discretion when it makes an error of law or when its decision falls outside the range of reasonable and principled outcomes. *People v Duncan*, 494 Mich 713, 722-723; 835 NW2d 399 (2013). This Court reviews de novo the trial court's interpretation of court rules. *People v Williams*, 483 Mich 226, 231; 769 NW2d 605 (2009).

III. ANALYSIS

First, we address the prosecution's argument that the trial court should not have granted defendant's motion for relief from judgment on the basis of a change in law when defendant only argued that he was entitled to relief from judgment on the basis of new evidence. To accept the prosecution's argument would require this

[2] The prosecution also argues that the trial court abused its discretion by concluding that defendant demonstrated that he was entitled to relief on the merits under MCR 6.508(D)(2) because of the Michigan Supreme Court's decision in *Beck*. In *Beck*, our Supreme Court held that acquitted conduct may not be used to increase a defendant's sentence. *Beck*, 504 Mich at 629. The Court reasoned that "[t]o allow the trial court to use at sentencing an essential element of a greater offense as an aggravating factor, when the presumption of innocence was not, at trial, overcome as to this element, is fundamentally inconsistent with the presumption of innocence itself." *Id*. at 626-627 (quotation marks and citation omitted). We decline to address this argument on appeal because the trial court did not base its decision on *Beck*, and this Court need not consider an issue that was not the basis of the trial court's decision. See *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 381; 689 NW2d 145 (2004).

Court to read language into two court rules: MCR 6.502(G), which concerns a preliminary showing, not the ultimate burden; and MCR 6.508(D), which requires the defendant to establish entitlement to "the relief" but does not require the defendant to identify under which exception the defendant is seeking that relief.

This Court applies the same legal principles when interpreting court rules as it does when interpreting statutes. *Williams*, 483 Mich at 232. When interpreting a court rule, this Court first considers the rule's plain language. *Id*. If the plain language is clear, this Court will not engage in further construction or interpretation. *Id*. This Court generally gives words their plain and ordinary meanings. *People v Morey*, 461 Mich 325, 330; 603 NW2d 250 (1999). This Court will not add language to an unambiguous court rule. See *People v Petit*, 466 Mich 624, 633; 648 NW2d 193 (2002).

MCR 6.502(G) provides[3] in pertinent part:

> (1) Except as provided in subrule (G)(2), . . . one and only one motion for relief from judgment may be filed with regard to a conviction. The court shall return without filing any successive motions for relief from judgment. . . .
>
> (2) A defendant may file a second or subsequent motion based on a retroactive change in law that occurred after the first motion for relief from judgment or a claim of new evidence that was not discovered before the first such motion.

Accordingly, before a trial court may consider a successive motion for relief from judgment, the defendant must make a threshold showing that the motion is brought on the basis of a retroactive change in law, that there is new evidence that was not discovered before the

[3] MCR 6.502(G) was recently amended. This opinion quotes the language of the rule as it existed at the time defendant's motion was ruled on in the trial court.

first motion, or that there is a significant possibility that the defendant is actually innocent. *People v Swain*, 288 Mich App 609, 632, 639; 794 NW2d 92 (2010). After a defendant meets this threshold, the defendant may be entitled to relief from judgment if good cause and actual prejudice warrant granting relief. *Id*. The defendant has the burden to establish entitlement to relief from judgment. *Id*. at 630. Michigan imposes the burden of establishing an entitlement to postconviction relief on the defendant because Michigan has a significant interest in the finality of judgments and preservation of scarce judicial resources and "collateral attacks threaten such finality." *People v Carpentier*, 446 Mich 19, 37; 521 NW2d 195 (1994).

We conclude that the prosecution's argument lacks merit because MCR 6.502(G) concerns a threshold showing, not the defendant's ultimate burden. MCR 6.508(D) provides, "The defendant has the burden of establishing entitlement to the relief requested." However, MCR 6.508(D) only becomes relevant *after* the defendant has made a preliminary showing under MCR 6.502(G). See *Swain*, 288 Mich App at 632-633. MCR 6.502(G) makes no reference to defendant's burden to establish entitlement to relief. Moreover, accepting the prosecution's argument would require this Court to read language into MCR 6.508(D) as well. When determining the meaning of terms, every word, phrase, and clause must be given effect. *Morey*, 461 Mich at 330. Language must be considered in context, considering its placement and purpose in the general scheme. *Id*.

As noted, MCR 6.508(D) provides, "The defendant has the burden of establishing entitlement to the relief requested." This rule contains no language requiring the defendant to particularly identify the exception to the rule against successive motions under which the

defendant is requesting relief. This Court would have to read language into the court rule to require that defendant identify a particular exception when that requirement does not exist in the rule's plain language. We decline to do so.

Further, considering MCR 6.508(D) in the context of the court rules in general supports the conclusion that MCR 6.508(D) does not require the defendant to particularly identify under which exception defendant seeks relief. When language is included in one part of a scheme but omitted in another, this Court assumes that the omission was intentional. *People v Peltola*, 489 Mich 174, 185; 803 NW2d 140 (2011). MCR 2.112(B)(1) requires a party to plead fraud "with particularity." In contrast, MCR 6.508(D) does not require the defendant to plead entitlement to relief with particularity. The use of this language in one area of the court rules but not in MCR 6.508 supports the conclusion that a defendant seeking relief from judgment is not required to state with particularity which ground supports the request for relief.

In this case, the trial court "recognize[d] that [d]efendant was not able to adequately legally articulate his argument as to why his changed circumstances should allow the Court to reconsider his situation . . . ." It opined that defendant had asserted that an exception in MCR 6.502(G)(2) applied, and therefore the court was required to determine whether his motion fell within one of the exceptions. We find no error in the trial court's decision. The relief defendant requested was resentencing. The basis for defendant's argument was that, following the order of the federal district court that vacated his assault and conspiracy convictions, he should be allowed to challenge his sentence because the old scores were founded on evidence that

was no longer applicable to defendant's circumstances. MCR 6.502(G) did not require defendant to meet his ultimate burden as part of his preliminary showing, and while MCR 6.508(D) requires defendant to establish entitlement to relief, it does not require him to state with particularity under which subrule he is seeking that relief. Furthermore, because defendant was acting *in propria persona*, he was entitled to an even greater degree of lenity and generosity in construing his pleadings than a lawyer would have been. *Estelle v Gamble*, 429 US 97, 106; 97 S Ct 285; 50 L Ed 2d 251 (1976).

Generally, a trial court may address an issue sua sponte if the court provides the parties with notice and an opportunity to be heard on the issue. *Lamkin v Hamburg Twp Bd of Trustees*, 318 Mich App 546, 550; 899 NW2d 408 (2017); see also *People v Curtis*, 389 Mich 698, 711; 209 NW2d 243 (1973). In this case, the prosecution was not deprived of notice and an opportunity to be heard regarding whether defendant was entitled to file a successive motion for relief from judgment on the basis of a retroactive change in law. Indeed, defendant asserted that the United States District Court's decision to grant him relief on his habeas corpus petition was the basis for his claim for relief. The prosecution responded that defendant had not established a retroactive change in law *or* newly discovered evidence. The prosecution argued that the order granting habeas relief in part to defendant was not a change in the law according to the definition of "law" and that a change in law did not mean a change in the application of law in an individual case. The prosecution had notice and the opportunity to be heard concerning whether a change in law supported defendant's motion. Therefore, we cannot conclude that the trial court abused its

discretion by recharacterizing defendant's arguments and then granting relief on that basis.

We next address the prosecution's argument that the trial court erred by concluding that the order granting defendant habeas relief constituted a retroactive change in the law of defendant's case that warranted relief under MCR 6.502(G). The prosecution argues that a retroactive change in the law under MCR 6.502(G) can only be the retroactive change in a law of general application, not a change in the law of a defendant's case. We agree.

MCR 6.502(G)(2) provides, "A defendant may file a second or subsequent motion based on a retroactive change in law that occurred after the first motion for relief from judgment or a claim of new evidence that was not discovered before the first such motion." MCR 6.502(G)(3) provides:

> For purposes of subrule (G)(2), "new evidence" includes new scientific evidence. This includes, but is not limited to, shifts in science entailing changes:
>
> (a) in a field of scientific knowledge, including shifts in scientific consensus;
>
> (b) in a testifying expert's own scientific knowledge and opinions; or
>
> (c) in a scientific method on which the relevant scientific evidence at trial was based.

We conclude that the trial court erred by holding that the order granting defendant habeas relief was a "retroactive change in law" for the purposes of MCR 6.502(G) because this phrase is a legal term of art with a particular meaning that does not include a change in the law of a case. This Court may consult a dictionary to determine the meaning of undefined terms. *People v Lewis*, 302 Mich App 338, 342; 839 NW2d 37 (2013).

However, "technical words and phrases that have acquired a peculiar and appropriate meaning in law shall be construed and interpreted in accordance with that meaning." *Id*.; see also *People v Flick*, 487 Mich 1, 11; 790 NW2d 295 (2010).

In this case, the trial court determined that defendant's vacated convictions were a retroactive change in law. It reasoned that the definition of "law" was broad in both legal and general dictionaries. The trial court separately considered the word "retroactive" and found that it has a broad meaning. It concluded that interpreting the word "law" to include the law of the case was consistent with the purposes of MCR 6.502(G)(2), which limited a defendant's ability to bring successive motions for relief when the challenged error could have been raised in an initial motion.

However, because the term "retroactive change in law" is a legal term of art, the trial court erred by breaking apart the words that comprise this phrase and by not construing this phrase consistently with its legal meaning. A large body of law is devoted to determining whether a change in law applies retroactively to a criminal case on collateral review. See, e.g., *People v Barnes*, 502 Mich 265, 267-269; 917 NW2d 577 (2018); *People v Maxson*, 482 Mich 385, 392-397; 759 NW2d 817 (2008). This body of law specifically focuses on whether a change in law should be applied in the context of MCR 6.502. *Barnes*, 502 Mich at 268; see also *Maxson*, 482 Mich at 387. There are distinct tests to determine whether something is a "retroactive change in law," including whether the new rule places private individual conduct beyond criminal lawmaking authority and whether it requires the observance of procedures that are "implicit in the concept of ordered liberty." *Maxson*, 482 Mich at 388 (quotation marks

and citation omitted). To determine whether a new rule of criminal procedure is retroactive, this Court applies a three-factor test that considers the purpose of the new rule, the reliance on the old rule, and the effect of retroactive application of the new rule. *Id*. at 393. None of these tests can be sensibly applied to a change in the law of a specific defendant's case.

The definitions of the word "retroactive" support this interpretation. "Retroactive" means "extending in scope or effect to matters that have occurred in the past." *Black's Law Dictionary* (11th ed). "Retroactivity" is "[t]he quality, state, or condition of having relation or reference to, or effect in, a prior time; specif., (of a statute, regulation, ruling, etc.) the quality of becoming effective at some time before the enactment, promulgation, imposition, or the like, and of having application to acts that occurred earlier." *Id*. *Black's Law Dictionary* provides the following note concerning retroactivity:

> "Retroactivity" is a term often used by lawyers but rarely defined. On analysis it soon becomes apparent, moreover, that it is used to cover at least two distinct concepts. The first, which may be called "true retroactivity," consists in the application of a new rule of law to an act or transaction which was completed before the rule was promulgated. The second concept, which will be referred to as "quasi-retroactivity," occurs when a new rule of law is applied to an act or transaction in the process of completion . . . . [Some quotation marks and citation omitted.]

The law-of-the-case doctrine "provides that an appellate court's decision regarding a particular issue is binding on courts of equal or subordinate jurisdiction during subsequent proceedings in the same case." *People v Herrera*, 204 Mich App 333, 340; 514 NW2d 543 (1994). The law-of-the-case doctrine concerns

specific issues in single cases, not rules of law generally. Because the phrase "retroactive change in law" is a technical phrase, we conclude that the trial court should have construed and interpreted this phrase in accordance with its particular legal meaning. The trial court's decision that a retroactive change in the law includes the change in the law of a case is not consistent with the tests for retroactivity or the legal definition of retroactivity.

However, we further conclude that the trial court's error was harmless. This Court will not modify a decision of the trial court on the basis of a harmless error. MCR 2.613(A). Likewise, this Court will not reverse if the trial court reached the correct result for the wrong reason. *People v Lyon*, 227 Mich App 599, 612-613; 577 NW2d 124 (1998). Similar to its interpretation of the term "retroactive change in the law," the trial court's interpretation of "new evidence" failed to consider the use of this phrase as a legal term of art. We conclude that when interpreted as a legal term of art and considered in context with MCR 6.502(G)(3), a federal court's habeas decision may constitute new evidence that could warrant revisiting the court's initial judgment.

In this case, the trial court ruled that a newly released judicial decision was not "evidence" because "evidence" could not include a judicial opinion. The trial court erred by not considering the legal definition of new evidence and applying new-evidence rules to defendant's request for relief. Evidence is "[s]omething (including testimony, documents, and tangible objects) that tends to prove or disprove the existence of an alleged fact; anything presented to the senses and offered to prove the existence or nonexistence of a

fact[.]" *Black's Law Dictionary* (11th ed)[4]. The explanatory note provides that evidence broadly means anything from which an inference can be drawn, or that establishes or disproves an alleged fact. *Id*. A defendant may challenge the factual accuracy of information on which the sentencing court relies, and the trial court must resolve such challenges. *People v Waclawski*, 286 Mich App 634, 689; 780 NW2d 321 (2009). Additionally, the trial court makes findings of fact to support its assessment of points for the offense variables at sentencing. *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008). A federal court's decision that defendant should not have been found guilty of things on which his OV scores were based tends to disprove the factual accuracy of the presentence investigation report and would affect the trial court's factual findings at sentencing. Therefore, it falls within the definition of "evidence."

The language of MCR 6.502(G)(3) also supports the conclusion that new evidence is not solely limited to evidence that could have been admitted at trial. Language must be considered in context, considering its placement and purpose in the general scheme. *Morey*, 461 Mich at 330. MCR 6.502(G)(3) provides that "new evidence" includes shifts in scientific consensus, shifts in a testifying expert's knowledge or opinions, and shifts in the scientific method on which scientific evidence at trial was based. If a change in scientific consensus, which necessarily occurs after trial, may constitute new evidence, then the vacating of a conviction after a trial may also constitute new evidence.

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[4] Additional definitions of "evidence" include "[t]he collective mass of things, esp. testimony and exhibits, presented before a tribunal in a given dispute," facts in evidence, and the body of law regulating what is admissible in a proceeding. *Black's Law Dictionary* (11th ed).

A trial court may grant a defendant a new trial on the basis of newly discovered evidence, but this does not negate the parties' responsibility to "use care, diligence, and vigilance in securing and presenting evidence." *People v Grissom*, 492 Mich 296, 312; 821 NW2d 50 (2012) (quotation marks and citations omitted). To establish that newly discovered evidence warrants a new trial, the defendant must establish that

> (1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial. [*Id*. at 313 (quotation marks and citations omitted).]

This four-part test applies regardless of whether a defendant is seeking a new trial or relief from judgment under MCR 6.502. See *People v Rogers*, 335 Mich App 172, 193; 966 NW2d 181 (2020).

Although the prosecution argues that this test cannot apply to a request for resentencing, MCR 6.508(D) does not support the prosecution's argument. Actual prejudice supporting relief from judgment *may* include that a defendant would have had a reasonably likely chance of acquittal but for the alleged error, MCR 6.508(D)(3)(b)(*i*)(A), and may also include that, "in the case of a challenge to the sentence, the sentence is invalid," MCR 6.508(D)(3)(b)(*iv*). The test is usually focused on evidence that would be produced at a new trial and therefore whether that evidence would make a different result probable on retrial. However, we conclude that when a defendant's requested relief is resentencing, the prejudice portion of the test would consider whether the party could not have produced the evidence at sentencing and whether the evidence would make a different result probable on resentencing.

The order from the federal district court vacating defendant's assault and conspiracy convictions falls within this test, as applied to defendant's requested relief. The fact that defendant should not have been convicted of any assault offenses and the fact that his sentences for his other convictions relied on the now-vacated assault and conspiracy convictions constitute newly discovered evidence. This evidence was not cumulative, defendant could not have produced the evidence at the time of sentencing, and the new evidence would make a different result probable on resentencing. Thus, the trial court erred by failing to rule that defendant's successive motion for relief from judgment should have been granted on the basis of newly discovered evidence, that evidence being the habeas relief granted to defendant by the federal district court.

Briefly, we note that as an alternative ground to affirm, defendant argues that the trial court did not abuse its discretion by granting his successive motion for relief from judgment because good cause warranted granting relief. However, because good cause or actual prejudice are not independent bases to grant relief from judgment, *Swain*, 288 Mich App at 632-633, this argument lacks legal support.

Defendant also argues as an alternative ground to affirm that the high possibility that he was actually innocent warranted granting relief from judgment. Again, we reject this argument because whether defendant was actually innocent of assault is a separate issue from whether defendant was actually innocent of witness intimidation or procuring perjury, which were the convictions for which he sought relief from judgment. Furthermore, the United States District Court did not conclude that defendant was actually innocent, but rather that the prosecution had not introduced sufficient evidence to support his assault and conspiracy

charges. "Actual innocence" generally entails some new evidence that tends to affirmatively undermine confidence in the outcome of the proceedings. See *Schlup v Delo*, 513 US 298, 316; 115 S Ct 851; 130 L Ed 2d 808 (1995). More importantly, our Supreme Court has observed that "doubt about credibility is not a substitute for evidence of guilt[.]" *People v Wolfe*, 440 Mich 508, 519; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Analogously, doubt about guilt, even serious doubt about guilt in combination with an error-riddled trial, does not per se establish actual innocence. See *People v Coy*, 243 Mich App 283, 313; 620 NW2d 888 (2000).

MCR 6.502(G)(2) provides that "[t]he court may waive the provisions of this rule if it concludes that there is a significant possibility that the defendant is innocent of the crime." In this case, defendant sought relief because his sentencing guidelines for witness intimidation and procuring perjury were incorrectly assessed on the basis of acquitted conduct. The federal district court rejected defendant's arguments that insufficient evidence supported his convictions of witness intimidation or procuring perjury, and this Court had previously rejected the same. See *Owens*, unpub op at 13-14. Defendant was not entitled to relief from judgment on the basis of actual innocence because the vacated assault and conspiracy convictions were distinct from the convictions for which defendant sought relief in his motion.

On the basis of the foregoing, we affirm and further conclude that the trial court shall continue the appointment of appellate counsel for resentencing.

M. J. KELLY and RONAYNE KRAUSE, JJ., concurred with JANSEN, P.J.

SPALDING v SWIACKI

Docket No. 354598. Submitted June 2, 2021, at Detroit. Decided July 8, 2021, at 9:05 a.m.

Robin Spalding and John Paterek filed an action in the Macomb Circuit Court against Mary K. Swiacki, Camille Finlay, and others, seeking to recover statutory damages, costs, and attorney fees under MCL 15.273(1) of the Open Meetings Act (OMA), MCL 15.261 *et seq*. The parties held various positions on the Armada Township Board. In December 2019, the township board scheduled several budget workshops throughout 2020; the workshops were not "meetings" for purposes of the OMA, and no votes were scheduled to take place during them. However, while a budget workshop was scheduled for January 21, 2020, at 7:00 p.m., the board subsequently added budget items to the agenda, including items on which the board would be voting. As a result, the workshop became a "special meeting of a public body," placing it within the scope of the OMA. A physical copy of the meeting agenda was posted outside the township's office on January 16, the township's website alerted the public that budget matters would be discussed on January 21, and members of the public were at the meeting. However, notice of the special meeting was not posted on the township's website until 11:50 a.m. on January 21, seven hours before the meeting, contrary to MCL 15.265(4), which requires that public notice of a special meeting not only be physically posted at least 18 hours before the meeting but also posted on the public body's website 18 hours before the meeting if the body has an official website. Paterek sought to postpone the meeting, arguing that the board had not posted timely public notice on the township's website. Swiacki informed the board that a staff member of the Michigan Townships Association had advised her that the board could proceed with the January 21 meeting even though they had not fully complied with the public-notice requirements. Paterek refused to participate in the meeting, but the remaining board members conducted the meeting and voted on several matters. Plaintiffs filed this action, and both parties moved for summary disposition. The court, Julie Gatti, J., concluded that defendants had violated the OMA by failing to provide timely notice on the township's official website but that the violation was

merely a technical one. The court held that defendants had substantially complied with the OMA's notice requirements and, therefore, granted summary disposition in defendants' favor. Plaintiffs appealed.

The Court of Appeals *held*:

There are three distinct types of relief under the OMA: (1) under MCL 15.270(2), a person can seek to invalidate a decision of the public body made in violation of the OMA, (2) under MCL 15.271(1), a person can seek an injunction against a public body to compel compliance or enjoin further noncompliance with the OMA, and (3) under MCL 15.273(1), a person can seek statutory damages, court costs, and attorney fees against a public official for an intentional violation of the public-notice requirement of the act. The three statutory sections, and the relief each provides, stand alone; the remedies must be strictly pursued, and a party seeking a remedy under the act is confined to the remedy conferred by each section and to that only. Michigan caselaw—*Arnold Transit Co v Mackinac Island*, 99 Mich App 266 (1980), and *Nicholas v Meridian Charter Twp Bd*, 239 Mich App 266 (2000)—establishes that a public body's decision will not be invalidated or injunctive relief imposed for a public-notice violation if the public body substantially complied with the OMA. Because the Legislature set forth different standards for the different forms of relief, the type of relief sought under the OMA must be kept in mind when considering whether a party has met the applicable standard for that relief. With regard to the act's public-notice requirements, MCL 15.265(4) provides that for a special meeting of a public body, a public notice stating the date, time, and place of the meeting shall be posted at least 18 hours before the meeting in a prominent and conspicuous place at both the public body's principal office and, if the public body directly or indirectly maintains an official Internet presence that includes monthly or more frequent updates of public meeting agendas or minutes, on a portion of the website that is fully accessible to the public. Relevant here, MCL 15.273(1) provides that a public official who intentionally violates the OMA shall be personally liable in a civil action for actual and exemplary damages of not more than $500 total, plus court costs and actual attorney fees. Unlike the relief sought for public-notice violations of MCL 15.270 and MCL 15.271, which require only substantial compliance with their public-notice requirements to defeat a claim under those sections, the plain language of MCL 15.273 does not refer to substantial compliance but, instead, imposes liability on a

public official for violating the OMA if the violation was intentional. In practice, then, the substantial-compliance standard that applies to violations of the OMA under MCL 15.270 and MCL 15.271 does not apply to actions brought under MCL 15.273 for statutory damages, court costs, and attorney fees. Instead, MCL 15.273 excuses from civil liability those public officials who act in good faith but inadvertently or mistakenly violate the act; thus, whether compliance with the public-notice requirements was substantial or whether the violation was a material or technical one does not matter, instead, the focus is in on the public official's state of mind. In this case, it was undisputed that the January 21 meeting was subject to the provisions of the OMA and that defendants did not post the proper public notice on the township's website at least 18 hours before the January 21 meeting. Although the trial court was correct that the board substantially complied with the public-notice requirements in MCL 15.273, it erred by granting defendants summary disposition on that basis. The board failed to strictly comply with the OMA's public-notice provisions, and remand was necessary for the trial court to address whether defendants intentionally violated the OMA.

Reversed and remanded.

STATUTES — OPEN MEETINGS ACT — PUBLIC-NOTICE VIOLATIONS — ACTIONS FOR STATUTORY DAMAGES, COSTS, AND ATTORNEY FEES — INTENT OF PUBLIC OFFICIAL.

MCL 15.265(4) of the Open Meetings Act (OMA) provides that for a special meeting of a public body, a public notice stating the date, time, and place of the meeting shall be posted at least 18 hours before the meeting in a prominent and conspicuous place at both the public body's principal office and, if the public body directly or indirectly maintains an official Internet presence that includes monthly or more frequent updates of public meeting agendas or minutes, on a portion of the website that is fully accessible to the public; under MCL 15.273(1), a public official who intentionally violates the OMA shall be personally liable in a civil action for actual and exemplary damages of not more than $500 total, plus court costs and actual attorney fees; the substantial-compliance standard that applies to violations of the OMA under MCL 15.270 and MCL 15.271 does not apply to actions brought under MCL 15.273 for statutory damages, court costs, and attorney fees; MCL 15.273 excuses from civil liability those public officials who act in good faith but inadvertently or mistakenly violate the act (MCL 15.261 *et seq*.).

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

Landry, Mazzeo & Dembinski, PC (by *Nancy Vayda Dembinski*) for defendants.

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

SWARTZLE, J. With its enactment in 1976 of the Open Meetings Act (OMA), MCL 15.261 *et seq*., our Legislature required that meetings of public bodies occur in the open. The accountability that comes with openness would be thwarted, however, if the public was not timely made aware of a meeting or if there was no penalty for violating the act. When the public is not sufficiently notified of a meeting, our Legislature has provided for several types of relief—invalidation of policies approved during that meeting, injunctive relief against future violations, and civil and criminal penalties against public officials. Different standards apply to different types of relief, as our caselaw has long recognized.

This case arises from defendants' decision to proceed with a meeting of the Armada Township Board of Trustees despite the board's failure to post timely notice of the meeting on the township's website. Although the board substantially complied with the notice requirements by, among other things, physically posting notice in the township's office and posting the notice to the website several hours before the meeting, there is no question that it did not strictly comply with the OMA's notice provisions. When a person brings a claim for statutory damages, that claim is not defeated by a showing of substantial compliance. As we explain, the trial court erred in this respect, and we reverse.

I. BACKGROUND

Plaintiff John Paterek is the township supervisor, and plaintiff Robin Spalding is Paterek's deputy. Defendant Mary K. Swiacki is the township clerk, defendant Camille Finlay is the township treasurer, and defendants Jim Goetzinger and Steve Nikkel are township trustees. In December 2019, the township board decided to schedule several budget workshops throughout 2020. The workshops were not "meetings" under the OMA, and no votes were planned to be taken during them. On December 18, the township posted its annual-meeting schedule on its website; the schedule included a budget workshop set for January 21, 2020, at 7:00 p.m. In early January 2020, the board added agenda items to the workshop, including items for which votes would be taken, and therefore the January 21 budget workshop became a "special meeting of a public body" that fell within the scope of the OMA.

Among other requirements, the OMA requires that public notice of a special meeting must be physically posted at least 18 hours before the meeting and, if the body maintains an official website, then public notice must similarly be made on that website 18 hours before the meeting. MCL 15.265(4). It is undisputed that a physical copy of the meeting agenda was posted outside the township's office on January 16, but notice was not posted on the township's website until 11:50 a.m. on January 21.

Several hours before the meeting, Paterek e-mailed the other board members, stating that the January 21 meeting should be rescheduled because the board had not posted timely public notice on the website. Swiacki consulted a staff member of the Michigan Townships Association; according to Swiacki, the staff member advised that the board could proceed with the

January 21 meeting. When the board convened later that day, Paterek again voiced his concern about the untimely notice. He informed the other board members that he would not participate in the meeting, and he moved to a seat in the audience along with other members of the public. The remaining board members proceeded with the meeting, during which they deliberated and took votes on several matters.

Plaintiffs subsequently sued defendants, alleging that defendants violated the public-notice requirements of the OMA. Plaintiffs did not seek to invalidate any decision made during the January 18 meeting or enjoin future noncompliance but, rather, sought statutory damages, costs, and attorney fees against defendants under MCL 15.273(1). Defendants moved for summary disposition under MCR 2.116(C)(10), arguing that they had substantially complied with the OMA's notice requirements. For their part, plaintiffs also moved for summary disposition under MCR 2.116(I)(2).

The trial court concluded that defendants had violated the OMA by failing to provide timely notice on the website, but the violation was merely a "technical" one. The trial court held that defendants had substantially complied with the OMA's notice requirements and therefore granted summary disposition in defendants' favor.

This appeal followed.

II. ANALYSIS

The question on appeal is a narrow, legal one: Is a public body's substantial compliance with the OMA's public-notice requirements in MCL 15.265 sufficient to defeat a claim for statutory relief under MCL 15.273? As we explain, it is not.

A. STANDARD OF REVIEW

"A trial court's grant or denial of summary dismissal is reviewed de novo by this Court." *Lantz v Southfield City Clerk*, 245 Mich App 621, 625; 628 NW2d 583 (2001). Similarly, we review de novo questions of statutory interpretation. *Adair v Michigan*, 486 Mich 468, 477; 785 NW2d 119 (2010). When reviewing a statute, "we are required to give effect to the Legislature's intent." *Bartalsky v Osborn*, 337 Mich App 378, 383; 977 NW2d 574 (2021). "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).

B. PUBLIC NOTICE AND CIVIL LIABILITY UNDER THE OMA

The parties do not dispute that the January 21 special meeting was a covered "meeting" of a "public body" involving deliberations about public policy. MCL 15.262(a) and (b). Thus, the meeting was subject to the provisions of the OMA, including those requiring public notice. MCL 15.265. With respect to notice, the OMA provides, in relevant part:

> (1) A meeting of a public body shall not be held unless public notice is given as provided in this section by a person designated by the public body.
>
> * * *
>
> (4) Except as provided in this subsection or in subsection (6), for a rescheduled regular or a special meeting of a public body, a public notice stating the date, time, and place of the meeting shall be posted *at least 18 hours before the meeting* in a prominent and conspicuous place at both the public body's principal office *and, if the public*

> *body directly or indirectly maintains an official internet presence that includes monthly or more frequent updates of public meeting agendas or minutes, on a portion of the website that is fully accessible to the public*. [MCL 15.265 (emphasis added).]

The OMA sets forth several different remedies for violations of its provisions, including civil liability for public officials. With respect to plaintiffs' claims here, "[a] public official who intentionally violates this act shall be personally liable in a civil action for actual and exemplary damages of not more than $500.00 total, plus court costs and actual attorney fees . . . ." MCL 15.273(1). Although a person can join an action for statutory damages, costs, and fees with an action for injunctive or exemplary relief, MCL 15.273(3), plaintiffs in this case chose to pursue only the former statutory relief.

C. *ARNOLD TRANSIT*, *NICHOLAS*, AND *LEEMREIS*

The record is clear that defendants did not post the proper public notice on the township's website at least 18 hours before the January 21 special meeting. Although defendants point out that the 2020 workshop schedule had been posted weeks before the January 21 special meeting, that schedule did not notify the public that the board would be holding a meeting on January 21 during which votes would be taken. With that said, the record is equally clear that proper notice was physically posted in the township's office; that notice via the township's website of the workshop at least alerted the public that budget matters would be discussed on January 21; that notice of the meeting was posted on the website approximately seven hours before the meeting started; and that members of the public were in attendance at the meeting. In light of our review of the record, we agree with the trial court that there is

no genuine issue of material fact that the board failed to comply strictly with the OMA's public-notice provision, but that it did comply substantially with the provision.

Defendants argue that this conclusion is fatal to plaintiffs' claim for statutory damages, court costs, and attorney fees, drawing attention to this Court's holdings in *Arnold Transit Co v Mackinac Island*, 99 Mich App 266; 297 NW2d 904 (1980),[1] and *Nicholas v Meridian Charter Twp Bd*, 239 Mich App 525; 609 NW2d 574 (2000), abrogated on other grounds by *Speicher v Columbia Twp Bd of Trustees*, 497 Mich 125 (2014). In arguing this, however, defendants fail to distinguish between the various types of relief available under the OMA.

As explained by this Court in *Leemreis v Sherman Twp*, 273 Mich App 691, 700; 731 NW2d 787 (2007), there are "three distinct types of relief" under the OMA (excluding a criminal action). First, a person can seek to invalidate a decision of the public body made in violation of the OMA. MCL 15.270(2). Second, a person can seek an injunction against a public body to compel compliance or enjoin further noncompliance with the OMA. MCL 15.271(1). And third, a person can seek statutory damages, court costs, and attorney fees against a public official for an intentional violation of the OMA, as noted earlier. MCL 15.273(1); see also *Speicher*, 497 Mich at 135-136; *Citizens for a Better Algonac Community Sch v Algona Community Sch*, 317

[1] *Arnold Transit* was released in 1980, and although we are not required to follow the rule of law established in a published opinion of this Court issued before November 1, 1990, MCR 7.215(J)(1), we are bound by our Supreme Court's opinion affirming the decision, *Arnold Transit Co v Mackinac Island*, 415 Mich 362, 363; 329 NW2d 712 (1982) ("After full consideration of the record, briefs, and argument of the parties, we are not persuaded of any error in the disposition of this matter by the Court of Appeals.").

Mich App 171, 181; 894 NW2d 645 (2016). As this Court observed in *Leemreis*, "None of these sections refers to either of the other sections. Reading the OMA as a whole, it appears that these sections, and the distinct kinds of relief that they provide, stand alone." *Leemreis*, 273 Mich App at 701. Our Supreme Court later reinforced this point in *Speicher*, first quoting *Leemreis* and then adding, "When a statute, like the OMA, 'gives new rights and prescribes new remedies, such remedies must be strictly pursued; and a party seeking a remedy under the act is confined to the remedy conferred thereby and to that only.' " *Speicher*, 497 Mich at 136, quoting *South Haven v Van Buren Co Bd of Comm'rs*, 478 Mich 518, 529; 734 NW2d 533 (2007). Thus, it is critical to keep in mind the specific type of relief sought under the OMA when considering whether a person has met the applicable standard for that relief.

In *Arnold Transit*, for instance, the plaintiffs sought to invalidate the defendant city's ferry-boats code. The plaintiffs argued that, when adopting the code, the city violated the OMA's public-notice provisions and, in accordance with MCL 15.270(2), the code should be invalidated. *Arnold Transit*, 99 Mich App at 268, 274. This Court agreed with the plaintiffs that the city had violated the "technical requirements" of the OMA by, among other things, failing to post public notice at least 18 hours before the meeting. *Id*. at 274. The Court went on to conclude, however, that there was not "any desire by defendant to conduct its meeting out of public sight or that it in fact did so." *Id*. Because the OMA was then a relatively new act, the Court looked to the Texas Court of Appeals for guidance on public notice:

> "Even though provisions of the statute are mandatory, we hold that the 'notice' provisions of the statute are subject to the substantial compliance rule. . . . The rationale of the substantial compliance rule is that while the

> notice provisions in statutes are mandatory, they are essentially procedural; that rigid adherence to such a procedural mandate will not be required if it is clear that a substantial compliance provides realistic fulfillment of the purpose for which the mandate was incorporated in the statute." [*Id*. at 275, quoting *Stelzer v Huddleston*, 526 SW2d 710, 713 (Tex Civ App, 1975).]

The Court held that the city had substantially complied with the OMA's public-notice provisions and that, because of this, the trial court did not err by refusing to invalidate the code. *Id*. at 275-276.

Our Court had occasion to consider a similar dispute involving public notice in *Nicholas*. In that case, the plaintiffs sought to invalidate several decisions made by the township board during a meeting that had not been adequately noticed. *Nicholas*, 239 Mich App at 527. The plaintiffs also sought injunctive relief. After reviewing the record, this Court agreed with the trial court that defendants had violated the OMA. *Id*. at 532. Citing *Arnold Transit*, the Court further concluded that there was substantial compliance with the public-notice provisions and that the rights of the public were not impaired. *Id*. at 532-533. Given that conclusion, the Court affirmed the trial court's judgment denying invalidation of the township board's decisions or any injunctive relief. *Id*. at 533-534.

Importantly for the present case, however, neither *Arnold Transit* nor *Nicholas* involved a claim for statutory damages under MCL 15.273(1). Because our caselaw requires that we focus on the distinct claim being made when determining the appropriate standard to pply, we turn to the text of MCL 15.273(1) itself and the context of the OMA as a whole to resolve the issue.

D. TEXT AND CONTEXT

The Legislature explained in the textual title that it enacted the OMA to ensure that meetings of public bodies would be open to the public. 1976 PA 267, title. To ensure this openness, the Legislature provided for, among other things, public notice in advance of meetings and various separate types of relief for violations of the OMA, including invalidation of decisions, injunctions, and damages. *Id.*; MCL 15.265; MCL 15.270; MCL 15.271; MCL 15.273.

With regard to enforcement, the Legislature set forth different standards for the different forms of relief. For example, to invalidate a public body's decision, a plaintiff must show that the public body violated either: (a) the provisions of MCL 15.263(1), (2), or (3) that require a meeting to be "open" to the public; or (b) the public-notice provisions of MCL 15.265, but only if the deficient notice actually interfered with the public body's "substantial compliance" with respect to the openness requirements of MCL 15.263(1), (2), or (3). MCL 15.270(2). Additionally, a plaintiff must further show "that the noncompliance or failure has impaired the rights of the public" under the OMA. *Id.* The explicit "substantial compliance" measure for public-notice violations, coupled with the need to show that the rights of the public were actually impaired, set a high bar for invalidating a public body's decision solely on the basis of a defect in notice. This high bar makes sense because invalidation of a public body's decision would impact everyone who is subject to that decision, not just the parties to the lawsuit, and thus invalidation should not occur unless the rights of the public were actually impaired.

The OMA's civil-liability provision also sets a high bar, but in a different way. In contrast to the decision-

invalidation provision, which explicitly refers to "substantial compliance," *id*., the civil-liability provision does not refer to "substantial compliance" and instead imposes liability on a public official for violating the OMA, but only if the violation is intentional, MCL 15.273(1). Thus, rather than focus on the impact of the violation, the civil-liability provision focuses on the state of mind of the public official. This has the practical effect of imposing civil liability on those public officials who intentionally flout the OMA, but excusing from civil liability those public officials who act in good faith but inadvertently or mistakenly violate the act. On this reading, it does not matter whether compliance was substantial or not, or whether the violation was a material or technical one—rather, the focus is on the public official's state of mind.

In addition to the plain language of the civil-liability provision itself, this reading finds further contextual support in the OMA. As already pointed out, the decision-invalidation provision explicitly sets a "substantial compliance" measure with respect to a public-notice violation. MCL 15.270(2). Nowhere else in the OMA does the Legislature require a plaintiff to show that a violation "interfered with substantial compliance" of the act. When the Legislature expressly sets a particular standard in one section of a statute but not in another, we presume that the Legislature intended for different standards to apply to the different sections—i.e., the Legislature's word choice was intentional. See *Bianchi v Auto Club of Mich*, 437 Mich 65, 72; 467 NW2d 17 (1991) (applying the legal maxim *expressio unius est exclusio alterius*).

In this respect, our reading of the OMA is similar to our Supreme Court's reading of the election code in *Stand Up for Democracy v Secretary of State*, 492 Mich

588; 822 NW2d 159 (2012). In that case, the Court considered whether a referendum petition complied with the requirement of the election code that " 'the heading of each part of the petition *shall be* prepared in the following form and printed in capital letters in *14-point boldfaced type*.' " *Id*. at 601 (opinion by MARY BETH KELLY, J.), quoting MCL 168.482(2) (note: the statute has since been amended to replace "shall" with "must," 2018 PA 608). The referendum at issue was submitted in typeface that was smaller than 14-point. *Stand Up for Democracy*, 492 Mich at 596-597 (opinion by MARY BETH KELLY, J.). The Court rejected the plaintiff's argument that substantial compliance with the typeface requirement was sufficient. The Court observed "that the Legislature knows how to construct language specifically permitting substantial compliance with regard to form and content requirements" of a referendum, *id*. at 601; the Court, in fact, pointed to an instance in which the Legislature did precisely that, *id*. at 603. In the Court's view, the Legislature's use of the term "shall" indicated "a mandatory and imperative directive" that required strict, not substantial, compliance with the typeface provision. *Id*. at 601 (cleaned up).

III. CONCLUSION

Our caselaw stresses the importance of focusing on the particular type of relief sought for a violation of the OMA. *Arnold Transit* and *Nicholas* held that a public body's decision will not be invalidated or injunctive relief imposed for a public-notice violation as long as the public body substantially complied with the OMA. And yet, neither *Arnold Transit* nor *Nicholas* involved a claim for statutory damages against a public official. Our review of the text and context of the civil-liability

provision of MCL 15.273 confirms that the substantial-compliance standard does not apply to a claim for statutory damages, court costs, and attorney fees under the OMA.

The trial court erred by granting summary disposition to defendants on this ground. Because the trial court did not reach the question of whether defendants intentionally violated the OMA, we decline to reach the question for the first time on appeal.

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

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

NORMAN v DEPARTMENT OF TRANSPORTATION

Docket No. 354459. Submitted May 12, 2021, at Lansing. Decided May 20, 2021. Approved for publication July 15, 2021, at 9:00 a.m. Leave to appeal denied 508 Mich 969 (2021).

Danielle Norman filed an action in the Court of Claims against the Department of Transportation, seeking to recover damages under the governmental tort liability act (GTLA), MCL 691.1401 *et seq*., for injuries she sustained while riding her bicycle in the buffer zone next to marked parallel-parking spots that were adjacent to a roadway. The location around which plaintiff was injured had four motor vehicle traffic lanes and a center turn lane. Adjacent to the traffic lanes on each side of the roadway, there were 8-foot-wide marked parallel-parking spots bordered by 3.5-foot-wide buffer zones marked by painted diagonal lines with periodically placed reflective delineator markers held in place by 8-inch-wide disks two inches in height affixed to the pavement. There were 6-foot-wide marked bike lanes adjacent to the buffer zones that were bounded by the curbs on each side of the avenue. Plaintiff alleged that she was injured when she struck a broken delineator in one of the buffer zones and fell off her bicycle. Plaintiff filed this action, asserting that defendant was liable under the GTLA's highway exception to governmental immunity because her accident had occurred on an improved portion of the highway that defendant had failed to properly maintain. On April 21, 2020, defendant moved for summary disposition, arguing that it was immune from tort liability under the GTLA. In support of its motion, defendant submitted the affidavit of its safety engineer, along with engineering drawings of the street's design and photos of the area in which plaintiff allegedly fell. Plaintiff failed to timely respond to defendant's motion. The court, MICHAEL J. KELLY, J., granted defendant's motion, concluding that defendant had governmental immunity to plaintiff's suit. Plaintiff thereafter moved for reconsideration, including within the motion her proposed brief in opposition to defendant's summary-disposition motion. The trial court considered the documents she submitted but denied her motion. Plaintiff appealed.

The Court of Appeals *held*:

1. Taken together, MCR 1.103, MCR 1.105, and MCR 2.001 establish uniform rules of civil procedure in all courts except those of limited jurisdiction, which may follow different procedures. MCR 2.116(G)(1)(a) provides that, except as provided in MCR 2.116, the provisions of MCR 2.119 apply to dispositive motions, and unless a different period is set by the court, MCR 2.116 prescribes the timing for filing briefs; thus, courts have discretion to define the timing of when parties must file briefs. While MCR 2.116 states that courts may hold hearings on dispositive motions, the court rule does not mandate those hearings. In turn, MCR 2.119 generally governs motion practice in civil proceedings. Like MCR 2.116(G), MCR 2.119(C) similarly prescribes deadlines for filing motions and responses to motions and links the deadlines to the date set for hearings on those motions; courts have discretion to vary from the prescribed deadlines. Although MCR 2.119(E)(1) provides that motions should be noticed for hearing at the time designated by the court for the hearing of the motions, MCR 2.119(E)(3) grants trial courts discretion to dispense with or limit oral arguments on the motions. Thus, neither MCR 2.116 nor MCR 2.119 makes hearings on motions mandatory.

2. The Court of Claims is a legislatively created court that derives its powers from the Court of Claims Act, MCL 600.6401 *et seq*. Under MCL 600.6419, it has jurisdiction to hear all claims and demands against the state. Practice and procedure in the Court of Claims is governed by the statutes and court rules prescribing practice in the circuit courts of Michigan pursuant to MCL 600.6422 unless otherwise specifically stated in the Court of Claims Act. MCR 8.112(A) sets forth the manner by which courts may adopt local rules. Relevant here, the Court of Claims adopted LCR 2.119, which governs its motion practice. Under that rule, the date a contested motion is filed triggers the 14-day response deadline; a motion filed under LCR 2.119 is deemed submitted for decision 21 days after filing unless the Court of Claims specifies otherwise; and the Court of Claims has discretion to determine whether to hold a hearing and permit oral arguments by the parties on those motions. Neither the Michigan Court Rules, the Court of Claims Act, or the Court of Claims' local court rules require courts to conduct hearings on dispositive motions, nor do they preclude a trial court from ruling on a properly filed dispositive motion when the opposing party fails to timely respond. Because both the general court rules (MCR 2.116 and MCR 2.119) and the applicable Court of Claims rule (LCR 2.119) grant courts discretion whether to hold

hearings on motions, there is no conflict between the general rules and LCR 2.119 on that issue, and the trial court correctly did not err by so holding.

3. Due process requires that a deprivation of life, liberty, or property by adjudication must be preceded by notice and an opportunity to be heard. In particular, the opportunity to be heard must be granted at a meaningful time and in a meaningful manner. The relevant Court of Claims rule, LCR 2.119(E)(3), provides that a hearing or oral argument on a motion will only be granted if either party requests it and the trial court grants the request; further, LCR 2.119(E)(3) provides that the trial court's decision to grant oral argument is discretionary. Procedurally, LCR 2.119 states that a party's motion is deemed submitted for decision 21 days after the date of filing unless the trial court directs otherwise. In addition, a party must file a response to the other party's dispositive motion within 14 days after the date of the motion being filed. In this case, plaintiff clearly had notice of defendant's summary-disposition motion yet failed to file a responsive brief within the 14-day period required by LCR 2.119. The trial court did not issue its opinion and order until well after the 14-day period had passed, and it considered the merits of plaintiff's complaint—considering whether any reasonable ground existed that would have permitted plaintiff's case to continue—when it decided defendant's motion. The Court of Claims rules were clear, and plaintiff had notice of defendant's motion yet did not request a hearing on the motion. Accordingly, plaintiff was not deprived of due process and an opportunity to be heard when the trial court did not schedule a hearing on the motion.

4. Under the GTLA, governmental agencies have broad immunity from tort liability unless a specified exception exists. Relevant to this case, MCL 691.1402(1) provides that a person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by the person from the governmental agency. The duty of a governmental agency to repair and maintain highways, and the liability for that duty, extends only to the improved portion of the highway designed for vehicular travel and does not include sidewalks, trailways, crosswalks, or any other installation outside of the improved portion of the highway designed for vehicular travel. When determining whether MCL 691.1402 applies, the primary focus is on whether the area was designed

for vehicular travel, with that inquiry requiring distinguishing between portions where ordinary vehicular travel occurs and areas where momentary vehicular travel could occur. The duty attaches only to the improved portion of the highway that is also designed for vehicular travel. The shoulders on highways and the parking spaces next to a highway or roadway do not fall within the highway exception to governmental immunity because they are not designed for vehicular travel. In this case, defendant's evidence established beyond a reasonable doubt that the buffer zone did not constitute an improved portion of the highway designed for vehicular travel. Even though a person could traverse the buffer zone despite the markings and delineators, that fact did not make the area subject to the highway exception to governmental immunity; the area clearly did not constitute a portion of the highway designed for vehicular or bicycle travel. Accordingly, the trial court correctly ruled that the highway exception did not apply in this case and that defendant was protected by governmental immunity from tort liability.

5. The trial court did not prematurely grant defendant's motion for summary disposition on the basis of governmental immunity. Plaintiff had an opportunity to present evidence to establish that factual issues existed, but she failed to, and could not, do so. Accordingly, in light of the evidence presented by defendant, the trial court did not err by granting summary disposition in favor of defendant.

Affirmed.

COURTS — COURT OF CLAIMS — MOTION PRACTICE IN COURT OF CLAIMS — LOCAL COURT RULES — HEARINGS ON MOTIONS DISCRETIONARY — NO CONFLICT WITH MICHIGAN COURT RULES.

Neither the Michigan Court Rules, the Court of Claims Act, or the Court of Claims' local court rules require courts to conduct hearings on dispositive motions, nor do they preclude a trial court from ruling on a properly filed dispositive motion when the opposing party fails to timely respond; because the general court rules (MCR 2.116 and MCR 2.119) and the Court of Claims rule applicable to practice in that court (LCR 2.119) grant the respective courts' discretion whether to hold hearings on motions, there is no conflict between the general rules and LCR 2.119 on that issue (MCL 600.6401 *et seq*.).

Rasor Law Firm, PLLC (by *Brandon T. Wolfe*) for plaintiff.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *John L. A. Tuttle*, Assistant Attorney General, for defendant.

Before: CAMERON, P.J., and BORRELLO and REDFORD, JJ.

REDFORD, J. Plaintiff, Danielle Norman, appeals by right the Court of Claims' grant of summary disposition to defendant, the Michigan Department of Transportation, and dismissal of her lawsuit on the basis of governmental immunity. We affirm.

I. FACTUAL BACKGROUND

In Detroit, Michigan Avenue (US-12), between the John C. Lodge Freeway and Brooklyn Street, has four motor vehicle traffic lanes and a center turn lane. Adjacent to the traffic lanes on each side of the avenue are 8-foot-wide marked parallel-parking spots bordered by 3.5-foot-wide buffer zones marked by painted diagonal lines with periodically placed reflective delineator markers held in place by 8-inch-wide disks two inches in height affixed to the pavement. Six-foot-wide marked bike lanes adjacent to the buffer zones are bounded by the curbs on each side of the avenue. On July 11, 2019, while riding a bicycle down the 1200 block of Michigan Avenue, plaintiff struck a broken delineator, fell, and was injured. She sued defendant, claiming that tort liability existed under the highway exception to governmental immunity because her accident occurred on an improved portion of the highway and defendant had failed to properly maintain it. In lieu of answering, defendant moved for summary disposition under MCR 2.116(C)(7) on the ground that it was entitled to governmental immunity from tort liability. With its supporting brief, defendant submitted an affidavit of its safety engineer with engineering

drawings of Michigan Avenue's design and photos of the area where plaintiff alleged that she fell. Plaintiff did not timely respond to defendant's motion, and the Court of Claims issued its opinion and order granting defendant's motion on the ground that the evidence established that the highway exception did not apply, entitling defendant to governmental immunity. Plaintiff moved for reconsideration and submitted a brief in support as well as a proposed opposition brief to defendant's motion, asserting that the trial court had erred by ruling in favor of defendant. The trial court considered her submissions but found that her arguments for a different disposition of defendant's motion lacked merit. Plaintiff now appeals.

II. STANDARDS OF REVIEW

We review de novo a trial court's ruling on a motion for summary disposition. *Willett v Waterford Charter Twp*, 271 Mich App 38, 45; 718 NW2d 386 (2006). The availability of governmental immunity is a question of law reviewed de novo. *Pierce v Lansing*, 265 Mich App 174, 176; 694 NW2d 65 (2005). Summary disposition is appropriate under MCR 2.116(C)(7) when a claim is barred by immunity granted by law. *Dextrom v Wexford Co*, 287 Mich App 406, 428; 789 NW2d 211 (2010). When reviewing a motion under MCR 2.116(C)(7), the trial court must accept as true all of the plaintiff's well-pleaded factual allegations and construe them in favor of the plaintiff unless disputed by documentary evidence submitted by the moving party. *Dextrom*, 287 Mich App at 428; *Pierce*, 265 Mich App at 177. The court must consider any affidavits, depositions, admissions, or other documentary evidence submitted, and the court must determine whether there are any genuine issues of material fact. *Dextrom*, 287 Mich App at 429. If no facts are in dispute, or if reasonable minds

could not differ regarding the legal effect of the facts, the question whether the claim is barred by governmental immunity is an issue of law for the trial court to decide. *Id*. If a question of fact exists, dismissal is inappropriate. *Id*. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). We also review de novo a trial court's interpretation and application of statutes and court rules. *Safdar v Aziz*, 501 Mich 213, 217; 912 NW2d 511 (2018).

III. ANALYSIS

Plaintiff first argues that the trial court erred by following provisions of a local court rule adopted by the Court of Claims, LCR 2.119, on the ground that that rule conflicts with MCR 2.116, the general procedural court rule governing dispositive-motion practice, because LCR 2.119 prescribes different timing for filing response briefs in relation to such motions. She contends that MCR 2.116 requires setting a hearing for dispositive motions, which triggers the time to file a response brief. Further, because the trial court erred by following LCR 2.119, which leaves setting a hearing to the discretion of the court, it violated her due-process rights by denying her notice and an opportunity to respond to defendant's dispositive motion. We disagree.

A. ANALYSIS OF THE MICHIGAN COURT RULES AND THE LOCAL COURT RULES FOR THE COURT OF CLAIMS

A review of the court rules clarifies why plaintiff's argument in this matter lacks merit. MCR 1.103 states:

> The Michigan Court Rules govern practice and procedure in all courts established by the constitution and laws of the State of Michigan. Rules stated to be applicable only in a specific court or only to a specific type of proceeding apply only to that court or to that type of proceeding and control over general rules.

MCR 1.105 directs that the "rules are to be construed, administered, and employed by the parties and the court to secure the just, speedy, and economical determination of every action and to avoid the consequences of error that does not affect the substantial rights of the parties." MCR 2.001 similarly states that the "rules in this chapter govern procedure in all civil proceedings in all courts established by the constitution and laws of the State of Michigan, except where the limited jurisdiction of a court makes a rule inherently inapplicable or where a rule applicable to a specific court or a specific type of proceeding provides a different procedure." These rules plainly express our Supreme Court's intention to establish uniform rules of civil procedure in all courts except courts of limited jurisdiction, which may follow different procedures.

MCR 2.116 provides for dispositive motions and states, in relevant part, as follows:

> [(B)](1) A party may move for dismissal of or judgment on all or part of a claim in accordance with this rule. . . .
>
> (2) A motion under this rule may be filed at any time consistent with subrule (D) and subrule (G)(1), but the hearing on a motion brought by a party asserting a claim shall not take place until at least 28 days after the opposing party was served with the pleading stating the claim.
>
> (C) The motion may be based on one or more of these grounds, and must specify the grounds on which it is based:
>
> * * *

(7) Entry of judgment, dismissal of the action, or other relief is appropriate because of . . . immunity granted by law[.] . . .

* * *

[(D)](2) The grounds listed in subrule (C)(5), (6), and (7) must be raised in a party's responsive pleading, unless the grounds are stated in a motion filed under this rule prior to the party's first responsive pleading. . . .

* * *

[(G)](1) Except as otherwise provided in this subrule, MCR 2.119 applies to motions brought under this rule.

(a) Unless a different period is set by the court,

(i) a written motion under this rule with supporting brief and any affidavits must be filed and served at least 21 days before the time set for the hearing, and

(ii) any response to the motion (including brief and any affidavits) must be filed and served at least 7 days before the hearing.

* * *

[(I)](1) If 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, the court shall render judgment without delay.

Analysis of MCR 2.116 reveals that, under Subrule (G)(1)(a), except as provided in MCR 2.116, the provisions of MCR 2.119 also apply to dispositive motions, and unless a different period is set by the court, MCR 2.116 prescribes the timing for briefing. Significant to the issues before this Court in the case at bar, although Subrule (G)(1)(a) links dispositive-motion brief filing to the date set for a hearing on such motions, the court rule, nevertheless, gives courts discretion to define the

timing of submissions of briefs by the parties. Further, although MCR 2.116 indicates that hearings on dispositive motions may be held by trial courts, the rule nowhere makes holding a hearing mandatory. Consequently, one must look elsewhere in the court rules to determine whether hearings are mandatory.

MCR 2.119 generally governs motion practice in civil proceedings. MCR 2.119 provides, in relevant part:

> [(C)](1) Unless a different period is set by these rules or by the court for good cause, a written motion (other than one that may be heard ex parte), notice of the hearing on the motion, and any supporting brief or affidavits must be served as follows:
>
> (a) at least 9 days before the time set for the hearing, if served by first-class mail, or
>
> (b) at least 7 days before the time set for the hearing, if served by delivery under MCR 2.107(C)(1) or (2) or MCR 1.109(G)(6)(a).
>
> (2) Unless a different period is set by these rules or by the court for good cause, any response to a motion (including a brief or affidavits) required or permitted by these rules must be served as follows:
>
> (a) at least 5 days before the hearing, if served by first-class mail, or
>
> (b) at least 3 days before the hearing, if served by delivery under MCR 2.107(C)(1) or (2) or MCR 1.109(G)(6)(a).
>
> (3) If the court sets a different time for serving a motion or response its authorization must be endorsed in writing on the face of the notice of hearing or made by separate order.
>
> (4) Unless the court sets a different time, a motion must be filed at least 7 days before the hearing, and any response to a motion required or permitted by these rules must be filed at least 3 days before the hearing.

* * *

> [(E)](1) Contested motions should be noticed for hearing at the time designated by the court for the hearing of motions. A motion will be heard on the day for which it is noticed, unless the court otherwise directs. If a motion cannot be heard on the day it is noticed, the court may schedule a new hearing date or the moving party may renotice the hearing.
>
> (2) When a motion is based on facts not appearing of record, the court may hear the motion on affidavits presented by the parties, or may direct that the motion be heard wholly or partly on oral testimony or deposition.
>
> (3) A court may, in its discretion, dispense with or limit oral arguments on motions, and may require the parties to file briefs in support of and in opposition to a motion.

MCR 2.119(C), like MCR 2.116(G), prescribes deadlines for filing motions and responses to motions and links the deadlines to the date set for hearings on such motions. MCR 2.119(C) also indicates that trial courts have discretion to vary from the prescribed filing deadlines. Although Subrule (E)(1) states that "motions should be noticed for hearing at the time designated by the court for the hearing of motions," Subrule (E)(3) grants trial courts discretion to "dispense with or limit oral arguments on motions[.]" Although MCR 2.119 indicates that hearings on motions may be held by trial courts, the rule nowhere makes hearings mandatory. These rules indicate that our Supreme Court anticipated that hearings on motions would ordinarily be held by trial courts, but it did not impose a requirement that they do so under all circumstances.

Respecting the Court of Claims, in *Okrie v Michigan*, 306 Mich App 445, 456; 857 NW2d 254 (2014), this Court explained:

> The Court of Claims is a "legislative court" and not a "constitutional court" and derives its powers only from the act of the Legislature and is subject to the limitations

> therein imposed. The Legislature created a Court of Claims as a substitute for the board of State auditors and the State administrative board for the purpose of hearing and determining all claims and demands, liquidated and unliquidated, *ex contractu* and *ex delicto* against the State[.] [Quotation marks and citations omitted.]

The Legislature enacted the Court of Claims Act (COCA), MCL 600.6401 *et seq*., in 1961, effective January 1, 1963, and it later authorized our Supreme Court to assign four judges from this Court to preside over the Court of Claims, MCL 600.6404. The Legislature defined the Court of Claims' jurisdiction and powers in MCL 600.6419, which provides, in relevant part:

> (1) Except as provided in sections 6421 and 6440, the jurisdiction of the court of claims, as conferred upon it by this chapter, is exclusive. All actions initiated in the court of claims shall be filed in the court of appeals. . . . Except as otherwise provided in this section, the court has the following power and jurisdiction:
>
> (a) To hear and determine any claim or demand, statutory or constitutional, liquidated or unliquidated, ex contractu or ex delicto, or any demand for monetary, equitable, or declaratory relief or any demand for an extraordinary writ against the state or any of its departments or officers notwithstanding another law that confers jurisdiction of the case in the circuit court.
>
> * * *
>
> (7) As used in this section, "the state or any of its departments or officers" means this state or any state governing, legislative, or judicial body, department, commission, board, institution, arm, or agency of the state, or an officer, employee, or volunteer of this state or any governing, legislative, or judicial body, department, commission, board, institution, arm, or agency of this state, acting, or who reasonably believes that he or she is acting,

> within the scope of his or her authority while engaged in or discharging a government function in the course of his or her duties.

In *Progress Mich v Attorney General*, 506 Mich 74; 954 NW2d 475 (2020), our Supreme Court considered whether a complaint had been timely filed in the Court of Claims. In deciding that issue, the Court looked "to the procedures that govern practice in the Court of Claims." *Id*. at 93. Our Supreme Court explained:

> Under MCL 600.6422, practice and procedure in the Court of Claims is governed by the statutes and court rules applicable to proceedings in the circuit court, unless otherwise specifically stated in the COCA:
>
> > (1) Practice and procedure in the court of claims shall be in accordance with the statutes and court rules prescribing the practice in the circuit courts of this state, except as otherwise provided in this section.
> >
> > (2) The supreme court may adopt special rules for the court of claims.
>
> * * *
>
> The Revised Judicature Act (RJA), MCL 600.101 *et seq*., governs practice and procedure in the Court of Claims because the COCA is contained within the RJA. [*Id*. at 93-94.]

MCL 600.6422 unambiguously provides that the Court of Claims must follow the statutes and the procedural court rules prescribed by our Supreme Court, but it also authorizes our Supreme Court to adopt special practice and procedural rules for the Court of Claims. *Progress Mich* acknowledged that the Legislature authorized our Supreme Court in MCL 600.6422 to adopt special rules for procedure in the Court of Claims.

In MCR 8.112(A), our Supreme Court has prescribed the manner by which courts may adopt local rules. MCR 8.112(A) provides:

> (1) A trial court may adopt rules regulating practice in that court if the rules are not in conflict with these rules and regulate matters not covered by these rules.
>
> (2) If a practice of a trial court is not specifically authorized by these rules, and
>
> (a) reasonably depends on attorneys or litigants being informed of the practice for its effectiveness, or
>
> (b) requires an attorney or litigant to do some act in relation to practice before that court, the practice, before enforcement, must be adopted by the court as a local court rule and approved by the Supreme Court.
>
> (3) Unless a trial court finds that immediate action is required, it must give reasonable notice and an opportunity to comment on a proposed local court rule to the members of the bar in the affected judicial circuit, district, or county. The court shall send the rule and comments received to the Supreme Court clerk.
>
> (4) If possible, the number of a local court rule supplementing an area covered by these rules must correspond with the numbering of these rules and bear the prefix LCR. For example, a local rule supplementing MCR 2.301 should be numbered LCR 2.301.

Relevant to the case at bar, the Court of Claims adopted LCR 2.119. Our Supreme Court approved the Court of Claims' adoption of LCR 2.119 by Administrative Order No. 2014-16, issued May 21, 2014, effective that same day.[1] Since its adoption, LCR 2.119 has been amended with approval of our Supreme Court and currently provides, in relevant part:

> [(A)](6) There is no oral argument on motions unless a request is made in the motion or response, and the request

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[1] See 495 Mich ccliv through cclx & cclx (staff comment).

is granted by the assigned judge. A notice of hearing, if any, will be provided by the court.

(7) The motion will be deemed submitted for decision 21 days after the date of filing as appears in the title of the motion unless otherwise specified by the court or noticed for hearing by the court.

* * *

[(C)](1) Unless a different period is set by these rules or by the court for good cause, a written motion (other than one that may be heard ex parte) and any supporting brief or affidavits must be served within 5 days after the date of filing as appears in the title of the motion, and in accordance with MCR 2.107.

(2) Unless a different period is set by these rules or by the court for good cause, any response to a motion (including a brief or affidavits) required or permitted by these rules must be filed with the court and served within 14 days after the date of filing as appears in the title of the motion and in accordance with MCR 2.107.

(3) The failure to file a response to a motion will result in the treatment of the motion as uncontested.

* * *

[(E)](1) Contested motions will be deemed submitted for decision 21 days after the date of filing as appears in the title of the motion unless otherwise specified by the court or noticed for hearing by the court.

(2) When a motion is based on facts not appearing of record, the court may hear the motion on affidavits presented by the parties, or may direct that the motion be heard wholly or partly on oral testimony or deposition.

(3) In its discretion, the court may grant, dispense with, or limit oral arguments on motions; and may require the parties to file supplemental briefs in support of and in opposition to a motion.

LCR 2.119 plainly governs motion practice in the Court of Claims. It informs litigants that the date of filing of all contested motions triggers the 14-day response deadline and that such motions are deemed submitted for decision 21 days after filing unless the Court of Claims specifies otherwise. LCR 2.119 also informs litigants that the Court of Claims has sole discretion to determine whether to hold a hearing and permit oral arguments by the parties on those motions. LCR 2.119 lacks any ambiguity.

LCR 2.119 is readily accessible online at the Michigan Courts' website located at https://courts.michigan.gov/courts/michigansupremecourt/rules/pages/current-court-rules.aspx [https://perma.cc/T4C2-735V]. Close analysis of MCR 2.116, MCR 2.119, and LCR 2.119 does not support plaintiff's argument. LCR 2.119 does not conflict with the general court rules that govern motions. MCR 2.116 and MCR 2.119 anticipate hearings on motions but do not mandate them. These rules grant trial courts in civil proceedings discretion to manage their dockets and dispense with hearings and oral argument. LCR 2.119—which exclusively applies to motion practice in the Court of Claims, a legislatively created court of limited jurisdiction—leaves conducting hearings in the sole discretion of the presiding judge. LCR 2.119 does not link to hearing dates the filing of briefs in response to motions, dispositive or otherwise. Instead, it sets forth specific procedural guidelines for motion practice in the Court of Claims. We find no conflict between the general rules and this local rule.

Plaintiff asserts that *Schlender v Schlender*, 235 Mich App 230; 596 NW2d 643 (1999), stands for the proposition that a local court rule that conflicts or regulates matters covered by the Michigan Court Rules must be deemed invalid. *Schlender*, a change-of-child-

custody case, involved a circuit court's administrative policy that this Court found in essence functioned as a local rule, permitting the trial court to summarily decide the child custody dispute without holding an evidentiary hearing if it concluded that the movant could not sustain the burden of proof for changing custody of the parties' child. *Id*. at 231. This Court concluded that the circuit court had not sought or obtained approval for the policy from our Supreme Court as required under MCR 8.112(A)(2). *Id*. at 232. This Court held that, in child custody matters, a trial court cannot properly resolve a custody dispute without holding the necessary evidentiary hearing. *Id*. at 233. This Court explained that the unapproved local court rule improperly denied the petitioner an evidentiary hearing in which the trial court had the statutory obligation to make findings on each factor defined in MCL 722.23. *Id*. This Court also observed that MCR 3.210(C) recognized the right to a hearing in child custody cases, and postjudgment motions in domestic relations actions are specifically governed by MCR 2.119 under MCR 3.213. *Id*. The unapproved local rule, therefore, lacked validity. *Id*. at 233-234.

Close analysis of *Schlender* reveals that it does not stand for the proposition that local rules are automatically invalid if they cover matters covered by the Michigan Court Rules. *Schlender* simply stands for the proposition that a local court cannot eliminate an evidentiary hearing in a child custody dispute through a blanket administrative policy. Moreover, *Schlender* is inapposite to this case for a number of reasons. First, the case at bar does not concern a child custody dispute. Second, it does not involve an instance in which a lower court applied a local court rule unapproved by our Supreme Court as required by MCR 8.112(A)(2). Third, this case does not involve a conflict

between the general court rules and a local rule. Neither Michigan statutes nor the Michigan Court Rules require that courts conduct hearings on dispositive motions, nor do they preclude a trial court from ruling on a properly filed dispositive motion when the opposing party fails to timely respond.

B. APPLICATION OF THE MICHIGAN COURT RULES AND THE COURT OF CLAIMS' LOCAL COURT RULES TO PLAINTIFF DOES NOT VIOLATE HER DUE-PROCESS RIGHTS

That the underlying premise of plaintiff's argument—i.e., that LCR 2.119 conflicts with MCR 2.116 and MCR 2.119—lacks merit does not fully resolve this matter. We must also consider whether the trial court deprived her of due process. It did not.

Plaintiff claims that the trial court deprived her of due process by not scheduling a hearing that would have alerted her to respond to defendant's dispositive motion, which, in essence, alleges a denial of procedural due process. In *Bonner v Brighton*, 495 Mich 209, 223-224; 848 NW2d 380 (2014), our Supreme Court explained:

> [A]nalysis of substantive and procedural due process involves two separate legal tests. While the touchstone of due process, generally, is protection of the individual against arbitrary action of government, the substantive component protects against the arbitrary exercise of governmental power, whereas the procedural component is fittingly aimed at ensuring constitutionally sufficient procedures for the protection of life, liberty, and property interests. [Quotation marks and citations omitted.]

Respecting procedural due process, the Court clarified:

> Well established is the assurance that deprivation of a significant property interest cannot occur except by due process of law. While the meaning of the Due Process Clause and the extent to which due process must be

> afforded has been the subject of many disputes, there can be no question that, at a minimum, due process of law requires that deprivation of life, liberty, or property by adjudication must be preceded by notice and an opportunity to be heard. To comport with these procedural safeguards, the opportunity to be heard must be granted at a meaningful time and in a meaningful manner.
>
> * * *
>
> The essence of due process is the requirement that a person in jeopardy of serious loss be given notice of the case against him and opportunity to meet it. All that is necessary, then, is that the procedures at issue be tailored to the capacities and circumstances of those who are to be heard to ensure that they are given a meaningful opportunity to present their case, which must generally occur before they are permanently deprived of the significant interest at stake. [*Id*. at 235, 238-239 (quotation marks, citations, and brackets omitted).]

In *Reed v Reed*, 265 Mich App 131, 159; 693 NW2d 825 (2005), this Court stated:

> [D]ue process is a flexible concept, the essence of which is to ensure fundamental fairness. Procedure in a particular case is constitutionally sufficient when there is notice of the nature of the proceedings and a meaningful opportunity to be heard by an impartial decision maker. [Citations omitted.]

In this case, the proof of service in the trial court's record reflects that defendant, through counsel, filed its motion for summary disposition and supporting brief on April 21, 2020, served plaintiff's counsel by e-mail at his e-mail address, and served him by ordinary mail on that same date in a postage-paid envelope addressed to plaintiff's counsel at his law firm's address. Plaintiff does not argue that defendant failed to

properly serve her its motion. Plaintiff, therefore, cannot legitimately claim that she lacked notice of defendant's motion.

Regarding whether she had an opportunity to be heard, LCR 2.119(A)(6) informed plaintiff that no oral argument would be heard unless requested by either party and the trial court granted the request. The record reflects that defendant did not request oral argument in its motion. Therefore, plaintiff needed to request a hearing and oral argument if that is what she desired. LCR 2.119(E)(3), however, further in formed the parties that the trial court had discretion regarding whether to grant the parties oral argument on the motion. Therefore, plaintiff had the opportunity to request a hearing with oral argument by the parties.

LCR 2.119(A)(7) informed the parties that defendant's motion would be deemed submitted for decision 21 days after the date of filing unless the trial court directed otherwise. LCR 2.119(C)(2) directed plaintiff to file a response to defendant's dispositive motion within 14 days after defendant filed its motion. Therefore, because defendant filed its motion on April 21, 2020, plaintiff had until May 5, 2020, to file a response. Nothing in the record remotely suggests that the trial court deprived plaintiff of the opportunity to file a response to defendant's motion. LCR 2.119 provided plaintiff an unrestricted opportunity to file a responsive brief. Plaintiff did not file a responsive brief within the required 14-day period.

The record reflects that, although LCR 2.119(A)(7) deemed defendant's motion submitted for decision as of May 12, 2020, the trial court did not issue its written opinion and order until June 29, 2020. In its opinion, the trial court noted that while plaintiff had failed to

timely respond to defendant's motion, it did not treat the motion as uncontested and did not merely grant the motion without consideration of the merits of defendant's motion in relation to plaintiff's claim in her complaint.

The record reflects that the trial court reviewed and considered plaintiff's allegations in her complaint in detail and then considered whether defendant established the availability of governmental immunity. The trial court reviewed the substantive evidence submitted by defendant and supported by defendant's safety engineer's affidavit testimony. The trial court's opinion indicates that the court thoroughly analyzed the applicable law and defendant's claim that it was not liable because of governmental immunity. Defendant presented ample evidence from which the trial court could appropriately conclude that the location of plaintiff's accident as specifically alleged by plaintiff did not constitute a portion of the highway designed for vehicular travel but a buffer zone off-limits to vehicular and bicycle traffic. The intended design of the buffer zone dictated the disposition of plaintiff's case because the highway exception did not apply. The record, therefore, reflects that, despite plaintiff's failure to respond to defendant's motion, the trial court did not jump to judgment but thoroughly considered whether any reasonable ground existed to permit plaintiff's case to continue.

Moreover, the record reflects that, after the trial court ruled and plaintiff moved for reconsideration, the court did not dismissively dispose of her motion but considered the grounds she asserted for a different disposition of defendant's motion. With her motion and supporting brief, plaintiff submitted her proposed opposition brief to defendant's motion,

which set forth her arguments for denying defendant's motion. The record indicates that the trial court reviewed all of her submissions but found that they lacked merit because she could not establish that the highway exception to governmental immunity applied in this case.

Given the record in this case, we conclude that the trial court did not deprive plaintiff of an opportunity to be heard. LCR 2.119 afforded her an opportunity to respond to defendant's motion, and despite her failure to do so, the trial court considered her claims and arguments for her case and in opposition to defendant's claim of governmental immunity. Accordingly, the trial court did not deprive plaintiff of due process.

C. PLAINTIFF'S ARGUMENT THERE IS A FACTUAL QUESTION IS UNSUPPORTED BY THE RECORD

Plaintiff also argues that the trial court erred by granting defendant dismissal because vehicles can drive over the buffer zone, which she claims necessitates a factual inquiry into both the intent and the practical effect of its design. We disagree.

In Michigan, unless a specified exception exists, governmental agencies have broad immunity from tort liability. MCL 691.1407(1) provides:

> Except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function. Except as otherwise provided in this act, this act does not modify or restrict the immunity of the state from tort liability as it existed before July 1, 1965, which immunity is affirmed.

One of the exceptions to governmental immunity is the highway exception under MCL 691.1402(1), which provides, in relevant part:

> Each governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. A person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency. . . . [*T*]*he duty of a governmental agency to repair and maintain highways, and the liability for that duty, extends only to the improved portion of the highway designed for vehicular travel and does not include sidewalks, trailways, crosswalks, or any other installation outside of the improved portion of the highway designed for vehicular travel*. [Emphasis added.]

In *Grimes v Dep't of Transp*, 475 Mich 72, 73; 715 NW2d 275 (2006), our Supreme Court considered whether the shoulder of a road constituted an improved portion of the highway designed for vehicular travel for purposes of the highway exception to governmental immunity. The Court concluded that the shoulders on highways do not fall within the highway exception because they are not designed for vehicular travel. *Id*. The Court explained:

> The scope of the highway exception is narrowly drawn. Under its plain language, every governmental agency with jurisdiction over a highway owes a duty to "maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel." However, when the governmental agency is the state or a county road commission, as is the case here, the Legislature constricted the scope of the highway exception by limiting the portion of the highway covered by that exception. For these agencies, the highway exception does not extend to an installation "outside" the improved portion of the highway such as a sidewalk, trailway, or crosswalk, although these features are included in the general definition of a "high-

> way." The duty of these agencies to repair and maintain does not extend to every "improved portion of highway." It attaches only "to the improved portion of the highway" that is also "designed for vehicular travel." As we discuss later in this opinion, such narrowing of the duty supplies important textual clues regarding the Legislature's intent concerning whether a shoulder falls within or without the protection afforded by the [governmental tort liability act (GTLA), MCL 691.1401 *et seq*.]. [*Id*. at 78.]

The *Grimes* Court further explained that in *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 162, 180; 615 NW2d 702 (2000), it had reconciled prior decisions and clarified the scope of the highway exception so that it was understood that if the condition that caused the injury " 'is not located in the actual roadbed designed for vehicular travel, the narrowly drawn highway exception is inapplicable . . . .' " *Grimes*, 475 Mich at 79. Our Supreme Court then went on to overrule *Gregg v State Hwy Dep't*, 435 Mich 307; 458 NW2d 619 (1990), as based on erroneous reasoning because it had held that a shoulder was designed for vehicular travel because it could be used in an emergency. The *Grimes* Court explained that the plain language of the highway exception made clear that it did not apply simply because motorists could use the shoulder; indeed, the Legislature very specifically limited the exception's application to portions of the highway designed for vehicular travel, not areas just available for temporary use to accommodate disabled or stopped vehicles. *Grimes*, 475 Mich at 84-88. The Court clarified that the Legislature "did not intend to extend the highway exception indiscriminately to every 'improved portion of the highway,' " but, "[r]ather, it limited the exception to the segment of the 'improved portion of the highway' that is 'designed for vehicular travel.' " *Id*. at 89. Our Supreme Court held "that only

the travel lanes of a highway are subject to the duty of repair and maintenance specified in MCL 691.1402(1)." *Id*. at 91.

More recently, in *Yono v Dep't of Transp*, 499 Mich 636, 641; 885 NW2d 445 (2016), our Supreme Court considered whether the highway exception applied in a case in which the plaintiff parked in a designated parallel-parking space on the side of a highway under the defendant's jurisdiction, and when she returned to her car, she stepped into a depression in the parking space, fell, and suffered injuries. The Court considered whether the parallel-parking area constituted a portion of the highway that the defendant had a duty to maintain in reasonable repair. The Court explained that the Legislature specified that the duty extended only to the improved portion of the highway designed for vehicular travel. *Id*. The Court analyzed MCL 691.1402(1) and focused on the limitation of the applicability of the highway exception to injuries sustained on "the improved portion of the highway designed for vehicular travel." *Id*. at 647-648. The Court explained that the case required it to determine "whether a parking lane is a 'travel lane'—and therefore 'designed for vehicular travel'—within the meaning of the statute." *Id*. at 648. As in *Grimes*, our Supreme Court explained that the inquiry required distinguishing between portions where ordinary vehicular travel occurred and areas where momentary vehicular travel could occur, and it instructed that the primary focus must be on whether the area had been designed for vehicular travel. *Id*. at 649-650. The Court reasoned that a parking spot essentially invited drivers to park and could support vehicular travel, but use of the designated parking area to travel did not comport with its design. *Id*. at 650-651. The Court stated that "paint markings and other traffic control devices can and do

delineate how a highway is designed and redesigned over its useful life." *Id*. at 652.

The Court directed that, to analyze and determine whether a portion of a highway is designed for vehicular travel, courts "must consider how the Department [of Transportation] had designed the highway at the time of the alleged injury." *Id*. The Court noted that the area of the alleged injury featured traffic-control devices, i.e., the paint delineating the parking spaces, which indicated that the area had been designed for parallel-parking use and not as a travel lane. *Id*. at 653. Our Supreme Court concluded:

> One basic principle . . . must guide our decision today: the immunity conferred upon governmental agencies is *broad*, and the statutory exceptions thereto are to be *narrowly* construed. Our caselaw teaches that because MCL 691.1402(1) is a narrowly drawn exception to a broad grant of immunity, there must be strict compliance with the conditions and restrictions of the statute. We cannot conclude that the statute clearly applies to the act of parking, which is only incidental to travel and does not itself constitute travel. Accordingly, defendant is entitled to governmental immunity.
>
> . . . In this case, . . . the lane was designated by the paint markings as a parking area, with no indication that it was also designed for vehicular travel. Accordingly, plaintiff cannot fit these facts into the narrow confines of the highway exception to [the] GTLA. [*Id*. at 656-657 (quotation marks, citations, and brackets omitted).]

In the case at bar, defendant submitted to the trial court evidence that established the engineering design of the location where plaintiff incurred her bicycle accident, as well as photos of the condition of the location at the time of the accident. Defendant's safety engineer testified in her affidavit regarding the specific design of the buffer zones on the subject highway

including the paint marking the area, the purpose of the buffer zones, and the delineators' design and purpose, all of which served to designate the buffer areas as off-limits for vehicular and bicycle travel and to inform persons driving motor vehicles and bicycles not to use the buffer zones for travel. The engineering design drawings plainly describe the travel lanes, turn lane, parallel-parking areas, bicycle lanes, and the buffer zones between the parallel-parking areas and the bicycle lanes. The photos depicting the area where the accident occurred unequivocally established that the buffer zone where plaintiff rode her bicycle into a delineator base had paint marking the area as off-limits to vehicular and bicycle travel, and the placing of the delineators within the buffer zone emphasized the area as off-limits to vehicular and bicycle travel. The buffer zones plainly were not lanes of travel.

Under *Grimes* and *Yono*, defendant's evidence established beyond a doubt that the buffer zone did not constitute an improved portion of the highway designed for vehicular travel. Further, contrary to plaintiff's contention, the fact that one could ignore the markings and delineators and traverse the buffer zones does not make the areas subject to the highway exception to governmental immunity. Application of the analytical principles directed by our Supreme Court in *Grimes* and *Yono* required the trial court to conclude, as it did, that the buffer zones are not improved portions of the highway designed for vehicular travel. The buffer zone where plaintiff's accident occurred, which could only incidentally be traveled on, did not constitute a portion of the highway designed for vehicular or bicycle travel. The trial court, therefore, did not err by ruling that the highway exception did

not apply in this case and that governmental immunity protected defendant from tort liability.

D. THE GRANT OF DEFENDANT'S MOTION FOR SUMMARY DISPOSITION BASED ON GOVERNMENTAL IMMUNITY WAS NOT PREMATURE

Plaintiff argues that the trial court prematurely ruled because she had not yet conducted discovery and did not have an expert to rebut defendant's evidence. Plaintiff asserts that it is enough that she pleaded in her complaint that she traveled on a road maintained by defendant and that where she fell constituted a part of the improved portion of the highway designed for vehicular travel. Plaintiff argues, incorrectly, that under MCR 2.116(C)(7), the trial court could only consider the pleadings.

Summary disposition is appropriate under MCR 2.116(C)(7) when a claim is barred by immunity granted by law. *Dextrom*, 287 Mich App at 428. When reviewing a motion under MCR 2.116(C)(7), the trial court must accept as true all of the plaintiff's well-pleaded factual allegations and construe them in favor of the plaintiff, *unless* disputed by documentary evidence submitted by the moving party. *Dextrom*, 287 Mich App at 428; *Pierce*, 265 Mich App at 177. The court must consider any affidavits, depositions, admissions, or other documentary evidence submitted, and the court must determine whether there are any genuine issues of material fact. *Dextrom*, 287 Mich App at 429. If no facts are in dispute, or if reasonable minds could not differ regarding the legal effect of the facts, the question whether the claim is barred by governmental immunity is an issue of law for the trial court to decide. *Id*.

In this case, the record reflects that defendant submitted with its motion and supporting brief evidence that absolutely gave plaintiff notice of the grounds on which defendant relied and the evidence supporting its position that governmental immunity protected it from her tort-liability claim. Plaintiff had an opportunity to present evidence to the trial court to establish factual issues precluding summary disposition, but she failed to, and could not, do so. Defendant's admissible evidence supported by affidavit testimony demonstrated that plaintiff's claim was barred by governmental immunity and that the highway exception did not apply. Reasonable minds could not differ regarding the legal effect of the evidence presented by defendant in this case. Accordingly, the trial court neither prematurely nor incorrectly granted defendant summary disposition and appropriately decided the governmental-immunity issue as a matter of law. Therefore, the trial court properly dismissed plaintiff's lawsuit.

Affirmed.

CAMERON, P.J., and BORRELLO, J., concurred with REDFORD, J.

RUSSELL TRUST v RUSSELL

Docket No. 354511. Submitted July 14, 2021, at Lansing. Decided July 22, 2021, at 9:00 a.m.

Joni White, as acting trustee of the Joseph and Anita Russell Trust, brought an action in the Eaton Circuit Court demanding payment in full from Joshua J. and Kelly M. Russell on a promissory note and oral loan agreement. In 2013, Joseph and Anita Russell deeded property to defendants and loaned them money so that defendants could build a house. On May 7, 2015, defendants executed a promissory note for the money and agreed to pay the trustees $500 or more in monthly payments starting 30 days from the date of the note including interest of 3% on the unpaid balance. The terms of the note allowed the promisees to declare the entire unpaid balance due and payable if any payment remained unpaid for more than 60 days. Defendants made the required monthly payments for several years except for a few months in 2018–2019 when Anita granted a durable power of attorney over the trust to plaintiff, the daughter of Joseph and Anita and the aunt of Joshua. Joshua alleged that he and Kelly were to start making payments to plaintiff, who did not respond to requests for information about where to send the payments, which resulted in the lapsed monthly payments. A make-up payment was made in March 2019, and thereafter defendants made the required monthly payments through January 2020. There was also an oral loan agreement regarding the property in which defendants agreed to pay Joshua and Anita monthly installments of $500 and 0% interest, starting on January 16, 2016. With a few missed payments and a similar lapse and repayment when the payee changed in 2019, defendants made regular monthly payments on the oral loan through January 2020. In October 2019, plaintiff assigned the oral loan agreement to the trust and sent a demand letter to defendants asserting that the promissory note and oral loan agreement were payable on demand and insisted on full payment of both loans. Plaintiff also gave defendants the option to instead execute a new promissory note secured by a mortgage on the farm property. Defendants refused to pay the full balance on the two loans, rejected the offer to execute a new promissory note, and indicated

their intent to continue making the monthly payments on the loans. In February 2020, plaintiff filed this action and sought full payment on the promissory note and the oral agreement along with attorney fees, costs, and interest. Defendants moved for summary disposition, arguing that the two loans were not payable on demand. The court, Janice K. Cunningham, J., concluded as a matter of law that the promissory note was not payable on demand and granted defendants' motion for summary disposition on the note. The court also concluded that plaintiff's claim on the oral agreement should be summarily dismissed. Plaintiff appealed.

The Court of Appeals *held*:

1. The parties and the trial court agreed that the promissory note was governed by the article in Michigan's Uniform Commercial Code governing negotiable instruments, MCL 440.3101 *et seq*. MCL 440.3108(1) provides that a promissory note is "payable on demand" if it states that it is payable on demand or otherwise indicates that is "payable at the will of the holder" or if it "[d]oes not state any time of payment." This statutory provision does not allude to promissory notes that lack a specific date for final payment on their face. Moreover, the Supreme Court in *First Nat'l Bank of Port Huron v Carson*, 60 Mich 432 (1886), did not state that a promissory note must contain the actual date of final payment; rather, the Court merely indicated that a note must be certain as to the "time of payment." The promissory note in this case had an express requirement of $500 monthly payments starting 30 days after execution of the note, which provided sufficient certainty to "time of payment" for purposes of MCL 440.3108(1). With respect to whether the promissory note was "payable at a definite time" for purposes of the requirement in MCL 440.3104(1)(b) that negotiable instruments must be "payable on demand or at a definite time," when that provision is read in conjunction with MCL 440.3108(1), the reference in the latter to notes that do "not state anytime for payment" means notes that are not payable at a definite time. Otherwise, if a note is neither payable on demand or payable at a definite time, it is not a negotiable instrument and MCL 440.3108(1) would not be implicated. The note's language requiring monthly payments of at least $500 commencing 30 days from the date of execution of the note, with 3% interest per annum, renders the note payable at a time that is "readily ascertainable" within the provisions of MCL 440.3108(2). In addition, the fact that defendants could and can pay more than $500 per month falls into the "prepayment"

exception in MCL 440.3108(2)(a). The circuit court did not err by ruling as a matter of law that the promissory note was not payable on demand.

2. Determining when final payment is due on the oral loan agreement was likewise easy to ascertain, and there was no indication that the oral agreement was payable on demand. The oral agreement was an installment loan agreement, and because any instances of missed payments occurred before plaintiff took over receiving payments, plaintiff was estopped from claiming that those missed payments provided a basis to demand payment in full.

Affirmed.

CONTRACTS — NEGOTIABLE INSTRUMENTS — PAYABLE ON DEMAND — INSTALLMENT AGREEMENTS — TIME OF PAYMENT.

A promissory note is governed by the Uniform Commercial Code—Negotiable Instruments, MCL 440.3101 *et seq*.; under MCL 440.3108(1), a promissory note that states that it is payable on demand or otherwise indicates that it is payable at the will of the holder or that does not state any time of payment is payable on demand; MCL 440.3104(1)(b) requires that negotiable instruments be payable on demand or at a definite time; under MCL 440.3108(2), a promissory note is payable at a definite time if it is payable at a time or times readily ascertainable; a promissory note that provides for monthly installment payments of $500 or more, including 3% interest, commencing 30 days from execution of the note and that provides for payment of the entire unpaid balance if any payment is late by more than 60 days states a readily ascertainable time of payment and is not payable on demand for purposes of MCL 440.3108(b) and MCL 440.3104(1)(b).

The Gallagher Law Firm, PLC (by *Byron P. Gallagher*) for plaintiff.

Chalgian & Tripp Law Offices, PLLC (by *Daniel S. Hilker*) for defendants.

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

MARKEY, J. In this action seeking immediate payment in full with respect to a promissory note and an oral loan agreement, plaintiff Joni White, acting by

power of attorney as trustee of the Joseph and Anita Russell Trust, appeals by right the trial court's order granting summary disposition in favor of defendants Joshua and Kelly Russell under MCR 2.116(C)(10). Defendants were the obligors under the promissory note and oral loan agreement, and, under the terms of the two loans, they were repayable in monthly installments. Defendants had been making monthly installment payments on the loans for several years, occasionally missing a payment. Plaintiff argues that the trial court erred when it ruled that the promissory note and oral loan agreement were not payable on demand. We disagree and affirm.

Defendant Joshua Russell, who is married to defendant Kelly Russell, is a grandson of trust creators Joseph and Anita Russell. Plaintiff is a daughter of Joseph and Anita and is Joshua's aunt. In 2013, Joseph and Anita deeded property to defendants so they could build a home. Joseph and Anita also loaned money to defendants to cover the costs of building the home. On May 7, 2015, defendants executed a promissory note associated with the 2013 transactions. The promissory note provided as follows:

> The undersigned hereby promise to pay to the order of Joseph L. Russell and Anita J. Russell, as Trustees of the Joseph L. Russell and Anita J. Russell Trust dated November 3, 1997, of . . . Olivet, Michigan 49076, the sum of $88,878.91 as follows: $500.00, or more, each and every month commencing 30 days from the date hereof, including interest on the unpaid balance at the rate of three (3%) percent per annum.
>
> If any payment hereunder shall remain unpaid for more than 60 days, the promisees may declare the entire unpaid balance due and payable forthwith and pursue any available remedies.

Defendants made the required monthly payments on the promissory note, except with respect to those payments due during the timeframe of December 25, 2018, through March 2, 2019. Documentary evidence reflects that defendants made a $500 cash payment to Joseph and Anita on December 24, 2018. A couple of months earlier, in October 2018, Anita had granted plaintiff durable power of attorney.[1] According to an affidavit executed by Joshua, there was to be a transition from making payments to Joseph and Anita to making payments to plaintiff. Joshua averred that defendants had contacted plaintiff, asking her where and how payments should be delivered to her, but, initially, plaintiff did not respond. Joshua claimed that plaintiff's failure to respond in a timely fashion caused the lapse in the monthly payments. Joshua further asserted that once plaintiff responded, payments were resumed, with a $1,500 payment being made to plaintiff on March 3, 2019, to make up for the missed payments. Defendants then made the required monthly payments on the promissory note through January 29, 2020, at which time the balance on the note was $66,865.51. Plaintiff's lawsuit was filed on February 18, 2020.

With respect to the oral loan agreement, on November 2, 2015, Joseph and Anita deeded 77 acres of farm property to defendants. And Joshua averred in his affidavit that, in exchange for the farm property, he and his wife "agreed to pay Joseph and Anita $172,000 in monthly installments of $500 at 0% interest." Defendants submitted copies of receipts showing that $500 monthly payments were made to Joseph and Anita starting on January 16, 2016, and ending on December 26, 2018. But the receipts did

[1] We note that Joseph passed away on January 25, 2019.

reveal that during this timeframe there were occasional months when payment was not made. By our count, 25 monthly payments of $500 were made to Joseph and Anita during this period. Similarly to what had occurred with regard to the promissory note, there were no payments made under the oral loan agreement in January and February 2019, but in March 2019, defendants made two $500 payments to plaintiff. For the remainder of 2019 and January 2020, defendants made all of the monthly $500 payments, plus one extra $500 payment.[2] The balance on the oral loan agreement after the January 2020 payment was $152,000, and the suit was filed the following month.

In October 2019, about seven months after plaintiff had started accepting payments from defendants on the two loans, plaintiff's attorney sent a demand letter to defendants, asserting that the promissory note and the oral loan agreement were payable on demand and insisting on full payment of the two loan balances by November 15, 2019. Plaintiff did give defendants the option of executing a new promissory note covering the balances on both loans, with a 7% annual interest rate amortized over 15 years and secured by a mortgage on the 77-acre farm property that had been deeded to defendants by Joseph and Anita. In November 2019, defendants' counsel responded, stating as follows: "It seems clear to me that all parties have agreed and acquiesced over a substantial period of time that the Promissory Note and the oral loan agreement were installment arrangements, with no indicia of being

[2] In October 2019, plaintiff, acting under the durable power of attorney, assigned the oral loan agreement to the trust. In an October 2019 letter by plaintiff's attorney to defendants, counsel stated, "The Trust and Power of Attorney provide that [plaintiff] can serve as Trustee of the Trust under the Power of Attorney."

treated as a 'payment on demand.' " Defendants refused to pay the full balances on the two loans, rejected the option of executing a new promissory note and accompanying mortgage, and indicated their intent to continue making the monthly payments on the loans.

Plaintiff subsequently commenced the instant action against defendants in February 2020, seeking full payment on the promissory note and oral loan agreement, along with attorney fees, costs, and interest. Defendants moved for summary disposition under MCR 2.116(C)(10), arguing that the two loans were not payable on demand. The trial court concluded as a matter of law that the promissory note was not payable on demand, ruling from the bench:[3]

> I don't have an issue about the (C)(10) motion as it relates to the Promissory Note. As it relates to the Promissory Note, the Court finds that based on the case law and authority cited by the parties, I do not find that the Promissory Note is payable on demand. I find the Note is clear and unambiguous that the agreement was an installment contract where the payments were due at the end of each month. The Note is also clear that the note was only to be payable on demand if payment was late by more than 60 days. Plaintiff has failed to cite any authority to support her position that the Note is payable upon demand if it does not include a final payment date. I would note that the authority Plaintiff cited is not binding in Michigan.
>
> Based on the writing of the Note it is clear that the parties contemplated and intended under what circumstances the Note could be payable upon demand. Plaintiff claims Defendant has not consistently paid on the Promissory Note but based on the records, the only instance where the Defendant was late on a payment by more than 60 days was from November of 2018 to March of 2019.

[3] We note that the trial court mistakenly referred to "defendant" instead of "defendants."

> Joseph Russell passed away in January of 2019, so his death may explain some of the late payments. In March of 2019, it appears that Defendant made several payments to make the account current. Plaintiff accepted the payments as opposed to requested payment in full as she may have had the right to do so under the Promissory Note. For these reasons, I believe the Defendant motion for summary disposition should be granted as it relates to the Promissory Note.

The trial court also concluded that plaintiff's claim regarding the oral loan agreement should be summarily dismissed. The court noted that the receipts showed that defendants paid $500 without interest and that the payments were generally made once a month. The trial court also addressed an argument posed by plaintiff that defendants had not made consistent payments over the years, ruling:

> I understand that Plaintiff says Defendant hasn't been consistent with their payments; however, since the property was conveyed there have been five time periods where no payments were made, which was June to October, 2016, November to March, 2017, April to June, 2017, and November, 2018 to January 2018 and then December '18 to March of '19. However, there were also occasions where extra payments were made. None of these instances occurred after Plaintiff took over receiving payments. So, to the extent Plaintiff wants to claim the inconsistent payments are a basis to demand them now, I find that she's estopped from doing so.

In an order entered on July 28, 2020, the trial court granted defendants' motion for summary disposition under MCR 2.116(C)(10).[4] Plaintiff now appeals.

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[4] The court also rejected an argument by defendants that summary disposition was proper under MCR 2.116(C)(5) (lack of legal capacity to sue), along with denying plaintiff's request to file an amended complaint.

On appeal, plaintiff argues that the trial court erred by ruling that the promissory note and the oral loan agreement were not payable on demand. This Court reviews de novo a trial court's ruling on a motion for summary disposition. *Hoffner v Lanctoe*, 492 Mich 450, 459; 821 NW2d 88 (2012). Additionally, this Court reviews de novo issues concerning the proper interpretation of a contract and the legal effect or application of a contract. *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005). And we likewise review de novo issues of statutory construction. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008).[5]

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[5] MCR 2.116(C)(10) provides that summary disposition is appropriate when, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." A motion brought pursuant to MCR 2.116(C)(10) tests the factual support for a party's action. *Pioneer State Mut Ins Co v Dells*, 301 Mich App 368, 377; 836 NW2d 257 (2013). "Affidavits, depositions, admissions, or other documentary evidence in support of the grounds asserted in the motion are required . . . when judgment is sought based on subrule (C)(10)," MCR 2.116(G)(3)(b), and such evidence, along with the pleadings, must be considered by the court when ruling on the (C)(10) motion, MCR 2.116(G)(5). "When a motion under subrule (C)(10) is made and supported . . . , an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial." MCR 2.116(G)(4). "A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact." *Pioneer State*, 301 Mich App at 377. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). The trial court is not permitted to assess credibility, weigh the evidence, or resolve factual disputes, and if material evidence conflicts, it is not appropriate to grant a motion for summary disposition under MCR 2.116(C)(10). *Pioneer State*, 301 Mich App at 377. "Like the trial court's inquiry, when an appellate court reviews a motion for summary dispo-

A promissory note constitutes a written contract. *Collateral Liquidation, Inc v Renshaw*, 301 Mich 437, 443; 3 NW2d 834 (1942). In *Highfield Beach at Lake Mich v Sanderson*, 331 Mich App 636, 654; 954 NW2d 231 (2020), this Court set forth the basic principles of contract construction, explaining:

> The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties; to this rule all others are subordinate. In ascertaining the meaning of a contract, we give the words used in the contract their plain and ordinary meaning that would be apparent to a reader of the instrument. Unless a contract provision violates law or one of the traditional defenses to the enforceability of a contract applies, a court must construe and apply unambiguous contract provisions as written. If the language of a contract is ambiguous, testimony may be taken to explain the ambiguity. [Quotation marks, citations, and brackets omitted.]

We "must . . . give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory." *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003). "It is a well-established rule that in the construction of a note the intention of the parties is to control if it can be legally ascertained by a study of the entire contents of the instrument with no part excluded from consideration[.]" *Collateral Liquidation*, 301 Mich at 442 (quotation marks and citation omitted).

"When interpreting a statute, the primary rule of construction is to discern and give effect to the Legis-

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sition, it makes all legitimate inferences in favor of the nonmoving party." *Skinner v Square D Co*, 445 Mich 153, 162; 516 NW2d 475 (1994). A court may only consider substantively admissible evidence actually proffered by the parties when ruling on the motion. *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999); see also MCR 2.116(G)(6).

lature's intent, the most reliable indicator of which is the clear and unambiguous language of the statute." *Perkovic v Zurich American Ins Co*, 500 Mich 44, 49; 893 NW2d 322 (2017). The language of a statute must be enforced as written, "giving effect to every word, phrase, and clause." *Id*. Additional judicial construction is only permitted when statutory language is ambiguous. *Wayne Co v AFSCME Local 3317*, 325 Mich App 614, 634; 928 NW2d 709 (2018). When determining the Legislature's intent, statutory provisions are not to be read in isolation; rather, they must be read in context and as a whole. *In re Erwin Estate*, 503 Mich 1, 11; 921 NW2d 308 (2018).

The parties and the trial court agreed that the promissory note is governed by the Uniform Commercial Code–Negotiable Instruments, MCL 440.3101 *et seq*. MCL 440.3108 provides, in pertinent part:

> (1) A promise or order is "payable on demand" if it:
>
> (a) States that it is payable on demand or at sight, or otherwise indicates that it is payable at the will of the holder.
>
> (b) Does not state *any time* of payment. [Emphasis added.]

In *Bonga v Bloomer*, 14 Mich App 315, 318; 165 NW2d 487 (1968), this Court addressed the language in 1948 CL 439.9, which was a predecessor statute to MCL 440.3108 and provided that a note was payable on demand if " 'no time for payment [was] expressed.' " (Emphasis omitted.) The *Bonga* panel affirmed the trial court's ruling that the promissory note in dispute had to be construed as payable on demand, reasoning as follows:

> The promissory note in question was at best a poorly drawn document. *The note states no time for payment in*

> *that it does not specify whether the payments are to be daily, weekly, yearly, etc*. The note specifies no due date. The note does not provide for regular payments. Possibly if monthly payments had been made and accepted, these acts could have been construed as an interpretation by the parties as was the case of *Collateral Liquidation* . . . . In the case at bar, there were no regular payments and therefore there is no basis for such construction. [*Bonga*, 14 Mich App at 318 (emphasis added).]

In *Collateral Liquidation*, the Michigan Supreme Court addressed two promissory notes that contained promises to pay "on demand after date," but which also provided for monthly payments on the notes and acceleration of the debts upon default. *Collateral Liquidation*, 301 Mich at 439-440. Our Supreme Court, reversing the trial court's ruling that the notes were payable on demand, held:

> In construing the notes in the case at bar, all of their provisions must be given effect and the construction placed upon them by the interested parties must be taken into consideration. The notes contain an acceleration provision which is optional with the holder of the note. The notation in the notes that certain sums are to be paid monthly followed by partial payments on the notes is a strong indication as to the manner in which the notes were to be paid. In our opinion the notes were intended to be and are installment notes[.] [*Id*. at 444.]

In this case, plaintiff contends that the promissory note does not state any time of payment; therefore, it is payable on demand under MCL 440.3108(1)(b). We conclude that this argument lacks merit. The promissory note does state a time of payment—"each and every month commencing 30 days from the date hereof[.]" Plaintiff's arguments to the contrary ignore the plain and unambiguous language of MCL 440.3108(1)(b) and the promissory note. Furthermore,

the promissory note provides that "[i]f any payment hereunder shall remain unpaid for more than 60 days, the promisees may declare the entire unpaid balance due and payable forthwith and pursue any available remedies." If we were to construe the promissory note as payable on demand, this provision would be rendered surplusage and nugatory, *Klapp*, 468 Mich at 468, because it would be entirely unnecessary. The 60-day default clause confirms that the promissory note is not payable on demand. We also note that plaintiff accepted multiple payments from defendants and did not invoke the default clause after defendants failed to make payments on the promissory note for over two months at the beginning of 2019. Plaintiff, therefore, could not later demand full payment of the note due to any alleged default.[6]

Plaintiff argues that the promissory note is payable on demand because it "does not indicate on its face a specific date when the final payment is due." This argument adds language to MCL 440.3108(1)(b) that does not exist. Again, MCL 440.3108(1)(b) simply provides that a note is payable on demand if it "[d]oes not state any time of payment." This statutory provision does not allude to notes that lack a specific date for final payment on their face. The promissory note's express requirement of $500 monthly payments starting 30 days after execution suffices as a "time of payment." See *Bonga*, 14 Mich App at 318 ("The note states no time for payment in that it does not specify whether the payments are to be daily, weekly, yearly, etc."). Flawed for the very same reason is plaintiff's

[6] We also note that Joshua's affidavit indicated that the missed payments were plaintiff's fault. And plaintiff does not even argue on appeal that the note is payable on demand due to the two months of missed payments in 2019.

additional argument that the promissory note failed to include an amortization schedule. This argument is inconsistent with the plain and unambiguous language of MCL 440.3108(1)(b).

As for plaintiff's argument that there must be certainty regarding the actual date of final payment, she relies on an unpublished opinion by this Court and our Supreme Court's decision in *First Nat'l Bank of Port Huron v Carson*, 60 Mich 432; 27 NW 589 (1886), which was cited in the unpublished opinion. The *Carson* Court simply ruled:

> The first question presented of importance is as to the true character of the instrument sued upon.
>
> I do not think the contract is a negotiable promissory note. A promissory note must be certain as to the sum to be paid, and the time of payment. In this case the sum is sufficiently certain, but the time of payment is not. It is made dependent, until the contract matures, upon the fact of whether the defendant shall sell or remove the property for which the contract was made. Such a degree of uncertainty is not allowable in a promissory note[.] The instruments, however, not being notes, may, if valid, be proved as contracts . . . . [*Id*. at 436-437 (citations omitted).]

We first note that there is no contention in the instant case that the promissory note is not a promissory note; the dispute concerns whether it is payable on demand, and plaintiff appears at times to lose sight of that fact. Furthermore, the Supreme Court in *Carson* did not state that a promissory note must contain the actual date of final payment; rather, the Court merely indicated that a note must be certain as to the "time of payment." We have that certainty in this case given the language in the promissory note calling for monthly payments of $500 or more.

Plaintiff's reliance on *Davis v Dennis*, 448 SW2d 495 (Tex Civ App, 1969), which addressed language comparable to that in MCL 440.3108(1), is also misplaced. The promissory note in *Davis* provided for 78 installment payments of $38.46, but, although interest was payable biweekly, there was no "fixed time of payment of any installment," which led the court to conclude that the note was payable on demand. *Id*. at 497-498. Here, the promissory note requires payments in monthly installments.

MCL 440.3108(2) provides:

> A promise or order is "payable at a definite time" if it is payable on elapse of a definite period of time after sight or acceptance or at a fixed date or dates or at a time or times readily ascertainable at the time the promise or order is issued, subject to rights of:
>
> (a) Prepayment.
>
> (b) Acceleration.
>
> (c) Extension at the option of the holder.
>
> (d) Extension to a further definite time at the option of the maker or acceptor or automatically upon or after a specified act or event.

The parties argue whether the promissory note is payable at a definite time. Plaintiff contends that a final payment date on the note cannot be ascertained because of certain variables, e.g., defendants' option to pay more than $500 per month. In general, a "negotiable instrument" must be "payable on demand or at a definite time." MCL 440.3104(1)(b). When MCL 440.3104(1)(b) is considered in conjunction with MCL 440.3108(1), it would appear that the reference to notes that do "not state any time of payment," MCL 440.3108(1)(b), means notes that are not payable at a definite time. Otherwise, if a note is neither payable on demand or payable at a definite time, it is not a

negotiable instrument and MCL 440.3108(1) would not even be implicated. We conclude that the promissory note at issue is payable at a definite time. In light of the language in the note requiring monthly payments of at least $500 commencing 30 days from the date of execution of the note, with 3% interest per annum, the promissory note is payable at a time that is *readily ascertainable*, MCL 440.3108(2). The fact that defendants could and can pay more than $500 per month effectively falls into the "[p]repayment" exception. MCL 440.3108(2)(a).

Additionally, assuming that the promissory note is not a negotiable instrument and that MCL 440.3108 is thus not implicated in this case, basic contract principles would nonetheless apply and dictate that the promissory note is not payable on demand and is instead payable in installments under the plain and unambiguous language of the note. In sum, the trial court did not err by ruling as a matter of law that the promissory note is not payable on demand.

With respect to the oral loan agreement, plaintiff maintains that there was no agreement regarding when the loan was due, that oral loan agreements must be paid in full within a reasonable time following demand when there is no set time for repayment, and that defendants' own evidence revealed that several payments were missed. In support, plaintiff cites a concurring opinion by Justice YOUNG in *Jackson v Green Estate*, 484 Mich 209, 217; 771 NW2d 675 (2009), in which he stated that "[a]s a general matter, because no terms of repayment were specified in the contracts, the oral loan agreements could not have been breached until payment was demanded and the demand was rebuffed."

As noted earlier, Joshua averred in his affidavit that, in exchange for the farm property, he and his wife orally "agreed to pay Joseph and Anita $172,000 in monthly installments of $500 at 0% interest." Accordingly, there were oral terms of and a set time for repayment. And determining when final payment is due on the loan is easy to ascertain. Most importantly, there is no indication whatsoever that the oral loan agreement encompassed an understanding that the loan was payable on demand, and the transactional history further supports the conclusion that an installment loan agreement was in place. Regarding the missed payments, the trial court noted that none of those instances occurred after plaintiff took over receiving payments and that plaintiff was estopped from now claiming that the missed payments could serve as a basis to demand payment in full. Plaintiff does not challenge the court's conclusion that she was estopped from demanding full payment on the basis of the missed payments; therefore, relief on the matter is not warranted. See *Denhof v Challa*, 311 Mich App 499, 521; 876 NW2d 266 (2015) ("When an appellant fails to dispute the basis of a lower court's ruling, we need not even consider granting the relief being sought by the appellant.").

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

HOOD, P.J., and GLEICHER, J., concurred with MARKEY, J.

MSSC, INC v AIRBOSS FLEXIBLE PRODUCTS CO

Docket No. 354533. Submitted July 16, 2021, at Detroit. Decided July 29, 2021, at 9:00 a.m. Reversed and remanded to the Court of Appeals 511 Mich ___ (2023).

MSSC, Inc., brought an action in the Oakland Circuit Court against Airboss Flexible Products Co., alleging breach of contract and seeking to enforce a purchase order between the parties after Airboss threatened to stop filling orders unless MSSC agreed to a price increase. Airboss supplies rubber-based products to MSSC, which uses those products to manufacture parts for its own customers. The parties' purchase order for the Airboss products was identified as a "blanket order" that listed the parts to be supplied but did not include specific quantities. Instead, the purchase order indicated that quantities would be based on the needs of an MSSC customer. Defendant moved for summary disposition, arguing that the purchase order was unenforceable under Michigan's statute of frauds because the order did not include a quantity term and because defendant had not signed the order. In response, plaintiff moved for summary disposition, arguing that the blanket purchase order was a requirements contract that satisfied the statute of frauds and that the lack of signature did not make the contract invalid in light of the parties' performance. The court, James M. Alexander, J., denied defendant's motion and granted summary disposition for plaintiff. Defendant appealed.

The Court of Appeals *held*:

1. Under MCL 440.2201, Michigan's statute of frauds, a contract for the sale of goods must include a quantity, but the quantity need not be precise in a requirements contracts that bases quantity on the buyer's needs or requirements. Two provisions in the parties' purchase order indicated that the parties intended to enter a requirements contract with "blanket" as a quantity term based on the needs of MSSC's customer. The trial court properly concluded that the use of "blanket order" was a quantity term sufficient to satisfy the statute of frauds. Airboss's mutuality-of-obligation argument also failed because there was no evidence that MSSC acted in bad faith or in violation of commercial standards of fair dealing. Instead, the evidence

indicated that MSSC purchased its requirements for these products from Airboss for seven years without any claims of bad faith or unfair dealing.

2. Under MCL 440.2201(1), a contract for the sale of goods for more than $1,000 must be signed by the party against whom enforcement is sought. Under MCL 440.2201(2), however, the signature requirement is satisfied between merchants if the party against whom enforcement is sought received a writing confirming a contract, had reason to know its contents, and did not raise written objections within 10 days of receipt. MSSC delivered a written contract confirmation to Airboss, and Airboss did not object within 10 days; the parties were merchants, and the contract was one between merchants under MCL 440.2104 because both held themselves out as manufacturers with knowledge specific to the automotive-parts industry and to the goods involved in the contract.

Affirmed.

1. CONTRACTS — UNIFORM COMMERCIAL CODE — REQUIREMENTS CONTRACTS — BLANKET ORDERS — STATUTE OF FRAUDS.

Under Michigan's statute of frauds, a contract for the sale of goods must include a quantity requirement, but the quantity need not be precise in a requirements contract that bases quantity on the buyer's needs or requirements; a purchase order identified as a blanket order in which "blanket" is intended to be an imprecise quantity term creating a requirements contract may satisfy the statute of frauds (MCL 440.2201).

2. CONTRACTS — UNIFORM COMMERCIAL CODE — STATUTE OF FRAUDS — SIGNATURES.

Under Michigan's statute of frauds, a contract for the sale of goods for more than $1,000 must be signed by the party against whom enforcement is sought, but the signature requirement is satisfied if the contract is between merchants and the party received written confirmation of the contract, had reason to know its contents, and did not object in writing within 10 days; where the parties to a contract, by their occupations and on their websites, have held themselves out as having knowledge peculiar to the goods involved in the contract, they are merchants under the statute of frauds (MCL 440.2104; MCL 440.2201).

McDonald Hopkins PLC (by *Michael G. Latiff*, *John E. Benko*, and *Mark W. Steiner*) for plaintiff.

Warner Norcross + Judd LLP (by *Gaëtan Gerville-Réache*, *Michael G. Brady*, and *Adam T. Ratliff*) for defendant.

Before: GADOLA, P.J., and JANSEN and O'BRIEN, JJ.

PER CURIAM. Defendant/counterplaintiff challenges on appeal the trial court's denial of defendant's motion for summary disposition and grant of plaintiff's motion for summary disposition. We affirm.

I. BACKGROUND

This case arises from a contract dispute between plaintiff and defendant. Plaintiff is a "tier one" automotive supplier that supplies various original equipment manufacturers (OEMs) with parts essential for a vehicle's suspension system. Defendant is a "tier two" automotive supplier that develops and manufactures rubber-based products for various industries, including the automotive industry. Before July 2013, plaintiff contracted with an OEM to supply suspension-related parts. In July 2013, plaintiff and defendant agreed that defendant would supply and assemble various component parts that plaintiff needed for its contract with the OEM.

The parties' agreement was memorialized in a purchase order, which was periodically amended to reflect agreed-upon changes to various terms, including pricing and delivery. The most recent purchase order was issued in 2019. The purchase order was identified as a "BLANKET" purchase order and stated:

> If this Purchase Order is identified as a "blanket" order, this order is valid and binding on seller for the lifetime of the program or until terminated pursuant to [plaintiff's] Terms and Conditions. A "blanket" order may be re-issued

> annually, but that does not change its binding effect for the lifetime of the program or until terminated. Annual volume is an estimate based on the forecasts of [plaintiff's] customers and cannot be guaranteed.

The purchase order specified certain parts to be supplied by defendant, including a unit price for those parts, but did not specify a quantity of parts to be supplied, instead stating that the "[a]nnual volume [required] is an estimate based on" the forecast of the OEM.

The purchase order also stated that plaintiff's "Terms and Conditions" applied. Those provided:

> 2. BLANKET ORDERS: If this order is identified as a "blanket order", [plaintiff] shall issue a "Vendor Release and Shipping Schedule" to [defendant] for specific part revisions, quantities and delivery dates for Products. [Plaintiff] shall have the right to cancel, adjust or reschedule the quantities of Products shown in such "Vendor Release and Shipping Schedule," except that it may not cancel, adjust or reschedule the Products shown as "Firm Obligations" on such "Vendor Release and Shipping Schedule."

In April 2019, defendant requested a modification of the pricing for two parts, which plaintiff agreed to on the condition that defendant sign an agreement to honor the terms of the purchase order, including all pricing terms. A few months later, defendant requested a price increase on additional parts. Plaintiff did not respond, and about two months later, defendant sent plaintiff another letter notifying plaintiff that it was "rejecting any releases for product to be delivered after March 31, 2020 unless [the parties] come to mutual agreement on revised pricing." In response, plaintiff stated that it did "not agree to the pricing increases" and expected defendant to "meet its contractual obli-

gations to [plaintiff]." The following day, defendant notified plaintiff that it was formally terminating the parties' agreement and would stop supplying parts to plaintiff after the current order was filled.

Plaintiff sued, alleging that defendant breached the parties' agreement by refusing to manufacture, supply, and assemble parts unless plaintiff paid a substantial and not-bargained-for increase in the price of the parts. Plaintiff asked for either a declaratory judgment enforcing its rights under the purchase order or a judgment for specific performance to enforce the terms of the purchase order.

Defendant eventually moved for summary disposition in relevant part under MCR 2.116(C)(7) and (10), arguing that the purchase order was not an enforceable contract under the statute of frauds, MCL 440.2201, in Michigan's Uniform Commercial Code (UCC), MCL 440.1101 *et seq*., because it failed to include a written quantity term and was not signed by defendant.

In response, plaintiff moved for summary disposition under MCR 2.116(I)(2), arguing that the purchase order was enforceable because its use of "blanket" was a quantity term sufficient to satisfy the statute of frauds.

Without a hearing, the trial court denied defendant's motion for summary disposition and granted plaintiff's motion for summary disposition, finding that the purchase order constituted an enforceable contract and that defendant breached the contract when it demanded a price increase and threatened to stop shipping parts. In rejecting defendant's argument that the purchase order did not contain a quantity term, the trial court relied on *Great Northern Packaging, Inc v Gen Tire and Rubber Co*, 154 Mich App 777; 399 NW2d

408 (1986), explaining that "like in *Great Northern*, the Court finds that the term 'blanket order' does express a quantity term," and so the purchase order "does not violate the statute of frauds." As for defendant's lack-of-mutuality argument, the trial court reasoned that defendant's argument failed because there was no evidence that plaintiff acted in bad faith or in violation of the commercial standards of fair dealing.

This appeal followed.

II. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision regarding a motion for summary disposition. *Cadillac Rubber & Plastics, Inc v Tubular Metal Sys, LLC*, 331 Mich App 416, 421; 952 NW2d 576 (2020). Under MCR 2.116(C)(7), a party is entitled to summary disposition if "dismissal of the action . . . is appropriate because of . . . [the] statute of frauds . . . ." MCR 2.116(C)(7). When reviewing a motion for summary disposition under MCR 2.116(C)(7):

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

MCR 2.116(C)(10) and (I)(2) test the factual sufficiency of a claim. *Pontiac Police & Fire Retiree Pre-*

funded Group Health & Ins Trust Bd of Trustees v Pontiac No 2, 309 Mich App 611, 617-618; 873 NW2d 783 (2015); *Cadillac Rubber & Plastics, Inc*, 331 Mich App at 421-422. When deciding a motion for summary disposition under MCR 2.116(C)(10) or (I)(2), this Court considers the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in a light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004); *Johnson v VanderKooi*, 502 Mich 751, 761; 918 NW2d 785 (2018). Summary disposition should be granted when "there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Cadillac Rubber & Plastics, Inc*, 331 Mich App at 421.

Questions of contract interpretation are reviewed de novo. *Burkhardt v Bailey*, 260 Mich App 636, 646; 680 NW2d 453 (2004).

III. ANALYSIS

In general, Michigan's UCC applies to the sale of goods. MCL 440.2102. The UCC "is to be liberally construed and applied to promote its underlying purposes and policies." *Power Press Sales Co v MSI Battle Creek Stamping*, 238 Mich App 173, 180; 604 NW2d 772 (1999). In the absence of a directly controlling UCC provision, questions are resolved according to general legal principles, i.e., the law of contract interpretation. *Conagra, Inc v Farmers State Bank*, 237 Mich App 109, 131-132; 602 NW2d 390 (1999); MCL 440.1103. "The primary goal of contract interpretation is to honor the intent of the parties." *Conagra, Inc*, 237 Mich App at 132.

A. QUANTITY TERM

Defendant first argues that the purchase order was an unenforceable contract because it failed to include any written quantity term as required by the statute of frauds. We disagree.

A contract for the sale of goods requires that the contract specify a quantity. MCL 440.2201; UCC § 2-201, comment 1. See also *Lorenz Supply Co v American Standard, Inc*, 419 Mich 610, 614-615; 358 NW2d 845 (1984). For a requirements contract, "the quantity term is not fixed at the time of contracting," and "[t]he parties agree that the quantity will be the buyer's needs or requirements of a specific commodity or service" over the life of the contract. 2 Corbin, Contracts (rev ed), § 6.5, p 240. The UCC recognizes the validity of requirements contracts. See MCL 440.2306(1).

