MICHIGAN APPEALS REPORTS

CASES DECIDED

IN THE

MICHIGAN

COURT OF APPEALS

FROM

November 17, 2016 through February 14, 2017

KATHRYN L. LOOMIS
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[1] To January 1, 2017.

[2] From January 1, 2017.

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	Term Expires January 1 of
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STEPHEN J. MARKMAN	2021[2]
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[1] To January 6, 2017.

[2] From January 6, 2017.

[3] From January 6, 2017.

[4] To January 6, 2017.

[5] To January 31, 2017.

[6] From January 3, 2017.

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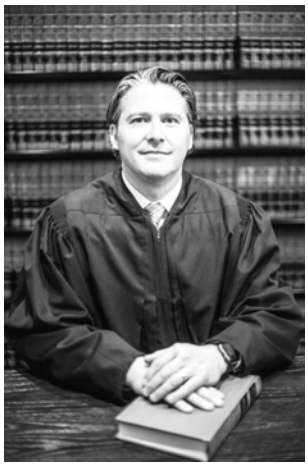
JUDGE

BROCK A. SWARTZLE



Judge Brock A. Swartzle was appointed to the Michigan Court of Appeals in 2017. Before joining the bench, Judge Swartzle was Chief of Staff for the Speaker of the Michigan House of Representatives, as well as General Counsel for the House, where he worked on numerous legal and policy issues, including the Detroit bankruptcy settlement package. Judge Swartzle was previously a litigation partner with Honigman Miller Schwartz and Cohn LLP, where he practiced in antitrust, healthcare fraud, white-collar crime, securities, and other areas. Judge Swartzle had extensive experience in federal court prior to joining the Michigan Court of Appeals, clerking for three years in both the Eastern District of Michigan and the Western District of Michigan and for four years with the Hon. David W. McKeague on the United States Court of Appeals for the Sixth Circuit.

Judge Swartzle currently sits on the editorial board of the American Bar Association's Appellate Practice Journal, a publication for which he was Coeditor in Chief for several years, as well as on the George Mason Law & Economics Center's Judicial Education Advisory Board. He has authored numerous legal articles

as well as coauthored a chapter in the practitioner treatise, Business and Commercial Litigation in Federal Courts. Judge Swartzle received his B.S. with distinction from the University of Michigan and his J.D. with honors from George Mason University School of Law, where he served on the George Mason Law Review Board of Editors.

Judge Swartzle is married with three children. He volunteers with the University of Michigan Club of Greater Lansing and is a member of the Williamston United Methodist Church.

COURT OF APPEALS CASES

DEPARTMENT OF ENVIRONMENTAL QUALITY v GOMEZ

Docket No. 328033. Submitted October 5, 2016, at Lansing. Decided November 17, 2016, at 9:00 a.m.

The Department of Environmental Quality filed an action against Hernan F. Gomez and Bethany M. Gomez in the Ingham Circuit Court, seeking a civil fine and injunctive relief to remedy defendants' filling of a portion of the wetland on their 145-acre property without a permit, contrary to the version of Part 303, MCL 324.30301 *et seq*., of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.101 *et seq*., as amended by 1995 PA 59, in effect at the time of the violations. Defendants placed fill dirt and other materials on a portion of wetland on their property between 2005 and 2010 to grow pasture grass for their horses. Plaintiff discovered the filled area in 2010 and issued defendants a violation notice, informing them that an inspection had revealed that fill material had been placed in a wetland without a permit, contrary to MCL 324.30304. Plaintiff indicated that defendants would not have qualified for a permit given the location of the land and ordered defendants to restore the site to a wetland within 30 days. The environmental consulting firm hired by defendants asserted that defendants were not required to obtain a Part 303 permit for the filled area because the land was used for farming or ranching activities, as allowed by former MCL 324.30305(2)(e). Plaintiff disagreed with the consulting firm's assessment, and plaintiff again ordered defendants to restore the site. Defendants stopped placing fill dirt in the disputed area but continued to plant pasture grass and did not restore the site to a wetland. Defendants moved for summary disposition under MCR 2.116(C)(8), arguing that they were exempt from the Part 303 permit requirement under the farming-or-ranching-activities exemption. The court, Clinton Canady III, J., denied the motion, concluding that there were factual issues regarding whether defendants' activities qualified for the exemption. Defendants later moved for summary disposition under MCR 2.116(C)(7), arguing that plaintiff's action was time-barred under the applicable statute of limitations. Plaintiff filed a cross-motion for summary disposition under MCR 2.116(C)(10), arguing that it was undisputed that defendants placed fill mate-

rial in a portion of the wetland without a permit and that those actions were not exempt as farming or ranching activities under Part 303. The court denied defendants' motion, concluding that plaintiff could seek enforcement against defendants' actions that occurred between December 19, 2007, and that date in 2013—encompassing the six-year period before the cause of action was filed—because the six-year statutory period of limitations began to run at the time the claim accrued, and each placement of fill materials in the wetlands created its own accrual date. The court then granted plaintiff's motion, concluding that defendants' actions were not protected farming or ranching activities for purposes of the Part 303 exemption and rejecting defendants' argument that their actions were exempt because they were cultivating the wetland. After a bench trial on the issue of remedies, the court ordered defendants to pay a civil fine of $10,000 and issued an injunction, ordering defendants to restore the 1.2-acre wetland site to the condition in which it existed before December 19, 2007. Defendants appealed.

The Court of Appeals *held*:

1. MCL 324.30304 provides that a person may not—unless the DEQ authorizes the action by permit or as elsewhere allowed in Part 303—deposit or permit the placing of fill material in a wetland; dredge, remove, or permit the removal of soil or minerals from a wetland; construct, operate, or maintain any use or development in a wetland; or drain surface water from a wetland. MCL 324.30301(1)(d) defines the term "fill material" to include soil, rocks, sand, waste of any kind, or other material that displaces soil or water or reduces water-retention potential. However, former MCL 324.30305(2)(e) provided that certain activities—e.g., farming, horticulture, and ranching activities, including plowing, seeding, or cultivating—could be conducted in a wetland without a permit. The specific examples of farming activities in that provision relate to the operation, improvement, expansion, and maintenance of a farm or to the actual practice of farming. The plain and ordinary meaning of the term "cultivating" means the preparing, improving, or tilling of soil already present in a given growing area, and those activities are of the kind, class, character, or nature of operating a farm or practicing farming.

2. The trial court correctly granted plaintiff's motion for summary disposition pursuant to MCR 2.116(C)(10) on the basis that defendants violated Part 303 by failing to obtain a permit before filling in a portion of the wetland on their property. It correctly concluded that defendants' action of filling the site with soil and other material and planting pasture grass was not

exempt from the Part 303 permit requirement. Defendants' extensive placement of fill material in the wetland did not constitute cultivating the land for purposes of the Part 303 farming-or-ranching exemption because their actions were not done to prepare, improve, or till soil that was already present in the wetland. Accordingly, defendants' placement of soil and other material in the wetland was distinct from activities routinely performed in the operation, improvement, expansion, and maintenance of a farm or ranch or to the actual practice of farming or ranching, especially because placement of the soil and other material completely changed the character of that portion of the wetland.

3. If plaintiff determines that a person has violated Part 303, MCL 324.30315(1) grants it authority to issue an order requiring the person to comply with the prohibitions or conditions of the act or request the attorney general to bring a civil action for appropriate relief, including injunctive relief, under MCL 324.30316(1).

4. The period of limitations applicable in this case was controlled by *Attorney General v Harkins*, 257 Mich App 564 (2003). MCL 600.5813 of the Revised Judicature Act, MCL 600.5801 *et seq*., sets forth the applicable period of limitations for all other personal actions unless a different period is stated in a statute. Accordingly, a civil cause of action arising from a statutory violation is subject to the MCL 600.5813 six-year limitations period if the statute itself does not provide a limitations period. There is no period of limitations expressly applicable to actions brought under the NREPA. Accordingly, the six-year period of limitations set forth in MCL 600.5813 applies to an action brought by the DEQ against a property owner for restoration of a wetland. The two-year period of limitations set forth in MCL 600.5809(2)—which applies to claims for the recovery of civil penalties based on a penal statute brought in the name of the people of this state—does not apply to actions brought under Part 303 for restoration and civil fines because the prescribed period of limitations, MCL 600.5813, applies equally to all actions regardless of whether equitable or legal relief is sought. In this case, the trial court correctly concluded that the six-year period of limitations applied.

5. MCL 600.5827 provides that a period of limitations runs from the time the claim accrues; a claim accrues at the time the wrong upon which the claim is based was done regardless of when the damage results. Under the continuing-violations doctrine, which is no longer followed in Michigan, when a defendant's wrongful acts are of a continuing nature, the period of limitations

will not run until the wrong is abated; the doctrine allows a separate cause of action to accrue each day that the defendant's tortious conduct continues. In this case, the trial court correctly concluded that the claims related to defendants' actions that occurred within six years of the date when plaintiff filed the complaint—in other words, all defendants' actions that occurred after December 19, 2007—were not time-barred. Plaintiff's claims were not erroneously based on the continuing-violations doctrine because defendants violated Part 303 each time they deposited fill material in the wetland. Accordingly, the fact that some of plaintiff's claims accrued outside the applicable six-year period of limitations did not time-bar those that accrued after December 19, 2007.

6. The doctrine of laches provides that a legal claim will not be enforced when a plaintiff fails to assert the claim at the proper time; the doctrine applies only when the inexcusable delay in commencing the action resulted in prejudice to a party. In this case, the trial court correctly concluded that plaintiff's action was not barred by laches. The doctrine did not apply because defendants had unclean hands in that they repeatedly violated Part 303 of the NREPA each time they deposited fill material in the wetland. Defendants also failed to demonstrate that they were prejudiced by plaintiff's delay in bringing the action, and even though defendants had notice in 2010 that plaintiff might assert its rights at any time, they continued to grow pasture grass in the converted wetland area at their own risk.

7. An order to restore a wetland is essentially a mandatory injunction, which is an equitable remedy. Under MCL 324.30316 of the NREPA, a trial court has broad discretion in fashioning a remedy for a Part 303 violation; specifically, the trial court may order the violating party to restore the wetland that was affected by the violation. The term "may" presupposes discretion in that it does not mandate an action. For these reasons, an order to restore a wetland constitutes equitable relief that an appellate court reviews for an abuse of discretion.

8. In this case, the trial court's findings of fact were not clearly erroneous and the court did not abuse its discretion by ordering defendants to restore the wetland area to its condition before the December 2007 violations. The trial court did not exceed its authority under Part 303 by ordering defendants to restore the wetland in a specified manner because the wetland's original condition was uncertain.

9. The Michigan environmental protection act (MEPA), Part 17 of the NREPA, MCL 324.1701 *et seq*., allows the attorney

general to seek declaratory and equitable relief against any person who violates the MEPA to protect the state's natural resources from pollution, impairment, or destruction. The factors applied by a trial court in an MEPA action to determine whether the effect of a proposed action on wildlife is so significant as to constitute an environmental risk that requires judicial intervention do not apply to an action brought by the attorney general for a Part 303 violation. Because the MEPA factors were developed without considering MCL 324.30316, which grants the trial court discretion when fashioning a remedy for a Part 303 violation, the court in this case did not abuse its discretion by declining to consider the MEPA factors, especially when the language in MCL 324.30316 does not support consideration of those specific factors. Similarly, the trial court was not required under MCL 324.30316 to consider those factors considered when federal courts review restoration orders under the federal Clean Water Act, 33 USC 1251 *et seq*.

10. The trial court did not abuse its discretion when it imposed a $10,000 civil fine for defendants' Part 303 violations.

Affirmed.

1. LIMITATION OF ACTIONS — NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION ACT — PART 303.

The six-year period of limitations set forth in MCL 600.5813 applies to actions brought by the Department of Environmental Quality for violations of Part 303, MCL 324.30301 *et seq*., of the Natural Resources and Environmental Protection Act, MCL 324.101 *et seq*.

2. ENVIRONMENT — NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION ACT — PART 303 — REMEDIES — STANDARD OF REVIEW.

Under MCL 324.30316, a circuit court has wide discretion in fashioning a remedy for a violation of Part 303, MCL 324.30301 *et seq*., of the Natural Resources and Environmental Protection Act, MCL 324.101 *et seq*.; an appellate court reviews for an abuse of discretion a circuit court's order of restoration of a wetland under MCL 324.30316; MCL 324.30316 does not require that any specific standard be considered when a circuit court is considering whether to order restoration of a wetland for a Part 303 violation.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Kelly M. Drake*, Assistant Attorney General, for plaintiff.

Conlin, McKenney & Philbrick, PC (by *Douglas G. McClure*), for defendants.

Before: RIORDAN, P.J., and METER and OWENS, JJ.

PER CURIAM. Defendants, Hernan F. Gomez and Bethany M. Gomez, appeal as of right the trial court's judgment—following a grant of summary disposition in favor of plaintiff, the Department of Environmental Quality, on the issue of liability and a bench trial on remedies—ordering defendants to remove the 1.2 acres of fill material they had placed in a wetland on their property, to restore the area to its previous condition, and to pay a $10,000 civil fine. For the reasons stated in this opinion, we affirm.

I. FACTUAL BACKGROUND

In 2002, defendants purchased approximately 54 acres of property in Green Oak Township, Michigan, with the intention of constructing a home and an adjoining "working ranch" with horses. After building the house, defendants selected an area of land on the property to convert into a horse pasture. However, in order to make the land suitable for "pasture seed," they believed that "top soil" needed to be added. Accordingly, they placed "fill dirt" in the area between May 2005 and December 2010.

While reviewing aerial photographs in an unrelated matter, Justin Smith, an environmental quality specialist for the Department of Environmental Quality (DEQ), happened to notice what "looked like . . . a filled wetland area" on defendants' property. Later, he and Thomas Kolhoff, a district representative for the DEQ and the Water Resources Division (WRD), conducted an onsite investigation of defendants' property in fall

2010, during which they sampled the vegetation and the soil, photographed the site, and identified the filled area's boundary. When they arrived at the property, Smith observed "a cleared area with exposed" light-colored soil, "no vegetation," and "some remnant of remaining wetlands that were not filled" nearby. He specifically observed "a section of cattails 30 feet wide" and "another small section that was not filled, that was basically . . . shrub swamp," which "was inundated with approximately six inches of water." Kolhoff performed four or five soil borings and attempted to perform more, but he "couldn't get through the fill," which included either "broken concrete or thick gravel."