On appeal, defendant challenges the trial court's conclusion that the purchase order's use of the term "blanket" expressed a quantity term sufficient to satisfy the statute of frauds.[1] In *Great Northern*, 154 Mich App at 780, the defendant issued a purchase order for 50 units then, in June 1979, changed "the quantity from fifty units to 'Blanket Order,' with no expiration date." The defendant argued on appeal that "since the contracts in this case were for a 'blanket' order, no quantity term was stated in writing." *Id*. at 786. This Court rejected that argument, concluding that "the term 'blanket order' expresses a quantity term, albeit an imprecise one," so parol evidence could be used to determine "what quantity is intended by that term." *Id*. at 787.

[1] Defendant does not appear to contest that, if the trial court correctly held that "blanket" was a quantity term, then the parties had a requirements contract. We therefore limit our analysis to whether the trial court correctly determined that the parties' contract contained a quantity term.

Like in *Great Northern*, the use of "blanket order" in this case was intended as an imprecise quantity term. As we indicated earlier, the purchase order was identified as "BLANKET" and stated:

> If this Purchase Order is identified as a "blanket" order, this order is valid and binding on seller for the lifetime of the program or until terminated pursuant to [plaintiff's] Terms and Conditions. A "blanket" order may be re-issued annually, but that does not change its binding effect for the lifetime of the program or until terminated. Annual volume is an estimate based on the forecasts of [plaintiff's] customers and cannot be guaranteed.

The purchase order also incorporated plaintiff's terms and conditions, which provided:

> 2. BLANKET ORDERS: If this order is identified as a "blanket order", [plaintiff] shall issue a "Vendor Release and Shipping Schedule" to [defendant] for specific part revisions, quantities and delivery dates for Products. [Plaintiff] shall have the right to cancel, adjust or reschedule the quantities of Products shown in such "Vendor Release and Shipping Schedule," except that it may not cancel, adjust or reschedule the Products shown as "Firm Obligations" on such "Vendor Release and Shipping Schedule."

Taken together, these provisions demonstrate that "blanket" was intended to be a quantity term creating a requirements contract. The contract did not state a specific quantity because plaintiff's need for parts was dependent on its customer's production schedule, which is common in the automotive industry. See *Cadillac Rubber & Plastics, Inc*, 331 Mich App at 427. While the precise quantity could not be readily determined, the contract "need not fail because the quantity term is not precise." *In re Estate of Frost*, 130 Mich App 556, 561; 344 NW2d 331 (1983); see also *Johnson Controls, Inc v TRW Vehicle Safety Sys, Inc*,

491 F Supp2d 707, 713 (ED Mich, 2007). Accordingly, the trial court properly concluded that the use of "blanket order" was a quantity term sufficient to satisfy the statute of frauds.

Defendant also argues that the purchase order lacked mutuality of obligation. Comment 2 of UCC § 2-306[2] explains:

> [A] contract for output or requirements is not too indefinite since it is held to mean the actual good faith output or requirements of the particular party. Nor does such a contract lack mutuality of obligation since, under this section, the party who will determine quantity is required to operate his plant or conduct his business in good faith and according to commercial standards of fair dealing in the trade so that his output or requirements will approximate a reasonably foreseeable figure.

As noted by the trial court, defendant does not argue, and the evidence does not suggest, that plaintiff acted in bad faith or in violation of commercial standards of fair dealing. To the contrary, the record indicates that plaintiff has purchased its requirement of parts from defendant for the past seven years without any claims of bad faith or unfair dealing. Plaintiff even agreed to the increase in price of two parts in April 2019 after defendant notified plaintiff of a pricing error. On this basis, defendant has not established a lack of mutuality of obligation.

B. SIGNATURE

Defendant next argues that the purchase order was unenforceable because it was not signed by defendant. We disagree.

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[2] See also MCL 440.2306 and *Cadillac Rubber & Plastics, Inc*, 331 Mich App at 426.

A contract for the sale of goods for more than $1,000 is not enforceable unless there is a writing "signed by the party against whom enforcement is sought." MCL 440.2201(1). However, "[b]etween merchants, if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against the party unless written notice of objection to its contents is given within 10 days after it is received." MCL 440.2201(2). Comment 3 of UCC § 2-201 explains the effect of Subsection (2):

> Between merchants, failure to answer a written confirmation of a contract within ten days of receipt is tantamount to a writing under subsection (2) and is sufficient against both parties under subsection (1). The only effect, however, is to take away from the party who fails to answer the defense of the Statute of Frauds[.]

MCL 440.2104(1) defines "merchant" as

> a person that deals in goods of the kind or otherwise by the person's occupation holds itself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to which that knowledge or skill may be attributed by the person's employment of an agent or broker or other intermediary who by the person's occupation holds itself out as having that knowledge or skill.

MCL 440.2104(3) defines "between merchants" as "any transaction with respect to which both parties are chargeable with the knowledge or skill of merchants."

Defendant holds itself out as a "manufacturer of high-quality proprietary rubber-based products for various industries, including automotive," as admitted in its answer to plaintiff's complaint. Plaintiff holds itself out as "a global leader in the manufacturing and supplying of automotive and off-road suspension sys-

tems," as stated in its complaint. The contract at issue concerned rubber-based parts used for automotive suspension systems. By their occupations, the parties hold themselves out as having knowledge peculiar to the goods involved in this contract. Accordingly, both plaintiff and defendant are merchants within the meaning of MCL 440.2104(1), and the contract was one "between merchants" within the meaning of MCL 440.2104(3).

As the at-issue contract was between merchants, MCL 440.2201(2) applied. Plaintiff delivered a written confirmation of the contract to defendant, and defendant received the contract and clearly knew of its contents but did not object within 10 days after receiving it. As a result, "the requirements of subsection (1)" are deemed satisfied. MCL 440.2201(2). The effect of this is that defendant cannot assert the defense of the statute of frauds. MCL 440.2201; UCC § 2-201, comment 3. Therefore, defendant's argument that the purchase order was not enforceable against defendant because it was not signed by defendant is without merit.

IV. CONCLUSION

Affirmed.

GADOLA, P.J., and JANSEN and O'BRIEN, JJ., concurred.

DORSEY v SURGICAL INSTITUTE OF MICHIGAN, LLC

Docket No. 349759. Submitted May 5, 2021, at Detroit. Decided July 29, 2021, at 9:05 a.m. Leave to appeal denied 509 Mich 1096 (2022).

Noel Dorsey brought a medical malpractice action in the Wayne Circuit Court against the Surgical Institute of Michigan, LLC, and the Surgical Institute of Michigan Ambulatory Surgery Center, LLC (collectively, SIM); against Dr. Aria O. Sabit and his practice, the Michigan Brain & Spine Physicians Group, PLLC (MBSPG); and against Dr. Jiab Suleiman and his practice, Premier Orthopedics. The complaint arose from a surgery that Sabit performed on plaintiff at SIM. Although Sabit's operative report stated that he performed several lumbar surgical procedures on plaintiff, a different physician discovered that Sabit had not actually performed those procedures. Neither Sabit nor MBSPG filed timely answers, so defaults were entered against them. During discovery, plaintiff requested documents from SIM regarding Sabit's application for privileges at SIM, including credentialing reviews conducted by SIM regarding Sabit. SIM claimed that its credentialing file on Sabit was privileged and protected from disclosure under MCL 333.21515. Plaintiff argued that MCL 333.21515 afforded protection to hospitals only and that, because SIM was a freestanding surgical outpatient facility licensed under a different provision of the Public Health Code, MCL 333.1101 *et seq*., SIM could not rely on the protections afforded by MCL 333.21515. SIM responded that it was a health facility, as set forth in MCL 333.20175(8), and thus it was entitled to the protections afforded by MCL 333.21515. The circuit court, Lita M. Popke, J., determined that the Legislature intended to treat hospitals and freestanding surgical outpatient facilities differently and that only hospitals were statutorily protected from disclosing peer-review files under MCL 333.21515. The court also denied SIM's pretrial motion for a separate trial for the negligent-credentialing claim and ruled that SIM could be held jointly and severally liable if plaintiff obtained a verdict against Sabit but that plaintiff could not rely on Sabit's default for that purpose and SIM was free to dispute Sabit's malpractice as part of its defense on the negligent-credentialing claim. The court also ruled that the claims against Sabit and Suleiman would be tried first and, and after a verdict was reached, the negligent-

credentialing claim would be tried before the same jury. During trial, SIM again moved to exclude its credentialing file from evidence. SIM argued this time that its credentialing file for Sabit was shielded from use at trial under the MCL 333.20175(8) statutory privilege. But because the circuit court had previously determined that the similar statutory privilege for peer-review material in MCL 333.21515 did not apply to SIM because it was not a hospital, it treated the motion as one for reconsideration and stated on the record that it did not intend to revisit the admissibility of the credentialing file. The jury found that Suleiman was not professionally negligent, and the circuit court entered a no-cause judgment in favor of Suleiman and Premier Practice. Notwithstanding the no-cause judgment for Suleiman, the jury made findings and awarded damages to plaintiff for purposes of the court's previously granted directed verdict against Sabit. After the verdict was placed on the record, the court advised the jury for the first time that there would be a second phase of the trial regarding plaintiff's negligent-credentialing claim against SIM. SIM argued that a fair trial on the negligent-credentialing claim was impossible after the jury had been inundated with harsh criticisms of Sabit—including implications that plaintiff had been left abandoned at SIM and unprotected and abused while she slept under anesthesia. The court denied SIM's second motion for a separate jury on the negligent-credentialing claim, opining that a second jury would be exposed to the same information because it was a necessary component of proximate cause on the negligent-credentialing claim and there was nothing in the medical malpractice trial that would prejudice SIM's defense of the negligent-credentialing claim. The second phase of the trial proceeded, and the jury determined that SIM negligently credentialed Sabit and that the negligent credentialing was a proximate cause of plaintiff's injuries. Following numerous postverdict motions, the court entered a judgment against Sabit, MBSPG, and SIM, jointly and severally. SIM then filed several postjudgment motions seeking a judgment notwithstanding the verdict or, alternatively, a new trial. The trial court denied all of SIM's postjudgment motions, and SIM appealed.

The Court of Appeals *held*:

1. Article 17 of the Public Health Code generally governs licensing and regulation of health facilities and agencies, which includes a freestanding surgical outpatient facility like SIM. The general provisions of Article 17 include MCL 333.20175(8), which creates a statutory privilege preventing disclosure of a health facility's peer-review records to assure that honest assessment and

review of performance is undertaken in peer-review committees. MCL 333.21515 creates a similar statutory privilege for peer-review records, but unlike MCL 333.20175(8), it does not use the "health facility or agency" terminology that, by definition, encompasses a freestanding surgical outpatient facility but, rather, shields the "records, data, and knowledge collected for or by peer review entities" from discovery. The Court of Appeals previously held that a credentialing committee is a peer-review committee, and thus that the statutory privileges set out in MCL 333.20175(8) and MCL 333.21515 apply to materials used in deciding whether to grant staff privileges at a hospital. Nothing in the language of MCL 333.20175(8) suggests that the privilege does not extend to a freestanding surgical outpatient facility exercising the same credentialing-review function under MCL 333.20813(c) that a hospital performs under MCL 333.21513(c). MCL 333.20175(8) thus applies to the peer-review materials collected by a health facility like SIM regarding the credentialing of an applicant like Sabit. The applicability of the statutory privilege in MCL 333.21515 to a health facility like SIM is not as clear as the applicability of the statutory privilege in MCL 333.21075(8) because MCL 333.21515 does not explicitly refer to a "health facility or agency" and because MCL 333.21515 is within the part of the code given the heading "HOSPITALS." Nonetheless, both Part 215 (regarding hospitals) and Part 201 (regarding the general provisions applicable to Article 17) incorporate the principles of construction set forth in Article 1 of the Public Health Code, which include the Legislature's express warning against relying on a heading or title to alter the plain meaning of the Public Health Code's statutory language. Accordingly, the reference in MCL 333.21515 to the review functions described in Article 17 evidences the Legislature's intent to extend the statutory privilege for peer-review materials in that statute to all health facilities and agencies with review functions imposed by Article 17. The credentialing process that a freestanding surgical outpatient facility performs to satisfy its duty under MCL 333.20813(c) is a review function described and required by Article 17. And because the Court of Appeals has held that a credentialing committee is a peer-review committee, the peer-review privilege in MCL 333.21515 applied to SIM. Moreover, as stated, even if SIM's credentialing file regarding Sabit was not protected by MCL 333.21515, it was clearly privileged under MCL 333.20175(8). Therefore, the credentialing file was not subject to discovery and should not have been admitted at trial.

2. A negligent-credentialing theory falls within the scope of a medical malpractice claim and generally requires expert testimony

regarding the appropriate standard of care and causation. Under MRE 703, there must be facts in evidence to support an expert's opinion. SIM argued that it was entitled to judgment notwithstanding the verdict because nearly all the testimony offered during the negligent-credentialing portion of the trial related to the contents of the improperly admitted credentialing file, and therefore, the testimony was premised on facts that were not properly in evidence, contrary to MRE 703. Without the admission of the credentialing file upon which plaintiff's only standard-of-care and proximate-cause expert witness depended, plaintiff could not have established a prima facie case of negligent credentialing and plaintiff's claim should not have been submitted to the jury. Affirming a verdict and judgment premised largely on inadmissible evidence would affect SIM's substantial rights and be inconsistent with substantial justice. Moreover, had the trial court not granted plaintiff's motion to compel discovery of the credentialing file and subsequently denied SIM's motion to strike plaintiff's expert testimony, SIM would have been entitled to judgment as a matter of law before trial even began. The trial court should have granted SIM's pretrial motion for summary disposition because plaintiff's proffer of its expert testimony was based on the contents of the inadmissible credentialing file. The standard of review is the same for granting a motion for summary disposition, a motion for directed verdict, and a motion for judgment notwithstanding the verdict. Accordingly, the judgment against SIM had to be reversed.

Reversed and remanded for entry of judgment in favor of SIM.

PUBLIC HEALTH CODE — FREESTANDING SURGICAL OUTPATIENT FACILITIES — CREDENTIALING FILES — STATUTORY PRIVILEGE AGAINST DISCLOSURE.

The statutory privileges in Public Health Code provisions MCL 333.20175(8) and MCL 333.21515, protecting peer-review records from disclosure, apply to a freestanding surgical outpatient facility's credentialing file relating to its decision whether to grant staff privileges to a physician.

Plunkett Cooney (by *Robert G. Kamenec*) for defendants Surgical Institute of Michigan, LLC, and Surgical Institute of Michigan Ambulatory Surgery Center, LLC.

Albert J. Dib and *Barbara H. Goldman* for Noel Dorsey.

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

PER CURIAM. Defendants, Surgical Institute of Michigan, LLC, and Surgical Institute of Michigan Ambulatory Surgery Center, LLC (collectively, SIM[1]), appeal as of right a judgment entered in plaintiff's favor following a jury trial in this medical malpractice action. We reverse and remand for entry of judgment in favor of SIM.

I. BACKGROUND FACTS

This matter arises from a surgery codefendant Dr. Aria Omar Sabit performed on plaintiff, Noel Dorsey, at SIM on February 8, 2012. Dr. Sabit's operative report indicates that he performed a posterior lumbar interbody fusion, a laminectomy for decompression of the nerve, and an interbody cage placement, all at the L4-L5 level of plaintiff's spine. Plaintiff's back pain persisted after the procedure. Plaintiff filed this lawsuit in 2016 after learning from another neurosurgeon that the described procedures were not actually performed. Plaintiff asserted a medical malpractice claim and other theories against Dr. Sabit and his practice, Michigan Brain and Spine Physicians Group, PLLC (MBSPG). Neither Dr. Sabit nor MBSPG filed timely answers, and defaults were entered against both defendants on March 17, 2017—which are not at issue in this appeal.[2]

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[1] Surgical Institute of Michigan, LLC, and Surgical Institute of Michigan Ambulatory Surgery Center, LLC, were treated as a single entity throughout these proceedings.

[2] Plaintiff's complaint also raised claims against Dr. Jiab Hasan Suleiman and his practice, Jiab Suleiman, D.O., PC, doing business as Premier Orthopedics. Dr. Suleiman was identified as the co-surgeon in

Plaintiff's complaint also raised numerous claims against SIM, an ambulatory surgery center that claimed to have "the most highly trained and experienced medical professionals." Only plaintiff's medical malpractice claim against SIM, premised on a negligent-credentialing theory, is at issue in this appeal.

During discovery, plaintiff filed a motion to compel asserting that SIM failed to produce certain requested documents, including Dr. Sabit's application for privileges, credentialing reviews conducted by SIM with respect to Dr. Sabit, and other documents demonstrating that Dr. Sabit was appropriately trained and licensed. SIM responded that the credentialing file was privileged and protected from disclosure under MCL 333.21515. Plaintiff replied that MCL 333.21515 afforded protection to hospitals only. And because SIM was a freestanding surgical outpatient facility licensed under a different section of the Public Health Code, MCL 333.1101 *et seq*., it could not rely on the confidentiality provision in MCL 333.21515. SIM responded that it was a health facility, as set forth in MCL 333.20175(8), and entitled to the protections afforded by statute. SIM also cited MCL 333.21515 and MCL 333.20175 in its written objections to plaintiff's request for production relating to personnel files, as well as a motion for protective order. The trial court determined that the Legislature intended to treat hospitals and freestanding surgical outpatient facilities differently and that only hospitals were given statutory protections against disclosing peer-review files. Although SIM pro-

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the operative report, but he testified at trial that he was only present during the initial dissection of the surgical site and then left to attend his own patients. The jury found that Dr. Suleiman was not professionally negligent, and a no-cause judgment was entered in favor of Dr. Suleiman and his practice—which is not at issue in this appeal.

duced its credentialing file regarding Dr. Sabit pursuant to the court's order, SIM continued to object to the admissibility of the file.[3]

The credentialing file included a series of letters that formed the primary evidentiary basis for plaintiff's case against SIM. Dr. Sabit submitted an application for surgical privileges at SIM on or about April 29, 2011. In the application, Dr. Sabit indicated that he had privileges at Community Memorial Hospital (CMH) in Ventura, California, from 2009 to 2011 and had current privileges at Doctor's Hospital in Pontiac, Michigan. As part of their credentialing process, SIM sent a letter to CMH requesting verification of Dr. Sabit's status there and a summary of any disciplinary actions within the previous five years. CMH responded with a request for Dr. Sabit to sign a comprehensive release permitting disclosure of information. On May 19, 2011, after the release was signed and returned, Dr. Marc Beaghler, CMH's chief of staff, sent the following letter:

> In response to your request regarding [Dr. Sabit], the following information is provided:
>
> | | |
> |---|---|
> | Current Status: | Resigned (Provisional at the time of Resignation) |
> | Appointment Date: | 8/11/2009 to 1/13/2011 |
> | Primary Specialty: | Neurosurgery |
> | Department: | Surgery |

[3] Although we conclude that the credentialing file was privileged and should not have been the subject of discovery or admitted into evidence at trial, the fact remains that, in this case, the file was produced under the trial court's order and at least parts of it were made part of the lower court record and were addressed and disclosed in the briefs on appeal. This Court also previously denied a motion to seal the credentialing file. See *Dorsey v Surgical Institute of Mich LLC*, unpublished order of the Court of Appeals, entered May 6, 2020 (Docket No. 349759). Under the circumstances, we will therefore discuss aspects of the credentialing file in this opinion.

> A review of information available indicates that this practitioner has not always complied with the Medical Staff Bylaws, Rules and Regulations, and other policies of Community Memorial Hospital of San Buenaventura. Action had been taken against this practitioner's clinical privileges in the form of a brief summary suspension. At the time he resigned from the Medical Staff his practice was the subject of a focused review but was not the subject of any formal investigation or disciplinary action. Please note that this letter does not address administrative suspension for expired licenses, liability certificates or health testing requirements. To our knowledge, there are no disciplinary actions pending against this individual, nor any health condition that might compromise this practitioner's ability to provide services to your organization or facility.
>
> As required by The Joint Commission, each member of our staff with clinical privileges is subject to ongoing and focused professional practice evaluation. Included in this evaluation is assessment of patient care practices, clinical knowledge and judgment, continuing medical education, improvement in the use of evidence-based medicine and technology, interpersonal and communication skills, professionalism, and practice of, and advocacy for, patient safety concepts. Ongoing professional practice evaluation of this practitioner's practice revealed several concerns.

SIM's credentialing file contained two copies of this letter. The first, presumably original, copy did not have the underlining reflected in the above quotation. The second copy included the above underlining added by hand.

On May 20, 2011, SIM sent a letter to Dr. Sabit indicating that CMH had raised issues that required further investigation before privileges could be granted. The letter continued, "Specifically, the chief of staff has informed us that you were non-compliant with policies, medical staff bylaws, rules and regulations." SIM therefore asked Dr. Sabit to respond in

writing to address that issue. Dr. Sabit was further advised that SIM might request his personal appearance before the medical executive committee to discuss the matter if his written response was deemed insufficient. Although SIM's credentialing file did not contain a written response from Dr. Sabit, the next letter from SIM to Dr. Sabit, dated May 26, 2011, said:

> I want to thank you for your prompt response to the letter from SIM in regard to the peer review from Community Memorial Hospital. Your reply has been reviewed by the members of the medical executive committee. At this time you have been granted temporary privileges for the surgical procedures that you have requested, pending final approval of your credential packet from the board of directors.

Citing SIM's request for a written response from Dr. Sabit, its subsequent acknowledgment of Dr. Sabit's prompt response, and deposition testimony from SIM's medical director indicating that the written response would have been kept in the credentialing file, plaintiff asked the trial court to give an adverse-inference instruction at trial, see M Civ JI 6.01, and sanction SIM for intentional spoliation of evidence. SIM opposed plaintiff's motions, denying that it removed or destroyed anything from the credentialing file before producing it to plaintiff. SIM argued that there was no evidence that Dr. Sabit submitted a written response, and SIM's medical director testified that he had no recollection of having seen any such response. The trial court agreed to give an adverse-inference instruction because the evidence showed that SIM asked Dr. Sabit for a written response, acknowledged receipt of a response, and no response was produced with SIM's records. However, the court found no evidence that SIM intentionally destroyed evidence and therefore denied the motion for sanctions.

Plaintiff also filed a motion to determine the scope of SIM's liability for negligently credentialing Dr. Sabit, arguing that the damages cap applicable to medical malpractice verdicts should not be applied if SIM was found to be vicariously liable for Dr. Sabit's ordinary negligence ("in performing unnecessary, fictitious, and/or incorrect surgery of plaintiff's lumbar spine"), which had been established by default. SIM disagreed that Dr. Sabit's default could be imputed to it. SIM also argued that it could not be held jointly and severally liable for Dr. Sabit's actions under MCL 600.6304(6) because the respective liabilities arose from acts and omissions that differed in time, place, and type. The trial court ruled that SIM could be held jointly and severally liable if plaintiff obtained a verdict against Dr. Sabit, but only with respect to a malpractice claim. The court also determined that plaintiff was required to prove that Dr. Sabit committed malpractice as part of her negligent-credentialing claim against SIM, plaintiff could not rely on Dr. Sabit's default for that purpose, and SIM was free to dispute Dr. Sabit's malpractice as part of its defense.

Of the nearly 20 motions in limine filed by the parties, only two have particular relevance to the issues on appeal. In the first, SIM moved for separate trials with respect to the negligent-credentialing claim against it and the medical malpractice claims against Drs. Sabit and Suleiman. SIM argued that separate trials would prevent SIM from unnecessarily having to participate in a lengthy medical malpractice trial, there was little overlap between the proofs for each respective claim, and that SIM would be unfairly prejudiced if plaintiff was "permitted to smear and taint the jury's consideration of SIM's credentialing decisions with the post-credentialing misdeeds of Dr. Sabit." The trial court denied the motion, reasoning

that it would not promote judicial economy because the medical malpractice of Drs. Sabit and Suleiman was a necessary element of the negligent-credentialing claim. The court also indicated that the claims against Drs. Sabit and Suleiman would be tried first and, after a verdict was received, the negligent-credentialing claim would be tried before the same jury. When SIM attempted to renew its argument about the prejudice arising from defending the negligent-credentialing claim after the jury were to find Dr. Sabit professionally negligent, the trial court said, "And the answer to 'am I going to hold two separate trials with two separate Juries' is a resounding no I am not." (Internal quotation marks supplied.)

SIM's second motion in limine asked the court to strike plaintiff's expert in credentialing and physician privileges, Dr. John Charles Hyde II. SIM explained that plaintiff had previously represented that Dr. Beaghler (the chief of staff at CMH) would be deposed, but Dr. Beaghler had since expressed his intent to invoke a statutory privilege against testifying or providing other evidence regarding the peer-review process at CMH and the events referenced in his letter about Dr. Sabit. Other evidence that would support the credentialing expert's opinion included National Practitioner Data Bank reports and California court records, but these sources should be deemed inadmissible because they were not available until after SIM granted Dr. Sabit privileges. Thus, SIM argued, the court should strike plaintiff's credentialing expert because his opinions would be speculative and would not have a basis in record evidence. The trial court denied SIM's motion, but declared that only evidence that was or should have been available at the time of SIM's credentialing decision could be admitted at trial.

The eight-day jury trial began on October 9, 2018, with the first five days devoted exclusively to the medical malpractice claims against Drs. Sabit and Suleiman. Plaintiff testified that Dr. Suleiman referred her to Dr. Sabit on January 11, 2012, for severe back pain. Dr. Sabit told her that she needed surgery, specifically, a lumbar fusion and laminectomy. He also talked about hardware that would be placed during the surgery. Dr. Sabit performed the surgery at SIM on February 8, 2012. Plaintiff followed up with Dr. Sabit, and his office notes indicated that she had an excellent result and felt great. That was not true, and she continued to feel pain months later. By October 2012, Dr. Sabit was falsely reporting in his records that plaintiff had a complete resolution of her symptoms. Plaintiff testified that, in reality, she felt no improvement. In fact, her continuing back pain left her unable to work throughout most of 2011 through 2014. By 2015, she forced herself to return to work for financial reasons and found flexible employment that allowed her to make $25,500 that year. Nonetheless, she still struggled to get out of bed every day and her husband took over a majority of household upkeep and child-rearing responsibilities.

Plaintiff testified that in February or March 2016, she began seeing neurosurgeon Dr. Jayant Jagannathan, who told her that an MRI did not reflect the procedures Dr. Sabit told her he performed. She underwent surgery with Dr. Jagannathan on March 24, 2016, and had not been able to return to work since then. Plaintiff believed her recovery from the March 24, 2016 surgery progressed as expected. Dr. Jagannathan was still hopeful that she would continue to improve. Plaintiff was able to function to some extent at home, but she could not drive, rarely left the house, and no longer participated in her children's

extracurricular activities or attended church. The ordeal had taken a toll on plaintiff's marriage, as she struggled with emotional turmoil and could not play much of a role with her family. Dr. Jagannathan recently performed a third surgery on plaintiff's back earlier in 2018. Plaintiff had been diagnosed with significant major depression and engaged in counseling, coupled with psychotropic medication, for the last year. Plaintiff felt "destroyed" by what she went through.

Dr. Jagannathan testified that he first consulted with plaintiff on March 10, 2016. Plaintiff reported persistent pain after a lumbar fusion performed by Dr. Sabit, but a CT myelogram did not reveal evidence of a lumbar interbody fusion, laminectomy, or placement of an interbody cage at L4-L5. The CT did, however, show an interspinous plate at L4-L5. Dr. Jagannathan operated on plaintiff on May 24, 2016. He noted disc degeneration at L4-L5 and decided to remove the interspinous plate and replace it, "along with doing the transforaminal lumbar interbody fusion with PEEK structural allograft at L4-[L]5." The plate he removed could have been used as part of a lumbar interbody fusion, but merely placing the plate without performing the necessary disc work would not suffice. During the surgery, Dr. Jagannathan was able to confirm that none of the procedures described in Dr. Sabit's operative report had actually been done. Dr. Jagannathan also explained that when a nerve has been pinched for four or five years without proper treatment, the chances of improvement are much lower. EMG studies suggested a possibility of permanent nerve damage. In the spring of 2018, Dr. Jagannathan operated on plaintiff again to decompress the area adjacent to the fusion level. Plaintiff continued to have persistent pain

and was treating with one of Dr. Jagannathan's colleagues, a pain-management specialist.

Plaintiff moved for a directed verdict against Dr. Sabit, arguing that there had been no defense proffered on his behalf, leaving only plaintiff's uncontroverted evidence regarding his violations of the standard of care and proximate causation. The trial court agreed and granted a directed verdict with respect to the standard of care, breach of the standard of care, and causation. After closing arguments were presented on behalf of plaintiff and Dr. Suleiman, SIM orally moved for separate juries. SIM argued that a fair trial on the negligent-credentialing claim was impossible after the jury had been inundated with harsh criticisms of Dr. Sabit and implications that plaintiff had been left abandoned at SIM, unprotected and abused while she slept under anesthesia. The trial court opined that a second jury would still be exposed to the same information because it was a necessary component of proximate cause on the negligent-credentialing claim. The court denied SIM's motion because there was nothing in the medical malpractice trial that would potentially prejudice SIM's defense of the negligent-credentialing claim.

In the midst of trial, SIM also filed a written motion in limine to exclude its credentialing file from evidence. SIM acknowledged that the trial court had already denied a motion in limine from Dr. Suleiman regarding the same issue, but asked it to revisit the issue because MCL 333.20175(8) provided a statutory privilege protecting credentialing files from use at trial. According to SIM, although the trial court had previously determined that a similar statutory privilege for peer-review materials did not apply to SIM because it was not a hospital, MCL 333.20175(8) applied to ambula-

tory surgical centers like SIM. The trial court viewed the motion as a motion for reconsideration and stated on the record that it did not intend to revisit the admissibility of the credentialing file.

As noted earlier, the jury determined that Dr. Suleiman was not professionally negligent. However, it still made findings regarding plaintiff's damages for purposes of the directed verdict against Dr. Sabit. With respect to past damages, the jury awarded plaintiff $104,000 for noneconomic damages, $104,000 for medical expenses, and $151,656 for loss of earning capacity. Next to each of these awards, the verdict form included a notation that said, "+12%." With respect to future damages, the jury also awarded plaintiff $5,000 per year from 2018 to 2055 for noneconomic damages, $18,000 per year from 2018 to 2055 for medical expenses, and $40,000 per year from 2018 to 2039 for loss of earning capacity. After the verdict was placed on the record, the trial court advised the jury for the first time that there would be a second phase of the trial regarding plaintiff's negligent-credentialing claim against SIM.

Plaintiff first called Elaine DeBeaudry as an adverse or hostile witness. DeBeaudry testified that she no longer worked at SIM but had previously been employed as its facility administrator during the early stages of this litigation. Part of her duties was to gather information regarding physicians who applied for staff privileges at SIM and point out any "red flags" or concerning material in the gathered information. DeBeaudry confirmed that she did not have specific experience in healthcare administration, but she did have a general background in management, nursing, and health sciences. She did not consider herself an expert in credentialing, but she was knowledgeable about preparing or gathering documentation for credentialing purposes.

Although she did not work at SIM when Dr. Sabit applied, DeBeaudry reviewed his file in connection with this case. Dr. Sabit reported that he previously had staff privileges at CMH, so a reference request was sent there. CMH required Dr. Sabit to execute an extensive release before it would disclose any information. Dr. Beaghler provided a written response after the release was returned. Dr. Beaghler reported that Dr. Sabit did not follow hospital rules, regulations, or bylaws; his privileges had been suspended; his practice had come under a focus review; and ongoing evaluations of his professional practices disclosed several concerns. It was evident that the foregoing issues were noticed by someone in the credentialing process, as they were underlined in a copy of the letter. DeBeaudry agreed that it would be logical and responsible to follow up with Dr. Beaghler, but she was unable to locate any evidence of additional contact with Dr. Beaghler. DeBeaudry agreed that SIM sent a letter to Dr. Sabit to inquire about some of the issues disclosed by Dr. Beaghler. The letter requested a written response, but there was no written response from Dr. Sabit in the credentialing file. DeBeaudry never saw a written response from Dr. Sabit and was not aware of one existing. Moreover, in SIM's later letter thanking Dr. Sabit for his "prompt response," there was no indication that the response was provided in writing, and it would not be uncommon for a credentialing committee to meet with an applicant in person to address certain concerns. DeBeaudry also explained that the National Practitioner Data Bank is a registry where claims against doctors are recorded, and it was used by healthcare facilities to help investigate a doctor's background. Although there were several entries regarding Dr. Sabit, none of them were recorded before SIM granted Dr. Sabit privileges.

Dr. John Charles Hyde, II, testified as an expert for plaintiff in credentialing and physician privileges. Dr. Hyde opined that SIM's decision-makers were "totally uninformed," and if Dr. Sabit had been properly vetted, there would have been no basis to grant him privileges. Dr. Hyde believed his opinion was reinforced by the deposition testimony of Dr. Kenneth Lock, SIM's medical director in 2011. Dr. Lock's explanations about various pieces of information that were not appropriately acted upon made it clear that he did not know the credentialing process. According to Dr. Hyde, several of Dr. Beaghler's disclosures were very alarming and required further scrutiny, including that (1) Dr. Sabit was on provisional status at the time of his resignation; (2) Dr. Sabit did not always comply with medical staff bylaws, rules, regulations, and other policies; (3) action was taken against Dr. Sabit's clinical privileges in the form of a brief summary suspension which generally occurs when there are patient-safety concerns; (4) after Dr. Sabit resigned, his practice was the subject of a focus review which generally means the hospital had concerns for patient safety; and (5) ongoing professional practice evaluations revealed several concerns regarding Dr. Sabit. Dr. Hyde opined that the combination of these disclosures should have prompted SIM to do a very thorough investigation before granting Dr. Sabit privileges. Although it was possible that the allegations were not credible, SIM needed to follow up with CMH. Yet there was no evidence that anyone at SIM reached out to Dr. Beaghler or anyone else at CMH again. Additionally, SIM should have assessed Dr. Sabit's application to see if he truthfully disclosed the same issues. Had SIM done that, they would have noticed that Dr. Sabit falsely indicated that he had never had medical staff privileges suspended. Dr. Hyde opined that it was a gross violation of the credentialing

process to rely on Dr. Sabit to clarify the details of Dr. Beaghler's disclosures, especially after Dr. Sabit made material misrepresentations in his application.

During his investigation of this case, Dr. Hyde discovered why CMH suspended Dr. Sabit. SIM objected to Dr. Hyde's testimony regarding this subject on hearsay, foundation, and relevancy grounds, but the trial court overruled the objections. Dr. Hyde explained that he came across an opinion from Dr. Sabit's lawsuit against CMH,[4] which stated that Dr. Sabit was suspended "to protect the life or wellbeing of patients and to reduce imminent danger to the life, health or safety of any person." It also referenced two specific instances in which Dr. Sabit did not render appropriate medical care. Although the opinion containing this information was not released until 2015, Dr. Hyde opined that Dr. Beaghler would have provided the same information if SIM had inquired. Dr. Sabit was suspended on December 3, 2010, so the information was part of his record with CMH at the time SIM was considering his application for privileges. Dr. Hyde believed the information would be within the scope of the comprehensive release CMH required before its initial disclosure. The opinion confirmed Dr. Hyde's suspicions about Dr. Beaghler's disclosures and demonstrated that more information was available well before SIM granted Dr. Sabit privileges.

On cross-examination, Dr. Hyde testified that Dr. Beaghler did not provide all the relevant information, even though the release CMH requested permitted him to do so. Dr. Hyde noted that CMH did not know what Dr. Sabit had already disclosed and would have assumed Dr. Sabit was forthcoming. Responding to this

[4] The trial court denied plaintiff's motion to admit the opinion as an exhibit.

type of inquiry, a hospital would generally summarize information without providing a detailed explanation of everything in Dr. Sabit's record. At any rate, CMH provided enough information to prompt a reasonably intelligent and prudent administrator to follow up. Dr. Hyde agreed that Dr. Sabit's National Practitioner Data Bank report was negative in May 2011 and that there were no lawsuits against Dr. Sabit pending in Ventura County at that time.

Dr. Kenneth Lock testified that he was the medical director and chair of the medical executive committee at SIM in 2011. He had no formal training in healthcare administration. He was never directly employed or compensated by SIM; he merely agreed to help out because SIM had a young, small staff at the time. According to SIM's bylaws, the medical director was responsible for making recommendations to the board of directors regarding all applicants for staff privileges. Dr. Lock explained that "credentialing packet[s]" were processed and given to the board of directors for decision.

With respect to summary suspensions, Dr. Lock said, "I'm not sure I understand what summary suspension means." Plaintiff's counsel drew Dr. Lock's attention to SIM's bylaws regarding summary suspensions,[5] which

[5] SIM's bylaws stated:

> Summary Suspension Criteria for Initiation. Whenever a practitioner's conduct requires that immediate action be taken . . . to protect the life of any patient or reduce the substantial likelihood of immediate injury or damage to the health or safety of any patient, employee or other person present in the facility, or the practitioner fails to report to the Medical Director and Administrator a loss of privileges or any corrective actions pending against the practitioner at any other healthcare facilities, either the Medical Director or the governing body shall have the authority to suspend summarily the medical staff membership status and any and all portion of clinical privileges of such practitioner.

used the term in a similar manner as Dr. Hyde. Even so, Dr. Lock could not say that he understood Dr. Sabit was suspended for reasons implicating patient safety because "I'm not sure I remember reading that letter from way back 6 years ago." Dr. Lock did not know if he underlined the criticisms in Dr. Beaghler's letter, but explained, "[H]ad I seen a letter like that I would immediately bring it to the Board's attention so that they could deal with it . . . ." Although Dr. Lock did not remember Dr. Beaghler's letter, he agreed that he must have read it because he referenced it in a subsequent letter to Dr. Sabit.

Dr. Lock agreed that he did not contact Dr. Beaghler at all. Instead, he wrote to Dr. Sabit to ask for clarification regarding the allegation of bylaw or rule violations. In 2011, Dr. Lock was not familiar with the significance of a summary suspension, and he did not ask Dr. Sabit to explain that disclosure. When asked why he did not inquire about issues other than the purported rule violations, Dr. Lock said, "Because I told you, I'm doing this as a helpful basis," and it was up to the board of directors to decide whether to grant privileges. Dr. Lock believed that his responsibilities as medical director were limited to making sure the board of directors had information to make its own decisions. When Dr. Sabit was granted privileges, Dr. Lock wrote a letter that thanked Dr. Sabit for his response. Dr. Lock assumed Dr. Sabit provided a written response, which would have been given to the board of directors with the rest of Dr. Sabit's file, but Dr. Lock did not recall ever seeing Dr. Sabit's response. Dr. Lock explained that he did not make a recommendation regarding Dr. Sabit and was not involved in the vote regarding his application.

SIM called only one defense witness: Dr. Mahmood Hai, one of SIM's founders and the executive director and president of the board of directors. Dr. Hai had participated in SIM's credentialing process since it first opened, including the decision to grant Dr. Sabit privileges. Dr. Hai indicated that he reviewed Dr. Sabit's National Practitioner Data Bank report, which was clean in May 2011. Additionally, Dr. Sabit had received a full license to practice in Michigan in January 2011 and, according to Dr. Hai, "the Licensing Board checks everything out before they give a license." Other than Dr. Beaghler's letter, there was nothing negative in Dr. Sabit's file, and SIM was also aware that Dr. Sabit had been given privileges at several hospitals in the area. "So all that confirmed that everybody has checked him through, so it was easy for us to say that there was nothing negative at that point."

Dr. Hai did not believe that anything in Dr. Beaghler's letter was alarming or justified denying Dr. Sabit's application for privileges. Dr. Hai explained that summary suspensions are common when physicians fall behind on their paperwork or charts; such suspensions are used as an enforcement mechanism to make sure records are completed so services can be billed. Moreover, Dr. Beaghler indicated that there were no disciplinary actions pending against Dr. Sabit, nor did he ask for a phone call or suggest Dr. Sabit had a major problem at CMH. Dr. Hai testified that there was "absolutely no indication [from Dr. Beaghler] that we needed to pursue anything further." After seeing Dr. Beaghler's letter, the board of directors decided to interview Dr. Sabit in person to determine what happened at CMH. From his response and the rest of the credentialing file, the board of directors saw no reason to follow up with Dr. Beaghler. Dr. Hai summarized:

"[Dr. Sabit] had been practicing for 7, 8 years. He had [a] Michigan license, he had [a] California license, he has [a] license in New Jersey, and there was nothing outstanding that we could see in paper."

On cross-examination, Dr. Hai testified that he did not think Dr. Sabit lied to SIM; the discrepancies between his disclosures and the matters in Dr. Beaghler's letter could have been a matter of differing terminology. Dr. Sabit told the board he was suspended because of problems with medical records, which the board considered acceptable. Dr. Hai questioned why Dr. Beaghler would not have indicated that Dr. Sabit was suspended for patient-safety concerns if that was the true reason. Dr. Hai reiterated that SIM looked at all the relevant information at the time of its decision and reasoned that Dr. Sabit simply went "rogue" later. As evidence that SIM performed its due diligence, Dr. Hai continued to emphasize that other facilities cleared Dr. Sabit for privileges as well and the state of Michigan granted Dr. Sabit a license. Dr. Hai also opined that if SIM had denied Dr. Sabit's application, it would not have caused his privileges elsewhere to be revoked.

The jury determined that SIM negligently credentialed Dr. Sabit and that the negligent credentialing was a proximate cause of plaintiff's injuries. On November 14, 2018, plaintiff moved for entry of a judgment against SIM, Dr. Sabit, and MBSPG, jointly and severally. Plaintiff opined that she was entitled to $630,431.04 in present damages, and $1,691,000 in future damages reduced to a present value of $1,038.540.74, for a total award of $1,668.971.78, less any expenses paid or payable by a collateral source, namely, the Social Security Administration. In support of her motion, plaintiff submitted a report from Nitin V. Paranjpe, Ph.D., regarding the foregoing

calculations and Dr. Paranjpe's curriculum vitae reflecting his background in economics. SIM objected on several grounds, including its assertion that the amounts awarded by the jury for past damages included interest within the stated figures. SIM argued that the jury's "+12%" notation should be ignored because it was specifically instructed to include any applicable precomplaint interest in the amount awarded. SIM also argued that it was inappropriate to enter a judgment against SIM, Dr. Sabit, and MBSPG, jointly and severally, when Dr. Sabit's liability was premised on his default.

At oral argument on November 29, 2018, SIM explained that it was inappropriate to apply a 12% interest rate to the past damages awards because the amount awarded for each category of damages included damages from the date of plaintiff's injury to the time of trial, while precomplaint interest was only applicable to the period between an injury and the filing of a complaint. SIM argued that the court could not assume that the jury would have calculated damages and interest in the same manner as plaintiff's economist. In response, plaintiff argued that the jury was properly instructed and that the 12% interest was clearly intended to apply only to the precomplaint period, consistent with the court's instructions. The court agreed that the "+12%" interest notation could be interpreted in more than one way and asked the parties for additional briefing regarding potential conflicts between jury instructions and a verdict form.

In their supplemental briefing, plaintiff argued that the trial court was obligated to ascertain and implement the jury's intent, which was to add 12% precomplaint interest to the amounts awarded for past damages, while SIM argued that it was impossible to

harmonize the jury's attempt to award precomplaint interest with its failure to designate which portion of past damages were attributed to the precomplaint time frame. The trial court ultimately determined that the jury intended to comply with its instructions, which required it to include only precomplaint interest, and therefore construed the verdict as awarding 12% interest from February 8, 2012 (date of surgery) through December 1, 2016 (plaintiff's complaint). The court then entered a judgment against Dr. Sabit, MBSPG, and SIM, jointly and severally. The judgment includes detailed calculations of each category of damages, interest, setoffs, and present-value reductions, resulting in a total judgment of $1,284.995.78.

SIM filed several postjudgment motions in which it sought a judgment notwithstanding the verdict (JNOV) or, alternatively, a new trial, arguing that (1) the credentialing file regarding Dr. Sabit was privileged and inadmissible; (2) Michigan does not recognize a negligent-credentialing cause of action; (3) Dr. Hyde's testimony was inadmissible and failed to establish negligence and proximate cause because it lacked a sufficient factual basis in record evidence; (4) SIM was denied a fair trial because the court refused to seat a second jury for the negligent-credentialing claim, SIM was not able to participate in voir dire, and the jury was exposed to inadmissible and prejudicial information about Dr. Sabit; (5) the jury's award of future medical expenses was speculative and excessive; (6) the jury's attempt to award precomplaint interest could not be harmonized with its failure to distinguish between precomplaint and postcomplaint damages; and (7) the adverse-inference jury instruction was unsupported by evidence. The trial court entertained oral argument regarding these matters on March 20,

2019, and denied each motion in a series of orders entered June 25, 2019. This appeal followed.

II. ANALYSIS

A. THE CREDENTIALING FILE WAS ADMITTED IN ERROR

SIM first argues that its credentialing file regarding Dr. Sabit was privileged under both MCL 333.20175(8) and MCL 333.21515; thus, it should not have been produced and then admitted as evidence at trial. We agree.

1. STANDARD OF REVIEW

A trial court's evidentiary rulings are generally reviewed for an abuse of discretion, but preliminary questions of law are reviewed de novo. *Mueller v Brannigan Bros Restaurants & Taverns LLC*, 323 Mich App 566, 571; 918 NW2d 545 (2018). "An abuse of discretion generally occurs only when the trial court's decision is outside the range of reasonable and principled outcomes, but a court also necessarily abuses its discretion by admitting evidence that is inadmissible as a matter of law." *Hecht v Nat'l Heritage Academies, Inc*, 499 Mich 586, 604; 886 NW2d 135 (2016) (citations omitted). A trial court's denial of a motion for JNOV is reviewed de novo. *Id*. "This Court reviews for an abuse of discretion a trial court's ultimate decision whether to grant a new trial, but considers de novo any questions of law that arise." *Moore v Detroit Entertainment, LLC*, 279 Mich App 195, 223; 755 NW2d 686 (2008) (quotation marks and citation omitted).

Issues of statutory interpretation are reviewed de novo. *Krusac v Covenant Med Ctr, Inc*, 497 Mich 251, 255; 865 NW2d 908 (2015). The goal of statutory interpretation is to give effect to the Legislature's

intent, as discerned from the plain language of the statute. *Id*. at 255-256. Unambiguous statutory language must be enforced as written and no judicial construction is required or permitted. *Id*. at 256.

2. DISCUSSION

SIM's credentialing file regarding Dr. Sabit was protected by a statutory peer-review privilege under MCL 333.20175(8) and MCL 333.21515. The trial court erred by compelling its production and admitting it at trial.

Article 17 of the Public Health Code generally governs licensing and regulation of health facilities and agencies. See MCL 333.20101 *et seq*. A "health facility or agency" is a broad term encompassing several types of entities, including freestanding surgical outpatient facilities and hospitals. MCL 333.20106(1)(c) and (f). It is undisputed that SIM is a freestanding surgical outpatient facility, as defined by MCL 333.20104(7),[6] and therefore also a health facility or agency under MCL 333.20106(1)(c).

The general provisions of Article 17 include § 20175(8), which states:

> The records, data, and knowledge collected for or by individuals or committees assigned a professional review function in a health facility or agency, or an institution of higher education in this state that has colleges of osteopathic and human medicine, are confidential, shall be

[6] " 'Freestanding surgical outpatient facility' means a facility, other than the office of a physician, dentist, podiatrist, or other private practice office, offering a surgical procedure and related care that in the opinion of the attending physician can be safely performed without requiring overnight inpatient hospital care. Freestanding surgical outpatient facility does not include a surgical outpatient facility owned and operated as part of a hospital." MCL 333.20104(7).

> used only for the purposes provided in this article, are not public records, and are not subject to court subpoena. [MCL 333.20175(8).]

MCL 333.21515 similarly provides, "The records, data, and knowledge collected for or by individuals or committees assigned a review function described in this article are confidential and shall be used only for the purposes provided in this article, shall not be public records, and shall not be available for court subpoena." The question before this Court is whether the materials gathered by a freestanding surgical outpatient facility in the process of determining whether to grant privileges to an applicant are entitled to either or both statutory privileges.

In *Attorney General v Bruce*, 422 Mich 157; 369 NW2d 826 (1985), our Supreme Court considered whether records from a hospital's peer-review committee could be compelled pursuant to an investigative subpoena. *Id*. at 161. After conducting an internal investigation of a staff physician following the death of a patient, the defendant hospital suspended the physician's privileges for six months. *Id*. at 162. The defendant notified the Michigan Board of Medicine of its decision but refused to turn over information developed in the internal investigation when the board began its own investigation of the incident. *Id*. The Court observed that the Public Health Code imposed a duty on the owner, operator, and governing body of a hospital to

> assure that physicians admitted to practice in the hospital are organized into a medical staff to enable an effective review of the professional practices in the hospital for the purpose of reducing morbidity and mortality and improving the care provided in the hospital for patients. This review shall include the quality and necessity of the care provided and the preventability of complications and deaths occur-

> ring in the hospital. [*Id*. at 164, quoting MCL 333.21513(d).]

Under MCL 333.21513, a hospital was required to conduct peer-review activities, and the Court opined that the unambiguous language of the section immediately following MCL 333.21513, i.e., the statutory privilege outlined in MCL 333.21515, constituted a clear expression of the Legislature's intent to preclude "peer review committee records" from disclosure, even in the context of an investigation by the board under other articles of the Public Health Code. *Id*. at 165-166.

Nearly a decade later, this Court considered the statutory privilege in the context of a medical malpractice action involving a negligent-credentialing theory. *Dye v St John Hosp & Med Ctr*, 230 Mich App 661, 663-664; 584 NW2d 747 (1998). The defendant hospital in *Dye* objected to the plaintiff's request for a physician's "personnel/privileges file," relying on MCL 333.21515, as well as MCL 333.20175(8). *Id*. at 664, 665-666. The defendant argued that because the materials were collected by or for its credentialing committee, "which exercise[d] a professional review function," the materials were not discoverable. *Id*. at 666-667. This Court found the defendant's position persuasive, agreeing that it was supported by the plain meaning of the statutory privilege. *Id*. at 667, 673. In reaching that conclusion, the Court rejected the plaintiff's contention that the privilege did not extend to materials used in deciding whether to grant staff privileges in the first instance, as opposed to a retrospective review of a past event or issue. *Id*. at 667-669. Recognizing the precedent established in *Attorney General* and *Dye*, this Court again confirmed in *Johnson v Detroit Med Ctr*, 291 Mich App 165, 168;

804 NW2d 754 (2010), that "a credentialing committee is a peer review committee" to which a privilege is afforded.

Although each of these cases involved hospitals, rather than a freestanding surgical outpatient facility like SIM, the analogous language establishing each health facility or agency's duties is significant. Under MCL 333.21513:

> The owner, operator, and governing body of a hospital licensed under this article:
>
> * * *
>
> (c) Shall assure that physicians and dentists admitted to practice in the hospital are granted hospital privileges consistent with their individual training, experience, and other qualifications.

Similarly, under MCL 333.20813:

> The owner, operator, and governing body of a freestanding surgical outpatient facility licensed under this article:
>
> * * *
>
> (c) Shall assure that physicians admitted to practice in the facility are granted professional privileges consistent with the capability of the facility and with the physicians' individual training, experience, and other qualifications.

Under both MCL 333.21513(c) and MCL 333.20813(c), the hospital and freestanding surgical outpatient facility, respectively, must ensure that professionals are only granted privileges consistent with their training, experience, and other qualifications. As our Supreme Court has observed, one of the measures enacted by the Legislature to promote candid assessment in peer-review proceedings is the statutory privilege that shields the "records, data, and knowledge collected for

or by peer review entities" from discovery. *Feyz v Mercy Mem Hosp*, 475 Mich 663, 680-681; 719 NW2d 1 (2006), citing MCL 333.21515 and MCL 333.20175(8). Nothing in the pertinent language of MCL 333.20175(8) suggests that the privilege does not extend to a freestanding surgical outpatient facility exercising the same credentialing-review function under MCL 333.20813(c) that a hospital performs under MCL 333.21513(c). To the contrary, MCL 333.20175(8) applies to materials "collected for or by individuals or committees assigned a professional review function in a *health facility or agency* . . . ." (Emphasis added.) As noted earlier, the parties do not dispute that SIM is a freestanding surgical outpatient facility, and MCL 333.20106(1)(c) includes a freestanding surgical outpatient facility within the definition of a health facility or agency.

The applicability of MCL 333.21515 presents a closer question. Unlike MCL 333.20175(8), MCL 333.21515 does not use "health facility or agency" terminology that, by definition, encompasses a freestanding surgical outpatient facility. Instead, the privilege established by MCL 333.21515 extends to "records, data and knowledge collected for or by individuals or committees assigned a review function described in this article . . . ." The article referenced in this provision is Article 17, which governs a wide variety of health facilities or agencies, including freestanding surgical outpatient facilities. However, the specific provision is set forth in Part 215 of Article 17, which addresses matters related to the narrower category of entities that constitute hospitals.

However, the first sections of both Part 215 (regarding hospitals) and Part 201 (the general provisions applicable to Article 17) incorporate the principles of construction set forth in Article 1 of the Public Health

Code. See MCL 333.20101(2) and MCL 333.21501(2). Section 1113 of Article 1 provides, "A heading or title of an article or part of this code shall not be considered as part of this code or be used to construe the code more broadly or narrowly than the text of the code sections would indicate, but shall be considered as inserted for convenience to users of this code." MCL 333.1113. Given the Legislature's express warning against relying on a heading or title to alter the plain meaning of the statutory language in the Public Health Code, the mere fact that MCL 333.21515 falls within a part with the heading "HOSPITALS" should not be unduly persuasive.

On the whole, we conclude that despite the placement of MCL 333.21515 in Part 215 alongside other provisions applicable to hospitals, the Legislature's reference to the review functions described in Article 17, as opposed to Part 215, evidences its intent to extend the statutory privilege for peer-review materials to all health facilities and agencies with review functions imposed by Article 17. The credentialing process that a freestanding surgical outpatient facility performs to satisfy its duty under MCL 333.20813(c) is a review function described and required by Article 17. See *Johnson*, 291 Mich App at 168 ("[A] credentialing committee is a peer review committee."). As such, the peer-review privilege in MCL 333.21515 applies to SIM. But even if SIM's credentialing file regarding Dr. Sabit was not protected by MCL 333.21515, it was clearly privileged under MCL 333.20175(8). The plain language of MCL 333.20175(8) limited the use of those materials to purposes provided in Article 17. Accordingly, the file was not subject to discovery and should not have been admitted at trial.

B. PLAINTIFF DID NOT ESTABLISH A PRIMA FACIE CASE FOR NEGLIGENT CREDENTIALING BASED ON ADMISSIBLE EVIDENCE

SIM also argues that it was entitled to JNOV because Michigan does not recognize negligent credentialing as a cause of action. SIM further argues that if a negligent-credentialing cause of action exists, it sounds in medical malpractice and Dr. Hyde's testimony could not establish the standard of care and proximate causation; rather, his testimony was speculative, unreliable, and inadmissible because it lacked a factual basis in the record. We need not decide the first issue because we conclude—even assuming that a negligent-credentialing theory may be pursued and construing the evidence and all legitimate inferences in the light most favorable to plaintiff—that plaintiff failed to establish the standard of care and proximate causation and that SIM is accordingly entitled to entry of JNOV.

1. STANDARD OF REVIEW AND GENERAL PRINCIPLES

Evidentiary rulings are generally reviewed for an abuse of discretion, *Mueller*, 323 Mich App at 571, which occurs when the trial court's ruling falls "outside the range of reasonable and principled outcomes," *Hecht*, 499 Mich at 604. We review de novo a trial court's decision regarding a motion for JNOV. *Id*. A motion for JNOV should be granted when the evidence, viewed in the light most favorable to the nonmovant, fails to establish a claim as a matter of law. *Attard v Citizens Ins Co of America*, 237 Mich App 311, 321; 602 NW2d 633 (1999). MCR 2.611(A)(1) sets forth the grounds upon which a jury verdict may be set aside and a new trial granted. See *Kelly v Builders Square, Inc*, 465 Mich 29, 38; 632 NW2d 912 (2001). In pertinent part, the rule permits a new trial when a party's substantial rights are materially affected by "[i]rregularity in the proceed-

ings of the court, jury, or prevailing party, or an order of the court or abuse of discretion which denied the moving party a fair trial." MCR 2.611(A)(1)(a).

Assuming that a negligent-credentialing theory may be asserted, it falls within the scope of a medical malpractice claim, because it arises from action occurring in the scope of a professional relationship and raises questions of judgment beyond common knowledge and experience. See *Bryant v Oakpointe Villa Nursing Ctr, Inc*, 471 Mich 411, 422; 684 NW2d 864 (2004) (discussing characteristics that distinguish medical malpractice from general negligence). Generally, medical malpractice claims require expert testimony regarding the appropriate standard of care and causation. *Woodard v Custer*, 473 Mich 1, 6; 702 NW2d 522 (2005); *Teal v Prasad*, 283 Mich App 384, 394; 772 NW2d 57 (2009). Under MRE 703, "[t]he facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence." See also *Teal*, 283 Mich App at 395 ("[T]here must be facts in evidence to support the opinion testimony of an expert.") (quotation marks and citation omitted; alteration in original).

2. DISCUSSION

SIM argues that it is entitled to JNOV because of the improper admission of the credentialing file. Nearly all of the testimony offered during the negligent-credentialing portion of the trial related to the contents of the credentialing file, primarily Dr. Beaghler's letter and SIM's reaction to it.[7] Most of Dr. Hyde's testimony was therefore premised on facts that were not properly

[7] Plaintiff claims that "Dr. Beaghler's letter to SIM was admitted by stipulation, in lieu of the attorneys' [sic] traveling to California to attempt to depose him." But there is no evidence of any such stipula-

in evidence. Because Dr. Hyde was the only expert to testify regarding the applicable standard of care and proximate cause, his testimony was critical to plaintiff's case. Without the admission of the credentialing file upon which the majority of Dr. Hyde's testimony depended, plaintiff's claim for medical malpractice should not have been submitted to the jury. See *Attard*, 237 Mich App at 321.

The vast majority of Dr. Hyde's testimony focused on the implications of Dr. Beaghler's disclosures and Dr. Hyde's belief that the nature of the disclosures required further investigation. SIM argues that this was not an appropriate basis for Dr. Hyde's testimony because Dr. Beaghler's letter was part of the inadmissible credentialing file and, even if the credentialing file had been admissible, the statements in Dr. Beaghler's letter were inadmissible hearsay. Although plaintiff makes no attempt to dispute SIM's characterization of the letter as hearsay, we are not persuaded by that aspect of SIM's argument. By definition, an out-of-court statement is only considered hearsay if it is "offered in evidence to prove the truth of the matter asserted." MRE 801(c). When the statement is offered to establish its effect on the person to whom the statement is made, it is not precluded by the rule against hearsay. *People v Fisher*, 449 Mich 441, 449-450; 537 NW2d 577 (1995). See also *Westland v Okopski*, 208 Mich App 66, 77; 527 NW2d 780 (1994) (concluding that a 911 call was not hearsay when it was offered to show why the police responded to a disturbance). The relevance of Dr. Beaghler's letter was not to prove the truth of the disclosures—the alleged deficiencies in Dr. Sabit's performance at CMH

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tion in the record. To the contrary, SIM raised numerous objections regarding Dr. Beaghler's absence and the hearsay contents of his letter at trial.

were of no moment to this case. Rather, the logical significance of the letter was the effect the disclosures had on SIM's decision to grant Dr. Sabit privileges. Because the disclosures in Dr. Beaghler's letter were not offered to prove the truth of those statements, the disclosures were not inadmissible hearsay.

Nonetheless, as explained above, the credentialing file was inadmissible. Although Dr. Beaghler's letter was not automatically inadmissible on this basis, see *Dye*, 230 Mich App at 674 n 11 ("[P]lacement of a document within such a file does not protect its discovery if available from another source."), there is no indication that plaintiff acquired the letter from a source independent of the credentialing file. To the contrary, when plaintiff attempted to depose Dr. Beaghler and sent a notice requesting production of the May 19, 2011 letter and other documents, Dr. Beaghler refused to comply with the request. On this record, there is no indication that plaintiff would have acquired the letter from a different source.[8] At any rate, the only basis for admission of Dr. Beaghler's letter at trial was as part of the credentialing file that should have been excluded from evidence under MCL 333.20175(8) and MCL 333.21515. Thus, Dr. Hyde's testimony about the significance of Dr. Beaghler's disclosures and the steps SIM should have taken in response to the letter was not based on facts in evidence, contrary to MRE 703.

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[8] Indeed, at a June 30, 2017 hearing on plaintiff's motion to compel (which was granted), counsel for plaintiff stated with regard to the negligent-credentialing claim, "the only way we're going to prove it is by looking at the credentialing file." Generally, a party that has taken a legal position and prevailed in an earlier proceeding may not assert a contrary position in the same or related litigation. See *Mich Gas Utilities v Pub Serv Comm*, 200 Mich App 576, 583; 505 NW2d 27 (1993).

Over SIM's objection, Dr. Hyde was also permitted to testify about the reasons for Dr. Sabit's suspension, which he discovered in an opinion issued by the California Court of Appeals in 2015. In pertinent part, the opinion states that on December 3, 2010, CMH informed Dr. Sabit "that it was summarily suspending his provisional staff privileges at the Hospital 'to protect the life or well-being of patients [and] to reduce imminent danger to the life, health or safety of any person.' " *Sabit v Abou-Samra*, unpublished opinion of the California Court of Appeals for the Second District, issued April 30, 2015 (Docket No. B249793), p 1 (alteration in original). According to *Sabit*, the written notice of Dr. Sabit's suspension also "referred to two instances where Sabit allegedly did not render appropriate medical care to patients." *Id*. Dr. Hyde reasoned that because Dr Sabit was suspended many months before he applied for privileges at SIM, these matters were well known to CMH in May 2011 and Dr. Beaghler would have disclosed the reason for the suspension if SIM had made further inquiries in response to Dr. Beaghler's letter.

SIM maintains on appeal that this portion of Dr. Hyde's testimony also lacked a factual basis in record evidence and was speculative in the absence of testimony from Dr. Beaghler. But Dr. Hyde's opinion about what Dr. Beaghler would have disclosed upon further inquiry may not necessarily be considered unduly speculative. As Dr. Hyde noted, the information was certainly available to Dr. Beaghler in May 2011. Dr. Hyde explained that hospitals commonly provide succinct summaries of information in an initial response to inquiries from other facilities about staff, so the mere fact that Dr. Beaghler did not explain the reasons for the suspension in the May 19, 2011 letter is not conclusive. Moreover, while Dr. Beaghler demon-

strated reluctance to participate in this litigation, any inquiries SIM made in 2011 would have been as part of the credentialing process. It appears that hospitals and other health facilities and agencies commonly share information about a physician's history for credentialing purposes even when they would not do so in the context of litigation, so much so that the Legislature has granted immunity for such disclosures. See *Feyz*, 475 Mich at 681, citing MCL 331.531. But even if Dr. Hyde's testimony regarding this matter was not speculative, SIM is correct that the reason for Dr. Sabit's suspension was not a fact in evidence. Dr. Hyde's testimony regarding that matter was therefore improper under MRE 703.

Dr. Hyde was the only expert witness to testify about the standard of care and proximate cause at issue in the negligent-credentialing portion of the trial. Without his testimony, plaintiff could not have established a prima facie case of negligent credentialing. The improper admission of his expert opinion without a sufficient factual basis in record evidence affected SIM's substantial rights, and affirming a verdict and judgment premised largely on inadmissible evidence would be inconsistent with substantial justice. See *Mitchell v Kalamazoo Anesthesiology, PC*, 321 Mich App 144, 157-158; 908 NW2d 319 (2017); *Lewis v LeGrow*, 258 Mich App 175, 200; 670 NW2d 675 (2003); *Miller v Hensley*, 244 Mich App 528, 531-532; 624 NW2d 582 (2001). SIM therefore argues that JNOV is warranted because, without the credentialing file, there was insufficient evidence to create a jury question. We agree. Although evidentiary errors are not ordinarily grounds for reversal, such relief is appropriate when "a substantial right of a party is affected and it affirmatively appears that failure to grant relief is inconsistent with substantial justice." *Lewis*, 258 Mich App at 200 (cita-

tions omitted). When a trial court errs with respect to critical evidence, the error cannot be deemed harmless. See *Mitchell*, 321 Mich App at 157-158 (vacating judgment on a jury verdict when the trial court restricted questions regarding the genuineness and reliability of key evidence); *Miller*, 244 Mich App at 531-532 (improper admission of police officers' testimony about fault for a motor vehicle accident required reversal of judgment). We therefore conclude that the judgment against SIM must be reversed.

Further, had the trial court not granted plaintiff's motion to compel discovery of the credentialing file and subsequently denied SIM's motion to strike plaintiff's expert testimony, SIM would have been entitled to judgment as a matter of law before trial even began. See MCL 600.2169(1); MCR 2.116(C)(10); *Nelson v American Sterilizer Co*, 223 Mich App 485, 498; 566 NW2d 671 (1997) (holding that, because the trial court struck the testimony of the plaintiff's two experts regarding her liver disorder, plaintiff was left "with no evidence of causation" and "could not establish a prima facie case" with regard to that disorder; the trial court therefore correctly granted summary disposition to defendants regarding those claims).

Indeed, SIM filed a pretrial motion for summary disposition with respect to plaintiff's negligent-credentialing claim. Following a July 19, 2018 hearing, the trial court denied that motion on the basis of plaintiff's proffer of its expert-witness testimony. Because that proffer was based on the contents of the inadmissible credentialing file, the trial court should have granted SIM's motion for summary disposition. This Court has held that "there is no different standard of review regarding [a] summary disposition motion, [a] motion for a directed verdict, and [a] JNOV motion"

when there is no "genuine and material difference" in the evidence underlying each motion. See *Crown Technology v D&N Bank, FSB*, 242 Mich App 538, 546 n 3; 619 NW2d 66 (2000); see also *Taylor v Kent Radiology, PC*, 286 Mich App 490, 510; 780 NW2d 900 (2009) (noting that "[i]f defendants felt that plaintiffs did not have the evidence to support their burden of proof for a traditional medical malpractice claim, defendants should have moved for *summary disposition*, *directed verdict*, *or JNOV* on the basis that plaintiffs' evidence was insufficient to prove by a preponderance that Bixler's malpractice caused Taylor's injuries") (emphasis added). Thus, we reverse and remand for entry of judgment in favor of SIM.[9]

III. CONCLUSION

In summary, the trial court improperly ordered the production and admission of SIM's credentialing file. That evidence should have been excluded. The evidence

[9] We therefore need not reach the remaining issues that are raised on appeal. We do note, however, that but for our determination that judgment should be entered in favor of SIM, we would in any event have reversed and remanded for a new trial, given that SIM was entirely excluded from participation in voir dire. "Voir dire is the process by which litigants may question prospective jurors so that challenges to the prospective jurors can be intelligently exercised." *Bynum v ESAB Group, Inc*, 467 Mich 280, 283; 651 NW2d 383 (2002). Voir dire must be calculated to facilitate that purpose. See *Fedorinchik v Stewart*, 289 Mich 436, 438-439; 286 NW 673 (1939) ("It is indispensable to a fair trial that a litigant be given a reasonable opportunity to ascertain on the *voir dire* whether any of the jurors summoned are subject to being challenged for cause or even peremptorily."). "A litigant's right to trial before an impartial jury . . . requires that he be given an opportunity to obtain the information necessary to challenge . . . individuals for cause or peremptorily." *Bunda v Hardwick*, 376 Mich 640, 659; 138 NW2d 305 (1965), citing Const 1963, art 1, § 14. MCR 2.511 sets forth the procedures for jury selection, including the process of exercising challenges for cause or peremptorily. When the procedures are not followed, "a party need not demonstrate prejudice arising from a claim of

was otherwise insufficient to meet plaintiff's burden of proof regarding the standard of care and proximate cause.

Reversed and remanded for entry of judgment in favor of SIM. We do not retain jurisdiction.

BOONSTRA, P.J., and CAVANAGH and GADOLA, JJ., concurred.

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defective jury selection, since the requirement would impose an impossible burden." *Leslie v Allen-Bradley Co, Inc*, 203 Mich App 490, 493-494; 513 NW2d 179 (1994).

In re APPLICATION OF CONSUMERS ENERGY COMPANY TO INCREASE RATES

Docket No. 351261. Submitted July 13, 2021, at Lansing. Decided July 29, 2021, at 9:10 a.m. Leave to appeal denied 508 Mich 1017 (2022).

Consumers Energy Company (Consumers) filed an application in the Public Service Commission (the PSC), seeking authority to increase its retail rates for the distribution of natural gas over the rates approved in an August 28, 2018 order in another case and for other relief. The request was based on a 12-month projected test year ending September 30, 2020. At the prehearing conference, the Association of Businesses Advocating Tariff Equity, Residential Customer Group (RCG), and others sought to intervene, and the administrative law judge (ALJ) granted the petitions to intervene. The ALJ issued a proposal for decision on August 1, 2019, and the PSC ultimately authorized Consumers to implement rates that increased its annual revenues over the rates approved in the August 28, 2018 order. RCG appealed.

The Court of Appeals *held*:

MCL 460.6a(1) provides, in relevant part, that a utility may use projected costs and revenues for a future consecutive 12-month period in developing its requested rates and charges. A test year is a device employed to determine representative levels of revenues, expenses, rate base, and capital structure for use in the rate-setting formula, which, conceptually, can be historical, projected, or some combination of historical and projected. In this case, Consumers used actual financial results from the historical test year ending December 31, 2017, normalized and adjusted for inflation and other projected changes, to arrive at a fully projected test year of October 1, 2019, through September 30, 2020. RCG urged rejection of Consumers' projected test year in favor of exclusive reliance on its historical year on the ground that MCL 460.6a(1) envisions projected years beginning no later than the date that the rate case is filed, i.e., in this case, November 30, 2018. RCG did not specifically identify or explain what estimates were flawed, nor did RCG offer any alternative calculations. The authorization in MCL 460.6a(1) of the use of "a

future consecutive 12-month period" limits the future period only in that it must consist of 12 consecutive, or contiguous, months and thus does not imply that it must begin no later than the filing date of the attendant rate case. The Legislature's decision not provide any express limitations in MCL 460.6a(1) on how far in the future a projected test year may run reflects its understanding that the PSC would reject a test year set so far removed from circumstances actually in view as to render it less than workable or that, should the PSC adopt such a flawed test year, it would be subject to appellate challenges for unreasonableness under MCL 462.26(8). Accordingly, RCG's challenge to the prospective test year adopted in this case was rejected.

Affirmed.

PUBLIC UTILITIES — PUBLIC SERVICE COMMISSION — COMMISSION APPROVAL TO INCREASE RATES AND CHARGES — USING PROJECTED COSTS AND REVENUES IN DEVELOPING REQUESTED RATES AND CHARGES.

MCL 460.6a(1) provides, in relevant part, that a utility may use projected costs and revenues for a future consecutive 12-month period in developing its requested rates and charges; the authorization in MCL 460.6a(1) of the use of "a future consecutive 12-month period" limits the future period only in that it must consist of 12 consecutive, or contiguous, months and does not imply that it must begin no later than the filing date of the attendant rate case.

Public Law Resource Center PLLC (by *Don L. Keskey* and *Brian W. Coyer*) for Residential Customer Group.

Anne M. Uitvlugt and *Bret A. Totoraitis* for Consumers Energy Company.

B. Eric Restuccia, Deputy Solicitor General, and *Amit T. Singh*, *Steven D. Hughey*, *Spencer A. Sattler*, and *Daniel E. Sonneveldt*, Assistant Attorneys General, for the Public Service Commission.

Clark Hill PLC (by *Michael J. Pattwell*, *Robert A. W. Strong*, and *Bryan A. Brandenburg*) for the Association of Businesses Advocating Tariff Equity.

Before: FORT HOOD, P.J., and MARKEY and GLEICHER, JJ.

FORT HOOD, P.J. Appellant, Residential Customer Group (RCG), appeals as of right the order of the Michigan Public Service Commission (the PSC), which, among other things, granted in part the request of petitioner, Consumers Energy Company (Consumers), to raise its rates for its natural gas service. *In re Application of Consumers Energy Co*, order of the Public Service Commission, entered September 26, 2019 (Case No. U-20322). RCG asserts that the PSC erred by adopting a projected test period extending more than 12 months after the rate case was filed for estimating Consumers' costs. We affirm.

I. FACTUAL BACKGROUND

The PSC's order engendering this appeal includes the following background information:

> On November 30, 2018, Consumers Energy Company (Consumers) filed an application seeking authority to increase its retail rates for the distribution of natural gas by approximately $229 million over the rates approved in the August 28, 2018 order in Case No. U-18424, and for other relief. The request was based on a 12-month projected test year ending September 30, 2020. In response to issues raised by the Commission Staff (Staff) and intervenors during the course of the proceedings, the company made adjustments and reduced the request to approximately $204 million.
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> . . . At the prehearing conference, the [administrative law judge (ALJ)] granted petitions for leave to intervene filed by the Association of Businesses Advocating Tariff Equity (ABATE), . . . the Residential Customer Group (RCG), and [others]. The Staff also participated in the proceeding.

* * *

> . . . Evidentiary hearings were held on May 13-15, 17, and 22, 2019. . . .
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> The ALJ issued a Proposal for Decision (PFD) on August 1, 2019. Exceptions were filed by Consumers, the Staff, . . . ABATE, . . . and RCG on August 16, 2019, and replies to exceptions were filed by Consumers, the Staff, . . . and RCG on August 26, 2019. The record consists of 2,339 pages of transcript and 338 exhibits. [*In re Application of Consumers Energy Co*, order of the Public Service Commission, entered September 26, 2019 (Case No. U-20322), pp 1-3 (citation and selected parentheticals omitted).]

The PSC ultimately authorized Consumers "to implement rates that increase its annual revenues by $143,531,000 over the rates approved on August 28, 2018, in Case No. U-18424, on an annual basis . . . ." *Id*. at 145.

II. ANALYSIS

A final order of the PSC must be authorized by law and be supported by competent, material, and substantial evidence on the whole record. Const 1963, art 6, § 28; *In re Consumers Energy Co*, 279 Mich App 180, 188; 756 NW2d 253 (2008). A party aggrieved by an order of the PSC has the burden of proving by clear and convincing evidence that the order is unlawful or unreasonable. MCL 462.26(8). To establish that a PSC order is unlawful, the appellant must show that the PSC failed to follow a statutory requirement or abused its discretion in the exercise of its judgment. *In re MCI Telecom Complaint*, 460 Mich 396, 427; 596 NW2d 164 (1999). A reviewing court gives due deference to the PSC's administrative expertise and is not to substitute its judgment for that of the PSC. *Attorney General v Pub Serv Comm No 2*, 237 Mich App 82, 88; 602 NW2d 225 (1999).

Issues of statutory interpretation are reviewed de novo. *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 102; 754 NW2d 259 (2008). A reviewing court should give respectful consideration to an administrative agency's interpretation of statutes it is obliged to execute, but not deference. *Id*. at 108.

Among the several provisions set forth in MCL 460.6a(1) is that "[a] utility may use projected costs and revenues for a future consecutive 12-month period in developing its requested rates and charges." According to Consumers, "[a] test year is a device employed to determine representative levels of revenues, expenses, rate base, and capital structure for use in the rate-setting formula, which, conceptually, can be historical, projected, or some combination of historical and projected."

In this case, as the PSC noted, "Consumers used actual financial results from the historical test year ended December 31, 2017, normalized and adjusted for inflation and other projected changes, to arrive at a fully projected test year of October 1, 2019, through September 30, 2020." *In re Application of Consumers Energy Co*, order of the Public Service Commission, entered September 26, 2019 (Case No. U-20322), p 7. RCG urged rejection of Consumers' projected test year in favor of exclusive reliance on its historical year on the ground that MCL 460.6a(1) envisions projected years beginning no later than the date that the rate case is filed, i.e., in this case, November 30, 2018. RCG protests that Consumers' "self-selected projected test year extending 33 months after the historical test year, or 22 months after [the] November 30, 2018 rate case filing . . . included a vast amount of speculative forecasts . . . of future investment and costs . . . ."

The PSC rejected RCG's arguments, explaining as follows:

> RCG . . . proposed using an historical test year, adjusted for known changes, to determine Consumers' future costs and revenues. According to RCG, the company's use of a projected test year "rests upon a tortured interpretation of the statutory language of Section 6a(1), MCL 460.6a(1), that essentially the inclusion of 'a' in the statutory phrase 'for a future consecutive 12-month period' means that the utility can project any future 12-month period, disconnected from either a historical year, or the date of the rate case filing, or anything else." RCG argued that the use of an historical test year to project income and expenses results in more reasonable and just rates.
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> * * *
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> Consumers disputes RCG's claim that the company's projected test year costs are exaggerated and speculative. Consumers states that the enactment of 2008 PA 286 "provided a shift in the regulatory ratemaking paradigm—changing from the use of historical, known, and measurable costs, with known and measurable adjustments, to forward-looking, projected costs." As a result, Consumers asserts, the Commission indicated in subsequent orders that, rather than relying on historical data, it would consider sufficiently supported test year projections. In addition, the company argues that RCG failed to demonstrate how 2017 historical information could be used to establish rates, and did not provide a calculation of known changes . . . .
>
> The Commission . . . adopts Consumers' projected test year ending September 30, 2020. As noted by the company, MCL 460.6a(1) permits utilities to use "projected costs and revenues for a future consecutive 12-month period in developing its requested rates and charges." Although a utility may use a projected test year to develop its requested rates and charges, it bears the burden to substantiate its projections. If the utility cannot or chooses not to provide sufficient support for a revenue or expense item,

> the Staff, intervenors, or the Commission may choose an alternative method for determining the projection. . . . RCG's arguments do not support the Commission rejecting Consumers' projected test year. [*In re Application of Consumers Energy Co*, order of the Public Service Commission, entered September 26, 2019 (Case No. U-20322), pp 8-11 (citations omitted).]

On appeal, RCG challenges the test year at issue primarily on the basis of its interpretation of MCL 460.6a(1). RCG also offers policy arguments against reliance on projections extending more than a year beyond the initiation of the rate case and, in doing so, largely adopts or repeats the advocacy below of ABATE, the Attorney General, and the PSC's staff. However, RCG challenges the evidentiary basis for the chosen test year only by complaining generally that, because it extends 22 months beyond the date on which the rate case was filed, it has resulted in speculative and exaggerated forecasts concerning Consumers' future costs and investments. RCG does not specifically identify or explain what estimates are flawed, nor does it offer any alternative calculations.

RCG insists that the one-sentence statutory provision at issue, that "[a] utility may use projected costs and revenues for a future consecutive 12-month period in developing its requested rates and charges," MCL 460.6a(1), should not be understood as allowing a utility to choose some arbitrarily distant 12-month period for this purpose but should instead be understood to envision a future period beginning no later than when the utility initially files its rate case. We are more inclined to agree with the PSC, Consumers, and also the panel of this Court that issued the unpublished decision in *In re Application of DTE Electric Co to Increase Rates*, unpublished per curiam opinion of the Court of Appeals, issued February 25, 2021 (Docket

Nos. 349924 and 350008), p 11, that the statute's authorization of the use of "a future consecutive 12-month period" limits the future period only in that it must consist of 12 consecutive, or contiguous, months and thus does not imply that it must begin no later than the filing date of the attendant rate case.

RCG argues that its reading of MCL 460.6a(1) is properly informed by related statutory provisions. See *Jennings v Southwood*, 446 Mich 125, 136-137; 521 NW2d 230 (1994) (providing that statutes that have a common purpose should be read to harmonize with each other in furtherance of that purpose). RCG points out that MCL 460.6a(5) sets forth a rule by which rate requests are approved by default when the PSC fails to issue a final order within 10 months after the utility's rate filing. Likewise, MCL 460.6a(6) prohibits the filing of a new rate case "earlier than 12 months after the date of the filing of a complete prior general rate case application." RCG argues that the running of these provisions' timing specifications from the filing date should also apply to MCL 460.6a(1) and further points out that such operation would align the prospective test year of Subsection (1) with the 12-month cycle envisioned by Subsection (6). We are of the opinion that, although such alignment might have empirical appeal, had the Legislature desired that outcome it would have clearly called for it.

Moreover, Subsection (5) also starts the 10-month decision period anew in the event that the utility either significantly amends its filing or requests its own timing extension, and Subsection (6) alternatively states that "[a] utility may not file a new general rate case application until the commission has issued a final order on a prior general rate case or until the rates are approved under subsection (5)." These provi-

sions permit continuing the proceedings beyond the 12 months commencing with the filing date and indicate that the running of timing limitations from the filing date is not so seriously ensconced as to militate in favor of projecting such a specification into Subsection (1). This is particularly true in light of the lack of any expressed limitations in MCL 460.6a(1) on how far in the future a projected test year may run. The Legislature's decision not to speak on the issue reflects its understanding that the PSC would reject a test year set so far removed from circumstances actually in view as to render it less than workable or that, should the PSC adopt such a flawed test year, it would be subject to appellate challenges for unreasonableness. See MCL 462.26(8); *In re MCI Telecom Complaint*, 460 Mich at 427.

With all of the above in mind, we reject RCG's challenge to the prospective test year adopted in this case.

Affirmed.

MARKEY and GLEICHER, JJ., concurred with FORT HOOD, P.J.

TRUGREEN LIMITED PARTNERSHIP v DEPARTMENT OF TREASURY (ON REMAND)

Docket No. 344142. Submitted August 13, 2019, at Lansing. Decided April 10, 2020, at 9:00 a.m. Vacated and remanded 507 Mich 950 (2021). Resubmitted June 21, 2021, at Lansing. Decided July 29, 2021, at 9:15 a.m. Leave to appeal denied 511 Mich 945 (2023).

TruGreen Limited Partnership filed an action in the Court of Claims against the Department of Treasury, seeking a refund of taxes it paid under the Use Tax Act, 205.91 *et seq*., for the fertilizer, grass seed, chemicals, and other products it used in its commercial lawn-care business for the tax years 2012 through 2016. TruGreen had sought a refund of use tax it had paid for the 2012–2016 tax years, asserting that it was exempt from the use tax under MCL 205.94(1)(f). The department denied the refund claim, reasoning that TruGreen did not qualify for the MCL 205.94(1)(f) exemption because, while it was a business enterprise, the property used by TruGreen was not used and consumed within agricultural production as required by Mich Admin Code R 205.51(1) and (7). TruGreen then filed its complaint in the Court of Claims, demanding a refund of $1,160,201.49 plus costs and interest. The court, MICHAEL J. TALBOT, J., affirmed the department's denial of the requested refunds, reasoning that MCL 205.94(1)(f) and caselaw interpreted that provision as requiring that the claimant create or contribute to an agricultural or horticultural product to qualify for the exemption. TruGreen appealed. In a published opinion, the Court of Appeals, SHAPIRO, P.J., and GLEICHER, J. (SWARTZLE, J., dissenting), affirmed the Court of Claims ruling. 332 Mich App 73 (2020). Defendant sought leave to appeal in the Supreme Court, and in lieu of granting the application, the Supreme Court vacated the Court of Appeals judgment and remanded the case to the Court of Appeals for reconsideration in light of *TOMRA of North America, Inc v Dep't of Treasury*, 505 Mich 333 (2020).

On remand, the Court of Appeals *held*:

1. MCL 205.94(1)(f), as amended by 2012 PA 474, set forth a use-tax exemption. It provided, in part, that property sold to a

person engaged in a business enterprise and using and consuming the property in the tilling, planting, caring for, or harvesting of the things of the soil or in the breeding, raising, or caring for livestock, poultry, or horticultural products, including transfers of livestock, poultry, or horticultural products for further growth was exempt from Michigan's use tax. Tax exemptions are narrowly construed and are, in general, construed in favor of the taxing authority. However, the strict-construction canon is one of last resort and cannot be used to overcome the plain text of a tax exemption. For that reason, as discussed in *TOMRA*, when a tax exemption is unambiguous, the strict-construction canon should not be applied; instead, the meaning of statutory language depends on context, and the context is a primary determinant of meaning. Under the whole-text canon of interpretation, the judicial interpreter must consider the entire text in view of its structure and the physical and logical relation of its many parts. Thus, the individual, discrete words of a statute must be read holistically with a view to their place in the overall statutory scheme, giving each provision its appropriate meaning and function.

2. The text of MCL 205.94(1)(f) is unambiguous, and therefore, it is not interpreted by applying the strict-construction canon. The words in the first sentence of MCL 205.94(1)(f)—i.e., tilling, planting, caring for, harvesting, breeding, and raising—describe actions respecting "things of the soil" or "livestock, poultry or horticultural products." Reading these words in the context of the entire statute and to give effect to the statute as a whole, the term "things of the soil" in MCL 205.94(1)(f) pertains to the products of farms and horticultural businesses, not to blades of well-tended grass. Reading each of the sentences in the statute together reinforces that the Legislature intended the exemption to apply to agricultural activities; indeed, earlier judicial decisions consistently referred to the statutory subsection as the agricultural-production exemption. Accordingly, MCL 205.94(1) grants a tax exemption for property used in agricultural production and supply. In this case, while the terms "caring for" and "planting," taken separately, could apply to lawn-care services, the statutory subsection was unambiguous and it therefore had to be analyzed in relation to the statute as a whole. TruGreen planted and tended decorative grasses, and the work was unrelated to crop cultivation or agriculture in general. Because TruGreen was not involved in any agricultural endeavors, it did not qualify for the tax exemption under MCL 205.94(1). The Court of Claims correctly affirmed the department's denial of TruGreen's refund requests.

Affirmed.

SHAPIRO, P.J., concurring, joined the majority opinion in full and adopted by reference his prior concurring opinion in the case, *TruGreen Ltd Partnership v Dep't of Treasury*, 332 Mich App 73, 89-96 (2020) (SHAPIRO, P.J., concurring).

SWARTZLE, J., dissenting, disagreed with the majority's analysis of MCL 205.94(1)(f). The language of the provision was broad, and the majority erred by reading the language narrowly; it was a mistake to avoid the plain, ordinary meaning of the statute on the basis that the Legislature meant something other than what it actually said. By doing so, the majority violated on remand seven of the eight principles of statutory interpretation it violated in its original opinion. On remand, the majority no longer relied on the strict-construction canon. Accordingly, Judge SWARTZLE adopted by reference his prior opinion in the case, *TruGreen*, 332 Mich App 73, 96-119 (SWARTZLE, J., dissenting), except for the discussion related to the strict-construction canon.

TAXATION — USE TAX ACT — EXEMPTIONS — WORDS AND PHRASES — "THINGS OF THE SOIL" — AGRICULTURAL ACTIVITIES.

MCL 205.94(1)(f), as amended by 2012 PA 474, provided, in part, that property sold to a person engaged in a business enterprise and using and consuming the property in the tilling, planting, caring for, or harvesting of the things of the soil or in the breeding, raising, or caring for livestock, poultry, or horticultural products, including transfers of livestock, poultry, or horticultural products for further growth was exempt from Michigan's use tax; the use-tax exemption was unambiguous and applied only to those businesses that contributed to farm products and horticultural businesses in Michigan, i.e., to agricultural activities; the term "things of the soil" pertained only to the products of farms and horticultural businesses.

Bursch Law PLLC (by *John J. Bursch*) and *Honigman Miller Schwartz & Cohn LLP* (by *June Summers Haas*) for TruGreen Limited Partnership.

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

ON REMAND

Before: SHAPIRO, P.J., and GLEICHER and SWARTZLE, JJ.

GLEICHER, J. Michigan's use tax exempts property consumed in the tilling, planting, caring for, or harvesting things of the soil, or in the breeding, raising or caring of livestock, poultry, or horticultural products for further growth. These words conjure images of our state's bean fields, dairy farms, and cherry orchards. The question presented is whether the Legislature intended that a lawn-care company would reap the fruits of this exemption. The statutory vocabulary describes a tax subsidy aimed at growing Michigan's agricultural economy, not ornamental grass and shrubs. The Court of Claims reached the same conclusion. We affirmed the Court of Claims' ruling, but the Supreme Court remanded for reconsideration. We again affirm.

I

The history of the statute at issue dates back to 1935, when the Legislature first exempted from "sale at retail" under the General Sales Tax Act "any transaction . . . of tangible personal property . . . for consumption or use in industrial processing or agricultural producing[.]" 1933 CL 3663(b.1), as amended by 1935 PA 77. Two years later, the Legislature exempted the same transactions from the use tax. MCL 205.94(g), as amended by 1937 PA 94.

Between 1937 and 2012, the Legislature revised the use-tax language several times. For more information regarding the amendments, see this link to the Legislature's website: Legislative Service Bureau, *MCL 205.94* <http://bit.ly/2Rc7zG5> [https://perma.cc/VPE8-WMRR]. The version of the statute in effect during the

tax years relevant here exempts the following from the use tax:

> *Property sold to a person engaged in a business enterprise and using and consuming the property in the tilling, planting, caring for, or harvesting of the things of the soil or in the breeding, raising, or caring for livestock, poultry, or horticultural products, including transfers of livestock, poultry, or horticultural products for further growth*. This exemption includes machinery that is capable of simultaneously harvesting grain or other crops and biomass and machinery used for the purpose of harvesting biomass. This exemption includes agricultural land tile, which means fired clay or perforated plastic tubing used as part of a subsurface drainage system for land used in the production of agricultural products as a business enterprise and includes a portable grain bin, which means a structure that is used or is to be used to shelter grain and that is designed to be disassembled without significant damage to its component parts. This exemption does not include transfers of food, fuel, clothing, or similar tangible personal property for personal living or human consumption. This exemption does not include tangible personal property permanently affixed to and becoming a structural part of real estate. As used in this subdivision, "biomass" means crop residue used to produce energy or agricultural crops grown specifically for the production of energy. [MCL 205.94(1)(f), as amended by 2012 PA 474 (emphasis added).]

Our task is to determine whether the emphasized language applies to TruGreen.

TruGreen offers its customers lawn and ornamental-plant-care services. An affidavit submitted by TruGreen's director of technical operations describes TruGreen's business as built around seasonal, or annual service subscriptions entered into by residential homeowners and commercial, institutional, and private landowners. For a set fee, the company cares for grass, trees, and shrubbery at a variety of locations in addi-

tion to homes, including schools, parks, athletic fields, business parks, malls, airports, roadways, and pastures not used for agricultural production. TruGreen utilizes fertilizers, herbicides, and insecticides to care for its customers' turfs and ornamental plants, providing nutrients, controlling weeds, and preventing insects. Sometimes TruGreen "amends" the soil after testing it by adding additional ingredients (such as lime, sulfur, gypsum, or iron) to enhance the health of grass, trees, or shrubs. It also aerates lawns and adds additional seed to remedy bare spots. TruGreen does not offer services to nurseries, tree or nut farms, or individuals or entities engaged in fruit or vegetable production. The affidavit elucidates: "Our branch location business licenses are specific to turf and ornamental plant care only."

In November 2015, TruGreen requested a use-tax refund in the amount of $4,745.39 for the fertilizer, grass seed, and other products it used in its commercial lawn-care business during a 31-day period in 2012. The Department of Treasury denied the refund claim, and TruGreen requested an informal conference. Before the conference could be held, TruGreen submitted another use-tax refund claim for a longer period (four-and-a-half years) in the amount of $1,168,333.49.

A referee concluded that TruGreen had established its eligibility for the exemption and was entitled to a refund. The referee reasoned that "there are only two requirements for this exemption, (1) that a person be engaged in a business enterprise, and (2) the tangible personal property be used and consumed in the . . . planting [or] caring for . . . things of the soil . . . ." (Quotation marks omitted; alteration in original.) In 2004, the referee noted, the Legislature removed language from the statute requiring that an entity be engaged in "agricultural or horticultural pro-

duction."[1] The referee concluded: "Petitioner is engaged in a business enterprise (servicing lawns) and used and consumed the tangible personal property purchased (grass seed and fertilizer) in the planting and caring for of [sic] things of the soil. As such, the grass seed and fertilizer it purchased meets the two requirements set forth in [MCL 205.94(1)(f)] for exemption from use tax in Michigan."

The department issued a "Decision and Order of Determination" denying the refund claim, reasoning that "the statute and administrative rules requiring tangible personal property to be used within agricultural production remained valid notwithstanding [the 2004] amendment." According to the department, caselaw following the amendment continued to construe the exemption as implicating "agricultural or horticultural production." "In giving proper meaning to the undefined phrase '*things of the soil,*' " the department advocated, "it is important to consider that Michigan follows the doctrine 'that a word or phrase is given meaning by its context of setting.' " (Citation omitted.) The department concluded that other words in the statutory "setting" support that the Legislature envisioned that "things of the soil" meant growing, cultivating, or extracting crops or comparable things.

TruGreen appealed in the Court of Claims, where the parties filed cross-motions for summary disposi-

[1] The 2004 amendment eliminated two sentences from the statute: "At the time of the transfer of that tangible personal property, the transferee shall sign a statement, in a form approved by the department, stating that the property is to be used or consumed in connection with the production of horticultural or agricultural products as a business enterprise. The statement shall be accepted by the courts as prima facie evidence of the exemption." Compare MCL 205.94(1)(f), as amended by 2002 PA 669 with MCL 205.94(1)(f), as amended by 2004 PA 172. We discuss the 2004 amendment later in the opinion.

tion. TruGreen raised two arguments in support of its eligibility for the exemption. First, TruGreen contended, its activities satisfy the plain language of the statute, as the company is engaged in " 'tilling, planting . . . [and] caring for . . . things of the soil . . . .' " (Alteration in original.) Second, TruGreen argues that this Court's opinion in *William Mueller & Sons, Inc v Dep't of Treasury*, 189 Mich App 570, 571; 473 NW2d 783 (1991), compels the same conclusion, asserting that it stands for the proposition "that agricultural production is not required by the statute."

The Court of Claims rejected both arguments, ruling that the statute required the claimant to create or contribute to an agricultural or horticultural product. Citing several of this Court's cases interpreting MCL 205.94(1)(f), the Court of Claims observed that all "support the conclusion that production of horticultural or agricultural products *is* necessary." The Court of Claims denied TruGreen's motion for reconsideration, TruGreen appealed as of right, and we affirmed.

The Supreme Court vacated our judgment and remanded the matter to us for reconsideration in light of *TOMRA of North America, Inc v Dep't of Treasury*, 505 Mich 333; 952 NW2d 384 (2020).[2] We again affirm.

II

This case presents a purely legal question, and so our review is de novo. *Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 369; 803 NW2d 698 (2010). Because the language of the tax exemption at issue is unambiguous, our task is to discern the ordinary meaning of the statutory text considered as a whole. *TOMRA*, 505 Mich at 339.

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[2] *TruGreen Ltd Partnership v Dep't of Treasury*, 507 Mich 950 (2021).

Historically, tax exemptions were considered "the antithesis of tax equality" and therefore were "strictly construed," generally "in favor of the taxing authority." *Canterbury Health Care, Inc v Dep't of Treasury*, 220 Mich App 23, 31; 558 NW2d 444 (1996). In *TOMRA*, 505 Mich at 342-343, the Supreme Court clarified that the strict-construction canon is a tool "of last resort," and "cannot overcome the plain text[.]" As did the Supreme Court in *TOMRA*, we "read[] the text in its immediate context and with the aid of appropriate canons of interpretation" and without the need of strict construction. *Id*. at 344.

Against this legal backdrop, we turn to the words. In relevant part, the exemption applies to the following:

> Property sold to a person engaged in a business enterprise and using and consuming the property in the tilling, planting, caring for, or harvesting of the things of the soil or in the breeding, raising, or caring for livestock, poultry, or horticultural products, including transfers of livestock, poultry, or horticultural products for further growth. [MCL 205.94(1)(f), as amended by 2012 PA 474.]

TruGreen contends that that because it "plants" grass and is engaged in "caring for things of the soil," it is excused from paying use taxes on the fertilizer, insecticides, and myriad other products it consumes to keep customers' lawns green and healthy. Employing a purely textual approach, TruGreen urges that its activities fall within the realm of "horticulture" and "caring for" soil. The analysis is simple, TruGreen insists. Because it uses and consumes tangible personal property to "plant" and "care for" grass, trees, and shrubs—indisputably things of the soil—it is plainly and unambiguously entitled to the use-tax exemption.

Often, "[w]hat is 'plain and unambiguous' . . . depends on one's frame of reference." *Shiffer v Gibraltar Sch Dist Bd of Ed*, 393 Mich 190, 194; 224 NW2d 255 (1974). Were we to consider the words and phrases cherry-picked by TruGreen in isolation from the rest of the text, we might agree that TruGreen should prevail. TruGreen's proposed interpretive methodology, however, reduces the statute's meaning to a couple of selectively harvested words and buries the balance of the text. This approach risks an interpretation in tension with the whole text's most logical and natural meaning. Rather than plucking words from the statute, we focus on the whole textual landscape. We endeavor to harmonize *all* the words, thereby cultivating a coherent reading that promotes the Legislature's goals.

"[T]he meaning of statutory language, plain or not, depends on context." *King v St Vincent's Hosp*, 502 US 215, 221; 112 S Ct 570; 116 L Ed 2d 578 (1991). "Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used." *Id*. (cleaned up). Our Supreme Court stressed in *TOMRA*, 505 Mich at 349, that " '[c]ontext is a primary determinant of meaning . . . .' " (Citation omitted; alteration in original.)

This focus on the big picture echoes a primary canon of construction: the individual, discrete words of a statute must be read holistically "with a view to their place in the overall statutory scheme." *Davis v Mich Dep't of Treasury*, 489 US 803, 809; 109 S Ct 1500; 103 L Ed 2d 891 (1989); see also Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), p 167 ("[T]he whole-text canon . . . calls on the judicial interpreter to consider the

entire text, in view of its structure and of the physical and logical relation of its many parts."); *South Dearborn Environmental Improvement Ass'n, Inc v Dep't of Environmental Quality*, 502 Mich 349, 367-368; 917 NW2d 603 (2018) ("However, we do not read statutory language in isolation and must construe its meaning in light of the context of its use."); *TOMRA*, 505 Mich at 351 ("This interpretation reflects a holistic reading of the statutory text and gives each provision its appropriate meaning and function.").

The exemption's first relevant sentence is a string of participles: tilling, planting, caring for, harvesting, breeding, and raising. The words describe actions respecting "things of the soil" or "livestock, poultry or horticultural products." Although grass and trees are "things of the soil," that phrase is surrounded by words describing activities that take place on farms. A "fundamental principle of statutory construction (and, indeed, of language itself) [is] that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." *Deal v United States*, 508 US 129, 132; 113 S Ct 1993; 124 L Ed 2d 44 (1993). TruGreen plants grass and cares for it. But the grass it plants and tends is decorative, and the work it does is unrelated to crop cultivation or agriculture in general. Considered within its contextual milieu, the term "things of the soil" pertains to the products of farms and horticultural businesses, not to blades of well-tended grass.[3]

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[3] TruGreen's interpretation would extend the use-tax exemption to every lawn-care and tree-service company doing business in Michigan. And consistently with TruGreen's interpretation of "things of the soil," those businesses would be eligible for a *sales*-tax exemption on lawn and garden-related purchases, as Michigan's sales tax includes the same exemption. See MCL 205.54a(1)(e) (stating that "a sale of tangible personal property to a person engaged in a business enterprise that uses

Independent of the rest of the statute, the terms "caring for" and "planting" could apply to TruGreen's lawn-care enterprise, and the vivisectionist model of statutory interpretation supports that result. Our Supreme Court has applied such an approach, we acknowledge, in cases such as *Robinson v Detroit*, 462 Mich 439, 461-462; 613 NW2d 307 (2000) (relying on a dictionary definition of the word "the"), and *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 160-162; 615 NW2d 702 (2000) (examining separately and independently the four sentences of a single statutory subsection to discern their meaning). Nevertheless, the "context is king" method we employ today has a long and healthy pedigree. For example, the United States Supreme Court has explained that "[i]n determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." *Crandon v United States*, 494 US 152, 156; 110 S Ct 997; 108 L Ed 2d 132 (1990). The Michigan Supreme Court follows the same interpretive pathway, counseling that words "must be read in context with the entire act, and the words and phrases used there must be assigned such meanings as are in harmony with the whole of the statute, construed in the light of history and common sense." *Arrowhead Dev Co v Livingston Co Rd Comm*, 413 Mich 505, 516; 322 NW2d 702 (1982). Presaging the principles clarified in *TOMRA*, in *G C Timmis & Co v Guardian Alarm Co*, 468 Mich 416, 421; 662 NW2d 710 (2003), the Supreme Court highlighted that the statutory language at issue in that case did not "stand alone" and "should not be construed in the void, but

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or consumes the tangible personal property, directly or indirectly, for either the tilling, planting, draining, caring for, maintaining, or harvesting of things of the soil or the breeding, raising, or caring for livestock, poultry, or horticultural products" is exempt from sales tax).

should be read together to harmonize the meaning, giving effect to the act as a whole." (Cleaned up.) Our Supreme Court continued, "Although a phrase or a statement may mean one thing when read in isolation, it may mean something substantially different when read in context," which requires interpreting courts to refrain from "divorc[ing]" "words and clauses . . . from those which precede and those which follow." *Id*. (cleaned up). "[W]ords grouped in a list should be given related meaning." *Id*. at 422 (cleaned up).

The words closely adjoining "planting" and "caring for . . . things of the soil" are: "tilling," "harvesting of things of the soil," "breeding," "raising," "caring for livestock, poultry, or horticultural products," and "the transfers of livestock, poultry, or horticultural products for further growth." MCL 205.94(1)(f), as amended by 2012 PA 474. This collection of words and phrases logically connotes that the use-tax exemption incentivizes investment in the agricultural realm.[4] Farmers "till," "plant," "care for" and "harvest" things of the soil; they also "care for" animals. Several sentences that followed these, then located in the same statutory subsection, reinforce that the Legislature intended the exemption to apply to agricultural activities.[5] The second sentence of MCL 205.94(1)(f), as amended by 2012 PA 474, stated that the "exemption includes machinery that is capable of simultaneously harvesting grain or other crops and biomass and machinery

[4] Promoting agricultural investment benefits Michigan's economy and helps put local food on our tables. Lawns, on the other hand, demand fertilizer, water, energy, and land. The exemption from taxation at issue encourages the *production* of market resources, not their consumption.

[5] The remaining sentences of MCL 205.94(1)(f), as amended by 2012 PA 474, have since been moved to other subsections of the statute.

used for the purpose of harvesting biomass."[6] The third sentence further provided that the "exemption includes agricultural land tile, which means fired clay or perforated plastic tubing used as part of a subsurface drainage system for land used in the production of agricultural products as a business enterprise and includes a portable grain bin . . . ." Read as a cohesive whole, MCL 205.94(1) was and is intended to benefit businesses that contribute to our state's agricultural sector.

III

We are not the first judges to conclude that MCL 205.94(1) applies to businesses associated with agriculture. The caselaw has consistently referred to the statutory subsection at issue as the "agricultural-production exemption." See *Detroit Edison Co v Dep't of Treasury*, 498 Mich 28, 50 n 14; 869 NW2d 810 (2015); *Sietsema Farms Feeds, LLC v Dep't of Treasury*, 296 Mich App 232, 235; 818 NW2d 489 (2012); *Mich Milk Producers Ass'n v Dep't of Treasury*, 242 Mich App 486, 488; 618 NW2d 917 (2000); *Kappen Tree Serv, LLC v Dep't of Treasury*, unpublished per curiam opinion of the Court of Appeals, issued April 26, 2016 (Docket No 325984), p 3.

William Mueller & Sons, 189 Mich App 570, is instructive. In that case, we held the exemption applicable to Mueller & Sons' purchase of fertilizer equipment. Mueller & Sons was "in the business of testing farm soil, recommending fertilizer mixes, and selling seed and fertilizer to farmers." *Id*. at 571. The company also purchased produce from farmers and both used

[6] The subsection defined "biomass" as "crop residue used to produce energy or agricultural crops grown specifically for the production of energy." MCL 205.94(1)(f), as amended by 2012 PA 474.

fertilization-application equipment and offered it for rent to farmers. *Id*. This Court rebuffed the department's argument that to qualify for the exemption the taxpayer had to *directly* produce agricultural products and, instead, explained that "Section 4(f), by its plain language, exempts property sold to a business enterprise if the property is used for agricultural or horticultural growth." *Id*. at 573. The taxpayer itself need not engage "in the business of producing agricultural products." *Id*. at 573-574. The touchstone, we highlighted, was involvement in an agricultural endeavor. *Id*. at 574.

TruGreen asserts that *Mueller* is inapposite, as the statute in effect at that time included the following two sentences:

> [A]t the time of the transfer of the tangible personal property, the transferee shall sign a statement, in a form approved by the department, stating that the property is to be used or consumed in connection with the production of horticultural or agricultural products as a business enterprise. The statement shall be accepted by the courts as prima facie evidence of the exemption. [MCL 205.94(f), as amended by 1978 PA 262.]

In 2004, the Legislature eliminated this signed-statement requirement. 2004 PA 172. The elimination of statutory language sometimes supplies an indicator of legislative intent. *Sam v Balardo*, 411 Mich 405, 430; 308 NW2d 142 (1981). Here, however, all that was removed was a certification requirement. In its opinion, the Court of Claims noted that this amendment was part of a larger legislative plan to adopt the Streamlined Sales and Use Tax Administration Act, MCL 205.801 *et seq*. The seller now bears the burden of identifying the ground for an exemption, not the purchaser. See MCL 205.104b(1). This administrative change did not alter

the design, structure, purpose, or meaning of the rest of the statute.

MCL 205.94(1) permits a tax exemption for property used in agricultural production and supply. TruGreen is not involved in any agricultural endeavors. Applying an organic approach to *all* the statutory words, we affirm the Court of Claims.

SHAPIRO, P.J., concurred with GLEICHER, J.

SHAPIRO, P.J. (*concurring*). I join Judge GLEICHER's opinion in full. In our previous review of this case, I authored a concurrence in response to Judge SWARTZLE's dissent. *TruGreen Ltd Partnership v Dep't of Treasury*, 332 Mich App 73, 89-96; 955 NW2d 529 (2020) (SHAPIRO, P.J., concurring), vacated and remanded 507 Mich 950 (2021). Given that Judge SWARTZLE has elected to adopt that dissent by reference, I will do the same by adopting my prior concurrence by reference rather than repeating it here.

SWARTZLE, J. (*dissenting*).

—A rule written broadly should be understood to be a broad rule—

There is no question that the Legislature chose broad language—"things of the soil"—when it enacted the use-tax exemption here. MCL 205.94(1)(f). The majority read this broad language narrowly in its original opinion, *TruGreen Ltd Partnership v Dep't of Treasury*, 332 Mich App 73; 955 NW2d 529 (2020), and now after our Supreme Court vacated that opinion, *TruGreen Ltd Partnership v Dep't of Treasury*, 507 Mich 950 (2021), the majority continues to read it narrowly on remand. But in my opinion, it is a grave mistake to avoid the plain, ordinary meaning of a

statute based on the notion that the Legislature simply must have meant something other than what it actually said—the majority's "holistic," "communal," "organic" approach to statutory interpretation notwithstanding.

By my count, the majority violated at least eight principles of statutory interpretation in its original opinion:

i. fair-reading approach;

ii. preference for the ordinary semantic meaning of words;

iii. proper use of a dictionary;

iv. proper analysis of context, including grammatical structure;

v. proper use of statutory history;

vi. *expressio unius est exclusio alterius*;

vii. avoidance of false equivalency; and

viii. use of the strict-construction canon only as a last resort.

Having now excised its references to the strict-construction canon, the majority violates only the first seven of these principles in its opinion on remand.

Accordingly, I now respectfully dissent for 7/8 of the reasons I did in my original dissenting opinion. See *TruGreen*, 332 Mich App at 96-119 (SWARTZLE, J., dissenting).

PAYNE v PAYNE

Docket No. 354057. Submitted May 4, 2021, at Detroit. Decided July 29, 2021, at 9:20 a.m.

Jeff Payne brought an action against his father, David Payne, in the Alpena Circuit Court seeking damages for injuries plaintiff suffered when the two were sharing a hunting blind during a European-style pheasant hunt. Plaintiff alleged that defendant accidentally shot plaintiff's hand, causing plaintiff to lose two fingers. Plaintiff's complaint alleged ordinary negligence, gross negligence, and reckless misconduct. Both parties moved for summary disposition under MCR 2.116(C)(10). Defendant argued that under *Ritchie-Gamester v Berkley*, 461 Mich 73 (1999), his liability was limited to injuries caused by reckless misconduct and that the record was clear that he did not act recklessly. Plaintiff argued that there was no genuine issue of material fact that defendant had breached the standard of care for an ordinary-negligence claim. The court, Michael G. Mack, J., denied both motions, concluding that the pheasant hunt was a recreational activity under *Ritchie-Gamester* and that the standard of care was recklessness, not ordinary negligence. The court further concluded that reasonable minds could differ on whether defendant's conduct was reckless. Plaintiff filed a delayed application for leave to appeal, which the Court of Appeals denied in an unpublished order entered March 10, 2017 (Docket No. 335952). Plaintiff then sought leave to appeal in the Supreme Court, which also denied leave. 501 Mich 863 (2017). The trial court then entered an order staying the proceedings pending the Supreme Court's decision in *Bertin v Mann*, 502 Mich 603 (2018), which ultimately held that "inherent risks" under *Ritchie-Gamester* are those that are reasonably foreseeable under the circumstances of the case and that when an injury arises from such a risk, the reckless-misconduct standard applies. After the *Bertin* decision was released, plaintiff moved for relief from judgment arguing that the trial court's denial of summary disposition essentially dismissed plaintiff's ordinary-negligence claim and that its ruling should be reversed under *Bertin* because there was not an inherent risk that a hunter would be shot by a fellow hunter in the same blind during a European-style pheasant hunt. The trial

court denied plaintiff's motion and concluded that a reasonable person would have foreseen getting shot as an inherent risk of participating in a European-style pheasant hunt. Plaintiff filed a second delayed application for leave to appeal. The Court of Appeals denied leave in an unpublished order entered May 8, 2019 (Docket No. 346694), and the Michigan Supreme Court also denied leave, 505 Mich 974 (2020). Back in the trial court, defendant filed a renewed motion for summary disposition, arguing that there was not sufficient evidence to show that he acted recklessly. The trial court denied the motion, continuing to conclude that because reasonable minds could differ as to whether defendant's conduct was reckless, the question should go to a jury. The trial court then entered a consent judgment dismissing plaintiff's gross-negligence claim with prejudice so that plaintiff could file an appeal challenging the court's dismissal of plaintiff's ordinary-negligence claim. Plaintiff appealed.

The Court of Appeals *held*:

1. Michigan courts recognize reckless misconduct as the minimum standard of care for coparticipants in recreational activities. The Supreme Court made clear in *Ritchie-Gamester* that the reckless-misconduct standard only applies to risks that are inherent in the recreational activity; it does not apply to risks that exceed the normal bounds of the activity. In *Bertin*, the Supreme Court explained that identifying whether a particular risk is "inherent" to a particular activity comes down to foreseeability and that inherent risks under *Ritchie-Gamester* are those that are reasonably foreseeable under the circumstances of the case. When an injury arises from such a risk, the reckless-misconduct standard of care applies. Plaintiff conceded that hunting is a recreational activity but argued that our Supreme Court did not intend to subject hunting to the *Ritchie-Gamester*/*Bertin* framework because prior caselaw applied the ordinary-negligence standard to hunting and public policy supported application of that standard. Plaintiff specifically argued that if the reckless-misconduct standard were applied to firearm-related recreational activities, participants would be permitted to ignore certain rules of firearm safety without fear of litigation. Plaintiff's caselaw and policy arguments were belied by the analysis set out in *Ritchie-Gamester*. Moreover, the risks posed by use of a firearm were best considered at the next stage of the analysis—i.e., whether a particular risk of injury was reasonably foreseeable under the circumstances. Hunting is a recreational activity subject to the standard-of-care framework established in *Ritchie-Gamester* and *Bertin*.

2. Notwithstanding the applicability of the *Ritchie-Gamester/Bertin* framework, the question remained whether the particular risk that gave rise to plaintiff's injury was inherent in the recreational activity at issue. A hunter who participates in a pheasant hunt with other hunters is on notice that firearm activity is taking place in close proximity. It is also well known that the use of a firearm—a dangerous instrumentality—during hunting poses some risk of harm. Plaintiff knew that defendant could be careless with a firearm, and it can be presumed that plaintiff knew that defendant had several medical conditions that could affect how defendant handled a firearm. Such evidence pointed to a foreseeable risk. The two men had hunted together regularly over many years, and neither testified about a prior similar incident. Plaintiff also knew that defendant was well-versed in the rules of hunting, including this style of hunting, and the weather conditions were good and there was nothing in the record to suggest that defendant's medical conditions affected him at the time of the incident. Moreover, defendant was an experienced, knowledgeable hunter, whom plaintiff knew very well. And the two stood shoulder-to-shoulder while they both shot outward from a blind at pheasants flying overhead. It might very well have been reasonably foreseeable that plaintiff was at risk of being shot by a hunter from another blind, but that was not what happened. Instead, after firing at a pheasant, defendant lowered his shotgun, which suddenly discharged with the birdshot striking plaintiff's hand. On that record, it remained a question of fact whether it was reasonably foreseeable to plaintiff that there was a risk that defendant would injure plaintiff in this way. On remand, if the finder of fact concludes that the risk was reasonably foreseeable, then defendant owed a duty only to refrain from reckless misconduct. If the finder of fact concludes the risk was not reasonably foreseeable, then defendant owed a duty to exercise ordinary care.

Affirmed in part and reversed in part; case remanded for further proceedings.

PERSONAL INJURY — STANDARD OF CARE — RECREATIONAL ACTIVITIES — HUNTING.

Hunting is a recreational activity subject to the standard-of-care framework established in *Ritchie-Gamester v Berkley*, 461 Mich 73 (1999), and *Bertin v Mann*, 502 Mich 603 (2018).

David F. Zuppke, PLC (by *David F. Zuppke*) and *James G. Gross, PLC* (by *James G. Gross*) for plaintiff.

Gault Davison, PC (by *Gregory A. Nave*, *Edward B. Davison*, and *Michael W. Edmunds*) for defendant.

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

SWARTZLE, J. Hunting injuries are not new to the courts of Michigan. Hunting has a long, rich tradition in the state, but as with any sport or recreational activity, injuries will happen, sometimes with devastating consequences. To encourage participation in sports and recreational activities and provide certainty in the law, our Supreme Court adopted a framework governing the standard of care that a participant owes to a coparticipant. Where a risk of injury is inherent to the sport or recreational activity, the standard of care is reckless misconduct; where a risk is not inherent, the standard of care is ordinary negligence.

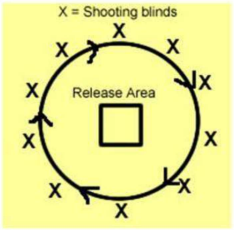
In this case, we conclude that there remains a question of fact on whether there was an inherent risk that a hunter would be shot by a fellow hunter in the same blind during a European-style pheasant hunt. Accordingly, we affirm in part and reverse in part, and we remand the matter back to the trial court for further proceedings.

I. BACKGROUND

European-Style Pheasant Hunt. Defendant is plaintiff's father. According to plaintiff, both he and his father are active, experienced outdoorsmen. The two frequently hunt together, approximately 20 times a year.

In the fall of 2015, the two men participated in a European-style pheasant hunt (sometimes called a "pheasant shoot"). This type of hunt involves several two-person blinds arranged in a circle around a tower

from which pheasants are released into the air. Each blind is approximately four feet front to back and eight feet in width. A blind is designed to accommodate two hunters, standing side-by-side. The following diagram and photograph were included in the trial court record to illustrate the layout of the hunt:



Once the hunters are in their respective blinds, a horn signals, pheasants are released from the tower, and hunters shoot at the wildfowl. After a set time limit, a second horn signals, the hunters cease fire, and they rotate to another blind.

Before beginning the hunt, the organizer instructed the hunters on the applicable rules. These included: (1) no shooting while walking from blind to blind; (2) no shooting until the horn sounds; (3) stop shooting when the horn sounds a second time; (4) no loading of shotguns until arriving at a blind; (5) hunters must wear "hunter orange" clothing; (6) no shooting directly to the left or right; and (7) no low shooting—a hunter must see sky around the pheasant before shooting at it.

According to plaintiff, his father did not have any problems handling his shotgun during the first circuit around the tower. Weather conditions were good, and the ground was not slippery. At some point during the second circuit, plaintiff and defendant were standing

next to each other in a blind; plaintiff was to the left of defendant as the two faced the tower. When the first horn sounded, the men raised their shotguns to shoot at a pheasant that was heading toward them at "12 o'clock." Plaintiff took just a single shot because, by the time he tracked the pheasant, the bird was directly above him, and he believed that it would not be safe to take a second shot. Defendant took three shots at the pheasant but did not hit the bird. After the third shot, defendant lowered his shotgun; he did not engage the safety or take his finger off the trigger. Defendant's shotgun suddenly discharged, and the birdshot struck plaintiff's hand, resulting in the loss of two of plaintiff's fingers.

The Lawsuit. Plaintiff sued defendant, alleging ordinary negligence, gross negligence, and reckless misconduct. Defendant answered, denying many of plaintiff's allegations and asserting that plaintiff's ordinary-negligence claim was barred by the standard-of-care framework set forth in *Ritchie-Gamester v Berkley*, 461 Mich 73; 597 NW2d 517 (1999).

During discovery, a key issue explored by the parties was defendant's state of mind and physical condition during the pheasant hunt. Defendant testified during his deposition that he has hunted for decades, and he knows the basic safety rules of hunting and firearms. On the day of the hunt, he had forgotten his regular hunting gloves, and instead he had to use thicker gloves that had less "feel" to them. Defendant testified that he suffers from Raynaud's syndrome, a condition that causes temporary discoloration, tingling, and numbness in his hands, and he further has difficulty gripping with his right hand because of a partially missing middle finger. Defendant admitted that, when his shotgun discharged and the birdshot hit his son's

hand, his shotgun was not pointed in a safe direction, his finger should not have been on the trigger, and he did not have control of the firearm, all of which violated the basic hunting and firearm safety rules.

For his part, plaintiff admitted during his deposition that, over the years, he would sometimes be concerned about how defendant handled his firearm. Defendant would, for example, occasionally swing his firearm in such a way that the muzzle would cross plaintiff's body. This might happen when defendant entered or exited a vehicle or at the shooting range, but not out in the field, according to plaintiff.

Both parties moved for summary disposition under MCR 2.116(C)(10). Defendant argued that *Ritchie-Gamester* limited his liability to injuries caused by reckless misconduct and the record was clear that he did not act recklessly. Plaintiff argued to the contrary that there was no genuine issue of material fact that defendant had breached the standard of care for an ordinary-negligence claim.

The trial court denied both motions. With respect to the applicable standard of care, the trial court held that the pheasant hunt fell within the scope of recreational activities contemplated by *Ritchie-Gamester*, and, as a result, defendant's conduct was measured by the standard of recklessness, not ordinary negligence. The trial court further concluded that reasonable minds could differ on whether defendant's conduct amounted to reckless misconduct.

First Application for Leave to Appeal. Plaintiff filed a delayed application for leave to appeal from the trial court's ruling, arguing that the trial court erred in finding that the pheasant hunt was within the scope of *Ritchie-Gamester*. This Court denied plaintiff's application "for failure to persuade the Court of the need for

immediate appellate review." *Payne v Payne*, unpublished order of the Court of Appeals, entered March 10, 2017 (Docket No. 335952). Plaintiff then sought leave to appeal to our Supreme Court, which also denied leave to appeal. *Payne v Payne*, 501 Mich 863 (2017).

After plaintiff's unsuccessful appeal, the trial court entered a stipulated order staying proceedings, pending the Supreme Court's decision in *Bertin v Mann*, 502 Mich 603; 918 NW2d 707 (2018). After the Court decided *Bertin*, plaintiff moved for relief from judgment, arguing that the trial court's denial of summary disposition essentially dismissed plaintiff's ordinary-negligence claim and that its ruling should be reversed under *Bertin*.

The trial court denied plaintiff's motion, stating that it was "not persuaded that extraordinary circumstances exist that would require setting aside the judgment to achieve justice." The trial court recognized the distinction made in *Bertin* "that coparticipants in a recreational activity owe each other a duty not to act recklessly, but that the standard only applies to injuries that arise from risk inherent to the activity." Analyzing plaintiff's claim under *Bertin*, the trial court concluded:

> In this European Shoot, 18 two-person shooting blinds were situated in a circle. Pheasants were then released from a central point to be shot. A horn signaled shooters to cease firing and rotate to the next blind. At some point, defendant fired his shotgun at a pheasant. As he lowered his gun, it discharged, and plaintiff was shot in the left hand. A reasonable person would have foreseen this inherent risk while participating in such an activity.

Second Application for Leave to Appeal. Plaintiff filed a second delayed application for leave to appeal, arguing that *Ritchie-Gamester* did not apply to his

claim. This Court denied the second application, *Payne v Payne*, unpublished order of the Court of Appeals, entered May 8, 2019 (Docket No. 346694), as did the Supreme Court, *Payne v Payne*, 505 Mich 974 (2020).

Back in the trial court, defendant filed a renewed motion for summary disposition, arguing that there was not sufficient evidence to show that he acted recklessly. The trial court denied the motion, explaining:

> Although all the testimony indicates that the gun discharged suddenly and accidentally, this same testimony could support a finding of reckless misconduct. There is evidence that defendant wore thick gloves, kept his finger on the trigger without being ready to shoot, and pointed his loaded gun directly at the plaintiff's hand. Reasonable minds could differ as to whether this amounted to reckless misconduct. Accordingly this question should go to a jury.

After denying defendant's motion, the trial court entered a consent order that dismissed plaintiff's "gross negligence claim with prejudice, which will free [p]laintiff to pursue an appeal challenging the [c]ourt's dismissal of his ordinary negligence claim."

II. ANALYSIS

On appeal, plaintiff argues that the trial court erred by holding that (a) the European-style pheasant hunt was a recreational activity under *Ritchie-Gamester*, and (b) plaintiff's injury was a reasonably foreseeable risk of the pheasant hunt, which subjected plaintiff's claim to a reckless-misconduct standard of care. For the following reasons, we reject plaintiff's first claim but conclude that there is a genuine issue of material fact on the second one.

A. STANDARD OF REVIEW

We review de novo a trial court's decision on a motion for summary disposition under MCR 2.116(C)(10). *Ritchie-Gamester*, 461 Mich at 76-77. When deciding a motion for summary disposition under MCR 2.116(C)(10), we consider the evidence submitted in a light most favorable to the nonmoving party. *Id*. at 75. Summary disposition is appropriate when "there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

B. RECREATIONAL ACTIVITY

Plaintiff first argues that the trial court erred in concluding that a European-style pheasant hunt is a recreational activity subject to the framework first set forth by our Supreme Court in *Ritchie-Gamester* and subsequently developed by the Court in *Bertin*. Plaintiff concedes that hunting is, broadly speaking, a recreational activity, but he argues that our Supreme Court did not intend to subject hunting to the *Ritchie-Gamester/Bertin* framework. We begin by analyzing the framework generally and then take up the question of hunting specifically.

The Ritchie-Gamester *Court Adopts the Reckless-Misconduct Standard*. Under the common law of tort, many interpersonal interactions are governed by the ordinary-negligence standard of care. If the common law provides that a person owes a duty to another person, then that duty is usually to exercise ordinary care commensurate with the particular circumstances of the situation. Up through the 1970s and 1980s, courts of this state imposed an ordinary-negligence standard

on hunters when they interacted with members of their own hunting party, *Nagy v McEachern*, 28 Mich App 439; 184 NW2d 556 (1970), members of another hunting party, *Clark v Braham*, 386 Mich 53; 191 NW2d 352 (1971), and nonhunters generally, *Walters v Sargent*, 46 Mich App 379; 208 NW2d 207 (1973), aff'd in part and rev'd in part 390 Mich 775 (1973). But in 1999, our Supreme Court pivoted away from the ordinary-negligence standard in a narrow category of cases—those cases involving coparticipants who are engaged in a sport or recreational activity.

In *Ritchie-Gamester*, an ice skater collided with another skater. The plaintiff asked the Court to apply the standard of ordinary negligence to her common-law claim, while the defendant argued that a reckless-misconduct standard should apply. *Ritchie-Gamester*, 461 Mich at 75-76.

The Court started its analysis by reviewing the then-current state of the common law for sports and recreational activities. *Id*. at 77-85. The first and second published opinions it analyzed involved parties who were fishing and duck hunting, respectively. *Id*. at 77-78 (discussing *Williams v Wood*, 260 Mich 322; 244 NW 490 (1932) (fishing), and *Felgner v Anderson*, 375 Mich 23; 133 NW2d 136 (1965) (duck hunting)). In both of the earlier cases, the courts applied the standard of ordinary negligence to the plaintiffs' claims, and in *Felgner*, the assumption-of-risk doctrine was abolished in cases involving sports and recreational activities. *Id*. at 78.

The Court then observed that, post-*Felgner*, courts of this state "began to move away from the 'ordinary care' standard" in sports and recreational-activity cases. *Id*. This movement reflected the presumption that coparticipants in a sport or recreational activity voluntarily consent to the risk of injury inherent in that activity,

and in the absence of the assumption-of-risk doctrine, the standard itself needed to adjust to reflect this presumption. The movement was uneven, however, because some courts continued to apply a straight ordinary-negligence standard, see, e.g., *Schmidt v Youngs*, 215 Mich App 222; 544 NW2d 743 (1996), while others applied less-stringent standards of various description, see, e.g., *Higgins v Pfeiffer*, 215 Mich App 423; 546 NW2d 645 (1996).

Looking outside of Michigan, the Supreme Court observed that other jurisdictions were basically split into two camps. A minority of jurisdictions applied an ordinary-negligence standard, while a majority of jurisdictions applied "a 'reckless or intentional conduct' or a 'willful and wanton or intentional misconduct' standard." *Ritchie-Gamester*, 461 Mich at 81-82. For those courts that applied a less-stringent standard, some justified the standard on the risk assumed or consented to by coparticipants, and almost every court "recognized that a fear of litigation could alter the nature of recreational activities and sports." *Id*. at 84. As the Court observed, "Fear of civil liability stemming from negligent acts occurring in an athletic event could curtail the proper fervor with which the game should be played and discourage individual participation." *Id*. (cleaned up).

With this background in mind, the Court took as a basic premise that "[w]hen people engage in a recreational activity, they have voluntarily subjected themselves to certain risks inherent in that activity. When one of those risks results in injury, the participant has no ground for complaint." *Id*. at 87. In light of this understanding, the Court joined the majority of other jurisdictions in adopting "reckless misconduct as the minimum standard of care for coparticipants in recreational activities." *Id*. at 89.

The adoption of the reckless-misconduct standard did not mean, however, that ordinary negligence had no place in recreational activities. The Supreme Court made clear that the reckless-misconduct standard applied only to risks that were inherent in the recreational activity, not those risks that exceeded "the normal bounds" of the activity. *Id*. at 94. Moreover, the reckless-misconduct standard applied only in the context where one participant injured another coparticipant, not where a participant injured a nonparticipant. In footnote 9 of its opinion, the Court explained that its holding was both broad and narrow: "We recognize that we have stated this standard broadly as applying to all 'recreational activities.' However, the precise scope of this rule is best established by allowing it to emerge on a case-by-case basis, so that we might carefully consider the application of the recklessness standard in various factual contexts." *Id*. at 89 n 9.

The Bertin *Court Clarifies How to Identify an "Inherent" Risk*. Two decades later, the Supreme Court considered a question that had come up repeatedly in sports and recreation lawsuits after *Ritchie-Gamester*, namely, how to identify whether a particular risk was "inherent" to a particular activity. In *Bertin*, the parties had been golfing, and the defendant hit the plaintiff with a golf cart. *Bertin*, 502 Mich at 606-607. The Court had to resolve whether the risk of being hit by a golf cart during a round of golf was an inherent risk of the sport. *Id*. at 605. If so, then the defendant "owed a duty only to refrain from reckless misconduct," but if not, then the defendant would "be held to the negligence standard of conduct." *Id*. at 605-606.

The *Bertin* Court concluded that the issue came down to one of foreseeability. Specifically, the Court held "that 'inherent risks' under *Ritchie-Gamester* are

those that are reasonably foreseeable under the circumstances of the case. When an injury arises from such a risk, the reckless-misconduct standard applies." *Id*. at 622. In determining whether a risk is reasonably foreseeable, the Court stressed several aspects. First, "[t]he foreseeability of the risk is a question of fact." *Id*. at 619. Second, "it is the risk of harm that must be reasonably foreseeable," not just the foreseeability of a particular use or act within the recreational activity. *Id*. at 620. Third, the test is an objective one, and it "focuses on what risks a reasonable participant, under the circumstances, would have foreseen." *Id*. Fourth, "[t]he risk must be defined by the factual circumstances of the case—it is not enough that the participant could foresee being injured in general; the participant must have been able to foresee that the injury could arise through the 'mechanism' it resulted from." *Id*. at 620-621. And fifth, the Court identified several factual circumstances that could be relevant, including: (a) "the general characteristics of the participants, such as their relationship to each other and to the activity and their experience with the sport"; (b) "[t]he general rules of the activity"; (c) "any regular departures from the rules or other practices not accounted for by the rules"; and (d) "any regulations prescribed by the venue at which the activity is taking place." *Id*. at 621-622. As the Court summarized, courts should apply "the usual approach to reasonable foreseeability" when determining whether a risk is inherent to a sport or recreational activity. *Id*. at 622.

Does the Ritchie-Gamester/Bertin *Framework Apply to Hunting?* Given this framework, the first question to consider is whether the framework even applies here. More specifically, plaintiff acknowledges that a European-style pheasant hunt is a "recreational activity," but he argues on appeal that his claim remains

subject to pre-*Ritchie-Gamester*/*Bertin* caselaw that applied the ordinary-negligence standard to hunting. Plaintiff maintains that this is justified on policy grounds because a firearm is a dangerous instrumentality and its use should be subject to a stricter standard than mere reckless misconduct.

Plaintiff is correct that hunting is a recreational activity. While a European-style pheasant hunt is a specialized form of hunting, broadly speaking, hunting is a physical activity performed outdoors for enjoyment, relaxation, and exercise. (This is not to ignore the fact that hunting is much more than a recreational activity; hunting can also serve as a vital source of sustenance for people and as a natural-resource management tool for the state.) Hunting is subject to extensive official rules and unofficial practices, see, e.g., MCL 324.43501 to MCL 324.43561, and it can be performed alone or with other hunters. Not surprisingly, hunting has long been recognized by our Legislature and courts as a recreational activity. See, e.g., MCL 324.73105 (classifying hunting, fishing, and trapping as recreational activities); *DiFranco v Pickard*, 427 Mich 32, 86; 398 NW2d 896 (1986) (categorizing hunting as a recreational activity).[1]

Despite this, plaintiff argues that the *Ritchie-Gamester* Court did not intend to include hunting within its new analytical framework, but a review of the decision belies this argument. As noted earlier, the majority began its analysis by reviewing the then-current "state of Michigan law regarding the appropriate standard of care in the *recreational activity* context." *Ritchie-Gamester*, 461 Mich at 77 (emphasis added). The first two cases that the majority consid-

[1] *DiFranco* was superseded by statute on other grounds, as stated in *McCormick v Carrier*, 487 Mich 180, 190-191 (2010).

ered involved fishing and hunting, *id*. at 77-78, and, as it subsequently summarized the law of this state, the majority described the activities it reviewed collectively as "recreational," *id*. at 81. At no point did the majority exempt hunting from its framework or otherwise suggest that its framework did not encompass the activity.

In fact, in his separate concurring opinion in *Ritchie-Gamester*, Justice BRICKLEY made clear that he believed that the majority's analysis applied to hunting. For instance, Justice BRICKLEY described the *Felgner* duck-hunting case as a "sports injury case," and later he cited hunting and fishing statistics to support his belief that "recreational sports in Michigan" showed "no sign of any wane" that might justify a change in the standard of care. *Id*. at 96, 98 & n 3 (BRICKLEY, J, concurring). The majority offered a lengthy response to various points made by Justice BRICKLEY, *id*. at 90-95 (opinion of the Court), but at no point did the majority suggest that Justice BRICKLEY was mistaken with regard to whether hunting was a recreational activity subject to the majority's reckless-misconduct analytical framework.

Plaintiff insists to the contrary that the majority did, in fact, intend to limit significantly the reach of its framework. This can be seen, according to plaintiff, by considering footnote 9 of the majority's opinion. Based on this footnote, plaintiff concludes that the majority exempted hunting from the reckless-misconduct framework.

This is, however, a misreading of footnote 9. The majority recognized in this footnote that the standard it developed was broadly worded to apply to "all 'recreational activities.' " *Id*. at 89 n 9. At the same time, the majority observed that the "precise scope" of

the standard was best left to emerge on a case-by-case basis. *Id*. We understand the majority to mean with this footnote that, when a participant injures a coparticipant in a sport or recreational activity, a court will apply the analytical framework set forth in *Ritchie-Gamester* (as subsequently developed in *Bertin*). The law will then develop on a case-by-case basis, as each court determines whether, in the context of the particular activity, it was a reasonably foreseeable risk that a participant could be injured by a coparticipant in a particular manner. A contrary reading of footnote 9 would suggest that the *Ritchie-Gamester* majority violated the old adage that one should not hide an elephant in a mousehole.

In his reply brief, plaintiff further points this Court to MCL 752.861, which criminalizes the careless, reckless, or negligent use of a firearm that kills or injures a person. While violation of a statute can be, under certain circumstances, used to support a common-law claim, see *Randall v Mich High Sch Athletic Ass'n*, 334 Mich App 697; 965 NW2d 690 (2020), plaintiff does not argue that defendant violated the criminal statute or, even if defendant did, that this would support plaintiff's common-law claim. The statute provides little support here, as it does not itself create a statutory civil cause of action and, moreover, "recklessness" and "negligence" in the criminal context are separate and distinct from "recklessness" and "negligence" in the civil context. See *Farmer v Brennan*, 511 US 825, 836-837; 114 S Ct 1970; 128 L Ed 2d 811 (1994) (addressing recklessness in both the criminal and civil contexts); *People v Schaefer*, 473 Mich 418, 438; 703 NW2d 774 (2005) (addressing gross negligence in the criminal-law context); *Cichewicz v Salesin*, 306 Mich App 14, 28-29; 854 NW2d 901 (2014) (addressing gross negligence in the civil-law context); *People v Williams*,

244 Mich App 249, 254; 625 NW2d 132 (2001) ("[A] civil action is completely separate and independent from a criminal action."); *Aetna Cas & Surety Co v Collins*, 143 Mich App 661, 663; 373 NW2d 177 (1985) ("Criminal and civil liability are not synonymous.").

Lastly, plaintiff argues that public policy favors rejection of the *Ritchie-Gamester/Bertin* framework in the hunting context because, if the reckless-misconduct standard is applied to firearm-related recreational activities, participants would be permitted to ignore certain rules of firearm safety without the fear of litigation. This argument is similar to one made by Justice BRICKLEY in his separate opinion in *Ritchie-Gamester*. In response to the majority's position that an ordinary-negligence standard would be insufficient to "encourage[] vigorous participation in recreational activities," *Ritchie-Gamester*, 461 Mich at 89 (opinion of the Court), Justice BRICKLEY countered, "[I]t is just as likely that many would choose not to participate in these activities because the recklessness standard might encourage dangerous behavior or make it too difficult for participants to recover in the event they are injured," *id*. at 99-100 (BRICKLEY, J, concurring). Although both the majority and Justice BRICKLEY made valid points on the question of which standard best encourages participation in recreational activities, the majority's position ultimately won the day.

And regardless, plaintiff's specific argument is too sweeping in its scope. If the use of a dangerous instrumentality was alone sufficient to justify carving out hunting from the *Ritchie-Gamester/Bertin* framework, then this logic would presumably apply to several other sports and recreational activities as well, including fencing, archery, javelin throw, and competitive firearm shooting. Adoption of plaintiff's position would

result in the very "bowdlerization" of the law for sports and recreational activities against which the majority expressly warned in *Ritchie-Gamester*, 461 Mich at 91. Cf. *Konrad v Morant*, 89 Ohio App 3d 803, 806; 627 NE2d 1007 (1993) (explaining that "the focus in determining whether an activity is recreational is not on the instrument used in the activity but on the expectations of the participants" and holding that a game of "BB Gun War" was a recreational activity subject to a recklessness standard of care).

With that said, courts cannot ignore the dangerousness of an instrumentality used in a sport or recreational activity. The instrumentalities used in bowling and basketball, for example, present much different risks than those used in golf and hunting. Each instrumentality, as it is used in a specific activity, will present risks that differ in degree and in kind from an instrumentality used in another activity. The risks posed by an instrumentality in a particular activity are too fact-specific to make sweeping exemptions from the *Ritchie-Gamester/Bertin* framework. Instead, the risks are best considered at the next stage of the analysis—i.e., whether a particular risk of injury was reasonably foreseeable under the circumstances.

It is to this question that we now turn.

C. QUESTION OF FACT ON REASONABLE FORESEEABILITY

Although the *Ritchie-Gamester/Bertin* framework applies, we must consider whether the particular risk that gave rise to plaintiff's injury was inherent to the recreational activity. Father and son were experienced hunters, well-versed in hunter-safety rules, standing shoulder-to-shoulder in the same blind, and shooting away from each other. Plaintiff concedes that there was an inherent risk that he could have been shot by a

hunter in a blind directly across from him, but he argues that being shot by defendant did not present the same type of risk.

As the *Bertin* Court made clear, whether a particular risk of harm was inherent to a recreational activity is a question of fact. The test is an objective one, i.e., it is based on "what risks a reasonable participant, under the circumstances, would have foreseen," *Bertin*, 502 Mich at 620, so a party's subjective evaluation of the circumstances and tolerance for risk are irrelevant. This does not mean, however, that the parties' observations are likewise irrelevant and can be ignored—rather, the observations must be considered from the viewpoint of the common law's "reasonable participant."

Like other sports and recreational activities, hunting in general poses known risks to the participants. While it would be unexpected in everyday life for a person to discharge a firearm near another person, a hunter that is participating in a pheasant hunt with other hunters is on notice that firearm activity is taking place in close physical proximity.

And yet, on review of this record, we conclude that there remains a genuine issue of material fact on whether the risk of being shot by defendant was reasonably foreseeable to someone in plaintiff's position. On the one hand, it is well known that, *ceteris paribus*, the use of a firearm during hunting poses some risk of harm; it is, after all, a dangerous instrumentality. Hunting in general and the pheasant hunt in particular had extensive rules in place to reduce the risk of harm from a firearm. Plaintiff knew that his father could be careless with a firearm, and it can also be presumed that plaintiff knew that his father had several medical conditions that could affect the handling of a firearm. This evidence points to a foreseeable risk.

On the other hand, the two men had hunted together regularly over many years, and neither testified about a prior similar incident. Defendant was well-versed in the rules of hunting, including this particular style of hunting, and plaintiff knew this. Weather conditions were good, and there is nothing in the record to suggest that defendant had tingling in his hands at the time of the incident.

It is also important to consider the specific way in which plaintiff was shot. He was not, for example, shot by another hunter across the perimeter in another blind. It might very well have been reasonably foreseeable that plaintiff was at risk of being shot by a hunter from another blind. We need not decide the issue, however, because that was not the specific risk that unfortunately became a reality here. Rather, plaintiff was hit by an experienced, knowledgeable hunter, who plaintiff knew very well, and who stood shoulder-to-shoulder with plaintiff while they shot outward from a blind at pheasants flying overhead. On this record, it remains a question of fact whether it was reasonably foreseeable to plaintiff that there was a risk that defendant would discharge his shotgun and injure plaintiff.

Accordingly, we affirm in part and reverse in part the trial court's orders with respect to the applicable standard of care. On remand, if the finder of fact concludes that the risk was reasonably foreseeable, then defendant owed a duty only to refrain from reckless misconduct. If the finder of fact concludes otherwise, then defendant owed a duty to exercise ordinary care.

III. CONCLUSION

Hunting is a recreational activity subject to the standard-of-care framework set forth by our Supreme Court in *Ritchie-Gamester* and *Bertin*. If a particular

risk of injury is reasonably foreseeable (i.e., the risk is "inherent" to hunting), then a hunter will be held to a reckless-misconduct standard of care when dealing with another hunter in the party; if not, then the hunter will be held to the ordinary-negligence standard. The inquiry is a factual one, and, on this record, we conclude that there remains a genuine issue of fact on whether it was reasonably foreseeable that defendant would shoot and injure plaintiff.

Affirmed in part and reversed in part. The matter is remanded to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

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

CHARTER TOWNSHIP OF YPSILANTI v DAHABRA

Docket No. 354427. Submitted July 13, 2021, at Lansing. Decided July 29, 2021, at 9:25 a.m. Leave to appeal denied 509 Mich 931 (2022).

The Charter Township of Ypsilanti filed an emergency petition in the Washtenaw Circuit Court seeking to declare a residential property leased by LV Jackson, Jr. (defendant) a public nuisance pursuant to MCL 600.3801(1)(g). The basis for the petition was an incident that occurred on April 19, 2020, when someone fired approximately 35 gunshots into the air outside defendant's home. Plaintiff alleged in the petition that the shots were fired by defendant, his adult son, and/or a person invited onto the premises by defendant. Defendant and his son were arrested, and criminal charges were filed against them. About a month after the incident, plaintiff filed its petition, seeking to abate the nuisance by evicting defendant from the home and padlocking the home for a period of time. The trial court, Timothy P. Connors, J., granted plaintiff a temporary restraining order on the basis of the emergency petition and ordered defendant to appear at a show-cause hearing. Defendant appeared at the hearing and asked the court for a one- to two-week adjournment so that he could retain counsel. The trial court did not respond to defendant's request and granted relief to plaintiff, ordering defendant to vacate the property. Defendant obtained counsel, and his counsel moved to vacate the order. The trial court denied the motion, and defendant appealed.

The Court of Appeals *held*:

1. A motion for an adjournment must be based on good cause; "good cause" means a legally sufficient or substantial reason. Defendant provided such a reason when he asked the trial court to adjourn the proceedings in order to obtain counsel. Defendant indicated at the show-cause hearing that he had spoken with counsel but had not yet been able to retain counsel to represent him. Defendant had significant interests at stake in this case, including that he was the sole surviving parent of his three minor children, and the subject property was the first home he had been able to establish for them since the death of his wife five years earlier. Additionally, the pending criminal case against defendant

related to the conduct at issue in the civil nuisance case supported defendant's need for counsel. Defendants who are subject to both civil nuisance-abatement cases and criminal charges relating to the same conduct are at a disadvantage because mounting a defense in the civil case might incriminate them in the criminal case. One solution that protects both the state's statutory right to seize property to abate a nuisance and protects the defendant in the criminal case is to delay the civil proceedings until after the criminal case is completed. Although defendants in these situations would not always be entitled to a delay in a civil nuisance-abatement suit, in considering whether to grant a request to delay, the trial court must consider the equity and necessity of proceeding with the civil action under the particular circumstances of a case. The trial court in this case did not do so, despite that equity and necessity would have supported defendant's request for an adjournment under the facts of the case. The trial court's decision did not promote the cause of justice and therefore, its failure to consider defendant's request for an adjournment was an abuse of its discretion.

2. At a minimum, due process affords parties the right to notice of the nature of the proceedings against them and a meaningful opportunity to be heard before an impartial decisionmaker. Defendant in this case was given one opportunity to speak at the show-cause hearing, which he used to request an adjournment to obtain counsel. Not only did the trial court fail to consider this request, but defendant was not given any further opportunity to mount a defense to plaintiff's petition. The court simply rendered its decision and ignored defendant's pleas to address the court. Assuming that the court was not convinced as to the necessity of an adjournment, it could at least have permitted defendant to present evidence to support his position that his adult son, not defendant, had fired the shots that led to this case. Alternatively, the court could have explored what relief would have been appropriate under the circumstances. In light of the fact that defendant was given a single opportunity to respond to plaintiff's petition and considering the severe impact the outcome of the case could have on his life, defendant's due-process right to a meaningful opportunity to be heard was violated.

3. Under MCL 600.3801(1)(g), a building is an abatable public nuisance if it is used to facilitate armed violence in connection with the unlawful use of a firearm or other dangerous weapon. The township where the nuisance is located may bring an action under the public-nuisance statutes, MCL 600.3801 *et seq*., to abate the nuisance, including by enjoining the lessee or owner of the building

from using the building for purposes prohibited by the statutes, by closing the building for up to a year, or by taking other equitable action as deemed necessary by the court. The Michigan Supreme Court has held that a nuisance involves a continuing detrimental effect on the public. Thus, a singular act tends to not constitute an abatable nuisance unless there is an element of continuity to the act's detrimental effects. In *Michigan ex rel Wayne Co Prosecutor v Bennis*, 447 Mich 719 (1994), the Michigan Supreme Court held that a single act of prostitution was sufficient to constitute a nuisance because it contributed to an existing nuisance, i.e., the ongoing, continuing prostitution in the neighborhood in which the act occurred. Under *Bennis*, plaintiff in this case failed to adequately establish a nuisance under Michigan law. Plaintiff alleged that the single incident of gunfire both created and constituted the nuisance, which was clearly insufficient under *Bennis*. Therefore, notwithstanding the trial court's abuse of discretion when it ignored defendant's request for an adjournment, the trial court did not have a basis to grant the relief requested as a matter of law.

Decision reversed and case remanded for further proceedings.

NUISANCE — ABATABLE NUISANCES — SINGLE ACTS.

The nuisance-abatement statutes, MCL 600.3801 *et seq*., allow the abatement of property used in a manner proscribed by the statutes; a nuisance is an activity that involves a continuing detrimental effect on the public; a singular act does not constitute an abatable nuisance unless there is an element of continuity to the act's detrimental effects.

McLain & Winters (by *Angela B. King* and *Dennis O. McLain*) for Charter Township of Ypsilanti.

Margolis, Gallagher & Cross (by *Laurence H. Margolis*) for LV Jackson, Jr.

Before: FORT HOOD, P.J., and MARKEY and GLEICHER, JJ.

FORT HOOD, P.J. In this nuisance-abatement action, defendant[1] appeals as of right the order of the trial

[1] Defendants Mouhanad Dahabra (Dahabra) and Jamill Diontee Jackson (Jackson) are not parties to this appeal. Accordingly, the use of "defendant" throughout is in reference only to defendant LV Jackson, Jr.

court declaring his home a public nuisance under MCL 600.3801, ordering him to vacate the premises, and ordering the property to be vacant or padlocked for a period of 90 days. Defendant contends that the trial court abused its discretion by denying his request for an adjournment to retain counsel and that the court erred by concluding that a public nuisance existed on the basis of a singular act and without evidence of "community blight." We agree that the court abused its discretion when it denied defendant's request for an adjournment. We further agree that the singular act alleged by plaintiff was insufficient to establish an abatable nuisance under Michigan law. We reverse and remand.

I. FACTUAL BACKGROUND

This action arises out of an incident that occurred on April 19, 2020, around 3:00 a.m., when approximately 35 gunshots were fired into the air outside defendant's home.[2] Plaintiff alleged below that the shots were fired either by defendant, Jackson,[3] an invitee on the premises who fled before the police arrived, or a combination of the three. Understandably, during the event, multiple neighbors called 911. After their arrival, police found shell casings on the ground outside the home. Defendant, Jackson, and defendant's three minor children were found inside. Defendant and Jackson were arrested. Plaintiff indicated below that charges of child neglect, careless use of a firearm, and use of a firearm while intoxicated were being sought against defendant; charges of careless use of a firearm and use of a

[2] Defendant was the lessee of the home. Dahabra was named in the case as the homeowner.

[3] Jackson is defendant's adult son and did not reside at the home in question.

firearm while intoxicated were being sought against Jackson. No additional information is contained in the lower court record regarding the charges.

Approximately one month after the incident, plaintiff filed a verified emergency petition seeking to declare the subject property a public nuisance pursuant to MCL 600.3801(1)(g) (building used to facilitate armed violence in connection with the unlawful use of a firearm). Plaintiff sought to abate the nuisance by evicting defendant from the home and padlocking the home for a period of time. The trial court granted plaintiff a temporary restraining order on the basis of the emergency petition and ordered all of the defendants to show cause for their conduct. At the show-cause hearing, defendant appeared and requested a one- to two-week adjournment so that he could obtain counsel to better defend himself. The trial court did not respond to the request and instead granted plaintiff the full relief it requested. The court reasoned only as follows:

> [Plaintiff's counsel], I'm aware of [the] statute. I'm also aware the township does not invoke it frivolously. I agree with you. Under these circumstances you are entitled to the relief that you are requesting . . . .

The court did not otherwise make any findings of fact or balance any equitable considerations on the record.

Shortly thereafter, defendant was able to obtain counsel. Defendant's counsel moved to vacate the trial court's order on the basis that, among other things, the single event was insufficient to constitute an abatable nuisance under the law. Defendant's counsel further argued that defendant was denied a meaningful opportunity to be heard in violation of his due-process rights. Without directly addressing these issues, the trial court denied the motion. Defendant now appeals to this court.

II. DEFENDANT'S REQUEST FOR AN ADJOURNMENT

Defendant first contends that the trial court abused its discretion by denying him an adjournment that would have allowed him more time to obtain legal counsel. Relatedly, defendant argues that he was denied a meaningful opportunity to be heard. We agree.

We review a trial court's decision regarding a motion for an adjournment or continuance for an abuse of discretion. *Soumis v Soumis*, 218 Mich App 27, 32; 553 NW2d 619 (1996). An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

"A motion for an adjournment must be based on good cause, and a court, in its discretion, may grant an adjournment to promote the cause of justice." *Soumis*, 218 Mich App at 32 (quotation marks and citation omitted). See also MCR 2.503(B)(1) and (D)(1) (indicating that a court may, in its discretion, grant a motion for an adjournment on the basis of good cause and in order to promote the cause of justice). We have held before that to establish good cause in the context of a motion for an adjournment a party must show "a legally sufficient or substantial reason." *In re Utrera*, 281 Mich App 1, 11; 761 NW2d 253 (2008) (quotation marks and citation omitted). In other contexts, our Supreme Court has defined "good cause" as meaning a "satisfactory, sound or valid reason." *People v Buie*, 491 Mich 294, 319; 817 NW2d 33 (2012) (quotation marks and citation omitted).

Here, defendant provided a legally sufficient, substantial reason to seek an adjournment. It was not disputed that defendant was an impoverished individual who thereby might have some difficultly expeditiously obtaining counsel for a civil defense. At the

show-cause hearing, defendant indicated that he had spoken with an attorney but had not yet been able to retain that attorney. Defendant requested a one- to two-week adjournment for that reason. Notably, when defendant did eventually obtain counsel for postjudgment relief, he unsurprisingly obtained the same attorney that he had spoken with before the show-cause hearing but had not yet been able to retain. That attorney was also representing defendant in the related criminal case. The attorney indicated that defendant had paid him "a little money" for representation in the criminal case, but continued to owe money for that case. Suffice it to say, although his intent to do so was clear,[4] defendant's financial status was clearly an issue when it came to expeditiously retaining counsel. It is also noteworthy that this all happened during the height of the Covid-19 pandemic, which could have further impacted defendant's ability to retain counsel.

In addition, the significant interests defendant had at stake in this case cannot be understated. Defendant indicated that he is the sole surviving parent and caregiver to his three minor children, all of whom lived with him at the subject property. Defendant indicated that he had lived there for several years and that he had

[4] Plaintiff contends that defendant did not establish good cause for the adjournment because he did not explicitly "commit" to retaining an attorney at the show-cause hearing. This argument is unavailing. Defendant sought an adjournment to obtain legal consultation in order to better defend himself, and whether he actually intended to retain an attorney has no bearing on the fact that he had sound reason to seek an adjournment to obtain assistance—be it actually hiring an attorney or further consulting one. Moreover, plaintiff's argument is one of semantics. Yet a full reading of defendant's statement at the show-cause hearing leaves the indubitable impression that defendant specifically sought to *retain* counsel—a specific attorney, in fact—for his defense. That defendant did, in fact, retain that attorney shortly following the hearing only further evidences the same.

previously lived in a shelter before moving to the subject property and establishing a home for his children. Defendant noted that it was his first actual home since his wife had died approximately five years ago, and he continued: "This is the only place my kids can really call home. This is a safe place for my kids. And it's a safe place for the neighborhood." Defendant noted that he had never had an incident at the house before and that, if necessary, he would bar Jackson from visiting if it meant that he could remain in the home with his younger children.[5] The trial court did not address defendant's concerns whatsoever, and indeed, there is no indication from the lower court record that they were truly considered.[6]

We also note defendant's argument that the existence of his ongoing criminal case tended to support the necessity of an adjournment. We agree. In *State ex rel Wayne Prosecuting Attorney v Moceri*, 47 Mich App 116, 121; 209 NW2d 263 (1973),[7] we noted that defendants

[5] We note that, along with seeking a charge of child neglect against defendant, officers reported the incident to Child Protective Services. It is not within the purview of this case for us to speculate as to whether or how defendant's conduct might implicate his parental fitness. However, that this case could have a profound impact on defendant's ability to provide and care for his children is without question.

[6] Plaintiff also does not address defendant's circumstances. Instead, plaintiff argues that defendant lacked good cause to seek an adjournment because he waited to do so until the day of the hearing and because he did not specify a time period for which the adjournment was sought. However, that defendant waited until the hearing to request the adjournment is understandable in light of the reason he requested it: defendant needed counsel to help him better represent himself. With respect to plaintiff's suggestion that defendant failed to specify a time period for the adjournment, plaintiff is incorrect. Defendant explicitly sought an adjournment of one to two weeks.

[7] Published opinions of this Court issued prior to November 1, 1990, are not binding, but may be considered for their persuasive value. MCR 7.215(J)(1).

subject to both civil nuisance-abatement cases and criminal charges related to the same conduct are at a disadvantage in terms of mounting a defense in the civil case because doing so might incriminate them in the criminal case. We stated:

> We are concerned . . . with protecting a defendant in such a situation. One solution which will both protect the state's statutory right to seize property as a nuisance and . . . protect the defendant who does not wish to risk incriminating himself is to delay the civil suit until after the criminal proceedings are completed. [*Id*.]

In such cases, while a trial court need not "in every instance delay a civil abatement suit under [MCL] 600.3801 *et seq*. . . . until after the criminal trial on the same facts is completed," "[t]he decision to proceed with or delay a civil abatement suit must be tested against the equity and necessity for proceeding with the civil action under the circumstances of a given case." *Id*. at 123. The trial court did not consider this issue, but in light of the available record, we suggest that equity and necessity would have supported defendant's request for an adjournment under the facts of this case. At minimum, those considerations supported a short adjournment for the limited purpose of allowing defendant to retain counsel.

In light of all of the above, we can discern no valid reason for the trial court to have outrightly ignored defendant's request for an adjournment in order to obtain counsel. There was no evidence that plaintiff had any concern that the event that gave rise to this case would occur again, nor was there any evidence to suggest that defendant's immediate eviction was necessary. There also appears to have been an ongoing criminal case related to defendant's conduct and potential child-protective proceedings, both of which might

have implicated defendant's ability to defend himself in this case. See *Moceri*, 47 Mich App at 121-123. In sum, it is entirely unclear from the lower court record why the trial court felt the need to move so rapidly with this case. See *Zerillo v Dyksterhouse*, 191 Mich App 228, 230-231; 477 NW2d 117 (1991) (concluding that, where no prior requests for an adjournment had been made and counsel's scheduling necessitated an adjournment, the trial court's denial of the same, which led to a particularly harsh result, constituted an abuse of discretion). The trial court's decision simply did not promote the cause of justice, and under these circumstances, its failure to consider defendant's request for an adjournment constituted an abuse of discretion. See *Soumis*, 218 Mich App at 32.[8]

Defendant also suggests in relation to the trial court's denial of defendant's motion to adjourn that defendant was denied a meaningful opportunity to be heard in violation of his due-process rights. We agree.

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[8] We note plaintiff's suggestion on appeal that an adjournment was not necessary because one had already been granted for the same reason. Indeed, the initial show-cause hearing was set for June 15, 2020, but for reasons unexplained in the lower court record, the hearing did not occur until June 25, 2020. Our review of the record did not uncover any order of adjournment or discussion related to adjourning the June 15, 2020 hearing in the lower court record. Of course, had defendant already been granted an adjournment for the purpose of obtaining counsel, we might be less inclined to conclude that denial of a second adjournment for the same reason constituted an abuse of discretion. However, again, whether plaintiff's description of events is true is not discernible from the lower court record. Moreover, it is somewhat telling that neither plaintiff nor the trial court indicated that this might be a basis for denying defendant's request at the show-cause hearing. See MCR 2.503(B)(2) and (D)(1) (indicating that the trial court should consider the number of adjournments granted and the party requesting the adjournment in rendering a decision that promotes the cause of justice). In any event, given the lack of any reference to the reason for the change of date in the lower court record, we decline to speculate as to the issue.

At a minimum, due process affords parties the right to notice of the nature of proceedings *and* a meaningful opportunity to be heard before an impartial decision maker. *Reed v Reed*, 265 Mich App 131, 159; 693 NW2d 825 (2005). Here, defendant was given a single opportunity to speak at the show-cause hearing, and he understandably used that opportunity to plead for an adjournment because he did not feel he could adequately defend his case without counsel. Not only was the request not considered, which was problematic for the reasons stated above, but defendant was otherwise given no additional opportunity whatsoever to actually mount a defense to plaintiff's petition. The trial court simply rendered its decision—justifying the same with only a single and conclusory statement that plaintiff would not have "frivolously" invoked the nuisance-abatement statute at issue—and proceeded to ignore defendant's pleas to be heard entirely.[9]

At the very least, defendant's plea for an adjournment to obtain counsel suggested his position that it was his son, not defendant, who fired the gunshots that led to this case, and that defendant would bar his son from further visiting his home if necessary. If the trial court was unconvinced that an adjournment was necessary, it could have at least allowed defendant to explain or support his position with evidence. Or, the court could have itself explored how the issue might

[9] After defendant was given the opportunity to speak and neither the trial court nor plaintiff responded to his statement, the trial court rendered its ruling and the following colloquy occurred:

> [*Defendant*]: Excuse me. Excuse me, may I speak?
>
> *The Court*: Call the next case.
>
> [*Defendant*]: Hello? Hello?
>
> [*Plaintiff's Counsel*]: Thank you, Your honor.
>
> *The Court*: Thank you.

have impacted what relief was appropriate under the circumstances.[10] All that is to say, where defendant was provided a single opportunity to respond to plaintiff's petition and the severe impact it could have on his life, and where that singular statement was, by all measures, ignored, we tend to agree that defendant was denied a meaningful opportunity to be heard. See *Al-Maliki v LaGrant*, 286 Mich App 483, 488-489; 781 NW2d 853 (2009) (indicating that the trial court denied the plaintiff a meaningful opportunity to be heard when it considered an issue sua sponte, was dismissive of plaintiff's counsel as to that issue, and "did not consider evidence plaintiff attempted to provide orally").

Because we conclude the trial court abused its discretion and failed to afford defendant a meaningful opportunity to be heard, we reverse and remand for further proceedings. Ordinarily, we might end our analysis there; however, because the additional issues defendant raises on appeal may be integral to the proceedings on remand and involve legal issues of significant public interest, we elect to address them.

III. APPLICATION OF THE NUISANCE-ABATEMENT STATUTES

Defendant contends that the trial court erred by concluding that an abatable nuisance existed on the basis of a singular, noncontinuous event. Relatedly, defendant contends that the trial court erred in abating the alleged nuisance because no evidence of "community

[10] As further indicated below, nuisance-abatement proceedings are equitable in nature, see MCL 600.3805, and the trial court had broad authority to fashion a remedy in this case that was appropriate in light of all of the circumstances, *Ypsilanti Charter Twp v Kircher*, 281 Mich App 251, 275-276; 761 NW2d 761 (2008); see also *Marshall v Consumers Power Co*, 65 Mich App 237, 257; 237 NW2d 266 (1975).

blight" was presented. Given the particular circumstances of this case, we agree that the singular event did not constitute an abatable nuisance under Michigan law. However, defendant's argument that plaintiff was required to present evidence of "community blight" is premised on a misconception of the law that we must clarify before remand proceedings take place.

Plaintiff brought its claim under the authority of the public-nuisance statutes, MCL 600.3801 *et seq*. "Nuisance-abatement proceedings brought in the circuit court are generally equitable in nature." *Capitol Props Group, LLC v 1247 Ctr Street, LLC*, 283 Mich App 422, 430; 770 NW2d 105 (2009). See also MCL 600.3805 (permitting actions to abate public nuisances as a form of "equitable relief"). We review the trial court's equitable considerations de novo, but we review the findings of fact underpinning those considerations for clear error. *Capitol Props Group*, 283 Mich App at 430. "A finding is clearly erroneous if it leaves this Court with the definite and firm conviction that a mistake has been made." *Id*.

We review issues of statutory interpretation de novo. *Echelon Homes, LLC v Carter Lumber Co*, 472 Mich 192, 196; 694 NW2d 544 (2005). "The primary rule of statutory interpretation is that we are to effect the intent of the Legislature." *Stanton v Battle Creek*, 466 Mich 611, 615; 647 NW2d 508 (2002). "To do so, we begin with the language of the statute, ascertaining the intent that may reasonably be inferred from its language." *Odom v Wayne Co*, 482 Mich 459, 467; 760 NW2d 217 (2008) (quotation marks and citation omitted). If the language is unambiguous, the intent of the Legislature is clear and "judicial construction is neither necessary nor permitted." *Id*. (quotation marks and citation omitted).

MCL 600.3801 prescribes what may be considered an abatable public nuisance and provides, in pertinent part:

> (1) A building, vehicle, boat, aircraft, or place is a nuisance if 1 or more of the following apply:
>
> * * *
>
> (g) It is used to facilitate armed violence in connection with the unlawful use of a firearm or other dangerous weapon.
>
> * * *
>
> (3) All controlled substances and nuisances shall be enjoined and abated as provided in this act and the court rules. [MCL 600.3801(1)(g) and (3).]

When a nuisance exists under MCL 600.3801, a township "in which the nuisance is located may maintain an action for equitable relief . . . to abate the nuisance and to perpetually enjoin any person . . . who owns, leases, conducts, or maintains the building . . . from permitting or suffering the building . . . to be used for any of the purposes or acts or by any of the persons described in section 3801." MCL 600.3805. When a nuisance exists under MCL 600.3801 and an action is brought under MCL 600.3805, the statutory scheme provides that the trial court "shall enter an order of abatement as a part of the judgment in the action" and may order any of the following:

> (a) The removal from the building or place of all furniture, fixtures, and contents.
>
> (b) The sale of the furniture, fixtures, and contents in the manner provided for the sale of goods under execution.
>
> (c) The effectual closing of the building or place against its use for any purpose, and so keeping it closed for a

> period of 1 year, unless sooner released as provided in this chapter.
>
> (d) Any other equitable relief the court considers necessary. [MCL 600.3825(1)(a) to (d).]

Plaintiff bears the burden of proving "that the material allegations of the complaint are true . . . ." MCL 600.3815(4).

Within the context of the nuisance-abatement statutes, our Supreme Court has noted:

> Because the public nuisance statute allows the abatement of property used in a proscribed manner without specifying the activity that will constitute a nuisance, we are aided in the definition of a nuisance by general public nuisance law. This Court has defined a public nuisance as involving "not only a defect, but threatening or impending danger to the public . . . ." *Kilts v Kent Co Bd of Supervisors*, 162 Mich 646, 651; 127 NW 821 (1910). Similarly, this Court has declared a public nuisance where an act "offends public decency." *Bloss v Paris Twp*, 380 Mich 466, 470; 157 NW2d 260 (1968). Finally, *Garfield Twp v Young*, 348 Mich 337, 342; 82 NW2d 876 (1957), held that to constitute a nuisance
>
> > the activity must be harmful to the public health, or create an interference in the use of a way of travel, or affect public morals, or prevent the public from the peaceful use of their land and the public streets. [Citations omitted.]
>
> The rationale is that a nuisance involves a *continuing* detrimental effect on the public. The nuisance abatement statute serves the same general purpose. [*Michigan ex rel Wayne Co Prosecutor v Bennis*, 447 Mich 719, 731-732; 527 NW2d 483 (1994) (*Bennis I*) (brackets in original), aff'd by *Bennis v Michigan*, 516 US 442; 116 S Ct 994; 134 L Ed 2d 68 (1996) (*Bennis II*).]

Relatedly, *Black's Law Dictionary* defines "nuisance" as

> [a] condition, activity, or situation (such as a loud noise or foul odor) that interferes with the use or enjoyment of property; esp., a *nontransitory condition* or *persistent activity* that either injures the physical condition of adjacent land or interferes with its use or with the enjoyment of easements on the land or of public highways. [*Black's Law Dictionary* (11th ed) (emphasis added).]

58 Am Jur 2d, Nuisances, § 60, pp 618-619 provides:

> Nuisance involves the idea of continuity or recurrence. The maintenance of a nuisance ordinarily implies a continuity of action over a substantial period of time, and the continuance of the acts constituting the nuisance for an unreasonable period. Thus, to constitute a nuisance, there must be a continuousness or a recurrence of the acts by which it is created. However, it is not always necessary that the acts charged are habitual or periodical. The duration of a particular condition is an important factor in determining whether the interference caused is sufficiently substantial to be deemed a nuisance but not a dispositive one. Thus, where a single act produces a continuing result, the nuisance may be complete without a recurrence of the act.

All that is to say, a singular act tends not to constitute an abatable nuisance unless there is an element of continuity to the act's detrimental effects. See *Bennis I*, 447 Mich at 732.[11]

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[11] By way of example, in *Detroit v Nationwide Recovery, Inc*, unpublished per curiam opinion of the Court of Appeals, issued March 18, 2021 (Docket No. 348814), pp 7-8, this Court provided a comprehensive list of the types of activities that have been considered public nuisances in the past:

> "Nuisance is the great grab bag, the dust bin, of the law." *Awad v McColgan*, 357 Mich 386, 389; 98 NW2d 571 (1959), overruled in part on other grounds *Mobil Oil Corp v Thorn*, 401 Mich 306, 310, 312 (1977). Indeed, past nuisance actions have concerned a wide variety of factual scenarios, including the use of personalty, *State ex rel Dowling v Martin*, 314 Mich 317, 324; 22 NW2d 381 (1946) (automobile used in illicit gambling

In *State ex rel Oakland Co Prosecutor v Motorama Motel Corp*, 105 Mich App 224, 225, 229-230; 307 NW2d 349 (1981), abrogated by *Bennis I*, 447 Mich at 730, 739, our Supreme Court held that within the context of MCL 600.3801, "a single instance of illegal conduct" was insufficient to create an abatable nuisance. We noted: "A nuisance involves the notion of repeated or continuing conduct and should not be based upon proof of a single isolated incident unless the facts surrounding that incident permit the reasonable inference that the prohibited conduct was habitual in nature." *Motorama*, 105 Mich App at 229-230. As noted, *Bennis I* overruled *Motorama*, and

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scheme), legitimate business activities on private realty, *Garfield Twp*, 348 Mich at 342-343 (operation of a junk yard), negative publicity, *Adkins v Thomas Solvent Co*, 440 Mich 293, 306; 487 NW2d 715 (1992) (publicity concerning contaminated ground water), riparian rights, *State ex rel Muskegon Booming Co v Evart Booming Co*, 34 Mich 462, 473-474 (1876) (use of a riverbed), widespread criminal activity, *State ex rel Wayne Co Prosecutor v Bennis*, 447 Mich 719, 733; 527 NW2d 483 (1994) (ongoing street prostitution in certain neighborhoods), unpleasant odors, *Grand Rapids v Weiden*, 97 Mich 82, 83-84; 56 NW 233 (1893) ("intolerable stench" emanating from a rendering plant), violations of zoning ordinances, *Travis v Preston*, 249 Mich App 338, 351; 643 NW2d 235 (2002) (pig farm allegedly operated contrary to local zoning), the publicly sanctioned erection of structures, *Kilts v Bd of Supervisors of Kent Co*, 162 Mich 646, 653; 127 NW 821 (1910) (water tower erected on county farmland), noise levels, *Capitol Props Group, LLC v 1247 Ctr St, LLC*, 283 Mich App 422, 429; 770 NW2d 105 (2009) (nightclub operated near residential dwellings), public roadways, *Stremler v Michigan Dept of State Highways*, 58 Mich App 620, 622; 228 NW2d 492 (1975) (wrongful-death action alleging defective road design, construction, and maintenance), and the public display of sexually explicit images, *Bloss v Paris Twp*, 380 Mich 466, 470; 157 NW2d 260 (1968) (explicit films at drive-in theater on screen visible to public).

In each of these cases, the element of continuity as to the detrimental effect of the nuisance is apparent.

the majority's justification for doing so in that case is particularly instructive here.

In *Bennis I*, the co-owner of a vehicle was arrested for gross indecency after engaging in sexual conduct with a prostitute inside the vehicle. *Bennis I*, 447 Mich at 723. Thereafter, the Wayne County Prosecutor brought a nuisance-abatement action under MCL 600.3801, alleging that the vehicle was a public nuisance. *Id*. The trial court agreed and abated the interests of both the guilty co-owner and his wife, the other co-owner of the vehicle. *Id*. at 723-724. Citing *Motorama*, this Court reversed, holding that "proof of a single incident of lewdness, assignation, or prostitution is insufficient to establish a nuisance." *Id*. at 724. Our Supreme Court then granted leave and considered a number of issues, including, in pertinent part: whether the single act of lewdness could fall within the definition of nuisance as it pertained to MCL 600.3801, and whether the innocent co-owner's interest in the vehicle could properly be abated where she had no knowledge of her husband's conduct. *Id*. at 722, 730-731.

The Court held that the single act was sufficient for the purposes of the statute, but did so only because the single act could be said to have contributed to an otherwise continuing nuisance. *Id*. at 733-734. In overruling *Motorama*, the Court noted that Michigan law "does not specifically require more than a single incident of conduct." *Id*. at 730. However, this did not discount the fact that the nuisance the conduct created must itself be continuous in nature. See *id*. at 732 (noting that the nuisance itself "involves a continuing detrimental effect on the public"). Thus, in *Bennis I*, the single act of prostitution was sufficient because it contributed to an already-existing nui-

sance: ongoing and continuing prostitution in the neighborhood in which the act occurred. *Id*. at 730-734.[12]

The Court noted that multiple members of the community testified about the condition of the neighborhood and its reputation for prostitution. *Id*. at 733. Some of those witnesses complained that they had been personally solicited multiple times, and one witness indicated that he was present when his minor child witnessed an act of prostitution. *Id*. at 733-734. The arresting officer further indicated that multiple arrests for prostitution had been made in the neighborhood. *Id*. at 733. With the above in mind, the Court concluded:

> Vehicles that enter the neighborhood in order to solicit acts of prostitution are being "used for" the continuance of [a] nuisance. Therefore, we would hold that the nuisance abatement statute allows the abatement of a vehicle where the driver entered into and thereby contributed to an existing condition that is a public nuisance.
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> . . . [T]he one act of nuisance by [the co-owner] in his vehicle must be viewed in light of the larger and continuing nuisance occurring in the neighborhood. Where testimony

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[12] The Court referred to MCL 600.3815 for the contention that evidence of an existing neighborhood nuisance was relevant to an abatement action over the vehicle. The statute provides:

> In an action brought under this chapter, evidence of the general reputation of the building, vehicle, boat, aircraft, or place is admissible for the purpose of proving the existence of the nuisance. [MCL 600.3815(1).]

The Court reasoned that "[t]he nuisance abatement statute's use of the disjunctive 'or' allows us to consider the reputation of the vehicle *or* the place to determine whether a nuisance exists." *Bennis I*, 447 Mich at 733.

> surrounding proof of an incident of prostitution unequivocally establishes that the neighborhood has a reputation for prostitution, the property contributing to the continuance of the nuisance may be abated pursuant to the statute. [*Id*. at 734, 737.]

Thus, for the purposes of this case, the crux of the *Bennis I* decision is that a single act can constitute an abatable nuisance within the meaning of the abatement statutes where that act contributes to an otherwise already-existing and continuing nuisance. See *id*. at 729-737.[13]

With the above in mind, we conclude that plaintiff failed to adequately establish a nuisance under Michigan law in this case. Plaintiff alleged simply that the single incident of gunfire both created and constituted the nuisance, which was clearly insufficient under *Bennis I*. See *United States v Marls*, 227 F Supp 2d 708, 715-716 (ED Mich, 2002) (indicating that a single act of soliciting prostitution from a vehicle was not sufficient under *Bennis I* for forfeiture of the vehicle given that the government made only "general assertions" that a public nuisance existed, so the trial court therefore could not make the requisite "case by case determination based on the industry, character, volume, time and duration of the alleged nuisance" that a nuisance did, in fact, exist).[14] See also *City of Warren v Executive Art Studio, Inc*, unpublished per curiam

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[13] Notably, the Supreme Court of the United States granted certiorari as to whether depriving the innocent co-owner of her interest in the vehicle violated her rights under the Due Process Clause of the Fourteenth Amendment and the Takings Clause of the Fifth Amendment. *Bennis II*, 516 US at 443. The *Bennis II* majority did not directly address the single-act issue that is before this Court.

[14] Although we are not bound by the opinions of federal district courts, they may be considered for their persuasive value. *Johnson v VanderKooi*, 502 Mich 751, 764 n 6; 918 NW2d 785 (2018).

opinion of the Court of Appeals, issued February 13, 1998 (Docket No. 197353), pp 2-3 (citing *Bennis I* and indicating that the plaintiff presented sufficient evidence that a nuisance existed where *multiple* incidents of prostitution at the defendant's massage parlor were documented over a ten-month period).[15] Plaintiff did not and has not alleged that defendant's conduct contributed to an otherwise existing nuisance, nor did the evidence plaintiff presented support such an assertion. To that end, and notwithstanding the trial court's abuse of discretion when it ignored defendant's request for an adjournment, we conclude that the trial court did not have a basis to grant the relief requested as a matter of law.[16]

Plaintiff points this Court to MCL 600.3815(3), which provides:

> In an action under this chapter, it is not necessary for the court to find the property involved was being used as and for a nuisance at the time of the hearing, or for the plaintiff to prove that the nuisance was continuing at the time the complaint was filed, if the complaint is filed within 90 days after any act, any violation, or the existence of a condition described in section 3801 as a nuisance.

Plaintiff suggests that the plain language of the statute provides that single acts can constitute abatable nuisances by themselves so long as the abatement

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[15] Unpublished opinions of this Court are not binding, but we again may consider them for their persuasive value. MCR 7.215(C)(1); *Cox v Hartman*, 322 Mich App 292, 307; 911 NW2d 219 (2017).

[16] We note plaintiff's suggestion that the caselaw relied upon by defendant refers only to common-law nuisance and has no bearing on the application of the nuisance-abatement statutes. Plaintiff is incorrect. At a minimum, defendant relies on *Bennis I*, which, as noted above, directly addressed the issue raised in this case. See *Bennis I*, 447 Mich at 730-732.

action is instituted within 90 days of the act. We disagree. The statute indicates that the nuisance need not be continuing *at the time* the petition is filed or the hearing occurs, so long as the action is filed within 90 days of the creation or existence of the condition. Nothing about the statute purports to abolish the otherwise well-established rule that continuity of detrimental effect is necessary to establish a nuisance. See *Bennis I*, 447 Mich at 732.

We next turn to defendant's use of the term "community blight" in his brief on appeal. Defendant refers to plaintiff's failure to allege an ongoing nuisance outside of the single act of gunfire as a failure to establish "community blight." Defendant refers to *Bennis I* when using this terminology, and while the *Bennis I* opinion did not utilize the phrase itself, it is somewhat understandable as to how defendant arrived at the term. Surely *Bennis I* did not seek to punish individuals for their poverty, but others have suggested such is the natural extension of its logic. Justice Stevens illustrated this point in his dissenting opinion in *Bennis II*, in which he briefly addressed the single-act issue that the majority did not:

> The car in this case . . . was used as little more than an enclosure for a one-time event, effectively no different from a piece of real property.[9] By the rule laid down in our recent cases, that nexus is insufficient to support the forfeiture here.

[9] In fact, the rather tenuous theory advanced by the Michigan Supreme Court to uphold this forfeiture was that the neighborhood where the offense occurred exhibited an ongoing "nuisance condition" because it had a reputation for illicit activity, and the car contributed to that "condition." On that view, the car did not constitute the nuisance of itself; only when considered as a part of the particular neighborhood did it assume that character.

> One bizarre consequence of this theory, expressly endorsed by the Michigan high court, is that the very same offense, committed in the very same car, would not render the car forfeitable if it were parked in a different part of Detroit, such as the affluent Palmer Woods area. This construction confirms the irrelevance of the car's mobility to the forfeiture; any other stationary part of the neighborhood where such an offense could take place—a shed, for example, or an apartment—could be forfeited on the same rationale. Indeed, if petitioner's husband had taken advantage of the car's power of movement, by picking up the prostitute and continuing to drive, presumably the car would not have been forfeitable at all.
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> [*Bennis II*, 516 US at 463-464 & n 9 (Stevens, J., dissenting) (citations omitted).]

See also *Bennis I*, 447 Mich at 744-745 (CAVANAGH, C.J., dissenting) (indicating that the majority's conclusion that the condition of an entire neighborhood constituted a public nuisance was problematic); *Bennis I*, 447 Mich at 762 (LEVIN, J., dissenting) ("The reasoning of the lead opinion would mean that a customer's vehicle used for prostitution may be abated as a nuisance when driven to and so used on Eight Mile Road in Detroit, but not when so used in Northville or Charlevoix.").

Without implying more, and because we think the issue particularly relevant to the facts of this case in light of the "community blight" terminology so naturally employed by defendant, it is at least prudent to note that there is some value to the concerns raised in the dissents above. That is, at the very least, courts should be wary of inadvertently using "community blight" as a synonym for any one of the specific conditions that could give rise to a nuisance under MCL 600.3801. Impoverished individuals should not be penalized in a manner that their wealthier counterparts would not be simply because they are impov-

erished. Courts should be cognizant of the line between promoting neighborhood improvement by abating nuisances and punishing individuals for their financial status. See *Bennis I*, 447 Mich at 734-735, 737 (opinion by RILEY, J.) (indicating that an underlying purpose of the nuisance-abatement statutes is to prevent "continuing blight of neighborhoods"). These considerations are important not only because of existing law that requires abatement actions to be considered on a case-by-case basis according to the underlying facts, see *Marshall v Consumers Power Co*, 65 Mich App 237, 257; 237 NW2d 266 (1975), but because such actions are equitable in nature and trial courts have such broad authority to fashion appropriate remedies, MCL 600.3805; *Ypsilanti Charter Twp v Kircher*, 281 Mich App 251, 275-276; 761 NW2d 761 (2008).

All that is to say, forgetting the unfortunate language defendant employs, there is merit to the spirit of his argument. In *Bennis I*, there was substantial evidence presented to establish that lewdness and prostitution were ongoing problems in the surrounding neighborhood when the defendant co-owner elected to engage in the same conduct. *Bennis I*, 447 Mich at 733-734. His single act *contributed* to the *existing* nuisance of lewd behavior and prostitution. *Id*. at 737. Here, plaintiff alleged that defendant's home was a nuisance because it was used to facilitate armed violence in connection with the unlawful use of a firearm in violation of MCL 600.3801(g). Defendant's argument is essentially that (1) the single act of gunfire was not sufficient to establish a nuisance in and of itself, and (2) the single act could not be said to have contributed to a greater nuisance because plaintiff failed to establish that armed violence was an

ongoing nuisance in the surrounding area. We agree. Plaintiff neither alleged nor established that fact.[17]

We reverse and remand for further proceedings consistent with this opinion. On remand, the trial court must follow the law concerning nuisances and the nuisance-abatement statutes. The court should further engage with any necessary equitable considerations after the parties have been given an opportunity to present evidence.

We do not retain jurisdiction.

MARKEY and GLEICHER, JJ., concurred with FORT HOOD, P.J.

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[17] And, of course, allegations or evidence of "community blight" would be insufficient to establish the same.

PEOPLE v ROGERS (ON REMAND)

Docket No. 346348. Submitted December 3, 2020, at Lansing. Decided August 5, 2021, at 9:00 a.m. Leave to appeal denied 510 Mich 1098 (2022).

Deonton A. Rogers was charged in the 36th District Court with, among other things, intentionally discharging a firearm in a building causing physical injury, MCL 750.234b(3); intentionally discharging a firearm in a building causing serious impairment, MCL 750.234b(4); and ethnic intimidation, MCL 750.147b (the ethnic-intimidation statute), in connection with an altercation between defendant and the complainant, a transgender woman. In July 2018, defendant made numerous offensive statements to the complainant while they were waiting in line at a gas station. The complainant tried to ignore the derogatory comments—which included calling her a man and asking to see her penis—before defendant pulled out a gun and threatened to kill her. According to the complainant, transgender people are often attacked and she was frightened that defendant would follow through on his threat. As defendant moved toward the exit of the station at the urging of a woman with him, he walked close to the complainant. Because the complainant was afraid that defendant would turn around and shoot her as he left the station, the complainant attempted to get the gun away from defendant as he walked by her. The complainant was shot in the left shoulder during the struggle for the gun. The district court, William McConico, J., bound defendant over to the Wayne Circuit Court on all the charged offenses. In doing so, the district court concluded that transgender individuals are protected under the ethnic-intimidation statute. Defendant moved in the circuit court to quash the bindover on the two charges of intentionally discharging a firearm in a building and the charge of ethnic intimidation. The circuit court, Catherine L. Heise, J., granted the motion to quash the three charges. With respect to the ethnic-intimidation charge, the court reasoned that because MCL 750.10 of the Michigan Penal Code, MCL 750.1 *et seq*., defines the term "gender" as including only masculine, feminine, and neuter genders, the ethnic-intimidation statute did not protect transgender individuals. The prosecution appealed by leave granted, challenging only the circuit court's order quashing the ethnic-

intimidation charge. The Court of Appeals, GADOLA, P.J., and REDFORD, J. (SERVITTO, J., concurring in part and dissenting in part), affirmed, concluding that although the trial court had employed erroneous reasoning, it nonetheless reached the correct result. 331 Mich App 12 (2020). The prosecution sought leave to appeal in the Supreme Court, and the Supreme Court vacated the judgment of the Court of Appeals and remanded the case to the Court of Appeals for reconsideration in light of the United States Supreme Court's decision in *Bostock v Clayton Co, Georgia*, 590 US ___; 140 S Ct 1731 (2020), which held that discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex.

On remand, the Court of Appeals *held*:

1. MCL 750.147b provides, in pertinent part, that a person is guilty of ethnic intimidation if that person maliciously, and with specific intent to intimidate or harass another person because of that person's race, color, religion, gender, or national origin, does any of the following: (a) causes physical contact with another person; (b) damages, destroys, or defaces any real or personal property of another person; (c) threatens, by word or act, to do an act described in Subdivision (a) or (b), if there is reasonable cause to believe that an act described in Subdivision (a) or (b) will occur. In this case, because the word "gender" is not defined in MCL 750.147b, the trial court considered the word "gender" as defined in the Penal Code at MCL 750.10. The trial court erred by relying on MCL 750.10 to define the term "gender" for purposes of the ethnic-intimidation statute. The legislative intent in enacting MCL 750.10 was to clarify that the Penal Code did not apply only to men but also to women and persons of neither male nor female sex, even when only masculine pronouns are used. Thus, MCL 750.10 establishes only a rule of grammar intending to explain that persons of the male sex are not the *only* people subject to the Penal Code. Accordingly, the trial court erred by holding that the provisions of MCL 750.10 establish a substantive, strictly limited definition of "gender" to be used throughout the Penal Code.

2. The terms of a statute must be interpreted on the basis of their ordinary meaning and the context in which they are used. When a term is not defined in a statute, a court may consult dictionary definitions of the term. Because the ethnic-intimidation statute was enacted in 1988, dictionary definitions from that time had to be used to determine what the word "gender" meant at the time the statute was adopted. Dictionary definitions at that time defined the term "gender" as being

synonymous with "sex," i.e., the biological roles of male and female. A 1993 Court of Appeals opinion, *Barbour v Dep't of Social Servs*, 198 Mich App 183 (1993), also illustrated that the term "gender" was used interchangeably with the word "sex" at that time. Additionally, *Bostock* did not control the outcome of this case because *Bostock* involved the interpretation of a federal employment-discrimination statute adopted in 1964 whereas this case required the interpretation of a state criminal statute enacted in 1988. In this matter, defendant's alleged conduct targeted the complainant because she was designated male at birth but did not match defendant's expectations of how a man should appear or behave. Presumably, were it not for the complainant's designated sex at birth (male), defendant would not have harassed and intimidated her. Given that defendant allegedly harassed and intimidated the complainant because he believed her to be male and based his intimidating conduct on that belief, the question whether the statute's use of the term "gender" in 1988 was intended to include the term "transgender" was a question that did not need to be reached. Defendant's actions were gender-based within the "traditional" understanding of that term, and harassing someone on the basis of their male gender (whether perceived or actual) fell within the prohibitions of the statute. It furthermore would not matter if defendant had been mistaken in his perception of the complainant's gender or biological sex, because the test under the statute is subjective; a defendant is guilty of ethnic intimidation if the defendant intimidates an individual "because of" that individual's gender, whether rightly or wrongly perceived. Accordingly, applying the term "gender" in any sense, whether it is interpreted as equating with "sex" or given a broader meaning, defendant engaged in harassment and intimidation of the complainant based on her gender, and therefore the conduct fell within the purview of the ethnic-intimidation statute.

3. The trial court abused its discretion when it granted defendant's motion to quash his bindover on the ethnic-intimidation charge. To support a bindover of defendant on the charge of ethnic intimidation, the prosecution must establish probable cause to believe that defendant maliciously, and with specific intent to intimidate or harass another person because of that person's race, color, religion, gender, or national origin, did any of the following: (a) caused physical contact with another person; (b) damaged, destroyed, or defaced any real or personal property of another person; (c) threatened, by word or act, to do an act described in Subdivision (a) or (b), if there was reasonable cause to believe that an act described in Subdivision (a) or (b)

would occur. In this case, the specific intent required would be that described in the statute: to intimidate or harass the complainant because of her gender. The preliminary-examination testimony in this case established probable cause to believe that defendant acted maliciously and with specific intent to harass the complainant on account of her gender. Defendant's words and conduct were predicated on his belief that the complainant was male. Additionally, defendant showed the complainant a loaded gun and threatened to kill her, causing her to fear for her life. While the complainant initiated the first physical contact by grabbing defendant's arm, MCL 750.147b(1)(a) requires that the defendant "[c]ause[]" physical contact; the statute does not require that the defendant be the person to initiate the physical contact. The complainant's testimony provided support for the conclusion that defendant caused physical contact when he placed the complainant in fear for her life, causing her to struggle for the gun. Thus, the trial court erred by concluding that there was no probable cause to believe that defendant caused physical contact with the complainant.

Trial court order granting defendant's motion to quash the ethnic-intimidation charge reversed, ethnic-intimidation charge reinstated, and case remanded to the trial court for further proceedings.

SERVITTO, J., concurring, agreed with the result reached by the majority but wrote separately to address several issues. First, Judge SERVITTO agreed with the majority that the trial court erred when it relied on MCL 750.10 to define the word "gender" for purposes of MCL 750.147b; the trial court further erred by relying on postenactment legislative history as a basis for interpreting the statute. Next, Judge SERVITTO disagreed with the majority's reliance on 1988 dictionary definitions of the term "gender" in its analysis because recourse to the dictionary was unnecessary in this case. There was nothing textually ambiguous about the use of the word "gender" in MCL 750.147b; the language of the statute indicates that MCL 750.147b is intended to criminalize harassing and intimidating behavior when the behavior is based on a victim's specific characteristics, including gender. In this case, the victim's gender was not tolerated by defendant and prompted defendant's behavior. Moreover, *Barbour* did not support the majority's position that the term "gender" was commonly understood as synonymous with the term "sex" at the time MCL 750.147b was drafted; *Barbour* dealt with harassment regarding sexual orientation, and sexual orientation is not the same as gender. Finally, Judge SERVITTO would have found *Bostock* more

persuasive than the majority found it and, more importantly, consistent with the result that a plain reading of MCL 750.147b would dictate: a plain reading of MCL 750.147b requires a finding that whenever a victim's gender was the impetus for the intimidating or harassing behavior, the conduct falls within the ethnic-intimidation statute.

CRIMINAL LAW — ETHNIC INTIMIDATION — WORDS AND PHRASES — "GENDER."

MCL 750.147b provides, in pertinent part, that a person is guilty of ethnic intimidation if that person maliciously, and with specific intent to intimidate or harass another person because of that person's race, color, religion, gender, or national origin, does any of the following: (a) causes physical contact with another person; (b) damages, destroys, or defaces any real or personal property of another person; (c) threatens, by word or act, to do an act described in Subdivision (a) or (b), if there is reasonable cause to believe that an act described in Subdivision (a) or (b) will occur; the test under MCL 750.147b is subjective: a defendant is guilty of ethnic intimidation if the defendant intimidates an individual "because of" that individual's gender, whether rightly or wrongly perceived.

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

David R. Cripps for defendant.

Amicus Curiae:

Jay D. Kaplan and *Daniel S. Korobkin* for the American Civil Liberties Union Fund of Michigan and *John A. Knight* for the American Civil Liberties Union Foundation.

ON REMAND

Before: GADOLA, P.J., and SERVITTO and REDFORD, JJ.

GADOLA, P.J. This case returns to this Court on remand from our Supreme Court for reconsideration, in light of *Bostock v Clayton Co, Georgia*, 590 US ___;

140 S Ct 1731; 207 L Ed 2d 218 (2020), of the prosecution's challenge to the trial court's order dismissing the charge against defendant of ethnic intimidation, MCL 750.147b. We reverse the trial court's order granting defendant's motion to quash the ethnic-intimidation charge, reinstate the ethnic-intimidation charge, and remand for further proceedings.

I. FACTS

The basic facts of this case were set forth in this Court's prior opinion as follows:

> This case arises out of an altercation between defendant and the complainant on the night of July 23, 2018. The complainant is a transgender person, which she explained to the court means that she was assigned as a male at birth but now identifies as a woman, living her life and presenting herself as such in society. On the night of the incident, the complainant went to a gas station in Detroit to make a purchase. When she arrived at the gas station, she saw defendant inside the gas station with a woman. The complainant got in line, and defendant began talking to her, using derogatory terms. According to the complainant, defendant made various offensive statements to her, including, "[Y]ou're a nigga." The complainant responded that "nigga is somebody that identify [sic] themselves as a man, carry themselves as a man. I don't do that. I'm a transgender." Defendant then asked the complainant about her sex organs and asked if he could see "it." The complainant tried to ignore defendant, but he continued to make derogatory remarks, which the complainant described as "gay" in nature and included calling her a man and asking to see her penis. Defendant then pulled out a gun and threatened to kill her. The complainant was frightened that defendant would follow through on his threat to kill her. The woman with defendant told defendant to leave the complainant alone and to leave the gas station. While defendant was speaking to the complainant, a child who had arrived in the car with defendant entered the gas

station. Defendant subsequently walked in close proximity to the complainant, gun in hand, moving toward the exit. The complainant testified that she feared that defendant would turn around and shoot her before leaving the gas station. The complainant further testified that transgender people are often attacked and harmed and that she feared for her life. Reacting to the threat from defendant, she grabbed at defendant's hand as he came near her in an attempt to get the gun away from him. A struggle between the two ensued, during which the complainant never had control of the gun. During this struggle, defendant kept his finger on the trigger. At some point during the struggle, the gun fired into the complainant's left shoulder. The complainant was then able to grab the gun from defendant. The woman with defendant took the gun from the complainant and moved toward the exit. Defendant then ran to the gas station exit, whereupon the woman with defendant gave him back the gun. Defendant then got into his car, and the child followed him out, climbing into defendant's car with him. The complainant was taken to the hospital, where she spent several days being treated for a shattered shoulder, including undergoing surgery.

At defendant's preliminary examination, surveillance footage was shown detailing the incident. Defendant objected to the court binding him over on the two charges of intentionally discharging a firearm, asserting that he did not intentionally fire a weapon at the complainant. With regard to the remaining charges (including the ethnic-intimidation charge), defendant conceded that there were "questions of fact for a jury[.]" Relevant to the appeal at hand, the district court ruled that "transgender" fell within the statutory definition of "gender" for purposes of the ethnic-intimidation charge.

In the trial court, defendant moved to quash the district court's decision to bind him over on the two charges of intentionally discharging a firearm in a building and the charge of ethnic intimidation. With respect to the ethnic-intimidation charge, defendant argued that the prosecution failed to demonstrate that defendant committed a malicious physical act accompanied by a specific intent to harass the complainant because of her gender. In his

> amended motion to quash, defendant further contended that the ethnic-intimidation statute does not apply to situations involving transgender people. The trial court granted defendant's motion to quash, finding that with respect to ethnic intimidation, the preliminary-examination testimony established that the complainant, not defendant, caused the physical contact between the two by grabbing defendant's wrist. The trial court further concluded that because the term "gender" is defined in the Michigan Penal Code as including only masculine, feminine, and neuter genders, the ethnic-intimidation statute did not apply to protect transgender people. [*People v Rogers*, 331 Mich App 12, 16-19; 951 NW2d 50 (2020) (citations omitted), vacated and remanded 506 Mich 949 (2020).]

This Court granted the prosecution leave to appeal[1] the trial court's order granting defendant's motion to quash and challenging the trial court's dismissal of the ethnic-intimidation charge. This Court affirmed the trial court's order, concluding that although the trial court had employed erroneous reasoning, the trial court nonetheless reached the correct result. *Rogers*, 331 Mich App at 16. Thereafter, the United States Supreme Court issued its decision in *Bostock*, 590 US ___; 140 S Ct 1731, and the Michigan Supreme Court subsequently vacated the judgment of this Court and remanded this case to us for reconsideration in light of *Bostock*. *Rogers*, 506 Mich 949.

II. ANALYSIS

A. STANDARD OF REVIEW

We review a trial court's decision regarding a motion to quash an information for an abuse of discretion.

[1] *People v Rogers*, unpublished order of the Court of Appeals, entered November 16, 2018 (Docket No. 346348).

People v March, 499 Mich 389, 397; 886 NW2d 396 (2016); *People v Dowdy*, 489 Mich 373, 379; 802 NW2d 239 (2011). An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). To the extent that a trial court bases its decision regarding a motion to quash an information on an interpretation of the law, we review that interpretation de novo. *March*, 499 Mich at 397. Whether a defendant's conduct falls within the scope of a criminal statute is a question of statutory interpretation, which we also review de novo. *People v Flick*, 487 Mich 1, 8-9; 790 NW2d 295 (2010). When a trial court makes an error of law, it necessarily abuses its discretion. *People v Duncan*, 494 Mich 713, 723; 835 NW2d 399 (2013).

B. MCL 750.147B

The prosecution contends that the trial court erred by dismissing the charge of ethnic intimidation asserted against defendant under MCL 750.147b. That statute provides, in pertinent part:

> (1) A person is guilty of ethnic intimidation if that person maliciously, and with specific intent to intimidate or harass another person because of that person's race, color, religion, gender, or national origin, does any of the following:
>
> (a) Causes physical contact with another person.
>
> (b) Damages, destroys, or defaces any real or personal property of another person.
>
> (c) Threatens, by word or act, to do an act described in subdivision (a) or (b), if there is reasonable cause to believe that an act described in subdivision (a) or (b) will occur. [MCL 750.147b.]

Before the trial court, defendant moved to quash the ethnic-intimidation charge, arguing, in part, that the prosecution failed to demonstrate that defendant had the specific intent to harass the complainant because of her gender. Defendant further argued that the ethnic-intimidation statute does not apply to situations involving transgender people. The trial court agreed in part, concluding that because the term "gender" is defined in the Michigan Penal Code, MCL 750.1 *et seq*., as including only masculine, feminine, and neuter genders, the ethnic-intimidation statute did not apply to protect transgender people.

The goal of statutory interpretation is to discern and give effect to the intent of the Legislature. See *Dowdy*, 489 Mich at 379. If a statute's language is clear and unambiguous, we enforce the language as written, and judicial construction is neither required nor permitted. *People v Gardner*, 482 Mich 41, 50; 753 NW2d 78 (2008). The word "gender" is not specifically defined within MCL 750.147b. The trial court in this case therefore considered the word "gender" as defined in the Penal Code, at MCL 750.10, and concluded that as defined in that section the word "gender" does not include "transgender."

We conclude that the trial court was misguided in relying on that provision to conclude that transgender is not a part or subset of "gender" for purposes of the ethnic-intimidation statute. MCL 750.10 states, in relevant part, that "[t]he masculine gender includes the feminine and neuter genders." MCL 750.10 provides grammatical clarity and miscellaneous definitions for the entirety of the Michigan Penal Code. This Court has long ago and consistently recognized that the legislative intent in enacting MCL 750.10 was to clarify that the Penal Code did not apply only to men,

but also to women and persons of neither male nor female sex, even when only masculine pronouns are used.[2] See *People v Gilliam*, 108 Mich App 695, 700; 310 NW2d 843 (1981) (stating that the gender provision in MCL 750.10 "indicates a clear legislative intent that the Penal Code apply to females as well as males"); *People v Ghosh*, 188 Mich App 545, 546-547; 470 NW2d 497 (1991) (stating that MCL 750.10 provides that the Michigan Penal Code "applies to both men and women"). Thus, MCL 750.10 establishes only a rule of grammar intending to explain that persons of the male sex are not the *only* people subject to the Michigan Penal Code. We therefore conclude that the trial court erred by finding that the provisions of MCL 750.10 establish a substantive, strictly limited definition of "gender" to be used throughout the Penal Code.

We next consider whether intimidation on the basis of a person's "gender" in the ethnic-intimidation statute, which was enacted in 1988, includes intimidation on the basis that a person is transgender. When a statute specifically defines a term, that definition controls. *People v Lewis*, 302 Mich App 338, 342; 839 NW2d 37 (2013). In addition, the terms of a statute must be interpreted " 'on the basis of their ordinary meaning and the context in which they are used.' " *Id.*, quoting *People v Zajaczkowski*, 493 Mich 6, 13; 825 NW2d 554 (2012). When a term is not defined in a statute, we may consult the dictionary definition of the term. *Lewis*, 302 Mich App at 342.

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[2] This Court notes that the other definitions listed in MCL 750.10 address similar grammatical rules of broad inclusion, such as, "The singular number includes the plural and the plural includes the singular," and "The words 'person', 'accused', and similar words include, unless a contrary intention appears, public and private corporations, copartnerships, and unincorporated or voluntary associations."

The word "gender" is not defined within the ethnic-intimidation statute, and we therefore may consult dictionary definitions of the word to determine what is included within its meaning. Because the statute was enacted into law in 1988, however, it is our task to determine what the word meant at the time the statute was adopted, not what it might mean more than 30 years following the statute's enactment. See *In re Certified Question*, 499 Mich 477, 484; 885 NW2d 628 (2016) ("[I]t is best to consult a dictionary from the era in which the legislation was enacted."); see also *Cain v Waste Mgt, Inc (After Remand)*, 472 Mich 236, 247; 697 NW2d 130 (2005) (looking to dictionary definitions from the era of the original legislation in construing the meaning of an undefined statutory term).

We therefore "orient ourselves to the time of the statute's adoption, here [1988], and begin by examining the key statutory terms in turn before assessing their impact [in this case] and then confirming our work against this Court's precedents." *Bostock*, 590 US at ___; 140 S Ct at 1738-1739. To do otherwise would allow a statute's meaning to change not as a result of statutory amendment, but rather by judicial fiat based on evolving societal understandings of a statutory term or terms. Moreover, in doing so "we would deny the people the right to continue relying on the original meaning of the law they have counted on to settle their rights and obligations." *Id*. at 1738, citing *New Prime Inc v Oliveira*, 586 US ___, ___; 139 S Ct 532, 538-539; 202 L Ed 2d 536 (2019).

Although a contemporary understanding of the term "gender" includes gender identity and transgender, MCL 750.147b was not enacted in the era of these contemporary understandings. Rather, the people's representatives in the Legislature enacted this statute

in 1988, and it took effect on March 30, 1989. What, then, was the common understanding of the term "gender" when the Legislature criminalized ethnic intimidation? *Webster's Ninth New Collegiate Dictionary*, published in 1990, gives a one-word definition of the word gender: "SEX." This is the only definition given of the word in noun form that bears upon sexual identity; the others relate to the grammatical meaning of the term. *The Random House College Dictionary*, published in 1988, after likewise defining the word as a grammatical term, gives the same one-word definition: "sex." Both dictionaries then illustrate this meaning by using the word in a phrase involving "the feminine gender." The *Webster's* dictionary defines "sex" as "either of two divisions of organisms distinguished respectively as male or female." At the time the statute was enacted, therefore, the term "gender" was synonymous with sex, being the biological roles of male and female.

That this was the common understanding of the term "gender" at the time the statute was enacted is further illustrated by a 1993 opinion of this Court. In *Barbour v Dep't of Social Servs*, 198 Mich App 183; 497 NW2d 216 (1993), this Court upheld the trial court's dismissal of the plaintiff's claim that he was unlawfully discriminated against in his employment on the basis of his sexual orientation. Plaintiff brought his claim under the Elliott-Larsen Civil Rights Act, MCL 37.2101 *et seq*., which prohibits various forms of discrimination on the basis of "sex." The Court held that "harassment or discrimination based upon a person's sexual orientation is not an activity proscribed by the act." *Barbour*, 198 Mich App at 185. The Court went on to state, "Plaintiff has failed to meet the requirement that the harassment be *gender-based*." *Id*. at 186 (emphasis added).

The Court in *Barbour* also relied on its review of federal caselaw interpreting Title VII of the federal Civil Rights Act of 1964, 42 USC 2000e *et seq*., which similarly prohibits discrimination on the basis of "sex," concluding that Title VII's "protections are aimed at *gender* discrimination, not discrimination based on sexual orientation." *Barbour*, 198 Mich App at 185 (emphasis added). Although *Bostock* has since dispelled that conclusion as a misconception, this Court in *Barbour* in 1993 used the term "gender" interchangeably with the statutory term "sex," suggesting an understanding at that time that gender meant sex and was understood to denote biological sex. The term gender, it would seem, would not have been understood to encompass transgender when the statute was enacted in 1988.

C. *BOSTOCK*

In *Bostock*, the United States Supreme Court considered whether Title VII of the Civil Rights Act of 1964, 42 USC 2000e-2(a)(1), which precludes discrimination against an individual "because of such individual's . . . sex" includes discrimination against homosexual and transgender persons. The Court specifically addressed "whether an employer can fire someone simply for being homosexual or transgender" under Title VII and concluded that "[a]n employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids." *Bostock*, 590 US at ___; 140 S Ct at 1737.

The Court assumed for purposes of that discussion that "sex" referred "only to biological distinctions be-

tween male and female" but posited that the question was not merely what "sex" meant, "but what Title VII says about it." *Id*. at ___; 140 S Ct at 1739. The *Bostock* Court found that from the "ordinary public meaning of the statute's language at the time of the law's adoption, a straightforward rule emerges: An employer violates Title VII when it intentionally fires an individual employee based in part on sex." *Id*. at ___; 140 S Ct at 1741. "If the employer intentionally relies in part on an individual employee's sex when deciding to discharge the employee—put differently, if changing the employee's sex would have yielded a different choice by the employer—a statutory violation has occurred." *Id*. at ___; 140 S Ct at 1741.

The *Bostock* Court acknowledged that "homosexuality and transgender status are distinct concepts from sex" but that "discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second." *Id*. at ___; 140 S Ct at 1746-1747. The Court concluded that "[f]or an employer to discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate against individual men and women in part because of sex." *Id*. at ___; 140 S Ct at 1743.

We observe initially that federal laws and regulations are not binding on a Michigan court interpreting a Michigan statute. *Peden v Detroit*, 470 Mich 195, 217; 680 NW2d 857 (2004). And "[w]hile federal precedent may often be useful as guidance in this Court's interpretation of laws with federal analogues, such precedent cannot be allowed to rewrite Michigan law. The persuasiveness of federal precedent can only be considered after the statutory differences between Michigan and federal law have been fully assessed, and, of

course, even when this has been done and language in state statutes is compared to similar language in federal statutes, federal precedent remains only as persuasive as the quality of its analysis." *Garg v Macomb Co Community Mental Health Servs*, 472 Mich 263, 283; 696 NW2d 646 (2005). See also *Huggett v Dep't of Natural Resource*s, 464 Mich 711, 721-722; 629 NW2d 915 (2001) (rejecting this Court's reliance, in determining the scope of a Michigan statutory provision, on an analogous, similarly worded provision of a federal statute and concluding that federal law need not be considered when the intent of the Michigan Legislature could be determined from the Michigan statute itself); *Sharp v Lansing*, 464 Mich 792, 803; 629 NW2d 873 (2001) (providing that federal caselaw is not binding precedent and is only persuasive authority in resolving a question of state law); *Chmielewski v Xermac, Inc*, 457 Mich 593, 601-602; 580 NW2d 817 (1998) (providing that when interpreting provisions of Michigan's Persons with Disabilities Civil Rights Act, MCL 37.1101 *et seq*., the analogous federal precedents are persuasive but not binding).

In *Bostock*, Justice Alito, joined by Justice Thomas, filed a lengthy dissenting opinion, beginning: "There is only one word for what the Court has done today: legislation. The document that the Court releases is in the form of a judicial opinion interpreting a statute, but that is deceptive." *Bostock*, 590 US at ___; 140 S Ct at 1754 (Alito, J., dissenting). Justice Alito went on to state: "Many will applaud today's decision because they agree on policy grounds with the Court's updating of Title VII. But the question in these cases is not whether discrimination because of sexual orientation or gender identity *should be* outlawed. The question is *whether Congress did that in 1964*. It indisputably did not." *Id*. at ___; 140 S Ct at 1756.

In its application to this case, we accord *Bostock* respectful consideration as we parse the meaning of Michigan's ethnic-intimidation statute. But following the precedents of our Supreme Court, we must conclude that *Bostock* does not control the outcome of this case. See *Garg*, 472 Mich at 283. *Bostock* interpreted a federal civil-employment-discrimination statute Congress adopted in 1964. We are tasked with interpreting the meaning of a state criminal statute enacted in 1988. Thus, we are not in this case comparing a state statute with an analogous federal statute. Moreover, the federal interpretation of an analogous federal statute would not control our interpretation of a Michigan statute, even under the most expansive reading of the United States Constitution's supremacy clause. Although *Bostock* might offer helpful guidance, we are bound by Michigan precedent to conclude that "such precedent cannot be allowed to rewrite Michigan law." *Garg*, 472 Mich at 283.

Having said that, we observe that if this Court substitutes the word "sex" for "gender" in MCL 750.147b(1)(a), the language of the statute is similar to 42 USC 2000e-2(1)(a), though the latter is an employment-discrimination statute. 42 USC 2000e-2(1)(a) prohibits certain forms of discrimination "against any individual . . . because of such individual's race, color, religion, sex, or national origin[.]" MCL 750.147b(1)(a) prohibits a person from causing physical contact with another person "maliciously, and with specific intent to intimidate or harass another person because of that person's race, color, religion, gender, or national origin . . . ." Title VII uses the word "individual" instead of "person," and Title VII uses the word "sex" as opposed to "gender."

We acknowledge that gender and sex are not now defined as synonymous, although, as discussed, they were defined as such in 1988.[3] However, as observed by the *Bostock* Court, the terms are often inextricably intertwined. In this matter, defendant's alleged conduct targeted the complainant because she was biologically male at birth but did not match defendant's expectations of how a man should appear or behave. Presumably, were it not for the complainant's biological sex (male), defendant would not have harassed and intimidated her. Given that defendant allegedly harassed and intimidated the complainant because he believed her to be male and based his intimidating conduct on that belief, we need not reach the question whether the statute's use of the term "gender" in 1988 was intended to include the term "transgender." Defendant's actions were gender-based within the "traditional" understanding of that term, and harassing someone on the basis of their male gender (whether perceived or actual) falls within the prohibitions of the statute. It furthermore would not matter if defendant had been mistaken in his perception of the complainant's gender or biological sex, because the test under

[3] Various dictionaries define "gender" in different ways. For example, *Merriam-Webster's Collegiate Dictionary* (11th ed) defines "gender," in part, as "the behavioral, cultural, or psychological traits typically associated with one sex." *The Oxford English Dictionary* (3d ed) provides a similar definition of gender but expounds further, defining gender as "[e]ither of the two sexes (male and female), especially when considered with reference to social and cultural differences rather than biological ones. The term is also used more broadly to denote a range of identities that do not correspond to established ideas of male and female." It also clarifies that the words "sex" and "gender" often mean different things and are used differently: "Although the words gender and sex are often used interchangeably, they have slightly different connotations; sex tends to refer to biological differences, while gender more often refers to cultural and social differences and sometimes encompasses a broader range of identities than the binary of male and female[.]" *Id*.

the statute is subjective; a defendant is guilty of ethnic intimidation if the defendant intimidates an individual "because of" that individual's gender, whether rightly or wrongly perceived.[4]

Our role is to effectuate the intent of the Legislature. Applying the term "gender" in any sense, whether it is interpreted as equating with "sex" or given a broader meaning, defendant engaged in harassment and intimidation of the complainant based on her gender. As enacted, MCL 750.147b prohibits intimidation and harassment because of gender. A plain reading of the statute would dictate that whenever a complainant's gender was the impetus for the intimidating or harassing behavior, the conduct falls within the ethnic-intimidation statute. We conclude that recognizing that the complainant here was targeted because of her gender effectuates the Legislature's intent.

D. BINDOVER

We therefore consider whether the trial court abused its discretion in granting defendant's motion to quash his bindover on the ethnic-intimidation charge and conclude that it did. "The purpose of a preliminary examination is to determine whether a crime was

[4] Another passage from Justice Alito's dissenting opinion is instructive in the application of the Michigan ethnic-intimidation statute to the facts at hand in this case. Justice Alito posited: "Contrary to the Court's contention, discrimination because of sexual orientation or gender identity does not in and of itself entail discrimination because of sex. We can see this because it is quite possible for an employer to discriminate on those grounds without taking the sex of an individual applicant or employee into account." *Bostock*, 590 US at ___; 140 S Ct at 1758 (Alito, J., dissenting). Such was not the case here, however. Defendant knew, or at least thought he knew, the complainant's biological sex and intimidated her on that basis. The Michigan statute prohibits such conduct, without reference to the fact that the complainant in this case was transgender.

committed and whether there is probable cause to believe that the defendant committed it." *People v Taylor*, 316 Mich App 52, 58; 890 NW2d 891 (2016). To support a bindover of defendant on the charge of ethnic intimidation, the prosecution must establish probable cause to believe that defendant

> maliciously, and with specific intent to intimidate or harass another person because of that person's race, color, religion, gender, or national origin, does any of the following:
>
> (a) Causes physical contact with another person.
>
> (b) Damages, destroys, or defaces any real or personal property of another person.
>
> (c) Threatens, by word or act, to do an act described in subdivision (a) or (b), if there is reasonable cause to believe that an act described in subdivision (a) or (b) will occur. [MCL 750.147b(1).]

"Malice" generally is defined in a criminal context as the " 'intent, without justification or excuse, to commit a wrongful act,' " a " '[r]eckless disregard of the law or of a person's legal rights,' " or " '[i]ll will[.]' " *People v Harris*, 495 Mich 120, 136; 845 NW2d 477 (2014), quoting *Black's Law Dictionary* (9th ed). In this case, the specific intent required would be that described in the statute: to intimidate or harass the complainant because of her "gender." MCL 750.147b(1). Here, the preliminary-examination testimony established probable cause to believe that defendant acted maliciously and with specific intent to harass the complainant on account of her gender. Defendant's words and conduct were predicated on his belief that the complainant was biologically male.

The trial court also determined that the prosecution did not establish probable cause to believe that defendant's intent to intimidate or harass the complainant on account of her gender caused physical contact with the complainant, as required under MCL 750.147b(1)(a).

Because the statute does not provide a definition of "cause," consulting dictionary definitions is proper. *Lewis*, 302 Mich App at 342. *Black's Law Dictionary* (11th ed) defines "cause" as "[t]o bring about or effect." *Merriam-Webster's Collegiate Dictionary* (11th ed) defines a "cause" as a "reason for an action or condition" or "something that brings about an effect or a result."

Here, defendant engaged in harassment and intimidation of the complainant based on her gender. He showed her a loaded gun and threatened to kill her, causing her to fear for her life. While the complainant initiated the first physical contact by grabbing defendant's arm, the statute requires that the defendant "[c]ause[]" physical contact; the statute does not require that the defendant be the person to initiate the physical contact. MCL 750.147b(1)(a). The complainant's testimony provides support for the conclusion that defendant caused physical contact when he placed the complainant in fear for her life, causing her to struggle for the gun. Thus, the trial court erred by concluding that there was no probable cause to believe that defendant caused physical contact with the complainant.

We reverse the trial court's order granting defendant's motion to quash the ethnic-intimidation charge, reinstate the ethnic-intimidation charge, and remand this case to the trial court for further proceedings that are consistent with this opinion. We do not retain jurisdiction.

REDFORD, J., concurred with GADOLA, P.J.

SERVITTO, J. (*concurring*). I agree with the result reached by the majority. I write separately, however, to address several issues I believe require attention.

First, I completely agree with the majority that the trial court erred by relying on the Penal Code, at MCL 750.10, to define the word "gender" given the purpose of MCL 750.10. I additionally note that in relying on that provision, the trial court found it persuasive that there were two bills pending before the Legislature that would add the terms "gender identification" and "sexual orientation" to MCL 750.147b: 2017 HB 4800 and 2017 SB 121. However, the Legislature does not necessarily intend to *change* the meaning of a statute merely by amending the statute's language; an amendment could merely reflect the Legislature's desire to clarify its intent. See *Bush v Shabahang*, 484 Mich 156, 167; 772 NW2d 272 (2009) ("[A] change in statutory language is presumed to reflect *either* a legislative change in the meaning of the statute itself *or* a desire to clarify the correct interpretation of the original statute.") (emphasis added). In addition, construing an unambiguous statute by relying on legislative history or potential amendment allows a reader, with equal plausibility, to pose a conclusion of their own that differs from that of the majority. See *People v Gardner*, 482 Mich 41, 57; 753 NW2d 78 (2008). Finally, in *Bostock v Clayton Co, Georgia*, 590 US ___, ___; 140 S Ct 1731, 1747; 207 L Ed 2d 218 (2020), the Supreme Court specifically rejected postenactment legislative history as a basis for interpreting a statute: "speculation about why a later Congress declined to adopt new legislation offers a 'particularly dangerous' basis on which to rest an interpretation of an existing law a different and earlier Congress did adopt." (Citation omitted.) Thus, the trial court's additional reason for holding that the ethnic-intimidation statute did not apply to transgender people is without basis.

Next, I disagree with the majority's reliance on a 1988 dictionary definition of "gender" in its analysis.

Because the ethnic-intimidation statute, MCL 750.147b, was enacted in 1988 and contains no definition of the term "gender," the majority relies on a dictionary definition of "gender" from that year. According to the majority, MCL 750.147b was not enacted in an era of a contemporary understanding of that term. Rather, the majority posits, the definition of "gender" was understood in 1988 to be synonymous with "sex," which, in turn, referenced only the biological roles of male and female.

While I do not disagree that dictionaries may sometimes be used as an aid in interpreting statutory terms, "recourse to the dictionary is unnecessary when the legislative intent may be readily discerned from reading the statute itself." *ADVO-Sys, Inc v Dep't of Treasury*, 186 Mich App 419, 424; 465 NW2d 349 (1990). Moreover, "[a] statute is not ambiguous merely because a term it contains is undefined . . . ." *Diallo v LaRochelle*, 310 Mich App 411, -418; 871 NW2d 724 (2015) (quotation marks and citation omitted). Here, I do not believe that referring to a dictionary is necessary to discern the legislative intent in MCL 750.147b,[1] because there is nothing textually ambiguous about the use of the word "gender" in the ethnic-intimidation statute when common sense is applied.

MCL 750.147b provides, in pertinent part:

> (1) A person is guilty of ethnic intimidation if that person maliciously, and with specific intent to intimidate

[1] Notably, however, the 1971 edition of *The Random House Dictionary of the English Language*, in defining "gender," states that "[t]he number of genders in different languages varies from two to more than twenty; often the classification correlates *in part* with sex or animateness." (Emphasis added.) When the Legislature does not designate a particular dictionary that it referenced in crafting a particular statute, I do not see how it can be said that any one dictionary is the best—let alone the conclusive—determiner of legislative intent.

> or harass another person because of that person's race, color, religion, gender, or national origin, does any of the following . . . .

While there is no binding authority stating the exact purpose of the ethnic-intimidation statute, it can be gleaned from the language of the statute itself that it is intended to criminalize harassing and intimidating behavior when the behavior is based on a victim's specific characteristics. Our role is to effectuate the intent of the Legislature, as determined from the statutory language. *Bukowski v Detroit*, 478 Mich 268, 273; 732 NW2d 75 (2007). In MCL 750.147b, the Legislature sought to redress crimes motivated by a person's intolerance of another's specifically listed characteristics (race, color, religion, gender, or national origin); in this case, the victim's gender was clearly not tolerated by defendant and, in fact, prompted his behavior.

I also do not believe that *Barbour v Dep't of Social Servs*, 198 Mich App 183; 497 NW2d 216 (1993), supports the majority's position that "gender" was commonly understood as synonymous with "sex" at the time MCL 750.147b was drafted. In that case, the plaintiff was subjected to harassment in efforts to get him to " 'engage in homosexual sex.' " *Id*. at 184. This Court thus stated that the "[p]laintiff's sexual orientation constituted the subject matter of the harassment." *Id*. Sexual orientation is not the same as gender,[2] and there is no indication that the intimidation and harassment of the victim in this case was based on her sexual orientation, as opposed to her gender.

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[2] "Sexual orientation" generally refers to one's preference in sexual partners. See, e.g., *Random House Webster's Collegiate Dictionary* (1995).

Finally, I would find *Bostock* more persuasive than the majority appears to have found and, more importantly, consistent with the result that a plain reading of the statute at issue would dictate. *Bostock* concerned three different cases. Most relevant to this matter, Aimee Stephens was first hired by her employer at a time when she presented as male, which was her assigned sex at birth. *Bostock*, 590 US at ___; 140 S Ct at 1738. But a few years later, after being diagnosed with gender dysphoria, clinicians recommended that she begin living as a woman. *Id*. at ___; 140 S Ct at 1738. Years later, Stephens informed her employer that, when she returned from an upcoming vacation, she planned to live and work full-time as a woman. *Id*. at ___; 140 S Ct at 1738. Stephens was fired before she left for her vacation. *Id*. at ___; 140 S Ct at 1738. She thereafter brought suit under Title VII, alleging discrimination on the basis of sex, and the United States Court of Appeals for the Sixth Circuit held that Title VII prohibited employers from firing an employee because he or she is transgender. *Id*. at ___; 140 S Ct at 1738. The Supreme Court granted certiorari "to resolve at last the disagreement among the courts of appeals over the scope of Title VII's "protections for homosexual and transgender persons." *Id*. at ___; 140 S Ct at 1738.

The *Bostock* Court determined that "[t]he statute's message . . . is equally simple and momentous: An individual's homosexuality or transgender status is not relevant to employment decisions." *Id*. at ___; 140 S Ct at 1741. "That's because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." *Id*. at ___; 140 S Ct at 1741. The *Bostock* Court specifically acknowledged that "homosexuality and transgender status are distinct concepts from sex,"

but "discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second." *Id*. at ___; 140 S Ct at 1746-1747. As the *Bostock* Court noted:

> [A]n employer who fires a woman, Hannah, because she is insufficiently feminine and also fires a man, Bob, for being insufficiently masculine may treat men and women as groups more or less equally. But in *both* cases the employer fires an individual in part because of sex. Instead of avoiding Title VII exposure, this employer doubles it. [*Id*. at ___; 140 S Ct at 1741.]

"As enacted, Title VII prohibits all forms of discrimination because of sex, however they may manifest themselves or whatever other labels might attach to them." *Id*. at ___; 140 S Ct at 1747. In sum, "[f]or an employer to discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate against individual men and women in part because of sex. That has always been prohibited by Title VII's plain terms—and that should be the end of the analysis." *Id*. at ___; 140 S Ct at 1743 (quotation marks and citation omitted).

A plain reading of MCL 750.147b would similarly dictate that whenever a victim's gender was the impetus for the intimidating or harassing behavior, the conduct falls within the ethnic-intimidation statute and that should be the end of the analysis. Clearly, under MCL 750.147b, if the victim was a man who was harassed or intimidated in whole or in part because he was a man, the conduct would be criminal under the statute. The same would hold true for a woman who was harassed or intimidated in whole or in part because she was a woman. There is no plausible reason to determine that the ethnic-intimidation statute applies

to biologically assigned males who present an outward appearance of male and biologically assigned females who present an outward appearance as female but not to persons whose biologically assigned sex might be different from the sex that their outward appearances reflect. Harassment based on gender is equally at the root of all the scenarios and is the prompting for the harassing or intimidating behavior.

No matter how we define "gender," our role is to effectuate the intent of the Legislature. Applying the term "gender" in any sense, whether it is interpreted as equating with "sex" as the trial court did and the majority does, or given a broader meaning, defendant engaged in harassment and intimidation of the victim based on her gender. The victim was targeted specifically *because* she was assigned biologically male at birth but self-identified and outwardly presented as a different gender. The preliminary-examination testimony indicates that defendant's harassment of the victim occurred because her manner of dress did not match defendant's expectations of how a man should appear or behave. As I stated in my prior dissent, and in accordance with *Bostock*, discrimination based on gender *necessarily includes* discrimination based on sex as well. Just as an employer who discriminates against an employee for being transgender necessarily discriminates against individual men and women in part because of sex, *Bostock*, 590 US at ___; 140 S Ct at 1743, when a defendant engages in harassing and intimidating behavior against a transgender person, the defendant necessarily does so based on that individual's biologically assigned sex and thus, *in part*, on his or her gender.

As enacted, MCL 750.147b prohibits intimidation and harassment because of gender, "however [it] may

manifest [itself] or whatever other labels might attach to [it]." *Bostock*, 590 US at ___; 140 S Ct at 1747. A plain reading of the statute requires a finding that whenever a victim's gender was the impetus for the intimidating or harassing behavior, the conduct falls within the ethnic-intimidation statute. I believe that to recognize that the victim here was targeted because of her gender, however it manifested itself, has an important role in *effectuating the Legislature's intent* in enacting MCL 750.147b—to criminalize and punish hate-based or discriminatory intimidation and harassment.

BATISTA v OFFICE OF RETIREMENT SERVICES

Docket No. 353832. Submitted July 13, 2021, at Lansing. Decided August 12, 2021, at 9:00 a.m. Affirmed in part, vacated in part, reversed in part, and remanded 511 Mich ___ (2023).

Patricia Batista, David Britten, Timothy Donohue, and others filed a complaint in the Court of Claims alleging, among other things, that the Office of Retirement Services (ORS) had violated the Public School Employees Retirement Act (the Retirement Act), MCL 38.1301 *et seq*., when it used salary schedules that it had created to help determine plaintiffs' retirement allowances or pension payments. Plaintiffs were current or retired public school superintendents and administrators who worked under personal employment contracts, rather than collective-bargaining agreements. Under the Retirement Act, following the retirement of a public school employee, or "member," the member is to receive a retirement allowance that equals the sum of the member's total years of credited service, multiplied by 1.5% of the member's "final average compensation." Determining an individual's "final average compensation" first required the determination of their annual compensation during their years of employment. The ORS created a manual to help payroll offices ensure the accuracy of pension payments to members. The manual was intended to be a summary of basic plan provisions set forth in the Retirement Act, and included in the manual were normal salary increase (NSI) schedules created by the ORS for superintendents and administrators. The NSI schedules set forth annual allowable salary increase percentages. Annual compensation increases above the percentages in the schedules were nonreportable compensation that could not be considered in calculating the final average compensation. A portion of the increases in compensation received by plaintiffs was classified as nonreportable compensation under the NSI schedules. Plaintiffs filed their action, arguing in part that the Retirement Act did not authorize the ORS to create the NSI schedules and apply them to plaintiffs. Defendants moved for summary disposition. The Court of Claims, CHRISTOPHER M. MURRAY, J., granted the motion, except with respect to plaintiffs' claim alleging a violation of the Administrative Procedures Act (APA), MCL 24.201 *et seq*. The

parties subsequently filed cross-motions for summary disposition regarding the APA claims, and the court granted defendants' motion on the basis that the APA was not applicable because the NSI schedules were not in the administrative rules. Plaintiff appealed.

The Court of Appeals *held*:

The Retirement Act does not authorize the ORS to create and implement NSI schedules and apply them to superintendents and administrators. Reportable compensation, i.e., compensation that is reported to the ORS for purposes of determining a member's final average compensation, does not include compensation in excess of an amount over the level of compensation reported for the preceding year except for those increases provided for by the normal salary schedule for the current job classification, pursuant to MCL 38.1303a(3)(f). The Legislature did not define the term "normal salary schedule," but it was clear from the Legislature's use of this term and its reference to "job classification" that the Legislature was alluding to schedules and classifications in the particular context of collective bargaining. This language plainly pertains to collective-bargaining agreements. Further, the language of MCL 38.1303a(3)(f) did not invite or authorize the creation of salary schedules and classifications by the ORS. Superintendents and administrators are not compensated according to normal salary schedules; rather, they perform their duties and functions pursuant to personal employment contracts that are distinct and tailored to particular individuals. Defendants relied on the second sentence of MCL 38.1303a(3)(f), providing that when the current job classification has less than three members, the normal salary schedule for the most nearly identical job classification in the reports shall be used. However, this language is a continuation of the preceding sentence in the statute and still addresses employees subject to collective-bargaining agreements, not those working under personal employment contracts. Further, the sentence does not authorize the creation of a normal salary schedule or an NSI schedule. The ORS also was not authorized to create NSI schedules for superintendents and administrators under MCL 38.1303a(5). MCL 38.1303a(5) authorizes the retirement board to make individual determinations as to whether compensation is reportable. While MCL 38.1303a applies generally to superintendents and administrators, MCL 38.1303a(3)(f) does not govern members who work pursuant to personal employment contracts because normal salary schedules and collective-bargaining agreements are not involved in such cases.

Decision reversed and case remanded for entry of judgment in favor of plaintiffs.

STATUTES — PUBLIC SCHOOL EMPLOYEES RETIREMENT ACT — SUPERINTENDENTS AND ADMINISTRATORS.

The Public School Employees Retirement Act, MCL 38.1301 *et seq*., does not authorize the Office of Retirement Services to create salary schedules and apply them to superintendents and administrators; the Legislature's use of the terms "normal salary schedule" and "job classification" in MCL 38.1303a(3)(f) plainly pertains to the context of collective-bargaining agreements, and superintendents and administrators perform their duties subject to personal employment contracts.

Lusk Albertson, PLC (by *Robert T. Schindler*, *Anya M. Lusk*, and *Adam J. Walker*) for plaintiffs.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Patrick M. Fitzgerald*, Assistant Attorney General, for defendants.

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

MARKEY, J. This case involves issues regarding the determination of reportable "compensation" under the Public School Employees Retirement Act (the Retirement Act), MCL 38.1301 *et seq*., and the Reporting Instruction Manual (the manual) prepared and implemented by defendant Office of Retirement Services (ORS). Resolution of these issues has a bearing on retirement allowances or pension payments for public school superintendents and administrators who work under personal employment contracts, not collective-bargaining agreements. The Court of Claims granted summary disposition to defendants, and plaintiffs appeal by right. We reverse and remand for entry of judgment in favor of plaintiffs.

I. THE STATUTORY FRAMEWORK

To provide context to and an understanding of our discussion of the facts, the procedural history of the

case, and the parties' arguments, we begin with a review of the relevant language in the Retirement Act. The "Michigan public school employees' retirement system [was] created for the public school employees of this state." MCL 38.1321. The retirement system is intended to "be a qualified pension plan created in trust under section 401 of the internal revenue code, 26 USC 401[.]" MCL 38.1408(1). In general, "upon [a] member's retirement from service . . . , a member shall receive a retirement allowance that equals the product of the member's total years, and fraction of a year, of credited service multiplied by 1.5% of the member's *final average compensation*." MCL 38.1384(1) (emphasis added).[1] A member's "final average compensation" is defined, in part, as "the aggregate amount of a member's compensation earned within the averaging period in which the aggregate amount of compensation was highest divided by the member's number of years, including any fraction of a year, of credited service during the averaging period." MCL 38.1304(12).

With respect to the term "compensation," MCL 38.1303a(1) provides that it "means the remuneration earned by a member for service performed as a public school employee." MCL 38.1303a(2) states that "[c]ompensation includes salary and wages," as well as eight specific types of payments that constitute compensation, e.g., "[l]ongevity pay," MCL 38.1303a(2)(d). MCL 38.1303a(3) lists types of payments that do not constitute compensation, including the following:

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[1] A "member" is, with some exceptions, "a public school employee." MCL 38.1305(1). There is no dispute that the individual plaintiffs are members. The term "retirement allowance" is defined as "a payment for life or a temporary period provided for in this act to which a retirant, retirement allowance beneficiary, or refund beneficiary is entitled." MCL 38.1307(5).

> (e) Remuneration paid for the specific purpose of increasing the final average compensation.
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> (f) Compensation in excess of an amount over the level of compensation reported for the preceding year except increases provided by the normal salary schedule for the current job classification. In cases where the current job classification in the reporting unit[2] has less than 3 members, the normal salary schedule for the most nearly identical job classification in the reporting unit or in similar reporting units shall be used.

MCL 38.1303a(5)(a) and (b) provide that the retirement board,[3] based on information and documentation provided by a member, shall determine "[w]hether any form of remuneration paid to a member is identified in this section" and "[w]hether any form of remuneration that is not identified in this section should be considered compensation reportable to the retirement system under this section." Finally, MCL 38.1303a(6) states that "[i]n any case where a petitioner seeks to have remuneration included in compensation reportable to the retirement system, the petitioner shall have the burden of proof."

II. BACKGROUND—OVERVIEW

Plaintiffs are current or retired public school superintendents and administrators who work or worked under personal employment contracts, not collective-

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[2] MCL 38.1307(3) provides:

> Except as otherwise provided in this subsection, "reporting unit" means a public school district, intermediate school district, public school academy, tax supported community or junior college, or university, or an agency having employees on its payroll who are members of this retirement system. The reporting unit shall be the employer for purposes of this act. . . . .

[3] The "retirement board" is "the board provided to administer th[e] retirement system." MCL 38.1307(7).

bargaining agreements.[4] Pension payments made to superintendents and administrators are calculated by taking into consideration years of credited service and, relevant here, their "final average compensation." Accordingly, there must be a determination of the individual's annual compensation during their years of employment. MCL 38.1303a(3) makes clear that not all payments are considered reportable compensation for purposes of ascertaining a member's final average compensation. And annual increases in compensation in excess of the normal salary schedule for a job classification are, effectively, nonreportable. MCL 38.1303a(3)(f).[5] The Retirement Act does not define "normal salary schedule" or provide any further elaboration on the phrase. This is where the ORS's manual comes into play with respect to superintendents and administrators.

The ORS, which is a division of the Department of Technology, Management and Budget, administers the retirement system. The ORS's manual, prepared annually, is designed to assist payroll offices, working in unison with the ORS, in ensuring the accuracy of account information and pension payments for members. The manual indicates that it is a summary of basic plan provisions found in the Retirement Act and that the Retirement Act governs if there are any discrepancies between the Retirement Act and the manual. The ORS creates normal salary increase (NSI) schedules for superintendents and administrators. These schedules are then placed in the manual. The following is an

[4] Plaintiffs also include the Michigan Association of Superintendents and Administrators.

[5] The ORS's manual speaks in terms of "reportable" and "nonreportable" compensation.

excerpt from the manual presented to the Court of Claims:

> In cases where a job classification has fewer than three members (superintendents, assistant superintendents, administrative assistants), ORS applies a normal salary schedule for the most nearly identical job classification in similar reporting units. To determine what constitutes a normal salary schedule for these job classifications, ORS has aggregated salary data for each classification and has calculated the annual average increases, which resulted in the Normal Salary Increase (NSI) percentage tables provided below.
>
> For each of the respective job classifications, similar reporting units are grouped into one of four categories based on payroll size. For each grouping, the annual average salary increase percentage is calculated and doubled to allow a more generous and flexible deviation of 'normal.' Annual increases in compensation for a particular job classification are reportable if they are within the NSI percentages for a given year. Increases in excess of the NSI are excluded.
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> Because the [Retirement Act] requires that all compensation increases fall within a normal salary schedule, any portion of salary above the applicable NSI in a given year will remain subject to the NSI in subsequent years. This is because the NSI included for one year becomes the base salary upon which the next year's allowable increase is calculated. . . .

As indicated, the NSI schedules set forth annual allowable salary increase percentages with respect to compensation. Yearly compensation increases at or below a particular enumerated percentage constitute reportable compensation that can be used for determining a member's final average compensation. But annual compensation increases above the percentage represent nonreportable compensation that cannot be considered in calculating the final average compensa-

tion. Plaintiffs received, in various forms, annual increases in compensation, not all of which were taken into consideration for purposes of ascertaining their final average compensation. In other words, a portion of their respective increases in compensation was characterized as nonreportable compensation under the NSI schedules created by the ORS.

III. THE LITIGATION

In Count I of their amended complaint, plaintiffs alleged in pertinent part that the Retirement Act does not authorize the ORS to create the NSI schedules and apply them to plaintiffs. Plaintiffs asserted, therefore, that the ORS had acted in violation of the Retirement Act by imposing the NSI schedules on plaintiffs. In Count II, plaintiffs contended that the NSI schedules violate Const 1963, art 9, § 24, which provides, in relevant part, that "[t]he accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions shall be a contractual obligation thereof which shall not be diminished or impaired thereby." In Count III of the complaint, plaintiffs alleged a violation of the Administrative Procedures Act (APA), MCL 24.201 *et seq*. Plaintiffs claimed that the NSI schedules, assuming that they were valid under the Retirement Act, must be promulgated as "rules" as defined in MCL 24.207, under the specific procedures set forth in Chapter 3 of the APA, MCL 24.231 *et seq*., and that the failure to do so constitutes a violation of the APA. In Count IV, plaintiffs maintained that their rights to procedural due process under the Michigan and United States Constitutions had been violated. Plaintiffs asserted that they had a property right to their compensation and pensions which entitled them to notice and a hearing before their pensions were

capped by the application of the NSI schedules, and the ORS had not provided them with predeprivation hearings or proper postdeprivation reviews. In Count V of the complaint (mistakenly also labeled Count IV), plaintiffs alleged that they are entitled to civil damages under 42 USC 1983 for the violation of their due-process rights.

Although plaintiffs did not request any type of relief with respect to each individual count, at the conclusion of the complaint, plaintiffs sought the following rulings and relief from the Court of Claims:

> (1) Issue declaratory ruling holding the NSI [schedules] as created by the ORS and placed into the [manual] to be unlawful and stricken from the [manual] and to no longer be used in application to the Plaintiffs and all other affected public employees[;]
>
> (2) Issue declaratory ruling holding that the application of the NSI [schedules] to be [sic] unlawful and that any prior application of it to any Plaintiff or other affected public employee to be [sic] stricken[;]
>
> (3) Issue an order that ORS conduct a new review of compensation for any Plaintiff or other affected public employee that has had their compensation reduced through the usage of the NSI [schedules] and order that review to be conducted without consideration of the NSI [schedules;]
>
> (4) Issue an order granting back pay to any affected public employee that is currently receiving a pension that was reduced in any manner because of the application of the NSI [schedules;]
>
> (5) Issue an order that ORS must follow the protocols and procedures of the APA when adopting or amending portions of the [manual] that are used and applied as rules by the ORS[;]
>
> (6) Issue an order that a pre-deprivation hearing must be conducted prior to reducing the reported compensation or [final average compensation] of a member of the System[;]

> (7) Issue an order granting reasonable costs and actual attorney fees to Plaintiffs for bringing this matter and administrative proceedings leading to this matter[;[6]]
>
> (8) Appoint a Special Master for purposes of reviewing pleadings and claims supporting the creation of a Class pursuant to MCL § 600.6419(1)(c) . . . [; and]
>
> (9) Any other relief that this Court deems proper.

Defendants moved for summary disposition, presenting a variety of arguments in support of dismissal of plaintiffs' lawsuit. The Court of Claims granted the motion for summary disposition, except in regard to plaintiffs' APA count, in an extensive written opinion and order. The Court of Claims first addressed defendants' contention that the court lacked subject-matter jurisdiction because plaintiffs had failed to exhaust their administrative remedies. The court ruled that, to the extent that plaintiffs' claims were challenging the validity of using the NSI schedules *in general*, the claims were not barred by a failure to exhaust administrative remedies. With respect to the claims seeking a recalculation of the pension benefits for individual plaintiffs, the Court of Claims proceeded on the assumption that those claims were not precluded by a failure to exhaust administrative remedies.[7]

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[6] The individual plaintiffs had previously pursued administrative relief by arguing to the retirement board that the creation and application of the NSI schedules violated the Retirement Act. The retirement board rejected the argument on the basis that the same argument regarding the NSI schedules had been entertained by the retirement board many times in the past or on judicial review and that all those challenges had been unsuccessful.