Smith issued a DEQ violation notice on December 2, 2010, informing defendants that an inspection of their property revealed that "fill material had been placed within wetland regulated under the authority of Part 303 [MCL 324.30301 *et seq*.]" of the Natural Resources and Environmental Protection Act (NREPA) [MCL 324.101 *et seq*.], and that "it appears that this activity was conducted in violation of Part 303" because the filling was performed without a permit, contrary to MCL 324.30304.[1] Smith also told defendants that the WRD had "determined that a permit would not have been approved for this project" and that defendants were required bring their property into compliance with Part 303 within 30 days by restoring the site to a wetland. According to defendants, they did not deposit additional fill material on their property after they received the violation notice, but they "continued thereafter to merely plant and nurture pasture grass seed on the land on which fill had already been deposited."

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[1] Certain sections of Part 303 were amended by 2013 PA 98, effective July 2, 2013. In this opinion, we refer to the NREPA provisions in effect at the time of the offenses.

Defendants hired an environmental consulting firm, Asti Environmental, to assist them in the resolution of the alleged violation. In a February 11, 2011 letter, Dianne C. Martin, the Director of Resource Assessment and Management at the firm, informed the WRD that "[a]pproximately 1.4 acres of wetland on the property were filled over the course of the last several years." She explained that because defendants intended to use the filled area for farming and ranching activities, they were not required to obtain a permit to fill the wetland under the corresponding exemption provided in Part 303 of the NREPA, MCL 324.30305(2)(e). Nonetheless, Martin indicated that defendants would be willing to enter into a conservation easement for approximately 18 acres of wetland on their property if plaintiff was amenable to such a resolution.

In a letter dated February 18, 2011, Smith informed defendants that the WRD had received Martin's letter and that "the WRD vehemently disagree[d]" that a permit was not required for defendants' activities. Accordingly, he informed defendants that "if the site is not restored . . . this violation may be referred for escalated enforcement action." Subsequently, when Kolhoff visited defendants' property once per year in 2011, 2012, and 2013, and Smith visited the site in March 2013, they each observed that restoration efforts had not begun.

On December 19, 2013, plaintiff initiated an action in the Ingham Circuit Court, seeking "injunctive relief to remedy . . . the filling of a wetland without a permit in violation of Part 303 (Wetlands Protection) of the [NREPA] . . . ." Plaintiff requested that the court order defendants to restore their property "to the state that existed prior to the unauthorized and unlawful activi-

ties" and to pay a civil fine of not more than $10,000 for each day of the Part 303 violation.

In February 2014, defendants moved for summary disposition pursuant to MCR 2.116(C)(8), arguing that they were entitled to judgment as a matter of law because no factual development would alter the fact that their filling of the wetland qualified under the "farming and ranching exemption" of Part 303, MCL 324.30305(2), which, in their words, "allows a person to undertake activities that bring a wetland into a previously non-established farming or ranching use" without acquiring a permit. Plaintiff disagreed that the exemption applied. The trial court denied defendants' motion on the basis that there were factual issues relevant to whether defendants' activities fulfilled the exemption.

In September 2014, defendants again moved for summary disposition, arguing that it was proper under MCR 2.116(C)(7) because plaintiff's action was time-barred under the applicable statute of limitations, in that an action for the recovery of a penalty must be brought within two years after the claim accrues. Alternatively, defendants argued that even if a six-year limitations period applied, the action still would be barred because plaintiff's claim accrued when defendants first placed fill material in the wetland in 2005, as established by Hernan's affidavit. Plaintiff disagreed, arguing that under *Attorney General v Harkins*, 257 Mich App 564; 669 NW2d 296 (2003), the applicable period of limitations for equitable actions to enforce Part 303 is six years and that it was undisputed that defendants placed fill material in the wetland in 2008, 2009, and 2010. However, plaintiff conceded that it could not seek enforcement for the portion of the wetland that was filled by

defendants between 2005 and 2007. After hearing oral argument, the trial court denied defendants' motion, concluding that, under *Harkins*, the statutory six-year period of limitations applied to plaintiff's claims. The court also held "that each plac[ement] of fill materials or dirt in the wetlands created its own accrual date for the six-year statute of limitations," and that there was no dispute that "this action existed within six years."

In the meantime, plaintiff filed a cross-motion for summary disposition on liability pursuant to MCR 2.116(C)(10), arguing that there was no genuine issue of material fact that defendants placed fill material in a wetland without a permit and that their activities did not constitute "cultivating" under the farming exemption. The trial court granted plaintiff's motion, noting that defendants admitted that they placed fill material in a wetland and that *Huggett v Dep't of Natural Resources*, 464 Mich 711; 629 NW2d 915 (2001), "clearly states that filling and dredging a wetland are prohibited activities that do not fit within the farming activities" exception. The court also found defendants' argument that they were cultivating the wetland unpersuasive because "in order to get any potential cultivating [they] had to fill and dredge and had to place materials in the site."

Subsequently, a two-day bench trial was held on the issue of remedies. After hearing testimony from Smith and Kolhoff, who were both qualified as expert witnesses, Martin, who also was qualified as an expert witness, and Hernan, the trial court ordered defendants to "[r]estore the approximately 1.2 acres of wetlands on [their property] into which fill material was placed after December 19, 2007 . . . to the condition that existed prior to the unauthorized and unlaw-

ful placement of fill material." The restoration activities ordered by the court were as follows:

> a. Remove all fill material from the restoration area described above;
>
> b. After the fill material is removed, address compaction of the wetland soils in the restoration area to allow the soils to return to the original grade;
>
> c. Re-establish wetland vegetation in the restoration area by applying a DEQ-approved native wetland plant seed mix and planting native Michigan species of wetland shrubs;
>
> d. Monitor the restoration area for five years after the date of completion; and
>
> e. Implement invasive species monitoring and control measures in the restoration area for five years after the date of completion.

Before commencing the restoration, defendants were required to prepare and submit a restoration plan to plaintiff no later than June 30, 2016. The trial court also ordered defendants to pay a civil fine of $10,000.

II. WHETHER DEFENDANTS' CONDUCT QUALIFIES AS A "FARMING" OR "RANCHING" ACTIVITY

Defendants argue that the trial court erroneously granted summary disposition in favor of plaintiff because their use of fill dirt to create a pasture was exempt as a farming or ranching activity from the wetland permitting requirements. We disagree.

A. STANDARD OF REVIEW

This Court reviews de novo a trial court's grant or denial of summary disposition. *Moraccini v Sterling Hts*, 296 Mich App 387, 391; 822 NW2d 799 (2012). "A motion under MCR 2.116(C)(10) tests the factual suf-

ficiency of the complaint." *Cannon Twp v Rockford Pub Sch*, 311 Mich App 403, 411; 875 NW2d 242 (2015). When reviewing such a motion, this Court may only consider, in the light most favorable to the party opposing the motion, the evidence that was before the trial court, which consists of "the 'affidavits, together with the pleadings, depositions, admissions, and documentary evidence then filed in the action or submitted by the parties.' " *Calhoun Co v Blue Cross Blue Shield of Mich*, 297 Mich App 1, 11; 824 NW2d 202 (2012), quoting MCR 2.116(G)(5). Under MCR 2.116(C)(10), "[s]ummary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008). "This Court is liberal in finding genuine issues of material fact." *Jimkoski v Shupe*, 282 Mich App 1, 5; 763 NW2d 1 (2008).

Questions of statutory interpretation are also reviewed de novo. *Stanton v Battle Creek*, 466 Mich 611, 614; 647 NW2d 508 (2002).

> When construing statutes, our primary task is to discern and give effect to the Legislature's intent. We begin by examining the statutory language, which provides the most reliable evidence of that intent. If the statutory language is clear and unambiguous, then we conclude that the Legislature intended the meaning it clearly and unambiguously expressed, and the statute is enforced as written. No further judicial construction is necessary or permitted. [*Huggett*, 464 Mich at 717.]

"Only when an ambiguity exists in the language of the statute is it proper for a court to go beyond the statutory text to ascertain legislative intent." *Whitman v City of Burton*, 493 Mich 303, 312; 831 NW2d 223 (2013). Additionally, "[w]hen construing a statute, a court must read it as a whole." *Klooster v Charlevoix*, 488 Mich 289, 296; 795 NW2d 578 (2011).

B. ANALYSIS

The NREPA "is a comprehensive statutory scheme containing numerous parts, all intended to protect the environment and natural resources of this state." *People v Schumacher*, 276 Mich App 165, 171; 740 NW2d 534 (2007). Part 303 of the act "governs activities in wetlands." *Huggett*, 464 Mich at 715.[2] "At the federal level, the Clean Water Act (CWA) [33 USC 1251 *et seq*.] provides for the regulation and protection of wetlands, while Michigan's wetland protection act . . . serves the same purpose for this state." *K & K Constr, Inc v Dep't of Environmental Quality*, 267 Mich App 523, 529; 705 NW2d 365 (2005) (citation omitted).

MCL 324.30304 states:

> Except as otherwise provided in this part or by a permit issued by the department[3] . . . , a person shall not do any of the following:
>
> (a) Deposit or permit the placing of fill material in a wetland.

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[2] Part 303 is sometimes referred to as "the wetland protections act" or "the wetlands protection act." See, e.g., *People v Taylor*, 495 Mich 923 (2014) (MARKMAN, J., concurring); *K & K Constr, Inc v Dep't of Environmental Quality*, 267 Mich App 523, 529; 705 NW2d 365 (2005); *Huggett v Dep't of Natural Resources*, 232 Mich App 188, 191; 590 NW2d 747 (1998), aff'd 464 Mich 711 (2001). See also *Huggett*, 464 Mich at 715 n 1.

[3] The DEQ has "the authority, powers, duties, functions, and responsibilities under" the relevant provisions of the NREPA. Executive Order No. 2011-1.

> (b) Dredge, remove, or permit the removal of soil or minerals from a wetland.
>
> (c) Construct, operate, or maintain any use or development in a wetland.
>
> (d) Drain surface water from a wetland.

"Fill material" is defined as "soil, rocks, sand, waste of any kind, or any other material that displaces soil or water or reduces water retention potential." MCL 324.30301(1)(d). "However, part 303 also provides that certain activities are not subject to § 30304's prohibitions." *Huggett*, 464 Mich at 715. In particular, MCL 324.30305(2) provides that, unless otherwise precluded by other state laws or "the owner's regulation," certain uses are allowed in a wetland without a permit. Defendants maintain that their filling of the wetland and subsequent growing of pasture grass are activities that fall under the exemption in MCL 324.30305(2)(e). During the period relevant to this case,[4] MCL 324.30305(2)(e) provided that the following

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[4] The current farming-activities exemption is one of the subsections added to the NREPA by 2013 PA 98. It provides that "[b]eginning October 1, 2013, to be allowed in a wetland without a permit, these activities shall be part of an established ongoing farming [or] ranching . . . operation." MCL 324.30305(2)(e)(*i*), as amended by 2013 PA 98.

While not directly relevant to the issues raised on appeal in this case, there appears to be some confusion regarding the effect of 2013 PA 98 that merits discussion. Enacting Section 2 of 2013 PA 98 states as follows:

> Part 303 of the natural resources and environmental protection act, 1994 PA 451, MCL 324.30301 to 324.30327, is repealed effective 160 days after the effective date, as published in the federal register, of an order by the administrator of the United States environmental protection agency under 40 CFR 233.53(c)(8)(vi) withdrawing approval of the state program under 33 USC 1344(g) and (h).

In *Dep't of Environmental Quality v Morley*, 314 Mich App 306, 308 n 1; 885 NW2d 892 (2016), this Court noted that "Part 303 was repealed by 98 PA 2013." However, a close reading of the enacting section confirms

activities could be conducted in a wetland without a permit:

> Farming, horticulture, silviculture, lumbering, and ranching activities, including plowing, irrigation, irrigation ditching, seeding, *cultivating*, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices. Wetland altered under this subdivision shall not be used for a purpose other than a purpose described in this subsection without a permit from the department. [MCL 324.30305(2)(e), as amended by 1995 PA 59 (emphasis added).]

In particular, defendants contend that their activities constituted "prepar[ation] and cultivat[ion of] the field for farming and ranching use," such that their filling and cultivation of the wetland qualified under the exemption for farming- and ranching-related activities.

In *Huggett*, 464 Mich at 718-722, the Michigan Supreme Court interpreted the former version of the farming-activities exemption at issue in this appeal. Other than the opinion issued by this Court before the Supreme Court's opinion in *Huggett*, see *Huggett v Dep't of Natural Resources*, 232 Mich App 188, 191; 590 NW2d 747 (1998), aff'd 464 Mich 711 (2001), we have found no other authority interpreting the farming-activities exemption. While we recognize the factual distinctions between *Huggett* and the instant case, we believe that the reasoning used by our Supreme Court in *Huggett* is directly applicable to the circumstances of this case.

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that 2013 PA 98 did not repeal Part 303, but merely provided that the part *will be* repealed in the event the EPA withdraws approval of Michigan's program. Indeed, the Legislature amended various sections of Part 303 through 2013 PA 98 and expressly repealed MCL 324.30325. It would have been nonsensical for the Legislature to make amendments to Part 303 and also repeal it in the same act.

In *Huggett*, the plaintiffs sought to build a 200-acre cranberry farm on a 325-acre parcel of land that included 278 acres of wetland. *Huggett*, 464 Mich at 713. In order to build the farm, the plaintiffs proposed "placing fill material in wetland areas, excavating and removing soil from wetland areas, building dikes and culverts; digging irrigation ditches; and constructing a reservoir and pumping station, roads, and an airstrip." *Id*. The plaintiffs maintained in the trial court and on appeal that their proposed activities qualified under the farming-activities exemption and were not, therefore, "subject to the wetland permit requirements[.]" *Id*. at 714. The plaintiffs argued that the list of exempt farming activities under MCL 324.30305(2)(e) was not exhaustive, contending that "[t]he farming activities exemption . . . includes all of the activities necessary for farming." *Id*. at 718 (quotation marks omitted).

The Michigan Supreme Court, however, concluded that "[t]hese specific examples of farming activities [under MCL 324.30305(2)(e)] relate to the operation, improvement, expansion, and maintenance of a farm, or to the actual practice of farming." *Id*. at 719. Accordingly, although activities not specifically listed in the statute may be covered by the farming-activities exemption, "[u]nder the canon of ejusdem generis,[5] . . . the activities must be of the kind, class, character, or nature of operating a farm or practicing farming." *Id*. at 719. Notably, in "constru[ing] both the prohibitions and exemptions in part 303 to make both viable," *id*. at 717, the Court recognized that "some of the activities allowed under § 30305 overlap with the activities prohibited under § 30304," *id*., at 720. The

[5] The canon of ejusdem generis restricts "the general term . . . to include only things of the same kind, class, character, or nature as those specifically enumerated." *Huggett*, 464 Mich at 718-719.

Court cited, as an example, the MCL 324.30304 prohibition of draining and the MCL 324.30305 allowance of "minor drainage." *Id*. at 720. "To make both sections viable," the Court reasoned, "we must read the allowance for minor drainage only to allow drainage that fits within the definition of 'minor drainage,' or, in other words, only to allow drainage that is inconsequential." *Id*.

Ultimately, the Supreme Court concluded that "[t]he activities [the] plaintiffs seek to exempt . . . are not in the kind, class, character, or nature of operating a farm." *Id*. at 719. More specifically, it determined that the "[p]laintiffs' proposed activities unquestionably amount to more than 'minor drainage' *and also entail filling* and dredging in a wetland, *which are prohibited activities*. These activities, then, do not fit within the farming activities exemption to the wetland permit requirements." *Id*. at 720 (emphasis added). On the basis of this reasoning, we conclude that defendants' acts of filling the wetland in this case were prohibited acts that did not fall under the farming-activities exemption. See *id*. at 719-720.

However, we recognize that the specific question raised by defendants in this appeal differs, to a certain extent, from the question raised in *Huggett*. In this case, defendants conceptualize the issue as whether the placement of fill material in a wetland for the purpose of growing grass thereon constitutes " 'cultivating' the land, as that term is used in Part 303," or is at least "of 'the same kind, character or nature' as cultivating, as allowed by *Huggett*." Stated differently, we understand defendants' claim as arguing, in essence, that their placement of fill material constitutes cultivating for purposes of MCL 324.30305(2)(e) and is,

therefore, a limited exception to the prohibition against filling in MCL 324.30304(a), similar to the way that minor drainage under MCL 324.30305(2)(e) is a limited exception to the prohibition against draining surface water from a wetland in MCL 324.30304(2)(d). We disagree that defendants' act of adding fill material to the wetland constitutes cultivating, or something similar to cultivation, which is exempted from the permit requirements pursuant to MCL 324.30305(2)(e).

The term "cultivating" is not defined for purposes of Part 303 or elsewhere in the NREPA. See MCL 324.30301. Accordingly, it is appropriate to consult a dictionary to determine its plain and ordinary meaning. *Epps v 4 Quarters Restoration LLC*, 498 Mich 518, 529; 872 NW2d 412 (2015). *Merriam-Webster's Collegiate Dictionary* (11th ed) defines "cultivate" as "to prepare or prepare and use for the raising of crops," "to loosen or break up the soil about (growing plants)," "to foster the growth of [~vegetables]," and "to improve by labor, care, or study." From these definitions, it appears that the plain and ordinary meaning of "cultivating" involves preparing, improving, or tilling soil already present in a given growing area, and all of these activities are of the "kind, class, character, or nature of operating a farm or practicing farming." See *Huggett*, 464 Mich at 719. Accordingly, we conclude that defendants' extensive depositing of dirt in the area does not fulfill the plain and ordinary meaning of "cultivating," because defendants' actions were not intended to accomplish any of those goals.

Additionally, we acknowledge, without deciding, that it is possible that some actions—which may appear at first glance to constitute "filling" prohibited under § 30304—could be permitted as cultivating un-

der the farming-activities exemption. In particular, defendants argue that the placement of manure on farmland constitutes filling, but would be allowed as a farming activity under MCL 324.30305(2)(e). Notably, however, "fill material" is defined for purposes of Part 303 as "soil, rocks, sand, waste of any kind, or any other material *that displaces soil or water or reduces water retention potential*." MCL 324.30301(1)(d) (emphasis added). To resolve the overlap between MCL 324.30304 and MCL 324.30305 concerning drainage, the *Huggett* Court applied "a balanced reading" of those sections to only allow "*inconsequential* draining" to be conducted without a permit. *Huggett*, 464 Mich at 720 (emphasis added). Analogously, we conclude that even if "cultivating" may encompass some *limited* placement of fill material in a wetland, this permitted act must be balanced with the express prohibition of fill materials that displace water or soil or reduce the wetland's ability to retain water. See MCL 324.30301(1)(d); MCL 324.30304(a); MCL 324.30305(2)(e).

Accordingly, although the placement of certain materials, such as manure, on a wetland to cultivate the land may qualify under the farming-activities exemption, we cannot conclude that defendants' extensive placement of soil and other materials in this case qualifies under the exemption, especially given the definition of "fill material" in MCL 324.30301(1)(d). It is apparent from the documentary evidence in the record that there was no genuine issue of material fact that defendants' extensive filling of the approximately 1.6-acre area[6] was distinct from activities routinely performed in "the operation, improvement, expansion,

[6] As discussed later in this opinion, the trial court concluded that only 1.2 acres of the total area filled was subject to relief under the statute of limitations.

and maintenance of a farm [or ranch], or to the actual practice of farming [or ranching]," see *Huggett*, 464 Mich at 719, especially because it *completely changed* the character of the vast majority of that 1.6-acre area such that it is now an upland meadow surrounded by wetland, except for the very small portions of the area that still qualify as wetland despite the filling.[7] See *Allison*, 481 Mich at 425; *Calhoun*, 297 Mich App at 11. Cf. MCL 324.30305(2)(e), as amended by 2012 PA 247 (now MCL 324.30305(2)(e)(*iii*)) ("Wetland *altered* under this subdivision shall not be used for a purpose other than a purpose described in this subsection without a permit from the department.") (emphasis added).

Accordingly, we conclude that the trial court correctly determined that defendants' filling activities required a permit and properly granted summary disposition in favor of plaintiff pursuant to MCR 2.116(C)(10).[8]

III. STATUTE OF LIMITATIONS

Defendants argue that the trial court erred by denying their motion for summary disposition pursuant to MCR 2.116(C)(7) because plaintiff's complaint was barred by both the applicable statute of limita-

[7] There is no dispute that the filled area was no longer a wetland. However, the parties dispute the effect of the filling on the entire 145-acre wetland complex.

[8] For similar reasons, the trial court properly denied defendants' earlier motion for summary disposition pursuant to MCR 2.116(C)(8). See *Diallo v LaRochelle*, 310 Mich App 411, 414; 871 NW2d 724 (2015) ("A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a complaint.") (quotation marks and citation omitted); *Diem v Sallie Mae Home Loans, Inc*, 307 Mich App 204, 210; 859 NW2d 238 (2014) ("Summary disposition under MCR 2.116(C)(8) is appropriate where the complaint fails to state a claim on which relief may be granted.") (quotation marks and citation omitted).

tions and the doctrine of laches. We disagree.

A. STANDARD OF REVIEW

This Court reviews de novo both the applicability of a statute of limitations, *Attorney General v Harkins*, 257 Mich App 564, 569; 669 NW2d 296 (2003), and the trial court's ruling on a motion for summary disposition, *Kincaid v Cardwell*, 300 Mich App 513, 522; 834 NW2d 122 (2013). "Summary disposition under MCR 2.116(C)(7) is appropriate when the undisputed facts establish that the plaintiff's claim is barred under the applicable statute of limitations." *Kincaid*, 300 Mich App at 522. "Generally, the burden is on the defendant who relies on a statute of limitations defense to prove facts that bring the case within the statute." *Id*.

> When reviewing a motion under MCR 2.116(C)(7), this 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) (citations omitted).]

B. ANALYSIS

1. APPLICABLE STATUTE OF LIMITATIONS

MCL 324.30315(1) provides:

> If, on the basis of information available to the depart-

> ment [of environmental quality], the department finds that a person is in violation of this part or a condition set forth in a permit issued under section 30311 or 30312, the department shall issue an order requiring the person to comply with the prohibitions or conditions or the department shall request the attorney general to bring a civil action under section 30316(1).

Under MCL 324.30316(1), if the department so requests, "[t]he attorney general may commence a civil action for appropriate relief, including injunctive relief . . . ." The NREPA does not provide a statute of limitations for NREPA enforcement actions. *Harkins*, 257 Mich App at 570.

"Statutes of limitations are found at Chapter 58 of the Revised Judicature Act (RJA), MCL 600.5801 *et seq*." *Peabody v DiMeglio*, 306 Mich App 397, 404; 856 NW2d 245 (2014). In *Harkins*, 257 Mich App at 570, we concluded that the attorney general's civil action seeking restoration of a wetland following violations of Part 303 of the NREPA "comes within the meaning of a 'personal action' as defined in [MCL 600.]5813" for two reasons: "it seeks to 'repair some loss,' " and "[a]ctions brought by the Attorney General on behalf of government departments are deemed personal actions." MCL 600.5813 provides that "[a]ll other personal actions shall be commenced within the period of 6 years after the claims accrue and not afterwards unless a different period is stated in the statutes." Accordingly, given the absence of a statute of limitations in the NREPA, we reasoned:

> While MCL 324.30316 provides for the commencement of a civil action by the Attorney General to seek "appropriate relief, including injunctive relief" for permit violations, it does not state a period of limitations for bringing such actions. The Revised Judicature Act specifies that § 5813

> is the general statute of limitations applying to "[a]ll other personal actions . . . unless a different period is stated in the statutes." This Court has held that "a civil cause of action arising from a statutory violation is subject to the six-year limitation period found in § 5813, if the statute itself does not provide a limitation period." *DiPonio Constr Co v Rosati Masonry Co, Inc*, 246 Mich App 43, 56; 631 NW2d 59 (2001). There being no period of limitations expressly applicable to actions brought under the NREPA, the general limitation provisions of § 5813 apply. [*Harkins*, 257 Mich App at 570-571.]

Accordingly, we concluded that the six-year statutory period of limitations set forth in MCL 600.5813 applied to the plaintiff's civil action against the defendant, which sought restoration of the wetland. *Id*. at 570-572.

Defendants attempt to distinguish *Harkins* from this case, emphasizing that *Harkins* only addressed the application of § 5813 to equitable actions and that the *Harkins* Court was not confronted with the argument that MCL 600.5809(2), which contains a two-year period of limitations, applies to claims for civil penalties. However, MCL 600.5815 states, in relevant part, that "[t]he prescribed period of limitations shall apply equally to all actions whether equitable or legal relief is sought." See also *Harkins*, 257 Mich App at 570 n 3 (quoting MCL 600.5815). Thus, even though *Harkins* focused on the period of limitations for equitable relief, under MCL 600.5815, the limitations period for an action does not hinge on the type of relief sought. Therefore, a necessary implication of *Harkins* is that all enforcement actions under Part 303 are governed by the six-year period of limitations under MCL 600.5813. Moreover, in *Harkins*, 257 Mich App at 568, the DEQ sought civil fines in addition to a restoration order, the same relief that plaintiff seeks in this case. Thus, we reject defendants' claim that *Harkins* is

distinguishable and apply the holding therein as binding precedent. See MCR 7.215(C)(2) and (J)(1).

Further, even if *Harkins* were not controlling, defendants' argument that MCL 600.5809(2) is the correct statute of limitations has no merit. MCL 600.5809(2) provides, "The period of limitations is 2 years for an action for the recovery of a penalty or forfeiture based on a penal statute brought in the name of the people of this state." Defendants characterize the instant action as being "based on a penal statute brought in the name of the people of this state" because a state agency, the DEQ, has brought this action through the attorney general and is seeking a penalty. However, the Michigan Supreme Court has recognized that MCL 600.5809(2) "applies in the criminal context," meaning that it "applies only to civil forfeiture actions based on a penal statute." *People v Monaco*, 474 Mich 48, 55; 710 NW2d 46 (2006) (quotation marks and citation omitted). There is no criminal statute or criminal action brought in the name of the people of this state at issue here.[9] Further, when viewed in context, it is clear that the phrase "an action for the recovery of a penalty or forfeiture" refers to an action to recover a penalty or forfeiture that *already has been assessed*, i.e., a noncontractual money obligation, not an action to *impose* a penalty. See *Sweatt v Dep't of Corrections*, 468 Mich 172, 179-180; 661 NW2d 201 (2003) (stating that statutory terms are not construed in a vacuum; rather, they must be read in context). Accordingly, we reject defendants' claim that the MCL 600.5809(2) period of limitations is applicable here.[10]

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[9] Although there are provisions for imposing criminal liability under MCL 324.30316, defendants were not held criminally liable in this case.

[10] We also reject defendants' reliance on the Michigan Department of Environmental Quality Land and Water Management Division Compli-

2. PLAINTIFF'S COMPLIANCE WITH THE STATUTE OF LIMITATIONS

Next, defendants contend that even if the six-year period of limitations under MCL 600.5813 applies, plaintiff's complaint is barred because its claim accrued more than six years before the complaint was filed in December 2013. We reject defendants' argument.

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ance and Enforcement Guidance Manual, which was proffered in the trial court, as a guideline that is binding on plaintiff with regard to the applicable statute of limitations. As explained in this opinion, we recognized in *Harkins*—which was decided more than two years after the manual was issued, according to trial testimony and the date on the manual's cover—that the NREPA does not include a statute of limitations for enforcement actions, and "the general limitation provisions of § 5813 apply."

Further, there is no indication that the manual constitutes a guideline that is binding on the agency pursuant to MCL 24.203(7), as amended by 2011 PA 239 (formerly MCL 24.203(6)). This Court has recognized that to promulgate a guideline under the Administrative Procedures Act, the agency must follow a specific procedure. See *In re Pub Serv Comm Guidelines for Transactions Between Affiliates*, 252 Mich App 254, 265 n 1; 652 NW2d 1 (2002); *Faircloth v Family Independence Agency*, 232 Mich App 391, 403 n 6; 591 NW2d 314 (1998), citing former MCL 24.203(6) (now MCL 24.203(7)) and MCL 24.224 (outlining the process by which an agency adopts a guideline). Defendants have provided no evidence that such a process was followed before the manual was issued, and we have found no indication that such a process was followed. See MCL 24.224. Rather, the relevant documents suggest that the contrary is true. The manual explains, "This manual describes the process and procedure for the Land and Water Management Division enforcement and compliance program, and implements the Department of Environmental Quality Compliance and Enforcement Policy, 04-003," and a revised version of DEQ Compliance and Enforcement Policy 04-003 states at the top: "This document is intended to provide guidance to staff to foster consistent application of the DEQ's compliance and enforcement processes and procedures. *This document is not intended to convey any rights to any person nor itself create any duties or responsibilities under the law*. This document and matters addressed herein are subject to revision." (Emphasis added.) Further, Smith testified at trial that the DEQ division that promulgated the manual no longer exists and that the manual is no longer in use by the DEQ.

MCL 600.5827 states, "Except as otherwise expressly provided, the period of limitations runs from the time the claim accrues." Generally, a "claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results." *Id*. Plaintiff filed suit on December 19, 2013, and conceded in the trial court that it was time-barred from seeking enforcement of any violation occurring between 2005 and 2007. The trial court limited its judgment accordingly, ordering defendants to restore the 1.2 acres of wetland "into which fill material was placed after December 19, 2007."