[7] Earlier in its discussion, the Court of Claims acknowledged that the individual plaintiffs had sought agency review and were rebuffed by the retirement board. The court also indicated that plaintiffs had "presented a compelling argument as to why further administrative review—were it required—would have been futile[.]"

The Court of Claims next determined that the claims involving the pension benefits of individual plaintiffs were barred for failure to strictly comply with the notice requirements of MCL 600.6431(1),[8] even if there was actual notice and regardless whether prejudice was incurred. The court agreed with defendants' contention that the claims of the individual plaintiffs accrued on June 30, 2017;[9] therefore, because the complaint was filed more than a year later, any effort to revisit the calculation of their pension benefits was essentially time-barred under MCL 600.6431(1). The court noted that "plaintiffs have not even argued that they complied with MCL 600.6431, nor have they challenged defendants' assertions about the accrual dates of their respective claims." Given the failure to meaningfully refute defendants' argument under MCL 600.6431(1), the court concluded that plaintiffs' claims seeking revisitation or recalculation of individual pension benefits were time-barred by operation of MCL 600.6431(1). The court determined that the same reasoning applied to the claims alleging state and federal due-process violations, the claim seeking relief under 42 USC 1983, and the claim asserting a violation of Const 1963, art 9, § 24. Accordingly, pursuant to MCR 2.116(C)(7), the Court of Claims summarily dismissed Counts II, IV, and V of plaintiffs' complaint.

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[8] MCL 600.6431(1) provides:

> Except as otherwise provided in this section, a claim may not be maintained against this state unless the claimant, within 1 year after the claim has accrued, files in the office of the clerk of the court of claims either a written claim or a written notice of intention to file a claim against this state or any of its departments, commissions, boards, institutions, arms, or agencies.

[9] In the fact section of its written opinion and order, the Court of Claims stated that "plaintiffs have not disputed the notion that all of OSR's discrete decisions that purportedly harmed the individual plaintiffs were made on or before June 30, 2017."

The Court of Claims ruled, however, that MCL 600.6431(1) did not preclude plaintiffs' claims for declaratory relief. With respect to Count I of plaintiffs' complaint, the court addressed whether the ORS's creation and use of the NSI schedules were authorized by the Retirement Act. The court stated that MCL 38.1303a(5) grants the retirement board, and thus the ORS, the authority to review forms of remuneration paid to members in order to assess whether it is reportable compensation. The court then focused its attention on MCL 38.1303a(3)(f), which, as indicated earlier, excludes from compensation the following:

> Compensation in excess of an amount over the level of compensation reported for the preceding year except increases provided by the normal salary schedule for the current job classification. In cases where the current job classification in the reporting unit has less than 3 members, the normal salary schedule for the most nearly identical job classification in the reporting unit or in similar reporting units shall be used.

The Court of Claims agreed with defendants that MCL 38.1303a(3)(f) gives the ORS the authority to create the NSI schedules for superintendents and administrators because those individuals are not subject to a normal salary schedule that would typically be found in a collective-bargaining agreement. The court also opined that the exclusions from compensation in MCL 38.1303a(3) apply to all members, which would necessarily include superintendents and administrators. The court observed that "there is no support for the proposition that administrators and superintendents were intended to be excluded from any exception." The court further explained:

> While . . . superintendents and administrators are not subject to a typical salary schedule like other public

> school employees might be, MCL 38.1303a(3)(f) expressly anticipates members—like superintendents and administrators—who are not subject to a normal salary schedule. The statute does so by allowing the ORS Board to use, in the case of small reporting units not subject to a salary schedule, "the normal salary schedule for the most nearly identical job classification" in the school district or similar school districts. . . . Stated otherwise, the plain language of the statute, consistent with recognizing the authority of the ORS Board to review all forms of remuneration, unambiguously gives the ORS Board authority to ensure that all salary increases—without exception—are in line with a "normal salary schedule" for the type of job classification at issue. The ORS Board's interpretation of MCL 38.1303a(3)(f) as authorizing the creation of the NSI is not in conflict with the plain language of the [Retirement Act].

The Court of Claims additionally remarked that "[i]f the Legislature had intended to exclude administrators and superintendents from the reach of MCL 38.1303a(3)(f), it could have expressly done so." The court also indicated that the ORS's construction of MCL 38.1303a(3)(f) was entitled to respectful consideration. The court granted summary disposition in favor of defendants under MCR 2.116(C)(8) with respect to Count I of plaintiffs' complaint.

In regard to Count III of the complaint pertaining to the alleged APA violation, the Court of Claims declined to address the matter because defendants had not actually presented an argument for summary dismissal of that count in their brief. The court later denied plaintiffs' motion for reconsideration relative to the counts that had been dismissed.

Subsequently, the parties filed competing motions for summary disposition on the issue of the alleged APA violation in Count III of the complaint. The Court of Claims noted that the issue before it was whether the

NSI schedules reflected rulemaking by the ORS without honoring the required APA procedures for rule promulgation. The court ruled that the NSI schedules merely explain reportable and nonreportable "compensation," including when a job classification in a reporting unit has fewer than three members. According to the court, the NSI schedules do not add requirements or terms to the statutory meaning of "compensation." The court further indicated that the manual itself provides that it is merely a summary of the Retirement Act and is simply meant to assist schools in determining reportable compensation. The court viewed the manual as an interpretive statement or guideline, not as a rule, opining that there was "ample caselaw wherein explanatory manuals did not constitute 'rules' under the APA." Ultimately, the court concluded that there was no genuine issue of material fact that the NSI schedules found in the manual are not administrative rules. Therefore, the APA's rulemaking procedures did not apply. The court granted defendants' motion for summary disposition under MCR 2.116(C)(10), denied plaintiffs' motion for summary disposition, and dismissed the case. Plaintiffs appeal by right.

IV. ANALYSIS

A. PLAINTIFFS' ARGUMENTS ON APPEAL

On appeal, plaintiffs present four broad arguments. First, they contend that the Court of Claims erred by ruling that the NSI schedules defendants created and administered do not violate the Retirement Act. Second, plaintiffs maintain that the Court of Claims erred by concluding that the NSI schedules do not violate the APA and its rulemaking procedures. Third, plaintiffs assert that the Court of Claims erred by determining that the claim of an alleged violation of Const 1963, art

9, § 24, was time-barred with respect to broad declaratory relief under the notice requirements of MCL 600.6431(1). Fourth, and finally, plaintiffs argue that the Court of Claims erred by ruling that the claims alleging due-process violations were time-barred in regard to broad declaratory relief under the notice requirements of MCL 600.6431(1).

B. STANDARD OF REVIEW

We review de novo a trial court's decision on a motion for summary disposition. *Hoffner v Lanctoe*, 492 Mich 450, 459; 821 NW2d 88 (2012). This Court additionally reviews de novo issues of statutory interpretation. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008). We also review de novo questions of constitutional law. *Adair v Michigan*, 497 Mich 89, 101; 860 NW2d 93 (2014).

C. PRINCIPLES OF SUMMARY DISPOSITION UNDER MCR 2.116(C)(7), (8), AND (10)

In *RDM Holdings, Ltd v Continental Plastics Co*, 281 Mich App 678, 687; 762 NW2d 529 (2008), this Court set forth the principles governing 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.]

MCR 2.116(C)(8), which provides for summary disposition when a "party has failed to state a claim on which relief can be granted," tests the legal sufficiency of a complaint. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). The trial court may only consider the pleadings in rendering its decision under MCR 2.116(C)(8). *Id*. All factual allegations in the complaint are accepted as true. *Dolan v Continental Airlines/Continental Express*, 454 Mich 373, 380-381; 563 NW2d 23 (1997). "The motion should be granted if no factual development could possibly justify recovery." *Beaudrie*, 465 Mich at 130.

MCR 2.116(C)(10) provides that summary disposition is appropriate when, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." A motion brought pursuant to MCR 2.116(C)(10) tests the factual support for a party's action. *Pioneer State Mut Ins Co v Dells*, 301 Mich App 368, 377; 836 NW2d 257 (2013). "Affidavits, depositions, admissions, or other documentary evidence in support of the grounds asserted in the motion are required . . . when judgment is sought based on subrule (C)(10)," MCR 2.116(G)(3)(b), and such evidence, along with the pleadings, must be considered by the court when ruling on the (C)(10) motion, MCR 2.116(G)(5). "When a motion under subrule (C)(10) is made and supported . . . , an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial." MCR 2.116(G)(4). "A trial court may grant a motion for summary disposition

under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact." *Pioneer State*, 301 Mich App at 377. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "The trial court is not permitted to assess credibility, weigh the evidence, or resolve factual disputes, and if material evidence conflicts, it is not appropriate to grant a motion for summary disposition under MCR 2.116(C)(10)." *Pioneer State*, 301 Mich App at 377. "Like the trial court's inquiry, when an appellate court reviews a motion for summary disposition, it makes all legitimate inferences in favor of the nonmoving party." *Skinner v Square D Co*, 445 Mich 153, 162; 516 NW2d 475 (1994). A court may only consider substantively admissible evidence actually proffered by the parties when ruling on the motion. *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999); see also MCR 2.116(G)(6).

D. STATUTORY CONSTRUCTION

In *Slis v Michigan*, 332 Mich App 312, 335-336; 956 NW2d 569 (2020), this Court recited the well-established rules of statutory construction:

> 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 unambigu-

> ous 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.]

An agency's construction of a statute that the agency is charged with executing is entitled to respectful consideration, and there must be cogent reasons for overruling the agency's interpretation of the statute. *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 103; 754 NW2d 259 (2008). "Furthermore, when the law is 'doubtful or obscure,' the agency's interpretation is an aid for discerning the Legislature's intent." *Id*. But an agency's construction is not binding on the courts, and the interpretation cannot conflict with the intent of the Legislature as expressed in the plain language of the statute at issue. *Id*.

E. DISCUSSION AND HOLDING

We hold that the Retirement Act does not authorize the ORS to create and implement NSI schedules and apply them to superintendents and administrators under the plain and unambiguous language of the statutory scheme. In light of our ruling, it is unnecessary to address the additional arguments plaintiffs pose in this appeal.

As indicated earlier, reportable compensation does not include "[c]ompensation in excess of an amount over the level of compensation reported for the preceding year except increases provided by the normal salary schedule for the current job classification. . . . " MCL 38.1303a(3)(f). This is the first of two sentences in Subdivision (f) of the statute, each of which we will separately analyze. Again, the Legislature did not define the term "normal salary schedule." We find it abundantly clear from the Legislature's references to "the" normal salary schedule and "the" current job classification that the Legislature was necessarily alluding to schedules and classifications that were familiar to school personnel and already in place in the particular contextual setting of collective bargaining. The references to "normal salary schedule" for a "job classification" plainly pertain to salary schedules contained in collective-bargaining agreements. See *Kalamazoo City Ed Ass'n v Kalamazoo Pub Sch*, 406 Mich 579, 590-591; 281 NW2d 454 (1979) ("The second finding entailed defendant's failure to observe the automatic salary progression schedule traditionally incorporated into each collective-bargaining agreement between the parties."); *Ranta v Eaton Rapids Pub Sch Bd of Ed*, 271 Mich App 261, 270; 721 NW2d 806 (2006) ("The Court held that where the collective bargaining agreement required all teachers to be placed at a step level applicable to his or her experience, the petitioner's placement on the salary schedule involved a labor dispute and presented an issue of contract interpretation."); *Martin v East Lansing Sch Dist*, 193 Mich App 166, 169; 483 NW2d 656 (1992) ("[T]he 1983-1986 collective bargaining agreement . . . contained a step-scale salary schedule."). The language in the initial sentence of MCL 38.1303a(3)(f) simply does not invite or authorize the creation of salary schedules and classifications

by the ORS. Superintendents and administrators, such as plaintiffs, are not compensated pursuant to normal salary schedules; rather, they perform their duties and functions pursuant to personal employment contracts that, by definition, are distinct and tailored to particular individuals.

To justify the creation of the NSI schedules by the ORS, defendants rely on the second sentence of MCL 38.1303a(3)(f), which provides, "In cases where the current job classification in the reporting unit has less than 3 members, the normal salary schedule for the most nearly identical job classification in the reporting unit or in similar reporting units shall be used." Indeed, the heart of this case involves the construction of this provision. The second sentence of MCL 38.1303a(3)(f) clearly concerns the same setting as, and is a continuation of, the preceding sentence, except that it addresses a situation in which the job classification has fewer than three members; no other deviation is involved or contemplated. The plain language of the sentences does not reflect a jump from a focus on compensation of employees subject to salary schedules and collective-bargaining agreements to a focus on employees who work under personal employment contracts. Moreover, the second sentence of MCL 38.1303a(3)(f) in no form or manner authorizes the *creation* of a normal salary schedule or an NSI schedule as described in the ORS's manual. Instead, it merely directs the use of an existing normal salary schedule for another job classification in the reporting unit or a similar reporting unit. Because the plain and unambiguous language does not authorize the creation of the NSI schedules, we need not entertain plaintiffs' arguments regarding legislative history or their uncontested assertion that some reporting units have

three or more assistant superintendents, yet the NSI schedules are applied to them.

MCL 38.1303a(5)(a) and (b) provide that the retirement board, based on information and documentation provided by a member, shall determine "[w]hether any form of remuneration paid to a member is identified in this section" and "[w]hether any form of remuneration that is not identified in this section should be considered compensation reportable to the retirement system under this section." The plain and unambiguous language of MCL 38.1303a(5) does not provide broad authority to the ORS or any of the defendants to create NSI schedules for superintendents and administrators. MCL 38.1303a(5) authorizes the retirement board to make individual compensation determinations. See *Dignan v Mich Pub Sch Employees Retirement Bd*, 253 Mich App 571, 576-577; 659 NW2d 629 (2002) (stating that the Retirement Act empowers the retirement board to determine what remuneration is to be considered a retiree's reportable compensation under MCL 38.1303a(5), with the petitioner having the burden of proof in a contested case). Moreover, MCL 38.1303a(5) confines the retirement board's decision-making authority to ascertaining whether a "form" of remuneration received by a member constitutes reportable compensation. There does not appear to be any dispute that the form of remuneration received by the individual plaintiffs was generally reportable compensation under MCL 38.1303a(1) and (2).

Finally, to be clear, we are not ruling that superintendents and administrators, such as plaintiffs, are not otherwise subject to the provisions of MCL 38.1303a; as members, MCL 38.1303a generally applies to them. We are only holding that MCL 38.1303a(3)(f) does not govern members who work pursuant to personal em-

ployment contracts because, in such cases, normal salary schedules and collective-bargaining agreements are not involved. MCL 38.1303a(3)(f) does not authorize the ORS to create NSI schedules for superintendents and administrators.

In sum, the ORS had no statutory authority under MCL 38.1303a to create the NSI schedules. Moreover, even assuming that the NSI schedules were merely interpretive statements or guidelines, as urged by defendants, and not rules, we find they were still challengeable and are invalid. See *Clonlara, Inc v State Bd of Ed*, 442 Mich 230, 243; 501 NW2d 88 (1993) (stating that interpretive statements that go beyond the scope of the law may be challenged and that an interpretation unsupported by the enabling statute or act constitutes an invalid interpretation).

In light of our holding that the NSI schedules were not lawfully created and are invalid, we need not address plaintiffs' argument that the NSI schedules violated the APA's procedural requirements with respect to rulemaking. Plaintiffs also argue that the trial court erred by summarily dismissing the constitutional claims in Counts II and IV because the claims not only concerned the individual plaintiffs, they also constituted broad facial challenges seeking declaratory relief that would affect a whole class of individuals who were not employed under collective-bargaining agreements.[10] Given that we have invalidated the NSI schedules because their creation exceeded the authority of the ORS, we need not assess whether they were also unconstitutional. See *Int'l Business Machines Corp v Dep't of Treasury*, 496 Mich 642, 662 n 67; 852

[10] Plaintiffs do not challenge the dismissal of Count V, which sought civil damages under 42 USC 1983.

NW2d 865 (2014) (noting that the Court will not reach constitutional issues when they are unnecessary to the resolution of an appeal).

We reverse and remand for entry of judgment in favor of plaintiffs with respect to declaratory relief and the invalidity of the NSI schedules under the Retirement Act. We do not retain jurisdiction. We decline to award taxable costs under MCR 7.219.

HOOD, P.J., and GLEICHER, J., concurred with MARKEY, J.

PEOPLE v PERRY

Docket No. 355330. Submitted June 3, 2021, at Grand Rapids. Decided August 12, 2021, at 9:05 a.m.

Madison D. Perry was charged in the 8th District Court with operating a motor vehicle with marijuana in her system, MCL 257.625(8). Defendant was 18 years old when she was involved in a motor vehicle crash. Responding police officers detected the odor of burned marijuana emanating from defendant's vehicle, and defendant admitted that she had smoked marijuana. The officers administered standard field-sobriety tests, and defendant submitted to a preliminary breath test, which produced a test result of 0.000% blood alcohol content. Defendant also agreed to a blood test, and her blood sample produced a test result positive for active tetrahydrocannabinol (THC), reflecting 4 nanograms of THC per milliliter of blood; the test results were negative for alcohol and all other controlled substances. Defendant was charged under MCL 257.625(8), and she moved to dismiss the charge, arguing that the voter-initiated Michigan Regulation and Taxation of Marihuana Act (the MRTMA), MCL 333.27951 *et seq*., barred any criminal prosecution against her for a violation of MCL 257.625(8), although she would be responsible for a civil infraction if she drove her car with marijuana in her system. The district court, Tiffany A. Ankley, J., denied the motion to dismiss, disagreeing with defendant's construction of the MRTMA and its interrelationship with MCL 257.625(8). Defendant appealed in the Kalamazoo Circuit Court, and the court, Gary C. Giguere, Jr., J., also concluded that the MRTMA did not prohibit charging defendant with a criminal offense under MCL 257.625(8). Defendant appealed.

The Court of Appeals *held*:

MCL 257.625(8) of the Michigan Vehicle Code, MCL 257.1 *et seq*., provides that a person, whether licensed or not, shall not operate a vehicle on a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state if the person has in their body any amount of a controlled substance listed in Schedule 1 under MCL 333.7212, or a rule

promulgated under that section, or of a controlled substance described in MCL 333.7214. Marijuana is a Schedule 1 controlled substance under MCL 333.7212(1)(c). MCL 333.27954(1)(c) provides, in pertinent part, that the MRTMA does not authorize any person under the age of 21 to possess, consume, purchase, or otherwise obtain, cultivate, process, transport, or sell marihuana. MCL 333.27965(3)(a)(2) decriminalized the possession and cultivation of marijuana for individuals under the age of 21; it provides a civil infraction for a person under 21 years of age who possesses not more than 2.5 ounces of marijuana or cultivates not more than 12 marijuana plants. Michigan law recognizes a distinction between possessing marijuana, MCL 333.7403, and using marijuana, MCL 333.7404. In this case, defendant was charged with operating a vehicle with "any amount of a controlled substance" in her body under MCL 257.625(8), and using or consuming marijuana is a necessary step leading to the operation of a motor vehicle with marijuana in the driver's system; simple possession, however, is not. Two and a half ounces of marijuana yields approximately 210 joints, which is much more than a single person could realistically "use" or "internally possess" at any given point in time. Had the Legislature intended to decriminalize the *internal* possession or use of marijuana for those under 21 years of age, it would presumably have placed a limit that was consistent with the amount a person could reasonably use or consume—much lower than the stated limit of 2.5 ounces. MCL 333.27965(3) also carves out exceptions—pertinent to this case, the civil-infraction penalty applies in situations except for when a person is under the influence of marijuana or is consuming marijuana while operating a vehicle. The officer in this case swore in an affidavit that there was an odor of marijuana emanating from both defendant's vehicle and her person and that defendant admitted to smoking marijuana, which provided probable cause to believe that defendant was consuming marijuana while operating a motor vehicle. Because defendant's behavior fit within one of the exceptions listed in MCL 333.27965(3), she was not entitled to the lower civil-infraction penalty. Furthermore, defendant's argument was illogical: defendant read the MRTMA as allowing criminal liability for a person who could not legally consume any amount of marijuana, yet precluding criminal liability if that person did do so *while driving*. Accordingly, the trial court properly affirmed the district court's denial of defendant's motion for dismissal.

Affirmed.

MARKEY, J., dissenting, would have held that a person under the age of 21 who operates a motor vehicle with any amount of marijuana in their system in violation of MCL 257.625(8) cannot be criminally prosecuted for the conduct under the statute in light of language in the MRTMA; instead, the individual may only be held responsible for a civil infraction. Judge MARKEY therefore would have reversed and remanded the case to the district court for entry of an order of dismissal. Although using or consuming marijuana is a necessary step leading to the operation of a motor vehicle with marijuana in the driver's system, a violation of MCL 257.625(8) can best be described as an offense involving the internal possession of marijuana. Judge MARKEY concluded that the term "possesses," as used in MCL 333.27965(3), encompasses internal possession of marijuana and that any other construction would render other language in MCL 333.27965(3) surplusage and nugatory. Moreover, under MCL 333.27955(1)(a), internal possession is a recognized form of possession in the MRTMA. None of the exceptions in MCL 333.27965(3) pertains to operating a motor vehicle with any amount of marijuana in one's system, and the 2.5-ounce limit in MCL 333.27965(3) makes practical sense when understanding that it pertains to both external and internal possession. The majority effectively read an additional exception into MCL 333.27954(1)—operating a motor vehicle with any amount of marijuana in the driver's system—that was not in the statute. Accordingly, Judge MARKEY would have reversed and remanded for entry of an order dismissing the charge.

STATUTES — MICHIGAN VEHICLE CODE — MICHIGAN REGULATION AND TAXATION OF MARIHUANA ACT — OPERATING A MOTOR VEHICLE WITH MARIJUANA IN THE BODY.

MCL 257.625(8) of the Michigan Vehicle Code, MCL 257.1 *et seq*., provides that a person, whether licensed or not, shall not operate a vehicle on a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state if the person has in their body any amount of a controlled substance listed in Schedule 1 under MCL 333.7212, or a rule promulgated under that section, or of a controlled substance described in MCL 333.7214; MCL 333.27965(3)(a)(2) of the Michigan Regulation and Taxation of Marihuana Act (the MRTMA), MCL 333.27951 *et seq*., provides that a person under 21 years of age who possesses not more than 2.5 ounces of marijuana or cultivates not more than 12 marijuana plants is responsible for a civil infraction; MCL 333.27965(3)(a)(2) of the MRTMA does not prohibit charg-

ing a defendant under 21 years of age who operates a motor vehicle with marijuana in their system with a criminal offense under MCL 257.625(8).

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Jeffrey S. Getting*, Prosecuting Attorney, and *Heather S. Bergmann*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Torey A. Davenport*) for defendant.

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

SERVITTO, J. Defendant appeals, by leave granted,[1] the trial court's affirmance of the district court's denial of defendant's motion for dismissal. We affirm.

In December 2019, defendant, who was 18 years old at the time, was driving her car when she was involved in a crash. The responding police officers detected the odor of burnt marijuana emanating from defendant's vehicle. Defendant admitted to the officers that she had smoked marijuana. The officers suspected that defendant had been operating her car under the influence of drugs. Defendant participated in standard field-sobriety tests and submitted to a preliminary breath test, which produced a test result of 0.000% blood alcohol content. The officers requested that defendant submit to a blood test, and she agreed. Defendant was taken to a hospital to have her blood drawn. Her blood sample produced a test result positive for active tetrahydrocannabinol (THC), reflecting 4 nanograms of THC per milliliter of blood. The test results were negative for alcohol and all other controlled substances.

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[1] *People v Perry*, unpublished order of the Court of Appeals, entered December 16, 2020 (Docket No. 355330).

Defendant was charged under MCL 257.625(8) with operating a motor vehicle with a Schedule 1 controlled substance—marijuana—in her system. Defendant moved to dismiss the charge in the district court, arguing that the voter-initiated Michigan Regulation and Taxation of Marihuana Act (the MRTMA), MCL 333.27951 *et seq*.,[2] barred any criminal prosecution against her for a violation of MCL 257.625(8), although she would be responsible for a civil infraction if she drove her car with marijuana in her system. The district court denied the motion to dismiss, disagreeing with defendant's construction of the MRTMA and its interrelationship with MCL 257.625(8). Defendant appealed in the circuit court, which also concluded that the MRTMA did not prohibit charging defendant with a criminal offense under MCL 257.625(8). This Court then granted defendant's application for leave to appeal.

"We review questions of statutory interpretation de novo." *People v Hartwick*, 498 Mich 192, 209; 870 NW2d 37 (2015). The *Hartwick* Court addressed the Michigan Medical Marihuana Act (the MMMA), MCL 333.26421 *et seq*., which, like the MRTMA, was passed into law by initiative. *Id*. at 198. The Supreme Court explained the applicable rules of construction for voter-initiated statutes:

> The MMMA was passed into law by initiative. We must therefore determine the intent of the electorate in approving the MMMA, rather than the intent of the Legislature. Our interpretation is ultimately drawn from the plain language of the statute, which provides the most reliable evidence of the electors' intent. But as with other initiatives, we place special emphasis on the duty of judicial

[2] Although the act uses the spelling "marihuana," we use the more common spelling "marijuana" throughout this opinion.

> restraint. Particularly, we make no judgment as to the wisdom of the medical use of marijuana in Michigan. This state's electors have made that determination for us. To that end, we do not attempt to limit or extend the statute's words. We merely bring them meaning derived from the plain language of the statute. [*Id*. at 209-210 (quotation marks and citations omitted).]

The statute under which defendant was charged, MCL 257.625(8), provides:

> A person, whether licensed or not, shall not operate a vehicle on a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state if the person has in his or her body any amount of a controlled substance listed in schedule 1 under section 7212 of the public health code, 1978 PA 368, MCL 333.7212, or a rule promulgated under that section, or of a controlled substance described in section 7214(a)(iv) of the public health code, 1978 PA 368, MCL 333.7214.

Marijuana is a Schedule 1 controlled substance. MCL 333.7212(1)(c).

Defendant asserts here, as she did in the trial court, that MCL 257.625(8) conflicts with and is preempted by the MRTMA. Thus, we are tasked in this case with ascertaining the intent of the voters in approving the 2018 initiative known as Proposal 18-1, later codified by the Michigan Legislature as the MRTMA, MCL 333.27951 *et seq*. More specifically, as applied to this case, we are tasked with determining whether the voters intended to decriminalize the use of any amount of marijuana by persons under the age of 21 even if operating a motor vehicle. We hold that they did not.

In advance of the 2018 election, an organization known as the Coalition to Regulate Marijuana Like Alcohol gathered petition signatures for what ultimately became Proposal 18-1. The face of the petitions

reflected that the undersigned electors were petitioning for the initiation of legislation described as follows:

> An initiation of legislation to allow under state law the personal possession and use of marihuana *by persons 21 years of age or older*; to provide for the lawful cultivation and sale of marihuana and industrial hemp *by persons 21 years of age or older*; to permit the taxation of revenue derived from commercial marihuana facilities; to permit the promulgation of administrative rules; and to prescribe certain penalties for violations of this act. If not enacted by the Michigan State Legislature in accordance with the Michigan Constitution of 1963, the proposed legislation is to be voted on at the General Election, November 6, 2018. For the full text of the proposed legislation, see the reverse side of this petition. [Petition for Proposal 18-1 (emphasis added).]

The face of the petitions also reflected that they were "Paid for with regulated funds by Coalition to Regulate Marijuana like Alcohol."[3]

What followed on the reverse side of the petitions (and thereafter) was four full legal-sized pages of proposed legislative text that commenced with the repetition of the above-quoted paragraph (except for the last sentence), followed by detailed proposed legislation (in 17 sections and numerous subsections). Of course, none of this language was incorporated into the official ballot wording that was approved by the Board of State Canvassers with respect to Proposal 18-1. Instead, what the voters saw when they went to vote in

[3] We note parenthetically that Michigan law does not permit persons under the age of 21 to operate a motor vehicle if they have any bodily alcohol content. See MCL 257.625(6) ("A person who is less than 21 years of age . . . shall not operate a vehicle . . . if the person has any bodily alcohol content."). A person in violation of that subsection may be prosecuted criminally and, upon conviction, is "guilty of a misdemeanor." MCL 257.625(12)(a).

the November 2018 general election was simply the language included on the Board's approved official ballot wording:

Official Ballot Wording approved by
Board of State Canvassers
September 6, 2018
Coalition to Regulate Marihuana Like Alcohol

Proposal 18-1

A proposed initiated law to authorize and legalize possession, use and cultivation of marijuana products by individuals who are at least 21 years of age and older, and commercial sales of marijuana through state-licensed retailers

This proposal would:

- Allow individuals 21 and older to purchase, possess and use marijuana and marijuana-infused edibles, and grow up to 12 marijuana plants for personal consumption.
- Impose a 10-ounce limit for marijuana kept at residences and require amounts over 2.5 ounces be secured in locked containers.
- Create a state licensing system for marijuana businesses and allow municipalities to ban or restrict them.
- Permit retail sales of marijuana and edibles subject to a 10% tax, dedicated to implementation costs, clinical trials, schools, roads, and municipalities where marijuana businesses are located.
- Change several current violations from crimes to civil infractions.

Should this proposal be adopted?

[ ] YES

[ ] NO

Notably, the ballot language repeatedly apprised voters that Proposal 18-1 only applied to individuals "21 years of age or older" and only allowed "individuals 21 and older to purchase, possess and use marijuana . . . ." It said nothing about decriminalizing marijuana use by persons less than 21 years of age, much less about decriminalizing marijuana use by such persons while operating a motor vehicle.

Following the passage of Proposal 18-1 in the 2018 general election, the Legislature enacted (as it was obliged to do) the full legislative text of Proposal 18-1 as the MRTMA. In keeping with the ballot language, Section 2 of the MRTMA described its purpose:

> 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 (emphasis added).]

The balance of the act provided all the detail that was contained in the four pages appended to the face of the petitions that placed Proposal 18-1 on the ballot.

Significantly, the MRTMA, at MCL 333.27954(1)(c), provides that the MRTMA "does not authorize . . . any person under the age of 21 to possess, consume, purchase or otherwise obtain, cultivate, process, transport, or sell marihuana[.]" Defendant nevertheless asserts that the MRTMA, at MCL 333.27965(3)(a)(2), decriminalizes marijuana use and sets forth a civil infraction fine schedule for possession of marijuana by those under 21 years of age. MCL 333.27965(3)(a)(2) states:

> A person who commits any of the following acts, and is not otherwise authorized by this act to conduct such activities, may be punished only as provided in this section and is not subject to any other form of punishment or disqualification, unless the person consents to another disposition authorized by law:
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> * * *
>
> 3. Except for a person who engaged in conduct described by section 4(1)(a), 4(1)(d), or 4(1)(g), a person under 21 years of age who possesses not more than 2.5 ounces of marihuana or who cultivates not more than 12 marihuana plants:
>
> (a) for a first violation, is responsible for a civil infraction and may be punished as follows:
>
> * * *
>
> (2) if the person is at least 18 years of age, by a fine of not more than $100 and forfeiture of the marihuana.

As the circuit court aptly observed, MCL 257.625(8) criminalized the "use" of marijuana, while MCL 333.27965(3) decriminalized the "possession" and "cultivation" of marijuana for individuals under the age of 21. Michigan law recognizes a distinction between possessing marijuana, MCL 333.7403,[4] and using marijuana, MCL 333.7404.[5] Defendant here was not charged with the possession or cultivation of marijuana. Rather, she was charged with operating a vehicle with "any amount of a controlled substance" in her body. MCL 257.625(8). Using or consuming marijuana is a necessary step leading to the operation of a

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[4] MCL 333.7403(1) provides that "[a] person shall not knowingly or intentionally possess a controlled substance . . . ."

[5] MCL 333.7404(1) provides that "[a] person shall not use a controlled substance . . . ."

motor vehicle with marijuana in the driver's system in violation of MCL 257.625(8); simple possession, however, is not.

We cannot ignore the quantities mentioned in the provision on which defendant relies. MCL 333.27965(3)(a)(2) provides a civil infraction for a person under 21 years of age who possesses not more than 2.5 ounces of marijuana or cultivates not more than 12 marijuana plants. Basic research[6] reveals that one ounce of marijuana yields approximately 84 "joints" (i.e., hand-rolled marijuana cigarettes). Thus, 2.5 ounces would yield approximately 210 joints. That is a significant amount of marijuana—much more than a single person could realistically "use" or "internally possess" at any given point in time. Had the Legislature intended to decriminalize the *internal* possession or use of marijuana for those under 21 years of age, it would presumably have placed a limit that was consistent with the amount a person could reasonably use or consume—much, much lower than the stated limit of 2.5 ounces.

In addition, MCL 333.27965(3) carves out exceptions to the statutory rule that a person under 21 years of age who possesses not more than 2.5 ounces of marihuana or who cultivates not more than 12 marihuana plants is responsible only for a civil infraction. The statutory provision begins, "Except for a person who engaged in conduct described by section 4(1)(a), 4(1)(d), or 4(1)(g) . . . ." Thus, according to the plain language of the statute, the civil-infraction penalty applies in situations *except for* those set forth in MCL 333.27954(1)(a),

[6] The Recovery Center, *Weed Through the Myths: Get the Facts*, <http://www.therecoverycenter.org/resources/weed-through-the-myths-get-the-facts> (accessed June 23, 2021) [https://perma.cc/Q7SC-FZUX].

(d), or (g). Relevant to the instant matter, MCL 333.27954(1)(a) and (g) state:

> This act does not authorize:
>
> (a) operating, navigating, or being in physical control of any motor vehicle, aircraft, snowmobile, off-road recreational vehicle, or motorboat while under the influence of marihuana;
>
> * * *
>
> (g) consuming marihuana while operating, navigating, or being in physical control of any motor vehicle, aircraft, snowmobile, off-road recreational vehicle, or motorboat, or smoking marihuana within the passenger area of a vehicle upon a public way[.]

Incorporating the above into MCL 333.27965(3) would have that statute read:

> *Except* for a person who engaged in operating, navigating, or being in physical control of any motor vehicle, aircraft, snowmobile, off-road recreational vehicle, or motorboat while under the influence of marihuana [MCL 333.27954(1)(a)] or consuming marihuana while operating, navigating, or being in physical control of any motor vehicle, aircraft, snowmobile, off-road recreational vehicle, or motorboat, or smoking marihuana within the passenger area of a vehicle upon a public way [MCL 333.27954(1)(g)], a person under 21 years of age who possesses not more than 2.5 ounces of marihuana or who cultivates not more than 12 marihuana plants:
>
> (a) for a first violation, is responsible for a civil infraction and may be punished as follows . . . . [Emphasis added.]

Clearly, then, when a person is under the influence of marijuana or is consuming marijuana while operating a vehicle, the person is not afforded the same limitation on punishment as one who is under 21 and

simply possesses less than 2.5 ounces of marijuana or cultivates 12 or fewer marijuana plants.

In the affidavit for probable cause, an officer swore that upon responding to a vehicular crash involving defendant on December 2, 2019, there was an odor of burnt marijuana emanating from defendant's vehicle. The officer further swore that upon speaking to defendant, an odor of marijuana was emanating from her person and that defendant admitted that she had smoked marijuana. A blood draw performed on defendant the same day revealed the presence of marijuana in defendant's system. The officer's affidavit, coupled with defendant's alleged admission that she had smoked marijuana, provided probable cause to believe that defendant was "consuming marihuana while operating, navigating, or being in physical control of any motor vehicle . . . upon a public way[.]" MCL 333.27954(1)(g). This is consistent with the opening proviso of MCL 333.27954 that "[t]his act does not authorize: . . . (c) any person under the age of 21 to possess, consume, purchase or otherwise obtain, cultivate, process, transport, or sell marihuana[.]"[7] Because defendant's behavior fits within one of the exceptions listed in MCL 333.27965(3), she is not entitled to the lower civil-infraction penalty.

We recognize that in *People v Koon*, 494 Mich 1, 3; 832 NW2d 724 (2013), our Supreme Court held:

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[7] We note that while MCL 333.27954(1) identifies certain conduct that the MRTMA expressly "does not authorize," it does not follow that the MRTMA *authorizes* any and all conduct that is *not* expressly identified as "not authorize[d]." See *Southeastern Oakland Co Incinerator Auth v Dep't of Natural Resources*, 176 Mich App 434, 442; 440 NW2d 649 (1989) (noting that the doctrine of *ejusdem generis* may not be applied when the language of the statute, in its entirety, " 'discloses no purpose of limiting the general words used' "), quoting *In re Mosby*, 360 Mich 186, 192; 103 NW2d 462 (1960).

> The Michigan Medical Marihuana Act (MMMA) prohibits the prosecution of registered patients who internally possess marijuana, but the act does not protect registered patients who operate a vehicle while "under the influence" of marijuana. The Michigan Vehicle Code prohibits a person from driving with any amount of a schedule 1 controlled substance, a list that includes marijuana, in his or her system. This case requires us to decide whether the MMMA's protection supersedes the Michigan Vehicle Code's prohibition and allows a registered patient to drive when he or she has indications of marijuana in his or her system but is not otherwise under the influence of marijuana. We conclude that it does. [Citation omitted.]

However, MCL 333.27954(1)(g) does not contain "under the influence" language. It prohibits what defendant admits she did here: "consuming marihuana while operating, navigating, or being in physical control of any motor vehicle, aircraft, snowmobile, off-road recreational vehicle, or motorboat, or smoking marihuana within the passenger area of a vehicle upon a public way[.]"

Finally, defendant's argument is simply illogical. Defendant would have this Court read the MRTMA as allowing criminal liability for a person who could not legally consume any amount of marijuana (given that such consumption is expressly not authorized under MCL 333.27954(1)(g)), yet preclude criminal liability if that person did so *while driving*. That is contrary to the entire purpose of the act, especially when the MRTMA is read in conjunction with motor vehicle laws.[8]

The motor vehicle laws were enacted, among other things, to provide for the safety and protection of

[8] It similarly would strain credulity to conclude that the mere inclusion of the "under the influence" language in the exception set forth in MCL 333.27954(1)(a) requires that we hold that it implicitly repealed MCL 257.625(8) insofar as it relates to persons under the age of 21.

drivers and passengers. In *People v Dupre*, 335 Mich App 126; 966 NW2d 200 (2020), this Court addressed an issue similar to the one at hand. In that case, the defendant entered a no-contest plea to operating while visibly impaired (OWVI) in violation of MCL 257.625(3). *Id*. at 128. He held a medical marihuana card and, on appeal, argued that the MMMA superseded the OWVI statute and thus that a defendant with a medical marihuana permit is protected from OWVI prosecution by the MMMA if a defendant is "under the influence" of marihuana under the MMMA. *Id*. at 128-129. This Court disagreed. *Id*. at 139-140.

We recognized that the Legislature created the offense of OWVI "to address those situations in which a defendant's level of intoxication and resulting impairment does not suffice to establish [operating while intoxicated (OWI)], yet the defendant still presents a danger to the public because his or her ability to operate the vehicle is visibly impaired." *Id*. at 132 (quotation marks and citation omitted). We also noted that "our Supreme Court has appeared to adopt the viewpoint that the electors intended for medical marijuana to be treated similarly to alcohol," *id*. at 137, and that "defendant's reading of the MMMA would require this Court to conclude that the electors' intent was to give registered patients internally possessing marijuana greater protections than average citizens internally possessing alcohol. The language of the MMMA is devoid of such language, and defendant presents no evidence that would lead us to conclude this was the electors' intent," *id*. at 137-138.

This Court stated:

> [O]ur reading of § 7 of the MMMA leads us to conclude that the limitations on immunity appear to be situations in which public safety or public health intersect with a regis-

> tered patient's use of medical marijuana. For example, registered patients cannot smoke marijuana in any public place or on public transportation, MCL 333.26427(b)(3), and they cannot "[u]ndertake any task under the influence of marihuana, when doing so would constitute negligence," MCL 333.26427(b)(1). Because a driver operates a vehicle while visibly impaired if they drive with "less ability than would an ordinary, careful, and prudent driver," the driver puts public safety at risk by doing so. In short, a driver operating while visibly impaired appears to do so negligently, in violation of MCL 333.26427(b)(1). Therefore, we discern no intent within the MMMA to immunize the visibly impaired driver from prosecution.
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> This connection mirrors what this Court has held was the Legislature's intent in passing the OWVI statute: to allow the government to protect the public from a driver when his or her "level of intoxication and resulting impairment does not suffice to establish OWI, yet the defendant *still presents a danger to the public* because his or her ability to operate the vehicle is visibly impaired." Moreover, the MMMA itself declares that its purpose is "to be an 'effort for the health and welfare of [Michigan] citizens.' " [MCL 333.26422(c)]. MCL 333.26422(c) appears to be direct evidence that the electors' intent in passing the MMMA was the improvement of health and safety of *citizens*, not just registered patients. Defendant's theory that the MMMA precludes registered patients from being convicted of OWVI would put ordinary citizens and registered patients alike in danger because registered patients would be allowed to drive with "less ability than . . . an ordinary, careful, and prudent driver" without fear of prosecution.
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> In sum, we conclude that the MMMA does not supersede the OWVI statute. "Under the influence" as used in MCL 333.26427(b)(4) is not limited in meaning to how that phrase is understood with regard to the OWI statute, MCL 257.625(1). [*Id*. at 138-140 (citations omitted).]

We can conceive of no reason for treating a person under the age of 21 who drives with marijuana in his or her system (although not legally permitted to possess

or consume it) more lightly than a person who does so while legally permitted to possess and consume it, just as we do not deem it appropriate to treat such a person more lightly than a person under the age of 21 who drives with alcohol in his or her system.

In sum, the MRTMA did not remove all criminal penalties for persons under the age of 21 who operate a motor vehicle with marijuana in their system, are under the influence of marijuana while driving, or consume marijuana while operating a vehicle. Defendant operated her vehicle on the road while she had in her body any amount of a controlled substance, in contravention of MCL 257.625(8). The trial court thus properly affirmed the district court's denial of defendant's motion for dismissal.

Affirmed.

BOONSTRA, P.J., concurred with SERVITTO, J.

MARKEY, J. (*dissenting*). Defendant was charged under MCL 257.625(8) with operating a motor vehicle with a Schedule 1 controlled substance—marijuana—in her system. She was 18 years old at the time of the incident that formed the basis for the charge. Defendant moved to dismiss the charge in the district court, arguing that the voter-initiated Michigan Regulation and Taxation of Marihuana Act (the MRTMA), MCL 333.27951 *et seq*., barred any criminal prosecution against her for a violation of MCL 257.625(8), although she would be responsible for a civil infraction if she drove her car with marijuana in her system. The district court denied the motion to dismiss, disagreeing with defendant's construction of the MRTMA and its interrelationship with MCL 257.625(8). Defendant appealed in the circuit court, which also concluded that the MRTMA did not

prohibit charging defendant with a criminal offense under MCL 257.625(8). This Court then granted defendant's application for leave to appeal. *People v Perry*, unpublished order of the Court of Appeals, entered December 16, 2020 (Docket No. 355330). I would hold that a person under the age of 21 who operates a motor vehicle with any amount of marijuana in his or her system in violation of MCL 257.625(8) cannot be criminally prosecuted for the conduct under the statute in light of language in the MRTMA. Instead, the individual may only be held responsible for a civil infraction. Accordingly, I would reverse and remand the case to the district court for entry of an order of dismissal. Therefore, I respectfully dissent.

I. STATUTORY FRAMEWORK—BRIEF OVERVIEW

To give context to my discussion of the background facts and procedural history of the case, I offer a brief overview of the statutory framework. MCL 257.625(8) provides:

> A person, whether licensed or not, shall not operate a vehicle on a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state if the person has in his or her body any amount of a controlled substance listed in schedule 1 under section 7212 of the public health code, 1978 PA 368, MCL 333.7212, or a rule promulgated under that section, or of a controlled substance described in section 7214(a)(iv) of the public health code, 1978 PA 368, MCL 333.7214.

Marijuana is a Schedule 1 controlled substance. MCL 333.7212(1)(c).

Turning to the MRTMA, MCL 333.27954(1)(c) provides that the MRTMA "does not authorize . . . any person under the age of 21 to possess, consume, pur-

chase or otherwise obtain, cultivate, process, transport, or sell marihuana[.]" But with respect to persons 21 years of age or older, unless otherwise provided by law, they cannot be arrested, prosecuted, or penalized in any manner for "possessing, using or consuming, internally possessing, purchasing, transporting, or processing 2.5 ounces or less of marihuana . . . ." MCL 333.27955(1)(a).

MCL 333.27965(3) addresses the treatment of persons under the age of 21, such as defendant, with respect to marijuana-related activities, providing, in relevant part, as follows:

> A person who commits any of the following acts, and is not otherwise authorized by this act to conduct such activities, may be punished only as provided in this section and is not subject to any other form of punishment or disqualification, unless the person consents to another disposition authorized by law:
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> * * *
>
> 3. Except for a person who engaged in conduct described by section 4(1)(a), 4(1)(d), or 4(1)(g), a person under 21 years of age who possesses not more than 2.5 ounces of marihuana or who cultivates not more than 12 marihuana plants:
>
> (a) for a first violation, is responsible for a civil infraction and may be punished as follows . . . .

Regarding the exceptions referenced in MCL 333.27965(3), the provision most pertinent to this case is MCL 333.27954(1)(a), which provides that the MRTMA "does not authorize . . . operating . . . any motor vehicle . . . while under the influence of marihuana[.]" None of the exceptions pertains to operating a motor vehicle with any amount of marijuana in one's system.

The ultimate question posed in this case is whether, in light of the MRTMA, a person under 21 years of age can be *criminally* charged with and convicted of operating a motor vehicle with any amount of marijuana in his or her system pursuant to MCL 257.625(8).

II. BACKGROUND FACTS AND PROCEDURAL HISTORY

In December 2019, our 18-year-old defendant was operating her car when she was involved in a crash. According to the responding police officers, they could smell the odor of marijuana coming from defendant's vehicle at the crash scene. Defendant admitted to smoking marijuana. The police suspected that she had been driving her vehicle while under the influence of marijuana. A preliminary breath test revealed that she had not been drinking alcohol. Defendant did agree to submit to a blood test and was taken to a local hospital to have her blood drawn. The blood test was positive for active tetrahydrocannabinol (THC), revealing 4 nanograms of THC per milliliter of blood. The test results were negative for any other controlled substances or alcohol.

The prosecution charged defendant under MCL 257.625(8)—she was not charged with operating a motor vehicle while under the influence of marijuana, MCL 257.625(1)(a). In the district court, defendant moved to dismiss the charge on the basis that the MRTMA, specifically MCL 333.27965(3) and MCL 333.27954(1)(a), conflicted with and preempted MCL 257.625(8). Defendant contended that because the MRTMA grants an individual under the age of 21 immunity from criminal prosecution for possessing not more than 2.5 ounces of marijuana unless the individual is operating a motor vehicle while under the influence of marijuana, the prosecution could not

criminally charge her with having any amount of marijuana in her system under MCL 257.625(8). Defendant maintained that the prosecution has a higher burden when attempting to convict a person of operating a motor vehicle while "under the influence" of marijuana as opposed to simply establishing that the individual was driving with marijuana in his or her system. In response, the prosecution argued that the MRTMA only provides an individual under the age of 21 with immunity from criminal prosecution for simple possession of marijuana. And the prosecution was not charging defendant for mere possession of marijuana. The district court denied defendant's motion to dismiss, ruling that the MRTMA was not intended to prohibit the criminal prosecution of individuals under the age of 21 for a violation of MCL 257.625(8).

Defendant filed an application for leave to appeal in the circuit court, seeking reversal of the district court's decision and entry of a judgment of dismissal. The circuit court concluded that defendant was conflating the term "possesses," as used in MCL 333.27965(3), with the word "uses." Therefore, according to the circuit court, because defendant's conduct involved the use of marijuana, the MRTMA did not shield her from criminal prosecution under MCL 257.625(8). Defendant then filed an application for leave to appeal in this Court, which was granted.

III. ANALYSIS

Defendant argues that MCL 257.625(8) conflicts with and is preempted by the MRTMA. Defendant contends that the plain language of the MRTMA addresses the precise situation involved in this case, i.e., where a person under 21 years of age uses marijuana, and that the exclusive penalty for such conduct is a

civil infraction. Defendant maintains that MCL 257.625(8), with its lower, no-tolerance standard of driving with any amount of marijuana in one's system, clearly conflicts with the provision in the MRTMA that requires the state to prove that a defendant operated a vehicle while under the influence of marijuana in order to convict the defendant in connection with driving and marijuana use.

"We review questions of statutory interpretation de novo." *People v Hartwick*, 498 Mich 192, 209; 870 NW2d 37 (2015). The *Hartwick* Court addressed the Michigan Medical Marihuana Act (the MMMA), MCL 333.26421 *et seq*., which, like the MRTMA, was passed into law by initiative. *Id*. at 198. Our Supreme Court recited the rules of construction governing a voter-initiated statute:

> The MMMA was passed into law by initiative. We must therefore determine the intent of the electorate in approving the MMMA, rather than the intent of the Legislature. Our interpretation is ultimately drawn from the plain language of the statute, which provides the most reliable evidence of the electors' intent. But as with other initiatives, we place special emphasis on the duty of judicial restraint. Particularly, we make no judgment as to the wisdom of the medical use of marijuana in Michigan. This state's electors have made that determination for us. To that end, we do not attempt to limit or extend the statute's words. We merely bring them meaning derived from the plain language of the statute. [*Id*. at 209-210 (quotation marks and citations omitted).]

MCL 257.625(8), which, again, prohibits operating a motor vehicle with any amount of marijuana in the driver's system, is considered the Michigan Vehicle Code's zero-tolerance provision. *People v Koon*, 494 Mich 1, 4; 832 NW2d 724 (2013). In 2018, Michigan voters passed into law a ballot initiative now codified

as the MRTMA. The MRTMA "shall be broadly construed to accomplish its intent as stated in [MCL 333.27952]." MCL 333.27967. And MCL 333.27952 provides:

> 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.

I initially note that a person under 21 years of age is not authorized to consume marijuana under the MRTMA. See MCL 333.27954(1)(c) (providing that the MRTMA "does not authorize . . . any person under the age of 21 to possess, consume, purchase or otherwise obtain, cultivate, process, transport, or sell marihuana"). Therefore, defendant did not have the right or authority to operate a motor vehicle with marijuana in her system; her conduct, if proved, was unlawful. The issue presented is whether she can be criminally prosecuted under MCL 257.625(8) or whether a civil infraction is the exclusive penalty.

MCL 333.27965(3) provides that an individual under 21 years of age is only legally responsible for a civil

infraction if he or she "*possesses* not more than 2.5 ounces of marihuana or . . . cultivates not more than 12 marihuana plants . . . ." (Emphasis added.) The district and circuit courts emphasized that there is a difference between "possessing" and "using" marijuana and that defendant was not charged with mere possession of marijuana. Michigan law does generally recognize a distinction between the possession of marijuana, MCL 333.7403,[1] and the use of marijuana, MCL 333.7404.[2]

Although using or consuming marijuana is a necessary step leading to the operation of a motor vehicle with marijuana in the driver's system, a violation of MCL 257.625(8) can best be described as an offense involving the internal possession of marijuana. I conclude that the term "possesses," as used in MCL 333.27965(3), encompasses internal possession of marijuana and that any other construction would render other language in MCL 333.27965(3) surplusage and nugatory. See *People v Ball*, 297 Mich App 121, 123; 823 NW2d 150 (2012) ("The Court must avoid construing a statute in a manner that renders statutory language nugatory or surplusage.") (quotation marks and citation omitted). I note that the MRTMA does reference the act of "internally possessing" marijuana. See MCL 333.27955(1)(a). Thus, internal possession is a recognized form of possession under the MRTMA.

There are three express exceptions to the language in MCL 333.27965(3), which makes it a civil infraction for a person under 21 years of age to possess mari-

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[1] MCL 333.7403(1) provides that "[a] person shall not knowingly or intentionally possess a controlled substance . . . ."

[2] MCL 333.7404(1) states that "[a] person shall not use a controlled substance . . . ."

juana. Those exceptions include MCL 333.27954(1)(a), which provides, in part, that the MRTMA does not authorize a person to operate a motor vehicle while under the influence of marijuana, and MCL 333.27954(1)(g), which provides, in part, that the MRTMA does not authorize an individual to consume marijuana while operating a motor vehicle. If one construes the term "possesses," as used in MCL 333.27965(3), to pertain solely to a charge of external possession of marijuana, which is the interpretation applied by the district and circuit courts, urged by the prosecution, and adopted by the majority, it becomes *entirely unnecessary* to carve out the exceptions that concern the use, consumption, or internal possession of marijuana. Those exceptions become surplusage and nugatory. For example, operating a motor vehicle while under the influence of marijuana entails more than the mere external possession of marijuana; it involves the use, consumption, or internal possession of marijuana. There is absolutely no need for this express exception if the term "possesses" does not even reach the crime of operating a motor vehicle while under the influence of marijuana in the first place. The fact that the exceptions set forth in MCL 333.27965(3) address crimes of use, consumption, and internal possession of marijuana necessarily means that the term "possesses" must also encompass those types of scenarios, thereby making express reference to the exceptions necessary. The majority's construction renders the listed exceptions nonessential and inconsequential redundancies. When the term "possesses" is read in conjunction with the use and consumption exceptions all found in MCL 333.27965(3), it becomes evident that the intent of the electorate was to broadly view possession, such that it included, minimally, external and internal possession of marijuana.

Furthermore, for purposes of MCL 333.27965(3), if the electorate found it necessary to expressly exclude offenses involving the use and consumption of marijuana from coverage under the marijuana-possession language, the lack of inclusion in those exceptions of the offense of operating a motor vehicle with marijuana in the driver's system *necessarily revealed an intent* for that particular conduct to fall within the parameters of marijuana possession, implicating the civil-infraction penalty and precluding a criminal prosecution. The silence in those exceptions is deafening, revealing an intent to criminally punish solely those persons who drive while under the influence of marijuana, including individuals under the age of 21. I therefore conclude that a person under the age of 21 who operates a motor vehicle with any amount of marijuana in his or her system is only responsible for a civil infraction and is not subject to criminal punishment under MCL 257.625(8). See MCL 333.27965(3).

The majority refers to MCL 333.27954(1)(g), which, as noted earlier, provides that the MRTMA "does not authorize . . . consuming marihuana while operating . . . or being in physical control of any motor vehicle . . . ." The majority asserts that there was evidence that defendant was consuming marijuana while operating her vehicle and that because her "behavior fits within one of the exceptions listed in MCL 333.27965(3), she is not entitled to the lower civil-infraction penalty." The majority's stance, in my view, is a red herring. Defendant was charged with operating a motor vehicle with marijuana in her system; therefore, the only relevant evidence would concern the amount of marijuana in her system when driving, not whether she was using or consuming the marijuana while she was driving. She was *not* charged with the crime of using or consuming marijuana. See MCL 333.7404(1).

The majority emphasizes that the MRTMA was intended to afford protection for those individuals 21 years of age or older, not persons under that age, like defendant. My interpretation of the MRTMA does not result in protecting individuals under the age of 21 and allowing them to drive with marijuana in their system. To the contrary, those persons have engaged in unlawful conduct in the eyes of the law and are subject to a civil penalty.

The majority, in rejecting any assertion that the term "possesses" as used in MCL 333.27965(3) encompasses internal possession, states that 2.5 ounces of marijuana would yield 210 "joints," which is an amount that does not speak to internal possession. The majority argues that "[h]ad the Legislature intended to decriminalize the *internal* possession . . . of marijuana for those under 21 years of age, it would presumably have placed a limit that was consistent with the amount a person could reasonably use or consume—much, much lower than the stated limit of 2.5 ounces." The majority's view fails to appreciate my interpretation of the language, i.e., that the term "possesses" concerns not only internal possession but also normal, external possession. Thus, the 2.5-ounce amount makes practical sense when understanding that it pertains to both types of possession. Setting a much lower weight that would be more in line with internal possession only would lack logic in connection with external possession. I note that the MMMA places a 2.5-ounce limit on the possession of marijuana for medical use, which weight limitation encompasses the internal possession of marijuana. MCL 333.26424(a); *Koon*, 494 Mich at 6.

The majority notes "that while MCL 333.27954(1) identifies certain conduct that the MRTMA expressly

'does not authorize,' it does not follow that the MRTMA *authorizes* any and all conduct that is *not* expressly identified as 'not authorize[d].' " (Alteration in original.) If we were construing MCL 333.27954(1) in isolation or in a vacuum perhaps I would agree, but MCL 333.27954(1) must be read in conjunction with MCL 333.27965(3), which is the starting point of the analysis. And, as part of that analysis, if the exceptions in MCL 333.27954(1) do not apply, the civil-infraction language pertaining to individuals under 21 years old governs. The majority, in my view, is effectively reading an additional exception into MCL 333.27954(1)—operating a motor vehicle with any amount of marijuana in the driver's system. While the majority would retort that the exceptions are irrelevant because this is not a case of "possession" to begin with and instead is a case of "use," I return to my point that such an interpretation renders the "use" exceptions meaningless and redundant.

Finally, the majority asserts that it "would strain credulity to conclude that the mere inclusion of the 'under the influence' language in the exception set forth in MCL 333.27954(1)(a) requires that we hold that it implicitly repealed MCL 257.625(8) insofar as it relates to persons under the age of 21." This argument ultimately and essentially ignores the analytical framework in which MCL 333.27965(3) works in tandem with MCL 333.27954(1), and it ignores the distinction in the law between driving while under the influence of marijuana and driving while having any amount of marijuana in one's system. I note that as part of its reasoning in ruling that the MMMA prohibits criminal prosecution for operating a motor vehicle while internally possessing marijuana under MCL 257.625(8), our Supreme Court in *Koon* indicated that the MMMA only expressly precluded driving while

under the influence of marijuana. *Koon*, 494 Mich at 6-7. The *Koon* Court stated:

> The MMMA . . . does not define what it means to be "under the influence" of marijuana. While we need not set exact parameters of when a person is "under the influence," we conclude that it contemplates something more than having any amount of marijuana in one's system and requires some effect on the person. Thus, taking the MMMA's provisions together, the act's protections extend to a registered patient who internally possesses marijuana while operating a vehicle unless the patient *is* under the influence of marijuana. In contrast, the Michigan Vehicle Code's zero-tolerance provision prohibits the operation of a motor vehicle by a driver with an infinitesimal amount of marijuana in his or her system even if the infinitesimal amount of marijuana has no influence on the driver.
>
> The immunity from prosecution provided under the MMMA to a registered patient who drives with indications of marijuana in his or her system but is not otherwise under the influence of marijuana inescapably conflicts with the Michigan Vehicle Code's prohibition against a person driving with any amount of marijuana in his or her system. [*Id*.]

In sum, I would reverse and remand for entry of an order dismissing the charge. Accordingly, I respectfully dissent.

PEOPLE v HAYNES

Docket No. 350125. Submitted June 11, 2021, at Grand Rapids. Decided August 12, 2021, at 9:10 a.m. Leave to appeal denied 510 Mich 862 (2022).

Gary E. Haynes was convicted following a jury trial in the Muskegon Circuit Court of four charges: one count of knowingly conducting or participating in the affairs of an enterprise through a pattern of racketeering activity (racketeering), MCL 750.159i(1); one count of obtaining or using a vulnerable adult's money or property through fraud, deceit, misrepresentation, coercion, or unjust enrichment (exploiting a vulnerable adult) when the value of the money or property equaled or exceeded $100,000, MCL 750.174a(1) and (7)(a); eight counts of exploiting a vulnerable adult when the value of the money or property had a value of at least $1,000, but less than $20,000, MCL 750.174a(1) and (4)(a); and four counts of failing or refusing to make a tax return or payment, making a false or fraudulent tax return or payment, or making a false statement in a tax return or payment with the intent to defraud or evade the tax (tax fraud), MCL 205.27(1)(a) and (2). Defendant befriended Ardis Liddle, a senior adult who had been living alone but with substantial assistance from friends and family, sometime in 2007 at a seminar defendant conducted through his business, Senior Planning Resource, for seniors interested in investing their money. Thereafter, Liddle hired defendant to help pay her bills online. Eventually defendant set up an estate plan for Liddle and convinced her to move her money, including numerous certificates of deposits with banks, to an annuity. Defendant alleged that Liddle also agreed to loan him money for real estate projects undertaken by his company Future By Design, in exchange for which he would pay Liddle interest, but Liddle denied that she ever lent money to defendant or agreed to invest in any of his real estate ventures. The relationship lasted roughly from 2007 through 2016, when Liddle discovered problems with her finances with the help of a bank manager and her nephew, who confronted defendant in September 2016. Liddle's nephew had Liddle file a police report after defendant could not account for Liddle's money. Eventually the matter made it to the Child, Elder, and Family Financial

Crimes Unit of the Attorney General's office, which discovered evidence of several crimes regarding defendant's handling of Liddle's financial matters and defendant's tax filings. Defendant was tried, and a jury found defendant guilty as charged on 14 counts. The trial court, Annette R. Smedley, J., sentenced defendant to serve 90 months to 20 years in prison for each of his convictions of racketeering and exploiting a vulnerable adult involving $100,000 or more, and to serve 30 months to 5 years in prison for each of his remaining convictions. Defendant appealed.

The Court of Appeals *held*:

1. A defendant who alleges that the voir dire process did not result in an impartial jury has the burden to show that a particular juror was not impartial or, at the very least, that the juror's impartiality was in reasonable doubt. The record demonstrates that the trial court removed for cause the majority of the prospective jurors who expressed a potential bias in favor of the prosecution and that defense counsel used his preemptory challenges to remove the remainder. Each remaining juror affirmed that they would be impartial and that they would be able to follow the trial court's instructions. Therefore, defendant did not meet his burden to show that the impartiality of any one juror was in reasonable doubt. Defendant's argument that the presence of prospective jurors during the questioning of other prospective jurors who expressed biases tainted the jury pool was also without merit because there was no evidence that the remarks by some of the prospective jurors had any effect on the impartiality of the jury.

2. The Legislature defines a vulnerable adult in MCL 750.145(m)(u)(*i*) to be, in relevant part, an "individual age 18 or over who, because of age, developmental disability, mental illness, or physical disability requires supervision or personal care or lacks the personal and social skills required to live independently." This Court has determined that a prosecutor must show that the four personal characteristics stated in the statute—age, developmental disability, mental illness, and physical disability—affect the individual in such a way that the individual (a) requires supervision, (b) requires personal care, or (c) lacks the personal and social skills required to live independently. There was evidence that Liddle was mentally and physically able to care for herself; but there was also strong evidence from which a jury could have found that Liddle was a vulnerable adult within the meaning of MCL 750.145(m)(u)(*i*) because she needed significant assistance in order to lead her life. For example, Liddle, who was at risk of falling and sustaining an incapacitating injury, had been using a cane or

walker since 2009, her physician testified that he was concerned about her ability to live alone, and others testified about help they gave Liddle with her basic needs like chores, getting to appointments, and shopping. Liddle herself testified that she could not use a computer to pay her bills, putting her at the mercy of anyone she entrusted to pay her bills electronically. Thus, the prosecution presented sufficient evidence from which a reasonable jury could find beyond a reasonable doubt that Liddle was not fully able to live independently and was a vulnerable adult. The prosecution also presented sufficient evidence from which a reasonable jury could find beyond a reasonable doubt that defendant knew or should have known that Liddle was a vulnerable adult.

3. MCL 205.27(1)(a) requires that to prove tax fraud, the prosecution must present evidence from which a reasonable jury could find beyond a reasonable doubt that defendant made a false or fraudulent return or payment or that defendant made a false statement in a return or payment. The prosecution must also present evidence that defendant did so with the intent to defraud or evade the payment of a tax. There was no evidence that defendant invested Liddle's money into an annuity or into a real estate venture, but there was evidence that Liddle had not given defendant permission to cash her annuities and deposit them into his own bank and had not agreed to lend defendant any of her money or invest in any of his real estate ventures. Further, there was evidence that defendant used Liddle's money to pay for personal expenses, that defendant obtained more than half of Liddle's wealth over a span of years that he did not report as income, and that defendant was attempting to forestall investigation into his activities when he was confronted about Liddle's money. The jury ultimately rejected defendant's version of events and found that he took Liddle's money without permission, and there was ample record evidence to support that finding. Under the totality of the evidence, a reasonable jury could also find that after defendant took Liddle's money without permission, he converted it to his own use and intended to cheat Liddle when he did so. Because there was sufficient evidence to support the finding that defendant unlawfully converted Liddle's money to his own use, the jury could further reasonably find that defendant had income from his illegal activities that must be reported under the Internal Revenue Code, 26 USC 1 *et seq*., and under Michigan law. Evidence that a taxpayer failed to file a tax return is sufficient evidence to allow a jury to find that the taxpayer intended to evade the tax that would have been due with the return. By the same measure, the evidence that defendant failed to include his unlawful income on his tax returns during the

relevant tax years was sufficient to establish the requisite intent for tax fraud. Therefore, the prosecution presented sufficient evidence to establish that defendant had income in the form of money embezzled from Liddle and that he deliberately failed to include that income on his personal tax return so he could evade tax on his illegal gain.

4. To establish the crime of racketeering under MCL 750.159(i)(1), the prosecution must establish four elements: (1) an enterprise existed, (2) defendant was employed by or associated with the enterprise, (3) defendant knowingly conducted or participated, directly or indirectly, in the affairs of the enterprise, (4) defendant did so through a pattern of racketeering activity that consisted of the commission of at least two racketeering offenses that (a) had the same or substantially similar purpose, result, participant, victim, or method of commission, or were otherwise interrelated by distinguishing characteristics and were not isolated acts, (b) amounted to or posed a threat of continued criminal activity, and (c) were committed for financial gain. Because the Legislature's definition of an enterprise includes an individual or sole proprietorship whether engaged in licit or illicit enterprises, the evidence that defendant did business as Senior Planning Resource and worked through his company, Future By Design, established that he was employed by or associated with an enterprise—even if those entities may also have been used to provide illicit services. The key question was whether defendant participated in those enterprises through a pattern of racketeering activity, which MCL 750.159f(c) defines as not less than 2 incidents of racketeering that have all the following characteristics: (i) the incidents have the same or a substantially similar purpose, result, participant, victim, or method of commission, or are otherwise interrelated by distinguishing characteristics and are not isolated acts; (ii) the incidents amount to or pose a threat of continued criminal activity; and (iii) at least one of the incidents occurred within this state on or after April 1, 1996, and the last of the incidents occurred within 10 years after the commission of any prior incident, excluding any period of imprisonment served by a person engaging in the racketeering activity. "Racketeering" is defined in MCL 650.159g as committing, attempting to commit, conspiring to commit, or aiding or abetting, soliciting, coercing, or intimidating a person to commit an offense for financial gain by obtaining money, property, or any other thing of value. The prosecution presented sufficient evidence from which a reasonable jury could find that defendant embezzled Liddle's money on multiple different occasions and that he did so through his investment-advice and estate-planning enterprises.

Those offenses sufficiently established that defendant participated in his enterprises through a pattern of racketeering, and the evidence was sufficient to establish the remaining elements of racketeering. Therefore, defendant has not established grounds for appellate relief.

5. Whether a defendant has been denied effective assistance of counsel is ordinarily a mixed question of fact and law, and the trial court's factual findings are reviewed for clear error. But because defendant failed to obtain an evidentiary hearing to expand the record, review was limited to errors apparent on the record. To establish a claim of ineffective assistance of counsel, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different. There is a strong presumption in favor of effective assistance, and defendant bears a heavy burden of proving otherwise. Defendant's contentions that he was denied effective assistance because his counsel refused to look at "large volumes of documents from his business," failed to subpoena various witnesses, failed to proffer evidence of defendant's real estate holdings, failed to call expert tax and medical experts, failed to prove that Liddle was competent to and did, in fact, execute a note memorializing her purported loan to defendant, and failed to challenge the trial court's instruction on the requirement that taxpayers report any gains on their tax return all failed for lack of record support. Specifically, defendant did not offer copies of or describe the documents of the unproffered business documents or provide an affidavit or other offer of proof to establish what the uncalled witnesses might have stated had they been called to testify, nor did defendant demonstrate a reasonable probability that had the jury known about his real estate investments, the outcome would have been different. Defendant also failed to identify any expert who was willing and able to testify favorably to the defense, and the fact that defense counsel was unable to persuade the jury of defendant's contentions that Liddle was competent and did, in fact, execute a note when Liddle denied that she agreed to lend defendant money did not establish ineffective assistance of counsel because the jury resolved that credibility dispute by rejecting defendant's evidence. And, finally, the instruction to the jury regarding the requirement that taxpayers report any gains on their tax return accurately reflected the law about what income includes, and it adequately protected defendant's rights by fairly presenting the issues to be tried when read as a whole. Therefore, none of defendant's ineffective-assistance claims warranted appellate relief.

6. Courts review a trial court's findings supporting a particular score under the sentencing guidelines for clear error, but courts review de novo whether the trial court properly interpreted and applied the sentencing guidelines to the findings. When a defendant fails to preserve a challenge to an alleged sentencing error, review is for plain error affecting substantial rights. In this case, the former standard of review applied to defendant's first two offense variable (OV) alleged errors—OV 4 and OV 10—but the latter standard applied to his third alleged error—prior record variable (PRV) 6—which he failed to preserve. As to defendant's first contention that the trial court erred by assessing 10 points for OV 4 because Liddle did not suffer a serious psychological injury, MCL 777.34(1)(a) requires courts to score OV 4 at 10 points if a victim, as a result of the offense, suffered serious psychological injury requiring professional treatment. And under MCL 777.34(2), whether the victim actually got treatment is not conclusive. Liddle's victim-impact statement was evidence that she suffered serious psychological injury that made it much harder for her to live a normal life, and although there was no evidence that she sought treatment for the injuries, the trial court could reasonably infer that her psychological injury was serious enough to require treatment. Thus, the trial court did not err when it assessed 10 points under OV 4. As for defendant's argument that the trial court erred when it assessed 15 points under OV 10 for defendant's preoffense predatory conduct, there was sufficient record evidence of such conduct. MCL 777.40(1) requires courts to score OV 10 at 15 points if the offense involved predatory conduct, which is defined as preoffense conduct directed at a victim, or a law enforcement officer posing as a potential victim, for the primary purpose of victimization. There must also be evidence that the victim was vulnerable, which means susceptible to injury, physical restraint, persuasion, or temptation. The evidence establishing that Liddle was a vulnerable adult for purposes of the crime of exploiting a vulnerable adult under MCL 750.159(i) was sufficient to support a finding that Liddle was a vulnerable person for purposes of assessing predatory conduct under MCL 777.40(1). There was also evidence that defendant befriended Liddle and performed gratuitous services in order to gain Liddle's trust and take advantage of the relationship by appropriating Liddle's wealth for his own use. Thus, the trial court could infer that defendant targeted Liddle and won her trust in order to exploit her existing vulnerability and make her a victim of his crimes. Therefore, the trial court did not err when it found that defendant had engaged in preoffense predatory conduct and assessed 15 points under OV 10. Finally,

under MCL 777.56(1)(d), the trial court had to assess five points under PRV 6 if it found that defendant was on probation for a misdemeanor when he committed the sentencing offense. Defendant's presentence investigation report (PSIR) states that defendant was on probation for operating a vehicle while intoxicated, which ended in October 2011. Notwithstanding that the PSIR listed the date of the offense at issue as all having occurred on September 1, 2015, the PSIR also listed the offense date of all 14 counts as March 1, 2011, and there was evidence that defendant started misappropriating Liddle's wealth in March 2011. Therefore, there was record evidence to support the trial court's implied finding that defendant committed the sentencing offense while he was still on probation for his operating-while-intoxicated offense. Therefore, the trial court did not plainly err when it assessed five points under PRV 6, and defense counsel could not be faulted for making a meritless objection to that score.

Affirmed.

TAXATION — TAX FRAUD — TAXABLE INCOME — INCOME FROM ILLEGAL ACTIVITIES — EVIDENCE.

Under the Income Tax Act, MCL 206.1 *et seq*., the income subject to state taxation is the same as taxable income as defined by the Internal Revenue Code, 26 USC 1 *et seq*., except as otherwise provided under Michigan law; unlawful gains from illegal activities constitute income under 26 USC 61(a) and must be reported under Michigan law; a failure to include income from illegal activities on one's tax returns in the relevant tax years is sufficient to establish the requisite intent for tax fraud.

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

Ann M. Prater, Attorney & Counselor at Law, PLLC (by *Ann M. Prater*) for defendant.

Gary E. Haynes *in propria persona*.

Before: STEPHENS, P.J., and BECKERING and O'BRIEN, JJ.

PER CURIAM. Defendant appeals as of right his jury-trial convictions of knowingly conducting or participat-

ing in the affairs of an enterprise through a pattern of racketeering activity (racketeering), MCL 750.159i(1); obtaining or using a vulnerable adult's money or property through fraud, deceit, misrepresentation, coercion, or unjust enrichment (exploiting a vulnerable adult) when the value of the money or property equaled or exceeded $100,000, MCL 750.174a(1) and (7)(a); eight counts of exploiting a vulnerable adult when the value of the money or property had a value of at least $1,000, but less than $20,000, MCL 750.174a(1) and (4)(a); and four counts of failing or refusing to make a tax return or payment, making a false or fraudulent tax return or payment, or making a false statement in a tax return or payment with the intent to defraud or evade the tax (tax fraud), MCL 205.27(1)(a) and (2). The trial court sentenced defendant to serve 90 months to 20 years in prison for each of his convictions of racketeering and exploiting a vulnerable adult involving $100,000 or more, and to serve 30 months to 5 years in prison each for his remaining convictions. For the reasons explained in this opinion, we affirm.

I. BACKGROUND

Ardis Liddle was 97 years of age at the time of trial. During the period relevant to the crimes at issue (roughly 2007 through 2016), she lived alone but had numerous people come over to help her with various tasks—she had a nurse to help with her medication, and friends and relatives to help with running errands, going to appointments, and doing household chores like laundry and cleaning. At the time of trial, Liddle needed a walker to get around because she had bad knees, she could not go up and down stairs, she had arthritis in her hands, she had a pacemaker, and she had poor vision and trouble hearing. Liddle's doctor

testified about her mobility issues and stated that she had a history of falling and suffering injuries—she had a closed-head injury from a fall in 2006, she once fell and fractured her nose, another time she fell and fractured her orbital bone, and still another time she fell and broke her spine.

Liddle said that she met defendant at a "symposium" that he held for elderly people. Defendant believed that this event took place in 2007. Liddle testified that defendant conducted the meeting in the name of a company, but she could not recall the company's name. She remembered that defendant discussed how one should handle money and "things like that." After the meeting, Liddle approached defendant and spoke to him. She asked him for help paying bills "because everyone was paying them on-line" and she was not familiar with how to use a computer. Defendant agreed to help her, and he began coming to her home to pay her bills on the computer. Liddle did not supervise defendant and did not know how he paid her bills, but she had given him a password for her bank account. The only password he was supposed to have was for her account with Chase Bank. Before defendant started helping her with her bills, Liddle received paper bank statements by mail, but that did not last long after defendant began helping her.

Liddle testified that defendant would also sometimes help her with things around the house, such as changing a lightbulb and fixing a screen door. Other people that would come over to help Liddle sometimes saw defendant helping her.

At one point after defendant began helping her with her bills, Liddle was sent to a nursing home to recover from an injury because the hospital "didn't want [her] to stay alone at home." Defendant visited Liddle at the

nursing home and told her that the nursing home "would take [her] money." Defendant also told her that he could put her money "in a safe place" so that the nursing home could not take it. According to Liddle, defendant said that he would put her money into an annuity. Liddle told defendant how upset she was about being in a nursing home and how she wanted to leave, and defendant eventually showed up with a pickup truck and moved her out.

Liddle characterized her relationship with defendant at the relevant time as friends. She explained that she even went to his daughter's play and met his wife and children.

That friendship deteriorated in 2016 when Liddle discovered problems with her finances. Ryan Rimedio, who in 2016 was a manager for a Chase Bank branch, testified that Liddle came into his branch in September 2016 and seemed confused, rattled, and frustrated. She told him that she could not get access to her money—specifically an annuity. Rimedio asked Liddle to get her documents together and bring them into the branch. She came back a few weeks later with her documents, and he reviewed them.

Rimedio was able to obtain a copy of an endorsed check from Liddle's annuity company. The check was a "huge red flag" for him because it was endorsed directly to a business. He explained that such checks are usually deposited by the client into his or her own account and then the client would write a separate check to the investment company. Liddle also gave him a copy of an investment statement from Future By Design—one of defendant's businesses. Rimedio opined that the statement looked homemade. Liddle also gave Rimedio a business card with defendant's name on it, and Rimedio thought the card looked

homemade too. While Liddle sat in the office with him, Rimedio called defendant and explained that Liddle was looking for her money, and defendant responded that he needed a few days to get the money. According to Rimedio, the money never came, but Rimedio did not call the police department about this case.

Donald Stenberg, Liddle's nephew, testified that he traveled the nation in a motor home and would stop and visit Liddle once or twice a year. At one such visit in September 2016, Liddle told Stenberg that she was concerned about her money, so he scheduled an appointment with defendant to discuss the matter. Defendant agreed to come by Liddle's home, and they had a meeting on September 29, 2016. At the meeting, defendant told Stenberg that he had so many clients that he could not state where he had invested Liddle's money. Stenberg warned defendant that if defendant did not get the information to Stenberg by the next day, then Stenberg would take Liddle to the police department to file a report. According to Stenberg, defendant called the next day and told Stenberg that he had invested about $117,000 of Liddle's money in a house-flipping business. He said that he could get Liddle $38,000 right now, but the remainder would take six to eight weeks because the business had to sell houses. According to Stenberg, he told defendant that this was unacceptable and then took Liddle to the police department to file a report.

Detective Sergeant Bryan Rypstra investigated Liddle's report. He spoke with defendant, and defendant told him that he met Liddle at a seminar that he had held. Defendant also told Detective Rypstra that Liddle lent him the money, which was evidenced by a note, and that he had invested the money into a house-flipping and rental-unit business. According to

the detective, defendant said that he had already spoken to Liddle and had informed her that he would pay back the $142,000 that she had lent him. Detective Rypstra felt the matter was civil, not criminal, and closed the report.

The matter eventually made its way to Special Agent Kevin Hiller with the Child, Elder, and Family Financial Crimes Unit of the Attorney General's office, who began investigating defendant in June 2017 after the Attorney General's office received a complaint from the Department of Licensing and Regulatory Affairs. Special Agent Hiller met with Liddle at her home in June 2017, and met with various relatives, friends, and doctors of Liddle. As part of his investigation, Special Agent Hiller also requested all documents relating to various businesses associated with defendant.

Richard Boyer, Jr., worked as a financial specialist for the same department as Special Agent Hiller, and at trial he was admitted as an expert on bank recordkeeping. Boyer reviewed bank records held by defendant and his various businesses. Boyer testified about an account for Senior Planning Resource—one of defendant's businesses—that listed defendant as a signatory. A check from Liddle for $20,000 was deposited into that account on October 28, 2011. There were also two $5,000 checks from Liddle's account deposited into the Senior Planning Resource account on December 31, 2011. A check for Liddle from National Western Life Insurance Company in the amount of $117,490.42 was deposited into the Senior Planning Resource account on May 24, 2012. There was also a check associated with Liddle's annuity from Aviva for $107,735.10 that was deposited into the account for Senior Planning Resource. Before that deposit, the account had a balance of $3.98.

The prosecution produced records for each of these transactions and showed them to Liddle. Liddle could not recall writing the $20,000 check to Senior Planning Resource, and could not think of any reason that she would write such a check. She only believed that she wrote the check because her name appeared on it. For the two $5,000 checks, Liddle similarly testified that she did not recall writing or signing the checks, and had no idea why she would write two $5,000 checks to Senior Planning Resource. When the prosecution showed Liddle the check issued by National Western Life Insurance Company for $117,490.42 payable to Liddle that had written on the back "Paid to the Order of Senior Planning Resource," Liddle denied that she intended to sign over that check to Senior Planning Resource. The prosecution also showed Liddle records from Aviva, which included a letter dated March 3, 2011, stating, "Enclosed is our Check Number 304464 in the amount of $107,735.10." Liddle testified that she had never seen the records from Aviva and that she did not intend to surrender that annuity. The prosecution also showed Liddle a check from Aviva that was endorsed and had written on the back, "Pay to the Order of Senior Planning Resource." Liddle denied that she ever saw the check and said that she never endorsed it.

The financial investigator, Boyer, testified that the Senior Planning Resource account that Liddle's money had been transferred to did not show typical business expenses—it showed no payroll or business accounting expenses. Instead, it showed numerous personal expenses: car repairs, gas, oil changes, groceries, restaurants, hotels, phone charges, air travel, credit card and loan payments, and payments made to defendant's family, which included college tuition payments. Boyer concluded that the funds deposited from Liddle into the Senior Planning Resource accounts were used for

defendant's personal expenses and not to benefit Liddle. Boyer did not find any indications that the money was used to purchase an annuity.

Boyer also testified about another account associated with defendant doing business as "Future By Design, LLC," which was confirmed to be one of defendant's businesses. The records for that account showed that there was a check from Liddle in the amount of $14,000 deposited on October 31, 2013. Another check from Liddle for $13,000 was deposited on December 2, 2013. The records showed that a $12,000 transfer was made from Liddle's account to the Future By Design account on July 14, 2014. There was also an online payment of $1,000 from Liddle's account to Future By Design on July 29, 2014.

The prosecution at trial produced records reflecting each of these transactions and asked Liddle about them. For the $14,000 check, Liddle stated that she did not intend to transfer that money to Future By Design even though it appeared that the signature was hers. For the $13,000 check, Liddle testified that she did not recall intending to write the check and could not recall why she would have written such a check to Future By Design. For the $12,000 transfer, Liddle denied making the transfer and denied intending to transfer that sum to Future By Design, defendant, or any of defendant's businesses. Likewise, for the $1,000 transfer in July 2014, Liddle denied that she intended to transfer that amount to Future By Design, defendant, or Senior Planning Resource.

Boyer testified that up until April 2013, the Future By Design account had very little activity—low balances and general spending on gas, food, shopping, and other basic personal items. Starting in May 2013, there were large deposits, which coincided with defendant's with-

drawals increasing dramatically. There were more than 30 cash withdrawals in that time totaling $32,000. There was also significantly increased spending on rent, shopping, credit cards, bars, and furniture, and there were large payments to various persons.

Boyer testified about another account associated with Future By Design for which defendant was a signatory. That account was opened with a $5,000 deposit from Liddle's account. The only transfers were for $4,500 and $450 to defendant's personal banking account. Boyer testified that there were also several $1,000 deposits from Liddle's account to yet another account associated with Future By Design: one on May 27, 2015; one on June 16, 2015; and one on July 13, 2015.

The prosecution produced records of these transactions as they related to Liddle and asked her about them. For the $5,000 deposit, Liddle denied that she wanted that payment to occur. Liddle also denied that she intended each of the $1,000 transfers.

As a general matter, Liddle testified that she did not give defendant permission to cash her annuities and deposit the funds in his own bank accounts. She further denied that she ever agreed to loan defendant money. She also did not agree to invest in defendant's business and did not agree to engage in "house-flipping."

Richard Grandy, Jr., testified that he was a specialist with the Michigan Department of Treasury. He was with the unit that handled the authorized disclosure of confidential tax information. He processed the request for tax information from the Attorney General's office. His staff determined that there were no tax records filed for a business named Future By Design from 2011 through 2016. He also verified the jointly filed tax

returns for defendant and his wife from 2011 through 2016.

Scott Darnell with the Michigan Department of Treasury in the Tax Enforcement Unit was certified as an expert in tax enforcement and testified that he reviewed defendant's taxes for tax years 2011 through 2015. Darnell stated that stolen or embezzled money must be reported as income, yet there was no evidence that defendant reported the income from the $117,490.42 deposited from Liddle in tax year 2012. There was also no evidence that defendant reported the checks from Liddle for $14,000 and $13,000 that were deposited into Future By Design's accounts in 2013. There was also no evidence that defendant reported income from Future By Design that reflected the $12,000 and $1,000 payments that it received from Liddle in 2014. There was similarly no evidence that defendant reported the $5,000 and $1,000 deposits from Liddle in 2015. Darnell admitted that the principal balance of a loan is not taxable income. He also agreed that taking money from someone to invest might not be income depending on the circumstances.

Defendant testified in his defense. He described himself as an "[e]ntrepreneur, independent businessman." He stated that he was a licensed insurance agent and a registered investment advisor. He had his own business called Senior Planning Resource. As part of that business, he would hire a firm to send out a mailing for a seminar, and then he would host the seminar for seniors interested in investing their money. After the seminar, defendant would set up appointments with anyone who expressed interest. He estimated that he had about 50 clients.

According to defendant, Liddle had been one of his clients from 2007 through "this incident." Defendant

stated that Liddle had mobility issues, but was intelligent and meticulous, and to that end she kept journals in which she wrote out her financial information. He never saw anything that would suggest to him that Liddle was incompetent.

Defendant said that the first thing he did for Liddle was help her set up an estate plan. While doing so, he noticed that she had five or six certificates of deposit with banks. He worried that the income from her certificates of deposit would have adverse tax consequences for her social security, so he recommended that she move the money to a "tax-deferred vehicle." He recommended an annuity.

Defendant said that he would help Liddle with various chores—he would change light bulbs, help her with her Christmas decorations, do minor repairs, and help her move furniture. According to defendant, they were friends, and he would take her to dinner on her birthday.

Defendant said that within a year or two, he started paying Liddle's bills for her. Liddle gave defendant her password and sat beside him 95% of the time when he paid her bills. Defendant said that Liddle kept track of every payment. He also said that he never touched Liddle's checks.

Defendant agreed that he had seen the checks that the prosecutor admitted and testified that he recognized the signatures on each check as Liddle's signature. Defendant denied that he ever signed the checks. He stated that Liddle knew about every check—whether electronic or paper—and approved each. He also disagreed with the bank manager who testified that it was irregular to just endorse a check over to another party for an investment; he stated that it was

actually a common practice. He said that Liddle herself signed the surrender documents for the insurance company.

According to defendant, he discussed investing in real estate with Liddle, and she agreed to lend him money for his real estate projects. Defendant said that he expected to pay Liddle interest and had repaid some of that money. According to defendant, none of the loans were past due. He explained that some of the online transactions occurred because Liddle wanted him to bring her cash, and he would transfer the money and then bring her cash. But he said that Liddle approved every transaction. Defendant said that, at first, he prepared a note to memorialize the loans, but as they continued to have transactions, Liddle just kept notes in one of her journals. He stated that it was a mistake for him to not make a copy of the journal.

Defendant identified a copy of a promissory note that showed that Liddle lent Future By Design $116,353.90. He stated that Liddle had the original note. Defendant said that Liddle verbally agreed to extend the maturity date of the note, and that Liddle told him not to put investments in her name because she wanted to avoid the Medicaid look-back period. He also said that Liddle knew she was not investing in annuities and that she agreed to invest in real estate. He acknowledged using some money for personal expenses, but said that he only did so when Liddle agreed to it.

Defendant denied that he misstated his taxes, and he testified that every dollar that he got from Liddle was with her permission. He also admitted that his tax returns did not reflect any income from his taking of Liddle's money, but he said that was because the money was loaned to him and was therefore not

income. Defendant also explained that he did not file tax returns for his entities because one was just a "DBA" and the other was a pass-through entity, so he did not need to file taxes for either of them. He explained that the taxes were part of his personal return.

The jury eventually found defendant guilty as charged on each of the 14 counts. He now appeals as of right.

II. JUROR MISCONDUCT

Defendant first argues that comments made by prospective jurors during voir dire about those jurors' biases tainted the jury, warranting a mistrial. We disagree.

A. STANDARD OF REVIEW

To preserve a claim that there was an irregularity warranting a mistrial, defendant had to move for a mistrial in the trial court and assert the same ground for relief before the trial court that he asserts on appeal. See *People v Clark*, 330 Mich App 392, 414; 948 NW2d 604 (2019); *People v Eccles*, 260 Mich App 379, 385; 677 NW2d 76 (2004). Although defendant objected when the prosecutor sought to further question certain prospective jurors about their biases in favor of law enforcement, defendant did not move for a mistrial or request any other relief rising from his belief that the prospective jurors were tainted by the comments made by the excused jurors. Therefore, he has not preserved this claim for appellate review. This Court reviews unpreserved errors for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

B. ANALYSIS

Defendant had the right to be tried by an impartial jury. See *People v Rose*, 289 Mich App 499, 529; 808 NW2d 301 (2010). A trial court ensures that a jury is impartial by conducting voir dire and removing biased jurors before impaneling the jury: "The purpose of voir dire is to elicit enough information for development of a rational basis for excluding those who are not impartial from the jury." *People v Tyburski*, 445 Mich 606, 618; 518 NW2d 441 (1994) (opinion by MALLETT, J.). To the extent that defendant maintains that the process did not result in an impartial jury, defendant has the burden to show that a particular juror was not impartial or, at the very least, that the juror's impartiality was in reasonable doubt. See *Rose*, 289 Mich App at 529.

In this case, the trial court and counsel for the parties extensively explored whether the prospective jurors might have biases arising from the nature of the events at issue. The trial court and parties inquired particularly into whether the prospective jurors held any biases for or against law enforcement witnesses and whether the prospective jurors would be able to remain impartial given that the charges involved alleged crimes against an elderly woman.

When the prosecutive jurors were asked how they might feel about witnesses who are police officers, prospective juror DB said that he was a "firm believer in the police and a firm supporter of the police." Later, DB did not raise his hand when the jurors were asked to raise their hands if they could be fair and impartial. When the prospective jurors were asked if they had any family in law enforcement, DB said that he had family that worked in corrections, but assured that this fact would not affect his ability to be impartial. He

further agreed that he would follow the court's instruction and give the same weight to an officer's testimony that he would give to that of any other witness.

Notwithstanding his earlier agreement that he would not give additional weight to testimony by officers, DB later mentioned that he had a background in the military and knew a bit about police procedures. He stated that, given the number of counts and the lengthy span of time covered by those counts, the prosecutor would not "be sitting here unless there was some type of evidence that they're bringing forth." He reiterated that he already had a bias. He explained that police officers would not be here unless there was a reason. Defense counsel thanked him for being "man enough to sit there and tell us" about his bias; counsel also stated that he would be asking DB to "leave this panel."

Defense counsel then asked if the remaining jurors would be willing to "wait until the end of the trial to see how this book is written[.]" They all agreed that they would. He also asked if they would be willing to uphold the presumption of innocence until proven guilty. They again agreed.

The prosecutor then questioned individual jurors who had expressed feelings of bias. Prospective juror AB previously indicated that she had worked with the elderly and was "sensitive to people doing things to the elderly that [she] view[ed] as wrong" and that the number of counts and length of time made her think that the prosecution had a significant amount of evidence against defendant such that she could not give defendant what defense counsel characterized as a "fair shake." When the prosecutor sought to explore these potential biases further, AB reiterated that she was unsure whether she could set aside her experi-

ences with the elderly. Accordingly, the trial court excused her for cause. The prospective juror who replaced AB indicated that she did not have any of AB's same concerns.

Next the prosecutor turned to prospective juror BL, who previously stated that, because her mother had been abused when she was elderly, there was "no way [she] could be anything but against." When asked by the prosecution to explain her bias further, BL began to cry and said that this "exact thing happened" to her mother, so she could not be impartial. The trial court excused her for cause.

The prosecutor then turned to prospective juror BW, who had previously mentioned that he had police officers for friends and opined that there was no way that the officers would be in court if nothing happened, so he would be biased. When the prosecutor again asked BW about this bias, BW confirmed that he had a bias in favor of law enforcement. Nevertheless, the trial court refused to excuse BW for cause because BW had indicated that his job required him to work against fraud, and BW had agreed that he understood how to evaluate evidence to determine whether there had in fact been fraud.

Then the prosecutor began to question DB about the biases he previously stated that he held, at which point the trial court interjected, saying that the parties had already heard DB's views. The court inquired whether it was really necessary to ask further questions. When the prosecutor said that it was, defense counsel objected and opined that, at this point, further questioning would "contaminate" the record. The trial court agreed and stopped the questioning. The court stated that it would excuse the other prospective jurors should the prosecutor wish to continue questioning

DB. After DB reiterated that he would be unable to follow the court's instructions, the prosecutor agreed that he should be removed for cause, and the trial court ordered him removed.

A replacement prospective juror, TJ, then expressed concerns about the number of charges. TJ, however, agreed that he could follow the court's instructions. All subsequent replacement jurors each agreed that they could be impartial and follow the court's instructions no matter how many charges a person faced. The defense excused prospective jurors TJ and MR (who had previously suggested that she may have a bias in favor of law enforcement witnesses), and their replacements agreed that they would be able to follow the court's instructions.

This record demonstrates that the trial court removed for cause the majority of the prospective jurors who expressed a potential bias in favor of the prosecution and that defense counsel used his peremptory challenges to remove the remainder. Each of the remaining jurors affirmed that they would be impartial and that they would be able to follow the trial court's instructions. Accordingly, defendant has not met his burden to show that the impartiality of any one juror was in reasonable doubt. See *Rose*, 289 Mich App at 529.

Nevertheless, relying on the decision in *People v Sowders*, 164 Mich App 36, 47; 417 NW2d 78 (1987),[1] defendant maintains that the presence of the prospective jurors during the questioning of other prospective

[1] Decisions published before November 1, 1990, are not binding on this Court. See MCR 7.215(J)(1). However, those decisions are entitled to deference under traditional principles of stare decisis and should not be lightly disregarded. See *People v Bensch*, 328 Mich App 1, 7 n 6; 935 NW2d 382 (2019).

jurors who expressed biases tainted the entire jury pool. This Court's decision in *Sowders* does not support that proposition.

In *Sowders*, this Court recognized that jury misconduct would not warrant relief unless the misconduct was such that it affected the impartiality of the jury or disqualified them from exercising the powers of reason and judgment. *Id*. at 47. The Court then concluded that, on the record before it, it did not appear that a prospective juror's remark about the police department had any effect on the impartiality of the jury. *Id*. at 47-48. Like the defendant in *Sowers*, defendant in this case has not shown that the remarks by some of the prospective jurors had any effect on the impartiality of the jury.

Defendant also argues that the jury was improperly exposed to extraneous evidence, as discussed in *People v Budzyn*, 456 Mich 77, 88-89; 566 NW2d 229 (1997). It is unclear how prospective jurors' answers to questions about their personal beliefs constituted extraneous evidence. But assuming without deciding that this was extraneous evidence, defendant has not shown that there was "a real and substantial possibility that [the extraneous influences] could have affected the jury's verdict." *Id*. at 89.

Counsel for both parties asked each of the prospective jurors selected to replace the prospective jurors who were removed whether they could decide the case on the facts and follow the trial court's instructions. Each juror agreed that they could. The trial court also administered an oath to the jurors, and they each swore to "justly decide the questions submitted" to them, to render "a true verdict," and to render that verdict "only on the evidence introduced and in accordance with the instructions of the Court." Finally, the

trial court instructed the jurors that they were to decide the case on the basis of the admitted evidence and not on the basis of any biases, sympathy, or prejudice and that they should not consider the fact that defendant had been charged with more than one crime. Jurors are presumed to follow their instructions, see *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998), and are presumed to be impartial, see *People v Johnson*, 245 Mich App 243, 256; 631 NW2d 1 (2001). Defendant has not rebutted those presumptions.

On this record, it cannot be said that the trial court plainly erred by failing to sua sponte grant a mistrial. See *People v Lane*, 308 Mich App 38, 60; 862 NW2d 446 (2014) (stating that a trial court should only grant a mistrial when the prejudicial effect of an error is so egregious that it cannot be removed in any other way).[2]

III. SUFFICIENCY OF THE EVIDENCE

Defendant next argues that the prosecution failed to present sufficient evidence establishing that Liddle was a vulnerable adult, that defendant intended to defraud or evade taxes, and that defendant engaged in

[2] Defendant alternatively argues that his trial counsel provided ineffective assistance by not moving for a mistrial. We disagree. The record shows that defense counsel thoroughly vetted the prospective jurors and intervened to prevent further questioning that might have contaminated the jury pool. He also used peremptory removals to remove the remaining prospective jurors who had expressed some degree of bias. A lawyer in defense counsel's position could have reasonably concluded that the voir dire adequately identified the jurors with biases and that the remaining jurors were capable of being fair and impartial. Moreover, given that there was no evidence that any of the jurors held a bias or were unable or unwilling to follow the trial court's instructions, there would have been no grounds to move for a mistrial, and counsel cannot be faulted for failing to make a frivolous motion. *People v Putman*, 309 Mich App 240, 245; 870 NW2d 593 (2015).

the necessary predicate racketeering offenses to support his conviction for racketeering. We disagree with all of defendant's arguments.

A. STANDARD OF REVIEW

As explained by this Court in *People v McFarlane*, 325 Mich App 507, 513; 926 NW2d 339 (2018):

> This Court reviews a challenge to the sufficiency of the evidence by examining the record evidence de novo in the light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt. This Court must resolve all conflicts in the evidence in favor of the prosecution. [Quotation marks and citation omitted.]

B. VULNERABLE ADULT

Defendant first challenges whether the prosecution presented sufficient evidence to establish that Liddle was a "vulnerable adult" because, according to defendant, the evidence showed that Liddle had only minor physical ailments and was otherwise mentally capable of handling her own affairs.

Defendant was convicted under MCL 750.174a(1), which requires the prosecution to prove that the victim was a "vulnerable adult" and that the defendant knew or had reason to know that the victim was a vulnerable adult. The Legislature defined a vulnerable adult to be, in relevant part, an "individual age 18 or over who, because of age, developmental disability, mental illness, or physical disability requires supervision or personal care or lacks the personal and social skills required to live independently." MCL 750.145m(u)(*i*); see also MCL 750.174a(15)(c) (stating that the term "vulnerable adult" has the meaning stated under MCL 750.145m).

This Court has analyzed that definition, albeit as applied in the context of elder abuse, and determined that to establish that a person was a vulnerable adult, the prosecution must show that the four personal characteristics stated under the statute—age, developmental disability, mental illness, and physical disability—"affect the individual in such a way that the individual (a) requires supervision, (b) requires personal care, or [(c)] lacks the personal and social skills required to live independently." *People v Cline*, 276 Mich App 634, 645; 741 NW2d 563 (2007). Although there was testimony that Liddle was mentally and physically able to care for herself, there was also strong evidence from which a jury could have found that Liddle was a vulnerable adult within the meaning of MCL 750.145m(u)(*i*).

Liddle testified that she was 97 years of age at the time of the trial and that she had issues with her mobility. Liddle's physician discussed Liddle's mobility issues and testified that the issues were severe as early as 2006. He noted that Liddle had been using a cane or walker since 2009. The physician also explained that he had long had concerns about Liddle's decision to live alone, but that he had "lost that battle" because Liddle was "very headstrong" and would rather be "gone" than live in an assisted living facility.

Others testified about the help that Liddle needed. Cheryl Crays explained that she went to Liddle's home a couple times a week from 2005 through 2013 to help Liddle with her basic needs like chores, getting to appointments, and shopping. Crays also had to get Liddle's mail because the mailbox was surrounded by concrete and Liddle had once fallen and injured her head while retrieving mail.

In 2013, Crays could no longer help Liddle, so Jacklynn Elliott took over. Elliott testified that she did

many of the same things for Liddle that Crays had done. Elliott stated that Liddle was no longer able to use the stairs by the time she started helping her. When Elliott was no longer able to help Liddle, she went to some lengths to notify others because she "wanted to know that someone from the family would be helping" Liddle after Elliott left.

Liddle herself also testified that she had trouble using a computer. She explained that she first approached defendant about assisting her with her bills. She entrusted the password and account information for one of her accounts to defendant so that he could pay her bills using the funds from that account. Although defendant testified that Liddle was intelligent, meticulous, and well aware of her financial situation, the fact that she could not even use a computer to pay her own bills suggested that she did not have basic computer literacy and would be unable to monitor financial transactions that were done through the computer. Additionally, Liddle testified that she stopped receiving paper statements after defendant took over paying her bills. This evidence suggested that Liddle was at the mercy of anyone she entrusted to pay her bills electronically.

All this testimony taken together established that Liddle needed significant assistance in order to lead her life. A reasonable jury hearing this testimony could find that Liddle had restricted mobility and that her mobility issues made her reliant on others to shop, get to doctor's appointments, and obtain her mail. She was also at risk of falling and sustaining an incapacitating injury. Given the fall risk, a reasonable jury could infer that Liddle needed supervision, even if she herself was unwilling to admit as much. See MCL 750.145m(u)(*i*). A reasonable jury could also infer that Liddle was not

computer literate and could not handle her financial needs to the extent that she had to rely on a computer to do so. The jury could also infer that Liddle was vulnerable to anyone that she entrusted with her account information. Consequently, viewing the evidence in the light most favorable to the prosecution, see *McFarlane*, 325 Mich App at 513, there was evidence that Liddle was not fully able to live independently, see *Cline*, 276 Mich App at 645-646 (holding that evidence that a person requires some level of personal care as a result of her conditions was sufficient evidence to establish that that person was a vulnerable adult).

The prosecution also presented sufficient evidence from which a reasonable jury could find beyond a reasonable doubt that defendant knew or should have known that Liddle was a vulnerable adult. Both Elliott and Crays stated that they met defendant on various occasions when they were helping to care for Liddle. From that testimony, a reasonable jury could infer that defendant knew that Liddle received at least some level of care from others. Additionally, Liddle testified that she needed assistance paying her bills with a computer and that she elicited defendant's help to do that. Liddle was obviously elderly and used a cane and walker during the periods at issue. Moreover, defendant knew that Liddle had been placed into an assisted living facility for a time—he helped Liddle move out of the facility. Accordingly, the prosecution presented sufficient evidence to permit the jury to find beyond a reasonable doubt that Liddle was a vulnerable adult and that defendant knew or at the very least should have known that she was a vulnerable adult. See *McFarlane*, 325 Mich App at 513; *Cline*, 276 Mich App at 645-646.

C. TAX FRAUD

Defendant next argues that the prosecution failed to present sufficient evidence that he had the requisite intent to commit tax fraud.

To prove tax fraud, the prosecution had to, in relevant part, present evidence from which a reasonable jury could find beyond a reasonable doubt that defendant made a "false or fraudulent return or payment" or made a "false statement in a return or payment." MCL 205.27(1)(a). The prosecution also had to present evidence that defendant did so with the "intent to defraud or to evade" the payment of a tax. MCL 205.27(2); see also *People v Schmidt*, 183 Mich App 817, 822; 455 NW2d 430 (1990) (stating that the violation must be done with the intent to defraud or evade the payment of tax).

The evidence showed that defendant obtained more than $300,000 of Liddle's money over a span of years and that he did not report any of that money as income on his tax returns for the years involved. Defendant took the position at trial, and continues to argue on appeal, that he did not have to report the more than $300,000 on his tax returns because that money was supposedly loaned to him or given to him to invest on Liddle's behalf, which means that the money was not taxable income. To be sure, if Liddle retained ownership of the funds and the proceeds from the funds—as would be the case with invested funds—those funds would not be income to defendant. See MCL 206.2(3) (providing that the income subject to taxation in Michigan is the same as the taxable income defined and applicable to the taxpayer under the Internal Revenue Code, 26 USC 1 *et seq*., except as otherwise provided under Michigan law); MCL 206.30(1) (defining Michigan's taxable income to mean "adjusted gross income"

as defined under the Internal Revenue Code); 26 USC 61(a) (defining "income" for purposes of taxation under the Internal Revenue Code). Likewise, the principal balance of a loan does not constitute taxable income to the borrower. See *Comm'r of Internal Revenue v Tufts*, 461 US 300, 307; 103 S Ct 1826; 75 L Ed 2d 863 (1983) (holding that the principal of a loan is not income).[3] Nevertheless, there was compelling evidence that Liddle did not authorize the transfer of any funds to defendant either as an investment or as a loan to defendant or any of his entities.

Liddle testified at trial that she did not give defendant permission to cash her annuities and deposit them into his own banking accounts. She also denied that she ever lent money to defendant or agreed to invest in any of his real estate ventures. She stated that she only ever gave defendant the information for one bank account, and she only did that so that he could pay her bills online with that account. This testimony by Liddle, if credited by the jury, would be sufficient to conclude that Liddle did not invest money with defendant or lend him the money.

Moreover, defendant's testimony that Liddle did indeed invest with him or lend him the money was difficult to believe. To do so would require believing that a nonagenarian would transfer all her wealth and not expect to be repaid until she was nearly 100 years

[3] Because our Legislature provided that Michigan's taxable income was the same as taxable income under the Internal Revenue Code except as otherwise provided under Michigan's tax code, we look to federal decisions interpreting and applying the Internal Revenue Code as to what constitutes income under the Internal Revenue Code. See, e.g., *Cook v Dep't of Treasury*, 229 Mich App 653, 660; 583 NW2d 696 (1998) (stating that, under MCL 206.2(3), Michigan's income tax must be calculated in the same manner that it would be under the federal Internal Revenue Code).

old. This was even more difficult to believe in light of the unanimous testimony that Liddle was determined to avoid a nursing home and Liddle's testimony that she was financially secure enough to live out her days in her own home. It seems highly unlikely that, under those circumstances, Liddle would voluntarily impoverish herself in order to further defendant's investment schemes.

In any event, there was evidence beyond Liddle's testimony that permitted an inference that defendant took Liddle's money without permission and that he spent her money on his own personal expenses. Bank manager Rimedio testified that Liddle came to him and was confused, rattled, and frustrated about being unable to obtain her funds. The bank manager helped Liddle track down what happened to her annuity and learned that it had been liquidated and signed over to one of defendant's businesses. When the bank manager called defendant, defendant stated that it would take a few days for him to get the money, but the money never came. Similarly, Liddle's nephew, Stenberg, testified that he too spoke to defendant about Liddle's money, and that defendant admitted to taking Liddle's $117,000 and investing it in a house-flipping enterprise. Defendant said that he would get her $38,000 immediately and the rest in a few weeks, but the money was never returned to Liddle.

In reviewing the sufficiency of the evidence, this Court must draw every reasonable inference in favor of the prosecution. See *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Moreover, if evidence is relevant and admissible, it does not matter that the evidence gives rise to multiple inferences or further inferences; it is for the jury alone to determine what inferences to draw. *Id*. Rimedio's and Stenberg's testi-

monies permitted an inference that Liddle had no idea that defendant had taken her money, which directly contradicted defendant's claim that Liddle authorized the transfers and kept meticulous records of having done so. Defendant's comments to Rimedio and Stenberg similarly evidenced that he was attempting to forestall investigation into his activities, which suggested consciousness of guilt. This in turn permitted an inference that defendant was lying when he testified that Liddle transferred more than $300,000 to him—which represented nearly all of her wealth—as loans or investments, and that he was lying because he had in fact stolen Liddle's money. See *id*.

There was also evidence that defendant used the money to pay for personal expenses. Evidence showed that defendant used Liddle's money to pay for groceries, restaurants, hotels, flights, car repairs, and personal goods, among other things. There was even evidence that defendant used Liddle's money to pay his children's college expenses. There was no evidence, however, that he invested the money into an annuity or into a real estate venture. Additionally, although some of the accounts were ostensibly business accounts, there was testimony that the account activity was inconsistent with the kinds of transactions one would see in a legitimate business account. Under the totality of the evidence, a reasonable jury could find that defendant took Liddle's money without permission, converted it to his own use, and intended to cheat Liddle when he did so. Indeed, the evidence was sufficient to establish that defendant embezzled Liddle's money, even if Liddle had transferred the money to him in trust. See *People v Schrauben*, 314 Mich App 181, 198; 886 NW2d 173 (2016) (stating the elements of embezzlement under MCL 750.174). Accordingly, even if Liddle had not testified that she never authorized the transfer of any

money to defendant, the prosecution presented sufficient evidence to establish that defendant embezzled Liddle's money.

In the absence of any basis for concluding that Liddle's testimony was so deprived of evidentiary value that no reasonable jury could rely on it, it was for the jury alone to determine whether to believe Liddle's version of events or defendant's version of events. See *People v Lemmon*, 456 Mich 625, 643-644, 646-647; 576 NW2d 129 (1998). The jury ultimately rejected defendant's version of events and found that he took Liddle's money without permission, and there was ample record evidence to support that finding. See *McFarlane*, 325 Mich App at 513.

Because there was evidence to support the finding that defendant unlawfully converted Liddle's money to his own use, the jury could reasonably find that defendant had income from his illegal activities. Illegally obtained income must be reported under the Internal Revenue Code. See *James v United States*, 366 US 213, 219; 81 S Ct 1052; 6 L Ed 2d 246 (1961) (holding that unlawful gains—including gains from embezzlement—constitute an accession to wealth that is income within the meaning of 26 USC 61(a)). Therefore, income from illegal activities must be reported under Michigan law as well. See MCL 206.2(3); MCL 206.30(1).

At trial, there was evidence that defendant did not file separate tax returns for his entities. Additionally, there was evidence that defendant did not report the more than $300,000 that he obtained from Liddle on his personal tax returns for the relevant tax years. This Court has held that evidence that a taxpayer failed to file a tax return is sufficient evidence to allow a jury to find that the taxpayer intended to evade the tax that would have been due with the return. See

People v Paasche, 207 Mich App 698, 713; 525 NW2d 914 (1994). By the same measure, the evidence that defendant failed to include his unlawful income on his tax returns during the relevant tax years was sufficient to establish the requisite intent for tax fraud in those years. See *id*. The evidence that the illegal proceeds constituted a significant portion of defendant's income and that he used the illegal income to pay his everyday expenses was also evidence that he understood that the illegal gains constituted income that should be reported. See *United States v Ytem*, 255 F3d 394, 396-397 (CA 7, 2001) (noting that the evidence was sufficient to establish the intent to defraud because the illegal income constituted a substantial portion of the taxpayer's income and the taxpayer used the illegal income to pay the sorts of expenses that people normally defray with taxable income).[4] "Furthermore, the fact that illegal income is taxable is widely known, even among lay people." *Id*. at 397 (citing the example of organized crime boss Al Capone, who was famously convicted of tax evasion on this basis). The prosecution therefore presented sufficient evidence to establish that defendant had income in the form of money embezzled from Liddle and that he deliberately failed to include that income on his personal tax return in order to evade the tax on his illegal gains. See *McFarlane*, 325 Mich App at 513.

D. RACKETEERING

Finally, defendant argues that the prosecution failed to present evidence that he committed the crime of

[4] Decisions by lower federal courts are persuasive—but not binding—authority. See *Abela v Gen Motors Corp*, 469 Mich 603, 606; 677 NW2d 325 (2004).

racketeering. To establish the crime of racketeering, the prosecution had to establish the following elements:

> (1) an enterprise existed, (2) defendant was employed by or associated with the enterprise, (3) defendant knowingly conducted or participated, directly or indirectly, in the affairs of the enterprise, (4) through a pattern of racketeering activity that consisted of the commission of at least two racketeering offenses that (a) had the same or substantially similar purpose, result, participant, victim, or method of commission, or were otherwise interrelated by distinguishing characteristics and are not isolated acts, (b) amounted to or posed a threat of continued criminal activity, and (c) were committed for financial gain. [*People v Martin*, 271 Mich App 280, 321; 721 NW2d 815 (2006).]

The Legislature defined an enterprise to include an individual or sole proprietorship, in addition to other entities or associations; it also stated that an enterprise includes both licit and illicit enterprises. See MCL 750.159f(a). Therefore, the evidence that defendant did business as Senior Planning Resource and worked through his company, Future By Design, was sufficient to establish that he was employed by or associated with an enterprise, even though those enterprises might also have been used to provide licit services. See *Martin*, 271 Mich App at 322. The key question was whether he participated in those enterprises through a pattern of racketeering activity.

A pattern of racketeering activity means "not less than 2 incidents of racketeering to which all of the following characteristics apply:"

> (*i*) The incidents have the same or a substantially similar purpose, result, participant, victim, or method of commission, or are otherwise interrelated by distinguishing characteristics and are not isolated acts.

> (*ii*) The incidents amount to or pose a threat of continued criminal activity.
>
> (*iii*) At least 1 of the incidents occurred within this state on or after the effective date of the amendatory act that added this section, and the last of the incidents occurred within 10 years after the commission of any prior incident, excluding any period of imprisonment served by a person engaging in the racketeering activity. [MCL 750.159f(c).]

"Racketeering" is defined in MCL 750.159g to mean "committing, attempting to commit, conspiring to commit, or aiding or abetting, soliciting, coercing, or intimidating a person to commit an offense for financial gain by obtaining money, property, or any other thing of value, involving," in relevant part, a felony violation of MCL 750.174, which prohibits embezzlement. See MCL 750.159g(t).

As already discussed, the prosecution presented evidence from which a reasonable jury could have found that defendant embezzled Liddle's money on multiple different occasions, and that he did so through his enterprises involving investment advice and estate planning. Those offenses were sufficient to establish that defendant participated in his enterprises through a pattern of racketeering. Moreover, the evidence showed that defendant repeatedly targeted Liddle, along with other older persons as shown through the other-acts testimony, and used the proceeds to pay his personal expenses. That evidence was sufficient to establish the remaining elements of racketeering. See *Martin*, 271 Mich App at 326-327.

The prosecution presented sufficient evidence to establish each of the elements that defendant argues were insufficiently supported at trial. Consequently, he has not established grounds for appellate relief.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant next raises numerous claims of ineffective assistance of counsel, both in his brief on appeal and in a Standard 4 brief filed pursuant to Administrative Order 2004-6. None of defendant's ineffective assistance claims warrants appellate relief.

A. STANDARD OF REVIEW

Ordinarily, whether a defendant has been denied effective assistance of counsel is a mixed question of fact and law—the trial court's factual findings supporting its decision are reviewed for clear error, while the court's determination of whether those facts violated the defendant's right to the effective assistance of counsel is reviewed de novo. *People v Dixon-Bey*, 321 Mich App 490, 515; 909 NW2d 458 (2017). Defendant, however, failed to obtain an evidentiary hearing to expand the record, so there are no factual findings to which this Court must defer, and this Court's review is instead limited to errors apparent on the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

B. ANALYSIS

To establish a claim of ineffective assistance, "a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different." *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012). Effective assistance is "strongly presumed," *People v Vaughn*, 491 Mich 642, 670; 821 NW2d 288 (2012), and the defendant bears the heavy burden of proving otherwise, *People v Dixon*, 263 Mich App 393, 396; 688 NW2d 308 (2004). If this Court can conceive of

a legitimate strategic reason for trial counsel's act or omission, this Court cannot conclude that the act or omission fell below an objective standard of reasonableness. *Clark*, 330 Mich App at 427.

Defendant first argues that his trial counsel's preparation for trial was deficient. Defendant maintains that his counsel refused to look at a "large volume of documents from his businesses," which he claims pertained to Liddle. Defendant has not offered copies of these documents or even described their content on appeal, but simply asserts that the documents would have been helpful without further explanation. Defendant bears the burden of establishing the factual predicate for his claim that defense counsel's performance fell below an objective standard of reasonableness and prejudiced his trial, see *People v Odom*, 327 Mich App 297, 314; 933 NW2d 719 (2019), and in the absence of any support for the contention that these documents might have helped the defense, this Court cannot conclude that the failure to admit the documents prejudiced the defense, see *People v Carll*, 322 Mich App 690, 703; 915 NW2d 387 (2018).

Similarly, defendant largely fails to support his claim that his trial counsel's failure to subpoena various witnesses amounted to ineffective assistance. Defendant claims that Mike Murphy, Mark Pursley, Dorothy Wolvolek, and Rick AuMiller would have testified favorably to the defense. Defendant, however, has not offered an affidavit or other offer of proof to establish what three of the four witnesses—Murphy, Wolvolek, or AuMiller—might have stated had they been called to testify. "Without some indication that a witness would have testified favorably, a defendant cannot establish that counsel's failure to call the witness would have affected the outcome of his or her trial." *Id*.

Defendant did submit Pursley's affidavit in support of his claim on appeal. However, Pursley did not aver that he had any firsthand knowledge about the transfers of money from Liddle's accounts to defendant's accounts, nor did he say that he had any direct knowledge of Liddle's business dealings. Pursley merely averred that he had worked with defendant on "real estate projects and repairs" and found him to "be strictly professional in all of his dealings." The fact that Pursley had worked with defendant on real estate projects was only minimally relevant to establish that defendant did in fact have legitimate real estate projects in which he could have invested money. Moreover, as already noted, whether defendant was involved in legitimate enterprises was not relevant to the charges he was facing, see *Martin*, 271 Mich App at 322—the question was whether defendant misappropriated Liddle's money and used it for his own ends. Pursley's proposed testimony would not have established that defendant had in fact invested Liddle's money in a real estate enterprise. Pursley also could not have stated whether defendant had the authority to take funds from Liddle's account and invest the money in such a project. Further, even if it was objectively unreasonable for defense counsel to not call Pursley, Pursley's marginally relevant evidence could not have had any conceivable effect on the verdict in light of the strong evidence that defendant wrongfully took Liddle's money and actually spent it on personal expenses rather than real estate or some other investment. Therefore, defendant has not established a reasonable probability that, but for defense counsel's failure to call Pursley, the outcome at trial would have been different.

For similar reasons, defendant cannot establish that his trial counsel's failure to proffer evidence of defendant's real estate holdings amounted to ineffective

assistance of counsel. Defendant again failed to establish the factual predicate for his claim that he owned investment properties. See *Odom*, 327 Mich App at 314. But even if he had offered evidence that he actually owned real estate as investments, defendant failed to demonstrate that there was a reasonable probability that, had the jury known about the real estate investments, the outcome would have been different. The mere existence of an investment does not establish that defendant had the authority to take Liddle's money and invest it in his properties.

Defendant's contention that his trial counsel should have called experts is likewise meritless. Defendant again failed to make an offer of proof to support this claim of error. He did not identify any expert who was willing and able to testify favorably to the defense. Accordingly, his claim fails. See *Carll*, 322 Mich App at 703.