However, defendants maintain that plaintiff's claim accrued in 2005 when they *first* placed fill dirt in the wetland, and they suggest that allowing plaintiff to enforce violations that occurred after 2007 invokes the continuing-violations doctrine—also known as the continuing-tort or continuing-wrong doctrine—which was abrogated by *Garg v Macomb Co Community Mental Health Servs*, 472 Mich 263, 284; 696 NW2d 646 (2005), amended 473 Mich 1205 (2005). We disagree.

Under the continuing-violations doctrine, "[w]here a defendant's wrongful acts are of a continuing nature, the period of limitation will not run until the wrong is abated; therefore, a separate cause of action can accrue each day that defendant's tortious conduct continues." *Harkins*, 257 Mich App at 572 (quotation marks and citation omitted; alteration in original); see also *Garg*, 472 Mich at 278-282. However, the Michigan Supreme Court has concluded that "the 'continuing violations' doctrine is contrary to Michigan law" and "has no continued place in the jurisprudence of this state." *Garg*, 472 Mich at 284, 290. Even though *Garg* was a discrimination case involving a three-year period of

limitations, "[t]he holding of *Garg* does not appear limited to discrimination cases; rather, the Court applied the plain text of the limitations and accrual statutes" in this state. *Terlecki v Stewart*, 278 Mich App 644, 655; 754 NW2d 899 (2008). Accordingly, we have held that the continuing-violations doctrine is no longer viable in Michigan. See *Rusha v Dep't of Corrections*, 307 Mich App 300, 313 n 9; 859 NW2d 735 (2014); *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 285-286; 769 NW2d 234 (2009); *Terlecki*, 278 Mich App at 654-655.

At first glance, it may appear that plaintiff's claims in this case are based on the now-overruled doctrine. However, an examination of *Garg* reveals that plaintiff's claims are not based on that doctrine.

In *Garg*, the plaintiff filed suit in 1995, claiming unlawful retaliation under the Civil Rights Act (CRA), MCL 37.2101 *et seq*. *Garg*, 472 Mich at 270. She alleged, among other things, that she was denied multiple promotions after filing a grievance in 1987. *Id*. at 270, 277. The Court reasoned that MCL 600.5805, which sets forth the statute of limitations for tort actions, and MCL 600.5827, which pertains to claim accrual, do not "permit[] a plaintiff to recover for injuries outside the limitations period when they are susceptible to being characterized as 'continuing violations.' To allow recovery for such claims is simply to extend the limitations period beyond that which was expressly established by the Legislature." *Id*. at 281-282. The Court held "that a person must file a claim under the [CRA] within three years of the date his or her cause of action accrues, as required by § 5805(10)." *Id*. at 284. Applying the three-year period of limitations to the plaintiff's claims in *Garg*, the Court ruled

that "plaintiff's claims of retaliatory discrimination arising from acts occurring before June 21, 1992, are untimely and cannot be maintained." *Id*. at 286.

Thus, under *Garg*, each alleged violation of the statute was a separate claim with a separate time of accrual. This Court came to the same conclusion in *Tarlecki*, explaining that, under *Garg*, whether a claim is timely is determined by the statute of limitations applicable to that claim, and that a "claim accrue[s] '[e]xcept as otherwise expressly provided . . . at the time the wrong upon which the claim is based was done regardless of the time when damage results.' " *Terlecki*, 278 Mich App at 657, quoting MCL 600.5827 (second alteration in original). Accordingly, the fact that some of a plaintiff's claims accrued outside the applicable limitations period does not time-bar all the plaintiff's claims. See *Garg*, 472 Mich at 286; *Terlecki*, 278 Mich App at 657-658.

In this case, defendants violated Part 303 each time they deposited fill material in the wetland. See MCL 324.30304(a). Therefore, even though plaintiff could not seek enforcement of the violations that occurred before December 19, 2007, it was not barred from initiating an enforcement action for the violations that occurred within the limitations period. Hence, the trial court correctly concluded that plaintiff's claims arising from acts that occurred after December 19, 2007, were not time-barred.

3. DOCTRINE OF LACHES

Lastly, defendants argue that the doctrine of laches bars plaintiff's claims. We disagree.

"The doctrine of laches is triggered by the plaintiff's failure to do something that should have been done under the circumstances or failure to claim or enforce

a right at the proper time." *Attorney General v Power-Pick Player's Club of Mich, LLC*, 287 Mich App 13, 51; 783 NW2d 515 (2010). However, the doctrine is only "applicable in cases in which there is an unexcused or unexplained delay in commencing an action and a corresponding change of material condition that results in prejudice to a party." *Pub Health Dep't v Rivergate Manor*, 452 Mich 495, 507; 550 NW2d 515 (1996). See also *Knight v Northpointe Bank*, 300 Mich App 109, 114; 832 NW2d 439 (2013) ("If a plaintiff has not exercised reasonable diligence in vindicating his or her rights, a court sitting in equity may withhold relief on the ground that the plaintiff is chargeable with laches."); *Tenneco Inc v Amerisure Mut Ins Co*, 281 Mich App 429, 457; 761 NW2d 846 (2008) ("For laches to apply, inexcusable delay in bringing suit must have resulted in prejudice."). "The defendant has the burden of proving that the plaintiff's lack of due diligence resulted in some prejudice to the defendant." *Yankee Springs Twp v Fox*, 264 Mich App 604, 612; 692 NW2d 728 (2004). The Michigan Supreme Court previously stated that when a party files a claim within the relevant period of limitations, "any delay in the filing of the complaint was presumptively reasonable, and the doctrine of laches is simply inapplicable." *Mich Ed Employees Mut Ins Co v Morris*, 460 Mich 180, 200; 596 NW2d 142 (1999). But this Court has held that courts may apply the doctrine of laches to bar actions at law even when the period of limitations established by the Legislature has not expired. *Tenneco*, 281 Mich App at 457.

In this case, it is likely that plaintiff did not "exercise[] reasonable diligence" in pursuing its rights.[11]

[11] Plaintiff sent a violation notice to defendants in December 2010 and ordered them to restore the area within 30 days, or within a time frame mutually agreed upon by the parties. After defendants asserted that

Knight, 300 Mich App at 114. However, defendants have not identified any prejudice that would justify application of the doctrine of laches. *Yankee Springs*, 264 Mich App at 612. Defendants assert that because of plaintiff's delay, the filled area is now "a cultivated and stabilized field of pasture grass." However, they do not explain how the presence of a stabilized field of pasture grass demonstrates that *plaintiff's delay caused* "a corresponding *change of material condition* that result[ed] in prejudice to [defendants]." *Rivergate Manor*, 452 Mich at 507 (emphasis added); see also *Yankee Springs*, 264 Mich App at 612. For example, they identify no additional expense or harm that they have incurred, or that they will incur, related to the pasture grass that has resulted exclusively from plaintiff's delay. Instead, they essentially argue that laches should apply because the area was successfully converted into something of a different nature during the period of plaintiff's delay. Cf. *PowerPick Club*, 287 Mich App at 51 ("The defense, to be raised properly, must be accompanied by a finding that the delay caused some prejudice to the party asserting laches and that it would be inequitable to ignore the prejudice so created.") (quotation marks and citation omitted). Moreover, plaintiff notified defendants that it might assert its rights at any time and that defendants continued growing pasture grass on the field at their own risk.

Most importantly, however, defendants are not entitled to assert the equitable defense of laches because

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they were exempt from the wetland permitting requirements, plaintiff warned defendants in February 2011 that "if the site is not restored, . . . this violation may be referred for escalated enforcement action." Subsequently, one of plaintiff's employees visited the property once a year in 2011, 2012, and 2013, and observed that restoration efforts had not begun. It is unclear why plaintiff waited until the end of 2013 to file an enforcement action.

they came before the trial court with unclean hands. *Id*. at 50-52. "Our Supreme Court has observed that a party who has 'acted in violation of the law' is not 'before a court of equity with clean hands,' and is therefore 'not in position to ask for any remedy in a court of equity.' " *Id*. at 52 (citation omitted). As explained earlier in this opinion, defendants violated Part 303 of the NREPA each time they deposited fill material in the wetland. See MCL 324.30304(a). Thus, the trial court properly concluded that the doctrine of laches does not bar plaintiff's claim in this case.

IV. RESTORATION RULING

Next, defendants contend that the trial court erred by ordering them to restore the area of the wetland on which fill material was deposited after December 19, 2007. We disagree.

A. STANDARD OF REVIEW

The parties do not dispute that "the trial court's factual findings are reviewed for clear error." *Canjar v Cole*, 283 Mich App 723, 727; 770 NW2d 449 (2009). "A finding of fact 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). However, the parties dispute the standard of review applicable to the trial court's restoration order in light of contradictory caselaw. Defendants assert that a restoration order constitutes equitable relief that is reviewed de novo, while plaintiff argues that a restoration order is injunctive relief that is reviewed for an abuse of discretion. We agree with plaintiff.

First, the applicable statute affords the trial court significant discretion in fashioning a remedy for a violation of Part 303. MCL 324.30316(4) provides:

> In addition to the penalties provided under subsections (1), (2), and (3), the court *may* order a person who violates this part to restore as nearly as possible the wetland that was affected by the violation to its original condition immediately before the violation. The restoration *may* include the removal of fill material deposited in the wetland or the replacement of soil, sand, or minerals. [Emphasis added.]

"[T]he term 'may' presupposes discretion and does not mandate an action." *In re Weber Estate*, 257 Mich App 558, 562; 669 NW2d 288 (2003). Accordingly, when the term "may" is used in the statute or court rule authorizing the action at issue, "review for an abuse of discretion is appropriate." *Detroit Edison Co v Stenman*, 311 Mich App 367, 384 n 8; 875 NW2d 767 (2015).

Likewise, on the basis of the relevant caselaw, we agree with plaintiff that the abuse of discretion standard applicable to injunctive relief is the applicable standard of review for the trial court's restoration ruling. We previously recognized that an order to restore a wetland "is essentially a mandatory injunction that historically has been considered an equitable remedy . . . ." *People v Keeth*, 193 Mich App 555, 562; 484 NW2d 761 (1992). Both this Court and the Michigan Supreme Court have repeatedly stated that a trial court's decision to grant injunctive relief is reviewed for an abuse of discretion. See, e.g., *Pontiac Fire Fighters Union Local 376 v Pontiac*, 482 Mich 1, 8; 753 NW2d 595 (2008); *Martin v Murray*, 309 Mich App 37, 45; 867 NW2d 444 (2015); *Janet Travis, Inc v Preka Holdings, LLC*, 306 Mich App 266, 274; 856 NW2d 206

(2014).[12] "An abuse of discretion occurs when the court's decision falls outside the range of reasonable

[12] Other cases have indicated that a trial court's imposition of an injunction is reviewed de novo. See, e.g., *Williamstown Twp v Hudson*, 311 Mich App 276, 289; 874 NW2d 419 (2015). The confusion seems to arise from the fact that an injunction is an equitable remedy, *Terlecki*, 278 Mich App at 663, and equitable relief is generally reviewed de novo, *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 197; 747 NW2d 811 (2008) ("When reviewing a grant of equitable relief, an appellate court will set aside a trial court's factual findings only if they are clearly erroneous, but whether equitable relief is proper under those facts is a question of law that an appellate court reviews de novo.").

However, we have located no recent Michigan Supreme Court cases indicating that a trial court's imposition of an injunction is reviewed de novo. The most recent Supreme Court case we could find that seemed to even suggest de novo review was *Sch Dist for Holland v Holland Ed Ass'n*, 380 Mich 314, 319; 157 NW2d 206 (1968). And, in reviewing the caselaw as a whole, it is clear that injunctive relief is carved out from the general rule that equitable relief is reviewed de novo and is, instead, reviewed for an abuse of discretion. See *Pontiac Fire Fighters*, 482 Mich at 8; *Mich Coalition of State Employee Unions v Mich Civil Serv Comm*, 465 Mich 212, 217; 634 NW2d 692 (2001); *Martin*, 309 Mich App at 45; *Barrow v Detroit Election Comm*, 305 Mich App 649, 662; 854 NW2d 489 (2014) ("We review for an abuse of discretion a circuit court's decision whether to grant injunctive relief."); *Wayne Co Employees Retirement Sys v Wayne Co*, 301 Mich App 1, 25; 836 NW2d 279 (2013) ("The decision whether to grant injunctive relief is discretionary, although equitable issues are generally reviewed de novo, with underlying factual findings being reviewed for clear error."), vacated in part on other grounds 497 Mich 36 (2014); *Cipri v Bellingham Frozen Foods, Inc*, 235 Mich App 1, 9; 596 NW2d 620 (1999).

Notably, we acknowledged the competing standards of review in *Cipri*, 235 Mich App at 9, while reviewing a trial court's denial of a request for a restoration order under the Michigan environmental protection act (MEPA), Part 17 of the NREPA, MCL 324.1701 *et seq*.:

> Lastly, equitable issues are reviewed de novo, although the findings of fact supporting the decision are reviewed for clear error. *Webb v Smith (After Remand)*, 204 Mich App 564, 568; 516 NW2d 124 (1994). However, "[t]he granting of injunctive relief is within the sound discretion of the trial court, although the decision must not be arbitrary and must be based on the facts of the particular case." *Holly Twp v Dep't of Natural Resources*, 440

and principled outcomes." *Ypsilanti Charter Twp v Kircher*, 281 Mich App 251, 273; 761 NW2d 761 (2008).

B. ANALYSIS

As onerous as the remedy may seem, the trial court did not abuse its discretion when it ordered defendants to restore the filled area.

1. TRIAL COURT'S FINDINGS AND REASONING

"Injunctive relief is an extraordinary remedy that issues only when justice requires, there is no adequate remedy at law, and there is a real and imminent danger of irreparable injury." *Janet Travis, Inc*, 306 Mich App at 274. We consider the following factors in determining whether a trial court abused its discretion by issuing a permanent injunction:

> (a) the nature of the interest to be protected, (b) the relative adequacy to the plaintiff of injunction and of other remedies, (c) any unreasonable delay by the plaintiff in bringing suit, (d) any related misconduct on the part of the plaintiff, (e) the relative hardship likely to result to defendant if an injunction is granted and to plaintiff if it is denied, (f) the interests of third persons and of the public, and (g) the practicability of framing and enforcing the order or judgment. [*Id*. (quotation marks and citation omitted).]

See also *Kernen v Homestead Dev Co*, 232 Mich App 503, 514-515; 591 NW2d 369 (1998). Additionally, "[c]ourts balance the benefit of an injunction to a

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Mich 891 (1992); see also *Wayne Co Dep't of Health v Olsonite Corp*, 79 Mich App 668; 699-700, 706-707; 263 NW2d 778 (1977).

We ultimately determined that "the trial court *did not abuse its discretion* in denying plaintiff's claim for equitable relief under the MEPA." *Cipri*, 235 Mich App at 10 (emphasis added).

requesting plaintiff against the damage and inconvenience to the defendant, and will grant an injunction if doing so is most consistent with justice and equity." *Janet Travis, Inc*, 306 Mich App at 274-275.

A close examination of the trial court's findings reveals that the court took these factors into consideration—albeit not explicitly—when determining that restoration of the wetland was warranted. Accordingly, for the reasons explained subsequently in this opinion, the trial court's reasoning and conclusion were not outside the range of principled outcomes. See *Ypsilanti Charter Twp*, 281 Mich App at 273.

The trial court first stated that it was not persuaded that the area at issue was in the process of returning to a wetland. The court based this finding on its review of the photographs proffered by both parties during the trial, particularly those photographs clearly showing that defendants had filled the site and that pasture grass had been planted—two facts never disputed by defendants. Additionally, Martin had testified that only 0.4 acres of the area, at most, would revert back to wetland over time. Accordingly, the trial court's finding was not clearly erroneous, and the court plainly supported its conclusion that restoration was necessary to protect the public's interest in preserving wetlands under the statute. See *King*, 303 Mich App at 185.

Next, the trial court found that defendants' violation of the statute was not intentional and acknowledged defendants' argument that restoration was unwarranted since the filled area had been improved because they "creat[ed] an upland area inside this wetland" that included various forms of wildlife. The court, however, concluded that such a consideration was not relevant to whether restoration is proper in this case, explaining: "I think what it comes down to is the Act

has to be enforced. There's no provision in there that . . . says that it's all right for me to fill in a wetland if it's going to improve it." The trial court's conclusion that this fact weighed in favor of ordering restoration, regardless of defendants' intent, is supported by the statute, see MCL 324.30316, and was not outside the range of principled outcomes, see *Ypsilanti Charter Twp*, 281 Mich App at 273.

The trial court then determined that the parties' potential settlement discussions regarding the possibility of a "conservatory easement" were not relevant to its determination of whether restoration was proper. It also acknowledged the contradictory testimony regarding the prevalence of narrow-leaf cattails in the filled area and whether that type of cattail constituted an invasive species that is harmful to the wetland. It ultimately concluded that it "was not convinced that there was really an invasive species issue either."

On appeal, defendants argue that because the filled area was previously dominated by narrow-leaf cattails, a nonnative species, it was improper for the trial court to order them to restore the area with native species, thereby making "the filled wetland better than it was before." However, it is important to note that neither party was certain what species were present in the wetland before it was filled, and there was conflicting testimony provided by defendants' expert and plaintiff's experts as to whether the area was previously dominated by narrow-leaf cattails and whether such cattails are harmful. Martin, defendants' expert, testified on the basis of her review of aerial photographs and her observations of the surrounding wetlands that the filled area had been dominated by narrow-leaf cattails, although she thought there were "probably" other wetland species present. Plaintiff's experts testi-

fied to the contrary, opining—on the basis of aerial photographs, wetland samples, and other evidence—that the filled expanse was "a pretty diverse area" including "a number of different habitat types," such as "large patches" of cattails as well as a mixture of assorted vegetation, including one section "dominated by shrubs." There also was conflicting testimony about whether narrow-leaf cattails would be problematic to the restoration project or would render the restoration project futile. However, in determining whether a finding was clearly erroneous, we must give deference "to the trial court's superior ability to judge the credibility of the witnesses who appeared before it." *Ambs v Kalamazoo Co Rd Comm*, 255 Mich App 637, 652; 662 NW2d 424 (2003) (quotation marks and citation omitted); see also MCR 2.613(C). Given the factual disputes, the trial court's finding that there was not "an invasive species issue" was not clearly erroneous. See *King*, 303 Mich App at 185.

Furthermore, the trial court had the authority to order defendants "to restore as nearly as possible the wetland that was affected by the violation to its original condition immediately before the violation." MCL 324.30316(4). Given the uncertainty regarding the wetland's original condition, the trial court did not exceed its authority under Part 303 by ordering defendants to "[r]e-establish wetland vegetation in the restoration area by applying a DEQ-approved native wetland plant seed mix and planting native Michigan species of wetland shrubs."

Next, the trial court determined that the wetland had been compacted and found that this fact was relevant to its consideration of whether the fill material should be removed. At trial, defendants' counsel expressed doubt regarding Smith's testimony on behalf

of plaintiff that there were two to three feet of fill material throughout the filled area given that only two soil borings had been conducted within the area. However, plaintiff's witnesses provided clear testimony regarding the depth of the fill and the heavy fill material that made further soil boring impossible. Thus, the court's finding on this matter was not clearly erroneous. See *King*, 303 Mich App at 185.

The trial court then noted that "[t]here was discussion concerning the statute of whether or not the loss of the wetland could deprive the state" of certain benefits, but the court "did not consider those to be requirements . . . because it was undisputed that the property had already been designated as a wetland." The statute to which the court was referring is MCL 324.30302, which sets forth the Legislature's findings regarding wetland benefits. The experts who testified in this case disagreed regarding the benefits that the filled area previously provided, but the trial court seemed to presume that the wetland provided one or more of the benefits identified by the Legislature because the area already had been designated as a wetland. Nonetheless, given the fact that both parties acknowledged that the filled area provided *some* benefit, even though they disputed the types and extent of the benefits, the trial court did not clearly err by concluding that restoration of the wetland would be beneficial given its prior designation as a wetland. See *King*, 303 Mich App at 185.

However, defendants argue on appeal—as they did in the trial court—that the trial court should have considered the specific effects of the filling on the surrounding wetland complex. Specifically, they contend that "the wetland complex in which [they] placed fill dirt is not rare or imperiled, the fill has not affected

any endangered or threatened species, and has not materially lessened the capacity of the wetland complex to function."[13] Likewise, they argued that restoring the filled area would impose a disproportionate burden on them because "the placement of fill dirt on 1½ acres to make this pasture . . . has not had any significant impact on the 145[-]acre wetland complex . . . ." Defendants rely on the wetland assessment report—prepared by their expert using a methodology not previously used to analyze a filled wetland area that had not been observed prior to the filling—which concluded that restoration of the wetland would not materially improve the benefits provided by the entire 145-acre wetland complex. To the contrary, Kolhoff testified on behalf of plaintiff that "the fill eliminated the wetland . . . . It's gone; it was a functioning wetland that was ponded. It had habitat value; it possibly had storm water value, it had water storage, water recharge, pollution control value and those values are gone." Kolhoff conceded that the area was "a small part of a larger complex," but explained that "it occupied a unique location compared to the rest of the wetland complex and it provided a different function than the remaining wetland would." He also noted that this case involves "a significant fill as far as a permit issue is concerned," because an "acre and a half is a substantial

[13] MCL 324.30301(k), as amended by 2009 PA 120, effective November 6, 2009, identifies various wetland types as falling within the "rare and imperiled wetland" category. Although whether a wetland is "rare and imperiled" may seem significant, the phrase only appears in one other Part 303 section, MCL 324.30304b, which pertains to permits issued by the United States Army Corps of Engineers. MCL 324.30304b(2)(b)(*i*). Moreover, there was conflicting testimony regarding whether the area at issue previously was a rare and imperiled wetland as an "inundated shrub swamp," and Kolhoff testified that "scrub-shrub areas like that typically can house a number of threatened or endangered or imperiled species."

impact" for purposes of issuing permits or reviewing violations. Consistent with his testimony, it was undisputed that more than one acre of wetland was filled, which constitutes "a major project" for permitting purposes. See MCL 324.30306(3)(c)(*i*) (indicating a wetland permit fee of $2,000 for a major project, including the "[f]illing or draining of 1 acre or more of coastal or inland wetland"). Accordingly, on this record, the trial court was justified in concluding that restoration was warranted, and this conclusion was not outside the range of reasonable and principled outcomes. See *Ypsilanti Charter Twp*, 281 Mich App at 273.

Furthermore, the trial court expressly recognized the burden that restoration would place on defendants, but weighed this fact against the potential precedential effect of allowing defendants to destroy a wetland and expand their usable property without any recourse:

> So I understand that that leaves the [defendants] in a difficult spot in that the property has been filled, [sic] there's the cost associated with reclearing the property[,] but if I did not order restoration that means that the [defendants] would in essence add an additional property to their land by filling this wetland.

Likewise, it later stated, "The Court is . . . cognizant of the impact of this decision[,] but I believe that for the precedence value the Court cannot say that the [defendants] should not have to restore the property in this matter." In so stating, the trial court implicitly recognized plaintiff's and the public's interest in ensuring that violations are remedied and prevented and that individual citizens are not incentivized to violate the law and infringe on the public's interest in preserving wetlands, in light of a likelihood that their actions will not be punished.

In sum, the trial court's findings were not clearly erroneous, as it necessarily had to make credibility determinations given the conflicting evidence. See MCR 2.613(C); *Ambs*, 255 Mich App at 652. Under these circumstances, the restoration order was not an abuse of discretion, as the court's ruling was not "outside the range of reasonable and principled outcomes." *Ypsilanti Charter Twp*, 281 Mich App at 273.

2. DEFENDANTS' ADDITIONAL ARGUMENTS REGARDING THE RESTORATION ORDER

Defendants argue that this Court should consider factors identified in cases applying the Michigan environmental protection act (MEPA), Part 17 of the NREPA, MCL 324.1701 *et seq*., to determine whether the restoration order was warranted in this case. See *Kernen*, 232 Mich App at 507. The MEPA provides, in relevant part:

> The attorney general . . . may maintain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable relief against any person for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction. [MCL 324.1701(1).]

Because "virtually all human activities can be found to adversely impact natural resources in some way or other," factors were developed to determine "whether the impact of a proposed action on wildlife is so significant as to constitute an environmental risk and require judicial intervention . . . ." *Portage v Kalamazoo Co Rd Comm*, 136 Mich App 276, 280-282; 355 NW2d 913 (1984). See also *Nemeth v Abonmarche Dev, Inc*, 457 Mich 16, 31-32; 576 NW2d 641 (1998); *Preserve the Dunes, Inc v Dep't of Environmental*

Quality (On Remand), 264 Mich App 257, 261 n 3; 690 NW2d 487 (2004). The MEPA factors identified by defendants "are not mandatory, exclusive, or dispositive," *Preserve the Dunes*, 264 Mich App at 262 (quotation marks and citation omitted), and they were developed given the need for "the courts to give precise meaning to" the statutory language of Part 17 of the NREPA, *Portage*, 136 Mich App at 281-282. Because those factors were developed without considering the statute at issue in this case, MCL 324.30316, we must refrain from deviating from the clear text of the statute and interjecting judicially crafted meaning into the words written by the Legislature and signed into law by the Executive. See *Huggett*, 464 Mich at 717. Accordingly, we decline to consider those factors, and we cannot conclude that the trial court abused its discretion by failing to consider those elements, especially when there is no legal authority mandating or suggesting their application in cases arising under Part 303. See *Robinson v Lansing*, 486 Mich 1, 15; 782 NW2d 171 (2010) ("[I]t is well established that we may not read into the statute what is not within the Legislature's intent as derived from the language of the statute.") (quotation marks and citation omitted); *In re Keyes Estate*, 310 Mich App 266, 272; 871 NW2d 388 (2015) ("When the Legislature includes language in one part of a statute that it omits in another, this Court presumes that the omission was intentional.").

Defendants also cite cases denying or reversing restoration orders under the federal CWA. According to one of the cases cited by defendants, the Eighth Circuit determines whether a restoration order is appropriate by considering whether the order

> (1) is designed to confer maximum environmental benefit,
> (2) is practical and feasible from an environmental and

> engineering standpoint, and (3) takes into consideration the financial resources of the defendant, and (4) includes consideration of defendant's objections. [*United States v Huseby*, 862 F Supp 2d 951, 966 (D Minn, 2012).]

Again, while the trial court could have considered these factors when deciding whether to order restoration, it would be inappropriate for us to conclude that consideration of these factors is mandatory when determining whether a restoration order is warranted for purposes of Part 303 when the Legislature did not so restrict the trial court's discretion.

More generally, however, we reject defendants' reliance on federal law as a basis for reversal. In *Huggett*, 464 Mich at 721-722, the Michigan Supreme Court rejected this Court's reliance, in determining the scope of the farming-activities exemption, on the "analogous, similarly worded" provisions of the CWA and its belief that the WPA was intended to "be consistent with, and at least as stringent as," the CWA. See *Huggett*, 232 Mich App at 194-195. The Supreme Court stated: "[T]he Court of Appeals relied on federal law to reach its conclusion. Because we can discern the Legislature's intent on this question from the wetland provisions themselves, we need not concern ourselves with federal law in this case. For these reasons, we disagree with these aspects of the Court of Appeals opinion." *Huggett*, 464 Mich at 722 (citation omitted). Similarly, the Michigan Supreme Court noted in *Garg*, 472 Mich at 283, "While 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." There is no indication in the statute at issue that trial courts are required to consider specific factors before ordering restoration of a wetland, or that we are required to consider specific factors when

reviewing a trial court's order of restoration on appeal. Accordingly, we reject defendants' reliance on federal caselaw in this case given the extensive discretion[14] under MCL 324.30316(4) for the trial court to order restoration of the wetland.

V. CIVIL FINE

Defendants next argue that the trial court erroneously ordered them to pay a $10,000 fine. Given the trial court's stated reasons for imposing the fine pursuant to MCL 324.30316(1), the extensive discretion afforded under the statute, and our standard of review, we cannot conclude that the trial court abused its discretion.

A. STANDARD OF REVIEW

MCL 324.30316(1) states that "[i]n addition to any other relief granted under this section, the court may impose a civil fine of not more than $10,000.00 per day of violation." Again, "the term 'may' presupposes discretion and does not mandate an action." *In re Weber Estate*, 257 Mich App at 562. Accordingly, we conclude that the trial court's imposition of a civil fine under Part 303 is reviewed for an abuse of discretion. See *Detroit Edison Co*, 311 Mich App at 384 n 8.

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[14] Notably, the Legislature specified numerous criteria for plaintiff to consider when determining whether to approve a permit for a prohibited activity under MCL 324.30304, including many of the factors advanced by defendants on appeal. See MCL 324.30311. The fact that the Legislature could have provided such guidance to trial courts to aid in determining whether to undo prohibited activities when fashioning a remedy—but chose not to—further suggests that a trial court has discretion. See *In re Keyes Estate*, 310 Mich App at 272 ("When the Legislature includes language in one part of a statute that it omits in another, this Court presumes that the omission was intentional.").