In any event, defendant has not identified any need for experts. Defendants asserts that he needed banking or tax experts to testify about the intricacies of tax law and to explain the banking records. Whether income is taxable is a question of law; it is for the Court to instruct the jury on the applicable law, not a tax expert. Accordingly, an expert on taxation could not have offered any testimony about the proper application of the law to the facts. And defendant has not identified any basis for concluding that a tax expert would have shed light on whether defendant misappropriated Liddle's money. Defendant similarly does not identify any ambiguity in the banking records that might have been alleviated by expert testimony on banking procedures or recordkeeping. Given that the trial essentially came down to a credibility contest between defendant and Liddle, a reasonable defense

lawyer could have concluded that it would be better to focus on whether Liddle authorized the transfers of money rather than complicate the trial with expert testimony that had limited evidentiary value. Consequently, even assuming that such experts were ready and willing to testify for the defense, defendant has not established that the decision not to call those experts fell below an objective standard of reasonableness.

Defendant also argues that his trial counsel should have called a medical expert to contest Liddle's mental and physical condition. Considering the evidence, however, a reasonable defense lawyer could conclude that there was no basis for doing so. There was undisputed evidence that Liddle had actually secured assistance and had numerous physical conditions that impaired her ability to live independently. There was no reason to believe that any medical professional would have testified that Liddle was capable of living independently, notwithstanding this evidence. Under the circumstances, defense counsel could have reasonably concluded that it would be better to elicit testimony on cross-examination of Liddle, her caregivers, and her physician that might suggest that Liddle's care needs were not so severe that she constituted a vulnerable adult. This is precisely what defense counsel attempted at trial. Accordingly, defendant failed to establish that defense counsel's decision not to call a medical expert fell below an objective standard of reasonableness.

In his Standard 4 brief, defendant argues that his trial counsel provided ineffective assistance by failing to prove that Liddle executed a note, which—in his view—would have definitively shown that she lent the money at issue to him. He concludes that the note would have served as an absolute defense to all the charges.

At trial, defendant testified that Liddle lent the money at issue to him and that the loan was memorialized by a note. The trial court admitted a copy of the note into evidence. Liddle, by contrast, testified that she did not lend defendant any money. Accordingly, the record demonstrates that defense counsel submitted evidence in support of defendant's theory of the case. Therefore, defendant's complaint in that regard is meritless.

Defendant also spends a significant amount of time discussing whether there was evidence that Liddle was competent to execute the note. Yet no one disputed Liddle's competency at trial; the question before the jury was whether Liddle had in fact entered into a contractually binding agreement to lend her money to defendant. Defendant presented evidence that he and Liddle had agreed that Liddle would lend defendant the money, but Liddle outright denied that she agreed to lend money to defendant or give him money to invest. The jury impliedly resolved that credibility dispute by rejecting defendant's evidence. The fact that defense counsel was unable to persuade the jury of defendant's position does not establish ineffective assistance of counsel. See *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001).

Defendant also argues that his trial counsel provided ineffective assistance by failing to challenge the trial court's instruction on the requirement that taxpayers report any gains on their tax return. After reviewing the instruction, we disagree. When read as a whole, the instruction at issue adequately protected defendant's rights by fairly presenting the issues to be tried. See *Martin*, 271 Mich App at 337-338. The contested instruction accurately reflected the law that income includes any accessions to wealth, clearly realized, and over which the taxpayer has complete dominion. *James*,

366 US at 219 (stating the definition of income under the current code).[5]

V. SENTENCING VARIABLES

In his final argument, defendant contends that the trial court erred by assessing Offense Variable (OV) 4 at 10 points, OV 10 at 15 points, and prior record variable (PRV) 6 at 5 points. We disagree.

A. STANDARD OF REVIEW

"This Court reviews for clear error a trial court's findings in support of a particular score under the sentencing guidelines but reviews de novo whether the trial court properly interpreted and applied the sentencing guidelines to the findings." *McFarlane*, 325 Mich App at 531-532. Defendant failed to preserve his challenge to PRV 6, so this Court's review of that alleged sentencing error is for plain error affecting substantial rights. See *People v Anderson*, 322 Mich App 622, 634; 912 NW2d 607 (2018).

B. OV 4

Defendant first asserts that the trial court erred by assessing 10 points for OV 4 because Liddle did not suffer a serious psychological injury.

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[5] In his Standard 4 brief, defendant makes other statements in his recitation of the facts that might be interpreted as additional claims of ineffective assistance. For example, he complains generally about his lawyer's performance during voir dire and criticizes defense counsel's handling of other-acts evidence. To the extent that these statements might be interpreted as additional claims of error, defendant has abandoned them by failing to identify them in his statement of the questions presented, see *People v Albers*, 258 Mich App 578, 584; 672 NW2d 336 (2003), and by failing to offer any meaningful discussion of the law or facts applicable to the potential claims, see *Martin*, 271 Mich App at 315.

The Legislature required trial courts to "[s]core offense variable 4" at 10 points if a victim suffered "[s]erious psychological injury requiring professional treatment" as a result of the offense. MCL 777.34(1)(a). Although the trial court may consider evidence that the victim sought professional treatment, whether the victim actually sought treatment "is not conclusive." MCL 777.34(2).

In her victim-impact statement—which the trial court could consider when making its findings, see *McFarlane*, 325 Mich App at 535—Liddle stated that she had lost confidence in her ability to make her own decisions and lost her trust in others. She also stated that, whereas before she did not have fears about living alone, she now wakes at night when she hears things and worries that defendant will send someone to hurt her. She explained that she now felt trapped in her home. She further wrote that she has nightmares about her day in court. She also told the trial court that she "suffered from a lot of stress," ate less, and was "more nervous and jumpy now." She closed by informing the court that she did not "want to die," but—at times—she would "welcome death to ease the suffering [that defendant] has created in [her] life."

Defendant dismisses Liddle's victim-impact statement as involving only concerns, stress, and trouble sleeping, which together do not rise to the level of requiring professional treatment. But this Court is not so dismissive of Liddle's description of the mental anguish that she has suffered. Liddle's statement is evidence that she suffered serious psychological injury that has made it much harder for her to live her normal life. Although there is no evidence that she has sought treatment for the injuries, the trial court could reasonably infer that her psychological injury was

serious enough that it requires treatment. On this record, the trial court did not clearly err when it found that Liddle suffered a serious psychological injury requiring treatment; consequently, it did not err when it assessed 10 points under OV 4 on the basis of that finding. See *McFarlane*, 325 Mich App at 531-532.

C. OV 10

Defendant next argues that the trial court erred when it assessed 15 points under OV 10. He contends that the record did not establish that he engaged in any preoffense conduct that qualified as predatory conduct, and he suggests that the only evidence to support that finding was the evidence that he held investment seminars for older persons, which could not constitute predatory conduct because the seminars did not make his victims more vulnerable.

The Legislature stated that trial courts must "[s]core offense variable 10" at 15 points if the offense involved "[p]redatory conduct." MCL 777.40(1), (1)(a). The Legislature defined "predatory conduct" to mean "preoffense conduct directed at a victim, or a law enforcement officer posing as a potential victim, for the primary purpose of victimization." MCL 777.40(3)(a). Our Supreme Court has explained that the statute requires evidence that the perpetrator engaged in "behavior that precedes the offense, [and is] directed at a person for the primary purpose of causing that person to suffer from an injurious action or to be deceived." *People v Cannon*, 481 Mich 152, 161; 749 NW2d 257 (2008). There must also be evidence that the victim was vulnerable, which means susceptible to injury, physical restraint, persuasion, or temptation. *Id*. at 158.

As discussed in Part III(B) of this opinion, there was significant evidence that Liddle was vulnerable within the meaning of MCL 750.145m(u)(*i*). That evidence was sufficient to support a finding that Liddle was also vulnerable for purposes of assessing MCL 777.40. See *Cannon*, 481 Mich at 158.

There was also record evidence that defendant engaged in preoffense conduct that he directed at Liddle for the purpose of making her a victim. Liddle testified that defendant befriended her and performed chores around her home. He even invited her to meet his family and attend his daughter's play. Defendant agreed that he befriended Liddle, and he stated that he never charged Liddle for his services. This evidence permitted an inference that defendant befriended Liddle and performed gratuitous services that were not the kinds of things that one's investment advisor would normally do in order to gain Liddle's trust and then take advantage of the relationship. The evidence suggested that he did so by appropriating Liddle's wealth for his own use. Taken as a whole, the trial court could infer that defendant targeted Liddle and won her trust in order to exploit her existing vulnerability and make her a victim of his crimes. The trial court did not clearly err when it found that defendant engaged in predatory conduct. Consequently, it did not err when it assessed 15 points under OV 10. See *McFarlane*, 325 Mich App at 531-532.

D. PRV 6

Finally, defendant argues that the trial court erred when it assessed five points under PRV 6 because the presentence investigation report (PSIR) listed the date of all the offenses involved in his trial as September 1, 2015, and he was no longer on probation on that date.

The trial court had to assess five points under PRV 6 if it found that defendant was on probation for a misdemeanor at the time he committed the sentencing offense. See MCL 777.56(1)(d). Defendant's PSIR states that defendant was on probation for operating a vehicle while intoxicated, which ended in October 2011. The PSIR indicated that the offenses at issue all occurred on a single date: September 1, 2015. Nevertheless, the PSIR also listed the offense date of all 14 counts as March 1, 2011. Moreover, there was evidence at trial that defendant started misappropriating Liddle's wealth in March 2011. Accordingly, there was evidence in the record to support the trial court's implied finding that defendant committed the sentencing offense while he was still on probation for his operating-while-intoxicated offense. Therefore, this Court cannot conclude that the trial court plainly erred when it assessed five points under PRV 6. See *Anderson*, 322 Mich App at 634-635. Moreover, given the support in the record, defense counsel cannot be faulted for failing to make a meritless objection to the score. See *Clark*, 330 Mich App at 426.

Affirmed.

STEPHENS, P.J., and BECKERING and O'BRIEN, JJ., concurred.

CHARTER TOWNSHIP OF PITTSFIELD v WASHTENAW COUNTY TREASURER

Docket No. 352524. Submitted July 8, 2021, at Lansing. Decided August 19, 2021, at 9:00 a.m.

The Charter Township of Pittsfield filed an action in the Washtenaw Circuit Court against the Washtenaw County Treasurer alleging conversion and seeking a money judgment and an injunction. Plaintiff attempted to collect taxes for the 2011 to 2015 tax years on certain real property within the township. When the property owners failed to pay their property taxes, plaintiff turned the delinquent taxes over to defendant pursuant to MCL 211.78a(2). Defendant initiated foreclosure proceedings but was not able to recoup the entire amount owed in delinquent taxes from the foreclosure sale. Defendant sent plaintiff a chargeback bill under MCL 211.87b(1) totaling $68,878.69 for the amount of the delinquent taxes it was unable to recover from the foreclosure sale. The chargeback bill included $23,255.45 in fees assessed by defendant against the subject properties in its efforts to collect the delinquent taxes and sell the properties. Plaintiff refused to pay the fees, arguing that the fees could not lawfully be included in the chargeback amount. Defendant later sent plaintiff a settlement check for plaintiff's portion of the previous year's delinquent taxes that defendant had collected for plaintiff, but withheld $23,255.45. In its action, plaintiff alleged conversion on the basis that defendant had withheld the amount of the fees and sought an order enjoining defendant from withholding any further funds from plaintiff except for those attributable to taxes and interest. Defendant moved for summary disposition, and plaintiff also moved for summary disposition and to amend its complaint to add a claim for mandamus. Plaintiff later filed a second motion to amend to add a claim of unjust enrichment on the basis that defendant had paid it less than the parties had agreed upon pursuant to a 2018 delinquent-tax "settlement sheet." The settlement sheet stated the amount owed to plaintiff from the 2018 delinquent-tax revolving fund established by defendant pursuant to MCL 211.87b. The trial court, Carol A. Kuhnke, J., granted defendant's motion for summary disposition and denied plaintiff's motions to amend and for summary disposition. The court con-

cluded that, when MCL 211.78m was read together with MCL 211.87b, the statutes allowed defendant to include the fees it had incurred in pursuing the delinquent taxes on plaintiff's behalf in its chargeback bill to plaintiff. Plaintiff appealed.

The Court of Appeals *held*:

1. Several provisions of the General Property Tax Act (GPTA), MCL 211.1 *et seq*., authorize counties to collect a property tax administration fee to offset the costs incurred in and ancillary to collecting delinquent property taxes. MCL 211.87b specifically provides for the creation of a delinquent-tax revolving fund, in which a county holds money collected from delinquent taxes in trust on behalf of the local taxing units in the county. The question at issue was whether defendant could charge its administration fees back to plaintiff as part of its right to recover the amount of the delinquent taxes and interest from plaintiff under MCL 211.87b. Plaintiff acknowledged that defendant could seek recourse against it for the amount of the delinquent taxes and interest. But plaintiff contended that because MCL 211.78a(1) defines "taxes" as including only the interest and fees that were imposed before the taxes became delinquent, defendant cannot include any fees it tacked on after the taxes became delinquent under the statute. Contrary to plaintiff's argument, MCL 211.78a(1) specifies that the definition of "taxes" in that provision applies only to MCL 211.78, MCL 211.78b, and MCL 211.79a; therefore, it is inapplicable to MCL 211.87b. Although "delinquent taxes" is not defined by MCL 211.87b, MCL 211.78a(3) permits a county to charge an administration fee and specifically states that the administration fee is to be added to the delinquent taxes owed on the property. Further, MCL 211.78g(1) provides that on March 1 of the year following the delinquency, properties with delinquent taxes are forfeited to the county treasurer for the amount of the tax delinquency, plus any interest, penalties, and fees associated with the delinquency. Additionally, after a foreclosure sale under MCL 211.78m(8), the county deposits the proceeds into an account designated the "delinquent tax property sales proceeds for the year ____", i.e., the year that the taxes became delinquent. Thus, by the time defendant sought a chargeback from plaintiff, its fees had become part of the delinquent taxes owed. The statute therefore allowed defendant to include its administration fees in its chargeback to plaintiff as part of the delinquent taxes it was entitled to pursue under MCL 211.87b, and it could offset that amount against any settlement from a subsequent year. Nevertheless, plaintiff argued that under *Rafaeli, LLC v Oakland Co*, 505 Mich 429 (2020), a county may only pursue as a chargeback the monies it advanced to the

township. However, this statement from *Rafaeli* was not necessary to the resolution of that case and therefore lacked the force of an adjudication. Moreover, MCL 211.78m(8) requires the foreclosing governmental unit to use the proceeds of the foreclosure sale to first reimburse the delinquent-tax revolving fund for all taxes, interest, penalties, and fees. Thus, any taxes, interest, penalties, and fees on foreclosed properties paid out of the revolving tax fund must be reimbursed from the foreclosure-sale proceeds. No language limits the taxes, interest, penalties, and fees to only those due and owing before the property taxes became delinquent and were turned over to the county for collection. Therefore, defendant could properly include its administration fees in its chargeback to plaintiff.

2. Plaintiff's claim of conversion was not supported by the record. Under MCL 211.87b(1), the county holds the delinquent-tax fund in trust for the local taxing units. Therefore, because the monies in defendant's delinquent-tax fund did not belong to defendant, defendant could not have converted any money in the fund. Alternatively, the administration fees assessed and collected by defendant belonged to defendant as a charge against properties with delinquent property taxes. Because conversion requires the wrongful possession of property belonging to another and the fees assessed and collected at no time belonged to plaintiff, plaintiff's claim of conversion failed.

3. Plaintiff sought to add a claim of mandamus in its first motion to amend its complaint. To obtain a writ of mandamus, a plaintiff must show that it has a clear legal right to the performance of the duty sought to be compelled, the defendant has a clear legal duty to perform, the act is ministerial in nature, and the plaintiff has no other adequate legal or equitable remedy. Because plaintiff did not have a clear legal right to the funds withheld by defendant, plaintiff could not establish the first element of mandamus. Additionally, plaintiff had an adequate legal or equitable remedy because it could have, as it did in this case, pursued a claim to obtain the money it alleged was wrongfully withheld by defendant.

4. Plaintiff's second motion to amend sought to add a claim of unjust enrichment on the basis of allegations concerning the 2018 settlement sheet. The trial court noted that these allegations related to events that occurred after the allegations underlying the initial complaint. Plaintiff acknowledged that the issues in this case were limited to the 2015 delinquent-tax sale, and the allegations that plaintiff sought to add concerned different transactions and apparently did not concern the county's administration fees

charged back to plaintiff, but rather concerned the withholding of plaintiff's own administration fees and taxes. This issue was not considered by the trial court, but because it seemed to be a new matter, separate and distinct from the issue raised in plaintiff's original complaint, the proposed amendment would not have related back to plaintiff's original pleading under MCR 2.118(D). Plaintiff also waited until long after the close of discovery to file its motions to amend, which could have been deemed an undue delay. For these reasons, the trial court properly denied plaintiff's motions to amend.

Affirmed.

TAXATION — GENERAL PROPERTY TAX ACT — DELINQUENT TAXES — FORECLOSURE SALES — PROPERTY TAX ADMINISTRATION FEES — CHARGEBACK.

Under the General Property Tax Act, MCL 211.1 *et seq*., the local taxing unit may turn over delinquent property taxes to the county for collection; when the county sells the delinquent-tax property in a foreclosure sale, if the property sale is insufficient to pay the amount of the delinquent taxes, the county has the right to recover the amount of delinquent taxes and interest from the local taxing unit; the chargeback includes any administration fees incurred by the county in its effort to collect the delinquent taxes.

Fink & Fink, PLLC (by *Andrew F. Fink III* and *James A. Fink*) for the Charter Township of Pittsfield.

Dykema Gossett PLLC (by *Theodore W. Seitz* and *Erin A. Sedmak*) for Washtenaw County Treasurer.

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

SERVITTO, J. Plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition, denying plaintiff's motion for summary disposition, and denying plaintiff's first and second motions to amend its complaint. We affirm.

I. BACKGROUND

Under the General Property Tax Act (GPTA), MCL 211.1 *et seq*., townships are responsible for collecting

property taxes for each property within their boundaries on behalf of all taxing entities (state, county, school districts, etc.). See MCL 211.44. The township treasurer pays the collected taxes to the county treasurer. If, by March 1 of the tax year, the township is unable to collect the taxes that are due on a property, the township turns over the delinquent taxes to the county, which then becomes responsible for collecting the taxes. MCL 211.45; MCL 211.55.

On March 1 of each tax year, taxes due in the immediately preceding year that remain unpaid are returned to the county treasurer as "delinquent." MCL 211.78a(2). On March 1 of the year following the delinquency, properties with delinquent taxes are "forfeited" to the county treasurer for the amount of the tax delinquency, as well as any interest, penalties, and fees associated with the delinquency. MCL 211.78g(1). After forfeiture, the county may foreclose on the property and conduct an auction to sell the property. MCL 211.78h; MCL 211.78m.

If the county elects to serve as a foreclosing governmental unit, it may create a "delinquent tax revolving fund" that funds local municipalities for the unpaid delinquent taxes. MCL 211.87b. Defendant has elected to create a delinquent tax revolving fund, from which it advances funds to any township with a delinquency to cover the unpaid taxes. MCL 211.87b(3). This ensures that the township has enough revenue to provide for the health, safety, and welfare of its residents. See *Rafaeli, LLC v Oakland Co*, 505 Mich 429, 443 n 14; 952 NW2d 434 (2020).

Once a foreclosed property is sold, the foreclosing governmental unit deposits the sale proceeds into an account designated as the "delinquent tax property sales proceeds for the year [the taxes became delin-

quent]." MCL 211.78m(8). The account is composed of the proceeds of all foreclosed-property sales for that year, such that the proceeds of a single sale are commingled with the proceeds of all the other sales. If the property sales are not large enough to pay the delinquent taxes owed, defendant has the right to recover the amount of delinquent taxes and interest from the taxing entity (here, plaintiff). MCL 211.87b(1). This is called a "chargeback."

According to plaintiff's April 2018 complaint, for the tax years 2011–2015, the owners of certain undeveloped parcels in the Wellesley Gardens condominium development (the Wellesley Parcels), located within plaintiff's boundaries, failed to pay their property taxes, and plaintiff turned the delinquent taxes over to defendant in accordance with MCL 211.78a(2). In 2015, defendant initiated foreclosure proceedings with respect to the Wellesley Parcels but was able to recoup far less than the delinquent taxes due on those parcels. On December 1, 2015, defendant sent plaintiff a chargeback bill in the amount of $68,878.69 for the taxes still owed on the Wellesley Parcels. Included in that chargeback bill amount, however, was $23,255.45 in fees that defendant had assessed against the properties throughout the course of its efforts to collect the delinquent taxes and sell the properties. Plaintiff refused to pay those fees because, in its opinion, they could not be included in the chargeback amount.

Thereafter, in 2016, defendant sent plaintiff a settlement check for plaintiff's portion of the previous year's delinquent taxes that defendant had collected for plaintiff, but withheld $23,255.45—the amount it had previously sought to collect from plaintiff. Despite plaintiff's demand for the $23,255.45, defendant refused to pay it. Plaintiff's one-count complaint thus alleged conversion

on the part of defendant and sought both a judgment in its favor for the $23,255.45 withheld by defendant and an order enjoining defendant from any further withholding of funds other than those attributable to taxes and interest when calculating amounts due.

On March 27, 2019, defendant moved for summary disposition pursuant to MCR 2.116(C)(8) and (10). According to defendant, the challenged fees were to be included in the chargebacks. Defendant asserted that the administration fees challenged by plaintiff were assessed in compliance with the GPTA, were lawfully collected by defendant pursuant to the GPTA, belong to defendant, are not plaintiff's property, and therefore have not been converted. Defendant further asserted that plaintiff failed to state a claim for injunctive relief because defendant's withholding of the administration fees was lawful, plaintiff would have an adequate legal remedy if it was not, and plaintiff's alleged future injuries were speculative.

Thereafter, plaintiff moved to amend its complaint to add a claim for mandamus and moved for summary disposition pursuant to MCR 2.116(C)(10). According to plaintiff, while defendant has full recourse to recover delinquent taxes and interest from plaintiff, fees assessed by defendant after the delinquent taxes have been turned over to defendant could not be charged back to plaintiff under MCL 211.87b. Plaintiff's argument was based, in large part, on its assertion that there was no question of material fact that defendant's fees were not included in the definition of "delinquent taxes" set forth in MCL 211.78a(1). Plaintiff further argued that it was entitled to the full amount of its 2016 settlement and that defendant could not reduce the settlement it owed to plaintiff because defendant believed plaintiff owed it money for fees.

The cross-motions for summary disposition and plaintiff's motion to amend its complaint were heard on April 24, 2019. The trial court orally denied plaintiff's motion to amend its complaint "for now." The trial court took the summary-disposition motions under advisement, indicating that it would issue a written opinion.

After the summary-disposition motions were heard, but not yet resolved, plaintiff filed a second motion to amend its complaint. Plaintiff stated in its motion that in April 2019, the parties signed a 2018 delinquent tax "settlement sheet," which stated the amount due to plaintiff from the 2018 delinquent tax revolving fund. According to plaintiff, the check it thereafter received was $8,275.93 less than the amount agreed upon on the 2018 settlement sheet. Upon inquiries from plaintiff, defendant provided information detailing that the reduction corresponded to the amount of plaintiff's taxes and fees that had not yet been paid on 218 parcels located in the Wellesley development. Plaintiff asserted that defendant was required to deliver to plaintiff its full portion of the taxes that were returned as delinquent under MCL 211.55 and MCL 211.78a, and the discrepancy represents defendant's failure to do so. Plaintiff therefore sought to amend its complaint to add a request for mandamus, a claim of unjust enrichment, and to include the additional money withheld by defendant.

On January 15, 2020, the trial court entered an opinion and order granting defendant's motion for summary disposition, denying plaintiff's motion for summary disposition, and denying plaintiff's first and second motions to amend its complaint. The trial court opined that MCL 211.78m requires that defendant's delinquent tax revolving fund be reimbursed from foreclosure sales for all taxes, interest, and fees on all the

property. The trial court then determined that when MCL 211.87b is read together with MCL 211.78m, those provisions allow defendant to include its property tax administration fees incurred in pursuing the uncollected tax in the chargeback to plaintiff. It further ruled that MCL 211.87b also entitles defendant to collect its fees by reducing the settlement amount owed to plaintiff and that plaintiff's claim for conversion would fail no matter what the reading of the relevant statutes was, given that the parties had an agreement much like a consignment contract. Finally, the trial court determined that amendment of plaintiff's complaint was not warranted. It specifically concluded that because plaintiff had no right to the funds withheld by defendant, a claim for mandamus would be futile, and the factual allegations plaintiff sought to add occurred after the first complaint was filed and could be addressed in a separate action.

II. ANALYSIS

A. CHARGEBACK

Plaintiff contends on appeal that, contrary to the trial court's determination, when the county treasurer sells properties at a foreclosure sale for less than the delinquent taxes owed, it may not include the property tax administration fees it has incurred in its efforts to collect the delinquent taxes from the property owners as "taxes" chargeable back to the taxing entities under MCL 211.78a(1). We disagree.

We review de novo the trial court's grant of summary disposition under MCR 2.116(C)(8) to determine whether the opposing party failed to state a claim upon which relief can be granted. *Dalley v Dykema Gossett PLLC*, 287 Mich App 296, 304; 788 NW2d 679 (2010). As stated in *Dalley*:

> A motion brought under subrule (C)(8) tests the legal sufficiency of the complaint solely on the basis of the pleadings. When deciding a motion under (C)(8), this Court accepts all well-pleaded factual allegations as true and construes them in the light most favorable to the nonmoving party. A party may not support a motion under subrule (C)(8) with documentary evidence such as affidavits, depositions, or admissions. Summary disposition on the basis of subrule (C)(8) should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. [*Id*. at 304-305 (quotation marks and citations omitted).]

A motion for summary disposition made under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Bernardoni v Saginaw*, 499 Mich 470, 472-473; 886 NW2d 109 (2016). In ruling on a motion brought under (C)(10), "[t]he Court considers all affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion." *Id*. In addition, MCR 2.116(G)(4) requires that a motion under (C)(10) specifically identify and support the issues as to which the moving party believes there is no genuine issue regarding any material fact. When this is done, "an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, judgment, if appropriate, shall be entered against him or her." *Id*. at 473, quoting MCR 2.116(G)(4) (quotation marks omitted).

We review issues of statutory interpretation de novo. *Karpinski v St John Hosp-Macomb Ctr Corp*, 238 Mich App 539, 542; 606 NW2d 45 (1999). The primary goal of statutory interpretation is to give effect to the intent of

the Legislature. *Petersen v Magna Corp*, 484 Mich 300, 307; 773 NW2d 564 (2009).

> The first step in ascertaining such intent is to focus on the language of the statute itself. If statutory language is unambiguous, the Legislature is presumed to have intended the meaning expressed in the statute. The words of a statute provide the most reliable evidence of the Legislature's intent, and as far as possible, effect should be given to every phrase, clause, and word in a statute. If the statutory language is certain and unambiguous, judicial construction is neither required nor permitted, and courts must apply the statute as written. [*Id*. (citations omitted).]

However, when statutory language is ambiguous (i.e., if the wording is susceptible to more than one reasonable interpretation), judicial construction is appropriate. *Karpinski*, 238 Mich App at 543.

Plaintiff does not dispute that defendant may charge property tax administration fees for its efforts to collect delinquent taxes and pursue foreclosure. Indeed, it could not, as such fees are specifically allowed. See, e.g., MCL 211.59(6) ("The county property tax administration fee shall be used by the county to offset the costs incurred in and ancillary to collecting delinquent property taxes and for purposes authorized by sections 87b and 87d."); MCL 211.78g(1) ("If property is forfeited to a county treasurer under this subsection, the county treasurer shall add a $175.00 fee to each property for which those delinquent taxes, interest, penalties, and fees remain unpaid."); MCL 211.44(3) ("A property tax administration fee is defined as a fee to offset costs incurred by a collecting unit in assessing property values, in collecting the property tax levies, and in the review and appeal processes."). The issue for our resolution is whether defendant may charge those fees back to a township as part of its right to recover

the amount of the delinquent taxes and interest from the township under MCL 211.87b.

The creation of a delinquent tax revolving fund, such as the one created by defendant, is provided for at MCL 211.87b. That statute states, in relevant part:

> (1) The county board of commissioners of any county, on behalf of the taxing units in the county . . . , may create a delinquent tax revolving fund that, at the option of the county treasurer, may be designated as the "100% tax payment fund". Upon the establishment of the fund, all delinquent taxes . . . are due and payable to the county, on behalf of the taxing units in the county and this state. Money and other property and assets held in the delinquent tax revolving fund shall be kept separate from and shall not be commingled with any other money, property, or assets in the custody of the county treasurer. All money, property, and assets acquired by the county treasurer, whether as revenues or otherwise, shall be held by it in trust for the taxing units in the county for which the taxes are levied. The county shall have no right, title, or interest in the delinquent tax revolving fund except for the right to payment provided for in section 87b(7) or 87c(3). . . . If the delinquent taxes that are due and payable to the county are not received by the county on behalf of the taxing units in the county and this state for any reason, the county has full right of recourse against the taxing unit or to this state for the state education tax under the state education tax act, 1993 PA 331, MCL 211.901 to 211.906, to recover the amount of the delinquent taxes and interest at the rate of 1% per month or fraction of a month or a lower rate as established by resolution of the board of commissioners until repaid to the county by the taxing unit. . . . Any amount that is due from a local taxing unit or this state for a prior year's uncollected delinquent tax is a lien against any future delinquent tax payments that may be payable to a local taxing unit or this state and the lien shall be satisfied by offsetting the amount due to the county from the local taxing unit or this state when

> distributions from the delinquent tax revolving fund are made by the county to the local taxing unit or this state in a subsequent year. . . .
>
> * * *
>
> (3) The county treasurer shall pay from the fund any or all delinquent taxes that are due and payable to the county and any school district, intermediate school district, community college district, city, township, special assessment district, this state, or any other political unit for which delinquent tax payments are due within 20 days after sufficient funds are deposited within the delinquent tax revolving fund . . . .
>
> * * *
>
> (6) The interest charges, penalties, and county property tax administration fee rates established under this act shall remain in effect and shall be payable to the county delinquent tax revolving fund. [MCL 211.87b(1), (3), and (6).]

Plaintiff, a taxing entity, acknowledges that because delinquent taxes owed on the Wellesley Parcels were not paid as required, defendant could seek recourse against plaintiff for the "amount of the delinquent taxes and interest" as set forth in MCL 211.87b(1). Plaintiff then refers to MCL 211.78a(1) for the definition of "taxes." That provision states:

> For taxes levied after December 31, 1998, all property returned for delinquent taxes, and upon which taxes, interest, penalties, and fees remain unpaid after the property is returned as delinquent to the county treasurers of this state under this act, is subject to forfeiture, foreclosure, and sale for the enforcement and collection of the delinquent taxes as provided in section 78, this section, and sections 78b to 79a. As used in section 78, this section, and sections 78b to 79a, "taxes" includes interest, penalties, and fees imposed before the taxes become

> delinquent and unpaid special assessments or other assessments that are due and payable up to and including the date of the foreclosure hearing under section 78k. [MCL 211.78a(1).]

Plaintiff contends that because "taxes" is defined as including only the interest and fees imposed before the taxes become delinquent, defendant cannot include any fee it tacked on to the Wellesley Parcels after the taxes became delinquent, such as fees and costs associated with defendant's collection efforts, as part of the "amount of the delinquent taxes and interest" it may charge back to plaintiff under MCL 211.87b(1).

Plaintiff incorrectly relies on MCL 211.78a(1) to define the "amount of the delinquent taxes and interest" that defendant may charge back to it pursuant to MCL 211.87b(1). MCL 211.78a(1) specifically states, "*As used in section 78, this section, and sections 78b to 79a*, 'taxes' includes interest, penalties, and fees imposed before the taxes become delinquent . . . ." (Emphasis added.) The definition of taxes set forth in MCL 211.78a, then, is limited only to those specific provisions and is inapplicable to MCL 211.87b.

That being said, neither party directs this Court to any other definition of "taxes" that should be applicable to the language in MCL 211.87b(1) that a foreclosing unit, such as defendant, has recourse against the taxing unit, such as plaintiff, "to recover the amount of the delinquent taxes and interest at the rate of 1% per month or fraction of a month or a lower rate as established by resolution of the board of commissioners until repaid to the county by the taxing unit." "Delinquent taxes" is not defined in MCL 211.87b(1). However, MCL 211.78a(3) allows a county to charge an administration fee and specifically states that the administration fee is to be added to the property:

> A county property tax administration fee of 4% and, except as provided in section 78g(3)(c), interest computed at a noncompounded rate of 1% per month or fraction of a month on the taxes that were originally returned as delinquent, computed from the date that the taxes originally became delinquent, shall be added to property returned as delinquent under this section.

Thus, once the delinquent taxes are turned over to the county, the county administration fee is imposed and becomes part of the amount that is due for that year's uncollected tax. On March 1 of the year following delinquency, properties with delinquent taxes are "forfeited" to the county treasurer for the amount of the tax delinquency, as well as any interest, penalties, and fees associated with the delinquency. MCL 211.78g(1). Only after forfeiture may the county foreclose on the property and conduct an auction to sell the property. After sale, the foreclosing governmental unit deposits the sale proceeds into an account designated as the "delinquent tax property sales proceeds for the year [the taxes became delinquent]" and distributes any sale proceeds located in that account in a specific order of priority. MCL 211.78m(8). By the time defendant seeks a chargeback from plaintiff, then, its fees have become part of the "delinquent tax" owed.

We additionally note that MCL 211.44(6) states:

> Along with taxes returned delinquent to a county treasurer, the amount of the property tax administration fee prescribed by subsection (3) that is imposed and not paid shall be included in the return of delinquent taxes and, when delinquent taxes are distributed by the county treasurer under this act, the delinquent property tax administration fee shall be distributed to the treasurer of the local unit who transmitted the statement of taxes returned as delinquent. Interest imposed upon delinquent property taxes under this act shall also be imposed upon the property tax administration fee and, *for purposes of*

> *this act other than for the purpose of determining to which local unit the county treasurer shall distribute a delinquent property tax administration fee, any reference to delinquent taxes shall be considered to include the property tax administration fee returned as delinquent for the same property*. [Emphasis added.]

And, more importantly, MCL 211.59(6) states:

> The county property tax administration fee shall be used by the county to offset the costs incurred in and ancillary to collecting delinquent property taxes and for purposes authorized by sections 87b and 87d.

MCL 211.87b(1) also states that

> [a]ny amount that is due from a local taxing unit or this state for a prior year's uncollected delinquent tax is a lien against any future delinquent tax payments that may be payable to a local taxing unit or this state and the lien shall be satisfied by offsetting the amount due to the county from the local taxing unit or this state when distributions from the delinquent tax revolving fund are made by the county to the local taxing unit or this state in a subsequent year.

By virtue of these provisions, defendant could include its administration fees in its chargeback to plaintiff as part of the "delinquent taxes" it was entitled to pursue under MCL 211.87b(1), and it could offset that amount against any subsequent year's settlement.

Plaintiff nonetheless directs this Court to *Rafaeli*, 505 Mich at 443 n 15, wherein our Supreme Court noted:

> Any taxes, interest, penalties, and fees subsequently collected by the county treasurer are deposited into the delinquent tax revolving fund. If delinquent property taxes are not collected, properties are foreclosed and typically sold at a public auction known as a tax-foreclosure sale. In disbursing the proceeds from the

> tax-foreclosure sale, the first priority is to reimburse the delinquent tax revolving fund for "all taxes, interest, and fees on all of the property . . . ." MCL 211.78m(8)(a). If the county is ultimately unable to collect the entire amount it advanced to the municipalities, either by tax collection or foreclosure sales, then the county can charge the municipalities back the uncollected amount. MCL 211.87b(1).

Plaintiff contends that the last sentence of this passage is a conclusive holding by our Supreme Court that the only chargeback a county may pursue is the monies it advanced to the township. However, the passage is a footnote and was not necessary for the resolution of the issue before the Supreme Court in that matter. "It is a well-settled rule that statements concerning a principle of law not essential to determination of the case are obiter dictum and lack the force of an adjudication." *Griswold Props, LLC v Lexington Ins Co*, 276 Mich App 551, 557-558; 741 NW2d 549 (2007) (quotation marks and citation omitted). Thus, even though plaintiff was not advanced monies to cover the county administration fees, this does not mean that the county must "eat" the costs it incurred in pursuing the payment of delinquent taxes on properties located within plaintiff's boundaries.

This finding is consistent with the requirement that when a county advances money from the revolving tax fund to a taxing entity (such as plaintiff) for the amount of delinquent taxes the taxing entity was unable to collect after the county forecloses on the property at issue, its first obligation is to reimburse the delinquent tax revolving fund for "all taxes, interest, and fees on all of the property" pursuant to MCL 211.78m(8)(a). Indeed, MCL 211.78m(8) states that the foreclosing governmental unit "*shall* deposit the proceeds from the sale of property under this section into a restricted account designated as the 'delinquent tax

property sales proceeds for the year _____' ." (Emphasis added.) MCL 211.78m(8) then requires that the foreclosing governmental unit use those proceeds to first reimburse the delinquent tax revolving fund created under MCL 211.87b or MCL 211.87f "for all taxes, interest, penalties, and fees." MCL 211.78m(8)(a) through (d). Thus, *any* taxes, interest, penalties, and fees on foreclosed properties paid out of the revolving tax fund must be reimbursed from the foreclosure-sale proceeds. There is no language limiting the taxes, interest, penalties, and fees to only those due and owing before the property taxes became delinquent and were turned over to the county for collection efforts. Simply, if money was taken out of the revolving fund in connection with a property that was later foreclosed, all those monies must be repaid back into the revolving fund first and foremost upon foreclosure. As a result, defendant could properly include its administration fees in its chargeback to plaintiff.

Finally, plaintiff cannot support its sole claim of conversion under any circumstances. "Under the common law, conversion is any distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein." *Aroma Wines & Equip, Inc v Columbian Distrib Servs, Inc*, 497 Mich 337, 346; 871 NW2d 136 (2015).

MCL 211.87b(1) states that "[a]ll money, property, and assets acquired by the county treasurer, whether as revenues or otherwise, shall be held by it in trust for the taxing units in the county for which the taxes are levied. The county shall have no right, title, or interest in the delinquent tax revolving fund except for the right to payment provided for in section 87b(7) or 87c(3)." Neither Section 87b(7) nor 87c(3) is implicated in this matter. Thus, the monies in defendant's delin-

quent tax fund do not belong to defendant, and monies expended by defendant from the fund were done so in trust for plaintiff. Any monies remaining in the fund are also held in trust and do not belong to defendant. That being the case, defendant could not have converted any monies in that fund.

Alternatively, the county property tax administration fees assessed and collected by defendant belong to defendant as a charge against properties with delinquent taxes. Because conversion requires the wrongful possession of property belonging to another and the fees assessed and collected at no time belonged to plaintiff, plaintiff's claim of conversion still fails.

B. MOTIONS TO AMEND

Plaintiff asserts that it should have been permitted to amend its complaint to add claims for a writ of mandamus and unjust enrichment. However, plaintiff acknowledges that the trial court denied its motions to amend because the court's interpretation and application of the relevant statutes rendered the proposed amendments futile. Plaintiff further contends that if, as plaintiff asserts, the trial court's analysis of the relevant statutes was wrong, then it was also wrong about plaintiff's motions to amend the complaint. Having found that the trial court was correct in its statutory analysis and conclusions, plaintiff's claim of automatic error with respect to its motions to amend is without merit. We briefly address plaintiff's claim of error in any event.

We review a trial court's decision on a motion to amend pleadings for an abuse of discretion. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997). Because a court should freely grant leave to amend a complaint when justice so requires, a motion to amend

should ordinarily be denied only for particularized reasons. *Miller v Chapman Contracting*, 477 Mich 102, 105; 730 NW2d 462 (2007). Reasons that justify denying leave to amend include undue delay, undue prejudice to the defendant, or futility. *Wormsbacher v Philip R Seaver Title Co, Inc*, 284 Mich App 1, 8; 772 NW2d 827 (2009).

In its first motion, plaintiff sought to amend its complaint to add a claim of mandamus. Plaintiff bears the burden of showing entitlement to the extraordinary remedy of a writ of mandamus. *White-Bey v Dep't of Corrections*, 239 Mich App 221, 223; 608 NW2d 833 (1999). To obtain a writ of mandamus, the plaintiff must show that

> (1) the plaintiff has a clear legal right to the performance of the duty sought to be compelled, (2) the defendant has a clear legal duty to perform, (3) the act is ministerial in nature, and (4) the plaintiff has no other adequate legal or equitable remedy. [*Id*. at 223-224.]

Given that this Court found that plaintiff did not have a clear legal right to the funds withheld by defendant, plaintiff cannot demonstrate even the first element necessary to establish mandamus. Moreover, even if this Court found otherwise, plaintiff would have an adequate legal or equitable remedy. It could, as it did here, pursue a claim to obtain the monies allegedly wrongfully withheld. Therefore, a claim of mandamus would be futile.

In its second motion to amend, plaintiff sought to add a claim of unjust enrichment. In order to sustain a claim of unjust enrichment, a plaintiff must establish "(1) the receipt of a benefit by the defendant from the plaintiff and (2) an inequity resulting to the plaintiff because of the retention of the benefit by the defendant." *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 195;

729 NW2d 898 (2006). "In other words, the law will imply a contract to prevent unjust enrichment only if the defendant has been unjustly or inequitably enriched at the plaintiff's expense." *Id*.

In seeking to add a claim of unjust enrichment, plaintiff proposed to include allegations concerning the 2018 settlement sheet. As the trial court noted, these factual allegations concern events that occurred after the allegations that made up the initial complaint. Plaintiff admits in its appellate brief that "[t]his case is limited to the 2015 tax sale." The additional purported allegations concern different transactions and appear to concern not a county administration fee charged back to plaintiff, but the withholding of plaintiff's own administration fees and taxes. This Court has ruled that defendant could lawfully charge back its administration fees to plaintiff as part of delinquent property taxes, but neither this Court nor the trial court had cause to consider any issue concerning plaintiff's administration fees and taxes. "An amendment that adds a claim or a defense relates back to the date of the original pleading if the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth, or attempted to be set forth, in the original pleading." MCR 2.118(D). It appearing that this is a new matter, separate and distinct from that raised in plaintiff's original complaint, plaintiff's purported amendment would not relate back to its original pleading and plaintiff would have a separate cause of action against defendant to address this issue.

Moreover, plaintiff allegedly received the incomplete check on or about June 18, 2019, yet did not move to amend its complaint on the basis of that check until almost two months later. And discovery in this matter

closed long before both plaintiff's first and second motions to amend. Therefore, plaintiff's motion to amend could be deemed unduly delayed. The trial court properly denied plaintiff's motions to amend.

Affirmed.

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

SMITH v TOWN AND COUNTRY PROPERTIES II, INC

Docket No. 353839. Submitted August 11, 2021, at Detroit. Decided August 19, 2021, at 9:05 a.m. Leave to appeal denied 509 Mich 1086 (2022).

Plaintiff, Burt Smith, an associate real estate broker, brought an action in Macomb Circuit Court against defendant, Town and Country Properties II, Inc., a real estate broker business, for wrongful discharge in violation of public policy. Plaintiff had entered into an agreement with defendant stating that plaintiff was an independent contractor, that he was not to be considered as an employee of defendant, and that defendant would not be responsible for any employment taxes for any purpose. The agreement also provided that either party could terminate it at any time without cause and without giving notice to the other party. Plaintiff's entire compensation was in the form of commissions from the sale of real estate. Defendant provided plaintiff with an office and office equipment, and plaintiff was required to attend mandatory meetings and abide by various policies. These policies included using Title One, Inc., exclusively for all closing services, which plaintiff alleged violated the Real Estate Settlement Procedures Act (RESPA), 12 USC 2601 *et seq*. Plaintiff alleged that he did not steer defendant's clients to Title One and that his supervisor advised him in an e-mail that he would need approval from the company president before he could complete a transaction without using Title One. Plaintiff was terminated about a month after attending a contentious meeting with his supervisor and the company president concerning his belief that as an independent contractor, he did not have to defer to the president's preferences that he use Title One exclusively. Count I of plaintiff's complaint alleged a claim of retaliatory discharge in violation of public policy premised on his purported refusal—presumably as an employee—to violate RESPA, and Count II alleged a claim of retaliatory termination of an employment contract in violation of public policy premised on his purported refusal—presumably as an independent contractor—to violate RESPA. Defendant moved for summary disposition under MCR 2.116(C)(10) on the ground that Michigan law only permits employees to assert claims for retaliatory discharge in violation of public policy, and because plaintiff

met the statutory definition of an independent contractor in the real estate context, the court should dismiss the entire matter. Plaintiff countered that notwithstanding the statutory definition of an independent contractor in the real estate context, under both the economic-realities test and the control test, he was an employee, and, in the alternative, an independent contractor could bring claims for retaliatory discharge in violation of public policy because such claims are rooted in tort law rather than contract law. The court, Joseph Toia, J., ruled for defendant on both counts after concluding that plaintiff fit the statutory description of an independent contractor in the real estate context and that plaintiff failed to present sufficient evidence to create a genuine issue of material fact that he was not an independent contractor. The court also concluded that because plaintiff was an independent contractor, he was without recourse under a public-policy theory. Plaintiff appealed.

The Court of Appeals *held*:

1. Article 25 of the Occupational Code, MCL 339.2501 *et seq*., the real estate brokers act (REBA), contains regulations that govern the real estate profession. MCL 339.2501(h) defines an "independent contractor relationship" to mean "a relationship between a real estate broker and an associate real estate broker or real estate salesperson" where "[a] written agreement exists in which the real estate broker does not consider the associate real estate broker or real estate salesperson as an employee for federal and state income tax purposes" and "[a]t least 75% of the annual compensation paid by the real estate broker to the associate real estate broker or real estate salesperson is from commissions from the sale of real estate." In this case, the parties signed a document titled "Independent Contractor Agreement," which expressly provided that plaintiff, in his capacity as defendant's sales associate, was not to be treated as defendant's employee and that defendant was not responsible for any federal, state, or local employment taxes for any purpose, and plaintiff's compensation was in the form of commissions from the sale of real estate. Accordingly, plaintiff's relationship with defendant met the statutory definition of "independent contractor relationship," which ended the inquiry into whether plaintiff was an employee or independent contractor. This interpretation is consistent with MCL 339.2501(a), which plainly distinguishes between an associate broker who provides real estate brokerage services as an "employee" of a real estate broker and an associate broker who provides real estate brokerage services as an "independent contractor" of a real estate broker. Because plaintiff, an associate broker, entered into an independent contractor agree-

ment with defendant, the employment status of plaintiff was definitive—he was an independent contractor and not an employee. Therefore, the trial court properly concluded that plaintiff failed to create a genuine issue of material fact on the issue of his employment status and dismissed Count I of plaintiff's complaint.

2. Michigan law presumes that employment relationships are terminable at the will of either party for any or no reason. There are three recognized public-policy exceptions to the at-will employment doctrine that are based on the principle that the grounds for termination are so contrary to public policy as to be actionable, and they include: (1) explicit legislative prohibitions disallowing the discharge, discipline, or other adverse judgment of employees who act in accordance with a statutory right or duty, (2) when the alleged reason for the discharge is the failure or refusal of the employee to violate a law in the course of employment, and (3) when the reason for the discharge is the employee's exercise of a right conferred by a well-established legislative enactment. All three exceptions have historically only applied to adverse employment actions taken with respect to employees. Plaintiff argued that the Court should expand the second exception to the at-will doctrine to apply to independent contractors who are terminated because they refuse to violate a law as a matter of public policy; however, making social policy is for the Legislature, not the courts. In Michigan, the wrongful-discharge cause of action has long been clearly tied to employees in the at-will context and has never been extended to independent contractors. Without more specific indications of the state's desire to protect independent contractors or any persuasive authority that would support the extension of the public-policy exceptions to the at-will employment doctrine outside the context of the employer-employee relationship, there was nothing to indicate that the prevailing norms and legal theories governing independent contractors and the at-will doctrine had changed since the adoption of the public-policy exception to the at-will doctrine such that it should be judicially expanded to cover independent contractors. Accordingly, the trial court correctly concluded that plaintiff had no recourse under a public-policy theory regarding defendant's termination of their employment relationship.

Affirmed.

1. STATUTES — OCCUPATIONAL CODE — REAL ESTATE BROKERS ACT — WORDS AND PHRASES — "INDEPENDENT CONTRACTOR RELATIONSHIP" — DETERMINATION OF EMPLOYMENT STATUS.

Article 25 of the Occupational Code, MCL 339.2501 *et seq*., governs the real estate profession; under MCL 339.2501(h), an "indepen-

dent contractor relationship" means a relationship between a real estate broker and an associate real estate broker or real estate salesperson where a written agreement exists in which the real estate broker does not consider the associate real estate broker or real estate salesperson as an employee for federal and state income tax purposes and at least 75% of the annual compensation paid by the real estate broker to the associate real estate broker or real estate salesperson is from commissions from the sale of real estate; an associate real estate broker who is in an independent contractor relationship with a real estate broker is an independent contractor, and there is no factual question as to whether that associate broker may be considered an employee for purposes of deciding a summary-disposition motion under MCR 2.116(C)(10).

2. EMPLOYMENT — AT-WILL EMPLOYMENT — WRONGFUL TERMINATION — PUBLIC-POLICY EXCEPTIONS — INDEPENDENT CONTRACTORS.

Under Michigan law, employment relationships are presumed to be terminable at the will of either party for any or no reason unless a recognized public-policy exception to the at-will employment doctrine applies; the three recognized exceptions are (1) when there is an explicit legislative prohibition disallowing an adverse employment action against an employee who acts in accordance with a statutory right or duty, (2) when the alleged reason for the discharge is the failure or refusal of the employee to violate a law in the course of employment, and (3) when the reason for the discharge is the employee's exercise of a right conferred by a well-established legislative enactment; these exceptions do not apply to independent contractors.

Pitt, McGhee, Palmer, Bonanni & Rivers (by *Michael L. Pitt*, *Jennifer L. Lord*, and *Channing Robinson-Holmes*) for plaintiff.

The Taunt Law Firm (by *Erika D. Hart*) for defendant.

Amicus Curiae:

McClelland & Anderson, LLP (by *Melissa A. Hagen* and *Gail A. Anderson*) for Michigan Realtors.

Before: CAVANAGH, P.J., MURRAY C.J., and REDFORD, JJ.

PER CURIAM. In this action for wrongful discharge in violation of public policy, plaintiff appeals as of right an order granting summary disposition to defendant. Plaintiff argues that the trial court erred by ruling that: (1) plaintiff had not created a genuine factual issue as to whether he was an employee, and (2) independent contractors could not bring claims asserting wrongful discharge in violation of public policy. We affirm.

This case arises out of the termination of the employment relationship between defendant and plaintiff, who was an associate real estate broker at defendant's real estate business from 2001 to 2018. Although plaintiff did not mention it in his complaint, on February 2, 2015, the parties signed a document titled "Independent Contractor Agreement" which stated, among other things, that plaintiff was an independent contractor. Specifically, Paragraph A of Article IV, which is titled "Independent Contractor," states: "It is expressly agreed and understood between the parties that the Sales Associate, in performance of his/her services hereunder, is not to be treated or otherwise considered as an employee of Broker." And Paragraph D states: "As a consequence of Sale[s] Associate's independent contractor status, Broker shall not be responsible for any federal, state or local employment taxes for any purpose." Further, Paragraph A of Article VIII, which is titled "Termination," states: "In furtherance of the Independent Contractor status of Sales Associate, this Agreement and the relationship created hereby, may be terminated by either party hereto, with or without cause, at any time upon notice given to the other." Pursuant to that agreement, plaintiff's entire compensation was in the form of commissions from the sale of real estate.

Defendant provided plaintiff with an office and office equipment, and plaintiff was required to attend mandatory meetings and abide by various policies.

One such policy, according to plaintiff, was that defendant required plaintiff to exclusively use Title One, Inc., for the title policy and closing services on every real estate transaction, regardless of the client's wishes. However, plaintiff averred in his complaint that this policy violated the Real Estate Settlement Procedures Act (RESPA), 12 USC 2601 *et seq*., which allows buyers and sellers to choose their settlement service provider. In accordance with the law, plaintiff averred that he "refrained from steering [defendant's] clients to Title One." However, on November 29, 2018, the sales manager and plaintiff's supervisor, John Goings, advised plaintiff through an e-mail that plaintiff would have to get approval from defendant's president, John Kersten, to complete a particular transaction that did not use Title One for the real estate transaction. Plaintiff responded to the e-mail, explaining that he could not demand that clients use a particular settlement service provider exclusively because that policy violated RESPA.

Thereafter, on December 20, 2018, plaintiff attended a meeting with Goings and Kersten. Plaintiff recorded this meeting without advising Goings or Kersten that he was doing so. During this meeting, Kersten allegedly told plaintiff that he was the broker and that, as the person who bore ultimate responsibility for the transactions, he preferred that Title One be used because they did good work, kept him informed of any issues, and because he had never heard of any problems arising with Title One. Apparently, plaintiff responded that Title One was more expensive and that the client had the right, under RESPA, to choose the

title company. Plaintiff referred to himself as an independent contractor, stating that he was not an employee, and implied that he did not have to defer to Kersten's preferences. Kersten reiterated that he was the broker, as well as the owner of the company, and that plaintiff used defendant's name, brand, and facilities in which to conduct business; thus, regardless of the label, plaintiff "worked for" defendant. Eventually, Kersten grew frustrated with plaintiff "lecturing" him, stated that "this conversation is going nowhere," and ended the meeting. About two hours later, plaintiff was informed by Goings that he was terminated at Kersten's directive.

On January 24, 2020, plaintiff filed this action asserting, in Count I, a claim of retaliatory discharge in violation of public policy premised on his purported refusal—presumably as an employee—to violate RESPA and, in Count II, a claim of retaliatory termination of employment contract in violation of public policy premised on his purported refusal—presumably as an independent contractor—to violate RESPA.

On March 16, 2020, defendant moved for summary disposition under MCR 2.116(C)(10), arguing that plaintiff's complaint must be dismissed because only an employee may bring wrongful-discharge claims and there was no genuine factual issue that plaintiff was not an employee but an independent contractor, as set forth in the parties' independent contractor agreement (which plaintiff failed to mention in his complaint) and as defined by MCL 339.2501(h). In support of the motion, defendant submitted a copy of the parties' independent contractor agreement as well as an affidavit from defendant's director of finance stating that from 2015 through 2018, plaintiff was not

an employee and was compensated "solely in the form of commissions from the sale of real estate."

Plaintiff responded to defendant's motion, arguing that the motion was premature because discovery was not complete. Further, plaintiff argued, the executed contract was not dispositive as to plaintiff's employment status either as an employee or as an independent contractor for purposes of this action. Rather, as set forth in *Nationwide Mut Ins Co v Darden*, 503 US 318, 322; 112 S Ct 1344; 117 L Ed 2d 581 (1992) (addressing whether one is an "employee" for purposes of ERISA, which "does not helpfully define" that term), the issue is determined by the hiring party's right to control the manner and means of the worker's work product. And, plaintiff noted, "the labels that the parties use in such a relationship are not dispositive," citing *Laster v Henry Ford Health Sys*, 316 Mich App 726, 735-736; 892 NW2d 442 (2016) (concerning vicarious liability to a third party). In this case, plaintiff argued that after applying the "control test" to the facts, it was evident that plaintiff actually functioned as defendant's employee and was not an independent contractor. For example, plaintiff occupied defendant's office space and used defendant's office supplies and equipment, attended defendant's required meetings, and abided by defendant's mandatory office practices, policies, and procedures. That plaintiff signed a contract, was paid through commissions, and was treated as an independent contractor for tax purposes did not outweigh the other evidence presented by plaintiff that he was treated like an employee. Moreover, plaintiff argued that even if he was considered an independent contractor, he could still assert a claim of wrongful discharge in violation of public policy because he was terminated for refusing to violate a law, namely, RESPA. Accordingly, plaintiff argued that defendant's motion for summary

disposition must be denied. With his responsive brief, plaintiff submitted his own affidavit with attached documents supporting his claim that he was defendant's employee rather than an independent contractor. Plaintiff also submitted a thumb drive that allegedly contained a recording of the December 20, 2018 meeting between plaintiff, Goings, and Kersten.

In its reply brief, defendant argued that plaintiff's analysis was directly at odds with and rendered meaningless MCL 339.2501(h)—which specifically defines an independent contractor in the context of the real estate profession—and therefore his argument must be rejected. Defendant argued that plaintiff was clearly an independent contractor as defined by Michigan law and because only employees can assert claims of retaliatory discharge in violation of public policy, this entire matter must be dismissed. Moreover, defendant argued that plaintiff's audio recording was not admissible as documentary evidence under MCR 2.116(G), and further, it was recorded without the knowledge and consent of Goings and Kersten. Nevertheless, defendant noted that plaintiff admitted on the recording that he was, indeed, an independent contractor.

On May 18, 2020, a hearing was held on defendant's motion. Defendant argued that because there was no genuine factual issue that plaintiff was an independent contractor and met the statutory definition of an independent contractor in the real estate context, plaintiff's claims failed. Defendant further contended that there was no caselaw to support the right of an independent contractor to bring claims such as those alleged by plaintiff and that further discovery would be a waste of time and resources because any documents plaintiff might want to use to dispute his status as an independent contractor—like W-2 forms—would already be in plaintiff's possession.

Plaintiff argued that the statutory definition of an independent contractor in the real estate context was not dispositive; rather, it merely set forth prerequisites that, once met, allowed for the application of the economic-realities test or the control test.[1] Under either test, plaintiff would be considered an employee. But once there is an employment relationship, as defined in MCL 339.2501(g), whether as an employee or an independent contractor, plaintiff argued, that relationship cannot be terminated for reasons that violate public policy. Plaintiff also argued that an independent contractor could bring claims for retaliatory discharge in violation of public policy because such claims are rooted in tort law rather than contract law and, similarly, under the Civil Rights Act (CRA), MCL 37.2101 *et seq*., a person can bring a claim regardless of whether they are an employee or independent contractor. Plaintiff also noted that it would be bad public policy to hold that independent contractors could be fired for refusing to violate a law.

In rebuttal, in addition to reiterating its other arguments, defendant argued that the court should ignore plaintiff's arguments based on MCL 339.2501(g) and on his analogy to civil-rights law because they were not supported by appropriate briefing and were first raised during oral argument. After significant discussions between the court and the parties, the court took the matter under advisement.

On May 29, 2020, the trial court issued an opinion and order granting defendant's motion for summary disposition under MCR 2.116(C)(10). The court recognized plaintiff's argument that the independent-

[1] See, e.g., *Clark v United Technologies Auto, Inc*, 459 Mich 681, 687-688; 594 NW2d 447 (1999); *Kidder v Miller-Davis Co*, 455 Mich 25, 31-35; 564 NW2d 872 (1997), for discussion about these tests.

contractor definition in MCL 339.2501(h) was not definitive for purposes of determining whether he had a claim. However, the court reasoned:

> Plaintiff does not offer any suggestions as to the meaning of the statutory provision if not to define the type of relationship between an associate real estate broker . . . and a real estate broker. Even if the definition is to apply to pay practices, as asserted by Plaintiff, it doesn't necessarily follow that it doesn't also apply to the other aspects of the relationship between the parties.

The trial court further noted that it was "undisputed that the provision defining an independent contractor relationship is applicable to the facts of this case and that Plaintiff fits the description of an independent contractor." The court concluded, "Plaintiff has not presented sufficient evidence or argument to create a genuine issue of material fact that he was not an independent contractor of Defendant. Therefore, Count I must be dismissed."

Regarding plaintiff's argument that even if he was an independent contractor, he was entitled to bring a public-policy claim for wrongful discharge, the court found persuasive the reasoning in *Pedell v Heartland Health Care Ctr*, unpublished per curiam opinion of the Court of Appeals, issued March 20, 2007 (Docket No. 271276), p 7. That case stated:

> "*Employment* contracts . . . are presumptively terminable at the will of either party . . . ."
>
> . . . Thus, the public policy exception is an exception to the general rule that *employees* are terminable at will. The public policy exception cannot apply to independent contractors, because independent contractors are, by definition, not employees. [*Id*. at 7-8 (emphasis added, citations omitted).]

Accordingly, the court held that plaintiff had "no recourse under public policy," so Count II also had to be dismissed. Accordingly, plaintiff's entire case against defendant was dismissed. This appeal followed.

Plaintiff first argues that MCL 339.2501(h) is not dispositive of whether he was defendant's employee and, because he presented sufficient evidence to establish that a genuine issue of material fact exists on that issue, defendant was not entitled to summary disposition. We disagree.

"A motion for summary disposition under MCR 2.116(C)(10) 'tests the factual support for a claim.' " *Stone v Auto-Owners Ins Co*, 307 Mich App 169, 173; 858 NW2d 765 (2014) (citation omitted). The pleadings, affidavits, and other documentary evidence is reviewed in the light most favorable to the nonmoving party to determine whether a genuine issue of material fact exists for the jury to decide. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). If reasonable minds could differ on an issue, a genuine issue of material fact exists. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

This Court also reviews de novo issues of statutory interpretation. *Makowski v Governor*, 317 Mich App 434, 441; 894 NW2d 753 (2016). Our purpose in reviewing questions of statutory construction is to discern and give effect to the Legislature's intent. *Echelon Homes, LLC v Carter Lumber Co*, 472 Mich 192, 196; 694 NW2d 544 (2005). Our analysis begins " 'by examining the plain language of the statute; where that language is unambiguous, . . . no . . . judicial construction is required or permitted, and the statute must be enforced as written.' " *Id*. (citation omitted).

Article 25 of the Occupational Code, MCL 339.2501 *et seq*., the real estate brokers act (REBA), contains

regulations that govern the real estate profession. MCL 339.2501 provides the following definitions:

> (a) "Associate broker" or "associate real estate broker" means an individual who meets the requirements for licensure as a real estate broker under this article and who is licensed as an associate real estate broker under section 2505 to provide real estate brokerage services as an employee or independent contractor of a real estate broker.
>
> * * *
>
> (g) "Employ" or "employment" means the relationship between a real estate broker and an associate real estate broker or a real estate salesperson which may include an independent contractor relationship. The existence of an independent contractor relationship between a real estate broker and an individual licensed to the real estate broker does not relieve the real estate broker of the responsibility to supervise acts of the licensee that are regulated under this article.
>
> (h) "Independent contractor relationship" means a relationship between a real estate broker and an associate real estate broker or real estate salesperson that satisfies both of the following conditions:
>
> (*i*) A written agreement exists in which the real estate broker does not consider the associate real estate broker or real estate salesperson as an employee for federal and state income tax purposes.
>
> (*ii*) At least 75% of the annual compensation paid by the real estate broker to the associate real estate broker or real estate salesperson is from commissions from the sale of real estate.

It is clear that plaintiff's relationship with defendant met the definition of "independent contractor relationship" found at MCL 339.2501(h). The parties entered into an independent contractor agreement that provided in Paragraph A of Article IV: "It is expressly

agreed and understood between the parties that the Sales Associate, in performance of his/her services hereunder, is not to be treated or otherwise considered as an employee of Broker." And Paragraph D states: "As a consequence of Sale[s] Associate's independent contractor status, Broker shall not be responsible for any federal, state or local employment taxes for any purpose." Further, plaintiff's compensation was in the form of commissions from the sale of real estate.

Defendant and amicus curiae Michigan Realtors argue, as the trial court held, that the statutory definition of "independent contractor relationship" ends the inquiry into whether plaintiff was an employee or independent contractor. Plaintiff argues that this definition is not dispositive of his employment status either as an employee or as an independent contractor. But our obligation when construing a statute is to discern the legislative intent that can be reasonably inferred from the words in the statute. *Chandler v Muskegon Co*, 467 Mich 315, 319; 652 NW2d 224 (2002). And here, MCL 339.2501(a) plainly distinguishes between an associate broker who provides real estate brokerage services as an "employee" of a real estate broker and an associate broker who provides real estate brokerage services as an "independent contractor" of a real estate broker. Plaintiff had an "independent contractor relationship" with defendant as defined by MCL 339.2501(h). Plain and clear statutory language must be enforced as written, *Velez v Tuma*, 492 Mich 1, 16-17; 821 NW2d 432 (2012), and when a statute defines a term, that definition alone controls, *Haynes v Neshewat*, 477 Mich 29, 35; 729 NW2d 488 (2007). Because plaintiff, an associate broker, entered into an independent contractor agreement with defendant, the employment status of plaintiff was definitive—he was an independent contractor and not

an employee. Accordingly, the trial court properly concluded that plaintiff failed to create a genuine issue of material fact on the issue of his employment status as a real estate professional and dismissed Count I of plaintiff's complaint.

Next, plaintiff argues that even if he was an independent contractor, he was not prohibited from asserting a claim of wrongful discharge in violation of public policy. We disagree.

In general, Michigan law presumes employment relationships are terminable at the will of either party for any or no reason. See *Suchodolski v Mich Consol Gas Co*, 412 Mich 692, 694-695; 316 NW2d 710 (1982); *Landin v Healthsource Saginaw, Inc*, 305 Mich App 519, 523; 854 NW2d 152 (2014). However, there are three recognized public-policy exceptions to the at-will employment doctrine, and they are based on the principle that the grounds for termination are so contrary to public policy as to be actionable. *Landin*, 305 Mich App at 524-525. The three recognized exceptions have been explained as follows:

> (1) explicit legislative statements prohibiting the discharge, discipline, or other adverse treatment of employees who act in accordance with a statutory right or duty (e.g., the Civil Rights Act, MCL 37.2701; the Whistleblowers' Protection Act, MCL 15.362; the Persons With Disabilities Civil Rights Act, MCL 37.1602), (2) where the alleged reason for the discharge was the failure or refusal of the employee to violate a law in the course of employment (e.g., refusal to falsify pollution reports; refusal to give false testimony before a legislative committee; refusal to participate in a price-fixing scheme), and (3) where the reason for the discharge was the employee's exercise of a right conferred by a well-established legislative enactment (e.g., retaliation for filing workers' compensation claims). [*Id*. at 524, citing *Suchodolski*, 412 Mich at 695-696.]

Clearly, all three recognized exceptions refer to the adverse employment action occurring to an "employee."

In this case, plaintiff argues that the public-policy exceptions to the at-will employment doctrine—which have historically only applied to employees—should be extended to apply to independent contractors. And, specifically here, plaintiff seeks a holding that independent contractors can bring claims under the second exception—when they are terminated because they refuse to violate a law. However, public-policy exceptions to the at-will employment doctrine are not to be created lightly. As this Court explained in *Landin*, 305 Mich App at 525-526, Michigan courts do not have

> unfettered discretion or authority to determine what may constitute sound public policy exceptions to the at-will employment doctrine. As observed in *Terrien v Zwit*, 467 Mich 56, 66-67; 648 NW2d 602 (2002):
>
> > In defining "public policy," it is clear to us that this term must be more than a different nomenclature for describing the personal preferences of individual judges, for the proper exercise of the judicial power is to determine from objective legal sources what public policy *is*, and not to simply assert what such policy *ought* to be on the basis of the subjective views of individual judges. . . .
> >
> > In identifying the boundaries of public policy, we believe that the focus of the judiciary must ultimately be upon the 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. See *Twin City Pipe Line Co v Harding Glass Co*, 283 US 353, 357; 51 S Ct 476; 75 L Ed 1112 (1931). The public policy of Michigan 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. There is no other proper means of ascertaining what constitutes our public policy.
>
> Consistent with this observation, the *Terrien* Court noted that as a general rule, making social policy is a job for the Legislature, not the courts, *id*. at 67, and found instructive the United States Supreme Court's mandate: " 'Public policy is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests. As the term "public policy" is vague, there must be found definite indications in the law of the sovereign to justify the invalidation of a contract as contrary to that policy.' " *Id*. at 68, quoting *Muschany v United States*, 324 US 49, 66; 65 S Ct 442; 89 L Ed 744 (1945). Thus, courts may only derive public policy from objective sources. *Kimmelman* [*v Heather Downs Mgt Ltd*,] 278 Mich App [569, 573; 753 NW2d 265 (2008)].
>
> Notably, the three public policy exceptions recognized in *Suchodolski* entail an employee's exercising a right guaranteed by law, executing a duty required by law, or refraining from violating the law. *Id*. These three recognized circumstances remain the only three recognized exceptions and the list of exceptions has not been expanded. While the *Suchodolski* Court's enumeration of public policies that might forbid termination of at-will employees may not have been phrased as if it were an exhaustive list (*id*. at 573), our courts have yet to find a situation meriting extension beyond the three circumstances detailed in *Suchodolski*.

Although the discussion in *Landin* related to expanding the number of exceptions to the at-will employment doctrine, its reasoning applies with equal force to the decision whether to apply or analogize those exceptions to the independent contractor context. Thus, plaintiff's arguments that essentially amount to urging that it would be "good public policy" to allow independent contractors to bring certain actions for wrongful discharge are not persuasive.

In fact, recognition of the wrongful-discharge cause of action has, from the earliest Michigan cases, been clearly tied to employees in the at-will employment context. In one early case, this Court reasoned:

> It is apparently true that the employment relationship present in this case was an employment at will. And, while it is generally true that either party may terminate an employment at will for any reason or for no reason, that rule is not absolute. It is too well-settled to require citation that an employer at will may not suddenly terminate the employment of persons because of their sex, race, or religion. Likewise, the better view is that an employer at will is not free to discharge an employee when the reason for the discharge is an intention on the part of the employer to contravene the public policy of this state. [*Sventko v Kroger Co*, 69 Mich App 644, 646-647; 245 NW2d 151 (1976).]

In another early case, this Court explained:

> This Court has recognized exceptions to the well established rule that at will employment contracts are terminable at any time for any reason by either party. These exceptions were created to prevent individuals from contravening the public policy of this state.
>
> It is without question that the public policy of this state does not condone attempts to violate its duly enacted laws.
>
> Plaintiff claims that defendants discharged him from their employ when he refused to manipulate and adjust sampling results used for pollution control reports . . . . Such action would clearly violate the law of this state. [*Trombetta v Detroit, Toledo & Ironton R Co*, 81 Mich App 489, 495-496; 265 NW2d 385 (1978) (citations omitted).]

When our Supreme Court endorsed the doctrine, it stated:

> In general, in the absence of a contractual basis for holding otherwise, either party to an employment contract for an indefinite term may terminate it at any time for

> any, or no, reason. However, an exception has been recognized to that rule, based on the principle that some grounds for discharging an employee are so contrary to public policy as to be actionable. [*Suchodolski*, 412 Mich at 694-695 (citation omitted).]

The reasoning of these cases extended only to at-will employment relationships between employees and employers, and not to independent contractors.

Because extending the at-will employment public-policy exceptions to independent contractors would clearly be an expansion of the current doctrine, we conclude that more specific indications of the state's desire to protect independent contractors in this context is required. Plaintiff offers relatively little in this regard. In fact, courts in several states have ruled that public-policy exceptions to at-will employment doctrines do not protect independent contractors. See, e.g., *Bishop & Assoc, LLC v Ameren Corp*, 520 SW3d 463, 471 (Mo, 2017); *Harvey v Care Initiatives, Inc*, 634 NW2d 681, 683 (Iowa, 2001); *McNeill v Security Benefit Life Ins Co*, 28 F3d 891, 893 (CA 8, 1994); *Cogan v Harford Mem Hosp*, 843 F Supp 1013, 1022 (D Md, 1994). On appeal, plaintiff has not referred us to any persuasive authority that supports the extension of the public-policy exceptions to the at-will employment doctrine outside the context of the employer-employee relationship. While it may be sound public policy to extend the public-policy exceptions outside the context of the employer-employee relationship and to independent contractors like plaintiff, such a decision should come from the Legislature or our Supreme Court. In our estimation, the prevailing legal norms and legal theories governing both independent contractors and the at-will doctrine have not changed since the adoption of the public-policy exception to the at-will doctrine such that the doctrine should be expanded to cover independent contractors. See *Price*

v High Pointe Oil Co, Inc, 493 Mich 238, 242-243; 828 NW2d 660 (2013). Accordingly, we agree with the trial court that plaintiff had "no recourse under public policy" with regard to defendant's termination of their employment relationship.

Affirmed.

CAVANAGH, P.J., MURRAY, C.J., and REDFORD, J., concurred.

AIRGAS SPECIALTY PRODUCTS v MICHIGAN OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION

Docket No. 351105. Submitted May 4, 2021, at Lansing. Decided August 26, 2021, at 9:00 a.m.

Respondent, the Michigan Occupational Safety and Health Administration (MIOSHA), cited and imposed penalties against petitioner, Airgas Specialty Products, a distributor of anhydrous ammonia, in July 2017 for violating three subparts of 29 CFR 1910.119, known as the "process safety management of highly hazardous chemical" standards (PSM standards), at the Woodworth industrial site in Pontiac, Michigan. Petitioner supplied the anhydrous ammonia, which is classified as a highly hazardous chemical, for Woodworth to use in its business treating metal parts. Petitioner would deliver the ammonia to the site by truck and transfer it into two large storage tanks that petitioner owned and maintained. From the tanks, the ammonia would flow through piping, valves, and controls and into the Woodworth facility. Under the contract between petitioner and Woodward, those tanks, piping, and fittings were owned and exclusively controlled by petitioner. The contract required petitioner to maintain the equipment it provided in "good repair and operation" and to provide Woodworth with an annual tank inspection and maintenance report. The contract further provided that petitioner would have access to the site at all times. Respondent alleged that petitioner had violated 29 CFR 1910.119(o)(1) (Citation 1, Item 1), 29 CFR 1910.119(j)(4)(iv) (Citation 2, Item 1), and 29 CFR 1910.119(d)(3)(i)(B) (Citation 2, Item 2). Regarding Citation 1, Item 1, respondent found that as of April 12, 2017, petitioner had failed to conduct a compliance audit of the ammonia storage facility since the facility became operational in September 2013, for which respondent proposed a $2,800 penalty. Regarding Citation 2, Item 1, respondent alleged that petitioner violated 29 CFR 1910.119(j)(4)(iv) by not providing documentation of the storage facility valves, which respondent requested following several visual inspections. Regarding Citation 2, Item 2, respondent alleged that petitioner violated 29 CFR 1910.119(d)(3)(i)(B) by not providing piping and instrument diagrams (P&ID's) of the storage system as requested. Petitioner appealed, and when the parties

were unable to resolve the matter, a contested case hearing was held before an administrative law judge (ALJ). Petitioner moved for summary disposition, arguing that the citations should be dismissed on the ground that the cited provisions of the PSM standards did not apply to its activities at the Woodworth site because petitioner was a contractor and not an employer within the meaning of the cited standards. The ALJ granted the motion with respect to Citation 2, Item 1 and vacated that citation, but denied petitioner's motion for summary disposition with respect to Citation 1, Item 1 and Citation 2, Item 2. The ALJ concluded that the language in 29 CFR 1910.119(h), which addresses the responsibilities of "employers," "contract employers," and their employees was ambiguous and that it was unclear whether a contractor may also be considered an employer. After considering federal decisions and discussion of the final rule, the ALJ concluded that the division of responsibilities between Woodworth and petitioner established that both were employers for purposes of 29 CFR 1910.119 under the multi-employer work site doctrine, which provides that more than one employer may be cited for a hazardous condition that violates a standard. The ALJ also granted cross-relief to respondent, affirming the two remaining citations and proposed penalty. Petitioner moved for reconsideration of the order, but neither the ALJ nor the Board of Health and Safety Compliance and Appeals ruled on the motion. On November 21, 2018, petitioner filed exceptions to the ALJ's order, but no member of the board directed review, and the order became final. Petitioner then appealed in the Ingham Circuit Court. The court, Wanda M. Stokes, J., affirmed, ruling that the ALJ did not err by ruling that 29 CFR 1910.119 applied to petitioner; that respondent's decision was supported by competent, material, and substantial evidence on the whole record in the form of the uncontested facts; and that petitioner's due-process rights were not violated when the ALJ granted relief to respondent. Petitioner appealed.

The Court of Appeals *held*:

1. The circuit court did not err by affirming the ALJ's decision and holding that the PSM standards applied to petitioner. Under MCL 408.1046(6), in construing or applying any state occupational safety or health standard that is identical to a federal occupational safety and health standard promulgated pursuant to 29 USC 651 *et seq*., the board must construe and apply the state standard in Mich Admin Code, R 325.18301 *et seq*., in a manner that is consistent with any federal construction or application by the Occupational Safety and Health Review Commission (OSHRC) of the federal standard in 29 CFR 1910.119.

The two PSM standards at issue in this appeal are 29 CFR 1910.119(d)(3)(i)(B), which requires the employer to compile written process safety information pertaining to the hazards of the highly hazardous chemicals used by the process, including piping and instrument diagrams, and 29 CFR 1910.119(o)(1), which requires employers to certify that they have performed a compliance audit at least every three years. Responsibilities of employers of contractors and responsibilities of contract employers with respect to contract employees are set forth in 29 CFR 1910.119(h). While Subrule (h)(2) lists six responsibilities for the "employer" of a contractor and Subrule (h)(3) lists five responsibilities for the "contract employer" with respect to a "contract employee," neither of these provisions states that a contract employer cannot also be an "employer" for purposes of applying other PSM standards. The category of "contract employer" in 29 CFR 1910.119(h) itself implies that a contractor can be both an employee and an employer, i.e., the employer of a "contract employee." Moreover, when Subrules (h)(2) and (3) are read together, they effectively establish a chain of command and responsibilities, with the contractor in the center. Thus, 29 CFR 1910.119(h) appears to recognize and apply the multi-employer work site doctrine. The use of the multi-employer work site doctrine was also supported by MIOSHA agency instructions, did not conflict with the plain language of 29 CFR 1910.119, and was supported by binding OSHRC decisions. Accordingly, neither the ALJ nor the circuit court erred by applying that analysis to the instant case and concluding that the cited PSM standards applied to petitioner.

2. Petitioner did not establish that either the ALJ or the circuit court erred by concluding that petitioner retained control over the relevant portion of the industrial process that took place at the Woodworth facility and thereby could be cited as an employer for violating 29 CFR 1910.119(d)(3)(i)(B) and 29 CFR 1910.119(o)(1). Although petitioner argues that only one unified industrial "process" was at issue as that term is defined in 29 CFR 1910.119(b) and that process was controlled by Woodworth, that provision defines "process" to include any activity involving a highly hazardous chemical including any use, storage, manufacturing, handling, or the on-site movement of such chemicals, or combination of these activities. The citations related to the storage tanks and related equipment, which petitioner alone owned and installed under its contract with Woodworth. The contract also expressly prohibited Woodworth from altering, adjusting, or repairing any of petitioner's equipment. These facts established that petitioner retained control over the equipment that created the specific hazard involved in the citations. Addi-

tionally, contrary to petitioner's claim that it lacked the ability to produce the information requested, petitioner's own brief indicated that petitioner had the material at hand. Further, while petitioner asserted that 29 CFR 1910.119(h)(1) plainly excluded delivery and supply services from the requirements of the rule, when considering that language in context, it was clear that petitioner's maintenance and repair of the valve and piping system could not be characterized as incidental services that did not influence process safety. Petitioner also asserted that Woodworth controlled the tank pressure, the flow of ammonia vapor, and access to the site on which the tanks sit. However, although Woodworth may have controlled what occurred within the walls of its facility, under the terms of the contract, petitioner controlled the tanks and attendant equipment, and Woodworth was prohibited from altering, adjusting, or repairing that equipment. The contract also grants petitioner the authority to unilaterally determine that equipment was inadequate and to replace that equipment when it deemed it necessary. Therefore, petitioner did not demonstrate that either the ALJ or the circuit court clearly erred by finding that petitioner retained control over the storage of ammonia at the Woodworth facility.

3. Petitioner's argument that the agency decision was not supported by competent evidence was unsupported and lacked merit. Petitioner did not explain why respondent's field narrative, inspection reports, and citations were inadmissible hearsay or address MCL 24.275, which applies to evidence in an administrative proceeding. The field narrative could be exempted from the definition of hearsay as statements by a party opponent under MRE 801(d)(2), which provides that a statement is not hearsay if it is a statement by the party's agent that concerns a matter within the scope of the employment and was made during the existence of the relationship. And petitioner has not established that the ALJ relied on inadmissible hearsay evidence or that the trial court erred by affirming the ALJ's decision based on the submitted documentary evidence. Additionally, petitioner's responsibilities relative to the storage equipment at issue were a matter of contract, and its objections to the issuance of the citations were primarily based on its interpretation of 29 CFR 1910.119. Interpretation of contracts and administrative regulations both involve questions of law, which means petitioner's challenges were primarily legal rather than factual. Accordingly, petitioner failed to show that the ALJ did not apply correct legal principles or that the ALJ misapprehended or grossly misapplied the substantial-evidence test to the agency's factual findings.

4. The trial court did not misapply legal principles in determining that granting petitioner cross-relief was consistent with summary-disposition practice under MCR 2.116(I)(2), despite petitioner's contention that when a motion for summary disposition is denied, the failure to proceed to a full hearing violated its due-process rights. Nothing in Rule 792.10129 prohibits an ALJ who denies a party's motion for summary disposition from rendering judgment in favor of an opposing party when it appears that the opposing party is entitled to judgment as a matter of law. Rather, the rule appears to identify the next step in the process when a motion is denied and the court does not otherwise dispose of the action. Moreover, MCR 2.116(I)(2) allows the court to render judgment in favor of the opposing party if it appears to the court that the opposing party, rather than the moving party, is entitled to judgment. Requiring an action to proceed to a full hearing when an ALJ denies summary disposition to the moving party but finds the opposing party is entitled to judgment would be an absurd result. This was not a case in which the ALJ raised an alternative ground and granted summary disposition on that basis or a case in which the moving party had no notice that summary disposition in favor of the opposing party was before the ALJ because MIOSHA requested it. Accordingly, petitioner failed to show that its due-process rights were violated or that it was entitled to any relief.

Affirmed.

ADMINISTRATIVE LAW — MICHIGAN OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION — WORK-SAFETY REGULATIONS — HIGHLY HAZARDOUS CHEMICALS — MULTI-EMPLOYER WORKSITES — CONTRACTORS.

The federal process safety management standards for highly hazardous chemicals set forth in 29 CFR 1910.119 apply to all workplaces in Michigan and impose certain duties on employers; the Michigan Occupational Safety and Health Administration (MIOSHA) may issue citations and assess civil penalties for violations of 29 CFR 1910.119; a contractor may be considered an employer for purposes of 29 CFR 1910.119 under the multi-employer work site doctrine, which provides that more than one employer may be cited for a hazardous condition that violates a MIOSHA standard.

Douglas W. Crim PLC (by *Douglas W. Crim*) and *Morgan, Lewis & Bockius LLP* (by *Brandon J. Brigham*) for petitioner.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *William S. Selesky*, Assistant Attorney General, for respondent.

Before: SAWYER, P.J., and STEPHENS and RICK, JJ.

RICK, J. Petitioner, Airgas Specialty Products, appeals by leave granted[1] the circuit court's opinion and order affirming an administrative ruling upholding two citations for violations of 29 CFR 1910.119 issued against petitioner by respondent, the Michigan Occupational Safety and Health Administration (MIOSHA). We affirm.

I. FACTS AND PROCEEDINGS

Petitioner appeals two citations for having violated 29 CFR 1910.119, "[p]rocess safety management of highly hazardous chemicals" standards (PSM standards), adopted by reference under the authority of Michigan's Occupational Safety and Health Act,[2] MCL 408.1001 *et seq*., and applicable to "all workplaces" in Michigan under Mich Admin Code, R 325.18301(2). See MCL 408.1014(5); Mich Admin Code, R 325.18302; *Process Safety Management of Highly Hazardous Chemicals*, 29 CFR 1910.119 (2013). Upon a violation of the act or a rule promulgated under it, MCL 408.1035 provides that respondent, the enforcing agency, may assess a civil penalty in an amount

[1] *Airgas Specialty Prod v Mich Occupational Safety & Health Admin*, unpublished order of the Court of Appeals, entered March 23, 2020 (Docket No. 351105).

[2] MIOSHA, the acronym by which this statute is commonly known, is also the acronym for the Michigan Occupational Safety and Health Administration, the current general enforcement agency of Michigan's work-safety regulations. We use "MIOSHA" in this opinion to refer to the enforcement agency.

dependent on the seriousness of the violation. A party can appeal the agency's decision to issue a citation and is afforded a hearing in accordance with the procedures applicable to a contested case under the Administrative Procedures Act (APA), MCL 24.201 *et seq*. See MCL 408.1042 and MCL 408.1043. The Board of Health and Safety Compliance and Appeals decides the appeal after receiving a hearing officer's report. MCL 408.1004(3); MCL 408.1044; MCL 408.1046. "The report of the hearing officer shall become the final order of the board within 30 days after filing with the board and parties, unless a member of the board directs that the report be reviewed and acted upon by the board." MCL 408.1042. An aggrieved party, such as petitioner, may obtain judicial review of the board's decision under the APA. MCL 408.1044(3).

Petitioner received the citations at issue following an inspection of a facility owned and operated by Woodworth, Inc., in December 2016 and a separate inspection relating to petitioner's activities at the facility in January 2017. Petitioner supplies ammonia for industrial uses. In January 2013, petitioner contracted with Woodworth to provide Woodworth with anhydrous ammonia, which Woodworth used in treating metal parts. Anhydrous ammonia is classified as a "highly hazardous chemical" under the PSM standards. 29 CFR 1910.119, Appendix A. The ammonia was held in two large storage tanks owned and maintained by petitioner. The storage tanks, piping, and fittings are situated in a "storage cage" outside the Woodworth facility. By contract, those tanks, piping, and fittings are owned and exclusively controlled by petitioner. The ammonia flowed from the petitioner's storage tanks through petitioner's piping valves and into the Woodworth facility. As part of the contract, petitioner was required to maintain the equipment it

provided in "good repair and operation," and Woodworth was prohibited from altering, adjusting, or repairing any of the equipment that petitioner provided. The contract further provided that petitioner "shall have access at all times to the Site." Petitioner was also required to provide Woodworth "an annual tank inspection/maintenance report."

On April 6, 2017, respondent issued a citation and notification of penalty to Woodworth. On July 5, 2017, respondent also issued a citation and notice of penalty to petitioner, asserting that petitioner had violated 29 CFR 1910.119(o)(1) (Citation 1, Item 1), 29 CFR 1910.119(j)(4)(iv) (Citation 2, Item 1), and 29 CFR 1910.119(d)(3)(i)(B) (Citation 2, Item 2). Regarding Citation 1, Item 1, respondent found that as of April 12, 2017, petitioner had failed to conduct a compliance audit of the ammonia storage facility since the facility became operational in September 2013. Respondent proposed a $2,800 penalty for Citation 1, Item 1. Regarding Citation 2, Item 1, respondent alleged that petitioner violated 29 CFR 1910.119(j)(4)(iv) by not providing documentation of the storage facility valves, which respondent requested following several visual inspections. Specifically, respondent found that "[t]he documentation did not identify each valve with an individual serial number or other type of identifier . . . ." Regarding Citation 2, Item 2, respondent alleged that petitioner violated 29 CFR 1910.119(d)(3)(i)(B) by not providing piping and instrument diagrams (P&ID's) of the storage system as requested. Respondent did not propose a financial penalty for either Item 1 or Item 2 in Citation 2.

A. ADMINISTRATIVE LAW JUDGE DECISION

On September 14, 2017, petitioner appealed the citations to respondent. When the parties were unable

to resolve the matter, a contested case hearing was scheduled with the Michigan Administrative Hearing System in front of an administrative law judge (ALJ). On July 20, 2018, petitioner moved for summary disposition. Petitioner argued that the cited provisions of the PSM standards did not apply to its activities at the Woodworth facility, in part because it was a contractor, not an employer, with respect to the facility. The ALJ denied petitioner's motion for summary disposition with respect to the violations of 29 CFR 1910.119(o)(1) (Citation 1, Item 1) and 29 CFR 1910.119(d)(3)(i)(B) (Citation 2, Item 2). However, the ALJ granted the motion with respect to the violation of 29 CFR 1910.119(j)(4)(iv) (Citation 2, Item 1) and vacated that citation.[3]

Discussing whether the PSM standards applied to petitioner's activities, the ALJ concluded that the language in 29 CFR 1910.119(h), which addresses the responsibilities of "employers," "contract employers," and their employees vis-á-vis each other, was ambiguous. The ALJ concluded it was unclear whether a contractor may also be considered an employer. The ALJ then considered earlier federal Occupational Safety and Health Review Commission (OSHRC) decisions and the federal-register discussion of the final rule, *Process Safety Management of Highly Hazardous Chemicals*, 57 Fed Reg 6356-6385 (Feb 24, 1992), for guidance to determine the intent of the drafters of 29 CFR 1910.119. The ALJ concluded that petitioner was subject to the requirements of 29 CFR 1910.119(h) and other applicable PSM standards and that such application was "consistent with OSHA's interpretation and application of the multi-employer worksite doctrine . . . ."

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[3] The ALJ concluded that petitioner complied with 29 CFR 1910.1199(j)(4)(iv), which is not challenged on appeal.

The ALJ further concluded that the division of responsibilities between Woodworth and petitioner established that both were employers. "Irrespective of how remote the possibility," the ALJ reasoned, "one or both storage tanks may fail for any variety of reasons while being filled, serviced and/or maintained, thereby resulting in the potential catastrophic release of anhydrous ammonia." In the event a release did occur, "both Woodworth and [petitioner's] employees are potentially exposed to the risk of significant illness, injury or death." The ALJ also rejected petitioner's assertion that there was only one unified industrial "process" at issue and that it was controlled by Woodworth, with petitioner merely supplying gas and maintaining storage tanks. The ALJ stated:

> The Petitioner retains control and responsibility over that *portion* of the process involving the ammonia storage tanks and their associated component parts (valves, piping, etc.). The Petitioner's supply of anhydrous ammonia, a highly hazardous chemical, is an integral component of Woodworth's overall process because without this chemical, Woodworth cannot accomplish the [ferritic nitrocarburizing] process as envisioned. The Petitioner therefore both creates and controls the hazard attendant to this portion of the process and must therefore comply with the cited PSM standards. The Petitioner's assertion that Woodworth controls the entire process is therefore without merit.

The ALJ affirmed Citation 1, Item 1 and Citation 2, Item 2 and the proposed penalty of $2,800.

In November 2018, petitioner filed exceptions to the ALJ's decision and requested it to be reviewed by the board.[4] However, no board member directed review. Respondent concluded, "Inasmuch as no member of the

[4] Petitioner also filed a motion for reconsideration in September 2018, which neither the ALJ nor the board ruled upon.

Board has directed review within the thirty (30) day time period prescribed by Section 42, the Order and Opinion of the ALJ became a final order of the Board on December 3, 2018."

B. CIRCUIT COURT

On January 25, 2019, petitioner appealed in the circuit court. Petitioner argued that the cited PSM standards were inapplicable in this case because it was a contractor, not an employer. Petitioner also argued that the ALJ's decision was not supported by competent, material, and substantial evidence because the allegations in the citations were hearsay. Further, petitioner asserted that the ALJ committed clear legal error and violated its due-process rights by not allowing the matter to proceed to a hearing.

Following a hearing, the circuit court affirmed the ALJ's decision and concluded that granting summary disposition to respondent was consistent with MCR 2.116(I)(2). The court held that the ALJ did not err by ruling that 29 CFR 1910.119 applied to petitioner. With respect to whether the decision was supported by competent, material, and substantial evidence on the whole record, the court concluded that the decision was supported by the uncontested facts. Although petitioner argued that the ALJ improperly relied on hearsay, the court noted that petitioner failed to identify any specific hearsay statements. With respect to petitioner's due-process claim, the circuit court rejected petitioner's assertion that summary disposition for respondent was improper under Mich Admin Code, R 792.10129(3).[5] The court concluded that petitioner's interpretation of the

[5] Rule 792.10129(3) provides that "[i]f the motion for summary disposition is denied, or if the decision on the motion does not dispose of the entire action, then the action shall proceed to hearing."

rule would lead to "inefficiencies and rather absurd results." The court explained:

> If, as here, a party's motion for summary disposition were denied, but an opposing party's was granted, or cross-relief under MCR 2.116(1)(2) were granted, the case would be required to proceed to hearing, notwithstanding the lack of any remaining triable issues. The plain meaning of Mich Admin Code R 792.10129(3) is that the action must proceed to a hearing when summary disposition is denied and the issues targeted in the motion are not otherwise disposed of. The ALJ's decision here disposed of the entire action, and so no hearing was required.

This appeal followed. On appeal, petitioner argues that this Court should overturn the circuit court's order upholding the ALJ's decision and dismiss the citations issued by respondent.

II. STANDARD OF REVIEW

The APA provides the following standard for judicial review of the board's order:

> (1) Except when a statute or the constitution provides for a different scope of review, the court shall hold unlawful and set aside a decision or order of an agency if substantial rights of the petitioner have been prejudiced because the decision or order is any of the following:
>
> (a) In violation of the constitution or a statute.
>
> (b) In excess of the statutory authority or jurisdiction of the agency.
>
> (c) Made upon unlawful procedure resulting in material prejudice to a party.
>
> (d) Not supported by competent, material and substantial evidence on the whole record.
>
> (e) Arbitrary, capricious or clearly an abuse or unwarranted exercise of discretion.

> (f) Affected by other substantial and material error of law.
>
> (2) The court, as appropriate, may affirm, reverse or modify the decision or order or remand the case for further proceedings. [MCL 24.306.]

See also Const 1963, art 6, § 28. The circuit court must affirm the agency's decision if it "was not contrary to law and was otherwise supported by competent, material, and substantial evidence on the whole record . . . ." *Polania v State Employees' Retirement Sys*, 299 Mich App 322, 328; 830 NW2d 773 (2013). " 'Substantial evidence is that which a reasonable mind would accept as adequate to support a decision, being more than a mere scintilla, but less than a preponderance of the evidence.' " *Lawrence v Mich Unemployment Ins Agency*, 320 Mich App 422, 431; 906 NW2d 482 (2017) (citation omitted). " 'Evidence is competent, material, and substantial if a reasoning mind would accept it as sufficient to support a conclusion.' " *Id*. (citation omitted).

"[W]hen reviewing a lower court's review of agency action this Court must determine whether the lower court applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the agency's factual findings. This latter standard is indistinguishable from the clearly erroneous standard of review . . . ." *Boyd v Civil Serv Comm*, 220 Mich App 226, 234; 559 NW2d 342 (1996). "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).

We review questions of statutory interpretation de novo. *Ayar v Foodland Distrib*, 472 Mich 713, 715; 698 NW2d 875 (2005). The interpretation of administrative regulations is also a question of law that this Court reviews de novo. *In re Petition of Attorney General for Investigative Subpoenas*, 274 Mich App 696, 698; 736 NW2d 594 (2007). However, we generally defer to an agency's administrative expertise in making decisions that fall within the agency's charged area of administration. *Id*.; *Dep't of Community Health v Anderson*, 299 Mich App 591, 598; 830 NW2d 814 (2013). An agency's interpretation of a statute "is entitled to respectful consideration," but it "cannot conflict with the plain meaning of the statute." *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 108; 754 NW2d 259 (2008). The "respectful consideration" standard provides that an agency's decision " 'ought not to be overruled without cogent reasons.' " *Id*. (citation omitted). In addition, "an agency's interpretation of its own regulation is of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *In re Petition of Attorney General for Investigative Subpoenas*, 274 Mich App at 701 (quotation marks and citations omitted).

"The rules of statutory construction apply to both statutes and administrative rules." *United Parcel Serv, Inc v Bureau of Safety & Regulation*, 277 Mich App 192, 202; 745 NW2d 125 (2007). With respect to statutory interpretation generally:

> "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) (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). Also, "[w]hen considering the correct interpretation, the statute must be read as a whole. Individual words and phrases, while important, should be read in the context of the entire legislative scheme." *Mich Props, LLC v Meridian Twp*, 491 Mich 518, 528; 817 NW2d 548 (2012) (citation omitted).

III. APPLICATION OF THE PSM STANDARDS

On appeal, petitioner first argues that the trial court erred by affirming the ALJ decision and holding that the PSM standards applied. Petitioner asserts that the cited PSM standards did not apply to its activities at Woodworth's facility because it was a contractor—not an employer—and, therefore, it cannot be cited for the violations of the PSM standards that apply solely to employers. We disagree.

The purpose of 29 CFR 1910.119 is to prevent or minimize "the consequences of catastrophic releases of toxic, reactive, flammable, or explosive chemicals." 29 CFR 1910.119 (2013). To this end, the federal Occupational Safety and Health Administration (OSHA) has developed the PSM standards that address the management of hazardous chemicals. See 29 CFR 1910.119.

> In construing or applying any state occupational safety or health standard which is identical to a federal occupational safety and health standard promulgated pursuant to 29 U.S.C section 651 *et seq*., the board shall construe and

> apply the state standard in a manner which is consistent with any federal construction or application by the occupational safety and health review commission created pursuant to 29 U.S.C. section 661. [MCL 408.1046(6).]

29 USC 661(j) provides:

> [An] administrative law judge appointed by the Commission shall hear, and make a determination upon, any proceeding instituted before the Commission and any motion in connection therewith, assigned to such administrative law judge by the Chairman of the Commission, and shall make a report of any such determination which constitutes his final disposition of the proceedings. The report of the administrative law judge shall become the final order of the Commission within thirty days after such report by the administrative law judge, unless within such period any Commission member has directed that such report shall be reviewed by the Commission.

Accordingly, MCL 408.1046(6) requires that the board "construe and apply the state standard [embodied in Mich Admin Code, R 325.18301 *et seq*.] in a manner which is consistent with any federal construction or application by the occupational safety and health review commission" of the federal standard in 29 CFR 1910.119.

A. WHO QUALIFIES AS AN EMPLOYER FOR PURPOSES OF APPLYING 29 CFR 1910.119(d)(3)(i)(B) AND 29 CFR 1910.119(o)(1)

The two PSM standards at issue in this appeal are 29 CFR 1910.119(d)(3)(i)(B) and 29 CFR 1910.119(o)(1). Standard 1910.119(d) provides, in relevant part:

> *Process safety information*. In accordance with the schedule set forth in paragraph (e)(1) of this section, the employer shall complete a compilation of written process safety information before conducting any process hazard analysis required by the standard. The compilation of written process safety information is to enable the em-

ployer and the employees involved in operating the process to identify and understand the hazards posed by those processes involving highly hazardous chemicals. This process safety information shall include information pertaining to the hazards of the highly hazardous chemicals used or produced by the process, information pertaining to the technology of the process, and information pertaining to the equipment in the process.

* * *

(3) *Information pertaining to the equipment in the process*. (i) Information pertaining to the equipment in the process shall include:

* * *

(B) Piping and instrument diagrams (P&ID's)[.]

Standard 1910.119(o) provides:

Compliance Audits.

(1) Employers shall certify that they have evaluated compliance with the provisions of this section at least every three years to verify that the procedures and practices developed under the standard are adequate and are being followed.

(2) The compliance audit shall be conducted by at least one person knowledgeable in the process.

(3) A report of the findings of the audit shall be developed.

(4) The employer shall promptly determine and document an appropriate response to each of the findings of the compliance audit, and document that deficiencies have been corrected.

(5) Employers shall retain the two (2) most recent compliance audit reports.

On appeal, petitioner asserts that it should be considered a contractor, not an employer, for purposes of

the PSM standards at issue on the basis of 29 CFR 1910.119(h). The ALJ concluded that the language in 29 CFR 1910.119(h) addressing the responsibilities of employers and contract employers was ambiguous because it was unclear whether a contractor could also be considered an employer. The trial court concluded that the ALJ did not err by concluding that the PSM standards applied to petitioner. Petitioner argues that the plain language of 29 CFR 1910.119(h) precludes a finding that it can be an employer for purposes of adhering to other PSM standards. Petitioner asserts that the plain language of 29 CFR 1910.119(h) "creates an express dichotomy between the responsibilities of 'the employer' who operates and controls the process and those contractors 'performing maintenance or repair, turnaround, major renovation, or specialty work on or adjacent to a covered process.' " We disagree.

Section 1910.119(h) provides, in pertinent part:

> (1) *Application*. This paragraph applies to contractors performing maintenance or repair, turnaround, major renovation, or specialty work on or adjacent to a covered process. It does not apply to contractors providing incidental services which do not influence process safety, such as janitorial work, food and drink services, laundry, delivery or other supply services.
>
> (2) *Employer responsibilities*.
>
> (i) The employer, when selecting a contractor, shall obtain and evaluate information regarding the contract employer's safety performance and programs.
>
> (ii) The employer shall inform contract employers of the known potential fire, explosion, or toxic release hazards related to the contractor's work and the process.
>
> (iii) The employer shall explain to contract employers the applicable provisions of the emergency action plan required by paragraph (n) of this section.

(iv) The employer shall develop and implement safe work practices consistent with paragraph (f)(4) of this section, to control the entrance, presence and exit of contract employers and contract employees in covered process areas.

(v) The employer shall periodically evaluate the performance of contract employers in fulfilling their obligations as specified in paragraph (h)(3) of this section.

(vi) The employer shall maintain a contract employee injury and illness log related to the contractor's work in process areas.

(3) *Contract employer responsibilities*.

(i) The contract employer shall assure that each contract employee is trained in the work practices necessary to safely perform his/her job.

(ii) The contract employer shall assure that each contract employee is instructed in the known potential fire, explosion, or toxic release hazards related to his/her job and the process, and the applicable provisions of the emergency action plan.

(iii) The contract employer shall document that each contract employee has received and understood the training required by this paragraph. The contract employer shall prepare a record which contains the identity of the contract employee, the date of training, and the means used to verify that the employee understood the training.

(iv) The contract employer shall assure that each contract employee follows the safety rules of the facility including the safe work practices required by paragraph (f)(4) of this section.

(v) The contract employer shall advise the employer of any unique hazards presented by the contract employer's work, or of any hazards found by the contract employer's work.

29 CFR 1910.119(h) "applies to contractors performing maintenance or repair, turnaround, major renovation, or specialty work on or adjacent to a covered

process. It does not apply to contractors providing incidental services which do not influence process safety, such as janitorial work, food and drink services, laundry, delivery or other supply services." 29 CFR 1910.119(h)(1). "Contractor" and "contract employer" are not expressly defined in the PSM standards. See 29 CFR 1910.119(b) (2013); MCL 408.1004.[6]

Although 29 CFR 1910.119(h) defines "contractors" in relation to the duties involved under this section, as opposed to other entities who supply "incidental services," it does not discuss whether a contractor can also be an employer for purposes of other PSM standards. Under this subrule, contractors are entities "performing maintenance or repair, turnaround, major renovation, or specialty work on or adjacent to a covered process." 29 CFR 1910.119(h)(1). Subrule (h)(2) lists six responsibilities for the "employer" of a contractor, and Subrule (h)(3) lists five responsibilities for the "contract employer" with respect to a "contract employee." None of these provisions states that a contract employer cannot also be an "employer" for purposes of applying other PSM standards.

The category of "contract employer" in 29 CFR 1910.119(h) itself implies that a contractor can be both an employee and an employer, i.e., the employer of a "contract employee." Additionally, Subrule (h)(2)(i) states: "The employer, when selecting a contractor, shall obtain and evaluate information regarding the *contract employer's* safety performance and programs." (Emphasis added.) This subrule thus mandates that an employer consider the contractor's performance as a

[6] We note that the Michigan Occupational Safety and Health Act defines "employer" as "an individual or organization, including this state or a political subdivision, that employs 1 or more persons." MCL 408.1005(2).

contract "employer" with respect to safeguarding its employees. Moreover, when Subrules (h)(2) and (3) are read together, they effectively establish a chain of command and responsibilities, with the contractor in the center. For example, Subrule (h)(2)(ii) mandates that an employer "inform contract employers of the known potential fire, explosion, or toxic release hazards related to the contractor's work and the process." In turn, Subrule (h)(3)(ii) requires that the contract employer itself "assure that each contract employee is instructed in the known potential fire, explosion, or toxic release hazards related to his/her job and the process, and the applicable provisions of the emergency action plan." Accordingly, 29 CFR 1910.119(h) appears to recognize, and apply, the multi-employer work site doctrine. The use of the multi-employer work site doctrine is also supported by the MIOSHA-COM-04-1R6 agency instruction.[7] For example, the instruction provides:

> A. Multi-Employer Work Sites. On multi-employer work sites (in all industry sectors), *more than one employer may be citable for a hazardous condition that violates a MIOSHA standard*. A two-step process must be followed in determining whether more than one employer is to be cited. All facts considered in the two-step process shall be documented in the case file. [MIOSHA-COM-04-1R6, § XI (emphasis added).]

The agency instruction defines "Controlling Employer," in part, as "[a]n employer who has general supervisory authority over the work site, including the power to correct safety and health violations . . . . Control can be established by contract or, in the absence of explicit

[7] MIOSHA Agency Instruction, *Multi-Employer Work Sites*, MIOSHA-COM-04-1R6 (September 3, 2020), available at <https://adms.apps.lara.state.mi.us/File/ViewDmsDocument/12774> (accessed May 12, 2021) [https://perma.cc/662A-5TN4].

contractual provisions, by the exercise of control in practice." MIOSHA-COM-04-1R6, § XI(E). Further discussing "Control Established by Contract," the instruction provides that "[i]n this case, the employer has a specific contract right to control safety. To be a controlling employer, the employer must itself be able to prevent or correct a violation or to require another employer to prevent or correct the violation." MIOSHA-COM-04-1R6, § XI(E)(5)(a). Although MIOSHA's interpretative statement alone cannot be relied on to resolve this case, see MCL 24.232(5);[8] *Brang, Inc v Liquor Control Comm*, 320 Mich App 652, 662; 910 NW2d 309 (2017), this interpretation does not conflict with the plain language of 29 CFR 1910.119. It is also supported by binding OSHRC decisions.

In concluding that the PSM standards applied to petitioner and that this application was consistent with OSHA's interpretation and application of the multi-employer work site doctrine, the ALJ considered and applied the recent OSHRC decisions *Perez v Jacobs Field Servs of North America, Inc*, OSHRC Decision & Order (Docket No. 13-1623), issued February 5, 2015; 2015 OSHD (CCH) P33445,[9] and *Secretary of Labor v*

[8] MCL 24.232(5) provides:

> A guideline, operational memorandum, bulletin, interpretive statement, or form with instructions is not enforceable by an agency, is considered merely advisory, and must not be given the force and effect of law. An agency shall not rely upon a guideline, operational memorandum, bulletin, interpretive statement, or form with instructions to support the agency's decision to act or refuse to act if that decision is subject to judicial review. A court shall not rely upon a guideline, operational memorandum, bulletin, interpretive statement, or form with instructions to uphold an agency decision to act or refuse to act.

[9] Available at <https://www.oshrc.gov/assets/1/6/13-1623.pdf?251> (accessed May 11, 2021) [https://perma.cc/CTM7-B7XT].

Southern Pan Servs Co, OSHRC Decision & Order (Docket No. 08-0866), issued December 18, 2014; 2015 OSHD (CCH) P33428.[10]

The respondent in *Perez* was a resident maintenance contractor at a facility owned by a Dutch manufacturing company. *Perez*, unpub op at 4. Like petitioner in the instant case, the respondent argued that, because it was a contractor, its activities were only subject to 29 CFR 1910.119(h) and, therefore, it was not required to comply with the other subsections of the PSM standards for which it was cited. *Id*. at 2-3, 9-10. Although the ALJ considered the preamble to the final rule of the PSM standards, *Process Safety Management of Highly Hazardous Chemicals; Explosives and Blasting Agents*, 57 Fed Reg 6356, 6384-6385, 6389 (February 24, 1992), it ultimately concluded that *Southern Pan* was controlling and rejected the respondent's argument, *Perez*, unpub op at 10-11.

In *Perez*, the ALJ found "no merit in [the respondent's] assertion that it had no obligation to comply with the cited subsections of the PSM standard because they did not specifically refer to the *contract employer* . . . . As the exposing employer, [the respondent] was responsible for all violative conditions to which its employee had access." *Id*. at 13. Further, the ALJ concluded, "[a]s the Commission emphatically held in *Southern Pan*, the Secretary must establish that the cited standard applies to the cited *conditions*, not to the cited *employer*." *Id*.

In the instant case, the ALJ applied *Perez* and explained that *Perez* rejected "the contractor's attempt to draw a bright-line distinction between an 'employer'

[10] Available at <https://www.oshrc.gov/assets/1/6/08-08661.pdf?2791> (accessed May 11, 2021) [https://perma.cc/SDD8-WSLF].

and 'contractor' . . . ." The ALJ concluded that these cases supported respondent's position, stating:

> The [*Perez*] and *Southern Pan* decisions demonstrate that the focus of liability for compliance with PSM standards is on the "cited condition," and, in determining who to hold responsible, OSHA " . . . *will look at who created the hazard, who controlled the hazard and whether all reasonable means were taken to deal with the hazard*."

Applying these considerations to the instant case, the ALJ concluded that petitioner was subject to the requirements of 29 CFR 1910.119(h) and other applicable PSM standards. The ALJ reasoned that this conclusion was in keeping with the precept that there can be multiple employers operating at a single work site. The ALJ also concluded that the division of responsibilities between Woodworth and petitioner established that both were employers. "Irrespective of how remote the possibility," the ALJ reasoned, "one or both storage tanks may fail for any variety of reasons while being filled, serviced and/or maintained, thereby resulting in the potential catastrophic release of anhydrous ammonia," and in the event a release does occur, "both Woodworth and [petitioner's] employees are potentially exposed to the risk of significant illness, injury or death."

We conclude that the circuit court's order and ALJ's decision regarding the application of the PSM standards to petitioner are supported by *Perez*. In the instant case, the ALJ also considered the preamble to the final rule of the PSM standards to examine "OSHA's intent in promulgating the PSM standards . . . ." We note that MCL 24.232(5) provides, in pertinent part, that "[a] court shall not rely upon a guideline, operational memorandum, bulletin, interpretive statement, or form with instructions to uphold

an agency decision to act or refuse to act."[11] However, the ALJ's application of *Perez* was consistent with MCL 408.1046(6), requiring that the board "construe and apply the state standard [embodied in Mich Admin Code, R 325.18301, *et seq*.] in a manner which is consistent with any federal construction or application by the occupational safety and health review commission" of the federal standard in 29 CFR 1910.119. Petitioner asserts that the preamble to the PSM standards supports its argument that a contractor should not be treated as "the employer." However, as discussed in *Perez*, this argument has no merit. See *Perez*, unpub op at 13.

Petitioner also argues that that the ALJ erred in concluding that *Perez* was binding precedent because the decision was issued by an ALJ, not the OSHRC. However, petitioner's argument has no merit. 29 USC 661(j) provides, in pertinent part, that "[t]he report of the administrative law judge shall become the final order of the Commission within thirty days after such report by the administrative law judge, unless within such period any Commission member has directed that such report shall be reviewed by the Commission." Accordingly, under 29 USC 661(j), when the commission in *Perez* allowed the ALJ decision to stand, it became the final order of the commission.

Further, this Court has applied this principle to a MIOSHA case in which the interpretation in question was based on a federal ALJ decision. In *United Parcel Serv, Inc*, 277 Mich App at 193-196, MIOSHA, the respondent, attempted to distinguish a federal OSHA

[11] "Guideline" is defined as "an agency statement or declaration of policy that the agency intends to follow, that does not have the force or effect of law, and that binds the agency but does not bind any other person." MCL 24.203(7).

interpretation of an equivalent rule concerning assessments to determine whether the use of personal protective equipment was necessary at the petitioner's various repair facilities. This Court determined that the respondent failed to distinguish a factually similar federal OSHA ruling. *Id*. at 210-211. We expressly noted that even though the federal decision was made "by a hearing officer appointed by the commission," it "becomes the final order of the commission" if no member directs review. *Id*. at 210. This Court then quoted the federal hearing officer's interpretation of the disputed rule at length and applied it to the dispute. *Id*. at 210-211. Considering the plain language of MCL 408.1046(6) and 29 USC 661(j), along with the analysis in *United Parcel Serv, Inc*, we conclude that neither the ALJ nor the circuit court erred by applying *Perez*'s analysis to the instant case and concluding that the cited PSM standards applied to petitioner.

B. COMPLIANCE WITH 29 CFR 1910.119(d)(3)(i)(B) AND (o)(1)

Next, petitioner argues that it cannot be held responsible for compliance with any of the cited PSM standards because Woodworth created and controlled the "process." Petitioner asserts that there was only one unified industrial "process" at issue and it was created and controlled by Woodworth, with petitioner merely supplying gas and maintaining storage tanks. Under the PSM standards, "process" means

> any activity involving a highly hazardous chemical including any use, storage, manufacturing, handling, or the on-site movement of such chemicals, or combination of these activities. For purposes of this definition, *any group of vessels which are interconnected and separate vessels which are located such that a highly hazardous chemical could be involved in a potential release shall be considered a single process*. [29 CFR 1910.119(b) (emphasis added).]

Petitioner does not explain how this provision aids its position here, given that all the "vessels" involved in the process appear to be owned and maintained by petitioner. In addition, the language of 29 CFR 1910.119(b) does not itself touch on whether more than one employer can be responsible for the PSM standards for the same process. Further, we do not find petitioner's argument persuasive in light of *Perez*, as discussed earlier.

Petitioner also argues that it cannot be held responsible for any violation of 29 CFR 1910.119(d)(3)(i)(B) (Citation 2, Item 2) because it "would need Woodworth to supply it with: (1) information 'pertaining to the hazards of the highly hazardous chemicals in the process'; (2) information 'concerning the technology of the process'; and (3) information 'pertaining to the equipment in the process,' all of which is required under 29 CFR 1910.119(d)(1)-(3)." Petitioner's arguments concern the requirements in 29 CFR 1910.119(d)(1) and (2). However, petitioner was not cited for violating either of these provisions. Instead, petitioner was cited for violating 29 CFR 1910.119(d)(3)(i)(B), which requires an employer to "complete a compilation of written process safety information before conducting any process hazard analysis required by the standard" and that this information shall "include information pertaining to the hazards of the highly hazardous chemicals used or produced by the process, information pertaining to the technology of the process, and information pertaining to the equipment in the process." 29 CFR 1910.119(d). Under 29 CFR 1910.119(d)(3)(i)(B), this relevant information shall include piping and instrument diagrams, or "P&ID's." Petitioner was cited for not including, "as part of the information pertaining to the equipment in the process, the piping and instrument diagrams . . . for the anhydrous ammonia storage system including the

storage tanks, equipment, and instrumentation that were located outdoors at Woodworth Inc . . . ."

Petitioner does not dispute that it inspects and repairs the ammonia tanks and related equipment at the Woodworth facility. Petitioner argues that Woodworth, rather than petitioner, created and controls the ultimate industrial process and the hazards inherent in it. For example, petitioner maintains that the ammonia it owns "would not even be on site if Woodworth were not operational." Petitioner also argues that Woodworth "owns the ammonia it buys from [petitioner]" and determines what equipment to have and how the chemicals combine. While these statements may be true, they are irrelevant for purposes of this analysis. The citations related to the storage tanks and related equipment, which petitioner alone owned and installed. The contract between Woodworth, as buyer, and petitioner, as seller, stated that the "Buyer shall have no ownership interest in the Equipment installed at the Site by the Seller . . . ." The contract also expressly prohibited Woodworth from altering, adjusting, or repairing any of petitioner's equipment. These facts establish that petitioner retained control over the equipment that created the specific hazard involved in the citations. Additionally, contrary to petitioner's claim that it lacked the ability to produce the information requested, as the entity in charge of this process, petitioner has this material readily at hand. In petitioner's brief on appeal, even petitioner acknowledges that Woodworth prepared P&ID's with information that petitioner provided to Woodworth. Therefore, we reject petitioner's assertion that it does not possess the requested information. We conclude that the ALJ did not err by finding that petitioner had a working knowledge of the hazards and the components associated with ammonia storage.

Petitioner also presents a number of interrelated arguments concerning other "errors" by the ALJ and the circuit court that it contends require reversal. Petitioner argues that the hearing officer erred by relying in part on the fact that it supplied the ammonia and that the tanks could fail " 'while being filled, serviced and/ or maintained.' " Petitioner asserts that 29 CFR 1910.119(h)(1) plainly excludes " 'delivery or other supply services' " from the requirements of the rule. However, petitioner fails to consider the cited language in context. Section 1910.119(h)(1) provides:

> This paragraph applies to contractors performing maintenance or repair, turnaround, major renovation, or specialty work on or adjacent to a covered process. It does not apply to contractors providing incidental services which do not influence process safety, such as janitorial work, food and drink services, laundry, delivery or other supply services.

Petitioner's "maintenance and repair" of the valve and piping system cannot be characterized as "incidental services which do not influence process safety." It is instead a core part of Woodworth's production, and petitioner's "services" are directly related to process safety with respect to the delivery of the ammonia.

Petitioner also argues that the ALJ and the circuit court erred by concluding that petitioner controlled the ammonia storage at the Woodworth facility. Petitioner asserts that only Woodworth controls tank pressure, the flow of ammonia vapor, and access to the site on which the tanks sit. However, the contract between petitioner and Woodworth explicitly required that petitioner have access to the site at all times. Moreover, although Woodworth may control what occurs within the walls of its facility, under the terms of the contract, petitioner controls the tanks and attendant equip-

ment, and Woodworth is prohibited from altering, adjusting, or repairing that equipment. The contract also grants petitioner the authority to unilaterally determine that equipment is inadequate and to replace that equipment when it deems it necessary. Therefore, we conclude that petitioner has not demonstrated that either the ALJ or the circuit court clearly erred by finding that petitioner retained control over the storage of ammonia at the Woodworth facility.

Petitioner additionally argues that partitioning responsibility makes little practical sense. According to petitioner, this means that both it and Woodworth would have to maintain data, over which petitioner has no control. However, respondent is not the entity who divided up the responsibilities. Rather, this division directly stems from the contract. More importantly, petitioner does have control over the material related to the storage tanks and attendant equipment that it was cited for not providing.

In summary, petitioner has not shown that the circuit court erred by affirming the portion of the ALJ's decision holding that petitioner could be cited as an employer for violations of PSM standards other than those in 29 CFR 1910.119(h) and that petitioner was an employer for purposes of applying 29 CFR 1910.119(d)(3)(i)(B) and 29 CFR 1910.119(o)(1) to this case.

IV. COMPETENCY OF THE EVIDENCE

Next, petitioner argues that the agency decision is not supported by competent evidence because the ALJ relied on hearsay statements in the field narrative, the inspection report, and the citations themselves. As the circuit court observed, however, petitioner did not identify any alleged hearsay statements in its discussion of this issue on appeal in the circuit court. For the

first time on appeal, petitioner now specifies that the alleged hearsay consisted of Woodworth's employees' statements in the field narrative and respondent's inspection report. Petitioner also asserts that citations are like a complaint and do not constitute evidence. Therefore, petitioner argues, the ALJ could not rely on the citations as a factual basis for his decision.

The Michigan Administrative Hearing Rules and the APA govern the conduct of administrative hearings. See Mich Admin Code, R 792.10101; MCL 408.1043. If an applicable rule does not exist, subject to statutory exceptions, the Michigan Court Rules and the APA apply. Mich Admin Code, R 792.10102(2) and (3).

Rule 792.10129 governs motions for summary disposition in administrative proceedings and provides, in pertinent part:

> (1) A party may make a motion for summary disposition of all or part of a proceeding. When an administrative law judge does not have final decision authority, he or she may issue a proposal for decision granting summary disposition on all or part of a proceeding if he or she determines that that any of the following exists:
>
> (a) There is no genuine issue of material fact. [Mich Admin Code, R 792.10129.]

The ALJ explained that petitioner's motion for summary disposition under Rule 792.10129 was "akin" to a motion brought under MCR 2.116(C)(10). Summary disposition is appropriate under MCR 2.116(C)(10) if "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." MCR 2.116(C)(10). "When considering such a motion, a trial court must consider all evidence submitted by the parties in the light most favorable to the party opposing the motion." *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152,

160; 934 NW2d 665 (2019). " 'A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.' " *Bennett v Russell*, 322 Mich App 638, 642; 913 NW2d 364 (2018) (citation omitted). "[A]ffidavits, depositions, admissions, or other documentary evidence may be submitted by a party to support or oppose the grounds asserted in the [MCR 2.116(C)(10)] motion." MCR 2.116(G)(2). In ruling on a motion for summary disposition under MCR 2.116(C)(10), the trial court may only consider substantively admissible evidence. *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999); MCR 2.116(G)(6). "However, although the evidence must be substantively admissible, it does not have to be in admissible form." *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 373; 775 NW2d 618 (2009).

With respect to evidence in administrative proceedings, Rule 792.10125 provides:

> (1) The Michigan rules of evidence, as applied in a civil case in circuit court shall be followed in all proceedings as far as practicable, but an administrative law judge may admit and give probative effect to evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs.
>
> (2) Irrelevant, immaterial, or unduly repetitious evidence may be excluded.
>
> (3) Effect shall be given to the rules of privilege recognized by law.
>
> (4) Objections to offers of evidence may be made and shall be noted in the record.
>
> (5) For the purpose of expediting a hearing, and when the interests of the parties will not be substantially prejudiced, the administrative law judge may require

> submission of all or part of the evidence in written form. [Mich Admin Code, R 792.10125.]

Further, MCL 24.275 provides:

> In a contested case the rules of evidence as applied in a nonjury civil case in circuit court shall be followed *as far as practicable, but an agency may admit and give probative effect to evidence of a type commonly relied upon by reasonably prudent men in the conduct of their affairs*. Irrelevant, immaterial or unduly repetitious evidence may be excluded. Effect shall be given to the rules of privilege recognized by law. Objections to offers of evidence may be made and shall be noted in the record. Subject to these requirements, an agency, for the purpose of expediting hearings and when the interests of the parties will not be substantially prejudiced thereby, may provide in a contested case or by rule for submission of all or part of the evidence in written form. [Emphasis added.]

First, the MIOSHA decisions that petitioner cites for the proposition that an ALJ cannot rely on hearsay evidence does not support its position. Rather, they stand for the proposition that an ALJ cannot rely "solely" on hearsay evidence. See *Bil Mar Foods v MIOSHA, Gen Indus Safety Div*, unpublished report of the administrative law judge, issued April 13, 2006 (Docket No. 2002-654), p 25. Petitioner does not argue that all the items on which the ALJ relied were inadmissible hearsay. Petitioner also fails to discuss MCL 24.275 or explain how, in the instant case, the ALJ was not allowed to "give probative effect to evidence of a type commonly relied upon by reasonably prudent men in the conduct of their affairs." With respect to the statements in the field narrative and inspection report, petitioner fails to explain why these documents and their contents constitute inadmissible hearsay. Although petitioner generally maintains that the employee statements were hearsay, petitioner fails

to identify any specific statements or articulate how exceptions to the hearsay rule do or do not apply. In addition, petitioner fails to discuss whether the admission of any "hearsay" evidence was harmless, or what facts could not have been proven without this evidence. Under these circumstances, we would be justified in treating petitioner's hearsay argument as abandoned. A party abandons an issue by failing to address the merits of his or her assertions. *Woods v SLB Prop Mgt, LLC*, 277 Mich App 622, 626-627; 750 NW2d 228, (2008). See also *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959) ("It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position."). Nonetheless, petitioner's arguments do not appear to have any merit.

" 'Hearsay' is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Hearsay is generally inadmissible unless it falls within a listed exception. MRE 802. A statement that is not offered to prove the truth of the matter asserted is not hearsay. *Guerrero v Smith*, 280 Mich App 647, 660; 761 NW2d 723 (2008). There appear to be several exceptions that could apply in this case. For example, MRE 803(6), which applies to records of regularly conducted activity, provides that the following items are "not excluded by the hearsay rule":

> A memorandum, report, record, or data compilation, in any form, of acts, transactions, occurrences, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with

> knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with a rule promulgated by the supreme court or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Respondent maintains that the field narrative was the product of an allegedly routine inspection, which petitioner does not dispute. Further, the employee statements in the field narrative could also be exempted from the definition of hearsay as statements by a party opponent. Specifically, MRE 801(d)(2) provides in part that a statement is not hearsay if it is

> offered against a party and is (A) the party's own statement, in either an individual or a representative capacity, . . . or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) *a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship*[.] [Emphasis added.]

Additionally, MRE 701 permits lay witnesses to offer opinion testimony based on their perceptions. Therefore, had respondent been obliged to do so, it could have established the proper foundation to present the contents of the field narrative and investigation report through the testimony of the respective authors.

Although the trial court may only consider substantively admissible evidence, a party does "not have to lay

the foundation for the admission" for evidence submitted in support of or in opposition to a motion for summary disposition under MCR 2.116(C)(10) "as long as there [is] a plausible basis for the admission" of the evidence. *Barnard Mfg Co, Inc*, 285 Mich App at 373. Applying those same principles to the instant case, petitioner has not established that the ALJ relied on inadmissible hearsay evidence or that the trial court erred by affirming the ALJ's decision on the basis of the documentary evidence submitted in support of or in opposition to petitioner's motion for summary disposition under Rule 792.10129. Additionally, it is worth noting that petitioner's responsibilities relative to the storage equipment at issue were a matter of contract, and petitioner's objections to the issuance of the citations were primarily based on its interpretation of 29 CFR 1910.119. Issues involving the interpretation of contracts and administrative regulations both present questions of law. See *Lueck v Lueck*, 328 Mich App 399, 404; 937 NW2d 729 (2019) ("The interpretation of a contract is a question of law reviewed de novo on appeal.") (cleaned up); *In re Petition of Attorney General for Investigative Subpoenas*, 274 Mich App at 698 (stating that the interpretation of administrative regulations is a question of law reviewed de novo). As such, petitioner's challenges were primarily legal rather than factual. With respect to petitioner's argument that the ALJ improperly "relied" on the citations themselves, petitioner again presents no further explanation of this claim. Given petitioner's lack of argument, it has not demonstrated any entitlement to relief with respect to this issue.

In summary, petitioner's claim that the ALJ erred by relying on alleged hearsay evidence is not supported by its cited authority. Petitioner has also not adequately demonstrated that the challenged statements were not

substantively admissible and either actually qualify as hearsay or, if they do, would not be subject to the hearsay exception in MRE 803(6). Accordingly, petitioner has not shown that the ALJ failed to apply correct legal principles or misapprehended or grossly misapplied the substantial-evidence test to the agency's factual findings.

V. DUE PROCESS

Petitioner argues that when the ALJ denied its motion for summary disposition, the action should have proceeded to a full hearing on the merits and that its right to due process was violated when a hearing was not held. We disagree.

In support of its position, petitioner relies on Mich Admin Code, R 792.10129(3), which provides, "If the motion for summary disposition is denied, or if the decision on the motion does not dispose of the entire action, then the action shall proceed to hearing."

Petitioner asserts that the ALJ sua sponte affirmed Citation 1, Item 1 and Citation 2, Item 2. Although the ALJ's opinion states that it denied petitioner's motion for summary disposition in part, it also essentially determined that respondent was entitled to judgment in its favor with respect to Citation 1, Item 1 and Citation 2, Item 2 and "affirmed" the $2,800 penalty. Further, respondent specifically requested that the case be dismissed under MCR 2.116(I)(2) if petitioner's motion for summary disposition was denied.

Nothing in Rule 792.10129 specifically prohibits an ALJ who denies a party's motion for summary disposition from rendering judgment in favor of an opposing party when it appears that the opposing party is entitled to judgment in its favor. Instead, the rule appears to identify the next step in the process when a

motion is denied and the court does not otherwise dispose of the action. Further, MCR 2.116(I)(2) provides that when deciding a motion for summary disposition, "[i]f it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party." We agree with the trial court. It would be an absurd result to adopt petitioner's position that when a motion for summary disposition is denied, the action must always proceed to a full hearing, even if the ALJ determines that the opposing party is entitled to judgment. Therefore, we conclude that the trial court did not misapply legal principles in determining that "cross-relief [was] consistent with summary disposition practice" under MCR 2.116(I)(2) in this case.

Petitioner cites *Al-Maliki v LaGrant*, 286 Mich App 483; 781 NW2d 853 (2009), in support of its due-process argument. The plaintiff in *Al-Maliki* was injured when her vehicle was struck from behind by the defendant's vehicle. *Id*. at 484. The defendant sought summary disposition on the ground that the plaintiff had not shown that she sustained a serious impairment of a body function. *Id*. At the motion hearing, the circuit court sua sponte raised the issue of causation and granted summary disposition to the defendant on that ground. *Id*. This Court found that this violated the plaintiff's right to due process, explaining:

> We are mindful of the fact that the trial court has the authority to grant summary disposition sua sponte under MCR 2.116(I)(1). However, the trial court may not do so in contravention of a party's due process rights. When the trial court decided to bring up the issue of causation at the motion hearing, the trial court then had the responsibility to provide plaintiff the opportunity to be heard on the issue. [*Id*. at 489 (citation omitted).]

Unlike in *Al-Maliki*, the ALJ in this case did not raise an alternative ground and then grant summary disposition on that basis. Rather, the ALJ granted summary disposition on the issue before it, i.e., whether petitioner qualified as an employer responsible for complying with the PSM standards.

Petitioner also cites *Lamkin v Hamburg Twp Bd of Trustees*, 318 Mich App 546; 899 NW2d 408 (2017). In that case, the plaintiff filed a complaint against the defendant for failing to pursue a zoning-violation action against one of the plaintiff's neighbors. *Id*. at 548. The circuit court dismissed the complaint sua sponte before it was even served. *Id*. at 549. The court cited MCR 2.116(C)(5) (lack of legal capacity) and MCR 2.116(I)(1). *Id*. This Court held that the plaintiff's due-process rights were violated. *Id*. at 550-551. The Court explained that "the circuit court's failure to notify [the plaintiff] that it was contemplating summary disposition of her claims constitutes a fatal procedural flaw necessitating reversal." *Id*. This case is distinguishable from *Lamkin*. In the instant case, petitioner had notice that summary disposition in favor of respondent was before the ALJ because respondent requested it.

Also, although petitioner asserts that it has defenses that it did not have an opportunity to present and argue, petitioner identifies only one possible defense that it says it could have raised. Specifically, petitioner asserts that it "intends to show at the hearing that it is infeasible for it to comply with 29 CFR 1910.119(o)(1) and 29 CFR 1910.119(d)(3)(i)(B)." However, that defense is based on petitioner's arguments concerning its alleged lack of responsibilities relative to the storage equipment at issue. As explained earlier, those arguments are refuted by the express terms of the contract between petitioner and Woodworth.

For these reasons, we hold that petitioner has not shown a due-process violation or that it is entitled to relief.

Affirmed.

SAWYER, P.J., and STEPHENS, J., concurred with RICK, J.

WEST ST JOSEPH PROPERTY, LLC v DELTA TOWNSHIP

Docket No. 354205. Submitted July 7, 2021, at Grand Rapids. Decided August 26, 2021, at 9:05 a.m. Leave to appeal denied 509 Mich 1072 (2022).

West St. Joseph Property, LLC, filed a petition in the Michigan Tax Tribunal against Delta Township, requesting that the tribunal reduce to zero the taxable value of property owned by petitioner in the township. In February 2018, petitioner had entered into an agreement with the state of Michigan in which petitioner leased a building on its property to the state; petitioner made changes to the property to conform with the state's use of the building. Under the terms of the lease, the state agreed to pay petitioner a specific amount of money over a 20-year period, and at the end of the term, the state had the option to purchase the property for $1. Sections of the lease marked "Rent adjustment for real property taxes," "Real property tax exemption," and "Real property tax assessment appeal" were marked "deleted, not applicable," and the lease provided terms under which either party could cancel the lease. Other sections that appeared in the lease's table of contents—specifically, "Transfer of title free and clear" and "Real Property Tax Adjustment"—were omitted from the body of the lease. In September 2018, petitioner filed an application with the township's assessor, seeking a property-tax exemption for the subject property under MCL 211.7*l* of the General Property Tax Act (GPTA), MCL 211.1 *et seq*.; petitioner included with the application a deed conveying legal title to the property to petitioner. In December 2018, the township's assessor denied the exemption request for the property. Thereafter, petitioner filed the instant action in the tribunal, arguing that, although the deed to the property was in its name, the lease constituted a transfer of ownership to the state under MCL 211.27a(6)(g)—making the state the equitable owner of the property—and that the property was, therefore, exempt from property taxes under MCL 211.7*l*. Respondent argued that the lease did not alter the ownership status of the property and that MCL 211.27a was inapplicable to MCL 211.7*l*. The parties filed cross-motions for summary disposition, and each party also filed a response to the other's motion. Petitioner moved for leave to file a reply to respondent's response

brief, arguing that respondent had raised new arguments in that brief. Following a hearing, the administrative law judge (ALJ) denied petitioner's motion for summary disposition, granted respondent's motion for summary disposition, and denied petitioner's motion to file a reply brief, determining that the property was not entitled to an exemption under MCL 211.7*l* for the 2019 tax year. The ALJ reasoned that the term "belonging to," as used in MCL 211.7*l*, equated with ownership by way of legal title and that the property did not, therefore, "belong to" the state. In two separate orders, the tribunal denied petitioner's motion for reconsideration of the denial of its motion for leave to file a reply brief and affirmed the ALJ's grant of summary disposition in favor of respondent. In so doing, the tribunal concluded that the property did not belong to the state and that petitioner was therefore not entitled to the property-tax exemption. Petitioner appealed.

The Court of Appeals *held*:

1. MCL 211.27a(6)(g) provides that, as used in the GPTA, the phrase "transfer of ownership" means the conveyance of title to or a present interest in property, including the beneficial use of the property, the value of which is substantially equal to the value of the fee interest. Transfer of ownership of property includes, but is not limited to, a conveyance by lease if the total duration of the lease, including the initial term and all options for renewal, is more than 35 years or the lease grants the lessee a bargain purchase option. The phrase "transfer of ownership" in MCL 211.27a(6)(g) is to be applied when that phrase itself is used in the GPTA. MCL 211.7*l* provides that public property *belonging to the state*, except licensed homestead lands, part-paid lands held under certificates, and lands purchased at tax sales, and still held by the state is exempt from taxation under the act. The exemption does not apply to lands acquired after July 19, 1966, unless a deed or other memorandum of conveyance is recorded in the county where the lands are located before December 31 of the year of acquisition, or the local assessing officer is notified by registered mail of the acquisition before December 31 of the year of acquisition. Because the phrase "transfer of ownership" does not appear in MCL 211.7*l*, MCL 211.27(6)(g) is not applicable in interpreting MCL 211.7*l*. The GPTA does not define the phrase "belonging to the state" as used in MCL 211.7*l*. Statutory provisions must be read in the context of the entire act, giving every word its plain and ordinary meaning as well its placement and purpose in the statutory scheme. Further, words are generally intended to connote different meanings when the Legislature uses different terms within a statute. Given the dictionary definition of "belonging to," the MCL 211.7*l* exemption

applies to property *owned by* the state—i.e., property to which the state has legal title—not to situations in which the state has equitable ownership through a lease agreement; had the Legislature intended the phrase "belonging to" to include broader situations, like leasehold agreements or installment-purchase agreements, it could have used specific language to do so as it has in other sections of the GPTA. Further, under MCL 211.7*l*, a present transfer of legal ownership to the state, along with a recorded conveyance (or other prescribed notice provided to the taxing authority), is required for the exemption to apply.

2. MCL 18.1222 provides that property acquired for the state or a state agency through an installment lease agreement is public property and shall be considered exempt for purposes of the GPTA if the state as lessee under the installment lease agreement is required to pay any taxes or reimburse the lessor for any payments the lessor has made. Thus, property may be deemed "public property" that is exempt under the GPTA, without regard to whether it "belongs to" the State, if certain conditions are met. Specifically, the provision is satisfied and property may be deemed to be "public property" that is exempt from taxation under the GPTA if the state, as lessee under an installment lease agreement, is required either to pay any taxes or to reimburse the lessor for any payments the lessor has made. The MCL 18.1222 exemption would be superfluous if the MCL 211.7*l* exemption encompassed equitable ownership via a lease agreement.

3. In this case, the property-tax exemption allowed under MCL 211.7*l* did not apply to petitioner's property because the state did not own the property but, rather, leased it from petitioner. Further, petitioner did not file a deed or memorandum of conveyance or inform the local assessing officer by registered mail of any acquisition of the property by the state, which is also required to qualify for the MCL 221.7*l* exemption. The property was also not exempt from taxation under MCL 18.1222 because the lease did not require the state to pay any taxes on the property and did not require the state to reimburse petitioner for any tax payments. Accordingly, the tribunal correctly granted respondent's motion for summary disposition and dismissed petitioner's corresponding motion because petitioner failed to establish that the subject property was public property belonging to the state for purposes of MCL 211.7*l*.

4. Respondent did not raise new arguments in its brief in response to petitioner's motion for summary disposition; therefore,

the tribunal did not abuse its discretion by denying petitioner's motion for leave to file a reply brief or by denying petitioner's motion for reconsideration.

Affirmed.

TAXATION — TAX EXEMPTIONS — WORDS AND PHRASES — "BELONGING TO THE STATE."

MCL 211.7*l* provides that public property belonging to the state, except licensed homestead lands, part-paid lands held under certificates, and lands purchased at tax sales, and still held by the state is exempt from taxation under the General Property Tax Act; the exemption does not apply to lands acquired after July 19, 1966, unless a deed or other memorandum of conveyance is recorded in the county where the lands are located before December 31 of the year of acquisition, or the local assessing officer is notified by registered mail of the acquisition before December 31 of the year of acquisition; the exemption applies to property owned by the state, not to situations in which the state has equitable ownership through a lease agreement; a present transfer of legal ownership to the state, along with a recorded conveyance (or other prescribed notice provided to the taxing authority), is also required for the exemption to apply (MCL 211.1 *et seq*.).

Honigman LLP (by *Stewart L. Mandell* and *Daniel L. Stanley*) for West St. Joseph Property, LLC.

Thrun Law Firm, PC (by *Gordon W. VanWieren, Jr.*, *Michael D. Gresens*, and *Philip G. Clark*) for Delta Township.

Amici Curiae:

Bauckham, Sparks, Thall, Seeber & Kaufman, PC (by *Robert E. Thall*) for Michigan Townships Association and Michigan Municipal League.

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

BOONSTRA, J. Petitioner appeals by right the July 6, 2020 final order and judgment of the Michigan Tax Tribunal (the Tribunal) denying petitioner's motion for

summary disposition and granting respondent's motion for summary disposition. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

In October 2019, the parties stipulated to the following undisputed facts underlying this case:

> 1. On December 31, 2018, the subject property (the "Property"), whose taxation is at issue in this case, had an address of 4125 W. St. Joseph, Delta Township, Eaton County, Michigan, Tax Parcel Number 23-040-061-500-520-00, and an office building with 33,000 usable square feet. The Property's 2019 state equalized value is $1,208,700 and its 2019 taxable value is $1,208,700.
>
> 2. The Property is the subject of an agreement (the "Agreement") between Petitioner West St. Joseph Property LLC and the State of Michigan (the "State"). Petitioner executed the Agreement on February 7, 2018, and the State executed the Agreement on March 7 and March 16, 2018. The Agreement is attached to the Stipulation as Exhibit A.
>
> 3. On September 25, 2018, Petitioner sought property tax exemption for the Property by filing an application (the "Application") with Respondent's Assessor. The Application is attached hereto as Exhibit B. Included as part of the Application were a deed conveying legal title to Petitioner and the Agreement.
>
> 4. On or about November 14, 2018, representatives of Petitioner met with Respondent's representatives, including Respondent's Assessor, to discuss the Application.
>
> 5. On December 13, 2018, Petitioner received Respondent's notice that Respondent's Assessor had denied Petitioner's exemption request for the Property.
>
> 6. The parties agree that valuation of the Property is not at issue and the only issue in this case is whether the property at issue is exempt or taxable under the General Property Tax Act (the "Act"). The Tribunal should resolve

this case by deciding whether on December 31, 2018, the Property was exempt.

7. Among Petitioner's contentions are that: (i) on December 31, 2018, the Property was "(p)ublic property belonging to the state," which would make the Property exempt under Act section 7l ("section 7l"), MCL 211.7l, and (ii) the Agreement constituted a transfer of ownership under MCL 211.27a(6)(g). Respondent contends that the Property is taxable because Petitioner, not the State, held legal title to the Property on December 31, 2018.

8. No specific Tribunal rule exists for summary disposition motions. Therefore, under Tribunal Rule 215, R 792.10215, MCR 2.116(C)(10) applies to this case.

The 2018 lease agreement (the lease) provides that the state of Michigan (the State), as lessee, would pay petitioner, as lessor, a total of $10,815,888 over a 20-year period from 2018 to 2038; then, in 2038, the State would have the option to purchase the property at issue (the property) for $1. Section 2.12 of the lease provides that "[t]he Lessor or Lessor's agent may enter the Leased premises with reasonable advance notice for the purpose of conducting repairs, preventive maintenance, or providing replacements, as requested under Article III." Sections 5.8 (regarding "Rent adjustment for real property taxes"), 5.9 (regarding "Real property tax exemptions"), and 5.10 (regarding "Real property tax assessment appeals") were marked "deleted, not applicable." Similarly, despite appearing in the lease's table of contents, §§ 6.13 (regarding "Transfer of title free and clear") and 6.18 (regarding "Real Property Tax Adjustment") were omitted from the body of the lease. On petitioner's application for the property-tax exemption, petitioner listed itself, not the State, as the property's owner. Sections 11.1 to 11.4 of the lease provided the terms under which either party could cancel the lease. Section 6.3 refers to "if" the

State were to exercise its option to purchase, indicating that the State was not obligated to exercise that option.

On May 6, 2019, petitioner filed a petition in the Tribunal, requesting that the Tribunal reduce the property's taxable value to zero. Petitioner argued that the lease constituted a transfer of ownership to the State under MCL 211.27a(6)(g) and that the property was therefore exempt from property taxes under MCL 211.7*l*. The parties stipulated a proposed scheduling order requiring that dispositive motions, briefs in support, and other supporting materials be filed on or before December 6, 2019, and that proposed findings of fact and conclusions of law be filed on or before December 20, 2019. The Tribunal entered an order stating, in relevant part, that the underlying issue in the case was a question of law and directing the parties to file dispositive motions and briefs to resolve the issue, to be served on the other party by December 20, 2019. The order permitted each party to file and serve a response brief by January 13, 2020. It did not provide for the filing of reply briefs.

On December 19, 2019, the parties filed cross-motions for summary disposition under MCR 2.116(C)(10). Petitioner argued that the lease constituted a transfer of ownership under MCL 211.27a. It further argued that the State alone occupied and used the property and that because the lease had a $1 purchase option, the property was public property belonging to the State and was exempt from taxation under MCL 211.7*l*. Petitioner accompanied its motion with the affidavit of Ronnie J. Boji, an owner of petitioner and the president of Boji Group, a real estate development and management company. Boji stated in his affidavit that petitioner had made substantial changes to the property to satisfy the State's needs and

that since August 8, 2018, the State alone had occupied the property and used it for state-government purposes. Respondent argued that "transfer of ownership" was a term of art defined by MCL 211.27a that did not expressly apply to leases or to the § 7*l* property-tax exemption. Respondent also argued that a lease did not change the ownership status of the property and that § 27a was inapplicable to § 7*l*.

The parties each filed a response to the other's motion on January 13, 2019. On January 22, 2020, petitioner moved for leave to file a reply to respondent's response brief, arguing that respondent had raised new arguments to which petitioner should be permitted to respond.

On March 17, 2020, the administrative law judge (ALJ) presiding over the case issued a proposed opinion and judgment, denying petitioner's motion for summary disposition, granting respondent's motion for summary disposition, denying petitioner's motion for leave to file a reply brief, and determining that the property was not entitled to an exemption under MCL 211.7*l* for the 2019 tax year. After consulting dictionary definitions, the ALJ concluded that the term "belonging to," as used in MCL 211.7*l*, equated with ownership by way of legal title and that the property therefore did not "belong to" the State.

In April 2020, petitioner filed in the Tribunal a motion for reconsideration of the denial of its motion for leave to file a reply brief. The Tribunal denied the motion.

In July 2020, the Tribunal entered a final opinion and judgment denying petitioner's motion for summary disposition and granting respondent's motion for summary disposition. The Tribunal adopted the ALJ's construction of the phrase "belonging to" in MCL 211.7*l*

and concluded that the property did not belong to the State and that petitioner therefore was not entitled to a property-tax exemption for the 2019 tax year.

This appeal followed.

II. SUMMARY DISPOSITION

Petitioner argues that the Tribunal erred by granting respondent's motion for summary disposition and denying petitioner's motion. We disagree.

> Absent a claim of fraud, this Court reviews decisions from the Tax Tribunal for the misapplication of law or the adoption of a wrong legal principle. We deem the tribunal's factual findings conclusive if they are supported by competent, material, and substantial evidence on the whole record. This Court reviews de novo the tribunal's interpretation of a tax statute. . . . Though this Court will generally defer to the Tax Tribunal's interpretation of a statute that it is delegated to administer, that deference will not extend to cases in which the tribunal makes a legal error. Thus, agency interpretations are entitled to respectful consideration but cannot control in the face of contradictory statutory text. [*SBC Health Midwest, Inc v Kentwood*, 500 Mich 65, 70-71; 894 NW2d 535 (2017) (quotation marks and citations omitted).]

We review de novo a trial court's grant or denial of summary disposition. See *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 417; 733 NW2d 755 (2007). Tax-exemption statutes are to be strictly construed in favor of the taxing authority. See *Mich United Conservation Clubs v Lansing Twp*, 423 Mich 661, 664; 378 NW2d 737 (1985).

The General Property Tax Act (GPTA), MCL 211.1 *et seq*., governs real property subject to ad valorem taxation. At issue in this case is the interpretation of MCL 211.7*l*, which provides:

> Public property belonging to the state, except licensed homestead lands, part-paid lands held under certificates, and lands purchased at tax sales, and still held by the state is exempt from taxation under this act. This exemption shall not apply to lands acquired after July 19, 1966, unless a deed or other memorandum of conveyance is recorded in the county where the lands are located before December 31 of the year of acquisition, or the local assessing officer is notified by registered mail of the acquisition before December 31 of the year of acquisition.

"If the language of [a] statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written." *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; alteration in original). "Statutory provisions must be read in the context of the entire act, giving every word its plain and ordinary meaning." *Driver v Naini*, 490 Mich 239, 247; 802 NW2d 311 (2011). "This Court must consider both the plain meaning of the critical word or phrase as well as its placement and purpose in the statutory scheme." *US Fidelity*, 484 Mich at 13 (quotation marks and citations omitted). "When the Legislature uses different words, the words are generally intended to connote different meanings. Simply put, the use of different terms within similar statutes generally implies that different meanings were intended. If the Legislature had intended the same meaning in both statutory provisions, it would have used the same word." *Id*. at 14 (quotation marks and citations omitted).

Petitioner argues that the property qualified for the exemption because the lease constituted a "transfer of ownership" under the GPTA, because the State was the "equitable" owner of the property under the lease, and

because the State possessed and occupied the property and used it for a public purpose. We disagree.

First, MCL 18.1222 provides that

> [p]roperty acquired for the state or a state agency through an installment lease agreement *is public property and shall be considered exempt for purposes of the general property tax act*, Act No. 206 of the Public Acts of 1893, being sections 211.1 to 211.157 of the Michigan Compiled Laws, *if the state as lessee under the installment lease agreement is required to pay any taxes or reimburse the lessor for any payments the lessor has made*. [Emphasis added.]

Under the plain language of MCL 18.1222, property thus may be deemed "public property" that is exempt under the GPTA, without regard to whether it "belongs to" the State, if certain conditions are met. Specifically, the provision is satisfied "if the state as lessee under [an] installment lease agreement" is required either to "pay any taxes" or to "reimburse the lessor for any payments the lessor has made." Neither of those conditions is satisfied by the lease in this case. The lease neither requires the State to pay any taxes on the property nor requires that the State reimburse petitioner for any tax payments. Consequently, the property is not exempt from taxation by virtue of MCL 18.1222.

Although petitioner argues that MCL 211.7*l* and MCL 18.1222 are "alternative paths to tax exemption," MCL 18.1222 expressly states that it applies to the entirety of the GPTA, including MCL 211.7*l*. This means that because MCL 18.1222 does not itself provide a path to exemption, petitioner must still satisfy all requirements for exemption under MCL 211.7*l*. Therefore, even if the property were deemed to be public property, petitioner must still demonstrate that it constitutes property "belonging to" the State.

Petitioner argues that the property "belongs to" the State by virtue of the lease because the lease constituted a "transfer of ownership" under MCL 211.27a(6)(g). We disagree. The GPTA defines "transfer of ownership" in MCL 211.27a(6) as follows:

> *As used in this act, "transfer of ownership" means* the conveyance of title to or a present interest in property, including the beneficial use of the property, the value of which is substantially equal to the value of the fee interest. Transfer of ownership of property includes, but is not limited to, the following:
>
> * * *
>
> (g) A conveyance by lease if the total duration of the lease, including the initial term and all options for renewal, is more than 35 years or the lease grants the lessee a bargain purchase option. As used in this subdivision, "bargain purchase option" means the right to purchase the property at the termination of the lease for not more than 80% of the property's projected true cash value at the termination of the lease. After December 31, 1994, the taxable value of property conveyed by a lease with a total duration of more than 35 years or with a bargain purchase option shall be adjusted under subsection (3) for the calendar year following the year in which the lease is entered into. This subdivision does not apply to personal property except buildings described in section 14(6) and personal property described in section 8(h), (i), and (j). This subdivision does not apply to that portion of the property not subject to the leasehold interest conveyed. [Emphasis added.]

MCL 211.27a(6)(g) thus provides a definition of the phrase "transfer of ownership" that is applicable when that phrase is "*used in this act*." That is, the unambiguous meaning of MCL 211.27a(6)(g), see *US Fidelity*, 484 Mich at 13, is simply that its definition of the phrase "transfer of ownership" is to be applied when *that phrase itself* is used in the GPTA. In other words,

MCL 211.27a(6)(g), as a definitional term, only applies when the phrase "transfer of ownership" is used in the GPTA, as it indeed is used in several GPTA exemptions. See, e.g., MCL 211.7o(8)(c)(*ii*), MCL 211.7cc(3)(e), (5), and (17), and MCL 211.7kk(2) and (7)(g). The term does not, however, appear in MCL 211.7*l*; accordingly, MCL 211.27a(6)(g) is not dispositive of our analysis of that exemption. Even supposing that the evidence might conceivably show that a "transfer of ownership" under MCL 211.27a(6)(g) was in progress, there was no evidence presented that any such transfer had been completed; accordingly petitioner would remain obligated to produce evidence establishing that the property actually and presently "belong[s] to" the State for purposes of MCL 211.7*l*.

The phrase "belonging to the state" in MCL 211.7*l* is not defined in the GPTA or by prior caselaw. The Michigan Supreme Court has recognized that, in order to accord undefined statutory terms their plain and ordinary meanings, "[a] court may consult dictionary definitions when terms are not expressly defined by a statute." *Oakland Co Bd of Co Rd Comm'rs v Mich Prop & Cas Guaranty Ass'n*, 456 Mich 590, 604; 575 NW2d 751 (1998).[1] The Tribunal consulted a dictionary in interpreting the statutory language at issue and concluded that "the phrase 'belonging to' in MCL 211.7*l* was intended to indicate that property 'owned' by the State was entitled to the exemption" and that the exemption did not apply to the property in this case. We find no error of law in the Tribunal's interpretation.

[1] Petitioner argues that the Tribunal should not have consulted a dictionary in its analysis because the phrase is not defined in the statute, there is no universal definition of the phrase, and the dictionary definitions did not contemplate the context of the entire statute. However, this ambiguity is precisely why the Tribunal's consultation of a dictionary was appropriate. *Oakland Co Bd of Co Rd Comm'rs*, 456 Mich at 604.

SBC Health Midwest, Inc, 500 Mich at 71. Had the Legislature intended the phrase "belonging to" to include broader situations, such as leasehold agreements or installment-purchase contracts, the Legislature could have used specific language to do so. For example, the Legislature stated, in part, in MCL 211.7m, "Property *owned by, or being acquired pursuant to, an installment purchase agreement* by a county, township, city, village, or school district used for public purposes . . . is exempt from taxation under this act." (Emphasis added.) Similarly, the Legislature stated in MCL 211.7z(1), "Property which is *leased, loaned, or otherwise made available* to a school district, community college, or other state supported educational institution . . . is exempt from taxation under this act." (Emphasis added.) "The omission of a provision in one part of a statute that is included in another should be construed as intentional . . . ." *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 103; 693 NW2d 170 (2005).

Moreover, petitioner's proposed definition of "belonging to the state" as encompassing equitable ownership via a lease agreement would render MCL 18.1222 superfluous. That is, if equitable ownership via a lease agreement is sufficient to satisfy the "belonging to" requirement of MCL 211.7*l*—even if the lease does not require that the State pay taxes or reimburse the lessor for its tax payment—then the conditions set forth in MCL 18.1222 would have no meaning. We avoid statutory construction that would render any part of the statute surplusage or nugatory. See *Apsey v Mem Hosp*, 477 Mich 120, 127; 730 NW2d 695 (2007). We additionally note that even if we were to accept that the phrase "belonging to" encompassed equitable ownership, the facts that the purchase option in the lease is not binding, that the State is not obligated to pay taxes, and

that petitioner otherwise held itself out as the owner tend to show that the State was not an equitable owner.

Further, MCL 211.7*l* also provides that "[t]his exemption shall not apply to lands acquired after July 19, 1966, *unless a deed or other memorandum of conveyance is recorded* in the county where the lands are located before December 31 of the year of acquisition, or the local assessing officer is notified by registered mail of the acquisition before December 31 of the year of acquisition." MCL 211.7*l* (emphasis added). This language suggests that a *present* transfer of legal ownership to the State, along with a recorded conveyance (or other prescribed notice provided to the taxing authority), is required in order for the exemption to apply. It is undisputed that petitioner did not file such a deed or memorandum of conveyance or inform the local assessing officer by registered mail of any acquisition of the property by the State. Strictly construed in favor of the taxing authority, *Mich United Conservation Clubs*, 423 Mich at 664-665, the property does not meet all of the requirements of MCL 211.7*l*, and petitioner is therefore not entitled to the exemption.[2]

The Tribunal correctly granted respondent's motion for summary disposition and dismissed petitioner's motion because petitioner did not establish that the property was "public property belonging to the state" under MCL 211.7*l*. See *Washington*, 478 Mich at 417.

III. DENIAL OF PETITIONER'S MOTIONS FOR LEAVE TO FILE A REPLY BRIEF AND FOR RECONSIDERATION

Petitioner argues that the Tribunal erred by denying petitioner's motion for leave to file a reply brief and that

[2] We note that, if the State had been made responsible for the payment or reimbursement of property taxes under the lease, the property would have qualified for exemption under MCL 18.1222.

it further erred by denying its motion for reconsideration to correct this supposed error. We disagree. We review for an abuse of discretion a trial court's decision whether to allow a brief that is not in compliance with the court's scheduling order. See *Kemerko Clawson, LLC* v *RxIV Inc*, 269 Mich App 347, 349; 711 NW2d 801 (2005) (noting that a trial court has discretion under the court rules to set deadlines through scheduling orders and to decline to consider motions filed outside of those deadlines). We also review for an abuse of discretion a trial court's decision regarding a motion for reconsideration. *Sherry v E Suburban Football League*, 292 Mich App 23, 31; 807 NW2d 859 (2011). "An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes." *Id*. (quotation marks and citation omitted).

Petitioner argues that respondent raised new arguments in its brief filed in response to petitioner's motion for summary disposition and that petitioner therefore should have been permitted to respond to those arguments by way of a reply brief. We disagree with petitioner's characterization of respondent's brief as raising new arguments. To the contrary, it is clear from the language of respondent's brief that respondent was simply addressing petitioner's arguments with respect to cases that it had cited in its motion for summary disposition, in which petitioner argued that the other cited Tribunal cases were dispositive notwithstanding certain factual differences. In its response brief, respondent responded to petitioner's arguments by citing to specific provisions of the lease as distinguishing this case from the other Tribunal cases cited by petitioner. This did not constitute a new argument requiring that the Tribunal afford petitioner a further opportunity to file a reply brief. Accordingly, the Tribunal did not abuse its discretion by denying

petitioner's motion for leave to file a reply brief or by denying petitioner's motion for reconsideration. *Frischman v Robinson*, 363 Mich 624, 628-629; 110 NW2d 741 (1961); *Sherry*, 292 Mich App at 31.

Affirmed.

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

VENESKEY v SULIER

Docket No. 355471. Submitted August 4, 2021, at Grand Rapids. Decided August 26, 2021, at 9:10 a.m. Leave to appeal denied 508 Mich 1001 (2021).

Tina and James Veneskey, the maternal grandparents of minor child, AS, filed a petition for custody of the child in the Delta Circuit Court, Family Division, naming Michael K. Sulier defendant. AS had been living in North Carolina with her mother, her stepfather, and a half-sibling in a home owned by plaintiffs before her mother unexpectedly died on May 10, 2020. On May 18, plaintiffs removed AS from North Carolina to Michigan and thereafter filed a petition for temporary guardianship in the Delta County Probate Court and were assigned as AS's temporary guardians on an emergency basis. Plaintiffs did not contact or notify defendant, who resided in South Carolina and claimed to be AS's biological father, before taking AS to Michigan. Defendant filed a competing petition for custody in North Carolina and moved for summary disposition in the Delta Circuit Court, alleging that the trial court lacked subject-matter jurisdiction under the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA), MCL 722.1101 *et seq*. Plaintiffs contended that North Carolina had no basis for jurisdiction under the UCCJEA, because there was no evidence of a significant connection between defendant and North Carolina, and that they should be given a permanent guardianship, because defendant abandoned AS and their temporary guardianship constituted an initial determination of custody that gave the Delta Circuit Court continuing and exclusive jurisdiction over the child custody determination. The Delta Circuit Court, Perry R. Lund, J., concluded that North Carolina, not Michigan, was the home state of AS, that Michigan was an inconvenient forum to determine the child's custody, and that the Michigan court lacked subject-matter jurisdiction. After noting that the North Carolina court would accept jurisdiction over AS and determine her custody, the Delta Circuit Court granted defendant's motion for summary disposition and ordered that the temporary guardianship previously determined by the Delta County Probate Court would remain in place until further order of the North Carolina court. Plaintiffs appealed.

The Court of Appeals *held*:

1. The UCCJEA prescribes the powers and duties of the court in a child custody proceeding involving Michigan and a proceeding or party outside Michigan and requires that a child's initial custody determination take place in the child's home state—unless the home state declines to exercise home-state jurisdiction because another state would be a more appropriate forum. MCL 722.1201(1)(a) provides that a court can exercise jurisdiction when Michigan is the child's home state or was the home state within six months of the commencement of the proceedings. Under MCL 722.1102(g), " 'Home state' means the state in which a child lived with a parent or a person acting as a parent for at least 6 consecutive months immediately before the commencement of a child-custody proceeding." The phrase "immediately before the commencement of a child-custody proceeding" can encompass a gap of several days, and an individual who removes a minor child from the home state should not obtain a benefit between the removal date and the date of filing a custody petition in Michigan by claiming that this period destroyed the prior occupancy period and relationship to the home state. In this case, it was undisputed that AS lived in North Carolina with her family for six months preceding her mother's death on May 10, 2020. She was removed from North Carolina on May 18, 2020, and plaintiffs filed their petition for guardianship on May 29, 2020. Any gap in time between the date AS was removed from North Carolina and the date plaintiffs filed in Michigan to secure guardianship and custody did not render Michigan AS's home state for purposes of plaintiffs' and defendant's claims for custody. North Carolina was the child's home state under the UCCJEA.

2. Even if North Carolina was not AS's home state under MCL 722.1202(1)(a), the Delta Circuit Court did not abuse its discretion by determining that Michigan was not a convenient forum for determining custody under MCL 722.1207, given the length of time the child resided outside Michigan and the North Carolina court's familiarity with the case. In fact, plaintiffs did not actually contest the Delta Circuit Court's findings but instead incorrectly claimed that North Carolina could not obtain jurisdiction under the UCCJEA. Because the Delta Circuit Court's findings under MCL 722.1207 were uncontested, reversal of the court's jurisdictional order under MCL 722.1201(1) was not warranted.

3. Plaintiffs also argued that they were entitled to permanent guardianship, but plaintiffs could not be awarded permanent guardianship in an appeal of circuit court custody proceeding

when the issue of permanent guardianship was not reached in the probate court and the parties had stipulated to an adjournment of the guardianship proceedings. Moreover, an award of temporary guardianship under MCL 722.1204, a provision for temporary emergency jurisdiction, does not provide a ground for assumption of jurisdiction over the custody issue in Michigan. Even if Michigan had continuing, exclusive jurisdiction, it could decline to exercise it. Plaintiffs' argument that MCL 722.1202 somehow mandated that the Michigan court retain jurisdiction was not persuasive.

4. Under MCL 722.1110, a Michigan court may communicate with a court in another state concerning a UCCJEA proceeding. A record must be made of the communication, and the parties must be granted access to the record. Plaintiffs asserted that the Delta Circuit Court failed to keep an adequate record, but even if that were true, the statute contained no penalty for noncompliance and the failure did not undermine the court's conclusions about jurisdiction. Accordingly, plaintiffs failed to demonstrate plain error affecting substantial rights.

Affirmed.

Laurie S. Longo for plaintiffs.

Upper Michigan Law (by *Katherine J. Clark*) for defendant.

Before: TUKEL, P.J., and K. F. KELLY and GADOLA, JJ.

K. F. KELLY, J. In this dispute addressing the custody of a minor child in light of the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA), MCL 722.1101 *et seq*., plaintiffs, Tina Veneskey and James Veneskey, appeal as of right the order granting summary disposition to defendant, Michael Keith Sulier, under MCR 2.116(C)(4) (lack of subject-matter jurisdiction). Specifically, the parties contest the trial court's decision that North Carolina served as the minor child's home state, MCL 722.1201(1), and that Michigan presented an inconvenient forum for resolution of the child custody dispute, MCL 722.1207. We

conclude that the plaintiffs' precipitous removal of the child from her residence in North Carolina and from the care of her stepfather shortly after the death of her mother did not prevent the North Carolina court from satisfying the jurisdictional requirements of the UCCJEA, MCL 722.1201(1). Furthermore, the trial court did not abuse its discretion by determining that Michigan presented an inconvenient forum for this child custody dispute, MCL 722.1207. Finding no errors warranting reversal, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

Plaintiffs are the maternal grandparents of the minor child, AS. AS was living in North Carolina with her mother, AR, her stepfather, and a half-sibling in a home owned by plaintiffs. On May 10, 2020, AR unexpectedly died. AR had not made provisions for AS's care in the event of her death, AS's stepfather had not adopted the child, and he did not have legal authority to care for AS. Nonetheless, plaintiffs consulted with legal counsel as well as law enforcement in North Carolina, obtained a power-of-attorney from AS's stepfather, and then removed AS from North Carolina to Michigan. They did not contact or notify defendant, who claimed to be AS's biological father,[1] before doing so, alleging that defendant had no contact with AS since she was 18 months old.[2]

Plaintiffs filed a petition for guardianship in the Delta County Probate Court, and the probate court assigned plaintiffs as AS's temporary guardians on an

[1] AR and defendant were never married; defendant was listed as the father on the birth certificate.

[2] Defendant claimed that his efforts to maintain contact with AS had been thwarted by AR.

emergency basis.[3] Plaintiffs then filed for custody in the Delta Circuit Court, naming Michael Sulier as the defendant in their complaint. Defendant, who resides in South Carolina, also filed a custody action but in North Carolina, the last place AS had been living before her removal to Michigan. Defendant then filed a motion for summary disposition in the Delta Circuit Court, alleging that jurisdiction for the custody proceedings under the UCCJEA was with the North Carolina court. The trial court agreed and dismissed plaintiffs' complaint for custody.[4]

II. UCCJEA JURISDICTION DETERMINATION

Plaintiffs contend that the trial court erred by granting defendant's motion for summary disposition on jurisdictional grounds because North Carolina had no basis for jurisdiction under the UCCJEA. We disagree.

This Court reviews de novo a lower court's decision regarding a motion for summary disposition. *Bennett v Russell*, 322 Mich App 638, 642; 913 NW2d 364 (2018). "When viewing a motion under MCR 2.116(C)(4), this Court must determine whether the pleadings demonstrate that the defendant was entitled to judgment as a matter of law, or whether the affidavits and other proofs show that there was no genuine issue of material fact." *Weishuhn v Catholic Diocese of Lansing*, 279 Mich App

[3] This Court granted plaintiffs' request to expand the appellate record to include the guardianship matter. The same trial judge who granted summary disposition in the circuit court presided over the guardianship matter.

[4] Plaintiffs recently filed a reply brief acknowledging that the North Carolina court satisfied the definition of "home state" but nonetheless asserting that consideration of other statutory criteria renders Michigan the proper jurisdiction. We disagree with that statutory interpretation as set forth in this opinion.

150, 155; 756 NW2d 483 (2008) (quotation marks and citation omitted). "Absent a factual dispute, this Court reviews de novo, as a question of law, whether a trial court has jurisdiction under the UCCJEA." *Cheesman v Williams*, 311 Mich App 147, 150; 874 NW2d 385 (2015). Although the question regarding whether a court has jurisdiction under the UCCJEA is subject to de novo review, a lower court's decision regarding whether to *exercise* that jurisdiction is reviewed for an abuse of discretion. *Id*. Further, issues of statutory construction are reviewed de novo. *Id*. at 151.

"The UCCJEA prescribes the powers and duties of the court in a child-custody proceeding involving Michigan and a proceeding or party outside of this state[.]" *Id*. (quotation marks, citation, and brackets omitted). The purpose of a uniform child custody act is to declare that custody decrees of sister states will be recognized and enforced, to achieve greater stability in custody arrangements, and to prevent forum-shopping. *Bivins v Bivins*, 146 Mich App 223, 227-228, 232; 379 NW2d 431 (1986).[5] "Under the UCCJEA, a child's initial custody determination must take place in the child's home state, unless the home state declines to exercise home-state jurisdiction under the UCCJEA because another state would be a more appropriate forum." *Foster v Wolkowitz*, 486 Mich 356, 359; 785 NW2d 59 (2010).

MCL 722.1201 of the UCCJEA[6] states:

> (1) Except as otherwise provided in section 204 [dealing with temporary emergency jurisdiction], a court of this

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[5] The *Bivins* Court cited the predecessor to the UCCJEA, the now-repealed Uniform Child Custody Jurisdiction Act, then found at MCL 600.651 *et seq*.

[6] North Carolina has also adopted the UCCJEA. NC Gen Stat 50A-101 *et seq*.

> state has jurisdiction to make an initial child-custody determination only in the following situations:
>
> (a) This state is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within 6 months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state.
>
> (b) A court of another state does not have jurisdiction under subdivision (a), or a court of the home state of the child has declined to exercise jurisdiction on the ground that this state is the more appropriate forum under section 207 or 208, and the court finds both of the following:
>
> (*i*) The child and the child's parents, or the child and at least 1 parent or a person acting as a parent, have a significant connection with this state other than mere physical presence.
>
> (*ii*) Substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships.
>
> (c) All courts having jurisdiction under subdivision (a) or (b) have declined to exercise jurisdiction on the grounds that a court of this state is the more appropriate forum to determine the custody of the child under section 207 or 208.
>
> (d) No court of another state would have jurisdiction under subdivision (a), (b), or (c).
>
> (2) Subsection (1) is the exclusive jurisdictional basis for making a child-custody determination by a court of this state.
>
> (3) Physical presence of, or personal jurisdiction over, a party or a child is neither necessary nor sufficient to make a child-custody determination.

Thus, MCL 722.1201(1)(a) is the primary jurisdictional basis of the UCCJEA and provides that a court can exercise jurisdiction when Michigan is the child's

home state or was the home state within six months of the commencement of the proceedings. *Hernandez v Mayoral-Martinez*, 329 Mich App 206, 210; 942 NW2d 80 (2019). Under MCL 722.1102(g):

> "Home state" means the state in which a child lived with a parent or a person acting as a parent for at least 6 consecutive months immediately before the commencement of a child-custody proceeding. In the case of a child less than 6 months of age, the term means the state in which the child lived from birth with a parent or person acting as a parent. A period of temporary absence of a parent or person acting as a parent is included as part of the period.

When Michigan is not determined to be the child's home state, the court must examine whether another state qualifies as the home state. MCL 722.1201(1)(b); *Hernandez*, 329 Mich App at 211. This inquiry may involve addressing a "person acting as a parent" and this person's relationship to the child. *Id*. This phrase is defined as:

> (m) "Person acting as a parent" means a person, other than a parent, who meets both of the following criteria:
>
> (*i*) Has physical custody of the child or has had physical custody for a period of 6 consecutive months, including a temporary absence, within 1 year immediately before the commencement of a child-custody proceeding.
>
> (*ii*) Has been awarded legal custody by a court of claims a right to legal custody under the law of this state. [MCL 722.1102(m).]

If a "person acting as a parent" is merely in the process of seeking custody, MCL 722.1102(m)(*ii*) does not equate that action with a right of "custody under the laws of this state." *Hernandez*, 329 Mich App at 211. Consequently, when there is no home state, the court must consider whether Michigan has "significant

connections" jurisdiction as set forth in MCL 722.1201(1)(b). *Hernandez*, 329 Mich App at 212. For Michigan to obtain "significant connections" jurisdiction, there must be no other state with jurisdiction as the home state, and the court must find that: (1) the child and the child's parents have a significant connection with this state other than mere physical presence, and (2) substantial evidence is available in this state addressing the child's care, protection, training, and personal relationships. MCL 722.1201(1)(b); *Hernandez*, 329 Mich App at 212.

Plaintiffs contend that North Carolina could not have had jurisdiction under MCL 722.1201. It is undisputed that AS lived in North Carolina for six months preceding AR's death on May 10, 2020. She was removed from North Carolina on May 18, 2020. Plaintiffs filed their petition for guardianship on May 29, 2020. Plaintiffs filed their circuit court complaint on July 31, 2020. Defendant filed his North Carolina complaint on July 15, 2020. Thus, there was a gap in time between AS's supervision by a parent in North Carolina and the commencement of the custody proceeding. However, in *Foster*, 486 Mich at 368, the Court, quoting MCL 722.1102(g), concluded that Illinois was a child's home state "because that is the state in which the child resided 'for at least 6 consecutive months immediately before the commencement of a child-custody proceeding.' " The facts in that case demonstrated that the child had been moved to Michigan at least several days before commencement of any custody proceedings. *Id*. at 360. *Foster* instructs that the phrase "immediately before the commencement of a child-custody proceeding" can encompass a gap of several days. Indeed, an individual who removes a minor child from the home state should not obtain a benefit between the removal date and date of a filing of a custody petition in Michigan by claiming

that this period destroyed the prior occupancy period and relationship to the home state. The *Foster* Court also concluded that an acknowledgment of parentage and initial custody determination did not provide a basis for a state to exert home-state jurisdiction under the UCCJEA. *Id*. at 368. In addition, MCL 722.1102(d) states:

> "Child-custody proceeding" means a proceeding in which legal custody, physical custody, or parenting time with respect to a child is an issue. *Child-custody proceeding includes a proceeding for* divorce, separate maintenance, separation, neglect, abuse, dependency, *guardianship*, paternity, termination of parental rights, and protection from domestic violence, in which the issue may appear. Child-custody proceeding does not include a proceeding involving juvenile delinquency, contractual emancipation, or enforcement under article 3. [Emphasis added.]

The May 29, 2020 guardianship petition was filed only several days after AS left North Carolina. Regardless of the time period between AS's removal from North Carolina and plaintiffs' filings in Michigan to secure guardianship and custody, we conclude that it did not render Michigan AS's home state for purposes of plaintiffs' and defendant's claims for custody. Indeed, in the six-month period preceding AS's move to Michigan and the commencement of legal proceedings here, AS resided in North Carolina with her family.

Nevertheless, even if North Carolina does not qualify as the home state under MCL 722.1201(1)(a), there was, contrary to plaintiffs' argument, another basis for North Carolina to acquire jurisdiction. Specifically, a Michigan court may determine that it presents an inconvenient forum for the custody determination. The trial court's determination regarding the convenience of a forum state is reviewed for an abuse of discretion. *Radeljak v DaimlerChrysler Corp*, 475 Mich 598, 603; 719 NW2d 40

(2006). An abuse of discretion occurs when the trial court's decision results in an outcome falling outside the range of reasonable and principled outcomes. *Id*. MCL 722.1207 states:

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

> (3) If a court of this state determines that it is an inconvenient forum and that a court of another state is a more appropriate forum, it shall stay the proceedings upon condition that a child-custody proceeding be promptly commenced in another designated state and may impose any other condition the court considers just and proper.
>
> (4) A court of this state may decline to exercise jurisdiction under this act if a child-custody determination is incidental to an action for divorce or another proceeding while still retaining jurisdiction over the divorce or other proceeding.

The Delta Circuit Court explicitly found that Michigan would not be a convenient forum under the factors from MCL 722.1207. Indeed, the court's conclusion that Factor (b) favored North Carolina is supported by plaintiffs' own allegations in the complaint. In addition, the court emphasized the North Carolina court's familiarity with the case.[7] Most importantly, plaintiffs simply do not take issue with the court's findings under MCL 722.1207.[8] Instead, plaintiffs essentially submit that the lower court's finding of an inconvenient forum is irrelevant because North Carolina lacked all ability to obtain jurisdiction under the UCCJEA. This is not the case, and plaintiffs misinterpret MCL 722.1201(1)(c).

Nonetheless, plaintiffs submit that North Carolina lacked jurisdiction because there was no evidence of a

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[7] We note that, according to the plain language of MCL 722.1207(2) ("the court shall . . . consider all relevant factors, including all of the following"), Factors (a) through (g) are not an exclusive list. That North Carolina would have had home-state jurisdiction under MCL 722.1201(1)(a) if AS had not been removed from that state was a relevant factor in determining that North Carolina was the "more appropriate forum." MCL 722.1207(1).

[8] See *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 381; 689 NW2d 145 (2004) (if an appellant "fails to dispute the basis of the trial court's ruling," this Court need not consider granting appellate relief).

significant connection between defendant[9] and North Carolina. MCL 722.1201(1)(a) and (b). However, MCL 722.1201 also states:

> (1) Except as otherwise provided in section 204 [dealing with temporary emergency jurisdiction], *a court of this state has jurisdiction to make an initial child-custody determination only in the following situations*:
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> * * *
>
> (c) *All courts having jurisdiction under subdivision (a) or (b) have declined to exercise jurisdiction on the grounds that a court of this state is the more appropriate forum to determine the custody of the child under section 207* or 208. [Emphasis added.]

As analyzed *supra*, Michigan had the ability to exercise jurisdiction under MCL 722.1201(1)(b) but declined to do so because North Carolina was "the more appropriate forum to determine the custody of the child under section 207[.]" MCL 722.1201(1)(c). Plaintiffs' arguments disregard the effect of Subparagraph (c). And given plaintiffs' failure to contest the substance of the Delta Circuit Court's findings under MCL 722.1207, those findings remain in place. Viewing them in the context of MCL 722.1201(1)(c) leads to the conclusion that reversal of the jurisdictional issue is not warranted. Contrary to plaintiffs' argument, North Caro-

[9] We also note that plaintiffs contest whether defendant has standing to pursue custody when he was solely named as the father on AS's birth certificate. In Michigan, standing is a separate question from subject-matter jurisdiction, and insufficient pleadings or facts regarding standing will not deprive the circuit court of subject-matter jurisdiction. See, e.g., *Altman v Nelson*, 197 Mich App 467, 476; 495 NW2d 826 (1993). Moreover, defendant's lack of "standing" is belied by the custody complaint plaintiffs filed *against* him, their claims that he was an absent unsupportive father, and their contention that he abandoned AS after she turned 18 months old.

lina did have a basis for jurisdiction under the UCCJEA.[10]

Plaintiffs submit that they should be given a permanent guardianship because defendant had abandoned AS. This argument is misguided because the present appeal involves the circuit court proceedings, not the guardianship proceedings. Also, the issue of a permanent guardianship was not yet reached in the probate court. The parties stipulated in the probate court to an adjournment of the guardianship proceedings. The order stated that "[t]he temporary guardianship shall continue for up to six months or until superseded by an order of the Delta County Circuit Court[11] . . . or the Davie County, North Carolina court, whichever is applicable."

Plaintiffs cite *In re Guardianship of Versalle*, 334 Mich App 173; 963 NW2d 701 (2020). In that case, the Court concluded that MCL 700.5204(2), addressing guardian appointment, is constitutional and justified the appointment of a guardian. *Id*. at 173.[12] Plaintiffs' reference to *In re Guardianship of Versalle* is inappo-

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[10] In a court order provided by plaintiffs themselves, the North Carolina court explicitly stated that it had jurisdiction over the child custody proceedings.

[11] MCL 722.26b(4) states:

> Upon the filing of a child custody action brought by a child's guardian or limited guardian, guardianship proceedings concerning that child in the probate court are stayed until disposition of the child custody action. A probate court order concerning the guardianship of the child continues in force until superseded by a circuit court order. If the circuit court awards custody of the child, it shall send a copy of the judgment or order of disposition to the probate court in the county that appointed the child's guardian or limited guardian.

[12] In their statement of questions presented on appeal, plaintiffs imply that, under *In re Guardianship of Versalle*, the circuit court should have evaluated defendant's fitness before granting the motion for

site because this appeal involves the circuit court proceedings, not the guardianship proceedings, and because the guardianship order was subject to being superseded by a different court's order. Plaintiffs sought the guardianship under MCL 722.1204, a provision for temporary emergency jurisdiction. Thus, reliance on the *Versalle* decision does not provide a ground for assumption of jurisdiction in Michigan.

Plaintiffs further contend that the temporary guardianship order constituted an initial determination of custody under the definitions set forth in MCL 722.1102(d) and (h), which state:

> (d) "Child-custody proceeding" means a proceeding in which legal custody, physical custody, or parenting time with respect to a child is an issue. Child-custody proceeding includes a proceeding for divorce, separate maintenance, separation, neglect, abuse, dependency, guardianship, paternity, termination of parental rights, and protection from domestic violence, in which the issue may appear. Child-custody proceeding does not include a proceeding involving juvenile delinquency, contractual emancipation, or enforcement under article 3.
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> * * *
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> (h) "Initial determination" means the first child-custody determination concerning a particular child.

Plaintiffs submit that because the guardianship order was an initial determination of custody, Michigan retained jurisdiction under MCL 722.1202(1), which states, "Except as otherwise provided in section 204, a court of this state that has made a child-custody determination consistent with section 201 or 203 has exclusive, continuing jurisdiction over the child-

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summary disposition. But the court was not required to evaluate fitness when determining the threshold issue of jurisdiction.

custody determination until [certain conditions occur]." Plaintiffs ignore the first phrase of this statute, however, providing that the effect of MCL 722.1204 must be considered. In addition, MCL 722.1202(3) states that "[a] court of this state that has exclusive, continuing jurisdiction under this section may decline to exercise its jurisdiction if the court determines that it is an inconvenient forum under section 207." Even if Michigan had continuing, exclusive jurisdiction, it could decline to exercise it. Plaintiffs' argument that MCL 722.1202 somehow mandated that the Michigan court retain jurisdiction is not persuasive.

Lastly, plaintiffs assert that the trial court failed to keep an adequate electronic record of communications it had with the North Carolina court contrary to MCL 722.1110(4) and (5)(d). We review this unpreserved issue for plain error affecting substantial rights. *In re Utrera*, 281 Mich App 1, 8; 761 NW2d 253 (2008). The trial court expressly communicated with the North Carolina court and delineated the substance of the discussion on the record. MCL 722.1110 contains no penalty for noncompliance with the electronic recording requirement and cannot obviate the court's conclusions regarding jurisdiction. Thus, plaintiffs failed to demonstrate plain error affecting substantial rights. *In re Utrera*, 281 Mich App at 8. Furthermore, as previously noted, the North Carolina court has already concluded that it has jurisdiction over the child custody dispute.

Affirmed. No taxable costs, a public question being involved.

TUKEL, P.J., and GADOLA, J., concurred with K. F. KELLY, J.

DEARBORN HEIGHTS PHARMACY v DEPARTMENT OF HEALTH AND HUMAN SERVICES

Docket No. 354008. Submitted August 6, 2021, at Detroit. Decided August 26, 2021, at 9:15 a.m.

Dearborn Heights Pharmacy appealed in the Wayne Circuit Court the final order of the director of the Department of Health and Human Services (the DHHS) requiring petitioner to repay the DHHS $803,961.86. In 2016, investigators in the DHHS's Office of Inspector General (the OIG) noticed that petitioner, a participant in Michigan's Medicaid program, was an outlier in its Medicaid billings for certain medications and began an inventory reconciliation audit. The OIG determined that petitioner owed the DHHS $803,961.86, the amount of an overpayment made by Medicaid to petitioner. Petitioner sought a hearing before an administrative law judge, and the administrative law judge upheld the amount of the overpayment. The director of the DHHS later affirmed that holding in a final order. Petitioner appealed the final order in the Wayne Circuit Court, and the court, Sheila Ann Gibson, J., reversed the DHHS order, in part because it found that the OIG had lacked the authority to conduct an inventory reconciliation audit of petitioner before July 1, 2015, the effective date of a change in DHHS policy as set forth in its Michigan Medicaid Provider Manual (the manual). The Court of Appeals granted the DHHS's application for leave to appeal.

The Court of Appeals *held*:

1. The trial court concluded that the OIG lacked authority to audit petitioner until the manual was updated to this effect in July 2015. However, many other authorities predated and authorized the audit. For instance, MCL 400.111a provides that the director of the DHHS is to ensure that participants in the Medicaid program comply with applicable state and federal law, that claims against the program are timely and accurate, and that reimbursement is made only for covered services. Additionally, the statute permits the director to recover payments made to providers in excess of the reimbursement to which the provider is entitled. MCL 333.26368(III)(A) authorizes the OIG to investigate fraud, waste, and abuse in the administration of Health

Services Programs in Michigan and authorizes the OIG to compel providers to produce records that are relevant to an OIG investigation. Providers are also required by MCL 400.111b to maintain records necessary to document the cost of their services, supplies, and equipment for a period of seven years after the date of service. The DHHS and the OIG have clearly long had broad authority to investigate possible fraud under the unambiguous language of the statutes, and the trial court failed to consider the plain language of the statutes when it reversed the DHHS order. Further, caselaw stipulated that an agency's decision was not authorized by law if it violated constitutional or statutory provisions, was beyond the agency's jurisdiction, followed from unlawful procedures resulting in material prejudice, or was arbitrary and capricious. Because the record did not provide any evidence that the decision of the administrative law judge fell under any of these categories, the trial court misapplied the appropriate standard of review in rejecting the decision of the DHHS.

2. The trial court held that the DHHS lacked the authority to conduct the audit and to require petitioner to produce all the documents described in the relevant section of the manual because it was not effective before July 2015. The trial court failed to apply correct legal principles and misapprehended and misapplied the substantial-evidence test to the agency's factual findings. The record from the administrative review showed that the OIG did not require petitioner to produce all the documents described in the portion of the manual covering invoice and inventory records for pharmacies, Subsection 19.2. Rather, the record from the administrative review showed that the OIG's only requirement of petitioner was that the records it produced be reliable. Because there was no evidence that the administrative law judge's factual findings required the use of the documents described in Subsection 19.2 of the manual, and because the record showed that the OIG also did not specifically require these documents, the trial court erred by reversing the DHHS's decision.

Trial court order reversed and case remanded to the trial court.

MEDICAID — PHARMACIES — INVENTORY RECONCILIATION AUDITS.

The Department of Health and Human Services has authority under MCL 400.111a and MCL 333.26368(III)(A) to conduct inventory reconciliation audits of pharmacies and other health care providers that participate in Michigan's Medicaid program, independent of any authority provided by the Michigan Medicaid Provider Manual.

Wachler & Associates, PC (by *Andrew B. Wachler* and *Stephen J. Shaver*) for Dearborn Heights Pharmacy.

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

Before: LETICA, P.J., and SERVITTO and M. J. KELLY, JJ.

PER CURIAM. Respondent, the Michigan Department of Health and Human Services (the DHHS), appeals by leave granted[1] the circuit court's order reversing DHHS's final order adopting the decision of an administrative law judge, who concluded that the DHHS properly audited petitioner, Dearborn Heights Pharmacy, and assessed an overpayment of $803,961.86. We reverse.

I. BACKGROUND FACTS

Petitioner operated a pharmacy in Dearborn Heights, Michigan. Petitioner voluntarily participated in Michigan's Medicaid program, which required it to make a number of agreements, including that it would allow any "state or federal government agents to inspect, copy, and/or take any records . . . pertaining to the delivery of goods and services to, or on behalf of, a Medical Assistance Program beneficiary."

On June 1, 2015, the DHHS issued a "bulletin" informing Medicaid pharmacies of its efforts to clarify the documentation requirements for pharmacy providers.

[1] *Dearborn Hts Pharmacy v Dep't of Health & Human Servs*, unpublished order of the Court of Appeals, entered October 7, 2020 (Docket No. 354008).

Specifically, the bulletin notified the pharmacies that they must maintain particular documents "to support the size and quantity of the goods paid for by Medicaid . . . ." The bulletin stated the effective date was July 1, 2015, and it was later incorporated into the Pharmacy chapter of the Michigan Medicaid Provider Manual (MPM) at Subsection 19.2, Invoice and Inventory Records.

In 2016, investigators from the DHHS Office of Inspector General (the OIG) began an inventory reconciliation audit of petitioner after OIG investigators noticed petitioner was an "outlier" in terms of its Medicaid billings for certain medications. Consequently, the OIG began an investigation of petitioner's inventory records of these medications for dates between January 1, 2011 and June 30, 2016. As part of its investigation, the OIG received a number of documents from third-party sources, including petitioner's medication wholesalers and bank. The OIG also asked petitioner for its own records of the audited medications, and petitioner produced some records. The OIG did not accept all of petitioner's proffered records, however, because its investigators could not verify their reliability.

Ultimately, the OIG notified petitioner that it owed $803,961.86, the amount of an overpayment Medicaid had made to petitioner. The matter was brought before an administrative law judge, and on April 18, 2019, the administrative law judge upheld the overpayment amount. The director of the DHHS affirmed this opinion in a final order entered July 9, 2019.

Petitioner appealed the director's final order in the Wayne Circuit Court. In reversing the final order, the trial court found that an agency's ability to conduct an inventory reconciliation audit is derived from Subsection 19.2 of the Pharmacy chapter of the Michigan

MPM, and before July 1, 2015, the OIG did not have the authority to order the production of certain documents under Subsection 19.2. The DHHS applied for leave to appeal, which this Court granted.

II. STANDARD OF REVIEW

With respect to agency decisions, "[t]he circuit court's task [is] to review the administrative decision to determine if it was authorized by law and supported by competent, material, and substantial evidence on the whole record." *Nat'l Wildlife Federation v Dep't of Environmental Quality (No 2)*, 306 Mich App 369, 372-373; 856 NW2d 394 (2014), citing Const 1963, art 6, § 28; MCL 24.306(1). "An agency decision is not authorized by law if it violates constitutional or statutory provisions, lies beyond the agency's jurisdiction, follows from unlawful procedures resulting in material prejudice, or is arbitrary and capricious." *Nat'l Wildlife Federation*, 306 Mich App at 373.

"[W]hen reviewing a lower court's review of agency action this Court must determine whether the lower court applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the agency's factual findings." *Boyd v Civil Serv Comm*, 220 Mich App 226, 234; 559 NW2d 342 (1996). Indeed, "[t]his latter standard is indistinguishable from the clearly erroneous standard of review that has been widely adopted in Michigan jurisprudence." *Id*. at 234-235. "[A] finding is clearly erroneous when, on review of the whole record, this Court is left with the definite and firm conviction that a mistake has been made." *Id*. at 235. "Substantial evidence is that which a reasonable mind would accept as adequate to support a decision, being more than a mere scintilla, but less than a

preponderance of the evidence." *VanZandt v State Employees' Retirement Sys*, 266 Mich App 579, 584; 701 NW2d 214 (2005) (quotation marks and citation omitted). "If there is sufficient evidence, the circuit court may not substitute its judgment for that of the agency, even if the court might have reached a different result." *Id*.

"A tribunal's interpretation of a statute is subject to review de novo. A tribunal's interpretation of an administrative rule is reviewed likewise. A tribunal's evidentiary decisions are reviewed for an abuse of discretion." *Nat'l Wildlife Federation*, 306 Mich App at 373 (citations omitted).

> The primary goal of statutory construction is to give effect to the Legislature's intent. This Court begins by reviewing the language of the statute, and, if the language is clear and unambiguous, it is presumed that the Legislature intended the meaning expressed in the statute. Judicial construction of an unambiguous statute is neither required nor permitted. When reviewing a statute, all non-technical words and phrases shall be construed and understood according to the common and approved usage of the language, and, if a term is not defined in the statute, a court may consult a dictionary to aid it in this goal. A court should consider the plain meaning of a statute's words and their placement and purpose in the statutory scheme. Where the language used has been subject to judicial interpretation, the legislature is presumed to have used particular words in the sense in which they have been interpreted. [*McCormick v Carrier*, 487 Mich 180, 191-192; 795 NW2d 517 (2010) (quotation marks and citations omitted).]

"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).

III. INVENTORY RECONCILIATION AUDIT—LAW AND ANALYSIS

The DHHS argues the trial court erred in concluding that it does not have the authority to conduct inventory reconciliation audits. We agree.

Though petitioner disputes the applicability of Subsection 19.2 of the MPM to the audit at issue, there are a number of authorities that predate and authorize the performance of this audit. For example, the "director of the department of community health" has a number of obligations under MCL 400.111a, which states, in pertinent part:

> (1) The director of the department of community health . . . may establish policies and procedures that he or she considers appropriate, relating to the conditions of participation and requirements for providers established by section 111b and to applicable federal law and regulations, to assure that the implementation and enforcement of state and federal laws are all of the following:
>
> (a) Reasonable, fair, effective, and efficient.
>
> (b) In conformance with law.
>
> (c) In conformance with the state plan for medical assistance adopted under section 10 and approved by the United States department of health and human services.
>
> * * *
>
> (3) Except as otherwise provided in section 111i, the director of the department of community health shall develop, after appropriate consultation with affected providers in accordance with guidelines, forms and instructions to be used in administering the program. . . . The forms and instructions shall relate, at a minimum, to standards of performance by providers, conditions of participation, methods of review of claims, and administrative requirements and procedures that the director of the department of community health considers reasonable and proper to assure all of the following:

(a) That claims against the program are timely, substantiated, and not false, misleading, or deceptive.

(b) That reimbursement is made for only medically appropriate services.

(c) That reimbursement is made for only covered services.

(d) That reimbursement is not made to those providers whose services, supplies, or equipment cost the program in excess of the reasonable value received.

* * *

(7) The director of the department of community health may do all of the following:

(a) Enroll in the program for medical assistance only a provider who has entered into an agreement of enrollment required by section 111b(4), and enter into an agreement only with a provider who satisfies the conditions of participation and requirements for a provider established by sections 111b and 111i and the administrative requirements established or developed under subsections (1), (2), and (3) with the appropriate consultation required by this section.

* * *

(d) Recover payments to a provider in excess of the reimbursement to which the provider is entitled. The department of community health shall have a priority lien on any assets of a provider for any overpayment, as a consequence of fraud or abuse, that is not reimbursed to the department of community health.

* * *

(17) If the director of the department of community health decides that a payment under the program has been made to which a provider is not or may not be entitled, or that the amount of a payment is or may be

> greater or less than the amount to which the provider is entitled, the director of the department of community health, except as otherwise provided in this subsection or under other applicable law or regulation, shall promptly notify the provider of this decision.

With respect to the preceding statute, many of these responsibilities have been delegated to the OIG under MCL 333.26368(III)(A):

> A. The Office of Health Services Inspector General shall conduct and supervise activities to prevent, detect, and investigate fraud, waste, and abuse in Health Services Programs. Specifically, the Office shall do all of the following:
>
> 1. Solicit, receive, and investigate complaints related to fraud, waste, and abuse in Health Services Programs.
>
> 2. Undertake and be responsible for the Department of Community Health's duties under federal law with respect to fraud, waste, and abuse for the administration of the Health Services Programs in Michigan.
>
> 3. Actively seek out fraudulent billing practices of providers and develop techniques and procedures for detecting suspect billing patterns through the use of existing database resources managed by the Department of Community Health and available from federal sources.
>
> * * *
>
> 5. Require and compel the production of such books, papers, records, and documents as the Health Services Inspector General deems to be relevant or material to an investigation, examination, or review undertaken by the Office.
>
> * * *
>
> 8. Pursue administrative and civil enforcement actions or collections against any individual or entity that engages in fraud, abuse, or illegal or improper acts or

unacceptable practices perpetrated within Health Services Programs, including but not limited to:

a. Referring information and evidence to regulatory agencies and licensure boards.

b. Withholding payment of medical assistance funds in accordance with state and federal laws and regulations.

c. Excluding providers, vendors, and contractors from participation in the Medicaid program.

d. Imposing administrative sanctions and penalties in accordance with state and federal laws and regulations.

e. Initiating and maintaining actions for civil recovery and, where authorized by law, seizure of property or other assets connected with improper payments.

f. Entering into administrative or civil settlements.

g. Pursuing any other formal or informal enforcement action relating to fraud, waste, and abuse that the Department of Community Health is authorized to take under state or federal law, including, but not limited to, any actions under Sections 111a to 111h of The Social Welfare Act, 1939 PA 280, MCL 400.111a to 400.111h, or 1979 AC, R 400.3401 to 400.3425.

* * *

10. Promptly provide all information and evidence relating to suspected fraud, waste or abuse by Health Services Programs beneficiaries to the Department of Human Services Office of Inspector General. The Office and the Department of Human Services Office of Inspector General shall collaborate on investigations as necessary.

11. Prepare cases, provide testimony, and support administrative hearings and other legal proceedings.

* * *

15. Develop procedures to collect overpayments, restitution amounts, and settlement proceeds.

> 16. Monitor compliance by entities participating in Medicaid programs with requirements to inform their employees, contractors, and agents about the details of state and federal false claims statutes.
>
> * * *
>
> 24. Perform any other functions necessary or appropriate to fulfill the duties and responsibilities of the Office.
>
> 25. Comply with applicable federal law.

In addition to the responsibilities placed on the DHHS and the OIG, there are corresponding obligations for Medicaid providers. For example, MCL 400.111b states, in pertinent part:

> (1) As a condition of participation, a provider shall meet all of the requirements specified in this section except as provided in subsections (25), (26), and (27).
>
> * * *
>
> (6) A provider shall maintain records necessary to document fully the extent and cost of services, supplies, or equipment provided to a medically indigent individual and to substantiate each claim and, in accordance with professionally accepted standards, the medical necessity, appropriateness, and quality of service rendered for which a claim is made.
>
> (7) Upon request and at a reasonable time and place, a provider shall make available any record required to be maintained by subsection (6) for examination and photocopying by authorized agents of the director, the department of attorney general, or federal authorities whose duties and functions are related to state programs of medical assistance under title XIX. . . .
>
> * * *

(8) A provider shall retain each record required to be maintained by subsection (6) for a period of 7 years after the date of service. . . .

* * *

(10) A provider shall submit all claims for services rendered under the program on a form or in a format and with the supporting documentation specified and required by the director under section 111a(7)(c) and by the commissioner of insurance under section 111i. Submission of a claim or claims for services rendered under the program does not establish in the provider a right to receive payment from the program.

* * *

(17) As a condition of payment for services rendered to a medically indigent individual, a provider shall certify that a claim for payment is true, accurate, prepared with the knowledge and consent of the provider, and does not contain untrue, misleading, or deceptive information. A provider is responsible for the ongoing supervision of an agent, officer, or employee who prepares or submits the provider's claims. A provider's certification required under this subsection shall be prima facie evidence that the provider knows that the claim or claims are true, accurate, prepared with his or her knowledge and consent, do not contain misleading or deceptive information, and are filed in compliance with the policies, procedures, and instructions, and on the forms established or developed under this act.

In reversing the director's order, the trial court stated

that [DHHS's] Final Order upholding the alleged overpayment to [petitioner] for claims submitted from January 1, 2011 through June 30, 2015, is REVERSED because the authority to conduct inventory audits found in Subsection

> 19.2 of the Pharmacy Chapter of the Michigan [MPM] was only effective as of July 1, 2015 and for the following reasons:
>
> 1. Subsection 19.2 of the Pharmacy Chapter of the Michigan [MPM], only effective as of July 1, 2015, authorizes the OIG and Respondent/Appellee to conduct inventory audits of pharmacies.
>
> 2. That conducting an inventory audit and requiring all of the documents set forth in subsection 19.2 of the Pharmacy Chapter of the Michigan [MPM] be maintained or be subject to recoupment prior to July 1, 2015 is not authorized by law[.]

The trial court did not "appl[y] correct legal principles," *Boyd*, 220 Mich App at 234, in finding that "Subsection 19.2 of the Pharmacy Chapter of the Michigan [MPM], only effective as of July 1, 2015, authorizes the OIG and Respondent/Appellee to conduct inventory audits of pharmacies." While the trial court entertained the DHHS's arguments regarding other authority granting the OIG the ability to investigate fraud, the trial court failed to follow basic rules of statutory construction.

> The primary goal of statutory construction is to give effect to the Legislature's intent. This Court begins by reviewing the language of the statute, and, if the language is clear and unambiguous, it is presumed that the Legislature intended the meaning expressed in the statute. Judicial construction of an unambiguous statute is neither required nor permitted. [*McCormick*, 487 Mich at 191-192 (citations omitted).]

Though the trial court questioned the parties about the construction of the statutory authority granting the OIG the ability to conduct audits, it failed to consider that "[t]he primary goal of statutory construction is to give effect to the Legislature's intent." *Id*. at 191. By concluding that "the authority to conduct inventory

audits found in Subsection 19.2 of the Pharmacy Chapter of the Michigan [MPM] was only effective as of July 1, 2015," the trial court failed to give effect to other statutory provisions requiring the DHHS to ensure "that claims against the program are timely, substantiated, and not false, misleading, or deceptive" and the OIG to "[s]olicit, receive, and investigate complaints related to fraud, waste, and abuse in Health Services Programs." MCL 400.111a(3)(a); MCL 333.26368(III)(A)(1). The DHHS and the OIG clearly have long had broad authority to investigate possible fraud by the unambiguous terms of these provisions. Thus, the trial court failed to consider the plain language of other authority granting the DHHS the authority to conduct investigations by focusing its conclusion of the effective date of Subsection 19.2.

Moreover, the trial court misapplied its own standard of review in rejecting the OIG's audit of petitioner. Again, "[a]n agency decision is not authorized by law if it violates constitutional or statutory provisions, lies beyond the agency's jurisdiction, follows from unlawful procedures resulting in material prejudice, or is arbitrary and capricious." *Nat'l Wildlife Federation*, 306 Mich App at 373. On this record, there is no evidence that the administrative law judge's decision falls under any of these categories. Indeed, the administrative law judge's affirmance of the OIG's audit was on the basis of a plain reading of statutory and other authority compelling the DHHS to investigate fraud.

In sum, the trial court applied incorrect legal principles when it erroneously concluded the audit at issue was not based in law, and the trial court misapplied its own standard of review in rejecting the DHHS's decision. Therefore, we reverse the holding of the trial court finding that the OIG's authority to conduct inventory

reconciliation audits is derived from and limited to Subsection 19.2.

IV. REQUIRED DOCUMENTS—LAW AND ANALYSIS

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

Initially, we must clarify the issue at hand. Rather than asking whether Subsection 19.2 exceeded the scope of the DHHS's statutory authority, the more pertinent question is whether the trial court correctly applied its review authority over the administrative law judge's opinion. The trial court held "[t]hat conducting an inventory audit and requiring all of the documents set forth in subsection 19.2 of the Pharmacy Chapter of the Michigan [MPM] be maintained or be subject to recoupment prior to July 1, 2015 is not authorized by law[.]" Again, the starting place for our limited review is to determine "whether the lower court applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the agency's factual findings." *Boyd*, 220 Mich App at 234. Indeed, "[t]his latter standard is indistinguishable from the clearly erroneous standard of review that has been widely adopted in Michigan jurisprudence." *Id*. at 234-235.

Using the applicable standard, we find the trial court "misapprehended . . . [and] misapplied the substantial evidence test to the agency's factual findings." *Id*. at 234. Absent from the administrative law judge's factual findings was any determination that the OIG "requir[ed] all of the documents set forth in subsection

19.2 . . . ." In fact, the record from the administrative review shows that the OIG's only requirement of petitioner was that the records it produced be "reliable." Because there is no evidence the administrative law judge's factual findings required the use of Subsection 19.2 documents, and because the record shows that the OIG did not specifically require Subsection 19.2 documents, the trial court erred by reversing the DHHS's decision. Consequently, we reverse the trial court.

V. CONCLUSION

Reversed and remanded to the trial court. We do not retain jurisdiction.

LETICA, P.J., and SERVITTO and M. J. KELLY, JJ., concurred.

In re BABY BOY DOE

Docket No. 353796. Submitted July 7, 2021, at Grand Rapids. Decided August 26, 2021, at 9:20 a.m. Reversed in part, vacated in part, and remanded 509 Mich 1056 (2022).

On August 8, 2018, petitioner filed a complaint for divorce against his then-pregnant wife, KGK, and sought custody of the unborn child in the Ottawa Circuit Court, Family Division (the Ottawa court). The next day, August 9, 2018, unbeknownst to petitioner or the Ottawa court, KGK gave birth to a male child (Doe) in a hospital in Kent County. On August 10, 2018, the Ottawa court, without knowledge of Doe's birth, entered an ex parte order for DNA testing of the child and an ex parte order prohibiting either petitioner or KGK from taking "any action pertaining to the permanent placement or adoption of the defendant's unborn child pending further order of the court." That order was not served on KGK before she surrendered Doe on August 12, 2018, under Michigan's Safe Delivery of Newborns Law (SDNL), MCL 712.1 *et seq*. Doe was placed with respondent, Catholic Charities of West Michigan, an adoption agency that petitioned the Kalamazoo Circuit Court, Family Division (the Kalamazoo court) for an order authorizing placement of Doe with a prospective adoptive family. The Kalamazoo court, unbeknownst to petitioner or the Ottawa court, entered an order on August 16, 2018, authorizing Doe's placement with the prospective adoptive parents. Also on August 16, 2018, a "Publication of Notice, Safe Delivery of Newborns" was published in the Grand Rapids Press. This notice, which contained no names, was addressed generically to the birth mother and father of "a newborn baby, born on August 9, 2018, at Spectrum Health Grand Rapids, MI." On September 14, 2018, after receiving no response during the statutory 28-day waiting period, respondent petitioned the Kalamazoo court to accept the release of the surrendering parent and terminate the parental rights of both the surrendering and nonsurrendering parent. Meanwhile, on September 21, 2018, the Ottawa court, without knowledge of the proceedings in the Kalamazoo court, entered an order awarding petitioner temporary physical and legal custody of Doe. On September 28, 2018, the Kalamazoo court terminated the parental rights of Doe's surrendering and nonsurrendering

parent and granted custody and care of Doe to respondent after finding that the surrendering parent had knowingly released her rights to Doe, the nonsurrendering parent had not been identified or located, and the child-placing agency had made reasonable efforts to provide notice of the surrender of the newborn. On January 16, 2019, petitioner issued a subpoena to respondent, requesting copies of Doe's adoption file and related information. Petitioner issued the subpoena after taking the deposition of KGK, during which she revealed that she had surrendered Doe and that the child had been placed with respondent to facilitate his adoption. On February 1, 2019, respondent moved to quash the subpoena on the ground that respondent's placement records were confidential and that disclosure of a placement agency's records without a court order constituted a criminal offense. Meanwhile, on February 12, 2019, the Kalamazoo court granted the prospective adoptive parents' petition to adopt Doe. Back in the Ottawa court, after several hearings, some of the subpoenaed information was provided to petitioner's counsel on July 12, 2019, which, at a minimum, provided petitioner with enough information to determine the docket number for the SDNL action in the Kalamazoo court. On July 30, 2019, the Ottawa court entered a default divorce judgment and granted petitioner full physical and legal custody of Doe. On October 7, 2019, petitioner moved the Kalamazoo court to unseal the adoption file; that motion was denied on January 2, 2020. Petitioner moved for reconsideration and made a new argument that his divorce/custody filing in the Ottawa court before Doe's birth constituted a timely petition for custody as required by MCL 712.10(1) and that the Kalamazoo court therefore erred by terminating his parental rights to Doe. The Kalamazoo court, Julie K. Philips, J., denied the motion and ordered that the adoption records remain sealed. Petitioner appealed by delayed leave granted.

The Court of Appeals *held*:

1. The SDNL permits a parent to surrender a child to an emergency service provider within 72 hours of the child's birth. The emergency service provider must take the newborn to a hospital if the emergency service provider is not a hospital. The hospital must then notify a child-placing agency about the surrender, and the child-placing agency has various obligations, including making reasonable efforts to identify, locate, and provide notice of the surrender of the newborn to the nonsurrendering parent within 28 days. Under MCL 712.10(1), the nonsurrendering parent, within 28 days of published notice of surrender, may file a petition to gain custody of the child in one of the

following places: (a) if the parent has located the newborn, the county where the newborn is located; (b) if Subdivision (a) does not apply and the parent knows the location of the emergency service provider to whom the newborn was surrendered, the county where the emergency service provider is located; or (c) if neither Subdivision (a) nor (b) applies, the county where the parent is located. It is undisputed that (1) petitioner was not aware of the county where Doe was located or the county where Doe was surrendered until after petitioner's parental rights were terminated, (2) Ottawa County was where petitioner was located, and (3) petitioner filed his complaint for divorce/custody in Ottawa County. Therefore, if his complaint constituted a "petition for custody" of Doe, then it was filed in the correct county under MCL 712.10(1)(c).

2. Petitioner's complaint in the Ottawa court was a petition for custody of Doe that was timely filed under MCL 712.10(1). Petitioner's complaint for divorce sought a legal resolution to the issue of the custody of (the then-as-yet unborn) Doe, and petitioner requested that the court award him custody of Doe. Petitioner additionally secured an ex parte order preventing *either* parent from taking "any action pertaining to the permanent placement or adoption of the defendant's unborn child pending further order of the court." Accordingly, petitioner sought to have the Ottawa court determine the issue of custody and, in fact, took steps to prevent either parent from doing anything that affected custody without permission of the court. Additionally, the complaint was filed "not later than 28 days after notice of surrender of a newborn has been published," as required in MCL 712.10(1). The complaint for divorce was filed on August 8, 2018, and the first order regarding custody in the case was entered on August 10. The notice of surrender was published on August 16, 2018. Nothing in the plain language of MCL 712.10(1) precludes the filing of a petition for custody by a nonsurrendering parent *before* a notice of surrender is published or sets any time limit on such an advance filing. The plain and ordinary meaning of the phrase "not later than 28 days after" in MCL 712.10(1) simply means a petition may not be filed more than 28 days after the publication of the notice of surrender. Consequently, the complaint filed in the Ottawa court was not only a petition for custody of Doe that was filed in the correct location, but it was also timely filed.

3. Because petitioner had properly and timely filed a petition for custody of Doe, the petition to terminate petitioner's parental rights filed by respondent in this case was filed in violation of MCL 712.17(3), and the Kalamazoo court's subsequent entry of a

termination order was in violation of MCL 712.17(5). MCL 712.17(3) provides that if the nonsurrendering parent has not filed a petition for custody of the newborn within 28 days of notice of surrender of a newborn, then the child-placing agency shall immediately file a petition with the court to determine whether the court shall enter an order terminating the rights of the nonsurrendering parent. And MCL 712.17(5) states that if the court finds by a preponderance of the evidence that the surrendering parent knowingly released their rights to the child and that reasonable efforts were made to locate the nonsurrendering parent *and a custody action was not filed*, the court shall enter an order terminating parental rights of the surrendering parent and the nonsurrendering parent. While respondent and the Kalamazoo court may not have been aware, at the time of the termination order, that petitioner had filed a petition for custody, the fact remains that he had, and the actions of respondent and the Kalamazoo court were therefore in error. In any event, the Kalamazoo court was aware of the Ottawa court divorce/custody action well before it decided petitioner's motion for reconsideration and therefore plainly erred by denying it. This Court prevented a nonsurrendering husband from asserting parental rights once they had been terminated in a proceeding under the SDNL in *In re Miller*, 322 Mich App 497 (2018)—but that was in the context of *no petition for custody having been filed*. *Miller* held generally that the termination of the parental rights of a nonsurrendering husband under the SDNL is valid; it did not hold that nonsurrendering parents are prohibited from challenging whether the SDNL procedures were correctly followed.

4. Publication of a notice, for one day, which merely generically states the newborn's date of delivery and hospital location, in a newspaper published in a county in which neither parent resides, does not constitute "reasonable efforts to identify, locate, and provide notice of the surrender of the newborn to the nonsurrendering parent" on the part of the agency as required by MCL 712.7(f). The plain language of the statute requires the agency to make reasonable efforts to identify, locate, and provide notice of surrender to the nonsurrendering parent and to file a written report identifying those efforts. Only then, if, despite those efforts, the identity of the nonsurrendering parent remains unknown, does the statute provide for publication in a newspaper of general circulation. Respondent's petition to terminate petitioner's parental rights claimed that "reasonable efforts were made to identify and locate the father and publication was made in a newspaper of general circulation in the county where the newborn was surrendered and no one responded," though it

appears that respondent undertook no efforts apart from the publication itself. Nothing in the language of MCL 712.7(f) can be read as providing that publication alone constitutes reasonable efforts or that such a nondescript and *de minimis* notice as the one in this case, or one that was published for such a brief time, should be accepted by a trial court as adequately evidencing reasonable efforts. Reasonable efforts must be tailored to the particular facts of the case and are to be evaluated on a case-by-case basis. Respondent's efforts in this case fell woefully short of reasonable.

The Kalamazoo Circuit Court's denial of petitioner's motion to unseal the adoption records was vacated, the court's decision that petitioner's parental rights as a nonsurrendering parent should be terminated was reversed, the order terminating those rights was vacated, and the matter was remanded for further proceedings.

RONAYNE KRAUSE, P.J., dissenting, disagreed that the SDNL permits the remedy crafted by the majority on these facts and disagreed that petitioner's Ottawa court petition for divorce and custody constituted a "petition for custody" within the meaning of MCL 712.10(1), because when the petition was filed, the child had not yet been born, let alone surrendered, making it literally impossible for petitioner to have "claim[ed] to be the nonsurrendering parent of [a] newborn." MCL 712.10(1), by its plain language, is premised upon the newborn having already been placed and therefore necessarily already born and surrendered. And it is readily apparent that the Legislature intended that a custody petition under the SDNL must be *specifically* brought *under the SDNL*. The Ottawa court petition was therefore not the proper kind of petition to invoke any procedures under the SDNL. While MCL 712.7(f) requires the child-placing agency to provide notice by publication if the nonsurrendering parent is unknown and also imposes an independent requirement of making "reasonable efforts" to communicate notice to the nonsurrendering parent, it does not follow that, under these circumstances, it was necessarily unreasonable to only post notice by publication because it is hard to imagine how respondent could have deduced that petitioner was Doe's father. A more appropriate remedy would be for the trial court to conduct an *in camera* review of the records to determine whether there is any evidence that respondent knew more about Doe and KGK than just the fact that KGK was married. The trial court could then, as appropriate, order release of properly redacted documentation or pass on the relevant information. Such a limited remedy would, at least, be consistent with the purposes of the SDNL's confidentiality provisions. The overarching goal of the

> SDNL is the protection of children and, while the Legislature has chosen a policy with consequences it may not have anticipated, the wisdom or propriety of legislative policy is the sole province of the Legislature.

Law Office of John R. Moritz, PC (by *John R. Moritz*) and *Villar Law Offices* (by *Michael Villar*) for petitioner.

Varnum LLP (by *Timothy P. Monsma*) for respondent.

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

BOONSTRA, J. Petitioner appeals by delayed leave granted the trial court's order denying his motion to unseal a sealed adoption file. Following the entry of that order, the trial court denied petitioner's motion for reconsideration in which he additionally requested that the trial court reinstate his parental rights to Baby Boy Doe (Doe). Petitioner raised both issues in his delayed application for leave to appeal, and this Court granted the application "limited to the issues raised in the application and supporting brief."[1] Underlying this matter is a series of conflicting orders independently entered by two circuit courts, each apparently acting largely without knowledge of the actions of (or the proceedings pending before) the other. We vacate in part, reverse in part, and remand for further proceedings.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

On August 8, 2018, petitioner initiated a divorce proceeding against his then-pregnant wife, KGK, in

[1] *In re Doe*, unpublished order of the Court of Appeals, entered August 31, 2020 (Docket No. 353796).

the family division of the Ottawa Circuit Court (the Ottawa court); petitioner additionally sought custody of his then-unborn child. Petitioner resided in Ottawa County at the time he filed for divorce, while KGK resided in Muskegon County.

The following day, August 9, 2018, unbeknownst to petitioner or the Ottawa court, KGK gave birth to a male child (Doe) at the Butterworth Campus of Spectrum Health Hospitals in Grand Rapids. On August 10, 2018, the Ottawa court entered an ex parte order for DNA testing of the child that was carried by KGK and an ex parte restraining order prohibiting either petitioner or KGK from taking "any action pertaining to the permanent placement or adoption of the defendant's unborn child pending further order of the court." The record before us[2] does not contain a proof of service or other indication that this order was served on KGK; petitioner's counsel later represented at a motion hearing that she was served with a copy of the complaint for divorce and the ex parte order sometime in September 2018.

KGK surrendered Doe at the hospital on August 12, 2018, under Michigan's Safe Delivery of Newborns Law (SDNL), MCL 712.1 *et seq*. KGK declined to provide any information regarding the birth father's identity but did indicate that she was married.[3] She also refused to sign a "Voluntary Release for Adoption of A Surrendered Newborn by Parent" form because

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[2] The Ottawa court file is not part of the record on appeal, inasmuch as this appeal arises out of Kalamazoo County.

[3] Petitioner asserts that KGK gave hospital staff her maiden name. At the motion hearing on petitioner's motion to unseal the adoption records, counsel for petitioner stated that KGK's maiden name was "in the hospital records" transferred from the hospital to respondent. Those records are not a part of the record provided to this Court. However, respondent has not challenged this assertion by petitioner.

she did not want her name appearing on any legal documents. The hospital placed Doe with respondent, a nonprofit agency that provides, among other services, child placement and adoption services.

On August 15, 2018, again unbeknownst to petitioner or the Ottawa court, respondent petitioned the family division of the Kalamazoo Circuit Court (the Kalamazoo court) for permission to place Doe with prospective adoptive parents. The Kalamazoo court entered an order authorizing placement on August 16, 2018. However, Doe was not placed with the prospective adoptive parents until August 25, 2018, because he was born with a methadone addiction and required additional medical care. Also on August 16, 2018, a "Publication of Notice, Safe Delivery of Newborns" was published in the Grand Rapids Press. This notice contained no names, but was merely addressed, generically, to the birth mother and father of "a newborn baby, born on August 9, 2018 at Spectrum Health Grand Rapids, MI." Twenty-eight days passed without a response to the publication being received by the Kalamazoo court.

On September 14, 2018, respondent petitioned the Kalamazoo court to accept the release of the surrendering parent and terminate the parental rights of both the surrendering and nonsurrendering parents. Meanwhile, on September 21, 2018, the Ottawa court entered an order awarding petitioner temporary physical and legal custody of Doe. On September 28, 2018, the Kalamazoo court held a hearing on respondent's termination petition. The court found that the surrendering parent (KGK) had knowingly released her rights to Doe, and that "[t]he nonsurrendering parent has not been identified or located, and the child-placing agency has made reasonable efforts to provide notice of the surrender of the newborn." The Kalamazoo court

then terminated the parental rights of both of Doe's parents (i.e., both petitioner and KGK) and granted custody of Doe to respondent.

On January 16, 2019, petitioner issued a third-party subpoena to respondent as part of the ongoing Ottawa court proceeding, requesting that respondent produce "any and all records regarding Baby Boy Doe, date of birth August 9, 2018 at Spectrum Health in Grand Rapids, Michigan to mother [KGK]." Petitioner issued the subpoena after taking the deposition of KGK, during which she revealed that she had surrendered Doe and that the child had been placed with respondent to facilitate his adoption. On February 1, 2019, respondent filed a motion to quash the subpoena on the ground that respondent's placement records were confidential and that disclosure of a placement agency's records without a court order constituted a criminal offense under MCL 712.2a(2) and (3).

On February 12, 2019, the Kalamazoo court granted the prospective adoptive parents' petition to adopt Doe.

On February 25, 2019, the Ottawa court heard arguments on respondent's motion to quash. The court held that petitioner was entitled to be informed of where the "Safe Delivery action" was proceeding, "so [petitioner] can pursue custody there." The court directed respondent to provide petitioner with a copy of the pleadings filed in the "Safe Delivery action," with the names and identifying information of the adoptive parents redacted from the pleadings. The parties disputed the language of the proposed order for several months; on June 10, 2019, an order was finally entered reflecting the Ottawa court's ruling.[4]

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[4] Respondent's counsel apparently mistakenly represented to the Ottawa court that the Safe Delivery action was pending in Kent County, not Kalamazoo County. Petitioner represents that he was not aware of

On July 30, 2019, the Ottawa court entered a judgment of divorce, which granted petitioner full physical and legal custody of Doe.

On October 7, 2019, petitioner moved the Kalamazoo court to unseal the adoption file of Doe and provide petitioner with access to all the information contained in that file. His motion stated, in relevant part:

> 52. The Michigan Safe Delivery Act provides that the emergency service provider to whom the newborn was surrendered has to provide the adoption agency "any information, either written or verbal, that was provided by and to the parent who surrendered the newborn."
>
> 53. The Michigan Safe Delivery Act provides that the adoption agency shall, "within 28 days, make reasonable efforts to identify, locate, and provide notice of the surrender of the newborn to the nonsurrendering parent. The child placing agency shall file a written report with the court that issued the order placing the child. The report shall state the efforts the child placing agency made in attempting to identify and locate the nonsurrendering parent and the results of those efforts. If the identity and address of the nonsurrendering parent are unknown, the child placing agency shall provide notice of the surrender of the newborn by publication in a newspaper of general circulation in the county where the newborn was surrendered."
>
> 54. Petitioner is in need of access to the entire adoption file, as he is the legal father of Baby Boy Doe.
>
> 55. Petitioner does not believe that Catholic Charities of West Michigan made reasonable efforts to identify and locate him.
>
> 56. Petitioner has no reason to rely on the accuracy of the disclosures of Catholic Charities West Michigan as they hid the location of the probate case from him and did

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the correct venue for the action until July 12, 2019, when he received from respondent the information that the Ottawa court ordered respondent to produce.

> not inform him of the impending final order of adoption once Catholic Charities knew he was seeking information on the adoption.
>
> 57. Furthermore, Catholic Charities of West Michigan sent Petitioner documents indicating that the Court knew of [sic, or?] should have known that the surrendering mother was married at the time of birth.

Respondent argued in response that MCL 712.2(a)(1) provides that the adoption records are subject to strict confidentiality and only the parties to the adoption proceeding are entitled to those records. According to respondent, petitioner was not a party to the Doe adoption proceedings and thus was not entitled to disclosure of the records. Respondent also argued that petitioner's claim that respondent had failed to use reasonable efforts to identify the nonsurrendering parent was both "legally irrelevant" and factually inaccurate. Respondent asserted that petitioner had failed to identify any legal basis that would allow the Kalamazoo court to grant the requested relief.

The Kalamazoo court held a hearing on petitioner's motion on December 10, 2019. After hearing the parties' arguments, the court ruled from the bench:

> They have got the legislature, the Court of Appeals, everybody has said this is secure haven. I understand you are arguing that mom went rouge [sic] and she had a duty — or somebody had a duty to let dad know what's going on, I mean that is really the heat [sic] of your argument, I get it. It is unfortunate for him.
>
> She is going to the hospital, telling the hospital there — there has been — what did she say — there has been abuse — domestic violence — I don't remember her exact terms and that the best interest [f]or my baby is for me to give my baby up. The hospital can't ask any questions, takes the baby, contacts the people on the list. Catholic Charities gets the baby placed. No questions by law can be asked.

I don't have any clear and convincing evidence of any legal argument from you why the confidential records for an adoption should be opened up in this case. There is nothing unique.

Other than the statute never addresses what happens if there is really no actual notice. There is legal notice. How many times — I don't know what kind of law you guys do, but I don't know how many times this Court has had published notice in the Climax Crescent, some tiny little newspaper within the county, but it is general circulation, meets the criteria of the statute. Do we think dad had actual notice? Probably not, but did he get legal notice? Absolutely.

I find that dad got legal notice. Did mom bamboozle everybody? Maybe. But that in and of itself is not a reason to change the confidential records and open up Pandora's Box and let me just assure you everything that Catholic Charities gave to this Court Ottawa County has already given you, just redacted with the third — innocent third parties names on it and the information about them.

So I really don't think our files would have anymore to give you. You got the orders, you have submitted them to us and we've got the information that Catholic Charities already gave you. That's all that there is.

* * *

Sure, but I really don' ' [sic] want to unseal our adoptive records. I don't think you've shown anything that shows that anything was violated, that there is any good cause.

I find this very interesting. The only concern that I have is I really think the legislature needs to tweak the law about notice. It is unfortunate that, you know, there is no requirement that the publication shall be where the mother resides or where the father resides or that shall be some notice a legal father [sic], but again the domestic violence people would be all up in arms to have that for this very reason. Mom is saying there is domestic violence. She is protecting herself allegedly and her baby. She

> doesn't want that baby to go to dad. I don't know. I don't know what the facts are, but we certainly have lots of cases like that.
>
> So I have to follow the law until the legislature changes it. In fact, *In re Miller*[, 322 Mich App 497; 912 NW2d 872 (2018),] confirms the legislature's intent.

The Kalamazoo court entered an order consistent with its ruling on January 2, 2020. Petitioner subsequently moved for reconsideration, arguing that the trial court had erred by not unsealing the adoption records so that he could determine whether respondent had made reasonable efforts to provide him with notice under the SDNL. In addition, petitioner advanced a new argument—that he had timely filed a petition for custody "within 28 days after the newborn is surrendered" as required by MCL 712.10(1) by filing for his divorce/custody action in the Ottawa court shortly before Doe's birth. Therefore, petitioner argued, the Kalamazoo court had erred by terminating his parental rights to Doe, and those rights should be reinstated. Without addressing the termination issue, the trial court entered an order denying petitioner's motion for reconsideration, stating:

> This matter having come before the Court on Petitioner's Motion for Reconsideration; the Court having read the parties' submissions and review of the testimony provided on the record on December 10, 2019, Petitioner's Motion for reconsideration is denied. The adoption records at issue shall remain sealed.

This appeal followed, by delayed leave granted. Petitioner's application for appeal raised two issues: (1) whether petitioner was entitled to have his parental rights reinstated and (2) whether the Kalamazoo court erred by not unsealing the adoption file.

II. TERMINATION OF PARENTAL RIGHTS

Petitioner argues that the Kalamazoo court erred by terminating his parental rights as a nonsurrendering parent under the SDNL. We agree. As discussed, it was in his motion for reconsideration that petitioner first raised the argument that his divorce action in Ottawa County was a "petition for child custody" under the SDNL, and the trial court did not specifically address that argument in its denial. This argument is therefore unpreserved. See *Vushaj v Farm Bureau Gen Ins Co of Mich*, 284 Mich App 513, 519; 773 NW2d 758 (2009). However, this Court "may overlook preservation requirements if the failure to consider the issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented." *Smith v Foerster-Bolser Constr, Inc*, 269 Mich App 424, 427; 711 NW2d 421 (2006).

We review for plain error unpreserved issues regarding the termination of parental rights. See *In re Utrera*, 281 Mich App 1, 8-9; 761 NW2d 253 (2008). We review issues of statutory interpretation de novo. *Eggleston v Bio–Med Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003).

This Court recently summarized the operation of the SDNL in *In re Miller*, 322 Mich App at 502-503:

> The Safe Delivery of Newborns Law "encourage[s] parents of unwanted newborns to deliver them to emergency service providers instead of abandoning them[.]" *People v Schaub*, 254 Mich App 110, 115 n 1; 656 NW2d 824 (2002). The statute permits a parent to surrender a child to an emergency service provider within 72 hours of the child's birth. MCL 712.1(2)(k); MCL 712.3(1). When the emergency service provider takes temporary custody

of the child, the emergency service provider must reasonably try to inform the parent that surrendering the child begins the adoption process and that the parent has 28 days to petition for custody of the child. MCL 712.3(1)(b) and (c). The emergency service provider must furnish the parent with written notice about the process of surrender and the termination of parental rights. MCL 712.3(1)(d). The emergency service provider should also try to inform the parent that, before the child can be adopted, "the state is required to make a reasonable attempt to identify the other parent, and then ask the parent to identify the other parent." MCL 712.3(2)(e). Finally, the emergency service provider must take the newborn to a hospital, if the emergency service provider is not a hospital, and the hospital must take temporary protective custody of the child. MCL 712.5(1). The hospital must notify a child-placing agency about the surrender, and the child-placing agency has various obligations, including making "reasonable efforts to identify, locate, and provide notice of the surrender of the newborn to the nonsurrendering parent" within 28 days, which may require "publication in a newspaper of general circulation in the county where the newborn was surrendered." MCL 712.7(f).

Either the surrendering parent, within 28 days of surrender, or the nonsurrendering parent, within 28 days of published notice of surrender, may file a petition to gain custody of the child. MCL 712.10(1). If neither the surrendering parent nor the nonsurrendering parent files a petition for custody within 28 days of surrender or notice of surrender, the child-placing agency must immediately file a petition with the court to terminate the rights of the surrendering parent and the nonsurrendering parent. MCL 712.17(2) and (3). The agency "shall present evidence that demonstrates that the surrendering parent released the newborn and that demonstrates the efforts made by the child placing agency to identify, locate, and provide notice to the nonsurrendering parent." MCL 712.17(4). If the agency meets its burden of proof by a preponderance of the evidence and a custody action has not been filed by the nonsurrendering parent, the trial "court shall enter an

order terminating parental rights of the surrendering parent and the nonsurrendering parent under this chapter." MCL 712.17(5). The Safe Delivery of Newborns Law does not define "parent," "surrendering parent," or "nonsurrendering parent." See MCL 712.1(2) (definitions).

Petitioner argues that the complaint in the Ottawa court constituted a petition for custody of Doe that was timely filed under MCL 712.10(1). We agree. MCL 712.10(1) provides:

> If a surrendering parent wants custody of a newborn who was surrendered under section 3 of this chapter, the parent shall, within 28 days after the newborn was surrendered, file a petition with the court for custody. *Not later than 28 days* after notice of surrender of a newborn has been published, an individual claiming to be the nonsurrendering parent of that newborn may *file a petition with the court for custody*. The surrendering parent or nonsurrendering parent shall file the petition for custody in 1 of the following counties:
>
> (a) If the parent has located the newborn, the county where the newborn is located.
>
> (b) If subdivision (a) does not apply and the parent knows the location of the emergency service provider to whom the newborn was surrendered, the county where the emergency service provider is located.
>
> (c) If neither subdivision (a) nor (b) applies, the county where the parent is located. [Emphasis added.]

The Legislature is presumed to have intended the meaning it has plainly expressed in statutory language. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). Therefore, nothing will be read into a clear statute that is not within the manifest intention of the Legislature as derived from the language of the statute itself. *Mich Ed Ass'n v Secretary of State (On Rehearing)*, 489 Mich 194, 218; 801 NW2d 35 (2011). The provisions of a statute should be construed

reasonably and in context and terms given their plain and ordinary meaning unless otherwise defined in the statute. *Pace v Edel-Harrelson*, 499 Mich 1, 7; 878 NW2d 784 (2016); *In re Wirsing*, 456 Mich 467, 474; 573 NW2d 51 (1998). If the plain and ordinary meaning of statutory language is clear, no judicial construction is permitted. *Pace*, 499 Mich at 7.

In this case, it is undisputed that (1) petitioner was not aware of the county where Doe was located or the county where Doe was surrendered until after petitioner's parental rights were terminated; (2) Ottawa County was where petitioner was located; and (3) petitioner filed his complaint for divorce/custody in Ottawa County. Therefore, if his complaint constituted a "petition for custody" of Doe, then it was filed in the correct county.[5]

We conclude that petitioner's complaint in the Ottawa court was a petition for custody of Doe. When terms are not defined in a statute, a court may consult a dictionary to ascertain their common meaning. See *Epps v 4 Quarters Restoration LLC*, 498 Mich 518, 529; 872 NW2d 412 (2015). A petition is "[a] formal written request presented to a court or other official body." *Black's Law Dictionary* (11th ed). This Court has referred to a marital partner's "right to petition for divorce . . . ." *Skaates v Kayser*, 333 Mich App 61, 83; 959 NW2dd 33 (2020) (quotation marks and citation

[5] MCL 712.10(2) states that "[i]f the court in which the petition for custody is filed did not issue the order placing the newborn, the court in which the petition for custody is filed shall locate and contact the court that issued the order and shall transfer the proceedings to that court." We note that this subsection imposes no further duties on a petitioning parent regarding such a transfer. MCL 712.14 provides the procedure for holding a hearing on a petition for custody and requires the court to "determine custody of the newborn based on the newborn's best interest." MCL 712.14(1).

omitted). And although the record of the proceedings in the Ottawa court was not provided to this Court, it is undisputed that the complaint for divorce sought a legal resolution to the issue of the custody of (the then-as-yet-unborn) Doe, and that petitioner requested that the court award him custody of Doe. In fact, the next action taken by petitioner after filing the complaint was to secure an ex parte order preventing *either* parent from taking "any action pertaining to the permanent placement or adoption of the defendant's unborn child pending further order of the court." Clearly, petitioner sought to have the Ottawa court determine the issue of custody, and in fact took steps to prevent either parent from doing anything that affected custody without permission of the court.

Further, the complaint was filed "not later than 28 days after notice of surrender of a newborn has been published." The complaint for divorce was filed on August 8, 2018, and the first order regarding custody in the case was entered on August 10. The notice of surrender was published on August 16, 2018. Nothing in the plain language of MCL 712.10(1) precludes the filing of a petition for custody by a nonsurrendering parent *before* a notice of surrender is published or sets any time limit on such an advance filing. See *Pace*, 499 Mich at 7. The word "not" is a function word that serves to "make negative of group of words or a word"—in this case, the words "later than 28 days after" notice of surrender has been published. *Merriam-Webster's Collegiate Dictionary* (11th ed). The word "later" means "at some time subsequent to a given time; [s]ubsequently, afterward." *Id*. Therefore, the plain and ordinary meaning of the phrase "not later than 28 days after" in MCL 712.10(1) is that a petition may not be filed more than 28 days after the

publication of the notice of surrender.[6] Consequently, the Ottawa County complaint was not only a petition for custody of Doe that was filed in the correct location, but it was also timely filed.

MCL 712.17(3) provides that "[*i*]*f the nonsurrendering parent has not filed a petition for custody of the newborn within 28 days of notice of surrender of a newborn*," then "the child placing agency with authority to place the newborn shall immediately file a petition with the court to determine whether the court shall enter an order terminating the rights of the nonsurrendering parent." (Emphasis added.) MCL 712.17(4) further requires the court to have a hearing on any such petition, at which the child-placing agency "shall present evidence that demonstrates that the surrendering parent released the newborn and that demonstrates the efforts made by the child placing agency to identify, locate, and provide notice to the nonsurrendering parent." MCL 712.17(5) states that "[i]f the court finds by a preponderance of the evidence that the surrendering parent has knowingly released his or her rights to the child and that reasonable efforts were made to locate the nonsurrendering parent *and a custody action has not been filed*, the court shall enter an order terminating

[6] We note also that the Legislature chose to require the surrendering parent to file a petition "within" 28 days after surrender, but to require the nonsurrendering parent to file a petition "not later than" 28 days after the notice was filed. The use of different terms suggests different meanings. *United States Fidelity Ins & Guaranty Co v Mich Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich 1, 14; 795 NW2d 101 (2009). While it would be illogical to give effect to a petition for custody filed by the surrendering parent that was filed *before* the surrender, because the act of surrender itself necessarily indicates a present desire to give up custody of the child, the same is not true of a nonsurrendering parent, who may be attempting, as seems to be the case here, to secure his or her parental rights against the possibility of a future surrender of a child by the other parent.

parental rights of the surrendering parent and the nonsurrendering parent under this chapter." (Emphasis added.)

Because petitioner had properly and timely filed a petition for custody of Doe, the petition to terminate petitioner's parental rights filed by respondent in this case was filed in violation of MCL 712.17(3), and the Kalamazoo court's subsequent entry of a termination order was in violation of MCL 712.17(5). This was plain error affecting substantial rights. *Utrera*, 281 Mich App at 8-9. While respondent and the Kalamazoo court may not have been aware, at the time of the termination order, that petitioner had filed a petition for custody, the fact remains that he had, and the actions of respondent and the Kalamazoo court were therefore in error.[7] *Id*. In any event, the Kalamazoo court had been made aware of the divorce/custody action well before it decided petitioner's motion for reconsideration, and therefore plainly erred by denying it. *Id*.[8]

Miller does not compel a different result. In a subsequent hearing on petitioner's motion to unseal the adoption file, the Kalamazoo court stated that

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[7] We note that MCL 712.17(4) requires a child-placing agency to present evidence at the termination hearing concerning its efforts to identify, locate, and provide notice to the nonsurrendering parent; it does not require a child-placing agency to present evidence regarding whether a petition for custody has been filed. This suggests to us that the requirement of MCL 712.17(5) that the trial court make certain findings "by a preponderance of the evidence" was not intended to require the trial court to make a *finding* about whether a custody action had been filed; rather, the phrase in MCL 712.17(5) that "a custody action has not been filed" sets forth a prerequisite that must be fulfilled before the court is authorized to terminate parental rights.

[8] We also note that respondent appears to have been aware (by virtue of petitioner's January 16, 2019 subpoena) of petitioner's custody interest before the Kalamazoo court entered its February 12, 2019 adoption order.

Miller prevented a nonsurrendering husband from asserting parental rights once they had been terminated in a proceeding under the SNDL and that a husband in that situation "would be without parental rights to assert—to disrupt an adoption." This analysis neglects a critical portion of our holding in *Miller*. In *Miller*, this Court indeed concluded that "the Safe Delivery of Newborns Law applies to the husband of a surrendering mother in that the husband may not later assert parental rights." *Miller*, 322 Mich App at 500. But it did so in the context of *no petition for custody having been filed*. *Id*. at 506. This Court described the procedure that should be followed when the husband of a surrendering mother does file such a petition and contrasted that with what happened in the case before it:

> If the husband had filed a petition for custody of the children within 28 days of published notice of the surrender, see MCL 712.10(1), he would have been required to submit to a DNA test to determine paternity, see MCL 712.11(1). If the testing established that he was not the children's biological father, the trial court would have dismissed his petition for custody. See MCL 712.11(5). This dismissal would be consistent with the rules governing the presumption of legitimacy. The DNA test would have demonstrated that the children were not the issue of the marriage, thereby defeating the presumption of legitimacy. See 722.711(a); *Barnes*, 475 Mich at 703. On the other hand, if the husband of the surrendering mother was the biological father, the trial court would have held a best-interest hearing to determine the children's custody. See MCL 712.14. *If the children's biological father never claimed paternity or petitioned for custody*, the child placing agency would have had to "immediately file a petition with the court to determine whether the court shall enter an order terminating the rights of the nonsurrendering parent." MCL 712.17(3).

> *In this case, no one claimed paternity*. If the trial court terminates the parental rights of the nonsurrendering parent and the husband of the surrendering mother later seeks to assert his parental rights, he would have to demonstrate that he was not the biological father to show that the order terminating parental rights did not apply to him. However, in doing so, he would be defeating the presumption of paternity, and he would be without parental rights to assert to disrupt an adoption. Accordingly, the termination proceedings under the Safe Delivery of Newborns Law apply to the legal father of the children. [*Id*. (emphasis added).]

In other words, *Miller* held generally that the termination of the parental rights of a nonsurrendering husband under the SDNL is valid; it did not hold that nonsurrendering parents were prohibited from challenging whether those procedures were in fact followed correctly. As we have discussed, in this case they were not. *Miller* does not prevent us from granting relief to petitioner.

III. MOTION TO UNSEAL ADOPTION FILE

Petitioner also argues that the Kalamazoo court erred by denying his motion to unseal the adoption file. We conclude that further proceedings are warranted in light of our determination that petitioner's parental rights were terminated erroneously. We review issues of statutory interpretation de novo. *Eggleston v Bio-Med Applications of Detroit, Inc*, 468 Mich at 32. We review a trial court's findings of fact for clear error. MCR 2.613(C).

MCL 712.2a(1) provides that "[a] hearing under this chapter is closed to the public. A record of a proceeding under this chapter is confidential, except that the record is available to any individual who is a party to that proceeding." MCL 712.2a(2) further states that "[a]ll

child placing agency records created under this chapter are confidential except as otherwise provided in the provisions of this chapter."