B. ANALYSIS

As just noted, in relevant part, MCL 324.30316(1) provides that "[i]n addition to any other relief granted under this section, the court may impose a civil fine of not more than $10,000.00 per day of violation." As discussed throughout this opinion, defendants violated the NREPA by placing fill material in a wetland without a permit. Therefore, under Part 303 of the NREPA, the trial court was authorized to impose a maximum fine of $10,000 a day.

In its ruling on the record, the trial court first stated that plaintiff had requested the imposition of a $50,000 fine, and the court expressly noted that the statute authorized up to $10,000 a day, "which is high." The court then considered the fines that it had ordered in "some other cases . . . where there was of course just a blatant disregard of the Department's orders and total lack of cooperation . . . ." Ultimately, it determined that a total fine of $10,000 was appropriate in this case. The court stated: "I think the violation occurred in 2008. So we've got a lot of years there." On this basis, it concluded that it would characterize the fine as $2,000 a year for the violations that occurred from 2010 through 2015, presumably in light of the fact that defendants first received notice of their violation, and were first ordered to remedy the violation, in 2010. In so reasoning, the trial court only considered a portion of defendants' ongoing violation of Part 303. Additionally, when divided per diem, based on the limited time frame established by the court, the fine imposed was only approximately $5.50 a day, as opposed to the $10,000 a day fine authorized by statute. Accordingly, the trial court's imposition of a total fine of $10,000 was not an unprincipled outcome, especially, as defendants emphasize, in light of the lack of evidence that they

acted in willful defiance of the law. See *Ypsilanti Charter Twp*, 281 Mich App at 273.

Defendants again rely on federal law to argue that the fine was outside the range of principled outcomes, but this reliance is misplaced. Two of the cases cited by defendants, *United States v Bay-Houston Towing Co, Inc*, 197 F Supp 2d 788 (ED Mich, 2002), and *Catskill Mountains Chapter of Trout Unlimited, Inc v City of New York*, 244 F Supp 2d 41 (ND NY, 2003), rev'd in part and remanded by 451 F3d 77 (CA 2, 2006), applied § 1319 of the CWA. Defendants focus on § 1319(d), which provides, in relevant part:

> In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require. [33 USC 1319(d).]

The Michigan Legislature did not direct courts to consider these factors when imposing civil fines under MCL 324.30316(1), and we may not read that requirement into the statute. Cf. *Garg*, 472 Mich at 282; *Huggett*, 464 Mich at 722.

In the other case cited by defendants, *United States v Bradshaw*, 541 F Supp 880 (D Md, 1981), the statutory section under which the government sought a civil penalty is not readily apparent. The district court simply determined that it was "unnecessary to impose any [civil penalties] because the [d]efendant immediately ceased his activities upon notice of a possible violation." *Id*. at 883. In this case, however, the trial court had discretion to reach the conclusion that it did. Notably, the statute at issue, MCL 324.30316(1), does not limit the trial court's discretion

by preventing it from imposing a fine when the violators immediately ceased their illegal activities, as defendants claim they did. Further, even if defendants did cease their illegal activities, they failed to remedy their violation before the DEQ initiated this action seeking restoration of the wetland and other relief, which was three years after the DEQ first notified them of the violations.

We also disagree with defendants that the penalty-related provisions in the Michigan Department of Environmental Quality Land and Water Management Division Compliance and Enforcement Guidance Manual, which was admitted in the lower court proceeding, establish that the trial court abused its discretion in this case. As previously explained, there is no evidence indicating that the manual constitutes a guideline that is binding on plaintiff.[15] Likewise, there is no indication in the statute that the Legislature intended for the trial court's discretion to be limited by any provisions in a compliance manual, assuming that it was in effect during the events at issue in this case.

VI. CONCLUSION

Defendants have failed to establish that any of their claims raised on appeal warrant relief.

Affirmed.

RIORDAN, P.J., and METER and OWENS, JJ., concurred.

[15] See the discussion in note 10 of this opinion.

PETERSEN FINANCIAL, LLC v TWIN CREEKS, LLC

Docket Nos. 329019 and 329622. Submitted November 1, 2016, at Grand Rapids. Decided November 22, 2016, at 9:00 a.m.

Petersen Financial, LLC, brought this action against Twin Creeks, LLC, James Schaefer, Jill Schaefer, Gary Burghgraef, and others in the Kent Circuit Court to quiet title to a parcel of property located in the Twin Creeks development in Kent County. Petersen's complaint also alleged slander of title and tortious interference with a business expectancy. Twin Creeks Development, LLC, was the original owner of all the lots in the development. It sold part of the lot at issue in this case to Carla Wolterstorff in 2002. The remainder was conveyed to Wolterstorff in 2004. In 2006, Twin Creeks, LLC, an entity different from Twin Creeks Development, LLC, recorded deed restrictions intended to apply to all lots in the Twin Creeks development. The document containing the restrictions indicated that it was executed in 2002. The parties later stipulated that Twin Creeks, LLC, had never had an interest in the lots in the development, and all claims against it were dismissed with prejudice. Wolterstorff ultimately lost her lot because of a tax lien, and Petersen purchased the lot at a foreclosure sale in 2011. Petersen claimed it was unaware of the deed restrictions when it purchased the lot. After Petersen listed the property, Burghgraef, a homeowner in the Twin Creeks development, sent an e-mail to Petersen's real estate agent informing her of the deed restrictions and of the homeowners' intention to enforce the restrictions on Petersen's lot. According to the real estate agent, she then informed potential buyers that the lot was subject to deed restrictions. This allegedly caused buyers to lose interest in the property. On this basis, Petersen asserted that defendants had slandered its title to the lot and had interfered with a business expectancy. The trial court, Dennis B. Leiber, J., disagreed and granted summary disposition to defendants. The court concluded that Petersen had failed to satisfy the publication requirement for its slander-of-title claim and that Petersen failed to support its claim of tortious interference by showing that defendants intentionally interfered in Petersen's real estate venture by contacting third parties. Petersen appealed (Docket No. 329019). In addition, the court granted summary

disposition in favor of Petersen on its quiet-title claim, specifically ruling that the deed restrictions did not apply to Petersen's lot. The Schaefers appealed that ruling (Docket No. 329622). The Court of Appeals consolidated the appeals in an unpublished order entered November 13, 2015.

The Court of Appeals *held*:

1. A slanderous statement must be published to a third party to support a slander-of-title claim. Publication to a plaintiff's agent does not satisfy the requirement of publication to a third party; publication to a party's agent is the same as publication to the party itself. In this case, there also existed the obligation of both the real estate agent and Petersen under MCL 565.957 to disclose any information regarding deed restrictions to possible buyers. Because both Petersen and the real estate agent had a duty to disclose the information to prospective buyers, publication of the deed restrictions to the real estate agent caused no greater harm to Petersen than if Petersen alone had the information.

2. Petersen made no independent argument to support its claim of tortious interference, which also required third-party contact. The tortious-interference claim failed for the same reason as did the slander-of-title claim—there was no communication with a third party.

3. Because deed restrictions not filed in the chain of title are not enforceable, the Schaefers raised equitable arguments in opposition to Petersen's quiet-title claim. None of the equitable arguments could defeat Petersen's right to quiet title of the lot it purchased and then put up for sale. Defendants asserted that Wolterstorff had waived her right to challenge the deed restrictions or had acquiesced in the restrictions' application. However, Petersen had no reason to know of Wolterstorff's experience with the deed restrictions. Moreover, the deed restrictions were not enforceable even if the property owners had agreed to them because the deed restrictions were not filed in the chain of title. Finally, the deed restrictions did not qualify as a reciprocal negative easement because they did not originate from a common owner. Petersen's lot was originally sold to Wolterstorff before the deed restrictions were applied to those who later purchased lots in the same development. A reciprocal negative easement does not arise on one lot simply because the other lot owners conform to the deed restrictions.

Affirmed.

Visser and Associates, PLLC (by *Ken Bauman* and *Donald R. Visser*), for Petersen Financial, LLC.

Burns Law Office, PLC (by *Daniel L. Burns*), for Jim Schaefer and Jill Schaefer.

Before: SAWYER, P.J., and MARKEY and O'BRIEN, JJ.

PER CURIAM. In Docket No. 329019, plaintiff appeals from the trial court's grant of summary disposition in favor of defendants on plaintiff's claims of slander of title and tortious interference with a business expectancy. In Docket No. 329622, defendants James and Jill Schaefer appeal from the trial court's grant of summary disposition in favor of plaintiff on plaintiff's claim to quiet title; defendants specifically appeal the court's decision that certain deed restrictions do not apply to their property. We affirm.

This dispute involves a parcel of land located in the Twin Creeks development in Cannon Township in Kent County. The time line begins in 2000 when defendant Twin Creeks Development, LLC,[1] owned all the lots in the development. Thereafter, the following relevant events occurred:

- In 2002, most of the lot at issue in this case was conveyed by Twin Creeks Development to Carla Wolterstorff, with the remainder of the lot conveyed in 2004.
- In 2006, Twin Creeks, LLC,[2] recorded a document entitled "Deed Restrictions" covering all the lots in

[1] Twin Creeks Development, LLC, is not a party to this case.

[2] Although Twin Creeks, LLC, was originally a defendant in this case, it was dismissed by stipulation. The stipulation acknowledged that "Twin Creeks, L.L.C. does not now have, nor has it ever had an interest in the property" and that all claims against it were dismissed with prejudice. Twin Creeks, LLC, is a business entity different from Twin

the development; the date on the document suggests that it had been executed four years earlier, in 2002.

- Carla Wolterstorff lost the lot due to a tax lien, and the Kent County Treasurer obtained title early in February 2011.
- Plaintiff purchased the lot at a foreclosure sale in September 2011.

The individual defendants, the Schaefers and the Burghgraefs, own parcels within the development.[3] According to plaintiff, it was unaware of the deed restrictions when it purchased the property, but when it listed the property for sale, Gary Burghgraef sent an e-mail to plaintiff's real estate agent notifying the agent that the property was subject to deed restrictions. Additionally, according to an affidavit by plaintiff's real estate agent, she had been "contacted several times by the Defendants in this matter who informed me that there were deed restrictions on Plaintiff's property and that they intended to enforce those restrictions." The real estate agent passed this information along to prospective buyers, who lost interest in the property as a result.

On the basis of defendants' conduct, plaintiff filed the instant action. Ultimately, the trial court granted summary disposition in favor of defendants on plaintiff's claim for slander of title. The trial court opined as follows:

> In order to prevail on a common-law slander of title claim, a plaintiff must prove "that the defendant maliciously published false statements that disparaged a

Creeks Development, LLC. As used in this opinion, the term "defendants" does not include Twin Creeks, LLC.

[3] According to James Schaefer's deposition, when the Schaefers moved into the development, the Burghgraefs owned the only other house in the development.

> plaintiff's right in property, causing special damages." *Fed Nat Mortg Ass'n v Lagoons Forest Condo Ass'n*, 305 Mich App 258, 270; 852 NW2d 217 (2014).
>
> The dispositive issue here is the publication requirement. Plaintiff has produced no evidence that Defendants made comments or other communications regarding the deed restrictions to anyone other than Plaintiff and Plaintiff's real estate agent[]. "Publication to an agent of the plaintiff who is acting at plaintiff's behest and on his behalf is tantamount to a publication to the plaintiff himself, and as such does not fulfill the publication requirement." *Delval v PPG Indus, Inc*, 590 NE2d 1078, 1081 (Ind App, 1992).
>
> Since Plaintiff cannot satisfy the publication requirement, its slander of title claim fails and must be dismissed as to all Defendants.

Plaintiff argues on appeal (Docket No. 329019) that the trial court's reliance on *Delval* was misplaced because it contradicts Michigan law. In this respect, plaintiff relies on this Court's decision in *Ball v White*, 3 Mich App 579, 584; 143 NW2d 188 (1966), in which we stated:

> Defendant further contended that there was no publication of the letter to a third party. However, the transmission of the letter to the employer, Mr. Ball, was a publication. All that is necessary for a publication to exist is the delivery of the defamatory matter to any person other than the one libeled. Our Supreme Court has held that:
>
> "If a person compose a libel and send it to his agent, to be read by him, and it reaches its destination and is read by such agent, it is sufficient publication to support the action." *Bacon* v. *Michigan C. R. Co.* (1884), 55 Mich 224, 228 (54 Am Rep 372).

But neither *Ball* nor the case it relies on, *Bacon*, is on point. *Ball* involved a situation in which the defendant published the defamatory statement not to the plain-

tiffs' agent, but to the plaintiffs' employer. *Ball*, 3 Mich App at 581-582. In *Bacon*, as *Ball*'s quotation from *Bacon* reflects, the defamatory statement was published not to the plaintiff's agent, but to the defendant's own agent. Thus, neither dealt with the situation here, a publication to plaintiff's agent.

We find the reasoning in *Delval*, as adopted by the trial court, to be persuasive. Under these circumstances, publication to plaintiff's agent was the equivalent of publication to plaintiff itself and did not satisfy the publication requirement. Furthermore, we are not persuaded by plaintiff's argument that a different result should be reached because of the real estate agent's obligation to disclose the information to third parties—that is, the potential buyers. Indeed, part of plaintiff's argument only makes the case for why we should follow *Delval*. Plaintiff points to MCL 565.957 and a seller's obligation to disclose a number of things about the property, including whether there is "a homeowners' association that has any authority over the property[.]" In other words, not only would the real estate agent have a duty to disclose, so would the seller.[4] This reinforces the applicability of the principle in *Delval*; because the seller possessed the information, the seller was obligated to disclose it through the agent to any potential buyer. That is, making the claim regarding the alleged deed restrictions to plaintiff's real estate agent caused no further harm than making the claim to plaintiff itself.

Defendants raise a number of other arguments regarding why they were entitled to summary disposition, but the trial court did not address these arguments. In any event, in light of our resolution of this

[4] Indeed, plaintiff acknowledges in its brief that the disclosure act imposes liability on both the seller and the real estate agent.

issue on the basis of the lack of publication to a third party, we need not address these additional arguments.[5]

We now turn to defendants' appeal (Docket No. 329622), which argues that the trial court erred by granting summary disposition in favor of plaintiff on the quiet-title claim. The trial court concluded that the deed restrictions do not apply:

> There are a number of reasons why the Deed Restrictions do not encumber the lot as a restrictive covenant. First, the majority of the lot was conveyed to Carla Woltersto[r]ff prior to the Deed Restrictions being recorded—or even executed. Second, the remainder of the lot was conveyed to Carla Woltersto[r]ff before the Deed Restrictions were recorded. Third, the Deed Restrictions were executed and recorded by Twin Creeks, LLC, which *never* held an interest in Plaintiff's lot, let alone at the time it executed or recorded the Deed Restrictions. Based on all of this, the Deed Restrictions were clearly outside the lot's chain of title, and a document recorded outside the chain of title cannot affect the interest of a person within the chain of title. *Bristol v Braidwood*, 28 Mich 191, 193 (1873).