In this case, the Kalamazoo court held that petitioner could not challenge the termination of his parental rights under *Miller*. As discussed, this holding was erroneous (although, in fairness to the court, it was only in his motion for reconsideration that petitioner specifically raised the issue of whether the Ottawa court complaint constituted a petition for custody under the SDNL). The court also stated that it had reviewed the sealed file and found that "everything [respondent] gave to this Court[,] Ottawa County has already given to you, just redacted with the third — innocent third parties [sic] names on it and the information about them." The court added: "So I really don't think our files would have anymore to give you. You've got the orders, you have submitted them to us and we've got the information that Catholic Charities already gave you. That's all that is there."

Petitioner's stated purpose in seeking to have the adoption records unsealed was to permit him to challenge the efforts made by respondent to identify and locate him, in order to provide him with notice of Doe's surrender. The court found that petitioner had been given all the evidence it had relied upon in making its determination that petitioner had been given adequate notice of Doe's surrender. It is unclear to us whether the court's statements were a specific factual finding, or more in the nature of reassurance to petitioner. And it is possible that its failure to grant petitioner's motion is harmless error. MCR 2.613(A). However, as we have discussed, there was a legal error concerning the termination of petitioner's parental rights. That being the case, we conclude that the Kalamazoo court's

orders denying petitioner's motion and denying reconsideration should be vacated. On remand, the Kalamazoo court should consider petitioner's request (if petitioner renews it) in the context of our holding regarding the termination of petitioner's parental rights.

Relatedly, we note that petitioner has argued at various points in the proceedings that the efforts undertaken by respondent to identify and locate him, in order to provide him with notice of Doe's surrender, were not reasonable and that his motion to unseal the records in this case was part of his effort to challenge the reasonableness of those efforts. In light of our holding in Part II of this opinion, we could opt not to address the reasonableness of respondent's efforts. However, we believe it important to note our disagreement with the Kalamazoo court's apparent interpretation of MCL 712.7 as providing that publication of a notice, for one day, which merely generically states the newborn's date of delivery and hospital location, in a newspaper published in a county in which neither parent resides, constitutes "reasonable efforts to identify, locate, and provide notice of the surrender of the newborn to the nonsurrendering parent." MCL 712.7(f). We interpret the provision differently. MCL 712.7(f) provides that the child-placing agency shall:

> Within 28 days, make reasonable efforts to identify, locate, and provide notice of the surrender of the newborn to the nonsurrendering parent. The child placing agency shall file a written report with the court that issued the order placing the child. The report shall state the efforts the child placing agency made in attempting to identify and locate the nonsurrendering parent and the results of those efforts. If the identity and address of the nonsurrendering parent are unknown, the child placing agency shall provide notice of the surrender of the newborn by publication

> in a newspaper of general circulation in the county where the newborn was surrendered.

This provision, by its plain language, see *Pace*, 499 Mich at 7, does not indicate that publication of notice of surrender satisfies an agency's duty to make reasonable efforts to identify, locate, and provide notice to a nonsurrendering parent. To the contrary, the plain language of the statute requires the agency to make reasonable efforts to identify, locate, and provide notice of surrender to the nonsurrendering parent and to file a written report identifying those efforts. Only then, if, despite those efforts, the identity of the nonsurrendering parent remains unknown, does the statute provide for publication in a newspaper of general circulation.[9] Yet, respondent's report to the Kalamazoo court was devoid of any mention of any efforts taken to identify and locate petitioner, other than the publication itself. Despite being told that KGK was married, there is no evidence that respondent attempted to locate, for example, marriage records, or inquire any further into her husband's identity. Respondent filed an essentially blank, unsigned Voluntary Release For Adoption of Surrendered Newborn by Parent form with the court. Although respondent's petition to terminate petitioner's parental rights claimed that "reasonable efforts were made to identify and locate the father *and* publication was made in a newspaper of general circulation in the county where the newborn was surrendered and no one responded," it appears that respondent undertook no efforts apart from the publication itself. (Emphasis added.) Simply put, nothing in the language of MCL 712.7(f) can be read as providing that publication alone constitutes reasonable efforts or that

[9] The statute does not specify the contents of the notice of publication or the duration of publication.

such a nondescript and *de minimis* notice as the one in this case, or one that was published for such a brief time, should be accepted by a trial court as adequately evidencing reasonable efforts.

In the context of termination-of-parental-rights proceedings under the Juvenile Code, exactly how thorough and extensive efforts must be to be considered "reasonable" has not been defined; rather, reasonable efforts must be tailored to the particular facts of the case and are to be evaluated on a case-by-case basis. See, e.g., *In re Hicks/Brown*, 500 Mich 79, 89-90; 893 NW2d 637 (2017). In this case, additional efforts on the part of respondent might have discovered the divorce/custody proceedings in the Ottawa court and the existence of a restraining order prohibiting KGK from doing exactly what she did in surrendering Doe. Based on the record before us, respondent's efforts in this case appear to us to have fallen woefully short of what is "reasonable."

We vacate the Kalamazoo court's denial of petitioner's motion to unseal the adoption records. We reverse the court's determination that petitioner's parental rights as a nonsurrendering parent should be terminated and vacate the order terminating those rights. We remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

BECKERING, J., concurred with BOONSTRA, J.

RONAYNE KRAUSE, P.J. (*dissenting*). I respectfully dissent. The majority thoroughly recites the relevant facts and applicable law. Petitioner has indeed suffered a grievous loss. However, I conclude that the Safe Delivery of Newborns Law (SDNL), MCL 712.1 *et seq*., simply does not permit the remedy crafted by the

majority on these facts. The Legislature made a policy choice under which other considerations take precedence over petitioner's rights. Therefore, any remedy must come from the Legislature, not from this Court. I believe the majority, although understandably frustrated, deviates from what the law permits.

As the majority recites, MCL 712.10(1) provides, in relevant part, that "[n]ot later than 28 days after notice of surrender of a newborn has been published, an individual claiming to be the nonsurrendering parent of that newborn may file a petition with the court for custody." I agree with the majority that the above sentence imposes a deadline: in this case, the notice of surrender was published on August 16, 2018, so an appropriate petition must have been filed by September 13, 2018. I also agree with the majority's determination that *if* petitioner's Ottawa County complaint for divorce and custody constituted a "petition for custody" within the meaning of MCL 712.10(1), then it was properly filed in Ottawa County, notwithstanding the fact that the termination proceeding was held in Kalamazoo County. I respectfully disagree with the majority's conclusion that the Ottawa County complaint for divorce and custody may, at least on these facts, be considered a "petition for custody" within the meaning of MCL 712.10(1).

The most obvious reason why the Ottawa County petition for divorce and custody was, pursuant to the plain language of the statute, not a proper petition under the SDNL is simply that the child had not yet even been born, let alone surrendered. Therefore, it was literally impossible for petitioner to have "claim[ed] to be the nonsurrendering parent of [a] newborn." Indeed, MCL 712.10(2) provides:

> If the court in which the petition for custody is filed did not issue the order placing the newborn, the court in which the petition for custody is filed shall locate and contact the court that issued the order and shall transfer the proceedings to that court.

In other words, the statute is, by its plain language, premised upon the newborn having already been placed,[1] and therefore necessarily already born and surrendered. In addition, elsewhere in the SDNL are references to custody petitions or proceedings being filed specifically under MCL 712.10. See MCL 712.7(c), MCL 712.10(3), MCL 712.11(1), MCL 712.11(2), MCL 712.17(3). Although not expressly stated in so many words, it is readily apparent that the Legislature intended that a custody petition under the SDNL must be *specifically* brought *under the SDNL*. The Ottawa County petition was therefore not the proper kind of petition to invoke any procedures under the SDNL.

I do not disagree with the majority that, in principle, if a statute sets a deadline after some triggering event, but the statute does not expressly require the filing to occur after any particular time, a filing could potentially be timely even if filed before that triggering event. See *Fischer-Flack, Inc v Churchfield*, 180 Mich App 606, 609-613; 447 NW2d 813 (1989) (notice held timely where it was provided before furnishing materials, notwithstanding statute requiring notice to be provided "within 20 days after" furnishing materials); *People v Marshall*, 298 Mich App 607, 625-627; 830 NW2d 414 (2012), vacated in part on other grounds 493 Mich 1020 (2013) (habitual-offender notice held timely because the defendant was not arraigned, so deadline of "within 21 days after the defendant's arraignment" was never triggered). However, all things are not equal

[1] Presumably pursuant to MCL 712.7(e).

here. As discussed, the SDNL requires the "petition for custody" under MCL 712.10 to be founded upon a surrender of a newborn having already occurred. Although the statute does not explicitly forbid, in so many words, a pre-surrender petition, the statute also does not explicitly permit a pre-surrender petition. Given the clear intent of the Legislature, I conclude that it would require impermissibly reading language into the SDNL to permit a pre-surrender petition to be considered timely under that statute.

The majority also takes issue with the reasonableness of respondent's efforts to provide notice to petitioner under MCL 712.7(f). The majority implicitly also analogizes to general principles of due process, which does not require notice to be successful but does require a good-faith effort under the circumstances to try to achieve actual notice. *Sidun v Wayne Co Treasurer*, 481 Mich 503, 509-510; 751 NW2d 453 (2008). Once again, I do not disagree in principle that MCL 712.7(f) requires the agency to provide notice by publication if the nonsurrendering parent is unknown, and it also imposes an independent requirement of making "reasonable efforts" to communicate notice to the nonsurrendering parent. However, it does not follow that, under these circumstances, it was necessarily unreasonable to only post notice by publication. In fact, the majority outlines precisely why there was effectively nothing more that respondent *could* do: the only thing it knew was that KGK was married. I do not know offhand how many married people there are in Michigan, but even if respondent had scoured every single marriage record in the state, I am unable to imagine how respondent could have deduced that petitioner was Doe's father.[2] As the

[2] Indeed, even if respondent had also known that divorce proceedings had been initiated against KGK, and respondent had requested a copy

majority states, reasonableness depends on the circumstances. The law generally does not obligate anyone to expend resources making clearly futile gestures. See *Cichecki v Hamtramck*, 382 Mich 428, 437; 170 NW2d 58 (1969).

Even if the Ottawa County petition could be considered a properly filed petition for custody under MCL 712.10, the remedy crafted by the majority would still be improper. First, even if there was any legal or rational basis for challenging the reasonableness of respondent's efforts to locate petitioner, it should not be necessary to unseal the entire adoption record to make that inquiry. A more appropriate remedy would be for the trial court to conduct an *in camera* review of the records to determine whether there is any evidence that respondent knew more about Doe and KGK than just the fact that KGK was married. The trial court could then, as appropriate, and if any such evidence was actually present, order release of properly redacted documentation or pass on the relevant information. Such a limited remedy would, at least, be consistent with the purposes of the statutory confidentiality provisions and would still permit respondent to make a meaningful argument regarding the reasonableness of respondent's efforts with the benefit of that knowledge—if any.

Furthermore, as this Court has explained, and as expressly set forth by statute, the proper procedure would have been to hold a hearing to "determine custody of the newborn based on the newborn's best interest." MCL 712.14; *In re Miller*, 322 Mich App 497, 506; 912 NW2d 872 (2018). As a general matter,

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of all records of all pending divorce proceedings in Kalamazoo County, and respondent had some way to divine a connection between an unidentified baby and any particular husband, respondent *still* would not have discovered petitioner, because the divorce proceeding was pending in Ottawa County.

custody best-interests analyses require consideration of the facts and circumstances as they exist at the time of that hearing, even if that hearing is held after remand due to an error in earlier proceedings. See *Fletcher v Fletcher*, 447 Mich 871, 889; 526 NW2d 889 (1994). It has now been more than two years since the Kalamazoo Circuit Court granted Doe's prospective adoptive parents' petition to adopt Doe, and Doe is almost three years old. Even if that adoption had been legally erroneous, which I do not accept, the majority's resolution of this appeal is contrary to the plain language of the statute. The majority's resolution also appears to presume that it would somehow be in Doe's best interest—the standard under the SDNL—to rip him from the arms of the only family he has known and place him with a stranger, as if Doe was somehow a mere piece of property instead of a living person. Again, I agree that petitioner has suffered a grievous loss, but the overarching goal of the SDNL is the protection of children.

It is certainly within the purview of the courts to point out that the Legislature has chosen a policy with consequences it may not have anticipated, but ultimately, the wisdom or propriety of legislative policy is the sole province of the Legislature. The Legislature enacted a statutory scheme to "encourag[e] parents of unwanted newborns to deliver them to emergency service providers instead of abandoning them." See *People v Schaub*, 254 Mich App 110, 115 n 1; 656 NW2d 824 (2002). That scheme includes provisions to address situations in which the newborn is only unwanted by one of the parents. That scheme requires emergency service providers to ask surrendering parents for identifying information, but it expressly does not require the surrendering parent to disclose any such information. MCL 712.3(2). The Legislature presumably un-

derstood the implications: that it was possible a nonsurrendering parent would therefore be unknowable and unfindable. The Legislature therefore enacted a policy that prefers to err on the side of protecting the safety of the child and of the surrendering parent, even at the possible detriment to the nonsurrendering parent. I appreciate the majority's frustration with such a scheme, but it is not for us to decide that it is wrong and therefore bypass the plain language of the statute.

I would affirm.

CRAMER v TRANSITIONAL HEALTH SERVICES OF WAYNE

Docket No. 347806. Submitted May 7, 2021, at Lansing. Decided August 26, 2021, at 9:25 a.m. Magistrate's findings vacated, Court of Appeals judgment reversed, and case remanded 512 Mich ___ (2023).

Agnes N. Cramer sought workers' compensation benefits after she suffered an electrical shock and fell from a ladder while working for defendant Transitional Health Services of Wayne, which was insured by defendant American Zurich Insurance Company. The magistrate concluded that plaintiff did become disabled for a time because of a shoulder injury resulting from the workplace incident but denied benefits. Plaintiff filed a claim for review with the Michigan Compensation Appellate Commission (MCAC), which reversed the magistrate's denial of disability benefits for plaintiff's shoulder injury but affirmed the magistrate's finding that plaintiff's mental disabilities were not work related. Plaintiff applied for leave to appeal in the Court of Appeals, which remanded the matter to the Board of Magistrates to determine whether plaintiff was entitled to a discretionary award of attorney fees on unpaid medical benefits but denied leave to appeal in all other regards. Plaintiff sought leave to appeal that order in the Supreme Court, which, in lieu of granting leave, remanded the case to the Court of Appeals for consideration of whether: (1) the MCAC correctly concluded that the magistrate properly applied the four-factor test set out in *Martin v City of Pontiac Sch Dist*, 2001 Mich ACO 118, and the standard in *Yost v Detroit Bd of Ed*, 2000 Mich ACO 347; (2) the *Martin* test is at odds with the principle that a preexisting condition is not a bar to eligibility for workers' compensation benefits and conflicts with the plain meaning of MCL 418.301(2); and (3) the MCAC correctly concluded that the magistrate's lack-of-causation conclusion was supported by the requisite competent, substantial, and material evidence.

The Court of Appeals *held*:

1. The MCAC correctly concluded that the magistrate's lack-of-causation conclusion was supported by the requisite evidence. MCL 418.861a(3) provides that "findings of fact made by a worker's compensation magistrate shall be considered conclusive by the

commission if supported by competent, material, and substantial evidence on the whole record." MCL 418.861a(3) also states that " 'substantial evidence' means such evidence, considering the whole record, as a reasonable mind will accept as adequate to justify the conclusion." As the MCAC properly noted, it has some fact-finding powers, but it may not substitute its judgment for that of the magistrate if competent, material, and substantial evidence supported the magistrate's findings. The magistrate found that plaintiff had emotional problems that were attested to by every treating or expert medical witness. The issue was causation and whether plaintiff's psychiatric problems prevented her from returning to employment. The magistrate used the language in MCL 418.301(2) that provides that "[m]ental disabilities are compensable if arising out of actual events of employment, not unfounded perceptions thereof, and if the employee's perception of the actual events is reasonably grounded in fact or reality" and the four-factor test outlined in *Martin* to analyze whether plaintiff's psychiatric problems were significantly contributed to by occupational events and circumstances. Given the finding that plaintiff had psychiatric problems, this was the proper standard of law. The magistrate's analysis resulted in her finding that the workplace incident did not significantly contribute to the plaintiff's psychiatric difficulties. There was no allegation of fundamentally incompetent or immaterial evidence, and plaintiff agreed that the question for the MCAC was whether the evidence was such that a reasonable mind would accept it as adequate to justify the magistrate's lack-of-causation conclusion. The magistrate's conclusion was based primarily on the expert opinions of a neurologist and a psychologist, who testified that there was no objective evidence to support plaintiff's contention that her injuries from the electric shock and fall significantly contributed to her psychiatric issues or that plaintiff sustained a disabling injury to her head. Consequently, the magistrate concluded that plaintiff failed to meet her burden of proof to establish that her psychiatric issues were work related. That there was evidence supporting a different conclusion did not indicate that the MCAC misapplied the governing legal standards nor undo the fact that the experts' testimony had *some* weight in favor of defendants' position.

2. The MCAC correctly concluded that the magistrate properly applied the four-factor test in *Martin* and the standard in *Yost*. In *Martin*, the commission adopted a four-factor guide to determine whether a claimant's employment contributed to the claimant's mental disability in a significant manner. The four factors identified in *Martin* are (1) the number of occupational and nonoccupational contributors, (2) the relative amount of contribution of each

contributor, (3) the duration of each contributor, and (4) the extent of permanent effect that resulted from each contributor. And as the MCAC noted, analysis of the *Martin* factors is fact-finding and if supported by competent, material, and substantial evidence the analysis must be affirmed. In *Yost*, the commission noted that a pre-existing condition might be so severe that a minor, insignificant workplace event pushes the employee over the edge into a symptomatic condition, providing merely the "last straw breaking the camel's back." Plaintiff's contention that the MCAC's decision was insufficient because it did not compare the nonoccupational stressors to the occupational stressors and because it failed to assess the magistrate's rejection of testimony of three of plaintiff's medical providers was not persuasive because the MCAC's opinion, which set forth competing evidence, read as a whole, made clear that the commission was accepting—because of its basis in competent, material, and substantial evidence—the conclusions of the magistrate regarding the factors. Regarding the *Martin* and *Yost* factors, the magistrate analyzed all the *Martin* factors and the *Yost* standard. Ultimately, the magistrate found that plaintiff's nonoccupational stressors were the more substantial contributors to her disability and clearly outweighed her occupational stressors. It is true that the purpose of the *Martin* test is not to determine which contributors—nonoccupational or occupational—come out "on top," but rather, as set forth in MCL 418.301(2), whether occupational factors contributed to the mental condition in a significant manner. But to that end, the magistrate stated that "a significant contribution from the electric shock and fall was virtually impossible." Moreover, the *Martin* factors are only a guide for determining whether the significant-manner standard has been satisfied. The MCAC's decision to uphold the magistrate's conclusion that the significant-manner standard had not been satisfied had adequate support in the evidence. And notwithstanding that the evidence produced could *also* have led to the contrary conclusion, it is not the role of the Court of Appeals to overturn a decision supported by the evidence in a workers' compensation case.

3. The *Martin* test is not at odds with the principle that a preexisting condition is not a bar to eligibility for workers' compensation benefits, and it does not conflict with the plain meaning of MCL 418.301(2). MCL 418.301(2) states that "[m]ental disabilities are compensable if arising out of actual events of employment, not unfounded perceptions thereof, and if the employee's perception of the actual events is reasonably grounded in fact or reality." Our Supreme Court has stated that the significant-manner requirement forces a claimant to prove a significant factual causal connection between the actual events of employment and the

mental disability, adding that the significant-manner requirement also imposes on claimants a higher standard of proof. To this end, the "analysis will, by necessity, require a comparison of nonemployment and employment factors. Once actual employment events have been shown to have occurred, the significance of those events to the claimant must be judged against all the circumstances to determine whether the resulting mental disability is compensable. The *Martin* test conforms with the Supreme Court's guidance regarding how to apply MCL 418.301(2)—i.e., it provides for a comparison of nonemployment and employment factors. Plaintiff's arguments that the *Martin* test is biased toward a finding of noncompensability were unpersuasive and speculative. And plaintiff's argument that the *Martin* test transforms the statute's requirement to assess whether a condition was contributed to in "a significant manner" into a requirement to assess whether a condition was contributed to in "the most significant manner" ignored the *Martin* panel's recognition that the purpose of the test was not to determine whether work contributors were "the" most significant factors and that " 'significant' does not require a preponderance standard where work contributors in combination with any natural progression of the condition accelerate the condition more than the nonwork contributors. The *Martin* panel appropriately cautioned that the "test" is not a definitive checklist and that the factors enumerated in *Martin* should act as merely guides, aiding the fact-finder in the often-difficult task of weighing the evidence.

Affirmed.

SHAPIRO, P.J., dissenting, would have reversed and remanded for a redetermination based on the MCL 418.301(2) statutory standard: whether the workplace injury "contributed to or aggravated or accelerated [the disability] in a significant manner"; alternatively, he would have concluded that the commission erred by holding that the magistrate's lack-of-causation conclusion was supported by substantial, competent, and material evidence. The *Martin* test is inconsistent with both the text and purpose of MCL 418.301(2). In *Martin*, the commission concluded that when the Legislature used the word "significant" in MCL 418.301(2), it really meant to say "substantial." Having concocted the "substantial" causation standard, *Martin* went on to define a faulty test, limited to four factors, none of which is set forth in the statute. Thus, the *Martin* test effectively requires that the claimant prove the workplace was the "most significant" cause of the disability, raising the causation requirement to one more demanding than the proximate-cause standard used in tort cases. The *Martin* test also fails to consider all relevant factors and heightens consideration of

factors that bias the test against compensability. In sum, the *Martin* test, at least as applied here, effectively required that the work event be the primary or even sole cause of the disabling condition, an approach that cannot be squared with the statute. And, of course, the *Martin* approach wholly ignores the history and purpose of the Worker's Disability Compensation Act, which make clear that a preexisting condition is not a bar to eligibility for benefits and that mere susceptibility to injury is not grounds to deny benefits. Accordingly, Judge SHAPIRO would have rejected the *Martin* test. Alternatively, Judge SHAPIRO would have concluded that the commission erred by holding that the magistrate's lack-of-causation conclusion was supported by substantial, competent, and material evidence. There was no evidence that before the workplace incident plaintiff had been diagnosed with, treated for, or suffered from PTSD, conversion disorder, or nonepileptic seizures; while there was evidence that plaintiff suffered through painful life experiences, she had never been diagnosed with any serious or disabling mental illness before the workplace incident. Plaintiff set forth prima facie proof of causation through her treating physicians who testified that the work incident contributed in a significant manner to her PTSD, conversion disorder, and seizures; the magistrate however discredited this testimony because the witnesses did not establish a hierarchy of plaintiff's nonoccupational stressors versus her occupational stressors. This misconstrued *Martin*'s directive that it is the *magistrate's* duty to establish a hierarchy of contributors. In addition, defendants' consultants did not conclude as a matter of medical opinion that plaintiff was malingering; yet, the magistrate did not find that plaintiff was malingering, making it unclear how the testimony suggesting malingering—which the majority heavily relied on—constituted substantial evidence for the magistrate's decision. Moreover, the magistrate did not seem to fully grasp the nature of conversion disorder given that much of the magistrate's opinion was spent discussing the lack of a *physical* cause for plaintiff's seizures. It was simply speculation to conclude that the abuse plaintiff suffered years ago was the sole or primary cause of her disability, let alone to conclude that her electrocution and fall did not significantly contribute to plaintiff's condition and disability.

WORKERS' COMPENSATION — DETERMINING WHETHER EMPLOYMENT CONTRIBUTED TO A MENTAL DISABILITY IN A SIGNIFICANT MANNER — PREEXISTING CONDITIONS.

MCL 418.301(2) provides that "[m]ental disabilities . . . are compensable if contributed to or aggravated or accelerated by the employment in a significant manner"; a worker with a preexisting

> illness can obtain benefits if analysis of pertinent factors—including a comparison of nonemployment and employment factors—shows that a work stressor contributed to, aggravated, or accelerated the illness in a significant manner; in *Martin v City of Pontiac School Dist*, 2001 Mich ACO 118, the Michigan Compensation Appellate Commission adopted a four-factor guide for determining whether a claimant's employment contributed to their mental disability in a significant manner within the meaning of MCL 418.301(2); the four factors are (1) the number of occupational and nonoccupational contributors, (2) the relative amount of contribution of each contributor, (3) the duration of each contributor, and (4) the extent of permanent effect that resulted from each contributor; use of the four-factor guide comports with MCL 418.301(2) and with the principle that a preexisting condition is not a bar to eligibility for workers' compensation benefits; these factors are merely a guide for the fact-finder in their task of weighing the evidence; the purpose of the factors is not to determine whether occupational contributors were "the" most significant factors; rather, occupational contributors must constitute a vital component or contribute a considerable amount to the progression of the condition.

Mancini Schreuder Kline, PC (by *Roger R. Kline*) for plaintiff.

Giarmarco, Mullins & Horton, PC (by *Adam Levitsky* and *Geoffrey S. Wagner*) for defendants.

Amicus Curiae:

Lacey & Jones LLP (by *Gerald M. Marcinkoski*) for Michigan Self-Insurers' Association.

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

JANSEN, J. Plaintiff appeals as on leave granted the opinion and order of the Michigan Compensation Appellate Commission (MCAC) affirming in part and reversing in part the order of the Workers' Compensation Board of Magistrates. The MCAC reversed the magistrate's order denying disability benefits to plaintiff predicated on a shoulder injury but affirmed, in perti-

nent part, the magistrate's determination that plaintiff failed to demonstrate that her workplace accident significantly contributed to her mental health issues.

Plaintiff previously filed an application for leave to appeal in this Court. See *Cramer v Transitional Health Servs of Wayne*, unpublished order of the Court of Appeals, entered August 16, 2019 (Docket No. 347806), where this Court ordered:

> Pursuant to MCR 7.205(E)(2), in lieu of granting the application for leave to appeal, the Court REMANDS this matter to the Board of Magistrates for the limited purpose of allowing the magistrate to determine whether plaintiff is entitled to a discretionary award of attorney fees on unpaid medical benefits. MCL 418.315(1); *Harvlie v Jack Post Corp*, 280 Mich App 439, 444-446; 760 NW2d 277 (2008). The conclusion of the Commission that the magistrate exercised her discretion to deny a requested award is unsupported by the record where the magistrate's opinion makes no reference to attorney fees. The Court does not retain jurisdiction. In all other regards, the application for leave to appeal is DENIED for lack of merit in the grounds presented.

Plaintiff filed an application for leave to appeal that order in our Supreme Court, which in turn ordered:

> [I]n lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration, as on leave granted, of whether: (1) the Michigan Compensation Appellate Commission correctly concluded that the magistrate properly applied the four-factor test in *Martin v Pontiac Sch Dist*, 2001 Mich ACO 118, lv den 466 Mich 873 (2002), and the standard in *Yost v Detroit Board of Education*, 2000 Mich ACO 347, lv den 465 Mich 907 (2001); (2) the *Martin* test is at odds with the principle that a preexisting condition is not a bar to eligibility for workers' compensation benefits and conflicts with the plain meaning of MCL 418.301(2); and (3) the Michigan Compensation Appellate Commission correctly concluded

> that the magistrate's lack of causation conclusion was supported by the requisite competent, substantial, and material evidence utilizing the proper standard of law. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court. [*Cramer v Transitional Health Servs of Wayne*, 505 Mich 1022, 1022 (2020).]

We now affirm.

I. BACKGROUND

On February 8, 2012, plaintiff was working for defendant Transitional Health Services as a dietary manager at a nursing home. She wiped a light fixture with a wet rag, received an electric shock, fell off a ladder, and hit her shoulder and head. She was taken to a hospital, assessed, and, showing no indications of injury, released. Plaintiff began experiencing seizures at the end of March 2012. It was later determined that these were nonepileptic seizures, meaning that they were brought on not by any physical brain abnormality but by stress. Plaintiff was diagnosed with post-traumatic stress disorder (PTSD), and she also claimed to be experiencing severe headaches. It is not disputed that plaintiff had an extremely traumatic history, including 19 years of horrific abuse at the hands of her ex-husband. The defense posture was that plaintiff's mental issues stemmed primarily from this history and that plaintiff was also exaggerating her claims of disability.

Testimony was presented from the following providers who treated plaintiff: Manfred Greiffenstein, Ph.D., a licensed psychologist; Dr. Wilbur J. Boike, M.D., a neurologist; John Stokes, a vocational rehabilitation consultant; Dr. Mariana V. Spanaki-Varalas, M.D., who monitored plaintiff in an epilepsy-monitoring unit; Andrea J. Thomas, a psychologist; Dr.

Gregory Barkley, M.D., who along with Thomas, worked with treating a small group of women, including plaintiff, who had a history of traumatic experiences; and James Fuller, a certified rehabilitation counselor.

Greiffenstein met with plaintiff and conducted a neuropsychological evaluation of her. Greiffenstein spoke with plaintiff and reviewed several imaging scans. Specifically, Greiffenstein reviewed an MRI of plaintiff's brain that was normal and an EEG that showed no epileptiform activity. Greiffenstein concluded on the basis of plaintiff's medical history that her apparent symptoms "waxed and waned in dramatic fashion," with diagnoses added and dropped accordingly. Plaintiff was having "psychogenic nonepileptic seizures" (PNESs). Greiffenstein stated that such seizures "are usually caused by the intersection of an underlying personality disorder and unusually stressful circumstances." He said that the causes could be in the distant past or "in the here and now." He added, "[T]he theory is that [PNESs] act to control the environment in persons who otherwise have inadequate coping skills." PNESs are "a complex behavior triggered by stress that mimics seizures." Plaintiff had been in a physically and sexually abusive marriage, was still in contact with her ex-husband, was estranged from some of her children, and maintained a contentious relationship with her mother. Accordingly, Greiffenstein found that "the stressors in [plaintiff's] life are not at one time or at [sic] one off event. They are recurrent features of her daily existence."

Greiffenstein reported that plaintiff "used exaggerated language to describe the symptoms and their functional impact on her life." After administering several tests, Greiffenstein concluded that plaintiff's results were consistent with someone "grossly over-

stating" disability-related complaints. He noted that plaintiff "did not make the types of errors associated with focal or diffuse brain disease" and stated that, "[b]ased on negative brain scans and a chart history of waxing and waning complaints, the evidence favors histrionic personality" or "Undifferentiated Somatoform Disorder." He said, "This is a form of mental illness characterized by prolific but medically unexplained symptoms, where personality and situational factors are the root cause." Greiffenstein stated that it is difficult to distinguish this illness from "malingering," or faking, and that this difficulty was present in plaintiff's case, because she had presented elements of such faking. Greiffenstein also gave a diagnosis of "conversion disorder." When asked to define this, he stated:

> Conversion disorder is the modern term for what used to be called chronic hysteria, meaning a psychologically disturbed patient whose mental illness takes the form of medically unexplained symptoms. In the case of conversion disorder, the medically unexplained symptoms refer to the central nervous system, meaning they might mimic disorders of the central nervous system but on further medical testing there is no lesion of the central nervous system found. These are typically persons who are histrionic and give colorful and dramatic medical histories that ultimately don't add up or make sense.

Greiffenstein concluded that plaintiff was able to work. He stated, "Mental health services are presently indicated for interpersonal conflict. These are personal problems that pre-date the accident." Greiffenstein said that plaintiff's "symptom claims are best understood as an interaction between a disturbed personality and psychosocial stressor." This personality issue would have been present before plaintiff even began working at Transitional Health Services.

Dr. Boike also conducted an independent neurological examination of plaintiff. In his first report, Dr. Boike concluded that plaintiff's "neurological examination is absolutely normal." Indeed, plaintiff had normal EEG findings even when claiming that seizures had occurred. He agreed with the diagnosis of "pseudoseizures" and said that plaintiff "demonstrates no apparent cognitive difficulties to suggest that she has any significant cognitive problems at this time." Dr. Boike did recommend that plaintiff be seen for psychiatric treatment to determine if she had psychiatric difficulties as a result of the work incident.

In his second report, Dr. Boike indicated that plaintiff was now complaining of frequent migraine headaches and associated slurred speech and reported to him that the severe headaches began in October 2013. Dr. Boike opined that plaintiff "appears to have largely substituted one diagnosis for another." He stated:

> It remains my strong opinion that [plaintiff] has no neurological impairment or disability. So long as her subjective complaints provoke yet evermore evaluation and treatment by medical care providers, it is likely that [plaintiff's] complaints will escalate over time. Given her complaints regarding comments reportedly made to her concerning the possibility of future "Parkinson's" disease, I would not be at all surprised if this will be the next "presentation" of her "illness."
>
> I strongly recommend that medical care providers discontinue the current practice of reacting to every new symptom as a manifestation of some serious underlying illness. I actually believe [plaintiff's] long-term prognosis is excellent. I believe it is likely that she will completely resolve all of her current "difficulties" once there is resolution of whatever legal proceedings are underway at this time. I do not believe [plaintiff] requires any additional evaluation or treatment of her ongoing complaints.

> I strongly doubt that she is actually experiencing headaches at this time. [Comma omitted.]

Dr. Boike concluded that plaintiff could work.

Stokes testified that he met with plaintiff in June 2014. On the basis of the opinions of doctors who said that plaintiff could work, Stokes looked for jobs for which plaintiff would be qualified. He noted that plaintiff had actually completed a final course for her Bachelor's degree in May 2013, after the workplace incident. Stokes identified jobs, such as receptionist, accounting clerk, bookkeeper, and fast-food-service manager, that plaintiff could perform. Apparently, plaintiff had been offered a job as a food-court manager that paid $120,000 a year, but the offer was rescinded when she mentioned her seizures. Stokes opined that plaintiff was exhibiting "work avoidance" by bringing up the seizures to prospective employers. He opined that, in light of certain medical opinions and her job skills, plaintiff had not "sustained the loss of her wage earning capacity."

Dr. Spanaki-Varalas testified that she saw plaintiff on May 16, 2012, and formulated a treatment plan for her. Dr. Spanaki-Varalas admitted plaintiff into an epilepsy-monitoring unit at the end of June 2012 where plaintiff remained for 14 days. Dr. Spanaki-Varalas stated that with medication and without medication, "We didn't see any brainwaves that are specific and indicate epilepsy." Plaintiff did not have a "100 percent normal EEG" because there were "some slow waves," but these were not "specific or diagnostic," and the doctor could not opine about what caused them. Dr. Spanaki-Varalas concluded that plaintiff's accident at work "led to anxiety" and that she therefore "developed [PTSD]." The doctor testified, "The patient had none of those episodes before the insult, and then she progres-

sively developed those up to the point that she had convulsive episodes." Dr. Spanaki-Varalas stated that the workplace incident "was the starting point of [plaintiff's] symptoms" and was a significant factor that led to PTSD and related nonepileptic seizures (NESs). Dr. Spanaki-Varalas admitted that she was not in the best position to determine the "cause or etiology of what ultimately was [the] diagnosis of PTSD leading to" NESs and that this was best left to other professionals.

Thomas, who began seeing plaintiff in October 2012, testified that the difference between NESs and epileptic seizures is that epileptic seizures begin in the brain and NESs are triggered by stress. Plaintiff told Thomas that her first seizure was on March 28, 2012. Thomas stated that plaintiff had moderate depression, PTSD, and conversion disorder with NESs. She explained conversion disorder as a disorder whereby "the body converts . . . stress into a physical symptom." Thomas did not think that plaintiff was malingering. Thomas stated that she determined that plaintiff had NESs because they were "diagnosed during her stay in the [epilepsy] unit," and she determined that plaintiff had PTSD by taking plaintiff's history. Thomas said that plaintiff had stressors earlier in her life, but the workplace incident made "the situation that much worse" and contributed to or caused her NESs and PTSD. Thomas did not think that plaintiff was employable at the moment because of her NESs and the PTSD symptoms. Plaintiff was taking clonazepam for anxiety and Lamictal to stabilize her moods.

Similarly, Dr. Barkley testified that he did not think plaintiff was a malingerer and that she was trying to get better. Dr. Barkley said that plaintiff had a number of physical and psychological symptoms, such as headaches, that did not exist before the workplace incident,

and that, therefore, the incident was causally related to them. Dr. Barkley admitted that plaintiff did not present to him with severe headache symptoms until August 19, 2013, although she complained of other headaches before then. In connection with her complaint of a severe headache, plaintiff reported having had an emotionally stressful week seeing her children. Dr. Barkley opined that plaintiff was disabled because of severe PTSD and NESs. He was hopeful that she could rejoin the workforce in one or two years. Dr. Barkley stated that plaintiff had been able to cope with "the other things that had happened to her," but the workplace incident "became the straw that broke the camel's back." He admitted that he was relying on plaintiff's provided information in making his conclusions.

Finally, Fuller testified that he met with plaintiff at the request of plaintiff's counsel and found her unemployable. He stated that there was an "either/or conundrum" in this case, because some professionals had concluded that plaintiff was able to work and some had concluded that she was not able to work. His opinion was formed from records provided by plaintiff's counsel, i.e., records indicating that plaintiff could not work. In addition, plaintiff reported to Fuller that she suffered from migraine headaches and NESs and that she was lying down for 70 percent of waking hours. According to Fuller, plaintiff told him she turned down the $120,000-a-year job because she "felt incapable of performing the work."

Plaintiff also offered testimony. Regarding the February 8, 2012 work incident, plaintiff recalled that she was thrown off the ladder and then hit her head on a sink and on the floor. She claimed that hospital records from that day that omitted a history of head

injury were wrong, because she mentioned a head injury and head problems, and not just an arm injury, when she was taken to the hospital. She claimed that she lost consciousness, but said, "When I hit my head the second time I came to." She acknowledged that the summary of the hospital visit stated that "the patient has escaped from any major injury or trauma to herself" and "will be going home." She also admitted that her various tests were normal.

Plaintiff claimed that in March 2012, she began experiencing tremors and was dizzy and had headaches. She claimed that she did not have any NESs during her stay in the hospital epilepsy unit because "it was a very calm environment." When asked what stressors in her life precipitated the seizures, she mentioned the trial and the denial of workers' compensation benefits. She said that she had gotten black eyes and broken ribs and had experienced incontinence as a result of her seizures. Plaintiff claimed that she was experiencing migraines with "stroke-like symptoms" and that they had been getting worse. She stated, "[T]here's something with the protons and ions that collide in my brain that pushes my brain out to my cranium." She claimed to have problems reading because of "blurriness."

Plaintiff stated that her emotional state and tearfulness were getting worse and that she did not want to live. She admitted that she attempted to commit suicide on July 4, 2014, and "died three times" from overdosing on pills. When asked about what she worked on with Thomas, plaintiff mentioned her "previous family issues." Plaintiff testified, "[W]hat happens when you have a severe trauma in your life, there are things that come flooding back into your head. And it's hard for you to push them away because it's like a dam being burst."

The magistrate issued a 42-page opinion. She stated that *Martin v Pontiac Sch Dist*, 2001 Mich ACO 118, provided a four-factor test for determining whether a workplace incident was a significant element in a plaintiff's allegedly disabling condition.[1] She said that "the factors to be considered are 1) the number of occupational and non-occupational contributors, 2) the relative amount of contribution of each contributor, 3) the duration of each contributor, and 4) the extent of permanent effect that resulted from each contributor." She stated that the test "compares qualitatively the occupational contributors to the non-occupational contributors." The magistrate detailed plaintiff's history of trauma and the testimony that plaintiff's PTSD and conversion disorder were influenced by the workplace incident. The magistrate stated that nonoccupational contributors were plaintiff's repetitive abuse in her prior marriage, the loss of her relationship with her mother, the loss of her relationship with some of her children, and the loss of her church community. The magistrate described the occupational contributor as "the electric shock and fall from the ladder." She stated that the nonoccupational triggers outnumbered the occupational triggers.

Regarding the second *Martin* factor, the magistrate merely stated that Thomas, Dr. Barkley, and Dr. Spanaki-Varalas did not quantify the effect of plain-

[1] MCL 418.301(2) states:

> Mental disabilities and conditions of the aging process, including but not limited to heart and cardiovascular conditions and degenerative arthritis, are compensable if contributed to or aggravated or accelerated by the employment in a significant manner. Mental disabilities are compensable if arising out of actual events of employment, not unfounded perceptions thereof, and if the employee's perception of the actual events is reasonably grounded in fact or reality.

tiff's earlier stressors and the workplace incident but merely said that the incident caused the PTSD and conversion disorder. Concerning the third *Martin* factor, the magistrate stated that plaintiff's nonoccupational stressors are "continuing," that plaintiff's mother had "disowned" her, that plaintiff's own children did not believe that she was having seizures from a work injury, and that plaintiff attempted suicide in July 2014 "when her children chose to spend the holiday with their grandmother rather than with her." The magistrate said that the work incident "was a one-time incident with no ongoing objective residuals." As for the fourth *Martin* factor, the magistrate concluded that "there is no objective evidence that there are permanent effects from" the workplace incident and no "objective medical evidence" of a closed head injury or seizures. She also mentioned that plaintiff's PTSD and NESs might improve and added that "it appears plaintiff's nonoccupational stressors are long term and possibly permanent."

The magistrate noted the testimony that the workplace incident was " 'the straw that broke the camel's back,' " but stated that such a "straw" was insufficient to meet the necessary statutory standard for entitlement to benefits in connection with a mental illness. She explicitly rejected the causation testimony of Thomas, Dr. Barkley, and Dr. Spanaki-Varalas and stated that they did not "establish[] a hierarchy of plaintiff's nonoccupational stressors versus her occupational stressors" and merely "made the assumption that because plaintiff was working she was not having stress from the nonoccupational stressors." She said, "All of plaintiff's nonoccupational stressors were the more substantial contributors and clearly outweighed her occupational stressors."

The magistrate explicitly accepted the testimony of Greiffenstein and Dr. Boike. She said that plaintiff's "non-occupational stressors had advanced the [PTSD] and conversion disorder so close to disability that a significant contribution from the electric shock and fall was virtually impossible." The magistrate concluded that plaintiff did become disabled for a time because of a shoulder injury resulting from the workplace incident. However, she then denied benefits regardless, stating that plaintiff had failed to present evidence establishing that she made a good-faith effort to find employment during this period and, therefore, had failed to establish a limitation in her wage-earning capacity in work suitable to her qualifications and training.

Plaintiff filed a claim for review with the MCAC. On January 25, 2019, the MCAC issued an opinion and order in which the commission clarified the magistrate's opinion, affirmed the opinion in part, and reversed the opinion in part. The commission overturned the magistrate's determination that plaintiff was not entitled to full wage-loss benefits as a result of her shoulder injury. In so doing, the MCAC rejected the magistrate's finding that plaintiff presented no evidence that she made a good-faith effort to find employment during her period of disability resulting from the shoulder injury. The commission found that plaintiff was entitled to full wage-loss benefits for the period from February 8, 2012, to April 12, 2013.

The MCAC rejected, however, plaintiff's claim that the magistrate incorrectly "lumped together" plaintiff's emotional difficulties with physical neurological problems and therefore employed an incorrect standard to assess whether those combined problems were related to the workplace accident. The commission elaborated:

> Plaintiff argues that, separate from her emotional difficulties, she also has organic neurologic problems that are not properly analyzed under MCL 418.301(2) but should be analyzed under the lower standard of causation found in MCL 418.301(1). We disagree.
>
> . . . We affirm the magistrate's conclusion that plaintiff does not have organic neurologic problems as that conclusion is supported by competent, material, and substantial evidence.

As for plaintiff's "non-organic" (or non-physically-based) mental issues, the commission rejected plaintiff's challenges to the application of *Martin*. The MCAC stated:

> The magistrate found that plaintiff has emotional problems. She writes, "Every treating or expert neurophysiology, neurologist, neuropsychologist, psychiatric [sic], or examiner agreed plaintiff has emotional problems. The area of disagreement is causation and whether plaintiff's psychiatric problems prevent her from returning to employment . . ." Thereafter, the magistrate uses the language in MCL 418.301(2) and the four-factor test outlined in *Martin* . . . to analyze whether plaintiff's emotional/mental problems were significantly contributed to by occupational events and circumstances. This analysis by the magistrate was proper considering the finding that plaintiff had emotional problems. MCL 418.301(2), *Martin*, supra. The analysis resulted in the magistrate finding the occupational incident on February 8, 2012, did not significantly contribute to the plaintiff's emotional difficulties. Consequently, the magistrate concluded that plaintiff failed to meet her burden of proof to establish that the emotional problems (mental disability) were work related.
>
> * * *
>
> Plaintiff argues that *Martin* . . . does not faithfully implement the standards constructed by the Legislature in MCL 418.301(2). We disagree. *Martin* is an en banc decision of this Commission that provides, contrary to

> plaintiff's assertion, a framework for consistent analysis of whether work factors played a significant causative role in a worker's mental disability.
>
> Plaintiff next argues that the magistrate erred in the application of the four-factor test in *Martin* to the facts of this case. We disagree.
>
> Analysis of the four factors in *Martin* is fact finding and if supported by competent, material, and substantial evidence the analysis must be affirmed. This magistrate separately analyzed each of the four factors in light of the evidence in this case. Thereafter the magistrate concluded that the work incident was not a significant contributor to the acknowledged mental conditions. The number, duration, and impact/effect of plaintiff's non-work stressors outweighed those aspects of the stress associated with the work event. Additionally, the magistrate rejected the opinions of Ms. Thomas, Dr. Barkley and Dr. Spanaki-Varalas, and relied upon the testimony of Dr. Boike and Dr. Greiffenstein. Plaintiff, once again, provides a detailed argument that there is evidence that supports another conclusion. As previously noted we are not permitted to alter a magistrate[']s conclusion simply because there is evidence supporting that altered conclusion. . . . The lack of causation conclusion reached by the magistrate is supported by the requisite competent, material, and substantial evidence and therefore must be affirmed. Plaintiff's argument to the contrary fails.

As noted, plaintiff sought leave to appeal in this Court, but this Court denied the application. *Cramer*, unpub order. Plaintiff sought leave to appeal in the Supreme Court, which remanded this matter back to this Court for consideration of the three questions noted above.

II. STANDARD OF REVIEW

This Court exercises de novo review of questions of law involved in any final order of the MCAC. *Mudel v*

Great Atlantic & Pacific Tea Co, 462 Mich 691, 697 n 3; 614 NW2d 607 (2000). "A decision of the [MCAC] is subject to reversal if it is predicated on erroneous legal reasoning or the wrong legal framework." *Ross v Modern Mirror & Glass Co*, 268 Mich App 558, 561; 710 NW2d 59 (2005). "The judiciary reviews the [MCAC's] decision, not the magistrate's decision." *Mudel*, 462 Mich at 732. "The judiciary treats the [MCAC's] findings of fact, made within the [MCAC's] powers, as conclusive absent fraud. If there is *any* evidence supporting the [MCAC's] factual findings, the judiciary must treat those findings as conclusive." *Id*.

III. ANALYSIS

We first answer our Supreme Court's directive to determine whether "the Michigan Compensation Appellate Commission correctly concluded that the magistrate's lack of causation conclusion was supported by the requisite competent, substantial, and material evidence utilizing the proper standard of law." *Cramer*, 505 Mich 1022. As stated in *Mudel*, 462 Mich at 732:

> The [MCAC] treats the magistrate's findings of fact as conclusive if supported by competent, material, and substantial evidence on the whole record.
>
> [S]ubstantial evidence means such evidence, considering the whole record, as a reasonable mind will accept as adequate to justify the conclusion.
>
> The whole record means the entire record of the hearing including all of the evidence in favor and all the evidence against a certain determination.
>
> The [MCAC's] review shall include both a qualitative and quantitative analysis of that evidence in order to ensure a full, thorough, and fair review.
>
> The [MCAC] has authority to make independent findings of fact, and is not required to remand a case to the

> magistrate where factual findings necessary to the decision are lacking, as long as the record is sufficient for administrative appellate review and the [MCAC] is not forced to speculate. [Quotation marks and citations omitted; see also MCL 418.861a.]

We conclude that the MCAC employed a proper standard of law when analyzing the magistrate's decision regarding causation. Indeed, the MCAC set forth the proper standards toward the beginning of its opinion. It noted that although it had some fact-finding powers, it could not simply substitute its judgment for that of the magistrate if competent, material, and substantial evidence supported the magistrate's findings. See *id*. at 699-700.

MCL 418.301 states, in part:

> (1) An employee, who receives a personal injury arising out of and in the course of employment by an employer who is subject to this act at the time of the injury, shall be paid compensation as provided in this act. A personal injury under this act is compensable if work causes, contributes to, or aggravates pathology in a manner so as to create a pathology that is medically distinguishable from any pathology that existed prior to the injury. In the case of death resulting from the personal injury to the employee, compensation shall be paid to the employee's dependents as provided in this act. Time of injury or date of injury as used in this act in the case of a disease or in the case of an injury not attributable to a single event is the last day of work in the employment in which the employee was last subjected to the conditions that resulted in the employee's disability or death.
>
> (2) Mental disabilities and conditions of the aging process, including but not limited to heart and cardiovascular conditions and degenerative arthritis, are compensable if contributed to or aggravated or accelerated by the employment in a significant manner. Mental disabilities are compensable if arising out of actual events of employment, not

> unfounded perceptions thereof, and if the employee's perception of the actual events is reasonably grounded in fact or reality.

On appeal, plaintiff no longer argues about a physical or "organic" condition, but instead focuses on her mental problems; she accedes that Subsection (2) of MCL 418.301 is the applicable paragraph. As noted, "findings of fact made by a worker's compensation magistrate shall be considered conclusive by the commission if supported by competent, material, and substantial evidence on the whole record." MCL 418.861a(3). MCL 418.861a(3) also states that " 'substantial evidence' means such evidence, considering the whole record, as a reasonable mind will accept as adequate to justify the conclusion." There was no allegation of fundamentally incompetent or immaterial evidence in the present case, and plaintiff agrees that the question for the MCAC was whether the evidence was such that a reasonable mind would accept it as adequate to justify the causation conclusion reached by the magistrate.

Plaintiff contends that no reasonable mind could accept that the workplace incident did not contribute to or aggravate plaintiff's mental illness in a significant manner. She contends that Dr. Boike's causation testimony should not be credited because he stated that he would defer to a mental health professional for a resolution of that question and because he worked primarily with spinal conditions. Plaintiff also contends that Greiffenstein's opinion on causation could not be accepted by a reasonable mind because he was focusing on whether a traumatic brain injury occurred, because he wrongly focused on whether the workplace incident was life-threatening, because the shock *was* in fact life-threatening, and because he simply (and wrongly) assumed that the shock was minor.

We conclude that plaintiff's arguments are not persuasive. Although Dr. Boike stated that he mostly saw spinal patients, he also stated that he "never quit being a general neurologist." And while he agreed that plaintiff needed a psychiatric consult to explore psychiatric issues, he also stated that plaintiff claimed to experience only one day a week without headaches, but had also reported that her seizures had improved to the point that she was only having "one episode every two to three weeks" as opposed to 14 in one month. As a result, Dr. Boike opined that plaintiff "appears to have largely substituted one diagnosis for another." He stated:

> So long as [plaintiff's] subjective complaints provoke yet evermore evaluation and treatment by medical care providers, it is likely that [plaintiff's] complaints will escalate over time. Given her complaints regarding comments reportedly made to her concerning the possibility of future "Parkinson's" disease, I would not be at all surprised if this will be the next "presentation" of her "illness."
>
> I strongly recommend that medical care providers discontinue the current practice of reacting to every new symptom as a manifestation of some serious underlying illness. I actually believe [plaintiff's] long-term prognosis is excellent. I believe it is likely that she will completely resolve all of her current "difficulties" once there is resolution of whatever legal proceedings are underway at this time. I do not believe [plaintiff] requires any additional evaluation or treatment of her ongoing complaints.
>
> I strongly doubt that she is actually experiencing headaches at this time. [Comma omitted.]

Dr. Boike stated, "When [plaintiff] was told, frankly, that these events that she represented as seizures were not really seizures, they seemed to have largely gone away." He also thought that plaintiff was consciously controlling her intermittent slurred speech.

He did not believe the headaches, if they were real, had anything to do with the work incident. He questioned plaintiff's diagnosis of conversion disorder because he suspected malingering. He thought that once the potential secondary gain from legal proceedings was eliminated, plaintiff would improve. Dr. Boike concluded that plaintiff could work.

As for Greiffenstein, he stated that the "core" of what he did in the present case was to evaluate whether plaintiff had residual effects from a traumatic brain injury, but the whole of his testimony, as delineated in the statement of facts, reveals that he also evaluated many other aspects of plaintiff's case, such as, for example, her failed relationships. As for plaintiff's complaint that Greiffenstein characterized the shock she incurred as minor, Greiffenstein, in doing so, referred to the "earliest description of the injury facts"—and plaintiff herself acknowledged that the summary of the hospital visit from the day of the incident stated that "the patient has escaped from any major injury or trauma to herself" and "will be going home." It is not disputed that Greiffenstein had access to plaintiff's medical records. The gist of his testimony was that this shock was an insignificant factor when compared globally to plaintiff's situation; this was not improper in light of available records.

Greiffenstein reported that plaintiff "used exaggerated language to describe the symptoms and their functional impact on her life." After administering several tests, Greiffenstein concluded that plaintiff's results were consistent with someone "grossly overstating" disability-related complaints. He testified that, based on a comparison to other cases, "[t]here was no doubt that [plaintiff] is engaging in extreme overreport of symptoms and problems." He stated, "[S]he's

a person who puts a lot of energy into looking as neurologically, and memory, and medically, and psychologically impaired as she possibly can." He went on to opine, "Mental health services are presently indicated for interpersonal conflict. These are personal problems that pre-date the accident."

Greiffenstein testified that plaintiff's "symptom claims are best understood as an interaction between a disturbed personality and psychosocial stressor." This personality issue would have been present before plaintiff even began working at the nursing home. He was asked if the work incident played a role "in any of the various impressions that you g[a]ve in this case." He replied, "Well, it's certainly a factor in her mind. You know, this work incident has become the convenient focus for everything that's wrong in her life and relationships." Greiffenstein stated that he did not believe that plaintiff had a psychological disability and that she "puts a lot of energy into having her many symptoms believed." He said, "Ultimately, it's her underlying personality that creates problems for her."

The MCAC explicitly noted that the magistrate relied on the testimony of Greiffenstein and Dr. Boike and found that the magistrate's causation conclusion was supported by "the requisite competent, material and substantial evidence." Plaintiff's arguments go to the weight to be afforded the testimony of Greiffenstein and Dr. Boike, but their testimony certainly had *some* weight in favor of defendants' position. There was evidence to support the MCAC's decision, *Mudel*, 462 Mich at 732, and no indication that the MCAC somehow misapplied the governing legal standards.

Next, we consider whether "the Michigan Compensation Appellate Commission correctly concluded that the magistrate properly applied the four-factor test in

Martin v Pontiac Sch Dist, 2001 Mich ACO 118, lv den 466 Mich 873 (2002), and the standard in *Yost v Detroit Board of Education*, 2000 Mich ACO 347, lv den 465 Mich 907 (2001)[.]" *Cramer*, 505 Mich at 1022.

In *Martin*, 2001 Mich ACO 118 at 16, the commission, in an en banc decision, adopted a four-factor guide for determining whether a claimant's employment contributed to his or her mental disability in a significant manner. The four factors identified in *Martin* are "1) the number of occupational and non-occupational contributors, 2) the relative amount of contribution of each contributor, 3) the duration of each contributor, and 4) the extent of permanent effect that resulted from each contributor." *Id*. The *Martin* panel rejected the use of the so-called "last event" or "straw that broke the camel's back" analysis. *Id*. It stated, "As the analogy indicates, otherwise harmless events can precipitate drastic consequences when accompanied by more substantial circumstances. As we have explained, the law requires plaintiffs to prove significance independent from the nonoccupational events." *Id*.

In *Yost*, 2000 Mich ACO 347 at 6, the commission, evaluating a knee injury, stated:

> As already noted, structural change of the knee resulting from an injury does not ipso facto render the injury a significant contribution to the resulting condition. Evidence of structural change or a mere shift form [sic] asymptomatic status to symptomatic status is never enough, standing alone, to demonstrate significant contribution, because a pre-existing condition might be so severe that a minor, insignificant workplace event pushes the employee over the edge into a symptomatic condition, providing merely the "last straw breaking the camel's back."

The Supreme Court has asked this Court to determine if the MCAC correctly concluded that the magis-

trate properly applied *Martin* and *Yost*. As noted, the MCAC stated the following with regard to *Martin*:

> Analysis of the four factors in *Martin* is fact finding and if supported by competent, material, and substantial evidence the analysis must be affirmed. This magistrate separately analyzed each of the four factors in light of the evidence. Thereafter the magistrate concluded that the work incident was not a significant contributor to the acknowledged mental conditions. The number, duration, and impact/effect of plaintiff's non-work stressors outweighed those aspects of the stress associated with the work event. Additionally, the magistrate rejected the opinions of Ms. Thomas, Dr. Barkley and Dr. Spanaki-Varalas, and relied upon the testimony of Dr. Boike and Dr. Greiffenstein. Plaintiff, once again, provides a detailed argument that there is evidence that supports another conclusion. As previously noted we are not permitted to alter a magistrate[']s conclusion simply because there is evidence supporting that altered conclusion. . . . The lack of causation conclusion reached by the magistrate is supported by the requisite competent, material, and substantial evidence and therefore must be affirmed. Plaintiff's argument to the contrary fails.

Plaintiff contends that the MCAC's decision was insufficient because the MCAC did not engage in a discussion of the nonoccupational stressors as compared to the occupational stressors. This argument is not persuasive because the above excerpt from the MCAC's opinion, read as a whole, makes clear that the commission was accepting—because of their basis in competent, material, and substantial evidence—the conclusions of the magistrate with regard to the factors. Plaintiff also contends that the MCAC's decision was deficient because the MCAC failed to assess the magistrate's rejection of the testimony by Thomas, Dr. Barkley, and Dr. Spanaki-Varalas. But once again, the above excerpt makes clear that the MCAC was

accepting—because of its basis in competent, material, and substantial evidence—the decision of the magistrate to reject plaintiff's causation evidence and accept defendants'. The MCAC set forth the competing evidence in its opinion, and implicit in its ruling was that Greiffenstein and Dr. Boike provided competent, material, and substantial evidence for the magistrate's causation decision. Plaintiff appears to be arguing that there is some sort of facial deficiency in the MCAC's opinion, but the opinion is detailed enough for appellate review.

Plaintiff cites *Lombardi v William Beaumont Hosp (On Remand)*, 199 Mich App 428; 502 NW2d 736 (1993). In *Lombardi*, *id*. at 435-436, this Court stated:

> We are troubled, however, by [the Workers' Compensation Appeal Board's (the WCAB's)] rather conclusory determination that plaintiff's employment contributed to, aggravated, or accelerated his mental disability in a significant manner.
>
> * * *
>
> In this case, the controlling and concurring opinions of the WCAB contain no mention of the various nonoccupational factors that might have contributed to plaintiff's disability, much less an analysis of the relative effect of occupational and nonoccupational factors on plaintiff's mental condition. Indeed, the controlling opinion contains but a single fleeting reference to the "significant standard," and the concurring opinion offers little more than a conclusory finding of significant contribution, aggravation, or acceleration in the form of the statutory language. Such conclusory treatment of the significant manner issue is insufficient to facilitate meaningful judicial review. . . . Therefore, we remand this case to the WCAB for a determination whether plaintiff's employment was a significant contributing, aggravating, or accelerating factor in the overall scheme of his mental disability, taking into consideration both nonoccupational and occupational factors.

In that case, "[t]he hearing referee denied benefits, finding that plaintiff's disability was not caused by work-related conditions. Plaintiff appealed to the WCAB, which reversed the decision of the hearing referee . . . ." *Id*. at 432. The present case is different because the magistrate gave a very detailed analysis of the various factors in issue, and it is clear from the MCAC's opinion that it was *accepting* this analysis.

As for the application of the *Martin* and *Yost*[2] factors, the magistrate set forth plaintiff's history of trauma and the testimony that plaintiff's PTSD and conversion disorder were influenced by the workplace incident. The magistrate said that nonoccupational contributors were plaintiff's repetitive abuse in her prior marriage, the loss of her relationship with her mother, the loss of her relationship with some of her children, and the loss of her church community. The magistrate described the occupational contributor as "the electric shock and fall from the ladder," and that the nonoccupational triggers outnumbered the occupational triggers. Concerning the second *Martin* factor, the magistrate stated that Thomas, Dr. Barkley, and Dr. Spanaki-Varalas did not quantify the effect of plaintiff's earlier stressors and the workplace incident but merely said that the incident caused the PTSD and conversion disorder. With regard to the third *Martin* factor, the magistrate said that plaintiff's nonoccupational stressors are "continu-

[2] Plaintiff complains that the MCAC failed to mention the *Yost* test. However, the magistrate incorporated *Yost*'s straw-that-broke-the-camel's-back test into its discussion of *Martin*. In *Martin*, 2001 Mich ACO 118 at 16, the commission spoke of this "last-event" issue, and the MCAC in the present case concluded that the magistrate "correctly applied" the "standards" from *Martin*. Plaintiff's apparent complaint of a facial deficiency in the MCAC's opinion in connection with *Yost* is not persuasive. The concept expressed in *Yost* was adequately ruled upon by the MCAC.

ing," that plaintiff's mother had "disowned" her, that plaintiff's own children did not believe that she was having seizures from a work injury, and that plaintiff attempted suicide in July 2014 "when her children chose to spend the holiday with their grandmother rather than with her." The magistrate said that the work incident "was a one-time incident with no ongoing objective residuals." As for the fourth *Martin* factor, the magistrate said that "there is no objective evidence that there are permanent effects from" the workplace incident and no "objective medical evidence" of a closed head injury or seizures. The magistrate stated that "it appears plaintiff's nonoccupational stressors are long term and possibly permanent." The magistrate noted the testimony that the workplace incident was " 'the straw that broke the camel's back,' " but that such a "straw" was insufficient to meet the statutory standard. Ultimately, the magistrate found that, "All of plaintiff's nonoccupational stressors were the more substantial contributors and clearly outweighed her occupational stressors."

On the basis of the foregoing, as well as the record before this Court, we conclude that the MCAC did not err by concluding that the magistrate's conclusions regarding the *Martin* and *Yost* factors were supported by competent, material, and substantial evidence. When asked about what she worked on with Thomas, plaintiff mentioned her "previous family issues." She said, "[W]hat happens when you have a severe trauma in your life, there are things that come flooding back into your head. And it's hard for you to push them away because it's like a dam being burst." Plaintiff described the abuse in her first marriage as lasting the entire marriage and as being mostly mental and sexual abuse, although her ex-husband had pulled her hair and thrown her against walls. She stated that the ex-

husband also physically abused the couple's children. Plaintiff stated that her mother told her "that whatever happens in the bedroom between a man and a woman is not rape no matter what" and told plaintiff to "put up with it." Plaintiff would try to go back to live with her mother to escape the abuse, but her mother would "force[] [plaintiff] to go back." Plaintiff's mother blamed plaintiff for getting a divorce, and their relationship suffered. Plaintiff had no other family to rely on, and her ex-husband ended up getting custody of three of the couple's children. Plaintiff said that the entire situation "did not sit well with [her] for a long time."

Plaintiff admitted that she attempted to commit suicide on July 4, 2014. She said that she was in a bad place that day because she had a migraine the night prior, because her "kids couldn't come home for the holiday," and because the "fireworks were like lightening [sic]." Later, she admitted that two of the children had chosen to spend the weekend with plaintiff's mother and did not answer plaintiff's telephone calls. Plaintiff felt "lonely and isolated" as a result.

Greiffenstein stated that "the stressors in [plaintiff's] life are not at one time or at [sic] one off event. These are recurrent features of her daily existence." He opined that plaintiff had "repeated psychological trauma" from "coping with failed relationships." He stated, "Mental health services are presently indicated for interpersonal conflict. These are personal problems that pre-date the accident." Similarly, Dr. Spanaki-Varalas testified that the workplace incident "brought up or maximized [plaintiff's] previous stressors" and caused plaintiff to stop being able to "cop[e]." Moreover, Thomas testified that NESs can result from a singular incident or from physical or sexual abuse that occurred in the distant past. She said that physical or sexual

abuse was "probably the most common" risk factor. When asked about the relevance of plaintiff's history, Thomas said, "Things can happen over time, then there will be that one straw that breaks the camel's back and initiates stronger symptoms." Thomas thought plaintiff's workplace incident "tipped the balance" and caused the seizures to start occurring. Dr. Barkley also stated that plaintiff had been able to cope with "the other things that had happened to her," but the workplace incident "became the straw that broke the camel's back." Implicit in this phrasing is a recognition that the workplace incident was not a "major" event but was a "straw" that tipped the balance against plaintiff.

In light of all this testimony, the MCAC's acceptance of the magistrate's analysis of the various factors was proper. There was testimony about the workplace incident being "the straw that broke the camel's back," testimony about multiple nonoccupational stressors that started long in the past and continued to this day (as evidenced, in part, by plaintiff's distress over her children), and testimony that these stressors had fundamentally impacted plaintiff and become a fixture of her daily life. In *Martin*, 2001 Mich ACO 118 at 16, the commission noted that a doctor had "fail[ed] to establish a hierarchy of contributors." The magistrate in this case also noted that such a hierarchy was not definitively established, but still, the ultimate conclusion that the occupational stressors were not significant had adequate support in the evidence. Certainly the "any evidence" test has been met. *Mudel*, 462 Mich at 732 (emphasis omitted).

The magistrate's statement that "[a]ll of plaintiff's nonoccupational stressors were the more substantial contributors and clearly outweighed her occupational

stressors" was, arguably, an improper legal analysis, because the purpose of the *Martin* test is not to determine which contributors—nonoccupational or occupational—come out "on top." As stated in *Martin*, 2001 Mich ACO 118 at 12, " '[S]ignificant' does not require a preponderance standard where work contributors in combination with any natural progression of the condition accelerate the condition more than the non-work contributors." The question, as set forth in MCL 418.301(2), is whether occupational factors contributed to the mental condition "in a significant manner." However, the magistrate went on to state that "a significant contribution from the electric shock and fall was virtually impossible." The imperfect wording of the magistrate's opinion was not consequential. Importantly, as will be discussed *infra*, the *Martin* factors are only a guide for determining whether the significant-manner standard has been satisfied, and the MCAC's decision to uphold the magistrate's ultimate conclusion that the significant-manner standard had not been satisfied had adequate support in the evidence. While the evidence produced could *also* have led to the contrary conclusion, it is not the role of this Court to overturn a decision supported by the evidence in a workers' compensation case.

Finally, our Supreme Court directed this Court to determine whether "the *Martin* test is at odds with the principle that a preexisting condition is not a bar to eligibility for workers' compensation benefits and conflicts with the plain meaning of MCL 418.301(2)[.]" *Cramer*, 505 Mich at 1022. We conclude that it is not.

Once again, MCL 418.301(2) states:

> Mental disabilities and conditions of the aging process, including but not limited to heart and cardiovascular conditions and degenerative arthritis, are compensable if

> contributed to or aggravated or accelerated by the employment in a significant manner. Mental disabilities are compensable if arising out of actual events of employment, not unfounded perceptions thereof, and if the employee's perception of the actual events is reasonably grounded in fact or reality.

And again, the four factors identified in *Martin* are "1) the number of occupational and non-occupational contributors, 2) the relative amount of contribution of each contributor, 3) the duration of each contributor, and 4) the extent of permanent effect that resulted from each contributor." *Martin*, 2001 Mich ACO 118 at 16.

In *Gardner v Van Buren Pub Schs*, 445 Mich 23, 48; 517 NW2d 1 (1994), overruled on other grounds by *Robertson v DaimlerChrysler Corp*, 465 Mich 732; 641 NW2d 567 (2002), our Supreme Court opined: "[I]t is well established that employers take employees as they find them, with all preexisting mental and physical frailties. A claimant's preexisting condition does not bar recovery." The Court also stated that "[t]he significant manner requirement now forces a claimant to actually prove a significant factual causal connection between the actual events of employment and the mental disability" and added that "[t]he significant manner requirement also imposes on claimants a higher standard of proof." *Gardner*, 445 Mich at 47. The Court concluded that "the causal connection must be objectively established given a particular claimant's preexisting mental frailties." *Id*. at 49. The Court stated:

> The relevant inquiry, and the only inquiry presently required by workers' compensation law in this state, is: Did the actual events of employment occur, and do these bear a significant relationship to the mental disabilities? Reduced to its simplest form, the analysis is this: Given actual events and a particular claimant, with all the

> claimant's preexisting mental frailties, can the actual events objectively be said to have contributed to, aggravated, or accelerated the claimant's mental disability in a significant manner?
>
> This type of inquiry places the focus where it should be: on the authenticity of the underlying event and the significance of its relationship to the resulting disability. [*Id*. at 50.]

The Court set forth the following guidance regarding the application of MCL 418.301(2):

> In determining whether specific events of employment contribute to, aggravate, or accelerate a mental disability in a significant manner, the factfinder must consider the totality of the occupational circumstances along with the totality of a claimant's mental health in general.
>
> The analysis must focus on whether actual events of employment affected the mental health of the claimant in a significant manner. *This analysis will, by necessity, require a comparison of nonemployment and employment factors*. *Once actual employment events have been shown to have occurred, the significance of those events to the particular claimant must be judged against all the circumstances to determine whether the resulting mental disability is compensable*. [*Id*. at 47 (emphasis added).]

In *Farrington v Total Petroleum Inc*, 442 Mich 201, 221-222; 501 NW2d 76 (1993), the Court stated that the "significant manner" requirement requires that "occupational factors . . . be considered together with the totality of [a] claimant's health circumstances to analyze whether the . . . injury was significantly caused by work-related events."

We cannot conclude that the *Martin* test conflicts with the plain language of MCL 418.301(2) when it essentially conforms with the Supreme Court's own guidance regarding how to apply that statute—i.e., it provides for a comparison of nonemployment and em-

ployment factors. Indeed, analyzing the number of stressors, the relative amount they contribute to a condition, the various stressors' duration, and the extent of the stressors' permanent effect essentially implements the language from *Gardner* and *Farrington*. A worker with a preexisting illness can obtain benefits as long as an analysis of pertinent factors shows that a work stressor contributed to, aggravated, or accelerated the illness in a significant manner.

Plaintiff argues that the *Martin* test allows the trier of fact to presume the existence of a causal relationship between a non-employment factor and an employee's illness and that this is improper because the statutory language does not create any such presumption. Plaintiff spends considerable time in her brief contending that the MCAC cannot create a presumption not authorized by statute. However, the test does not authorize any such presumption. The test refers to "contributors," and clearly this term refers to *contributors to the disability at issue*. Anyone applying the test would, by necessity, have to first *determine* that a non-employment factor contributed to the disability in order to count it as a "contributor."

Plaintiff also argues that the test's directive to count contributors will almost always result in a finding of noncompensability because "(1) the amount of time an employee spends away from work will always exceed the amount of time spent working, and (2) the number of nonoccupational contributors will likely exceed the number of occupational contributors." We find this argument to be entirely speculative. A person with a particularly stressful job and a peaceful home life may well have many more contributors toward a mental condition at work than at home. Plaintiff argues that the assessment of duration is "likewise biased towards

a finding of non-compensability because an employee has lived his or her life both before and after the work experience." Again, however, a person with a particularly stressful job and a peaceful home life may well have longer-lasting contributors toward a mental condition at work than those at home.

Plaintiff takes issue with this statement from *Martin*:

> Fourth, the magistrate must examine whether any permanent effect resulted from any contributor. Stated differently, the magistrate must evaluate the ability of medical treatment, including rest and abstaining from work, to reverse the effect of the contributor. In those instances where the contributors can be separated, the more lasting effect produces greater significance. [*Martin*, 2001 Mich ACO 118 at 13.]

Plaintiff contends that MCL 418.301(2) "lacks language authorizing the factfinder to consider whether a contributor's causal relationship to disability can be decreased in any way." But the commission tied its reference to the possibility of treatment to the concept of "significance," which is obviously a concept encompassed by the statute.

Finally, plaintiff argues that the *Martin* test transforms the statute's requirement to assess whether a condition was contributed to in "a significant manner" into a requirement to assess whether a condition was contributed to in "the most significant manner." However, the *Martin* panel explicitly stated:

> The essence of the process is as follows: as a basic principle, significant contribution requires more than minimal contribution. *However, "significant" does not require a preponderance standard where work contributors in combination with any natural progression of the condition accelerate the condition more than the non-work contributors*. Between these two parameters, we require the occupational contributors to constitute a vital compo-

> nent or to contribute a considerable amount to the progression of the condition. [*Martin*, 2001 Mich ACO 118 at 12 (emphasis added).]

In other words, the *Martin* panel recognized that the purpose of the test was not to determine whether work contributors were "the" most significant factors. The panel later reiterated that "[c]ontribution is significant when it constitutes a vital component or when it contributes a considerable amount toward the progression of the condition." *Id*. at 16. Recall the language from *Gardner*, 445 Mich at 47, that "[t]he analysis must focus on whether actual events of employment affected the mental health of the claimant in a significant manner. This analysis will, by necessity, require a comparison of nonemployment and employment factors." The *Martin* panel was attempting to undertake such a comparison. It is important to remember that "[c]ourts 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." *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146; 644 NW2d 715 (2002). It is not enough that a workplace event contributes to a mental disability—it must have done so *in a significant manner*. The *Martin* panel was attempting to come up with a framework for implementing this language, in accordance with *Gardner*. In *Mudel*, 462 Mich 702 n 5, the Court stated:

> This distinction between the administrative and judicial standards of review flows from the long-recognized principle that administrative agencies possess expertise in particular areas of specialization. Because the judiciary has neither the expertise nor the resources to engage in a fact-intensive review of the entire administrative record, that type of detailed review is generally delegated to the administrative body. In the particular context of worker's

> compensation cases, a highly technical area of law, the judiciary lacks the expertise necessary to reach well-grounded factual conclusions. Worker's compensation cases typically involve lengthy records replete with specialized medical testimony. These cases require application of extremely technical and interrelated statutory provisions that determine an employee's eligibility for disability benefits. The judiciary is not more qualified to reach well-grounded factual conclusions in this arena than the administrative specialists. Therefore, the Legislature has decided that factual determinations are properly made at the administrative level, as opposed to the judicial level.

In addition, while an agency cannot interpret a statute in a way that changes its meaning, an agency's interpretation of a statute it is charged with implementing is entitled to respectful consideration and should not be overturned without cogent reasons. *Grass Lake Improvement Bd v Dep't of Environmental Quality*, 316 Mich App 356, 362-363, 366; 891 NW2d 884 (2016). The *Martin* panel was attempting to come up with a workable manner for applying the "significant manner" test in the course of agency fact-finding, and there does not appear to be cogent reasons for overturning the test it concluded would be appropriate. Of particular import is the *Martin* panel's statement that the "test" is not a definitive checklist. The panel stated:

> Importantly, we avoid creating a bright-line test or a checklist. Instead, we propose factors which concentrate the analysis on the fundamental evidence regarding increased contribution. We prefer factors because factors differ from elements. Each element requires a preponderance of proof. Factors do not require such proof. Rather, overwhelming proofs regarding one factor can overcome the absence of proof regarding another factor. . . . The magistrate's evaluation defies mathematic calculation. It simply requires a conclusion, using specified criteria, that the evidence presented satisfies a legal standard. [*Martin*, 2001 Mich ACO 118 at 11-12.]

The panel stated, "We also accept the notion that fact-finding discretion must prevail over an absolute definition." *Id*. at 10. As stated in *Dortch v Yellow Transp, Inc*, 2007 Mich ACO 21 at 4:

> We repeat our previous caution that the factors enumerated in *Martin* should act as merely guides, aiding the fact finder in their often difficult task of weighing the evidence before them, and not as a Bright-Line test. In the final analysis, we must keep in mind the Legislature placed the responsibility and power to determine what is significant in the hands of the magistrate. If the Legislature had wanted a more detailed definition of "significant," we believe they would have included it within the language of the statute.

While we do not conclude that there are grounds to overturn *Martin*, we acknowledge that magistrates and the MCAC should always remain cognizant that there can be more than one contributor or group of contributors affecting a mental disability "in a significant manner" and that the *Martin* test is only a guide to aid in the fact-finding process.

Affirmed.

BECKERING, J., concurred with JANSEN, J.

SHAPIRO, P.J. (*dissenting*). I respectfully dissent. I would vacate the magistrate's opinion and remand for a redetermination based on the standard set forth in MCL 418.301(2) that "[m]ental disabilities . . . *are compensable if contributed to or aggravated or accelerated by the employment in a significant manner*." (Emphasis added.)

I. INTRODUCTION

In the course of her work on February 20, 2012, plaintiff was on a ladder cleaning a light fixture with a

wet rag when she suffered a nonfatal electrocution. Plaintiff's testimony indicates a sustained electric shock; she explained that she physically could not "let go" from the light fixture until she was thrown from the ladder. Not long after the workplace accident, she began suffering seizures. After epilepsy was ruled out by neurological testing,[1] plaintiff was diagnosed with post-traumatic stress disorder (PTSD) and conversion disorder, in which a person—due to a psychiatric rather than physical disorder—manifests and suffers from symptoms of physical illness or disorder. When conversion disorder manifests in seizures, the seizures are referred to as nonepileptic seizures. Conversion disorder, though challenging to understand, is nevertheless a well-recognized and real mental illness as acknowledged by all the physicians in this case.[2] And pursuant to MCL 418.301(2), if plaintiff's mental disability was "contributed to or aggravated or accelerated by the employment in a significant manner," she is entitled to workers' compensation benefits.

In ruling that plaintiff's mental disability was not compensable, the magistrate did not apply MCL 418.301(2) as written, but instead applied a standard adopted by the Workers' Compensation Appellate Commission in *Martin v City of Pontiac Sch Dist*, 2001 Mich

[1] The tests did reveal some abnormalities in plaintiff's EEG, but they did not indicate epilepsy.

[2] "Conversion disorder is a disorder in which a person experiences blindness, paralysis, or other symptoms affecting the nervous system that cannot be explained solely by physical illness or injury. Symptoms usually begin *suddenly* after a period of emotional or physical distress or psychological conflict." Genetic and Rare Diseases Information Center, *Conversion Disorder* <http://rarediseases.info.nih.gov/diseases/6191/conversion-disorder> (accessed August 23, 2021) [https://perma.cc/TM5M-4ZQS] (emphasis added).

ACO 118. In my view, that test is inconsistent with both the text and purpose of MCL 418.301(2) and should be rejected.

Before turning to the *Martin* test, certain facts should be reviewed. First, there is no record evidence that before February 20, 2012, plaintiff was diagnosed with, treated for, or suffered from PTSD, conversion disorder, or nonepileptic seizures. Second, there is no record evidence that before the workplace accident plaintiff ever suffered a seizure or displayed other symptoms of conversion disorder. Thus, by definition, these were not preexisting conditions. Third, there is no evidence that before her injury plaintiff ever took any time off work due to mental illness, let alone that she was disabled. As recounted in the magistrate's opinion, plaintiff suffered through an abusive marriage and upon remarriage became estranged from several family members. However, the first marriage ended in 2006, and her conversion syndrome did not appear until after the workplace accident in 2012. There was no evidence that during that six-year period plaintiff suffered from some other disabling mental condition, displayed symptoms of some other mental illness, or required time off due to mental illness. Following her 2006 divorce, plaintiff participated in counseling that ended in 2008, and the record does not indicate any other preinjury therapy or counseling. In other words, while plaintiff had previously suffered through painful life experiences, she was never diagnosed with any serious or disabling mental illness.

Defendants did not offer the testimony of a psychiatrist, clinical psychologist, or a specialist in seizure disorders. They instead presented testimony from a neurologist, whose practice focuses almost exclusively on spinal disease, and a neuropsychologist. Nearly all of their testimony concerned their conclusions that

plaintiff's condition lacked an organic physical basis, i.e., her seizures were not caused by epilepsy or other physical condition, a conclusion of little, if any, consequence because conversion disorder is the result of mental, rather than physical, pathology.

Plaintiff's treating psychologist and neurologists[3] diagnosed her with nonepileptic seizures. They further testified that plaintiff's seizures are disabling and that the primary cause of her illness was her electrocution injury at work and its accompanying trauma.

With that factual background, I turn to the *Martin* test.

II. MCL 418.301(2) AND THE *MARTIN* TEST

The *Martin* test, which the magistrate concluded was controlling, was adopted by the commission in 2001. It has never been adopted in a published decision of this Court, and it is plainly inconsistent with the language of the Worker's Disability Compensation Act of 1969 (WDCA), MCL 418.101 *et seq*. MCL 418.301(2) provides:

> *Mental disabilitie*s and conditions of the aging process, including but not limited to heart and cardiovascular conditions and degenerative arthritis, *are compensable if contributed to or aggravated or accelerated by the employment in a significant manner*. Mental disabilities are compens-

[3] Dr. Gregory Barkley is board-certified in both neurology and neurophysiology and was vice-chair of the department of neurology at Henry Ford Hospital for 10 years. Dr. Mariana Spanaki-Varalas is also a board-certified clinical neurophysiologist and the medical director of the Comprehensive Epilepsy Clinic at Henry Ford Hospital, which treats both epilepsy and nonepileptic seizures. Andrea Thomas is a psychologist at Henry Ford Hospital who also practices in that clinic. Each testified that the workplace injury was the primary cause of plaintiff's nonepileptic seizures, and each stated that they saw no basis to suspect malingering.

> able if arising out of actual events of employment, not unfounded perceptions thereof, and if the employee's perception of the actual events is reasonably grounded in fact or reality. [Emphasis added.]

The only portion of the statute at issue in this case is the requirement set forth in the emphasized language that when the claimed disability concerns mental disability, the workplace injury must have "contributed to or aggravated or accelerated [that disability] in a *significant* manner." MCL 418.301(2) (emphasis added).

Whether one agrees with the *Martin* test or not as a matter of policy, it is clear that the test is not derived from the text of the statute. To the contrary, the *Martin* test is wholly a creation of the commission, and it was adopted without formal rulemaking under delegated authority pursuant to the Administrative Procedures Act, MCL 24.201 *et seq*. See *Fisher v Kalamazoo Regional Psychiatric Hosp*, 329 Mich App 555, 561; 942 NW2d 706 (2019) (holding that the commission exceeded its authority by creating a requirement not authorized by the WDCA or a promulgated rule). And much as in *Fisher*, the commission adopted the *Martin* test with minimal analysis and no authority directly supporting it.

Martin's discussion of the meaning of the word "significant" as used in MCL 418.301(2) is minimal despite the fact that it was the central issue in that case. The entire analysis is provided in a single paragraph. See *Martin*, 2001 ACO 118 at 10-11. More problematic is the commission's conclusion that when the Legislature used the word "significant," it really meant to say "substantial." The commission failed to adequately explain how interpreting "significant" to mean "substantial" "provides the essential framework for meeting the legislative requirement of increased contribution while main-

taining flexibility and discretion," *id*. at 11, or how this approach effectuated legislative intent when the Legislature could have easily used "substantial" rather than "significant" in the statute. And *Martin* failed to cite a single Michigan case in which the word "significant" when used in a statute was understood to have the same meaning as "substantial." Indeed, the commission cited only caselaw and statutes from sister states even though those states' workers' compensation statutes are not substantially similar to MCL 418.301(2).[4] *Id*. at 8-10 & nn 9-12.

The fact that the commission could not find a single case anywhere in the country that defined "significant" as equivalent to "substantial" in the context of workers' compensation claims did not dissuade *Martin* from concluding exactly that. In doing so, *Martin* ignored the Supreme Court's cautionary statement that "this Court need not hone the analytical knife sharper than the statutory language requires." *Gardner v Van Buren Pub Schs*, 445 Mich 23, 42-43; 517 NW2d 1 (1994), overruled on other grounds by *Robertson v Daimler-Chrysler Corp*, 465 Mich 732; 641 NW2d 567 (2002).

As noted by a different panel of the commission in *Taig v Gen Motors*, 2006 Mich ACO 134 at 13, the

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[4] The commission relied on: an Oregon statute (and caselaw interpreting it) that required the work injury to "be the major contributing cause," Or Rev Stat 656.005(b), which is obviously a very different standard than the one defined in MCL 418.301(2); a New York statute that uses the term "substantially" to define its standard, NY Workers' Comp 15(8)(d); Pennsylvania caselaw that applies a "substantial contributing factor" test, *McCloskey v Workmen's Compensation Appeal Bd*, 501 Pa 93; 460 A2d 237 (1983); and a Wyoming statute that bars compensation for preexisting conditions, Wy Stat 27-14-102(a)(xi)(F), while noting that Wyoming courts have concluded that compensation is due if "work effort contributed to a material degree to the precipitation, aggravation or acceleration of the existing condition." *Lindbloom v Teton Intern*, 684 P2d 1388, 1389-1390 (Wy, 1984).

Martin test effectively requires that the claimant prove that the workplace was the "most significant" cause of the disability. This inserts the word "most" into the statute—despite the Legislature's choice not to do so. This essentially raised the causation requirement to one more demanding than the proximate-cause standard used in tort cases. But there is nothing in the statute that indicates that contributing "in a significant manner" means that the contributor must be the sole or most significant cause. Not only does *Martin* require a twisting of the meaning of the word "significant," it also requires that we ignore the statute's use of the terms "contribute to" or "aggravated or accelerated by the employment." MCL 418.301(2). As *Taig* explained:

> *Martin* . . . creates a legal standard far a field [sic] from the one envisioned by MCL 418.301(2). *Martin* fails to recognize that there can be more than one significant contributing factor in a compensable condition. . . .
>
> * * *
>
> . . . [I]f the work-related conditions are found not to have aggravated the condition "in a significant manner" because some other condition is more significant, this is legal error because it alters the legislative scheme of "in a significant manner" into requiring the employment conditions be "the most significant" cause of the injury before it will be found to be compensable. This is precisely the kind of shift in policy that is not the role of the administrative agency to make.
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> . . . [T]he obligation here is to interpret MCL 418.301(2) according to its plain language. Any issues relating to the soundness of the policy underlying the statute or its practical ramifications are properly directed to the Legislature. To follow *Martin* is to "rewrite the plain statutory language and substitute our own policy decisions for those

> already made by the Legislature." [*Taig*, 2006 Mich ACO 134 at 11-13 (citations omitted).]

Having concocted the "substantial" causation standard, *Martin* went on to define a faulty test, limited to four factors, none of which are set forth in the statute: "1) the number of occupational and nonoccupational contributors, 2) the relative amount of contribution of each contributor, 3) the duration of each contribution, and 4) the extent of permanent effect that resulted from each contributor." *Martin*, 2011 ACO 118 at 16.

The first and third factors are inherently biased toward a finding of noncompensability. A single incident at work can never constitute more than one "contributor," and therefore will never outnumber nonoccupational contributors when there is a preexisting condition or vulnerability. Similarly, a single-event work injury, no matter how serious, can never compare in "duration" to a preexisting condition. The other two factors, degree of contribution and degree of permanent effect, are relevant. But, as noted, in this case there is no evidence of a preexisting mental illness or a disability, let alone a permanent one. Thus, the magistrate's approach was plainly inconsistent with the statutory language providing that a mental health condition is compensable if it has been "contributed to or aggravated or accelerated by the employment." MCL 418.301(2).

In sum, the *Martin* test, at least as applied here, effectively requires that the work event be the primary or even sole cause of a disabling condition, an approach that cannot be squared with the statute. And the *Martin* test excludes consideration of other relevant factors, e.g., the temporal proximity of the disability to the workplace event, the natural history of any underlying condition, the degree to which the workplace

event aggravated the preexisting mental condition and whether that condition would have necessarily worsened without the aggravation as well as other factors that may be relevant in a particular case. Counting the different contributors and their duration, especially in a case involving mental illness, is simply a game of numbers that degenerates into speculation and invites conclusory opinions like those presented by defendants' medical consultants in this case.

This is not to say that the *Martin* factors should never be considered among the totality of the circumstances. In some cases, they may be relevant, but in other cases they may not be, and there may be other more important factors that were not discussed in *Martin*. As noted in *Taig*:

> Even if the non-occupational contributors exceed the occupational contributors, even if a non-work-related contributor provides a greater contribution than a work-related contribution, even if the non-work contributor is of greater duration than the work-related contributor, and even if the permanent effect of a non-work related contributor exceeds the effect of the work-related contributor, it is still possible that the work-related conditions contribute to the injury "in a significant manner" since nothing in Section 301(2) militates against the conclusion that because one contributing element to the injury is significant, some other element cannot also be significant.
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> . . . [I]f the work-related conditions are found not to have aggravated the condition "in a significant manner" because some other condition is more significant, this is legal error . . . . [*Taig*, 2006 Mich ACO 134 at 13.]

Martin paid lip service to the actual text of the statute, noting the commission's prior statement that "[a] pre-existing condition which makes a claimant more susceptible to mental injury does not act as a bar to benefit entitlement if workplace injury cause the

claimant to become disabled," *Martin*, 2011 ACO 118 at 14 n 15 (quotation marks and citation omitted), but the four-factor test virtually ensures that preexisting conditions will be viewed as the most significant factor. And, of course, the *Martin* approach wholly ignores the history and purpose of the worker's compensation act, which make clear that a preexisting condition is not a bar to eligibility for benefits and that mere susceptibility to injury is not grounds to deny benefits. As noted in *Samels v Goodyear Tire & Rubber Co*, 317 Mich 149, 157; 26 NW2d 742 (1947) (opinion by REID, J.): "Defendants claim unusual susceptibility of plaintiff. . . . Such defense is of no avail. Mere susceptibility is nowhere mentioned in the Michigan act as a matter defeating compensability."

The *Martin* test is poorly constructed, fails to consider all relevant factors, and heightens consideration of factors that bias the test against compensability. Most significantly, it dramatically departs from the statute. We should reject it.

III. CAUSATION RULING

Because I conclude that the *Martin* test is an erroneous interpretation of MCL 418.301(2) and should not be followed by this Court, I would reverse and remand for a redetermination of plaintiff's claim based on the statute as written. Alternatively, I would conclude that reversal is warranted for the magistrate's erroneous application of *Martin* and *Yost v Detroit Bd of Ed*, 2000 Mich ACO 347, and that the commission erred by concluding that the magistrate's lack-of-causation conclusion was supported by competent, substantial, and material evidence.

"A claimant in a workers' compensation matter must establish a work-related disability and entitlement to

benefits by a preponderance of the evidence." *Romero v Burt Moeke Hardwoods, Inc*, 280 Mich App 1, 5; 760 NW2d 586 (2008). "To establish a compensable mental disability under MCL 418.301(2), a claimant must prove: (1) a mental disability; (2) which arises out of actual events of employment, not unfounded perceptions thereof, and (3) that those events contributed to or aggravated the mental disability in a significant manner." *Zgnilec v Gen Motors Corp*, 224 Mich App 392, 396; 568 NW2d 690 (1997). Plaintiff set forth prima facie proof of causation through her treating physicians who testified that the work incident contributed in a significant manner to her PTSD, conversion disorder, and seizures. However, the magistrate discredited this testimony for two reasons: (1) the treating physicians "did not compare the nonoccupational stressors to the occupational stressors in plaintiff's life to determine which stressors were the more substantive contributors" per the second *Martin* factor; and (2) they relied on the "straw that broke the camel's back" concept.

The second *Martin* factor requires a "relative comparison" of nonoccupational and occupational contributors to "find which contributors contribute the most." *Martin*, 2001 Mich ACO 118 at 12. *Martin* provided that medical opinions are "critical" to "assist the magistrate's attempt to establish a hierarchy of contributors." *Id*. The commission explained that "[t]he magistrate may adopt a medical assessment that any contributor minimally, moderately or maximally influenced the progression of the condition." *Id*. The commission cautioned against "mere conclusory" medical opinions that a contributor is or is not significant, adding that "[f]or a medical opinion to be supportive of the magistrate's legal conclusion that contribution is significant, it must clearly express relative contribu-

tion in light of all the contributors. Thus, it is imperative for the expert to be accurately informed of all applicable factors." *Id*. at 12 n 14.

In this case, plaintiff's treating physicians were aware of the prior abuse she suffered from her ex-husband and the family stress stemming from her divorce. But given that plaintiff was functioning well at the time of the accident, they reasonably concluded that the workplace accident significantly contributed to the disorders plaintiff later developed. These were not "mere conclusory" opinions, and the physicians were aware of the relevant circumstances. Plaintiff's treating psychologist, Andrea Thomas, explained that "everybody has issues, and certainly Mrs. Cramer has some issues earlier in her life, but my opinion is that she was dealing fairly well with everything prior to this incident." Thomas acknowledged that plaintiff had discussed her prior abuse and family estrangement, but she reiterated "that prior to [the workplace] incident [plaintiff] was not having seizures, she was not having any other major issues regardless of past incidents." To the contrary, plaintiff "was doing well, she liked her job, [and] she was happily married." Thomas's causation opinion was also based on the fact that plaintiff has "always been focused on the work incident" during therapy. That is, plaintiff reported dreams and flashbacks related to the electrocution, panic when she saw someone on a ladder adjusting a light, and she had never reported panic or stress related to the emotional and sexual abuse she suffered from her ex-husband.

Nonetheless, the magistrate concluded that plaintiff's treating physicians failed to comply with *Martin* because they did not "establish[] a hierarchy of plaintiff's non-occupational stressors versus her occupa-

tional stressors." This misconstrues *Martin*'s directive that it is the *magistrate*'s duty to establish a hierarchy of contributors and that medical opinions are relied on for that purpose. Setting that aside, if the *Martin* test is only a "guide," as the majority assures us, then the lack of strict compliance with *Martin* should not automatically invalidate a physician's opinion. But it is clear that the magistrate used what she perceived to be a lack of compliance with *Martin*'s standards as grounds to reject the treating physicians' causation opinions.

The other flaw the magistrate found in the treating physicians' testimony was their reference (either in name or substance) to the "last-straw" concept, first discussed by the commission in *Yost*, 2000 Mich ACO 347:

> A workplace contribution to an individual's disability is not "significant", merely because it caused a dramatic change in the claimant's status. Just because a condition changes from asymptomatic to symptomatic, or there was a specific injury which contributed to a change, does not equate with significant contribution. Just because a claimant was functional before the workplace event and then becomes disabled after the event does not make the event significant. *The weight of the event must be compared with the severity of the claimant's pre-existing condition in order to determine significance*. If an individual has a very severe pre-existing problem, such as an advanced degenerative condition, or serious heart disease, or an extremely distraught mental persona, the workplace event must have substantial weight in order to be deemed a significant contributor. If a claimant is a walking invitation to an arthritic disability or a heart attack or a mental breakdown, due to his or her pre-existing condition, and the event at work merely pushes that individual into the disabling condition, such event is not significant. Such event is merely the last event, or "the straw that broke the camel's back." Such event is not compensable under the

> significant manner standard, because if it were, the standard would in essence be identical to the regular "any contribution" standard otherwise applicable in Chapter 3. *Magistrates must look beyond the fact that an employee's status may have been changed by a workplace event (which is merely evidence of workplace contribution), and look as well at the weight of the workplace event in comparison with the claimant's pre-existing health in order to make the finding concerning significant contribution*. [*Id*. at 2 n 2 (emphasis added).]

I do not believe that the mere utterance or reference to the last-straw concept provides grounds to wholly reject a physician's opinion. *Yost* explained that the onus is on the *magistrate* to consider the claimant's preexisting health and the weight of the workplace event. In this case, the magistrate overlooked that while plaintiff had prior life stressors, she was happily married and had a job she enjoyed.[5] She was not in counseling and there is nothing to suggest that she had any ongoing mental health issues. Accordingly, there is no evidentiary basis for the magistrate's extraordinary finding that plaintiff was "so close to disability that a significant contribution from the electrical shock and fall was virtually impossible." As to the weight of the workplace event, plaintiff described a sustained electrical shock before being thrown from a ladder and hitting her head and shoulder. It is recognized that electrical injuries and the related trauma may lead to PTSD and conversion disorder,[6] and plaintiff's physi-

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[5] According to her testimony, plaintiff worked her entire adult life, and defendants have not presented evidence to the contrary. She was hired by defendant Transitional Health as a dietary manager. Previously she had worked as a manager at Arby's and as food-service director of a high school. Prior to the electrocution incident, she had not missed any time from work.

[6] "Psychiatric disorders such as . . . post-traumatic stress disorder [and] conversion disorder . . . have been reported as diseases triggered by

cians believed that this occurred here. If the workplace accident was indeed a last event—rather than the sole cause of plaintiff's disorders—it carried significant weight.[7]

After the magistrate relied on *Martin* and *Yost* to discard the medical opinions of plaintiff's treating physicians, she accepted the causation opinions of defendants' consultants, which the commission determined provided substantial evidence for the magistrate's causation ruling. This was error.

Neither of defendants' two consultants had significant experience diagnosing or treating conversion syndrome. Dr. William Boike is a neurologist whose career has focused almost entirely on spinal injury and disease. His testimony that there was not a physical neurological basis for plaintiff's condition is of little, if any, relevance as that fact is wholly consistent, indeed essential, to the diagnosis of conversion syndrome and nonepileptic seizures. Moreover, he declined to offer an opinion about much of anything relevant to the case, conceding that he would "defer as to whether or not any psychological or psychiatric difficulties plaintiff has may or may not be related to the February injury."

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electrical injuries." Fadhilah & Amin, *Schizoaffective Disorder That Is Induced by Electrical Voltage That Is Treated with Risperidone*, Open Access Maced J Med Sci (2019), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6876808/> (accessed August 23, 2021) [https://perma.cc/B2QK-GGKQ].

[7] Sometimes a "last straw" is not a significant contributor but sometimes it is, especially where prior to the workplace accident there was no disability and the last event was significant. In other words, the *weight* of the "last straw" is important, not merely when it occurred. Sometimes the "last straw" is only a straw, but sometimes it is a very heavy bale of hay. Further, even assuming that the worker might have had a heart attack, for example, at some undefined time in the future precipitated by nonwork activities, the statute mandates compensation when the disability was *accelerated* by the workplace injury.

The majority relies on testimony from Dr. Boike suggesting that plaintiff is a conscious malingerer. However, defendants' consultants did not conclude as a matter of medical opinion that plaintiff was malingering, and they agreed that conversion syndrome is an appropriate diagnosis. And while the magistrate concluded that plaintiff's conversion syndrome was not caused by occupational stressors, she did not find that plaintiff was malingering. Accordingly, it is unclear how the testimony suggesting malingering—which the majority heavily relies on—constitutes substantial evidence for the magistrate's decision.

The other defense consultant was a neuropsychologist, Dr. Manfred Greiffenstein, who, like Dr. Boike, did not request or review any of plaintiff's medical records predating her injury. His testing confirmed that plaintiff suffers from conversion disorder and psychological nonepileptic seizures. He opined, without any reference to pre-incident diagnosis, treatment, or disability, that plaintiff had "weaknesses in her personality"[8] that had likely been there since adolescence. And, again without reference to any medical or employment records predating the incident, he vaguely concluded that the causes of her disorder are due to "the interaction between a disturbed personality and psychological stressors." In any event, he agreed that mental health treatment was in order.

Dr. Greiffenstein dismissed any trauma from the workplace electrocution on the curious basis that if it had happened to him, he would not have been trau-

[8] The vague characterization of a preexisting "weaknesses in [one's] personality" is not a diagnosis but at best a description of a preexisting vulnerability. And it is difficult to say how having weaknesses in her personality distinguishes plaintiff from nearly every other human being.

matized.[9] This is not factually relevant for the obvious reason that whether or not someone suffered a trauma is not determined by whether the examining doctor would personally have been traumatized. It is not legally relevant because it amounts to an argument that plaintiff's subjective reaction was out of proportion to the trauma, which runs counter to another provision of MCL 418.301(2). The statute requires that

[9] Having reviewed Dr. Greiffenstein's testimony, I have difficulty understanding the magistrate's conclusion that he was credible. And the magistrate's ability to determine credibility is not superior to ours as she did not hear or see his testimony but simply read the transcripts as we have. Notably, despite his testimony that "it's important to have multiple sources of information," Dr. Greiffenstein did not review nor request any of plaintiff's medical records preceding the date of her injury.

What is likely a more accurate commentary on Dr. Greiffenstein's testimony was provided by the court in *United States v Shields*, unpublished order of the United States District Court for the Western District of Tennessee, entered May 11, 2009 (Case No. 04-20254), in which the issue was whether the defendant in a murder case was mentally retarded. Federal district Judge Bernice Bouie Donald, who now sits on the United States Court of Appeals for the Sixth Circuit, characterized Dr. Greiffenstein's evaluation as "especially lacking in credibility," noting that "the problems with Dr. Greiffenstein's work are legion" and that his conduct during the evaluation was "highly inappropriate." The court further stated that "Dr. Greiffenstein proved to be a very biased witness. One could in fact be forgiven for thinking that Dr. Greiffenstein never even attempted to engage in a truly objective evaluation of Defendant, but instead undertook a results-driven evaluation designed to deliver the [desired] conclusion . . . ." The court also pointed out that Dr. Greiffenstein misrepresented to the examinee what the purpose of the interview was and, that "even more troubling . . . Dr. Greiffenstein administered Defendant three tests—none of which is designed to measure IQ." The court went so far as to say that the doctor's motive for not conducting the proper tests was "readily apparent: Dr. Greiffenstein did not want to run the risk [that the results would] undermine [his client's] position." The court described Dr. Greiffenstein's conclusions as "woefully unjustified and inaccurate" and noted that he "seemed incapable of fairly identifying and assessing" the examinee.

mental disabilities "aris[e] out of actual events of employment, not unfounded perceptions thereof, and [that] the employee's perception of the actual events is reasonably grounded in fact or reality." This means that the workplace event(s) that a claimant alleges caused a mental disability must be an event that objectively occurred rather than imagined by the claimant's "impaired mind." *Robertson v Daimler-Chrysler Corp*, 465 Mich 732, 753; 641 NW2d 567 (2002). However, the claimant's reaction to the event is viewed subjectively:

> [T]here is a distinction between a claimant's perception of an event and a claimant's reaction to that event, and it is only the former that is evaluated objectively. . . . [W]hile a claimant's perception of an event must be objectively based in fact, because a claimant with a psychological disability cannot be expected to react to events in the same manner as a normal, healthy, individual, the claimant's reaction may be atypical, and is therefore viewed subjectively. [*Wolf v Gen Motors Corp*, 262 Mich App 1, 6; 683 NW2d 714 (2004), citing *Robertson*, 465 Mich at 754 n 10.]

In this case, defendants concede that the workplace injury actually occurred and that plaintiff's perception that she suffered an electrical shock and a fall from a ladder are accurate and not the delusion of an impaired mind. That the "reaction" to that event is to be judged subjectively appears to have escaped the magistrate and defendants' consultants.

The commission's review of a magistrate's findings is deferential but not toothless:

> The "substantial evidence" standard, governing the [commission's] review of the magistrate's findings of fact, provides for review which is clearly more deferential to the magistrate's decision than the de novo review standard previously employed. Nevertheless, the [commission] has the power to engage in both a "qualitative and quantita-

> tive" analysis of the "whole record," which means that the [commission] need not necessarily defer to all the magistrate's findings of fact. [*Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 702-703; 614 NW2d 607 (2000).]

To be clear, there is not a scintilla of evidence that plaintiff would have developed this syndrome had the electrocution incident not occurred. And whatever her preexisting diagnoses, there is *no* evidence that she suffered from conversion disorder or some other disabling psychological disorder or was unable to work before that incident. It is difficult to see how plaintiff had been capable of working up until the 2012 injury if, as defendants maintain, the true cause of her condition occurred many years earlier.

Defendants' consultants theorized that plaintiff's abusive first marriage that ended in 2006 and subsequent alienation from her family was the cause of her mental disability in 2012—despite the fact that she was never deemed disabled and that she nevertheless worked following her divorce, notwithstanding any residual trauma from that marriage. Defendants' consultants' suggestion that plaintiff's psychological disorders were all due to her abusive marriage amounts to nothing more than speculation in service of a predetermined conclusion. Similarly, the magistrate's opinion engages in speculation about how marital abuse and family disputes that occurred years earlier must have been the primary cause of the disability following the work injury in 2012. Moreover, the magistrate did not seem to fully grasp the nature of conversion disorder given that much of the opinion is spent observing the lack of a *physical* cause for plaintiff's seizures. It is simply speculation to conclude that the abuse plaintiff suffered years ago is the sole or primary cause of her disability, let alone to conclude that her electrocution

and fall did not even significantly contribute to plaintiff's condition and disability.

IV. CONCLUSION

There is no basis in the text of MCL 418.301(2) to require that the causal connection be closer than "contributed to . . . in a significant manner." Requiring that the workplace event be the sole cause, the sole contributor, the prime contributor, the vital contributor, or other such formulation is simply a departure from the statute. *Martin*'s formulation of the standard is error. And the four-factor test it defined is of little assistance unless the goal is to avoid the payment of compensation due under the statute. Accordingly, I would reverse and remand for a redetermination based on the statutory standard. Alternatively, I would conclude that the commission erred by concluding that the magistrate's lack-of-causation conclusion was supported by substantial, competent, and material evidence.

RIVERA v SVRC INDUSTRIES, INC (ON REMAND)

Docket No. 341516. Submitted February 12, 2019, at Lansing. Decided April 4, 2019, at 9:00 a.m. 327 Mich App 446 (2019). Affirmed in part, reversed in part, vacated in part, and remanded. 507 Mich 962 (2021). Resubmitted July 7, 2021, at Lansing. Decided September 2, 2021, at 9:00 a.m. Leave to appeal denied. 509 Mich 866 (2022).

Linda Rivera filed an action in the Saginaw Circuit Court against SVRC Industries, Inc., alleging that defendant violated the Whistleblower's Protection Act (the WPA), MCL 15.361 *et seq*., by retaliating against plaintiff when she was allegedly about to report coworker LS's conduct to the police and by retaliating against plaintiff when she reported LS's conduct to defendant's attorney, Gregory Mair; plaintiff also claimed that defendant unlawfully retaliated against plaintiff in violation of Michigan's public policy. Plaintiff worked for defendant from October 2015 through October 2016. In September 2016, plaintiff held a disciplinary meeting with LS to address insubordination issues. During the meeting, LS made statements that plaintiff perceived as threatening in violation of the Michigan Anti-Terrorism Act, MCL 750.543a *et seq*. Plaintiff reported LS's statements to defendant's chief operating officer, Debra Snyder, and asked Snyder whether she should report LS's statements to the police. Plaintiff also discussed the incident with a friend who worked at a different company and with the chair of defendant's board of directors, Sylvester Payne, with whom she had a personal relationship. Snyder told plaintiff that Snyder would give plaintiff further instructions after speaking with defendant's chief executive officer, Dan Emerson. After meeting with Mair, Emerson instructed Snyder not to file a police report on defendant's behalf regarding LS's statements. Snyder later informed plaintiff by text message that Mair had advised against filing a police report on defendant's behalf but that plaintiff could file a personal protection order against LS if she wanted. No one working for defendant discouraged plaintiff from reporting LS's conduct to the police, plaintiff never indicated that she was going to report it to the police, and she never reported it to the police. Following an investigation, defendant

terminated LS's employment with the company on October 3, 2016. Plaintiff was permanently laid off from her position with defendant on October 4, 2016, for purported budgetary and economic reasons. Plaintiff filed this action, and defendant moved for summary disposition of all claims; the trial court denied the motion. Defendant appealed. In a published opinion, the Court of Appeals, M.J. KELLY, P.J., and SERVITTO and BOONSTRA, JJ., reversed the trial court's order and remanded for entry of an order granting summary disposition in favor of defendant. 327 Mich App 446 (2019). After concluding that summary disposition of plaintiff's WPA claim was appropriate under MCR 2.116(C)(10), the Court declined to address plaintiff's public-policy claim, reasoning that the public-policy claim was preempted by the WPA. Plaintiff appealed. The Supreme Court heard oral argument on the application, and in lieu of granting leave to appeal, the Court affirmed in part, vacated in part, and reversed in part the Court of Appeals judgment and remanded the case to the Court of Appeals to further consider plaintiff's public-policy claim. 507 Mich 962 (2021).

On remand, the Court of Appeals *held*:

In the absence of a contract providing to the contrary, employment is usually terminable by the employer or the employee at any time, for any or no reason whatsoever. However, an employer is not free to discharge an at-will employee when the reason for the discharge contravenes public policy—that is, (1) when the discharge is the result of adverse treatment of employees who act in accordance with a statutory right or duty, (2) when the discharge is the result of an employee's failure or refusal to violate a law in the course of employment, or (3) when the discharge is the result of an employee's exercise of a right conferred by a well-established legislative enactment. While the list of public-policy exceptions that might forbid termination of an at-will employee is not exhaustive, Michigan courts do not have unfettered discretion or authority to determine what may constitute sound public-policy exceptions. Instead, the focus of the judiciary must be on the policies that have been adopted by the public through our various legal processes and that are reflected in our state and federal Constitutions, our statutes, and the common law. As a general rule, though, making social policy is the Legislature's job, not the courts'. Public policy must be discerned by referring to the laws and legal precedents and not from general considerations of supposed public interests; thus, courts may only derive public policy from objective sources. To that end, caselaw establishes that it is well settled

that any contract, the consideration of which is to conceal a crime or suppress a prosecution, is repugnant to public policy and that a contract whose consideration is contrary to public policy is void. Consistently with that public-policy consideration, MCL 750.149 makes it a crime for any person having knowledge of an offense punishable with death or by imprisonment to take money, any gratuity or reward, or any engagement, upon an agreement to compound or conceal the offense or not to prosecute. Together, these objective sources reflect a public policy that persons may not enter into agreements to conceal a crime or suppress a criminal investigation. Thus, public policy may be violated when an employer conditions an employee's continued employment on the employee's agreement to conceal or suppress an investigation into criminal conduct. Plaintiff asserted in this case that she engaged in activity protected by public policy because she attempted to report LS's action to the police and refused to conceal or compound LS's allegedly criminal conduct. Viewing the evidence in the light most favorable to plaintiff, she failed to establish a genuine issue of material fact regarding whether defendant had instructed her not to disclose LS's conduct, let alone that it had conditioned her employment on her agreement not to disclose the conduct and terminated her for refusing to enter into or abide by such an agreement. Plaintiff's affidavit, which indicated that Mair had instructed her not to file a report with the police, was contradicted by her earlier deposition testimony, and she could not rely on the affidavit to create a genuine issue of material fact that she was instructed not to report LS's conduct to the police. Further, plaintiff's own evidence demonstrated that, while some of defendant's employees may have preferred that she not file a police report, defendant never implicitly or explicitly conditioned plaintiff's continued employment on her concealment of LS's unlawful activity. For these reasons, the trial court erred by denying defendant's motion for summary disposition as to plaintiff's public-policy claim.

Reversed and remanded.

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

David A. Wallace, *Brett Meyer*, *Robert A. Jordan*, and *Kailen C. Piper* for defendant.

ON REMAND

Before: M. J. KELLY, P.J., and SERVITTO and BOONSTRA, JJ.

BOONSTRA, J. Defendant appealed by leave granted the trial court's denial of its motion for summary disposition under MCR 2.116(C)(10) (no genuine issue of material fact) in this action alleging a violation of the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*., and unlawful retaliation against plaintiff in violation of Michigan public policy. This Court reversed and remanded for entry of an order granting summary disposition in favor of defendant. *Rivera v SVRC Indus, Inc*, 327 Mich App 446, 451; 934 NW2d 286 (2019). Plaintiff appealed this Court's decision in our Supreme Court. In lieu of granting leave to appeal, that Court affirmed our holding that plaintiff had failed to establish a genuine issue of material fact regarding her "about to report" claim under the WPA and our holding that plaintiff had failed to establish a causal connection between plaintiff's communication with defendant's attorney and her termination. *Rivera v SVRC Indus, Inc*, 507 Mich 962, 963 (2021). The Court vacated the portion of our opinion holding that plaintiff's communication with defendant's attorney was not a "report" under the WPA, stating that this Court's holding was "unnecessary in light of our agreement with [the Court of Appeals'] conclusion that summary disposition was warranted" on causation grounds. *Id*. Finally, the Court reversed our holding that plaintiff's public-policy claim was preempted by the WPA and remanded the case to this Court to address whether, viewing the evidence in the light most favorable to plaintiff, there is a genuine issue of material fact that plaintiff's termination was unlawful in violation of public policy. *Id*. We hold that

defendant is entitled to summary disposition on plaintiff's public-policy claim.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

In our previous opinion, this Court summarized the pertinent facts and procedural history of this case:

> Plaintiff, Linda Rivera, was employed as the director of industrial operations at defendant, SVRC Industries, Inc., from October 2015 to October 2016. On September 15, 2016, plaintiff conducted a disciplinary meeting with an employee, LS, to address insubordination issues. According to plaintiff, LS made several statements during the meeting that plaintiff perceived to be threatening; specifically, LS raised the possibility of a "revolution" in this country and alluded to the fact that he could operate a firearm, that he was not afraid to pull the trigger, and that he did not discriminate.
>
> Plaintiff reported LS's statements to defendant's chief operating officer, Debra Snyder. Plaintiff asked Snyder whether she should report the incident to the police, and Snyder stated that she would apprise chief executive officer Dean Emerson of the situation before calling back with further instructions. After consulting with the company's attorney, Gregory Mair, Emerson instructed Snyder not to file a police report on defendant's behalf. Meanwhile, plaintiff sought advice from a friend at a different company, who told her to notify the police and to, in effect, "start a paper trail." Plaintiff then discussed the incident with Sylvester Payne, her "on and off" significant other, who served as the chairman of defendant's board of directors.
>
> Plaintiff also communicated with Snyder about the incident by text message. In the text messages, plaintiff reasserted her concern and inquired about whether she should contact the police. Snyder informed plaintiff that Mair had advised against filing a police report on defendant's behalf. Plaintiff told Snyder that she had contacted Payne to discuss the incident, and Snyder responded by text message:

> Linda, Sylvester is not an employee of SVRC. He is a board member. Please be very careful with sharing confidential information about employees. If you want to file a personal protection order you can do so, which may mean filing a police report, but that is not what was advised by our attorney. Let's talk when you get to work in the morning.

Plaintiff acknowledged that she was never discouraged by Snyder or anyone else from reporting LS's conduct to the police. Regardless, plaintiff never gave any indication that she was going to report the incident to the police, and she apparently never took any action to do so.

Emerson instructed Mair to investigate the incident. Mair spoke with plaintiff, as well as other employees who were present at the meeting with LS, between September 22 and September 28, 2016. Defendant terminated LS's employment on October 3, 2016.

On October 4, 2016, plaintiff received notice that she was being permanently laid off from her position with defendant, effective October 6, 2016, for "budgetary and economic reasons." Plaintiff filed suit against defendant, claiming that defendant had violated MCL 15.362 of the WPA in two ways: (1) by retaliating against plaintiff when she was about to report LS's conduct to the police and (2) by retaliating against plaintiff when she reported LS's conduct to Mair. Plaintiff additionally claimed that defendant had unlawfully retaliated against her in violation of Michigan public policy. Defendant moved for summary disposition under MCR 2.116(C)(10), which the trial court denied. [*Rivera*, 327 Mich App at 451-453.]

II. STANDARD OF REVIEW

"This Court reviews de novo a trial court's decision on a motion for summary disposition . . . ." *Dextrom v Wexford Co*, 287 Mich App 406, 416; 789 NW2d 211 (2010). Summary disposition is proper under MCR 2.116(C)(10) if, "[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 brought under MCR 2.116(C)(10), a 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." *Dextrom*, 287 Mich App at 415-416. This Court also reviews de novo questions of law. *Fraser Twp v Linwood-Bay Sportsman's Club*, 270 Mich App 289, 293; 715 NW2d 89 (2006).

III. ANALYSIS

Plaintiff failed to establish a genuine issue of material fact regarding whether defendant instructed her not to report LS's conduct, and the trial court therefore erred by denying defendant's motion for summary disposition regarding her unlawful-termination claim based on public policy.

"[I]n the absence of a contract providing to the contrary, employment is usually terminable by the employer or the employee at any time, for any or no reason whatsoever." *McNeil v Charlevoix Co*, 484 Mich 69, 79; 772 NW2d 18 (2009); *Smith v Town & Country Props II, Inc*, 338 Mich App 462, 476; 980 NW2d 131 (2021). There is, however, a public-policy exception to this rule; an employer is not free to discharge an at-will employee when the reason for the discharge contravenes public policy. *Smith*, 338 Mich App at 476; see also *Suchodolski v Mich Consol Gas Co*, 412 Mich 692, 695; 316 NW2d 710 (1982); *Kimmelman v Heather Downs Mgt Ltd*, 278 Mich App 569, 572-573; 753 NW2d 265 (2008). Termination of at-will employment is typically proscribed by public policy in Michigan in three situations: "(1) 'adverse treatment of employees who

act in accordance with a statutory right or duty,' (2) an employee's 'failure or refusal to violate a law in the course of employment,' or (3) an 'employee's exercise of a right conferred by a well-established legislative enactment.' " *Kimmelman*, 278 Mich App at 573, quoting *Suchodolski*, 412 Mich at 695-696; see also *Smith*, 338 Mich App at 476.

The "Supreme Court's enumeration of 'public policies' that might forbid termination of at-will employees was not phrased as if it was an exhaustive list." *Kimmelman*, 278 Mich App at 573. However, as this Court has recently reiterated, Michigan courts do not have

> unfettered discretion or authority to determine what may constitute sound public policy exceptions to the at-will employment doctrine. As observed in *Terrien v Zwit*, 467 Mich 56, 66-67; 648 NW2d 602 (2002):
>
> > In defining "public policy," it is clear to us that this term must be more than a different nomenclature for describing the personal preferences of individual judges, for the proper exercise of the judicial power is to determine from objective legal sources what public policy *is*, and not to simply assert what such policy *ought* to be on the basis of the subjective views of individual judges. . . .
> >
> > In identifying the boundaries of public policy, we believe that the focus of the judiciary must ultimately be upon the 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. See *Twin City Pipe Line Co v Harding Glass Co*, 283 US 353, 357; 51 S Ct 476; 75 L Ed 1112 (1931). The public policy of Michigan 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.

> There is no other proper means of ascertaining what constitutes our public policy.
>
> Consistent with this observation, the *Terrien* Court noted that as a general rule, making social policy is a job for the Legislature, not the courts, *id*. at 67, and found instructive the United States Supreme Court's mandate: " 'Public policy is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests. As the term "public policy" is vague, there must be found definite indications in the law of the sovereign to justify the invalidation of a contract as contrary to that policy.' " *Id*. at 68, quoting *Muschany v United States*, 324 US 49, 66; 65 S Ct 442; 89 L Ed 744 (1945). Thus, courts may only derive public policy from objective sources. *Kimmelman*[, 278 Mich App at 573]. [*Smith*, 338 Mich App at 477-478 (quotation marks omitted), quoting *Landin v Healthsource Saginaw, Inc*, 305 Mich App 519, 524; 854 NW2d 152 (2014).]