The trial court also rejected defendants' argument that, even if not effective as deed restrictions, the restrictions qualified as a reciprocal negative easement:

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[5] We also note that plaintiff argues that the trial court erroneously granted summary disposition in favor of defendants on plaintiff's claim for tortious interference with a business expectancy. But plaintiff makes no independent argument related to this claim, essentially acknowledging the trial court's reasoning that, like the slander-of-title claim, tortious interference required contact with a third party. Therefore, the tortious-interference claim rises or falls with the slander claim. That is, a communication to a real estate agent either satisfies the publication requirement for the slander claim and the third-party-contact requirement for the tortious-interference claim, or it fails for both.

> Defendants maintain that even if the Deed Restrictions do not qualify as a restrictive covenant, Plaintiff's lot is still encumbered by a reciprocal negative easement. In order to create a reciprocal negative easement, there must be (1) a common owner, (2) a general plan, (3) and the common owner must have conveyed other lots with express restrictions in those deeds before conveying the lot at issue. *Sanborn v McLean*, 233 Mich 227, 230; 206 NW 496 (1925). "Thus, the implied restriction arises from the express restriction." *Civic Ass'n of Hammond Lake Estates v Hammond Lake Estates No 3 Lots 126-135*, 271 Mich App 130, 137; 721 NW2d 801 (2006). "Reciprocal negative easements are never retroactive." *Sanborn*, 233 Mich at 230. Also, the party seeking to establish the existence of a reciprocal negative easement bears the burden of proof. *Grant v Craigie*, 292 Mich 658, 662; 291 NW 44 (1940).
>
> While Defendants can clearly establish that there was a common owner, and perhaps even show that the common owner had a general plan, they have provided no evidence that any lots were conveyed with express deed restrictions prior to Carla Woltersto[r]ff taking title to Plaintiff's lot in 2001. Defendants have also failed to provide any evidence that lots were conveyed with express deed restrictions prior to Carla Woltersto[r]ff obtaining title to the remaining 200 feet of Plaintiff's lot in 2004. Consequently, Defendants have failed to establish a genuine issue of material fact that a reciprocal negative easement exists, and Plaintiff is entitled to judgment as a matter of law on Count I.

Turning first to the issue of the deed restrictions themselves, we note that defendants make no argument that deed restrictions filed outside the chain of title are enforceable. Rather, defendants raise a number of equitable claims, none of which is persuasive.

First, defendants argue that Wolterstorff acquiesced to the deed restrictions. Defendants cite only a case from this Court, *B P A II v Harrison Twp*, 73 Mich App 731; 252 NW2d 546 (1977), which addressed the doctrine of estoppel by acquiescence in general and did not

involve deed restrictions. In a variation of this argument, defendants argue that Wolterstorff waived or voluntarily relinquished her rights to object to the deed restrictions. Again, the case relied on by defendants, *Dahrooge v Rochester German Ins Co*, 177 Mich 442; 143 NW 608 (1913), discussed the concept of waiver in general and did not involve deed restrictions; rather, it involved a fire insurance claim. Defendants then argue that both plaintiff and Wolterstorff are guilty of laches in failing to timely challenge the deed restrictions. Once again, neither case cited by defendants involved deed restrictions. *Lothian v Detroit*, 414 Mich 160; 324 NW2d 9 (1982), involved a claim against the city's retirement system, and *Regents of the Univ of Mich v State Farm Mut Ins Co*, 250 Mich App 719; 650 NW2d 129 (2002), involved a no-fault insurance claim.

These arguments might have merit were this litigation initiated by defendants in an attempt to enforce the deed restrictions against Wolterstorff. But this is not the case. Whether Wolterstorff acquiesced to the deed restrictions, waived her right to challenge the restrictions, or was even guilty of laches, there is no basis on which to enforce the restrictions against plaintiff, who had no basis to know of such action (or inaction) by Wolterstorff. The only one of these arguments that could even potentially apply to plaintiff would be an argument of plaintiff's own laches. But plaintiff purchased the property on September 9, 2011. This action was filed three years later. This hardly constitutes laches.

Finally, defendants argue that the deed restrictions are enforceable because they were agreed to by all the owners. While the case relied on by defendants, *Eveleth v Best*, 322 Mich 637; 34 NW2d 504 (1948), does support the contention that a group of property

owners can agree to deed restrictions, it does not support defendants' position in this case. Any agreement to deed restrictions must be accomplished in the chain of title:

> The initial question in the case is whether the restrictions against use agreed to by some but not all of the owners of lots 1 to 81 in said subdivision, not shown to have been imposed by the original plattor or a common owner or owners on all of said property, or as a general plan adopted by a common owner or owners, are valid restrictions on the use of said lot 63.
>
> The record fails to show that any owner in the chain of title of said lot 63 has ever agreed to or been a party to the aforesaid use restrictions. While the conveyance of said lot 63 by the State of Michigan to defendants Samuel W. and Emma M. Best is expressly made subject to any restrictions upon the use of said lot 63, this conveyance does not *impose* any restriction against use but merely continues in effect restrictions against use, if any such existed at the time of such conveyance. Nor is there any showing in the record that the Bests have imposed any restrictions against use of said lot 63. Hence, the precise question is whether there was any such restriction against the use of said lot 63 at the time the Kubats acquired whatever interest they have in said lot. More particularly, the question is whether the agreement entered into by some lot owners applies to the use of lot 63. [*Id*. at 641.]

Defendants, however, point to no document signed by Wolterstorff and filed in the chain of title that shows Wolterstorff's acceptance of the deed restrictions. And, in any event, this argument does not overcome the fact that the deed restrictions themselves, when they were filed, were not filed in the chain of title. Rather, they were filed by Twin Creeks, LLC, which the parties stipulated never had an ownership interest in the property. Simply put, had Wolterstorff signed a document accepting the deed restrictions *and* that docu-

ment had been filed in the chain of title, then plaintiff would be bound by the restrictions.

The *Eveleth* decision also addressed the issue of reciprocal negative easements:

> In referring to a restriction imposed upon the use of lots in a subdivision, commonly referred to as a reciprocal negative easement, this Court has said:
>
> "It must start with a common owner. Reciprocal negative easements are never retroactive; the very nature of their origin forbids. They arise, if at all, out of a benefit accorded land retained, by restrictions upon neighboring land sold by a common owner. Such a scheme of restrictions must start with a common owner; it cannot arise and fasten upon one lot by reason of other lot owners conforming to a general plan. If a reciprocal negative easement attached to defendants' lot it was fastened thereto while in the hands of the common owner of it and neighboring lots by way of sale of other lots with restrictions beneficial at that time to it." *Sanborn* v. *McLean*, 233 Mich. 227 (60 A. L. R. 1212).
>
> "Courts of equity do not aid one man to restrict another in the use to which he may put his property unless the right to such aid is clear." *Casterton* v. *Plotkin*, 188 Mich. 333, 344.
>
> "Where there is no express restriction in the chain of title of the particular lot the use of which is sought to be restricted, there must be proof of a 'scheme of restrictions' originating from a common owner. *Williams* v. *Lawson*, 188 Mich. 88; *McQuade* v. *Wilcox*, 215 Mich. 302 (16 A. L. R. 997); *Kiskadden* v. *Berman*, 244 Mich. 473; *Nerrerter* v. *Little*, 258 Mich. 462; *Taylor* v. *State Highway Commissioner*, 283 Mich. 215; *Grant* v. *Craigie*, 292 Mich. 658. A restriction placed in the title to a single lot does not establish such a plan. *Taylor* v. *State Highway Commissioner*, *supra*. The general plan must have been 'maintained from its inception,' and 'understood, accepted, relied on, and acted upon by all in interest' (*Allen* v. *City of Detroit*, 167 Mich. 464, 469 [36 L. R. A. (N. S.) 890]);

> *Library Neighborhood Association* v. *Goosen*, 229 Mich. 89; *French* v. *White Star Refining Co.*, 229 Mich. 474; *Signaigo* v. *Begun*, 234 Mich. 246; *Kime* v. *Dunitz*, 249 Mich. 588. The scheme must have its origin in a common grantor; 'it cannot arise and fasten upon one lot by reason of other lot owners conforming to a general plan' (*Sanborn* v. *McLean*, 233 Mich. 227 (60 A. L. R. 1212)). See, also, *Casterton* v. *Plotkin*, 188 Mich. 333, and *Miller* v. *Ettinger*, 235 Mich. 527. Plaintiffs have failed to produce evidence tending to establish a plan founded by the common grantor." *Denhardt* v. *DeRoo*, 295 Mich. 223.
>
> "There is but one question here and that is, whether a reciprocal negative easement can be fastened upon use by defendant of his property by reason of endeavor of other property owners to conform to restrictions self-imposed.
>
> "Plaintiffs cannot, by their own desire and action in accord therewith, in the absence of joinder therein by defendant, constitute their tenements dominant in respect to use by defendant of his property." *Hart* v. *Kuhlman*, 298 Mich. 265. [*Eveleth*, 322 Mich at 642-643.]

As the trial court concluded, defendants are unable to establish the common-owner requirement because plaintiff's lot was sold before other lots were sold subject to the deed restrictions. Defendants attempt to avoid this problem by arguing that Wolterstorff's reliance on and acceptance of the subsequent deed restrictions made her part of a group of "common owners." But, for the same reason that the similar argument fails with respect to the deed restrictions, it fails with respect to the reciprocal negative easement.

Affirmed. No costs, no party having prevailed in full.

SAWYER, P.J., and MARKEY and O'BRIEN, JJ., concurred.

BEDFORD v WITTE

Docket Nos. 327372 and 327373. Submitted July 6, 2016, at Grand Rapids. Decided November 22, 2016, at 9:05 a.m. Application for leave to appeal dismissed on stipulation 501 Mich 867.

Michael J. Bedford and Gary Stewart, Jr., brought separate actions in the Kent Circuit Court against Derek S. Witte, Jordan C. Hoyer, and the Law Offices of Jordan C. Hoyer, PLLC, alleging that defendants had defamed them by including false allegations of criminal activity by plaintiffs in federal collections complaints against Bedford and Stewart brought by defendants' clients. Defendants had posted a copy of the federal complaints to the law firm's website, along with a link to a television interview in which Witte had stated that plaintiffs had broken the law by obstructing justice, committing bribery, and perpetrating mail and wire fraud. Defendants moved for summary disposition, arguing in part that all statements in the federal pleadings were entitled to absolute privilege and that the statements were protected by MCL 600.2911(3), which prohibits the award of damages in a libel action for the publication or broadcast of a fair and true report of matters of public record. Defendants also argued that plaintiffs were public figures or officials and were therefore required to establish that defendants had published the statements with actual malice, which plaintiffs had not done. The court, Mark A. Trusock, J., granted defendants' motion for summary disposition under MCR 2.116(C)(8) with respect to both plaintiffs, ruling that the statements defendants made in the federal complaints were relevant to the claims asserted and were therefore entitled to an absolute privilege. The court also ruled that the statements made in the television interview were a substantially accurate reflection of the complaints, which were public documents, and were therefore protected under MCL 600.2911(3). Plaintiffs appealed, and their appeals were consolidated.

The Court of Appeals *held*:

1. The trial court did not err by granting defendants summary disposition with respect to plaintiffs' claims that they were defamed by statements that defendants made in the federal complaints against them. To establish a defamation claim, a

plaintiff must establish that there was a false and defamatory statement concerning the plaintiff, an unprivileged communication to a third party, fault amounting at least to negligence on the part of the publisher, and either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. Privilege can be used as a defense in a defamation action. Statements made by judges, attorneys, and witnesses during the course of judicial proceedings are absolutely privileged if they are relevant, material, or pertinent to the issue being tried. The trial court correctly ruled that the challenged statements in the federal complaints against plaintiffs were protected by this judicial-proceedings privilege.

2. The trial court correctly granted summary disposition to defendants with regard to posting the federal complaints on their website. MCL 600.2911(3) provides that damages may not be awarded in a libel action for the publication or broadcast of a fair and true report of matters of public record, a public and official proceeding, or of a governmental notice, announcement, written or recorded report or record generally available to the public, or act or action of a public body. A report is fair and true if it substantially represents the public record or other pertinent matter. If any inaccuracy does not alter the effect the literal truth would have on the recipient of the information, the standard has been satisfied. The trial court did not err by ruling that this standard was met, because the publishing of an exact copy of the complaint that initiated judicial proceedings constitutes a fair and true report of those proceedings. Plaintiffs' argument that defendants are not protected by MCL 600.2911(3) because they acted with malice, which is defined as knowledge of falsity or recklessness regarding falsity, is not supported by the clear statutory language, by caselaw, or by common sense, given that a report must be fair and true to meet the requirements of MCL 600.2911(3). Plaintiffs' argument that defendants are not protected by MCL 600.2911(3) because defendants created the documents in question is also unsupported by the clear statutory language, which contains no such exception.

3. The trial court erred by ruling that MCL 600.2911(3) applied to shield defendants from liability for the statements made in the television interview and the posting of the link to the interview on defendants' website. MCL 600.2911(3) does not apply to libels that are not a part of the public and official proceeding or governmental notice, written record, or record generally available to the public. The comments at issue did not merely summarize what was alleged in the federal complaint;

they expressed the view that it could be said "with certainty" that plaintiffs had broken the law. These comments did not meet the "fair and true" standard in MCL 600.2911(3), and they went beyond the public record.

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

1. LIBEL AND SLANDER — FAIR-REPORTING PRIVILEGE — MALICE.

The prohibition in MCL 600.2911(3) against awarding damages in a libel action for the publication or broadcast of a fair and true report of public matters does not contain an exception for defendants who acted with knowledge that the report was false or recklessness regarding falsity.

2. LIBEL AND SLANDER — FAIR-REPORTING PRIVILEGE — SELF-REPORTING.

The prohibition in MCL 600.2911(3) against awarding damages in a libel action for the publication or broadcast of a fair and true report of public matters does not contain an exception for defendants who created the report at issue.

Silver & Van Essen, PC (by *Lee T. Silver* and *Michael L. Gutierrez*), for plaintiffs.

Maddin Hauser Roth & Heller, PC (by *Kathleen H. Klaus* and *Jesse L. Roth*), for defendants.