The three circumstances recognized by the Supreme Court in *Suchodolski* for when public policy prohibits termination "all entail an employee exercising a right guaranteed by law, executing a duty required by law, or refraining from violating the law." *Kimmelman*, 278 Mich App at 573. Although the Supreme Court's list of circumstances for when the public-policy exception applies is not an exhaustive list, neither this Court nor the Supreme Court has yet found "a situation meriting extension beyond the three circumstances detailed in *Suchodolski*." *Landin*, 305 Mich App at 526; see also *Smith*, 338 Mich App at 480 (noting that when the "prevailing legal norms and legal theories" have not changed since the adoption of the public-policy exception to at-will employment, extension of the public-policy exception to independent contractors "should come from the Legislature or the Supreme Court").

In this case, plaintiff alleged that she engaged in activity protected by public policy "by attempting to report [LS's] actions to the police and refusing to conceal and/or compound [LS's] violations of the Michigan Anti-Terrorism Act." We conclude that plaintiff failed to establish a genuine issue of material fact regarding this claim.

Plaintiff has primarily argued that the basis for her public-policy claim was her refusal to conceal LS's allegedly criminal conduct and has cited *Pratt v Brown Machine Co*, 855 F2d 1225, 1236-1238 (CA 6, 1988), in support of her argument. In *Pratt*, the United States Court of Appeals for the Sixth Circuit held that Michigan public policy prohibited an employer "from imposing as a condition of employment an agreement, express or implied, by an employee with knowledge of the commission of a crime to compound or conceal or not prosecute or not to give evidence concerning the commission of the crime." *Id*. at 1236 (quotation marks, citation, and brackets omitted).

Pratt is not binding on this Court. See *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004). However, its holding is consistent with our Supreme Court's statement that "[i]t is well settled that any contract, the consideration of which is to conceal a crime or stifle a prosecution, is necessarily repugnant to public policy, and that a contract whose consideration is contrary to public policy is void," *Case v Smith*, 107 Mich 416, 419; 65 NW 279 (1895), as well as consistent with our Legislature's decision, through the compounding statute, MCL 750.149, to make it a crime for any person, having knowledge of an offense punishable with death or by imprisonment, to take money, any gratuity or reward, or any engagement, upon an agreement to compound or conceal the offense or not to

prosecute. This caselaw and statute, which are objective sources, *Landin*, 305 Mich App at 526; see also *Terrien*, 467 Mich at 68 (indicating that public policy must be ascertained with reference to laws and legal precedents), reflect a public policy that persons may not enter into agreements to conceal a crime or stifle a criminal investigation. That public policy may be violated when an employer conditions an employee's continued employment on the employee's agreement to conceal or stifle an investigation into criminal conduct.

Viewing the evidence in the light most favorable to the plaintiff, however, it is clear that plaintiff failed to establish a genuine issue of material fact regarding whether defendant had instructed her not to disclose LS's conduct, much less that it had conditioned her employment on her agreement not to disclose the conduct and terminated her for refusing to enter into or abide by such an agreement. As this Court has previously stated, there was evidence that plaintiff, after she initially reported LS's conduct to defendant, disclosed the conduct to others. *Rivera*, 327 Mich App at 468 n 7. Plaintiff discussed LS's conduct with a friend, as well as with defendant's attorney, Mair. *Id*. at 451-452. Although plaintiff never reported LS's conduct to law enforcement, there was no evidence that defendant instructed her not to make such a report, or conditioned her continued employment on her not reporting LS's conduct to the police. Although plaintiff stated in an affidavit filed with the trial court that Mair had told her that she should not file a police report, that statement was contradicted by her earlier deposition testimony, in which plaintiff clearly stated that she had based her claim that she was instructed not to call the police solely on text messages she had received from Deb Snyder. A plaintiff cannot create a factual issue by making assertions in an affidavit that

are contrary to her earlier testimony at a deposition. *Mitan v Neiman Marcus*, 240 Mich App 679, 682; 613 NW2d 415 (2000). Therefore, plaintiff cannot merely rely on her affidavit to create a genuine issue of material fact that she was instructed not to report LS's conduct. See *Dykes v William Beaumont Hosp*, 246 Mich App 471, 480-481; 633 NW2d 440 (2001).

Regarding the text messages between plaintiff and Snyder, the trial court was provided with the following transcript of messages sent to and received by plaintiff immediately after the incident:

> *Snyder*: Trying to call attorney
>
> *Snyder*: Talked w Dean/talked w attorney/will fill u in tomorrow/document. Thx
>
> *Plaintiff*: Deb- I was advised we should immediately make out a police report!
>
> He is a hostile employee and that was a threat!
>
> *Snyder*: Dean talked w the attorney and he said no police report. The attorney will be at SVRC at 830 Wednesday morn to talk w [LS]
>
> *Plaintiff*: Uhhhh Deb . . .
>
> I don't feel comfortable not file [sic] police report. I prefer he [sic] authorities having a record of this incident. WEDNESDAY is a long time away to look over my shoulder wondering if he is lurking in the parking lot. He is an ex-marine.
>
> Eve confirmed [LS] has a key. All job coaches have a key to the building.
>
> Can I ask why the attorney said no police report?? I called Sylvester and told him about the [LS] situation and i asked him why a threat would not be documented with the police ASAP. He said he didn't know why either??
>
> *Snyder*: Linda, Sylvester is not an employee of SVRC, he is a board member. Please be very careful with sharing confidential information about employees. If you want to

> file a personal protection order you can do so, which may mean filing a police report, but that is not what was advised by our attorney. Lets [sic] talk when you get to work in the morning.
>
> *Plaintiff*: Sylvester is my significant other. I am upset bcuz an ex-marine just threatened me. I am am [sic] employee too!! I am discussi g [sic] my personal experience. [LS] looked right at me and said those things. So SVRC doesn't care about threats coming from a disgruntled angry employee that are directed at his supervisor and the director that told him about his 3 day suspension. It happen at work, but you are saying I should file a PPO personally, and nothing with SVRC even though it took place at work . . . . Wow. That's all I can say.

The messages make clear that, although Snyder told plaintiff that Mair had advised against filing a police report, Snyder never told defendant not to file a report. In fact, Snyder specifically told plaintiff that she could request a personal protection order, which could require that she file a police report. At her deposition, plaintiff specifically acknowledged that Snyder did not tell her that she could not file a police report:

> *Q*. If we take Exhibit 4 and go to the second page, we have the complete—presumably the complete communication from Deb to you, right?
>
> *A*. Yes.
>
> * * *
>
> *Q*. And it says, "Dean talked with attorney and he said no police report. The attorney will be at SVRC at 8:30 Wednesday morning to talk with [LS]." That's what it says, doesn't it?
>
> *A*. Yes.
>
> * * *

Q. Okay. What it really says is that Dean talked to SVRC's lawyer and he advised SVRC not to make a police report, isn't that what that says?

A. Yes.

* * *

Q. . . . If you want to file a personal protection order, you can do so which may mean filing a police report, right?

A. It's—yes, that's what's here.

Q. Okay. It doesn't say don't file a police report, does it?

A. No.

Q. Okay. "But that is not what was advised by our attorney." She goes onto say that, right?

A. Correct.

Plaintiff's own evidence shows that, while employees of defendant may have preferred that plaintiff not file a police report, defendant never implicitly or explicitly conditioned plaintiff's continued employment on her concealment of LS's unlawful activity. *Pratt*, 855 F2d at 1236; *Case*, 107 Mich at 419. Plaintiff has presented no other evidence in support of her public-policy claim, as we noted in our previous opinion. See *Rivera*, 327 Mich App at 468 n 7 ("We are not persuaded by plaintiff's contention that her public-policy claim is broader that her WPA claims because it 'could include' a refusal to conceal LS's conduct from Payne or others who are not public bodies. First, not only is there no evidence that plaintiff 'refused to conceal' LS's conduct from Payne or others, there is instead evidence that plaintiff actually disclosed that conduct to them. There is, moreover, no evidence in the record that defendant directed plaintiff not to disclose LS's conduct to (or that plaintiff 'refused' to conceal it from) anyone. Finally, Snyder's caution to plaintiff (after she

had disclosed information to Payne) to '[p]lease be very careful with sharing confidential information about employees' wholly fails to provide any basis for plaintiff's public-policy claim.") (alteration in original).

For these reasons, we reverse the trial court's order denying defendant's motion for summary disposition on plaintiff's public-policy claim and remand for entry of an order granting summary disposition in favor of defendant on that claim. We do not retain jurisdiction.

M. J. KELLY, P.J., and SERVITTO, J., concurred with BOONSTRA, J.

ESTATE OF KINZIE R CARLSEN v SOUTHWESTERN MICHIGAN EMERGENCY SERVICES, PC

Docket No. 351159. Submitted August 4, 2021, at Grand Rapids. Decided September 2, 2021, at 9:05 a.m. Leave to appeal denied 510 Mich 932 (2022).

Mindy Carlsen and Allen Carlsen, as personal representatives of the estate of Kinzie R. Carlsen, filed a professional negligence action in the Kalamazoo Circuit Court, Alexander C. Lipsey, J., against Erin K. Eferem and Ryan S. Smith, emergency-medicine physicians at Bronson Methodist Hospital. Southwestern Michigan Emergency Services, PC, was a corporation that ran the emergency room at Bronson. Kinzie Carlsen, a seven-month-old infant, was examined by Eferem and Smith in Bronson's emergency department, where she presented with a fever and other symptoms. Kinzie was given Motrin and Tylenol for her fever and was discharged with the recommendation that her parents, Mindy and Allen, bring her back to the hospital or follow up with her pediatrician in a few days. The following day, Allen brought Kinzie to a different hospital after noticing a lump on her neck. Kinzie was diagnosed with meningitis and given antibiotics before being transferred back to Bronson, where she later died of staphylococcal sepsis and meningitis. In their action, Mindy and Allen alleged that Eferem and Smith were negligent and that Southwestern and Bronson were vicariously liable for Eferem's and Smith's acts and omissions. The complaint further alleged that Eferem and Smith had failed to comply with the standard of care for emergency-medicine physicians when confronted with a patient with Kinzie's symptoms. Eferem and Smith were later dismissed from the action, and plaintiffs entered into a confidential settlement agreement with Bronson. Plaintiffs proceeded to trial against Southwestern. Following a jury trial, the jury returned a verdict of no cause of action. Plaintiffs appealed, and Southwestern cross-appealed.

The Court of Appeals *held*:

1. Plaintiffs raised a *Batson* challenge (under *Batson v Kentucky*, 476 US 79 (1986)) at trial during voir dire in response to defense counsel's use of a peremptory challenge to exclude a

prospective juror who was a pregnant, African American woman. A *Batson* error occurs when a juror is dismissed on the basis of race or gender. Plaintiffs objected to the removal of the juror, noting that she was the only African American on the panel, but the trial court accepted as not inherently discriminatory defense counsel's reasoning that the facts of the case would be particularly disturbing to a juror, male or female, who was expecting their own child. To establish a *Batson* violation, the opponent of the peremptory challenge must establish a prima facie showing of discrimination by demonstrating that (1) the juror is a member of a cognizable racial group, (2) the proponent exercised a peremptory challenge to exclude a member of a certain racial group from the jury pool, and (3) all the relevant circumstances raise an inference that the proponent of the challenge excluded the prospective juror on the basis of race. If the court determines that a prima facie showing has been established, the burden shifts to the proponent of the peremptory challenge to articulate a race-neutral explanation for the exclusion. The reason need not be persuasive or even plausible, so long as it is not inherently discriminatory. The record in this case supported the trial court's finding that defense counsel's reason for excluding the juror was not inherently discriminatory. Defense counsel's questions during voir dire showed that he was trying to impanel jurors who would put their emotions aside when deciding the case, and he asked several jurors, both male and female, whether they based their decisions more on logic or emotion. The prospective juror at issue indicated that she leaned more toward logic than emotion in making decisions, but regarding her suitability to be a juror, she was concerned about her "emotions" due to her pregnancy. Defense counsel struck just two prospective jurors using peremptory challenges, both of whom stated that their emotions might affect their deliberations. Therefore, defense counsel's use of peremptory strikes did not show a pattern of striking jurors on the basis of their race or gender, but on whether the jurors could view the facts dispassionately. Because defense counsel's reason for the peremptory challenge was not inherently discriminatory, it survived plaintiffs' *Batson* challenge, and the trial court did not err when it denied plaintiffs' motion for a new trial on the basis of this issue.

2. Plaintiffs moved for a new trial on the basis that defense counsel prejudiced them when he improperly revealed plaintiffs' settlement with Bronson in violation of MRE 408 and the trial court's order prohibiting disclosure of the terms of the settlement to anyone other than the parties, attorneys, or appropriate court officials. Defense counsel objected to plaintiffs' counsel questioning an expert witness concerning whether Kinzie's blood pressure

had been taken at Bronson, arguing that such questions were inappropriate because "the hospital's been dismissed" from the action. Following a bench conference, the trial court instructed the jury that Bronson and plaintiffs had reached an agreement and settled their dispute and that Bronson was no longer a defendant in the case. Defense counsel's statement that the hospital had been dismissed did not violate MRE 408. It was an accurate statement and did not disclose the existence or terms of the settlement or violate the prohibition in the settlement order against disclosure of the terms of the settlement. Plaintiffs also did not support their argument that questions that the jury asked the court showed that it was preoccupied with the settlement, and therefore, they did not identify any prejudice from either defense counsel's statement or the court's explanation.

3. Plaintiffs moved for a new trial on the basis that comments and objections made by defense counsel were designed to incite the jury's passion and prejudice against plaintiffs' attorney. The trial court concluded that both attorneys had been very strong advocates for their clients and that defense counsel's comments were within the bounds of "good lawyering." The trial court's assessments were fair and accurate, and when viewed in the context of the entire record, defense counsel's objections were not made to distract the jury, but to keep it focused on the issues. Specifically, plaintiffs objected to defense counsel's statement while examining a defense expert that Mindy's deposition testimony was merely a recalled memory by someone who was "seeking to get money" through a lawsuit; plaintiffs argued that the statement portrayed them as money-grubbing and avaricious. Viewed in context, however, this comment was appropriate in light of plaintiffs' counsel's statements during opening argument that this case was about "money" because in America, "justice equals money." Thus, if plaintiffs claimed that they were seeking money as a quest for justice, it was incongruous for them to assert that defense counsel's comments regarding money wrongfully impugned their motives. Moreover, juries are aware that the point of a lawsuit is for the plaintiff to recover money and for the defendant to avoid having to pay. Given that, the comments had a limited ability to inflame the jury.

4. Under MCR 2.625(A)(1), the prevailing party in an action is allowed to tax costs unless prohibited by court rule, statute, or the court. "Costs" or "taxable costs" are not the equivalent of "expenses." "Costs" or "taxable costs" are strictly defined by statute, and these terms are not as broad as "expenses," which the court rules refer to in the general sense of the term. Accordingly, the prevailing party may not recover all its expenses from the opposing

party. In this case, plaintiffs argued that the trial court improperly taxed costs in the amount of $2,350 for the deposition transcripts of two of plaintiffs' expert witnesses. However, the record showed that these costs were not for the transcripts, but to compensate the witnesses for the time that they spent being deposed. Because plaintiffs did not dispute that the witnesses were entitled to a reasonable fee for the time they spent at the deposition or that it was improper to tax an expert's reasonable fee as a cost, the trial court did not err by awarding these costs. The court did err, however, when it taxed $15,387.50 in costs for another expert who never testified at a deposition or at trial. Southwestern listed the expert as a potential witness on defense witness lists in February 2014. However, by early 2016, three years before the trial, Southwestern had decided not to use the expert as a witness. Under MCL 600.2164(1), an expert witness may be paid an amount in excess of the ordinary witness fees as provided by law if the court before whom the witness "is to appear" awards the larger sum, which may then be taxed to the nonprevailing party as taxable costs. The phrase "is to appear" does not apply to a witness who was not deposed and did not testify at trial, even though the case went to trial and resulted in a final verdict. Rather, it applies only to witnesses who could have been called to testify, either at trial or deposition. The Court of Appeals has repeatedly interpreted MCL 600.2164(1) to allow the prevailing party to tax costs for an expert's trial preparation, even if the case did not proceed to trial, such as when the case was dismissed at summary disposition before the witness was called upon to testify. However, in this case, there was no pretrial dismissal that obviated the need for the expert witness; rather, Southwestern decided not to use the expert as a witness three years before the trial. Once the trial has concluded, a party's proposed expert witness can no longer be called to appear; therefore, if a case has gone to trial and reached a final verdict, a trial court may tax costs only for those witnesses who actually appeared to testify at trial or at a deposition, or both. In this case, no statutory authority supported the trial court's order taxing the expert's fees as costs. Lastly, regarding two additional defense experts, an evidentiary hearing was required to assess the basis for and reasonableness of costs awarded by the court. The record did not provide sufficient support for the fees claimed by and awarded to these experts, and when this is the case, the remedy is to remand for an evidentiary hearing.

5. Southwestern argued that it was entitled to recover its taxable costs from plaintiffs' settlement with Bronson. The settlement was governed by MCL 600.2922, which directs how the proceeds of the settlement in a wrongful-death action must be

distributed. Significantly, the statute addresses the disbursement of settlement "proceeds," not the entirety of all funds received in the settlement. In *Mason v Cass Co Bd of Co Rd Comm'rs*, 221 Mich App 1 (1997), the Court of Appeals affirmed the trial court's order imposing mediation sanctions on the plaintiff in a wrongful-death action, to be paid from the jury award. In *Hill v LF Transp, Inc*, 277 Mich App 500 (2008), the Court of Appeals extended the rule from *Mason* to taxed costs in a wrongful-death action, holding that the prevailing party could tax its costs from the plaintiff's award before the award was distributed to the decedent's estate. *Mason* held that a "fair and equitable" approach should be used when deciding whether sanctions should be taken from a settlement or judgment before its proceeds are paid to an estate under the wrongful-death act. Although *Hill* did not explicitly address *Mason*'s "fair and equitable" framework, it did refer directly to *Mason*'s reasoning and extend *Mason*'s rule regarding mediation sanctions to taxed costs. Therefore, a trial court may tax costs from a settlement before the proceeds are distributed to the estate under the wrongful-death act only when it would be fair and equitable to do so. In this case, the trial court did not clearly err when it concluded that it was not appropriate to tax Southwestern's costs before distributing the Bronson settlement to the estate. The record indicated that the court balanced Michigan's public-policy preference favoring settlements against the competing policy preference that prevailing parties must be able to tax costs, and the court placed a higher value on settlements than on Southwestern's ability to fully recover its taxed costs, concluding that this was the most fair and equitable outcome.

Decision affirmed in part, reversed in part, and case remanded for further proceedings.

1. COSTS — TAXABLE COSTS — EXPENSES.

The prevailing party in an action is entitled to recover costs unless prohibited by statute or court rule; however, costs are not the equivalent of expenses; costs and taxable costs are strictly defined by statute, while expenses are defined broadly and used by the court rules in the general sense; accordingly, the prevailing party may not recover all of its expenses from the opposing party.

2. WORDS AND PHRASES — "IS TO APPEAR" — EXPERT WITNESSES — COSTS.

Under MCL 600.2164(1), an expert witness may be paid an amount in excess of the ordinary witness fees as provided by law if awarded by the court before whom the witness "is to appear;" the prevailing party is permitted to tax costs for an expert's trial preparation even

if the case did not proceed to trial, such as when the case was dismissed at the summary-disposition phase; however, when a trial has concluded, a witness can no longer be called to appear; therefore, if a case has reached a final verdict following a trial, a trial court may only tax costs for those witnesses who actually appeared to testify at either the trial or a deposition.

3. WRONGFUL-DEATH ACTIONS — SETTLEMENTS — PROCEEDS — ORDER OF DISTRIBUTION.

Mediation sanctions and taxed costs may be removed from a settlement before its proceeds are paid to an estate under the wrongful-death act when the trial court determines that it is "fair and equitable" to do so.

Fieger, Fieger, Kenney & Harrington, PC (by *Sima G. Patel* and *Geoffrey N. Fieger*) for the estate of Kenzie Renee Carlsen.

Collins Einhorn Farrell PC (by *Trent B. Collins* and *Michael J. Cook*) for Southwestern Michigan Emergency Services, PC.

Before: TUKEL, P.J., and K. F. KELLY and GADOLA, JJ.

TUKEL, P.J. This professional negligence action arises from the June 30, 2012 death of seven-month-old Kinzie Renee Carlsen at Bronson Methodist Hospital (Bronson). Plaintiffs Mindy Carlsen and Allen Carlsen, Kinzie's parents and personal representatives of the estate of Kinzie Renee Carlsen, appeal by right from the trial court's orders denying their motion for a new trial and granting the motion of defendant Southwestern Michigan Emergency Services, PC (Southwestern) for taxed costs. Plaintiffs also appeal the trial court's order entering a judgment on the jury's verdict of no cause of action. On appeal, plaintiffs raise a *Batson*[1] challenge, assert

[1] *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986), as modified by *Powers v Ohio*, 499 US 400; 111 S Ct 1364; 113 L Ed 2d 411 (1991).

several instances of prejudicial misconduct on the part of Southwestern's counsel, and challenge the amount of taxed costs awarded to Southwestern. On cross-appeal, Southwestern challenges the trial court's order granting plaintiffs' motion to approve payment of costs. Southwestern asserts that it was entitled to recover its taxed costs from the estate's settlement with Bronson before plaintiffs' attorney recovered his costs and fees. We affirm the trial court's orders entering a judgment of no cause of action, denying plaintiffs a new trial, and granting plaintiffs' motion for payment of costs. In addition, we affirm, in general, the trial court's award of taxable costs to Southwestern, but we reverse the amount of taxable costs awarded and remand for further proceedings consistent with this opinion.

I. UNDERLYING FACTS

Just before 6:00 p.m. on June 27, 2012, Kinzie presented to the emergency department at Bronson in Kalamazoo. She had a fever of 104.6 degrees Fahrenheit, a pulse of 180, and a respiratory rate of 28. According to her medical chart, she was examined by second-year resident Dr. Erin K. Eferem and Dr. Eferem's supervising physician, Dr. Ryan S. Smith. According to Kinzie's chart, she was active with a strong cry; her ears, nose, mouth, and throat were normal; the whites of her eyes were normal; and her pupils were equal, round, and reactive to light. She was alert and displayed normal strength and muscle tone, her anterior fontanelle was flat, and her neck was supple with a normal range of motion. A urinalysis showed an elevated level of proteins but no sign of infection, and she had no diaper rash. She was given Motrin and Tylenol for her fever and discharged at 8:45 p.m., by which time her temperature had de-

creased to 100.7 degrees Fahrenheit. It was recommended that her parents bring Kinzie back to the hospital or follow up with her pediatrician in a few days.

The next day, June 28, Kinzie's father, Allen, noticed a lump on the side of Kinzie's neck that had not been there before. He took her to Bronson LakeView Hospital in Paw Paw, where they were told that Kinzie had meningitis. Kinzie was intubated, given 900 milligrams of intramuscular Rocephin—an antibiotic—and transferred by "baby bus" to Bronson in Kalamazoo; at some point, she was put on a life-support machine. Two days later, tests showed no brain activity. Life support was withdrawn, and Kinzie was pronounced dead at 11:25 a.m. on June 30, 2012. Kinzie's death certificate identifies her cause of her death as "Staphylococcal Sepsis and Meningitis."

Kinzie's parents, as personal representatives of Kinzie's estate, filed a professional negligence claim against Drs. Eferem and Smith, alleging that Bronson and Southwestern were vicariously liable for the acts and omissions of Drs. Eferem and Smith.[2] The complaint alleged that the standard of care for an emergency-medicine physician confronted with a patient that presented with Kinzie's signs and symptoms required the physician to formulate a differential diagnosis that included bacterial infection, order the diagnostic tests necessary to confirm or eliminate that diagnosis, diagnose and treat a bacterial infection, keep the child in the hospital for monitoring, and consult with experts in pediatrics or infectious diseases. Drs. Eferem and Smith were professionally negligent for failing to comply with this standard of

[2] Southwestern is a corporation that runs Bronson's emergency room.

care, and their negligence proximately caused plaintiffs' injuries and damages.

In February 2015, the parties stipulated to the dismissal of Dr. Eferem with prejudice and to the dismissal with prejudice of claims against Bronson arising from Dr. Eferem's conduct. In May 2018, plaintiffs and Bronson entered into a confidential settlement agreement. Plaintiffs affirmed that they understood that costs incurred by their attorney's firm as well as their attorney fees would be deducted from the settlement funds. The remainder would go to the estate to be distributed by the trial court. The trial court entered an order approving the agreement.[3] About the same time as the agreement to settle, the parties stipulated to dismiss Dr. Smith from the action without prejudice. Plaintiffs proceeded to trial against Southwestern.

Plaintiffs' expert witnesses at trial were Dr. Joseph Cervia, Dr. Karen Jubanyik, and Dr. Carolyn Crawford. Drs. Cervia and Crawford testified that, although Kinzie was in the early stages of meningitis when she presented to Bronson on June 27, there was a window of opportunity for effective treatment. Dr. Cervia explained that Kinzie had an overwhelming bacterial infection caused by methicillin-resistant staph aureus (MRSA). Dr. Cervia stated that, although MRSA are resistant to the antibiotics typically used to treat staph infections, there are antibiotics that still work on the organism, and Vancomycin was the drug of choice used to treat MRSA. All three of plaintiffs' experts testified that if doctors had administered the antibiotic Vancomycin to Kinzie on June 27, she would have survived.

[3] The settlement order prevented "disclosure of the terms of the settlement to any person other than the parties, their attorneys, and appropriate court officials." As such, we will not address the settlement's terms here.

Dr. Jubanyik testified that Dr. Smith's failure to administer Vancomycin breached the standard of care for an emergency-medicine doctor.

Southwestern's expert witnesses were Dr. Francis McGeorge and Dr. David Talan. Dr. McGeorge testified that Drs. Eferem and Smith complied with the standard of care: they did exactly what he would have done, what he would have trained any resident to do, and what he would have expected any colleague to do. He explained that even if the doctors had administered antibiotics to Kinzie on June 27, the standard treatment that all doctors do is to administer the antibiotics Rocephin and/or Amoxicillin, neither of which is effective against MRSA. In essence, Dr. McGeorge testified, nothing that the standard of care called for the doctors to do for Kinzie on June 27 would have changed the outcome. Dr. Talan confirmed that the evaluation of Kinzie met the standard of care and that there was nothing in textbooks or the guidelines regarding how to treat MRSA infections that would have led the doctors to administer Vancomycin. Dr. Talan also opined that the MRSA that Kinzie's father had in his toe differed from the bacteria that caused Kinzie's death.[4]

The jury returned a five-to-two verdict of no cause of action. After several posttrial motions were resolved, plaintiffs appealed and Southwestern filed a cross-appeal.

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[4] While providing Kinzie's medical history, Allen told Dr. Eferem that he had recently injured his toe and was treated at the local emergency room with antibiotics. After examining the toe and discussing her evaluation with Dr. Smith, Dr. Eferem concluded that Allen had an unidentified bacterial infection. She prescribed Keflex, an antibiotic. The parties disputed whether Kinzie contracted an infection from the toe, and whether Drs. Eferem and Smith were negligent by failing to, in the words of plaintiffs' attorney, put "two and two together" and treat Kinzie with antibiotics.

II. *BATSON* CHALLENGE

Plaintiffs first contend that defense counsel erroneously exercised a peremptory strike to exclude a juror on the basis of race and sex in violation of the United States and Michigan Constitutions and that the only remedy for the error is to vacate the jury's verdict and remand the matter for a new trial. We find no *Batson* violation.

A. STANDARD OF REVIEW

When reviewing a *Batson* challenge,

> the proper standard of review depends on which *Batson* step is before us. If the first step is at issue (whether the opponent of the challenge has satisfied his burden of demonstrating a prima facie case of discrimination), we review the trial court's underlying factual findings for clear error, and we review questions of law de novo. If *Batson*'s second step is implicated (whether the proponent of the peremptory challenge articulates a race-neutral explanation as a matter of law), we review the proffered explanation de novo. Finally, if the third step is at issue (the trial court's determinations whether the race-neutral explanation is a pretext and whether the opponent of the challenge has proved purposeful discrimination), we review the trial court's ruling for clear error. [*People v Knight*, 473 Mich 324, 345; 701 NW2d 715 (2005).]

A trial court's finding "is clearly erroneous when no evidence supports the finding or, on the entire record, this Court is left with a definite and firm conviction that a mistake has been made." *King v Mich State Police Dep't*, 303 Mich App 162, 185; 841 NW2d 914 (2013).

B. ANALYSIS

"A *Batson* error occurs when a juror is actually dismissed on the basis of race or gender." *People v Bell*,

473 Mich 275, 293; 702 NW2d 128 (2005). To establish a *Batson* violation, the opponent of a peremptory challenge must first establish a prima facie showing of discrimination. This requires showing that

> (1) he [or she] is a member of a cognizable racial group; (2) the proponent has exercised a peremptory challenge to exclude a member of a certain racial group from the jury pool; and (3) all the relevant circumstances raise an inference that the proponent of the challenge excluded the prospective juror on the basis of race. [*Knight*, 473 Mich at 336.]

"[I]f the trial court determines that a prima facie showing has been made, the burden shifts to the proponent of the peremptory challenge to articulate a race-neutral explanation for the strike." *Id*. at 337. The race-neutral explanation for the strike "need not rise to the level justifying exercise of a challenge for cause." *Batson*, 476 US at 97. Indeed, "*Batson*'s second step does not demand articulation of a persuasive reason, or even a plausible one; 'so long as the reason is not inherently discriminatory, it suffices.' " *People v Tennille*, 315 Mich App 51, 63; 888 NW2d 278 (2016), quoting *Rice v Collins*, 546 US 333, 338; 126 S Ct 969; 163 L Ed 2d 824 (2006). "Finally, if the proponent provides a race-neutral explanation as a matter of law, the trial court must then determine whether the race-neutral explanation is a pretext and whether the opponent of the challenge has proved purposeful discrimination." *Knight*, 473 Mich at 337-338. At this third stage, a trial court's finding will turn largely on an assessment of credibility; therefore, "a reviewing court ordinarily should give those findings great deference." *Batson*, 476 US at 98 n 21.

The United States Supreme Court held in *JEB v Alabama ex rel TB*, 511 US 127, 130-131; 114 S Ct 1419; 128 L Ed 2d 89 (1994), that intentional discrimination

on the basis of gender violated the Equal Protection Clause, US Const, Am XIV, "particularly where . . . the discrimination serve[d] to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women." The Court explained that "[p]arties still may remove jurors who they feel might be less acceptable than others on the panel; gender simply may not serve as a proxy for bias. . . . Even strikes based on characteristics that are disproportionately associated with one gender could be appropriate, absent a showing of pretext." *Id*. at 143. The Supreme Court noted, for example, that "challenging all persons who have had military experience would disproportionately affect men at this time, while challenging all persons employed as nurses would disproportionately affect women. Without a showing of pretext, however, these challenges may well not be unconstitutional, since they are not gender or race based." *Id*. at 143 n 16.

In the present case, plaintiffs' attorney raised a *Batson* challenge during voir dire when defense counsel used a peremptory challenge to exclude Juror 5(c)—a pregnant, African-American woman—from the jury. Juror 5(c) was the third juror to fill seat five, the first having been dismissed for cause, and the second having been struck by Southwestern. When asked by the trial court if there was anything it should be aware of regarding her suitability to serve as a juror in this case, Juror 5(c) answered that she was $6^1/_2$ months pregnant, and stated, "Emotions, you know, all that stuff." The attorneys' subsequent questions revealed that Juror5(c) had just graduated from college with a degree in financial planning and anticipated attending graduate school to study accounting. She believed that she would be able to evaluate the case on the basis of the facts and the evidence, not on sympathy, and she said that, when making decisions, she leaned more toward logic than

toward passion and emotion. Defense counsel exercised a peremptory strike to excuse Juror 5(c).

Plaintiffs' counsel requested a bench conference and immediately raised a *Batson* challenge, stating that Juror 5(c) was the only "African American on that panel . . . ." Defense counsel replied: "It's really simple. . . . She's pregnant." Plaintiffs' counsel argued that, although pregnancy was race-neutral, excluding Juror 5(c) because she was pregnant was nonetheless discriminatory because pregnancy was a proxy for sex. Defense counsel explained that he liked Juror 5(c)'s answers during voir dire, but this case was about the death of a seven-month-old child, thus suggesting that the facts of the case would be particularly disturbing or stressful to Juror 5(c), who was expecting her own child. Defense counsel said that he would have the same concern regarding a male sitting on the jury whose wife was expecting. After the parties had argued their respective positions, the trial court determined that defense counsel's reason for peremptorily challenging Juror 5(c) was not inherently discriminatory and allowed the challenge to go forward.

The record in the present case supports the trial court's finding that the reason offered by defense counsel for excusing Juror 5(c) from the jury was not inherently discriminatory. Parties may "remove jurors who they feel might be less acceptable than others on the panel" as long as their reasons for doing so are not proxies for race or gender bias. See *JEB*, 511 US at 143. This case involved the tragic death of a seven-month-old baby. The questions that defense counsel asked during voir dire show that he was trying to impanel a jury that would put aside emotions when deciding the case. He asked at least seven potential jurors—male and female—whether they made deci-

sions based more on emotion or on logic. Furthermore, defense counsel exercised only two peremptory challenges, both of which were used on jurors who admitted to varying degrees that emotions might affect their deliberations: Juror 5(b), who said that she was not sure she could focus on the facts of the case because she was a very sympathetic person, described herself at one point as "insanely sympathetic," and characterized herself as tending to base decisions more on passion than on logic; and Juror 5(c). Defense counsel's exercise of peremptory strikes does not show a pattern of striking jurors on the basis of their gender—by our estimation, three or four of the impaneled jurors were women—but on counsel's estimation of whether there were any indications that a juror, for whatever reason, might not view the facts of the case with the level of dispassion desired by the defense.[5]

Because defense counsel's reason for peremptorily challenging Juror 5(c) was not inherently discriminatory, it survives plaintiffs' *Batson* challenge. See *Tennille*, 315 Mich App at 63 (holding that, at the second step of a *Batson* challenge, a race-neutral reason need not be persuasive or plausible; "so long as the reason is not inherently discriminatory, it suffices") (quotation marks and citations omitted). Accordingly, the trial court did not err by determining that Southwestern's peremptory challenge was not race- or sex-based and by allowing the challenge to go forward. Because there was no *Batson* error, the trial court did not abuse its discretion by denying plaintiffs' motion for a new trial on the basis of this issue.

[5] The record is unclear regarding whether there were three or four female jurors when voir dire concluded. Either way, the number of female jurors clearly did not establish a pattern of defense counsel making a concerted effort to exclude females from the jury.

III. VIOLATION OF MRE 408

Plaintiffs next contend that defense counsel gratuitously and improperly revealed plaintiffs' settlement with Bronson in violation of MRE 408 and a prior order of the trial court and that counsel's comment so prejudiced them that a new trial was warranted. We disagree.

A. STANDARD OF REVIEW

This Court reviews a trial court's decision on a motion for a new trial and evidentiary decisions for an abuse of discretion. *Zaremba Equip, Inc v Harco Nat'l Ins Co*, 302 Mich App 7, 21; 837 NW2d 686 (2013). "An abuse of discretion occurs when the decision resulted in an outcome falling outside the range of principled outcomes." *Hayford v Hayford*, 279 Mich App 324, 325; 760 NW2d 503 (2008). "An error of law necessarily constitutes an abuse of discretion." *Denton v Dep't of Treasury*, 317 Mich App 303, 314; 894 NW2d 694 (2016). "[A]n abuse of discretion will normally not be found when addressing a close evidentiary question." *Peña v Ingham Co Rd Comm*, 255 Mich App 299, 303; 660 NW2d 351 (2003). Additionally, this Court reviews the interpretation of court rules de novo. *Lamkin v Engram*, 295 Mich App 701, 707; 815 NW2d 793 (2012). Finally, "[t]his Court reviews a trial court's findings of fact for clear error." *Kuhlgert v Mich State Univ*, 328 Mich App 357, 368; 937 NW2d 716 (2019).

B. ANALYSIS

Plaintiffs argue that they are entitled to a new trial because defense counsel violated MRE 408 by stating that Bronson was dismissed from the case. MRE 408 provides, in relevant part:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible.

During trial, plaintiffs' counsel asked Dr. Jubanyik about Kinzie's vital signs when she was at Bronson. During this line of questioning, Dr. Jubanyik testified that Kinzie's blood pressure had not been recorded, she would expect to see a blood pressure test under the circumstances, and "if the nurse didn't do it (inaudible) a physician's job to request." Defense counsel objected on the basis that there had been no claim that it was a violation of the standard of care to not tell the nurse that she should take Kinzie's blood pressure, there was no claim that any nurse did anything wrong in this case, and "the hospital's been dismissed from it."

Plaintiffs' counsel immediately asked for a bench conference and, at the conference, asked for the jury to be excused. After the jury was excused, plaintiffs' counsel asserted that telling the jury that Bronson was dismissed was error, and he asked the trial court to tell the jury that Bronson had not been dismissed. Rather than inform the jury that Bronson had not been dismissed (which it in fact had been), the trial court told the jury that Bronson and plaintiffs had reached an agreement and settled their dispute, Bronson was not present as a defendant, and the only defendant was Southwestern. The trial court deemed the explanation both necessary and appropriate, given that the case had repeatedly been called as "Carlsen versus Bronson Methodist Hospital" in the jury's presence.

Defense counsel's comment that "the hospital's been dismissed" did not violate MRE 408. Defense counsel's observation was accurate and, on its face, was not a statement about the existence or terms of a settlement—the hospital could have been "dismissed" by stipulation or through summary disposition—or about any conduct related to the settlement. For the same reasons, the statement did not violate the trial court's prohibition in the settlement order against "disclosure of the terms of the settlement to any person other than the parties, their attorneys, and appropriate court officials." There simply is no merit to plaintiffs' allegation that the comment violated either MRE 408 or the trial court's order. Plaintiffs assert that *Brewer v Payless Stations, Inc*, 412 Mich 673; 316 NW2d 702 (1982), and *Kueppers v Chrysler Corp*, 108 Mich App 192; 310 NW2d 327 (1981),[6] support their entitlement to a new trial. But both cases involved situations in which the trial court concluded that the jury could learn details of settlement amounts. *Brewer*, 412 Mich at 674-675; *Kueppers*, 108 Mich App at 197-198, 203; *Brewer v Payless Stations, Inc*, 94 Mich App 281, 283-284; 288 NW2d 352 (1979), aff'd 412 Mich 673 (1982).[7] The trial court in the present case did not admit evidence of settlement amounts. Consequently, *Kueppers* and *Brewer* are of no help to plaintiffs.

Plaintiffs contend that they suffered prejudice from defense counsel's comment and the trial court's expla-

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[6] "Although cases decided before November 1, 1990, are not binding precedent, MCR 7.215(J)(1), they nevertheless can be considered persuasive authority." *In re Stillwell Trust*, 299 Mich App 289, 299 n 1; 829 NW2d 353 (2013) (citation omitted).

[7] We cite this Court's opinion in *Brewer* because it was referred to by our Supreme Court's opinion in *Brewer* and provides additional facts not addressed by our Supreme Court's opinion.

nation to the jury that Bronson and plaintiffs had reached a settlement. Specifically, plaintiffs point to two questions submitted by the jury to the trial court as evidence that the jury was preoccupied with the settlement.[8] Rather than explain how these questions show that the disclosure of the Bronson settlement influenced the jury's assessment of the case against Southwestern, plaintiffs have essentially announced their position and left it to this Court to discover and rationalize the basis for their claim. Thus, the issue is abandoned. See *Cheesman v Williams*, 311 Mich App 147, 161; 874 NW2d 385 (2015) ("An appellant may not merely announce a position then leave it to this Court to discover and rationalize the basis for the appellant's claims; nor may an appellant give an issue only cursory treatment with little or no citation of authority.").

We conclude that defense counsel's statement that "the hospital's been dismissed" did not violate MRE 408 or the trial court's order prohibiting disclosure of the terms of the settlement. The trial court's explanation to the jury that Bronson and plaintiffs had settled their dispute and that Bronson was no longer a party to the litigation was accurate, reasonable, and arguably necessary given how the case had been called during the first three days of trial. Plaintiffs have not identified any prejudice from either defense counsel's comment or the trial court's explanation. For these reasons, the trial court did not abuse its discretion by denying plaintiffs' motion for a new trial on the basis of defense counsel's comment.

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[8] The questions were: (1) "Who were the nurses employed by? SWM[E]S vs Bronson"; and (2) "Were the nurses or the Resident legally prevented from testifying on behalf of the defense due to the settlement with Bronson? If not, why are there no character witnesses for the doctor?" The trial court's answer to the first question was "Bronson," and it responded that the second question was irrelevant to the proceedings.

IV. ATTORNEY MISCONDUCT

Plaintiffs next assert that defense counsel made multiple comments designed to incite the jury's passion and prejudice against plaintiffs' counsel, which resulted in a verdict premised on bias and prejudice rather than reasonable deliberation, and therefore, this Court is required to vacate the jury verdict and remand for a new trial. We disagree.

A. STANDARD OF REVIEW

Claims of attorney misconduct are subject to harmless-error review. *Reetz v Kinsman Marine Transit Co*, 416 Mich 97, 102-103; 330 NW2d 638 (1982). "An attorney's comments do not normally constitute grounds for reversal unless they reflect a deliberate attempt to deprive the opposing party of a fair and impartial proceeding." *Zaremba Equip*, 302 Mich App at 21. Reversal is required only when "the prejudicial statements reveal a deliberate attempt to inflame or otherwise prejudice the jury, or to deflect the jury's attention from the issues involved." *Id*. (quotation marks and citation omitted). Additionally, as explained earlier, this Court reviews a trial court's denial of a motion for new trial for an abuse of discretion. *Id*.

B. ANALYSIS

A trial court may grant a new trial when the misconduct of the prevailing party materially affected the substantial rights of the nonprevailing party. MCR 2.611(A)(1)(b). In *Reetz*, 416 Mich at 102-103, our Supreme Court provided the following framework for analyzing claims of improper attorney conduct:

> When reviewing an appeal asserting improper conduct of an attorney, the appellate court should first determine

> whether or not the claimed error was in fact error and, if so, whether it was harmless. If the claimed error was not harmless, the court must then ask if the error was properly preserved by objection and request for instruction or motion for mistrial. If the error is so preserved, then there is a right to appellate review; if not, the court must still make one further inquiry. It must decide whether a new trial should nevertheless be ordered because what occurred may have caused the result or played too large a part and may have denied a party a fair trial. If the court cannot say that the result was not affected, then a new trial may be granted. Tainted verdicts need not be allowed to stand simply because a lawyer or judge or both failed to protect the interests of the prejudiced party by timely action.

Plaintiffs moved for a new trial in part on the basis that defense counsel's comments were attacks on plaintiffs' counsel and intended to prejudice the jury. In rejecting this argument, the trial court noted that this case was a "contentious" proceeding and that the attorneys had been "very strong in their advocacy [and] very forceful in their—their arguments . . . ." The trial court opined that their "zealous advocacy" was within "the bounds of . . . good lawyering . . . within the context of a trial." The trial court further stated that its prior order limiting plaintiffs' causes of action to what they had asserted in their complaint had occasioned many objections from both parties, but opined that counsels' conduct, although perhaps displaying their frustrations with each other, did not create an atmosphere of intimidation for the jury or taint the trial.

Our review of the record convinces us that the trial court's observations about the attorneys' conduct during the trial were fair and accurate. The parties fiercely disputed the condition Kinzie was in when she arrived at Bronson on the evening of June 27, whether she was properly examined and treated there, and

whether antibiotics could have saved her life; counsel even disputed the significance of facts upon which they agreed, such as Kinzie's vital signs. Some of defense counsel's objections arose from a "hyper sensitivity," as the trial court described it, to any indication that plaintiffs' counsel was trying to introduce new theories of negligence. Viewing these objections in the context of the entire record makes clear that their purpose was not to distract the jury, but to keep it focused on the relevant issues.

Plaintiffs claim that defense counsel made several impermissible speaking objections, i.e., objections that contain "more information than the judge needs to rule on the objection" and "are often intended to influence the jury or the witness." *Zaremba Equip*, 302 Mich App at 20 n 3. Plaintiffs take exception to defense counsel's statement that he wanted to "admonish Counsel and instruct the jury of two things," and they object to defense counsel's comment made while examining Dr. Talan that Mindy's deposition testimony amounted to a recalled memory from "a person filing a lawsuit, seeking to get money, right," portraying them as avaricious and money-grubbing. In our view, none of defense counsel's objections appear to have been designed to attack plaintiffs' attorney or to distract, inflame, or prejudice the jury. Rather, they typify what the trial court referred to as the attorneys' frustrations with one another. Regarding defense counsel's observation about money, as Southwestern points out in its brief to this Court, plaintiffs' attorney stated during opening statement that plaintiffs were there "for one reason and one reason only[:] money," because Southwestern did not "want to pay." Plaintiff's attorney then emphasized this comment by stating that in America, "[j]ustice equals money." If plaintiffs' attorney's references to money implied a quest for justice, it seems incongruous for plaintiffs to

claim that defense counsel's reference to money impugns their motives and paints them as avaricious. Moreover, that all occurred in the context of a lawsuit, and juries are certainly well aware that the point of a lawsuit is for the plaintiff to recover money and for the defendant to avoid having to pay. Given that, the comments had a limited ability to inflame the jury, as they did not convey any information of which the jury otherwise would have been unaware.

We conclude that the trial court was correct that the attorneys' zealous advocacy for their clients was within the bounds of good lawyering within the context of a trial. None of defense counsel's comments rises to the level of comments that warrant a new trial. See, e.g., *Badalamenti v William Beaumont Hosp-Troy*, 237 Mich App 278, 290-291; 602 NW2d 854 (1999) (describing how, among other improprieties, the plaintiff's attorney repeatedly and baselessly accused the defendants and their witnesses of covering up their malpractice through conspiracy, collusion, perjury, fabrication, and the destruction, alteration, and suppression of evidence, and insinuated that the defendants were motivated by money and greed to cover up their alleged malpractice). On this record, we cannot conclude that defense counsel's comments were improper. The record simply does not support plaintiffs' assertion that defense counsel's comments were unfairly prejudicial or designed to distract the jury from the issues at hand. Accordingly, we conclude that the trial court did not abuse its discretion by denying plaintiffs' motion for a new trial on the basis of defense counsel's alleged misconduct.

V. SOUTHWESTERN'S TAXED COSTS

Plaintiffs next raise several challenges to the amount of prevailing-party costs that the trial court awarded

Southwestern. Specifically, plaintiffs assert that Southwestern is not entitled to the $2,350 claimed for taking the depositions of Drs. Jubanyik and Crawford and the $15,387.50 in expert fees for Dr. William Barson. In addition, plaintiffs argue that an evidentiary hearing is necessary to determine the bases and reasonableness of the $68,321.47 in expert fees awarded for Dr. Talan and the $50,676.99 in expert fees awarded for Dr. McGeorge. We agree in part.

A. STANDARD OF REVIEW

This Court reviews a trial court's award of taxable costs under MCR 2.625 for an abuse of discretion. *Klinke v Mitsubishi Motors Corp*, 219 Mich App 500, 518; 556 NW2d 528 (1996). This Court also reviews for an abuse of discretion "the proper amount of taxable expert witness fees," *Guerrero v Smith*, 280 Mich App 647, 675; 761 NW2d 723 (2008), as well as a trial court's decision that an evidentiary hearing is not warranted, *Kernen v Homestead Dev Co*, 252 Mich App 689, 691; 653 NW2d 634 (2002). Whether a particular expense is taxable as a cost is a question of law that this Court reviews de novo. *Guerrero*, 280 Mich App at 670.

B. ANALYSIS

"Costs will be allowed to the prevailing party in an action, unless prohibited by statute or by [court] rules or unless the court directs otherwise, for reasons stated in writing and filed in the action." MCR 2.625(A)(1). "The power to tax costs is purely statutory, and the prevailing party cannot recover such expenses absent statutory authority." *Guerrero*, 280 Mich App at 670. "Costs" or "taxable costs" are not the equivalent of "expenses." See *id*. at 671-675. " 'While "expenses" is used by the Michigan Court Rules in its generic sense,

i.e., the reasonable charges, costs, and expenses incurred by the party directly relating to the litigation, "costs" or "taxable costs" are strictly defined by statute, and the term is not as broad. . . .' " *Beach v State Farm Mut Auto Ins Co*, 216 Mich App 612, 621-622; 550 NW2d 580 (1996) (citation omitted; ellipsis in original). Accordingly, the presumption that costs shall be allowed as a matter of course to the prevailing party "does not mean . . . that every expense incurred by the prevailing party in connection with the proceeding may be recovered against the opposing party." *Id*. at 622 (quotation marks and citation omitted). Rather, "[t]he term 'costs' as used [in] MCR 2.625(A) takes its content from the statutory provisions defining what items are taxable as costs." *Id*. (second alteration in original).

1. EXPERT FEES FOR DRS. CRAWFORD AND JUBANYIK

Plaintiffs object to the $2,350 taxed for the depositions of Drs. Crawford and Jubanyik. We disagree.

Plaintiffs argue that the trial court taxed $2,350 for the deposition transcripts of the depositions of Drs. Crawford and Jubanyik. But the record shows that the cost was not assessed for transcripts; rather, the cost was for the doctors' time spent being deposed. MCR 2.302(B)(4)(a)(ii) authorizes a party to "take the deposition of a person whom the other party expects to call as an expert witness at trial." As explained by this Court in *Kernen*, 252 Mich App at 692,

> MCR 2.302(B)(4)(c)(i) requires the trial court to direct the party obtaining deposition testimony from an expert to pay the expert a reasonable fee, unless a manifest injustice would result from the payment. Similarly, unless a manifest injustice would occur, MCR 2.302(B)(4)(c)(ii) also requires the trial court to direct an opposing party to pay a reasonable portion of the expenses incurred by a party in

> obtaining discoverable information from a retained expert who is not expected to testify at trial. In its discretion, the trial court may, but is not obligated to, require reimbursement for other discovery obtained by a party from the expert of the opposing party.

Additionally, the court rule "does not require that the deposition testimony of the expert be used at trial before the trial court may award fees under the rule." *Id*. at 693. It is indisputable that the $2,350 at issue was for the deposition time of Drs. Crawford and Jubanyik, and plaintiffs do not dispute that the doctors are entitled to a reasonable fee for time spent at a deposition or that it is improper to tax an expert's reasonable fee for deposition time as a cost. Thus, the trial court did not err by awarding as taxable costs $2,350 for the deposition time of Drs. Crawford and Jubanyik.

2. EXPERT FEES FOR DR. BARSON

Plaintiffs object to the $15,387.50 taxed for Dr. Barson's trial preparation, arguing that no costs should be taxed because three years before trial, Southwestern voluntarily chose to not use Dr. Barson as a witness. We agree.

Plaintiffs argue that Dr. Barson was "never anticipated or called to testify at trial." This is not an accurate statement of the record. The record clearly establishes that Dr. Barson was listed as a potential expert witness on defense witness lists filed in February 2014. The record, however, also shows that by the spring of 2016, Southwestern had decided not to use Dr. Barson as an expert witness at trial and that Dr. Barson's final invoice for a service rendered is dated May 2016. That Southwestern essentially discharged Dr. Barson three years before trial raises the question

of the statutory authority to tax his fees as costs. The trial court determined that Dr. Barson's fees were taxable because Southwestern's decision not to use Dr. Barson as an expert "[did] not diminish the fact that it was a cost associated with employing that individual at some point." The trial court is correct that Southwestern incurred costs associated with employing Dr. Barson as an expert witness, but the question we must answer is whether plaintiffs must pay those costs as taxed costs even though Southwestern voluntarily chose, long before trial, to not use Dr. Barson as an expert witness. Consequently, Dr. Barson never testified, either by deposition or at trial.

MCL 600.2164(1), which addresses expert-witness fees, states in pertinent part:

> No expert witness shall be paid, or receive as compensation in any given case for his services as such, a sum in excess of the ordinary witness fees provided by law, unless the court before whom such witness is to appear, or has appeared, awards a larger sum, which sum may be taxed as a part of the taxable costs in the case.

The question presented here is whether the phrase "is to appear" applies to a witness who was not deposed and did not testify at trial even though the case went to trial and resulted in a final verdict. For the reasons explained here, we conclude that it does not. Instead, "is to appear" applies to witnesses who could have been called to testify at some point, either by deposition or through trial testimony. The phrase "is to appear" does not refer to the situation which took place here, in which a case proceeded to trial and verdict but the witness gave neither deposition nor trial testimony, notwithstanding language in other cases which could be read as authorizing witness fees under such circumstances.

"[I]t is well settled that, regardless of whether the expert testifies, the prevailing party may recover fees for trial preparation." *Peterson v Fertel*, 283 Mich App 232, 241; 770 NW2d 47 (2009).

> "The language "is to appear" in MCL 600.2164 applies to the situation at bar in which the case was dismissed before defendant had a chance to call its proposed expert witnesses at trial. Furthermore, the trial court was empowered in its discretion to authorize expert witness fees which included preparation fees." [*Id*., quoting *Herrera v Levine*, 176 Mich App 350, 357-358; 439 NW2d 378 (1989) (brackets omitted).]

Expert-witness fees for trial preparation are compensable because

> "[i]t is not amiss to observe generally that few expert witnesses could testify properly or effectively without careful preparation and, on occasion, without necessary disbursement in the course of such preparation. For instance any medical or legal expert, testifying without preparation and confronted by a cross-examiner of competence, would find little comfort in the witness box. More important, his testimony would provide but little light for the trier or triers of fact." [*Peterson*, 283 Mich App at 241-242, quoting *State Hwy Comm'r v Rowe*, 372 Mich 341, 343; 126 NW2d 702 (1964).]

This Court has repeatedly interpreted MCL 600.2164(1) to allow the prevailing party to tax costs for an expert's trial preparation, even if the case did not proceed to trial, provided that the witness would have testified if there had been a trial. See, e.g., *Home-Owners Ins Co v Andriacchi*, 320 Mich App 52, 72-73; 903 NW2d 197 (2017) (holding that "a party may recover expert fees under MCL 600.2164 where a case is dismissed before that expert can testify at trial"); *Peterson*, 283 Mich App at 241 (stating that when a case is dismissed at the summary-disposition phase,

taxing costs for defendants' expert witnesses who did not testify at deposition or trial was permitted because the witness would have testified if case had continued); *Herrera*, 176 Mich App at 356-358 (taxing costs for defendants' expert witnesses who did not testify at a deposition or at trial because the case was dismissed at the summary-disposition stage).

In each of the cases cited, however, the reason that the prevailing party's expert witness did not testify was due to the case having been summarily dismissed before the witness was called upon to testify, either by deposition or for trial. The present case is distinguishable from these cases due to the fact that it was not a pretrial dismissal which obviated the need for Dr. Barson's testimony, but because Southwestern decided more than three years before the trial not to use him as an expert witness. Interpreting the phrase "is to appear" to include an expert whom, long before trial, the party who hired the expert has determined will not be a witness, conflicts with this Court's prior interpretation and application of the phrase "is to appear" in MCL 600.2164 as applying in situations in which a case is dismissed before a defendant has "a chance to call its proposed expert witnesses at trial." *Herrera*, 176 Mich App at 357. Southwestern had every chance to call Dr. Barson at a deposition long before trial, but decided, for whatever reason, not to obtain his testimony. As a result, Dr. Barson simply did not "appear" as a witness, and Southwestern had no need to prepare his testimony.

Prior to trial, a party's proposed expert witness certainly qualifies as a witness who could be called "to appear" at some point in the future. But that is no longer so after the proceedings have concluded. At that point, all potential witnesses either have appeared or

not. Consequently, if a case goes to trial and reaches a final verdict, then a trial court may tax costs only for those witnesses who actually appeared, either through deposition, or trial testimony, or both, or who would have appeared had the case not been dismissed before trial. Applied to the circumstances of this case, no statutory authority supported the trial court's order taxing costs for Dr. Barson's expert-witness fees. Consequently, we reverse the portion of the trial court's order taxing costs for Dr. Barson's expert-witness fees.

3. EXPERT FEES FOR DRS. TALAN AND MCGEORGE

Plaintiffs also contend that an evidentiary hearing was necessary to evaluate the basis for, and the reasonableness of, the costs awarded for Drs. Talan and McGeorge. We agree.

As this Court explained in *Van Elslander v Thomas Sebold & Assoc, Inc*, 297 Mich App 204, 218; 823 NW2d 843 (2012):

> An expert is not automatically entitled to compensation for all services rendered. Conferences with counsel for purposes such as educating counsel about expert appraisals, strategy sessions, and critical assessment of the opposing party's position are not regarded as properly compensable as expert witness fees. Experts are properly compensated for court time and the time required to prepare for their testimony. In addition, the traveling expenses of witnesses may be taxed as costs, MCL 600.2405(1); MCL 600.2552(1); MCL 600.2552(5). [Quotation marks, citations, and brackets omitted.]

When the record is insufficient to enable this Court "to discern the actual hours expended for taxable costs of court time from that attributable to conference and meeting time, which would not necessarily be a taxable cost," the remedy is a remand "for an evidentiary

hearing to further distinguish and recalculate those hours spent on taxable versus nontaxable costs." *Id*. at 219.

Plaintiffs complain that Drs. Talan and McGeorge did not provide sufficient detail in their invoices to show how much time was spent on particular tasks. The record shows that, in six years, Dr. McGeorge submitted three invoices. The first was dated May 7, 2018, and stated that from June 2013 until the date of the invoice, he had "logged 61.5 hours in review of materials, discussions with you [Southwestern's attorney] and your associates, as well as travel on this matter." Dr. McGeorge stated that his review "include[d] but [was] not limited to review of initial and subsequent medical records, discussion with attorneys, preparation for deposition and trial twice (requiring re-review of file), and review of depositions [listed]." At $400 an hour, the total charge was $24,600.

Dr. McGeorge's second invoice was dated June 17, 2019, and stated that, since May 2018, he had "logged 43 hours in review of materials, discussions with you and your associates, as well as travel to Kalamazoo and expenses on this matter." His review included but was not limited to "review of initial and subsequent medical records, discussion with attorneys, review of literature, preparation for trial (requiring re-review of file), and review of depositions from" the same people listed in the May 2018 invoice, as well as Dr. McGeorge reviewing his own prior deposition testimony in the case. At Dr. McGeorge's new rate of $450 an hour, he billed Southwestern $19,350.

The final invoice was dated June 17, 2019. It stated that Dr. McGeorge had logged eight hours of trial appearances, which he billed at his trial rate of $500 an hour. In addition, he charged $2,475 "for expenses

related to trial, travel, and accommodations." The total charged on the invoice was $6,475. None of the invoices establishes whether Dr. McGeorge provided receipts to document charges for the expenses he claimed. On each invoice, Dr. McGeorge offered to make available more detailed billing information if required. Nevertheless, defense counsel explained at the hearing on Southwestern's motion for taxed costs that Dr. McGeorge was not required to provide additional detail: counsel submitted the invoices to the insurance carrier, and the carrier paid.

Southwestern argues on appeal that the trial court did not abuse its discretion by denying plaintiffs' request for an evidentiary hearing because "the parties briefed the issue and the court had ample information to assess the reasonableness of Southwestern's costs . . . ." But, with respect to the costs taxed for Dr. McGeorge's services, the trial court did not have sufficient information to determine whether all of the expenses incurred for Dr. McGeorge's services were taxable as costs. Costs are taxable for Dr. McGeorge's court time, preparation time, and travel expenses. See *Van Elslander*, 297 Mich App at 218. But, in addition to these tasks, Dr. McGeorge's invoices also stated that he had "discussion[s] with attorneys." The invoices are not sufficient to allow the trial court, or this Court, to determine whether these discussions are taxable because they were for trial preparation, or are not taxable because they were for "educating counsel about expert appraisals, strategy sessions, and critical assessment of the opposing party's position . . . ." See *id*. Consequently, we remand to the trial court "for an evidentiary hearing to further distinguish and recalculate those hours spent on taxable versus nontaxable costs." See *id*. at 219.

Regarding the trial court taxing Dr. Talan's fees as costs, what stands out to us is $17,000 in "trial testimony cancellation fees" and an additional $17,000 in what appear to be combined travel-time and trial-testimony fees. Travel and trial testimony are both compensable, so, although a more detailed invoice regarding those charges would have been helpful, a more detailed invoice for those expenses was not, strictly speaking, necessary. Dr. Talan's cancellation fees, however, are another matter. At the hearing on Southwestern's motion for taxed costs, defense counsel justified taxing Dr. Talan's trial-testimony cancellation fees on the ground that they were actual fees that Southwestern had to pay.[9] On appeal, Southwestern justifies the travel-time fees by explaining that travel is as necessary a part of testifying as is preparation and that nothing prevents a trial court from compensating experts for travel time and expenses.

We agree that an expert witness's travel expenses are compensable. *Id*. But, as discussed, "costs" or "taxable costs" are not the equivalent of "expenses." See *Guerrero*, 280 Mich App at 671-675. The presumption that costs shall be allowed as a matter of course to the prevailing party "does not mean . . . that every expense incurred by the prevailing party in connection with the proceeding may be recovered against the opposing party." *Beach*, 216 Mich App at 622 (quotation marks and citation omitted). "[T]he prevailing party cannot recover costs where there exists no statutory authority for awarding them." *Id*. at 621. The record before us fails to adequately establish a statutory basis for all of Dr. Talan's fees. As such,

[9] Southwestern used the same justification for taxing more than $26,000 in media expenses to prepare defense counsel's trial exhibits.

rather than make factual findings in the first instance we remand to the trial court "for an evidentiary hearing to further distinguish and recalculate those hours spent on taxable versus nontaxable costs." See *Van Elslander*, 297 Mich App at 219.[10]

For the foregoing reasons, we affirm, in general, the trial court's award of taxable costs to Southwestern. However, we reverse the trial court's specific order taxing costs related to Dr. Barson and remand for an evidentiary hearing to establish the basis for the trial court's order awarding Southwestern the costs for the expert-witness fees of Drs. McGeorge and Talan.

VI. DISBURSEMENT OF SETTLEMENT

On cross-appeal, Southwestern contends that the trial court erred by allowing plaintiffs' attorney to recover $192,096.61 in costs and fees from the Bronson settlement funds and disbursing the remainder of the funds to the estate without first ordering the payment of Southwestern's taxable costs. We disagree.

A. STANDARD OF REVIEW

This Court reviews for clear error a trial court's distribution of proceeds in a wrongful-death case. *Reed v Breton*, 279 Mich App 239, 241; 756 NW2d 89 (2008). Additionally, this Court reviews the interpretation of statutes and court rules de novo. *Id*. at 242.

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[10] We note that neither plaintiffs nor Southwestern addressed whether any statutory authority exists for Dr. Talan's "cancellation fees." We question whether any such statutory authority exists, but we decline to address the issue in the first instance. Nevertheless, on remand, such fees are an item which the trial court may review to determine whether there are both legal and factual bases for imposing them.

B. ANALYSIS

1. SOUTHWESTERN'S ENTITLEMENT TO THE BRONSON SETTLEMENT FUNDS

Southwestern, a nonparty to the Bronson settlement, argues that it may recover its taxable costs from the settlement funds before plaintiffs' attorney recovers his costs and fees. We disagree.

Southwestern bases its legal argument that it is entitled to a portion of the Bronson settlement funds on two cases, *Mason v Cass Co Bd of Co Rd Comm'rs*, 221 Mich App 1; 561 NW2d 402 (1997), and *Hill v LF Transp, Inc*, 277 Mich App 500; 746 NW2d 118 (2008); plaintiffs, for their part, do not dispute that these cases should guide our analysis.[11] We will discuss each case in turn, but first we find it necessary to note that a settlement between parties is not the result of a ruling on a motion and, therefore, is not a "verdict" subject to costs under MCR 2.403. *Webb v Holzheuer*, 259 Mich App 389, 390-392; 674 NW2d 395 (2003). Consequently, Southwestern's argument that its taxable costs may be paid from the Bronson settlement relies on the wrongful-death act, MCL 600.2922, which provides, in relevant part:

> (6) In every action under this section, the court or jury may award damages as the court or jury shall consider fair and equitable, under all the circumstances including reasonable medical, hospital, funeral, and burial expenses for which the estate is liable; reasonable compensation for the

[11] Southwestern also relies on *Bennett v Weitz*, 220 Mich App 295; 559 NW2d 354 (1996), for the proposition that Southwestern should have priority over plaintiffs' attorney regarding the distribution of funds from the Bronson settlement. We find it unnecessary to reach this issue, however, because, as explained in greater detail later, Southwestern is entitled only to a portion of the Bronson settlement proceeds, not funds directly from the settlement itself.

> pain and suffering, while conscious, undergone by the deceased during the period intervening between the time of the injury and death; and damages for the loss of financial support and the loss of the society and companionship of the deceased. The proceeds of a settlement or judgment in an action for damages for wrongful death shall be distributed as follows:
>
> * * *
>
> (d) After a hearing by the court, the court shall order payment from the proceeds of the reasonable medical, hospital, funeral, and burial expenses of the decedent for which the estate is liable. The proceeds shall not be applied to the payment of any other charges against the estate of the decedent. The court shall then enter an order distributing the proceeds to those persons designated in subsection (3) who suffered damages and to the estate of the deceased for compensation for conscious pain and suffering, if any, in the amount as the court or jury considers fair and equitable considering the relative damages sustained by each of the persons and the estate of the deceased. If there is a special verdict by a jury in the wrongful death action, damages shall be distributed as provided in the special verdict.

What we must now determine is whether Southwestern's taxable costs should be taken from the Bronson settlement or from that settlement's "proceeds." This distinction is important because the wrongful-death act addresses the disbursement of a settlement's "proceeds," not the entirety of all funds received from a settlement. *Id*.

We begin by examining this Court's opinion in *Mason*. In *Mason*, the plaintiff's decedent was killed in a car accident and was the prevailing party following a jury trial. *Mason*, 221 Mich App at 3. Before the trial, however, the plaintiff had rejected a mediation evaluation that was higher than the jury award, so the trial

court imposed mediation sanctions against the plaintiff to be paid from the jury verdict. *Id*. The plaintiff objected, arguing that the wrongful-death act prevented the trial court from ordering the mediation sanctions to be paid from the jury verdict. *Id*. This Court began its analysis by examining the language of the wrongful-death act, stating:

> In its first sentence, § 6 provides: "In every action under this section the court or jury may award damages as the court or jury shall consider fair and equitable, under all the circumstances . . . ." In its next sentence, § 6 provides for the distribution of "[t]he proceeds of a settlement or judgment." We conclude from the language and structure of this subsection that "[t]he proceeds" means an "award [of] damages as the court or jury shall consider fair and equitable, under all the circumstances." Further, "all the circumstances" surrounding an award of damages certainly includes the court rules and their provision for mediation as an important tool to promote settlements, using mediation sanctions to promote that end. Thus, when § 6(d) limits the purposes for which "the proceeds" are to be used, that limitation applies to the "award [of] damages" which, in an appropriate case, has already been reduced as a sanction for rejecting a mediation evaluation.
>
> Moreover, we conclude that this is the most "fair and equitable" approach, as contemplated by the statute. If defendants are required to seek the recovery of mediation sanctions from decedent's estate, they may well be able to make only partial, if any, recovery. Under § 6(d), most of the judgment amount will likely be used to pay medical, hospital, funeral, and burial expenses, along with payments to decedent's survivors for their pain and suffering, loss of companionship and support, or other damages they may have suffered. The estate will receive payment only to the extent that damages were awarded because of decedent's "conscious pain and suffering" before death. To the extent that defendants are unable to obtain full recovery of mediation sanctions from the estate, the penalty for rejecting the mediation evaluations is avoided. We will not

> "frustrate the intent behind the mediation sanctions rule . . . by giving estates immunity from the consequences of prosecuting meritless claims." *In re McDivitt Estate*, 169 Mich App 435, 440; 425 NW2d 575 (1988). [*Id.* at 5-6 (alterations in original).]

The *Mason* Court then affirmed the trial court's order allowing the mediation sanctions to be paid from the jury's verdict before it was paid to the estate of the plaintiff's decedent. *Id*. at 6.

In *Hill*, this Court extended the rule from *Mason* regarding mediation sanctions, concluding that a similar rationale applied to taxed costs. Unlike *Mason*, *Hill* dealt with taxed costs and the distribution of settlement funds. *Hill*, 277 Mich App at 502. In *Hill*, the plaintiff's decedent died in a car accident; one of the defendants, Auto-Owners, insured the vehicle the decedent was driving when that accident occurred. *Id*. at 502-504. Auto-Owners moved for summary disposition, arguing that the decedent already had coverage from a different insurer. *Id*. at 504. The trial court denied Auto-Owners' motion and the case proceeded to arbitration; the plaintiff received a favorable arbitration award and Auto-Owners appealed following that award. *Id*. On appeal, this Court concluded that the trial court erred by denying Auto-Owners' motion for summary disposition. *Id*. at 505. The trial court eventually taxed costs and ordered plaintiff to pay the taxed costs "from any available property of the Estate as that property becomes available to fund such payment." *Id*. (quotation marks and citation omitted).

The plaintiff then filed a new wrongful-death lawsuit, to which Auto-Owners was not a party, and received a monetary judgment following case evaluation and a settlement with the defendants in that case. *Id*. at 505-506. Auto-Owners moved to intervene and

sought payment of its taxed costs from this new award. *Id*. at 505. The trial court denied Auto-Owners' motion to intervene, which Auto-Owners appealed. *Id*. at 506-507. The *Hill* Court concluded that the trial court erred by denying Auto-Owners' motion to intervene and then turned to the wrongful-death act to determine whether Auto-Owners was entitled to any of the new award. *Id*. at 508-509. The *Hill* Court summarized *Mason* before holding that

> [w]hile this case involves costs taxed by the prevailing party in an appeal, and not the recovery of mediation sanctions, we see no basis to distinguish between the two. Part of the analysis in *Mason* was a refusal to frustrate the intent behind mediation sanctions by effectively giving estates immunity from sanctions where there are little assets in an estate. Although an award of costs to the prevailing party in an appeal does not serve the same purpose as mediation sanctions, it serves a similar purpose. And just as there is no purpose to allowing estates to escape mediation sanctions, there is no valid purpose to allowing estates the ability to escape an award of costs to the prevailing party. Accordingly, consistent with this Court's decision in *Mason*, we hold that the proceeds of a wrongful death action are determined after the reduction for an award of costs in litigation arising from the wrongful death just as the award may be reduced for mediation sanctions under *Mason*. [*Id*. at 509-510 (citations omitted).]

Consequently, the *Hill* Court concluded that Auto-Owners was entitled to recover its taxable costs from the plaintiff's new award because that award "involve[d] the same essential claim"—i.e., which party, if any, was liable for the decedent's death—as the claim at issue when Auto-Owners was a named defendant. *Id*. at 510-511. Accordingly, Auto-Owners could tax its costs from the plaintiff's award before that award was distributed to the decedent's estate. *Id*.

When viewed together, *Mason* and *Hill* establish that mediation sanctions and taxed costs may be removed from a settlement or judgment before its "proceeds" are paid to an estate under the wrongful-death act. *Mason* held that a "fair and equitable" approach should be used when deciding whether sanctions should be taken from a settlement or judgment before its "proceeds" are paid to an estate under the wrongful-death act. *Mason*, 221 Mich App at 5-6. *Hill* then held that *Mason*'s rationale applied to taxed costs because, just as with mediation sanctions, "there is no valid purpose to allowing estates the ability to escape an award of costs to the prevailing party." *Hill*, 277 Mich App at 510. Consequently, "consistent with this Court's decision in *Mason*," the *Hill* Court held "that the proceeds of a wrongful death action are determined after the reduction for an award of costs in litigation arising from the wrongful death just as the award may be reduced for mediation sanctions under *Mason*." *Id*. The *Hill* Court did not explicitly address *Mason*'s "fair and equitable" framework for determining when an award should be reduced due to sanctions, but *Hill* explicitly referenced *Mason*'s reasoning and stated that the same rule established in *Mason* for mediation sanctions applied to taxed costs. *Id*. Thus, a trial court may tax costs from a settlement or judgment before the proceeds are distributed to an estate under the wrongful-death act only when it would be "fair and equitable" to do so. *Id*.; *Mason*, 221 Mich App at 5-6.

Here, the trial court concluded that it would not be appropriate to tax Southwestern's costs before distributing the Bronson settlement to the estate. The trial court's decision certainly creates the possibility that the estate may escape the award of costs to Southwestern and therefore conflicts with our general public-policy preference that prevailing parties have an opportunity

to collect sanctions and taxed costs. But that general policy preference is not an absolute rule. Indeed, if it was an absolute rule then there would be no need for a "fair and equitable" approach when determining whether costs or sanctions should be taken from a settlement or judgment before those proceeds are paid to an estate.

In ruling on Southwestern's motion to tax costs directly from the Bronson settlement rather than its proceeds, the trial court did not explicitly reference *Mason* or its "fair and equitable" approach. But the trial court clearly balanced the equities and thoughtfully considered the impact its ruling would have on the Bronson settlement. The trial court did not want the Bronson settlement "to be ultimately undone" by allowing Southwestern to tax costs from it before distributing any of those funds to Kinzie's estate. In doing so, the trial court essentially balanced Michigan's public-policy preference favoring settlements and the idea that Southwestern's course of action could have the effect of disincentivizing future settlements against the competing public-policy preference that prevailing parties be able to tax costs. The trial court's order placed a higher value on settlements than on Southwestern's ability to fully recover its taxed costs, concluding that this was the most "fair and equitable" outcome. We are not definitely and firmly convinced that it erred by doing so. As such, we affirm the trial court's order requiring Southwestern to tax its costs from the Bronson settlement's proceeds after the proceeds were paid to the estate.

2. ATTORNEY FEES OF PLAINTIFFS' ATTORNEY

Lastly, Southwestern nonetheless urges this Court to reverse the trial court's order and remand the

matter for an evidentiary hearing to determine the basis and reasonableness of plaintiffs' attorney costs and fees. Southwestern has failed to provide any legal authority entitling it to this relief.

"[T]he recovery of costs advanced by an attorney to a client under a fee agreement is governed by contract law." *Kalisek Estate v Durfee*, 322 Mich App 142, 149; 910 NW2d 717 (2017). Likewise, contract law also guides "a trial court's authorization of the distribution of proceeds from a successful wrongful-death suit in regard to costs incurred by the plaintiff's counsel . . . ." *Id*. As already discussed, the trial court accepted plaintiffs' attorney's costs as "in the ballpark in terms of the expenses that would have been incurred" during the five years before the settlement. The trial court also accepted plaintiffs' attorney's representation that those costs were advanced as part of the estate's action against Bronson. Further, plaintiffs agreed on the record that they understood that their attorney would deduct his firm's costs and attorney fees from the gross amount of the settlement and that the net amount would go to the estate to be distributed. The trial court having determined that the costs and fees were reasonable, necessary, and incurred, and there being no complaint about the fee agreement from plaintiffs, the trial court did not err by disbursing the Bronson settlement funds according to the fee agreement. Southwestern contends that the trial court did not make a record sufficient for appellate review. To the contrary, the record is sufficient because neither the parties to the Bronson settlement agreement nor the parties to the fee agreement have asked this Court to review either. Finally, Southwestern has not cited any legal authority for the proposition that it may inject itself into the contractual relationship between plaintiffs and their attorney. As such, the argument is

abandoned and we decline to address it further. See *Cheesman*, 311 Mich App at 161.

VII. CONCLUSION

Plaintiffs have failed to establish a *Batson* violation, a violation of MRE 408, or that defense counsel made prejudicial statements revealing a deliberate attempt to inflame or otherwise prejudice the jury. Therefore, we affirm the trial court's order entering a judgment of no cause of action and its order denying plaintiffs' motion for a new trial. Given our affirmance of these two orders, we need not address other issues the parties raised that were contingent on our vacating the jury's verdict and remanding for a new trial. We affirm in part and reverse in part the trial court's order granting Southwestern's motion for taxed costs and remand for further proceedings consistent with this opinion. As for Southwestern's cross-appeal, we affirm the trial court's order granting plaintiffs' motion to approve payment of costs.

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

K. F. KELLY and GADOLA, JJ., concurred with TUKEL, P.J.

MICHIGAN HEAD & SPINE INSTITUTE PC v AUTO-OWNERS INSURANCE COMPANY

Docket No. 354765. Submitted July 8, 2021, at Detroit. Decided September 2, 2021, at 9:10 a.m. Leave to appeal denied 509 Mich 915 (2022).

Michigan Head & Spine Institute PC filed an action in the Oakland Circuit Court against Auto-Owners Insurance Company and Home-Owners Insurance Company, seeking to recover no-fault insurance benefits from defendants for healthcare services plaintiff provided to 39 individuals between June 11, 2019 and May 8, 2020. In its complaint, plaintiff asserted that the circuit court had jurisdiction over the action because the amount in controversy exceeded $25,000; specifically, plaintiff submitted documentation showing that the total unpaid balance of the 39 individual patient accounts exceeded $200,000. Defendants alleged that the individual patients were involved in separate motor vehicle crashes that occurred on different dates, that the individual patients' injuries resulted in varying treatments, and that while each patient was insured by either Auto-Owners or Home-Owners, none was insured by both companies. Defendants moved for summary disposition, arguing that the circuit court lacked jurisdiction over the action because plaintiff could not aggregate the 39 claims to meet the jurisdictional threshold of $25,000. The court, Hala Y. Jarbou, J., agreed and dismissed all 39 claims for lack of subject-matter jurisdiction. Plaintiff appealed.

The Court of Appeals *held*:

Under MCL 600.605, circuit courts are courts of general jurisdiction that have original jurisdiction to hear and decide all civil claims and remedies except where exclusive jurisdiction is given in the Constitution or by statute to some other court. In contrast, MCL 600.8301(1) provides that the district court has exclusive jurisdiction in civil actions when the amount in controversy does not exceed $25,000. Under *Boyd v Nelson Credit Ctrs, Inc*, 132 Mich App 774 (1984), separate claims of individual plaintiffs may not be aggregated to determine jurisdiction; however, various claims of a single plaintiff may be aggregated to meet the jurisdictional threshold. Thus, a single healthcare provider may aggregate

unrelated patient claims against a no-fault insurer to satisfy the jurisdictional minimum of the circuit court. Absent bad faith in the pleadings, the amount in controversy is determined from the prayer for relief in the plaintiff's pleadings. The issue in this case involved a determination whether plaintiff sufficiently pleaded the amount in controversy necessary for jurisdiction to be in the circuit court; it did not involve the joinder of claims, which is governed by MCR 2.203. Plaintiff alleged in its complaint that the amount in controversy exceeded $25,000, and there was no evidence that the pleading was made in bad faith; therefore, the plaintiff met the jurisdictional threshold for an action in circuit court. Further, although its claims were based on treatment it provided to 39 separate patients, it was a single plaintiff that aggregated its various claims, which was appropriate under *Boyd* to determine the jurisdictional amount. The circuit court's reliance on *Priority Patient Transp LLC v Farmers Ins Exch*, unpublished per curiam opinion of the Court of Appeals, issued May 2, 2017 (Docket No. 329420), was unpersuasive because the opinion simultaneously acknowledges that a single plaintiff may aggregate its various claims to meet or exceed the jurisdictional limits of the circuit court and then immediately precludes a single plaintiff from taking that permissible action. Accordingly, the circuit court erred by dismissing plaintiff's action for lack of subject-matter jurisdiction.

Reversed and remanded for further proceedings.

RIORDAN, P.J., dissenting, disagreed with the majority's conclusion that plaintiff could aggregate unrelated patient claims against two unrelated defendants to satisfy the jurisdictional minimum of the circuit court. Given that plaintiff's prayer for relief did not include a particular amount in controversy or other monetary amount, it was questionable whether plaintiff properly invoked the jurisdiction of the court, but assuming the entire pleading (which included plaintiff alleging that jurisdiction was properly in the circuit court because the amount in controversy exceeded $25,000) was the measure of jurisdiction, jurisdiction still did not lie with the circuit court. The holding in *Boyd*—that a single plaintiff may aggregate claims to establish the jurisdictional minimum—only applies when the single plaintiff is the patient, not the healthcare provider. Nothing in *Moody v Home Owners Ins Co*, 304 Mich App 415 (2014), rev'd sub nom *Hodge v State Farm Mut Auto Ins Co*, 499 Mich 211 (2016), suggests that a single healthcare provider may aggregate claims to establish that jurisdictional minimum; because a healthcare provider's claim is derivative of the patient's claim, a single healthcare provider's claims against a no-fault insurer for multiple patients would be contrary to *Boyd* in that it

would involve bringing the separate claims of individual plaintiffs to establish the jurisdictional amount. A no-fault action is unusual in that the amount in controversy is determined by identifying the amount in controversy alleged with respect to a single patient. The Legislature's amendment of MCL 500.3112 in 2019, which authorized healthcare providers to bring direct causes of action against no-fault insurers to recover benefits payable for services provided, revived the holding in cases like *Moody* that claims by healthcare providers against no-fault insurers are derivative and dependent on the underlying claims of patients themselves. Because plaintiff attempted to aggregate the claims of multiple plaintiffs against two defendants, contrary to the holding in *Moody*, Judge RIORDAN would have affirmed the circuit court's dismissal of the case for lack of subject-matter jurisdiction.

CIRCUIT COURTS — JURISDICTION — AMOUNT IN CONTROVERSY — AGGREGATION OF PATIENT CLAIMS BY PROVIDERS.

Circuit courts in Michigan have exclusive jurisdiction to hear and decide all civil claims and remedies where the amount in controversy exceeds $25,000; while separate claims of individual plaintiffs may not be aggregated to establish the jurisdictional minimum of the circuit court, various claims of a single plaintiff may be aggregated to meet the jurisdictional threshold; a single healthcare provider may aggregate unrelated patient claims against a no-fault insurer to satisfy the jurisdictional minimum of the circuit court (MCL 600.605; MCL 600.8301).

Miller & Tischler, PC (by *Sean F. Kelly*) for plaintiff.

Cummings, McClorey, Davis & Acho, PLC (by *Jacklyn P. Paletta*, *Stanley Okoli*, and *Douglas J. Curlew*) for defendants.

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

M. J. KELLY, J. Plaintiff, Michigan Head & Spine Institute PC, appeals by right the trial court order granting summary disposition to defendants Auto-Owners Insurance Company and Home-Owners Insurance Company. For the reasons stated in this opinion, we reverse and remand for further proceedings.

I. BASIC FACTS

This appeal arises from Michigan Head & Spine's claim for no-fault insurance benefits from Auto-Owners and Home-Owners for healthcare services provided to 39 individuals between June 11, 2019 and May 8, 2020. Michigan Head & Spine alleged that although it submitted reasonable proof of the fact and amount of each loss, and although it repeatedly requested full payment of the outstanding charges, Auto-Owners and Home-Owners unreasonably withheld or delayed full payment. Relevant to the issue raised on appeal, Michigan Head & Spine alleged that jurisdiction lay with the circuit court because the amount in controversy exceeded $25,000. In support of that allegation, it submitted documentation showing that the unpaid balance of the 39 individuals' accounts was more than $200,000.

Auto-Owners and Home-Owners moved for summary disposition under MCR 2.116(C)(8) and MCR 2.116(C)(10). They stressed that the individual patients named in the complaint were involved in separate motor vehicle crashes that occurred on different dates and at different locations and that resulted in varying treatments. They contended that the only commonality between the patients was their purported treatment at Michigan Head & Spine. In addition, they argued that the reason for nonpayment or reduced payment on the claims listed in the complaint varied, noting that *some* of the reasons were that Michigan Head & Spine billed at an unreasonable rate, that the treatment billed for was unrelated to the relevant motor vehicle crashes, that there was insufficient information in the invoices submitted, and that there were attempted double billings for the same procedures. Finally, they noted that although each patient was insured by either Auto-Owners or Home-Owners, none was insured by both.

Relevant to this appeal, Auto-Owners and Home-Owners argued that Michigan Head & Spine could not aggregate 39 "completely different claims" to meet the jurisdictional threshold of $25,000. The trial court agreed and dismissed all 39 claims for lack of subject-matter jurisdiction.

II. SUBJECT-MATTER JURISDICTION

A. STANDARD OF REVIEW

Michigan Head & Spine argues that the circuit court erred by granting summary disposition. We review de novo a trial court's decision on a motion for summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). "Whether a trial court has subject-matter jurisdiction is a question of law that this Court reviews de novo." *Citizens for Common Sense in Gov't v Attorney General*, 243 Mich App 43, 49-50; 620 NW2d 546 (2000). Summary disposition under MCR 2.116(C)(4) is proper if the court lacks jurisdiction over the presented subject matter. *Packowski v United Food & Commercial Workers Local 951*, 289 Mich App 132, 138; 796 NW2d 94 (2010). In reviewing a motion under MCR 2.116(C)(4), we examine whether the pleadings, affidavits, depositions, admissions, and documents in the case show that the trial court lacked subject-matter jurisdiction. *Id*. at 139.[1]

B. ANALYSIS

Circuit courts are courts of general jurisdiction that have original jurisdiction to hear and decide all civil claims and remedies "except where exclusive jurisdic-

[1] Although the motion for summary disposition was brought under MCR 2.116(C)(8) and (C)(10), defendants argued that the circuit court

tion is given in the constitution or by statute to some other court . . . ." MCL 600.605; *Manning v Amerman*, 229 Mich App 608, 610-611; 582 NW2d 539 (1998). Under MCL 600.8301(1), "[t]he district court has exclusive jurisdiction in civil actions when the amount in controversy does not exceed $25,000.00." Although MCL 600.8301(1) is silent as to how the "amount in controversy" should be determined, our Supreme Court held that, absent bad faith in the pleadings, the amount in controversy is determined from the prayer for relief in the plaintiff's pleadings. *Hodge v State Farm Mut Auto Ins Co*, 499 Mich 211, 223-224; 884 NW2d 238 (2016). In its complaint, Michigan Head & Spine alleged that the amount in controversy exceeded $25,000, and there is no evidence indicating that the pleading was done in bad faith. Therefore, under *Hodge*, the jurisdictional threshold for an action before the circuit court is satisfied.

The circuit court, however, held that under *Boyd v Nelson Credit Ctrs, Inc*, 132 Mich App 774; 348 NW2d 25 (1984), Michigan Head & Spine could not aggregate multiple claims of multiple patients to meet the circuit court's jurisdictional threshold. In doing so, the circuit court misapplied the holding from *Boyd*. In *Boyd*, this Court held that the separate claims of individual plaintiffs may not be aggregated for the purposes of determining jurisdiction. *Id*. at 780-781. But it also recognized that the various claims of a single plaintiff may be aggregated. *Id*. at 781. Here, although Michigan Head

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lacked subject-matter jurisdiction and the circuit court agreed. "[W]here a party brings a summary-disposition motion under the wrong subrule, the trial court may proceed under the appropriate rule so long as neither party is misled." *Blair v Checker Cab Co*, 219 Mich App 667, 670-671; 558 NW2d 439 (1996). Therefore, we consider this motion under MCR 2.116(C)(4), which requires the trial court to grant summary disposition if it lacks subject-matter jurisdiction.

& Spine has 39 individual claims based on treatment it provided to 39 separate patients, Michigan Head & Spine is indisputably a single plaintiff attempting to aggregate its various claims. As a result, applying the rule from *Boyd*, Michigan Head & Spine may aggregate its various claims for the purposes of determining jurisdiction.

The circuit court also relied upon this Court's decision in *Priority Patient Transp LLC v Farmers Ins Exch*, unpublished per curiam opinion of the Court of Appeals, issued May 2, 2017 (Docket No. 329420). Unpublished decisions of this Court are not binding, MCR 7.215(C)(1), but they can be "instructive or persuasive," *Paris Meadows, LLC v Kentwood*, 287 Mich App 136, 145 n 3; 783 NW2d 133 (2010). In *Priority Patient*, a single plaintiff filed suit against the defendant alleging that the defendant had "failed to tender personal injury protection (PIP) benefits for the medical transportation of 14 separate individuals in violation of the no-fault act . . . ." *Priority Patient*, unpub op at 1. The *Priority Patient* Court correctly noted that *Boyd* held that, absent a class action, multiple plaintiffs could not aggregate multiple claims to meet the jurisdictional threshold of the circuit court. *Id*. at 3. The Court also recognized a single plaintiff with multiple claims could aggregate those claims to meet or exceed the amount-in-controversy jurisdictional requirement. *Id*., citing *Moody v Home Owners Ins Co*, 304 Mich App 415; 849 NW2d 31 (2014), rev'd on other grounds by *Hodge*, 499 Mich 211. Yet, despite citing caselaw that expressly permits a single plaintiff to aggregate its various claims to reach the jurisdictional threshold, the *Priority Patient* Court concluded that the single plaintiff could not aggregate its 14 claims against the defendant to reach the jurisdictional threshold because to do so would be to "subvert" the rule in *Boyd*. *Priority Patient*,

unpub op at 4. The rationale in *Priority Patient* is unpersuasive. The opinion simultaneously acknowledges that a single plaintiff may aggregate its various claims to meet or exceed the jurisdictional limits of the circuit court and then immediately precludes a single plaintiff from taking that permissible action. Given the logical dissonance, we decline to find *Priority Patient* either instructive or persuasive.

Ostensibly, the *Priority Patient* Court was concerned that the plaintiff was aggregating the separate claims of 14 separate plaintiffs into a single action, which would be impermissible under *Boyd*. Joinder of claims, however, is governed by MCR 2.203, whereas the determination of whether the amount in controversy has been sufficiently pleaded is determined by referring to the pleadings, *Hodge*, 499 Mich at 223-224. As a result, whether claims are properly joined is an issue separate, but related to whether a plaintiff may aggregate its properly joined claims to reach the jurisdictional limits of the circuit court.[2]

III. CONCLUSION

Under *Hodge*, the amount in controversy is determined by referring to the pleadings. *Id*. Under *Boyd*, a

[2] In the proceedings before the circuit court, defendants argued that under MCR 2.206, Michigan Head & Spine improperly joined the claims of multiple plaintiffs. The trial court expressly declined to address defendants' joinder argument. Yet that claim is entirely without merit. Because the claims arose on or after June 11, 2019, Michigan Head & Spine has a direct claim or cause of action against defendants. See MCL 500.3112, as amended by 2019 PA 21. Therefore, contrary to defendants' arguments below, Michigan Head & Spine did not attempt to permissively join the claims of 39 separate plaintiffs under MCR 2.206(A).

Additionally, although the parties dispute whether Michigan Head & Spine must or may join all of its claims against defendants pursuant to MCR 2.203, that issue was not decided by the trial court. We may

single plaintiff may aggregate its various claims to satisfy the jurisdictional limits of the circuit court. Here, although Michigan Head & Spine has 39 separate claims, it is still just a single plaintiff aggregating its various claims. Therefore, under *Hodge* and *Boyd*, it may aggregate all of its various claims to reach the jurisdictional threshold of the circuit court. The trial court erred by holding otherwise.[3]

Reversed and remanded for further proceedings. We do not retain jurisdiction. Michigan Head & Spine may tax costs as the prevailing party. MCR 7.219(A).

SHAPIRO, J., concurred with M. J. KELLY, J.

RIORDAN, P.J. (*dissenting*). I respectfully dissent.

Plaintiff, Michigan Head & Spine Institute PC, sued defendant Auto-Owners Insurance Company and defendant Home-Owners Insurance Company—apparently

overlook preservation requirements when deciding an issue is necessary for a proper determination of the case, particularly if the issue is one of law and the necessary facts have been presented, *Jawad A Shah MD, PC v State Farm Mut Auto Ins Co*, 324 Mich App 182, 192-193; 920 NW2d 148 (2018); however, we decline to do so here. Unlike defendants' argument that joinder was improper under MCR 2.206, the facts necessary to determine whether the claims are properly joined under MCR 2.203 are not presently before this Court. Nor were those facts available to the trial court as the motion to dismiss was filed before the issuance of a scheduling order or any discovery, and the court's ruling was issued shortly thereafter. In its briefing, Michigan Head & Spine asserts that the claims all raise the common issue of whether the charges for their services were reasonable while defendants' briefing denies that assertion and argues that there are multiple other issues relevant to some of the claims that would justify severance of some of the cases. However, the record requires further development through discovery before the accuracy of those representations can be determined so as to allow the court to rule on a motion for severance.

[3] Given our resolution, we do not address Michigan Head & Spine's alternate argument that the circuit court erred by dismissing its claims instead of removing them to the appropriate district courts.

two unrelated entities—for no-fault benefits under the no-fault act, MCL 500.3101 *et seq*., for healthcare services that it provided to 39 patients. There is nothing in the complaint to suggest that the claims for these 39 patients are connected in any respect beyond the allegation that "DEFENDANTS are the No-Fault insurers that are responsible to pay No-Fault benefits to or for the benefit of the patients." In other words, the complaint indicates that plaintiff sought to aggregate unrelated patient claims against two unrelated defendants to satisfy the jurisdictional minimum of the circuit court.[1]

As the majority correctly states, "our Supreme Court held that, absent bad faith in the pleadings, the amount in controversy is determined from the prayer for relief in the plaintiff's pleadings." See *Hodge v State Farm Mut Auto Ins Co*, 499 Mich 211, 223-224; 884 NW2d 238 (2016) ("[I]n its subject-matter jurisdiction inquiry, a district court determines the amount in controversy using the prayer for relief set forth in the plaintiff's pleadings, calculated exclusive of fees, costs, and interest.").[2] The prayer for relief in the instant

[1] MCL 600.605 provides that "[c]ircuit courts have original jurisdiction to hear and determine all civil claims and remedies, except where exclusive jurisdiction is given . . . by statute to some other court . . . ." And, MCL 600.8301(1) provides that "[t]he district court has exclusive jurisdiction in civil actions when the amount in controversy does not exceed $25,000.00." Thus, the circuit court has jurisdiction over cases in which the amount in controversy exceeds $25,000. Here, the complaint itself does not expressly state that aggregation of the claims is necessary to satisfy the jurisdictional minimum of the circuit court. However, the parties do not dispute that such aggregation is necessary, particularly when an attached exhibit to the complaint indicates that only one claim for patient services would satisfy the jurisdictional minimum.

[2] See also *Hodge*, 499 Mich at 224 ("[T]he prayer for relief controls when determining the amount in controversy and the limit of awardable damages.").

pleading includes no particular amount in controversy or other monetary amount, so for this reason alone I question whether the jurisdiction of the circuit court was properly invoked.

I acknowledge that the pleading summarily alleges elsewhere that "[j]urisdiction is proper in [the circuit court], because the amount in controversy is more than $25,000.00." Assuming that the entire pleading, and not simply the prayer for relief, is the measure of jurisdiction—a necessary assumption implicit within the majority opinion—I would still conclude that the circuit court lacked jurisdiction over this case.

In *Boyd v Nelson Credit Ctrs, Inc*, 132 Mich App 774; 348 NW2d 25 (1984),[3] this Court explained that aggregation of "the separate claims of individual plaintiffs" is "not permitted to establish the jurisdictional minimum . . . ." *Id*. at 780-781. However, this Court added that "aggregation of various claims of a single plaintiff" is permitted to establish the jurisdictional minimum. *Id*. at 781. The majority here concludes that the latter principle applies because "although Michigan Head & Spine has 39 individual claims based on treatment it provided to 39 separate patients, Michigan Head & Spine is indisputably a single plaintiff attempting to aggregate its various claims." I respectfully disagree.

That conclusion, in my view, is inconsistent with *Moody v Home Owners Ins Co*, 304 Mich App 415; 849

[3] "Although published opinions of this Court decided before November 1, 1990, are not strictly binding, MCR 7.215(J)(1), they are nevertheless precedential, MCR 7.215(C)(2), and they are thus afforded significantly more deference than would be given to unpublished cases." *People v Spaulding*, 332 Mich App 638, 657 n 5; 957 NW2d 843 (2020).

NW2d 31 (2014), rev'd sub nom *Hodge*, 499 Mich 211,[4] which specifically addressed determining the amount in controversy in no-fault actions. *Moody* explained that in no-fault actions, a healthcare provider's claim against a no-fault insurer is derivative of the patient's underlying claim, such that when a single patient sues a no-fault insurer to recover no-fault benefits for services received from multiple healthcare providers, "the consolidated claims are the equivalent of a single plaintiff asserting multiple claims against a single defendant." *Moody*, 304 Mich App at 443. Thus, in no-fault actions, the *Boyd* principle—i.e., that "aggregation of various claims of a single plaintiff" is permitted to establish the jurisdictional minimum—applies when the "single plaintiff" at issue is the *patient*, not the healthcare provider. *Boyd*, 132 Mich App at 781. There is nothing in *Moody* to suggest that the inverse is true as well, i.e., that a single healthcare provider may aggregate the various claims of multiple patients to establish the jurisdictional minimum. This is for good reason: because the healthcare provider's claim is derivative of the patient's claim, *Moody*, 304 Mich App at 441, a single healthcare provider bringing claims against a no-fault insurer for multiple patients is, in essence, bringing "the separate claims of individual plaintiffs," contrary to *Boyd*, 132 Mich App at 780-781.

Simply put, a no-fault action is materially distinguishable from the ordinary case in which a single plaintiff seeks to aggregate multiple, if unrelated,

[4] *Hodge* reversed the holding in *Moody* that the district court may be "divested of jurisdiction when the pretrial discovery answers, the arguments of plaintiff's counsel before trial and the presentation of evidence at trial pointed to damages in excess of $25,000," notwithstanding that the complaint itself alleged damages not exceeding $25,000. *Hodge*, 499 Mich at 214-215 (cleaned up). *Hodge* did not reverse other holdings in *Moody*.

claims against a single defendant to satisfy the jurisdictional minimum of the circuit court. In that case, the majority is correct that aggregation of claims is a question of permissive joinder under MCR 2.203(B), not a threshold question of subject-matter jurisdiction determined from the pleadings alone. But a no-fault action, in contrast, presents an unusual case in which the amount in controversy for the purposes of subject-matter jurisdiction is determined by identifying the amount in controversy alleged with respect to a single patient. See *Moody*, 304 Mich App at 443. Again, because a healthcare provider's claim against a no-fault insurer is derivative of the patient's underlying claim, a healthcare provider bringing claims against no-fault insurers for multiple patients based on multiple and presumably distinguishable insurance policies, essentially is bringing the claims of multiple plaintiffs.

Subsequent developments in the law do not obviate this aspect of *Moody*. In 2017, our Supreme Court held that neither MCL 500.3112 nor any other provision of the no-fault act "bestow[s] on a healthcare provider a statutory right to directly sue no-fault insurers for recovery of no-fault benefits." *Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co*, 500 Mich 191, 196; 895 NW2d 490 (2017). In so holding, *Covenant* overruled a series of our decisions holding that healthcare providers did possess such a statutory right. See, e.g., *Moody*, 304 Mich App 415; *Mich Head & Spine Institute, PC v State Farm Mut Auto Ins Co*, 299 Mich App 442; 830 NW2d 781 (2013); *Regents of the Univ of Mich v State Farm Mut Ins Co*, 250 Mich App 719; 650 NW2d 129 (2002). In response to *Covenant*, the Legislature amended MCL 500.3112(1), effective June 11, 2019, to provide that a healthcare provider "may make a claim and assert a direct cause of action against an insurer . . . to recover overdue benefits payable for

charges for products, services, or accommodations provided to an injured person." See MCL 500.3112, as amended by 2019 PA 21. This amendment of MCL 500.3112 therefore revived the holdings in cases such as *Moody* that healthcare providers have claims against no-fault insurers "completely derivative of and dependent on" the underlying claims of the patients themselves. *Moody*, 304 Mich App at 440.[5] See *People v Williams*, 491 Mich 164, 177; 814 NW2d 270 (2012) (noting that statutory amendments in response to judicial decisions should be interpreted in light of those decisions).

Accordingly, while the majority is correct that ordinarily a single plaintiff may aggregate multiple, unrelated claims against a single defendant to satisfy the jurisdictional minimum of the circuit court, see *Boyd*, 132 Mich App at 781, that is not the case before us. Instead, the case before us concerns a single healthcare provider seeking to aggregate the claims of multiple, unrelated *plaintiffs* against two apparently unrelated defendants to satisfy the jurisdictional minimum of the circuit court. In my view, *Moody* precludes plaintiff here from doing so. Therefore, I respectfully dissent

[5] See also *Regents of the Univ of Mich*, 250 Mich App at 733 ("Although [the healthcare providers] may have derivative claims, they also have direct claims for personal protection insurance benefits."); *Wyoming Chiropractic Health Clinic, PC v Auto-Owners Ins Co*, 308 Mich App 389, 395; 864 NW2d 598 (2014) (same), overruled by *Covenant Med Ctr, Inc*, 500 Mich 191.

and would affirm the trial court's dismissal of this case for lack of subject-matter jurisdiction.[6]

[6] Although not necessary for resolution of this case, I respectfully disagree with the majority's very cursory analysis, and inverted reasoning, of *Priority Patient Transp, LLC v Farmers Ins Exch*, unpublished per curiam opinion of the Court of Appeals, issued May 2, 2017 (Docket No. 329420). Resolution of that case was premised on *Moody*'s discussion of derivative claims in the no-fault context. That is, *Priority Patient* did not treat the healthcare provider as a "single plaintiff" for the purposes of *Boyd* because *Moody* indicated that the healthcare provider was essentially multiple plaintiffs for the purposes of *Boyd*. *Priority Patient* correctly recognized that in *Moody*, there were three claims arising from a single insurance policy emanating from the same, single incident, which is quite the opposite of the fact pattern before us. Even if *Moody* is no longer valid law on that point, *Priority Patient* was nonetheless correct to rely on *Moody* at the time it was decided because *Covenant* had not yet been decided by our Supreme Court and MCL 500.3112(1) had not yet been amended by the Legislature.

CALHOUN COUNTY v CITY OF BATTLE CREEK

Docket No. 354857. Submitted August 10, 2021, at Lansing. Decided September 2, 2021, at 9:15 a.m.

Calhoun County brought an action in the Calhoun Circuit Court against the city of Battle Creek, requesting a declaration regarding the continued validity of MCL 600.1513(4)—which requires Battle Creek to furnish and provide, free of expense to Calhoun County, a suitable place for holding court and a suitable jail for the incarceration of prisoners during court sessions—and seeking recompense after Battle Creek refused to pay for the housing of city prisoners in the jail that Calhoun County had constructed. Battle Creek moved for summary disposition, contending that MCL 600.1513(4) was a special or local act that had not been approved by the voters, rendering it invalid under Const 1963, art 4, § 29. The court, Alexander C. Lipsey, J., dismissed Calhoun County's complaint, determining that the constitutional issue controlled the outcome and that MCL 600.1513(4) was an unconstitutional local or special act that had not been put to a vote. The court did not reach the parties' arguments regarding the intersection of various statutes governing the location and funding of circuit courts but instead dismissed the county's complaint after analyzing the constitutionality of MCL 600.1513 alone. Calhoun County appealed, and the circuit court held its judgment in abeyance pending resolution of the appeal.

The Court of Appeals *held*:

Const 1963, art 4, § 29 prohibits the Legislature from passing a local or special act when a general act can be made applicable. MCL 600.1513(4) provides, in pertinent part, that Battle Creek shall furnish and provide, free of expense to Calhoun County, both a suitable place for holding court within Battle Creek and a suitable and sufficient jail for the incarceration of prisoners during the sittings of the circuit court. The purpose of MCL 600.1513(4) is to govern the arrangement of the 37th circuit court, a division of the state court system. The management of the state court system is an issue of statewide concern, and a statute governing the funding and operations of the circuit courts is a general act. Maintenance of a jail next to a courthouse benefits

the administration of justice generally. The general public safety is served by facilitating the rapid transportation of prisoners to and from court proceedings and by the immediate incarceration of those whose bonds are revoked or who are the subject of contempt proceedings in a nearby courtroom. The smooth operation of the Calhoun County court system, including the incarceration of its prisoners, is a matter of general public concern. In the Legislature's judgment, the Battle Creek jail is a necessary adjunct to the Battle Creek courthouse, and no basis existed to disturb that judgment. Accordingly, MCL 600.1513 is a general act, and the circuit court's ruling to the contrary was erroneous.

Summary dismissal order vacated; case remanded for further proceedings.

Bodman PLC (by *Floyd E. Gates, Jr.*, and *Jane Derse Quasarano*) for Calhoun County.

The Mike Cox Law Firm, PLLC (by *Michael A. Cox* and *Kimberly M. Moehle*) and *Jill Steele* for the city of Battle Creek.

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

PER CURIAM. Over a century ago, the Michigan Legislature enacted a statute requiring that the circuit court in Calhoun County conduct two terms of court each year in the county seat (Marshall) and two in the city of Battle Creek. The statute also obligated Battle Creek to furnish "a suitable and sufficient jail for the incarceration of prisoners" at the city's expense. 1905 PA 272. In 1961, the Legislature reenacted virtually that same statute as MCL 600.1513, which also requires that Battle Creek "furnish and provide, free of expense to Calhoun county," both a "suitable place" for holding court within Battle Creek and "a suitable and sufficient jail for the incarceration of prisoners during the sittings of the circuit court . . . ." MCL 600.1513(4).

In 2018, the city stopped paying the county for the cost of certain jail beds, and the county brought this

suit. The city promptly moved for summary disposition, contending that MCL 600.1513(4) is an unconstitutional "local or special act" that required the approval of the citizens of Battle Creek, and no such vote was ever held. Const 1963, art 4, § 29. The circuit court agreed and summarily dismissed the case.

The various circuit courts of this state are not local courts, but rather pieces of a larger statewide court system. Establishing and maintaining a jail serves vital needs of the court and thereby qualifies as integral to the performance of a state function. MCL 600.1513 is a general act that does not require a local vote to become effective. We vacate the circuit court's order and remand for continued proceedings.

I. BACKGROUND

Since 1905, the circuit court in Calhoun County has convened in two locations—the county seat of Marshall and the county's largest city, Battle Creek—pursuant to a legislative arrangement. In 1905 PA 272, § 1, the Legislature provided:

> After [1905], two of the regular terms of the circuit court for the Thirty-seventh Judicial circuit, said circuit being made up of Calhoun county, shall be held each year within the city of Battle Creek, in said county: Provided, *That the common council of said city, of Battle Creek, or the citizens thereof, shall furnish and provide, free of expense to said county, a suitable place, including light, heat and janitor, for holding said court within said city and transacting the business thereof, and also a suitable and sufficient jail for the incarceration of prisoners, who may be held therein for trial, during the sittings of said court,* and also a fire-proof safe or vault within which to keep the files and records of cases on the calendar for any such terms of court; the place for the holding of said court and the jail, together with the sufficiency of said vault or safe, to be

> inspected and approved by the judge of said court or the prosecuting attorney of said county, which approval shall be in writing and shall be filed with the clerk of said county. [Emphasis altered.]

This court structure continued with the enactment of the Revised Judicature Act, MCL 600.101 *et seq*., in 1961. MCL 600.1513 largely echoes the substance of the 1905 statute, albeit in a reorganized version incorporating a few minor language changes:

> (1) Two of the regular terms of the circuit court for the thirty-seventh judicial circuit shall be held each year within the city of Battle Creek, and 2 of the regular terms shall be held within the city of Marshall, the county seat of Calhoun county.
>
> (2) The terms of court to be held at the city of Battle Creek shall be respectively alternated with the terms of the court to be held at the city of Marshall. The judge of the circuit court shall designate in writing which of the regular terms thereof shall be held within the city of Battle Creek, and shall transmit the designation to the clerk of Calhoun county.
>
> (3) The circuit court may adjourn any session of the court while sitting at one place, and continue the court at the other place of holding court.
>
> (4) *The common council of the city of Battle Creek, or the citizens thereof, shall furnish and provide, free of expense to Calhoun county, a suitable place for holding court within the city of Battle Creek and transacting the business thereof, and a suitable and sufficient jail for the incarceration of prisoners during the sittings of the circuit court,* and a fireproof safe or vault within which to keep the files and records of the court.
>
> (5) At each term of the circuit court designated to be held in the city of Battle Creek, the county clerk of Calhoun county shall deposit in the building designated for the holding of the court, under the direction of the circuit judge, all of the records and files in all cases noticed

> for trial or hearing at such term on or before the first day of the term and when such term is finished, such records and files shall be returned to the office of the county clerk. [Emphasis added.]

For 87 years, the city of Battle Creek provided a courthouse and jail for the circuit court terms held within its borders. In 1992, Battle Creek and Calhoun County arranged to combine two neighboring land parcels—one owned by the city and the other by the county—upon which they would construct a new courthouse and jail. Calhoun County footed the bill for the construction costs, despite that MCL 600.1513(4) required Battle Creek to provide a courthouse and jail free of cost to the county. The parties negotiated a deal under which the city would provide free dispatch services to the Calhoun County Sheriff's Department, and the county granted the city access to jail space for 30 city prisoners at any given time.

In 2010, the Calhoun County Consolidated Dispatch Authority took over dispatch services for all municipalities in the county. The county no longer benefited from its prior arrangement with the city, and the two entities reached a new agreement under which the city agreed to pay $1,735.20 per day for the use of 30 jail beds for the prearraignment lockup of city prisoners.

In 2015, 110 years after the Legislature's initial enactment of the Calhoun County court and jail funding arrangement, Battle Creek objected to its constitutionality. The city agreed to a year-by-year payment plan pending the resolution of its legal challenge. The Calhoun County Prosecutor then requested that the Attorney General express an opinion on the subject.

In 2019, a deputy attorney general (the AG) issued an opinion regarding whether MCL 600.1513's requirement that Battle Creek provide a courthouse and

suitable jail "remains in full force and effect or is now 'defunct.' " The AG emphasized that the statutory requirement had remained in place since 1905 and was enacted despite the existence of other statutes providing for county funding of the state courts and, specifically, jails.

The AG continued that MCL 600.1513 had not been repealed and remained in effect. And the plain language of the statute required the city of Battle Creek to provide a "suitable courthouse and jail for the 37th Circuit Court's sessions" held in that city. "The provision of the jail is specifically limited to the business and duration of the 37th Circuit Court's terms in Battle Creek," the AG noted. According to the plain language of the statute, "[t]he intent of this provision is to ensure that incarcerated individuals having business before the circuit court during its terms in Battle Creek are easily accessible to the court while remaining incarcerated."

The AG then turned to the legislative history of MCL 600.1513 as further support for its validity and purpose:

> In 1905, when MCL 600.1513 was initially enacted, and in 1961, when it was most recently amended, Calhoun County was required to operate a county courthouse and jail in the county seat, in this case the City of Marshall. See 1897 PA 226. As a result, in requiring that the 37th Circuit Court hold two terms a year in Battle Creek, the Legislature also required that the city provide the courthouse and jail. MCL 600.1513. This prevented Calhoun County from being required to provide a courthouse and jail in two locations in the county. After MCL 45.16 was amended in 1971, Calhoun County was allowed to locate the county jail anywhere in the county, but the county courthouse was still required to be in the county seat. See 1971 PA 113.

> This 1971 amendment to MCL 45.16 does not create an irreconcilable conflict with MCL 600.1513 that would repeal by implication the requirement that Battle Creek provide a suitable jail for the duration of the term of the circuit court. Calhoun County's obligations under MCL 45.16 are independent from Battle Creek's obligations under MCL 600.1513. And Calhoun County's actions under MCL 45.16 cannot negate or absolve Battle Creek's obligations under MCL 600.1513. Both statutory sections, therefore, are in full force and effect.

Thereafter, Battle Creek refused to pay for the housing of city prisoners in the jail constructed by the county. The county filed suit, requesting a declaration regarding the continued validity of MCL 600.1513 and seeking recompense under theories of unjust enrichment, quantum meruit, and conversion.

The city sought summary disposition, contending that MCL 600.1513 was a special or local act that had not been approved by the voters, rendering it invalid under the Michigan Constitution. Specifically, Const 1963, art 4, § 29 provides:

> The legislature shall pass no local or special act in any case where a general act can be made applicable, and whether a general act can be made applicable shall be a judicial question. No local or special act shall take effect until approved by two-thirds of the members elected to and serving in each house and by a majority of the electors voting thereon in the district affected. Any act repealing local or special acts shall require only a majority of the members elected to and serving in each house and shall not require submission to the electors of such district.

Prior to the ratification of the 1963 Constitution, Const 1908, art 5, § 30 similarly provided:

> The legislature shall pass no local or special act in any case where a general act can be made applicable, and whether a general act can be made applicable shall be a

> judicial question. No local or special act, excepting acts repealing local or special acts in effect January 1, 1909 and receiving a ⅔ vote of the legislature shall take effect until approved by a majority of the electors voting thereon in the district to be affected.

The circuit court determined that the constitutional issue controlled the outcome and deemed MCL 600.1513 an unconstitutional local or special act that had not been put to a vote before the citizens of Battle Creek.

The county appealed the circuit court's summary dismissal of its complaint, and the circuit court held its judgment in abeyance pending resolution of this appeal.

II. ANALYSIS

We review de novo a circuit court's resolution of a summary-disposition motion. *Zaher v Miotke*, 300 Mich App 132, 139; 832 NW2d 266 (2013). The circuit court did not reach the parties' arguments based on the intersection of various statutes governing the location and funding of circuit courts, but instead dismissed the county's complaint after analyzing the constitutionality of MCL 600.1513 alone. We review de novo a court's consideration of the constitutionality of a statute. *Makowski v Governor*, 495 Mich 465, 470; 852 NW2d 61 (2014). "Statutes are presumed to be constitutional, and we have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent." *In re Sanders*, 495 Mich 394, 404; 852 NW2d 524 (2014).

As noted, Const 1963, art 4, § 29 prohibits the Legislature from passing a "local or special act . . . where a general act can be made applicable . . . ." MCL 600.1513 directly names two localities subject to legislative control: Calhoun County and the city of Battle Creek. But the purpose of the statute is to govern the arrangement of the 37th circuit court, a division of the *state* court

system. The management of the state court system is an issue of statewide concern, and a statute governing the funding and operations of the circuit courts is a general act.

Before the ratification of Const 1908, art 5, § 30, the Michigan Supreme Court considered the propriety of the predecessor to MCL 600.1511, which was enacted in 1883.[1] *Whallon v Ingham Co Circuit Judge*, 51 Mich 503, 505; 16 NW 876 (1883). The defendant challenged the Legislature's authority to require that sessions of court be held somewhere other than the county seat. *Id*. at 508-509. The Supreme Court held that the Legislature had the power and authority to direct the location of court terms. "The circuit court has general common-law jurisdiction, and has always been a State court, held by judges paid by the State, and *is in no sense a local court*." *Id*. at 511-512 (emphasis added). "For the convenience of the people its terms" are held in various locations around the state. *Id*. at 512. For the most part, circuit court districts coincide with county borders and usually, but not necessarily, are headquartered in the county seat. *Id*. But, the Court noted, "[t]here has never been any express constitutional provision upon the subject in anywise limiting the power of the Legislature to establish or change the place for holding the circuit court when once located." *Id*. And "[t]he county seat exists without [the Supreme Court], and the location of the seat of justice has always been a subject of legislative discretion." *Id*.

Although *Whallon* was decided before the state Constitution was amended to prohibit the enactment

[1] MCL 600.1511 is identical to MCL 600.1513 in requiring the city of Lansing to provide and fund a courthouse and jail for the Ingham Circuit Court to convene two terms each year. The remaining court terms convene in the county seat of Mason.

of local acts without a vote of that locality's electorate, its discussion of the general, statewide interest presented by the network of circuit courts remains accurate. Our Supreme Court's more recent decision in *Hart v Wayne Co*, 396 Mich 259; 240 NW2d 697 (1976), confirms the constitutionality of MCL 600.1513 and its subparts.

In *Hart*, 396 Mich at 263, the Michigan Supreme Court considered a 1919 statute requiring Wayne County to supplement the salaries of recorder's court judges. The question was whether the 1919 statute was a general or local act requiring a referendum under Const 1908, art 5, § 30. *Hart*, 396 Mich at 263. The Court noted that "funding of the judiciary is a unique situation presenting overriding state concerns." *Id*. at 268. The Court further held that, "[i]n a sense, all justices of the peace, constables, and judges of courts of record are appointed—hold office—by virtue of State authority. The recorder's court is, when exercising jurisdiction to try persons accused of crimes, under the general laws of the State, a State court[.]" *Id*. at 270-271 (cleaned up). The Court concluded that "[r]ecorder's court is a state court performing a state function, not a local function. Funding of the state judicial system is a legislative function. . . . Because recorder's court is a state function, the Legislature has authority to determine its funding." *Id*. at 272. The Court held that the payment of recorder's court judge salaries was not a local issue and that a statute governing that issue was a general, and not a local, act. *Id*.

Hart guides our decision in this case. The locations for the terms of a circuit court and the funding of circuit court facilities pertain directly to the management of the state court system. This is an issue of statewide concern.

In *Hart*, the Supreme Court quoted at length from Justice CAMPBELL's opinion in *People ex rel Schmittdiel v Bd of Auditors of Wayne Co*, 13 Mich 233 (1865), a dispute regarding the payment of the salary of the clerk of the police court in Detroit. The Legislature assigned that responsibility to Wayne County, which, in turn, asserted an exclusive power to determine the amount of the clerk's compensation. The Supreme Court rejected Wayne County's position, highlighting that when it comes to the delivery of justice by the courts, "the counties are no more directly affected than the State at large." *Id*. at 235. Justice CAMPBELL explained that "[i]t is an advantage to have justice accessible to all, and to have evil-doers punished," and that those advantages benefit "the community generally." *Id*. In 1915, our Supreme Court again observed that "[t]he execution of the criminal laws of the State is a matter of State concern, and in this respect the court possesses a jurisdiction which the electors of the city cannot confer." *Civil Serv Comm of Detroit v Engel*, 187 Mich 83, 88; 153 NW 358 (1915).

Maintenance of a jail next to a courthouse benefits the administration of justice generally, for reasons that are self-evident. The general public safety is served by facilitating the rapid transportation of prisoners to and from court proceedings and by the immediate incarceration of those whose bonds are revoked or who are the subject of contempt proceedings in a nearby courtroom. The smooth operation of the Calhoun County court system, including the incarceration of its prisoners, is a matter of general public concern. In the Legislature's judgment, the Battle Creek jail is a necessary adjunct to the Battle Creek courthouse, and no basis exists to disturb that judgment.

Accordingly, MCL 600.1513 is a general act. The circuit court's ruling to the contrary was erroneous, as was its summary dismissal of the county's complaint on this ground. The circuit court has yet to consider the various other arguments posited by the parties and should do so in the first instance.

We vacate the circuit court's summary dismissal of Calhoun County's complaint and remand for continued proceedings. We do not retain jurisdiction.

STEPHENS, P.J., and BORRELLO and GLEICHER, JJ., concurred.