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

METER, J. Plaintiffs, Michael J. Bedford and Gary Stewart, Jr., appeal as of right an opinion and order[1] granting summary disposition under MCR 2.116(C)(8) to defendants, Derek S. Witte, Jordan C. Hoyer, and the Law Offices of Jordan C. Hoyer, PLLC. These appeals involve the interpretation of the fair-reporting privilege, codified at MCL 600.2911(3). We affirm in part, reverse in part, and remand for further proceedings.

[1] Although plaintiffs filed separate complaints, the trial court issued a joint order.

In December 2013, defendants—acting on behalf of their clients, the plaintiffs in an underlying collection action in Van Buren County—filed a complaint in the United States District Court for the Western District of Michigan against Bedford, Stewart, and others. Defendants alleged in that complaint that Bedford, Stewart,[2] and others acted unethically during the collection litigation.[3] Defendants set forth eight causes of action, including a violation of the Racketeer Influenced and Corrupt Organizations Act, 18 USC 1961 *et seq*.; malicious prosecution; and tortious interference with a contract. On January 2, 2014, defendant Derek Witte participated in an interview with a reporter for a local CBS affiliate. During that interview, Witte allegedly stated that "we can say with certainty" that plaintiffs broke the law by obstructing justice, committing bribery, and perpetrating mail and wire fraud. According to plaintiffs, defendants then, on the website for their law firm, posted a copy of the federal complaint and a link to the news interview.

In December 2014, plaintiffs filed the defamation complaints that led to the present appeals. Plaintiffs alleged that defendants knowingly and maliciously made false statements about plaintiffs in the federal lawsuit and in the interview and furthered the defamation by the public postings on the law firm's website. Ultimately, after various pleadings and arguments, the trial court ruled that the absolute privilege for judicial proceedings applied to the filing of the complaint and that defendants could not be held liable for this filing.

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[2] Stewart and Bedford will henceforth be referred to in this opinion as "plaintiffs."

[3] Stewart served as a defense attorney in the collection action, and Bedford, who is the Van Buren County prosecutor, filed various criminal charges against an agent and an attorney for the plaintiffs in the collection action.

The trial court additionally concluded that MCL 600.2911(3) protected defendants from liability related to the interview and the postings on the website and granted defendants' motions for summary disposition under MCR 2.116(C)(8).

This Court reviews de novo issues of statutory interpretation and orders granting summary disposition. *Johnson v Recca*, 492 Mich 169, 173; 821 NW2d 520 (2012); see also *Dalley v Dykema Gossett PLLC*, 287 Mich App 296, 304; 788 NW2d 679 (2010). Under MCR 2.116(C)(8), summary disposition is appropriate if "[t]he opposing party has failed to state a claim on which relief can be granted." "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." *Dalley*, 287 Mich App at 304-305. "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 305 (quotation marks and citation omitted).

Moreover, this Court reviews de novo, as a question of law, whether there exists a privilege that immunizes a defendant from liability for defamation. *Northland Wheels Roller Skating Ctr, Inc v Detroit Free Press, Inc*, 213 Mich App 317, 324; 539 NW2d 744 (1995); *Couch v Schultz*, 193 Mich App 292, 294; 483 NW2d 684 (1992).

"The elements of a defamation claim are: (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se)

or the existence of special harm caused by publication." *Mitan v Campbell*, 474 Mich 21, 24; 706 NW2d 420 (2005).

Privilege can be used as a defense in a defamation action. *Postill v Booth Newspapers, Inc*, 118 Mich App 608, 618; 325 NW2d 511 (1982). The defense of privilege is grounded in public policy; in certain situations, the criticism uttered by the defendant is sufficiently important to justify protecting such criticism notwithstanding the harm done to the person at whom the criticism is directed. *Dadd v Mount Hope Church*, 486 Mich 857, 860 (2010) (MARKMAN, J., concurring in part and dissenting in part), citing *Lawrence v Fox*, 357 Mich 134, 136-137; 97 NW2d 719 (1959), and *Bacon v Mich Central R Co*, 66 Mich 166, 169; 33 NW 181 (1887). "Statements made by judges, attorneys, and witnesses during the course of judicial proceedings are absolutely privileged if they are relevant, material, or pertinent to the issue being tried." *Oesterle v Wallace*, 272 Mich App 260, 264; 725 NW2d 470 (2006). The purpose of absolute immunity for attorneys under the judicial-proceedings privilege is to promote the public policy of allowing attorneys broad freedom to obtain justice for their clients. *Id*. at 265. The trial court correctly ruled that the filing of the federal complaint was not actionable because of the judicial-proceedings privilege.[4] See, generally, *id*. at 264.

The next question is whether defendants could be held liable for posting the complaint on the firm's website. This action (and, for that matter, the interview and the posting of the link to the interview) did not fall within the judicial-proceedings privilege be-

[4] It is not entirely clear whether plaintiffs are even challenging this aspect of the court's opinion and order. At any rate, the law clearly and definitively supports the trial court's ruling.

cause it was not part of the actual judicial proceedings but was extraneous and unnecessary to those proceedings. See *Timmis v Bennett*, 352 Mich 355, 365; 89 NW2d 748 (1958). Defendants thus rely on the fair-reporting privilege. MCL 600.2911(3) states, in relevant part:

> Damages shall not be awarded in a libel action for the publication or broadcast of a fair and true report of matters of public record, a public and official proceeding, or of a governmental notice, announcement, written or recorded report or record generally available to the public, or act or action of a public body, or for a heading of the report which is a fair and true headnote of the report.[5]

In order for a report to be privileged under this statute, the report must be "fair and true . . . ." *Id*. In other words, the report must "substantially represent" the public record or other pertinent matter. *Northland Wheels*, 213 Mich App at 325 (quotation marks and citation omitted). If any inaccuracy does not alter the effect the literal truth would have on the recipient of the information, the pertinent standard has been satisfied. *Id*. Clearly, the publishing of an exact copy of the complaint that initiated judicial proceedings constitutes a "fair and true" report with respect to those proceedings. Plaintiffs contend that defendants cannot avail themselves of the fair-reporting privilege with regard to the posting of the complaint because (1) plaintiffs pleaded that defendants acted with malice[6] and (2) defendants were the creators of the posted document. However, "[w]e are bound to ascertain and

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[5] "Libel" as used in MCL 600.2911 includes "defamation by a radio or television broadcast." MCL 600.2911(8).

[6] Plaintiffs attempt to define "malice" in various ways in their appellate briefs, at one point, while discussing the issue, referring to whether a report is "free from . . . injustice."

give effect to the Legislature's intent, and the Legislature is presumed to have intended the meaning it plainly expressed." *Id*. at 326. "If the meaning of the statutory language is clear, judicial construction is neither necessary nor permitted." *Id*. MCL 600.2911(3) carves out no exception for malice or for so-called "self-reporters." See, generally, *Book-Gilbert v Greenleaf*, 302 Mich App 538, 542; 840 NW2d 743 (2013) (stating that a court may not read into statutes language that the Legislature has seen fit to omit).[7]

The cases plaintiffs cite for the proposition that malice can vitiate the fair-reporting privilege in MCL 600.2911(3) are simply not apposite. Indeed, plaintiff cites cases referring to a "qualified privilege"[8] under the statute or similar, prior statutes, but a closer look at these cases reveals that they do not discuss malice except in passing or in other contexts. See *McCracken v Evening News Ass'n*, 3 Mich App 32, 39-40; 141 NW2d 694 (1966) (referring briefly to a "qualified privilege" but not discussing malice and instead concluding that the reportage in question was substantially accurate and that the plaintiff had not shown proof of damages), *Nabkey v Booth Newspapers, Inc*, 140 Mich App 507, 514-515; 364 NW2d 363 (1985) (referring to a "qualified privilege" but not reaching the question of malice and instead emphasizing that the statute encompassed reports of "official proceedings"

[7] We note that the Legislature used a "malice" standard in MCL 600.2911(6), which states, "An action for libel or slander shall not be brought based upon a communication involving public officials or public figures unless the claim is sustained by clear and convincing proof that the defamatory falsehood was published with knowledge that it was false or with reckless disregard of whether or not it was false."

[8] In general, a "qualified privilege" is one that can be overcome by a showing of untruth and malice. See *Dadd*, 486 Mich at 857 n 1 (MARKMAN, J., concurring in part and dissenting in part).

and remanding for a determination regarding whether the reports in question should be characterized as such), *Rouch v Enquirer & News of Battle Creek*, 427 Mich 157, 164 n 1, 164-173; 398 NW2d 245 (1986) (discussing the statutory "qualified privilege" but then going on simply to conclude that the statements at issue did not relate to a "proceeding" encompassed by the statute),[9] and *Koniak v Heritage Newspapers, Inc*, 190 Mich App 516, 521-524; 476 NW2d 447 (1991) (mentioning a "qualified privilege" but not discussing malice and instead discussing the "fair and true" standard), remanded 441 Mich 858 (1992). See also *Kefgen v Davidson*, 241 Mich App 611, 623 n 7; 617 NW2d 351 (2000) (noting that an analysis under MCL 600.2911(3) requires a determination of whether the reportage in question was fair and true). Because "actual malice" (which, plaintiffs argue, is the applicable standard here) is defined as knowledge of falsity or recklessness regarding the issue of falsity, see *id*. at 624, it only makes sense that a "fair and true" report would not be subject to an exception for malice, as plaintiffs contend. Indeed, this Court has referred to the "qualification" connected to the statutory fair-reporting privilege as the requirement "that the report . . . be fair and true." *Stablein v Schuster*, 183 Mich App 477, 482; 455 NW2d 315 (1990). The Court specifically stated, "The immunity is a qualified one, but defendant has met the qualifications that the report must be fair and true." *Id*.

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[9] In their combined reply brief on appeal, plaintiffs cite this Court's opinion in *Rouch v Enquirer & News of Battle Creek*, 137 Mich App 39; 357 NW2d 794 (1984), aff'd and remanded 427 Mich 157 (1986). This Court in *Rouch* discussed the general meaning of a qualified privilege but went on to conclude that the statutory privilege did not apply because "official proceedings" were not at issue. *Id*. at 46-48. The case simply does not stand for the proposition for which plaintiffs cite it.

In rejecting plaintiffs' various arguments concerning the posting of the complaint on the firm's website, we find highly instructive the case of *Amway Corp v Procter & Gamble Co*, 346 F3d 180 (CA 6, 2003). In *Amway*, *id*. at 183-184, similar to the present case, legal complaints filed against the plaintiff were posted on a website and the plaintiff took issue with those postings. The plaintiff argued, in part, that certain of the defendants could not avail themselves of the privilege codified in MCL 600.2911(3) because they had created one of the complaints *and* participated in publishing it on the website. *Amway*, 346 F3d at 185. The plaintiff also argued that the conduct of certain of the defendants "was undertaken with a malicious and manifest disregard for the rights of [the plaintiff]." *Id*. at 184. The court concluded that "Michigan's fair reporting privilege applies to the publication of the entire complaints on [the] website, and no exception to the privilege applies to the . . . conduct complained of here." *Id*. at 187. The court emphasized that "the plain language of the statute clearly direct[ed] [its] decision," *id*., subsequently stating:

> Generally speaking, a party's publication of any actual court filing or statement made in a judicial proceeding is privileged because the public has a legitimate interest in accessing and viewing that type of information. [The plaintiff] brings suit for injuries claimed under a state-created tort, but the state has seen fit to codify a general privilege and not to except from it the kind of conduct alleged in this case. The state has not, contrary to [the plaintiff's] arguments, limited that privilege in a way that exposes the [d]efendants to liability. [*Id*. at 187-188.]

We agree with the *Amway* court that the plain language of the statute simply does not provide an exception for cases involving malice (however plaintiffs try to define it) or self-reporting. Therefore, the trial

court correctly granted summary disposition to defendants with regard to the act of posting the complaint on the law firm's website.[10]

We now turn to the television interview and the posting of the link on the firm's website. Plaintiffs argue that the comments made by Witte during the television interview did not constitute mere reportage on the federal lawsuit, but instead were "added" comments that are expressly precluded from protection under MCL 600.2911(3). As discussed earlier, that provision protects a person's right to give a "fair and true report of matters of public record . . . ." *Id*. The statute also provides:

> This privilege shall not apply to a libel which is contained in a matter added by a person concerned in the publication or contained in the report of anything said or done at the time and place of the public and official proceeding or governmental notice, announcement, written or recorded report or record generally available to the public, or act or action of a public body, which was not a part of the public and official proceeding or governmental notice, announcement, written or recorded report or record generally available to the public, or act or action of a public body. [*Id*.]

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[10] As noted by the *Amway* panel, the case of *Park v Detroit Free Press Co*, 72 Mich 560; 40 NW 731 (1888), is clearly not applicable to a situation like that at issue here and in *Amway* because "[c]ourt filings were not public records in Michigan when *Park* was decided more than one hundred years ago." *Amway*, 346 F3d at 188. Plaintiffs also place great reliance on *Williams v Detroit Bd of Ed*, 523 F Supp 2d 602 (ED Mich, 2007), but *Williams* simply stands for the proposition that, to avail oneself of the privilege in MCL 600.2911(3), one must actually report the public record at issue and not simply create the record and supply it to another, who then reports it. See *Williams*, 523 F Supp 2d at 607. The present case does not involve a dispute with regard to this proposition; indeed, plaintiffs do not argue that defendants were not the parties responsible for "publishing" the statements at issue.

As noted in *Amway*, 346 F3d at 187, "[t]he statute excepts from the privilege libels that are not a part of the public and official proceeding or governmental notice, written record or record generally available to the public." In this case, viewing the defamation complaint in the light most favorable to plaintiffs, Witte's comments did not merely summarize what was alleged—but not yet adjudicated—in the federal complaint. He stated that "we can say with certainty" that plaintiffs broke the law in various ways. Given the level of certainty expressed, we conclude that his words did alter the effect the literal truth would have on the recipient of the information, and thus the "fair and true" standard in MCL 600.2911(3) was not satisfied. *Northland Wheels*, 213 Mich App at 325. These statements went beyond the public record. See *Amway*, 346 F3d at 187. Accordingly, defendants were not entitled to claim the fair-reporting privilege with regard to the television interview and the link on their website.[11]

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

MURRAY, P.J., and SAWYER, J., concurred with METER, J.

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[11] We express no opinion regarding other defenses that might be available. We merely conclude that the trial court erred by applying the fair-reporting privilege to the interview and link.

WELLS FARGO BANK, NA v SBC IV REO, LLC

Docket No. 328186. Submitted October 5, 2016, at Marquette. Decided November 29, 2016, at 9:00 a.m. Application for leave to appeal dismissed on stipulation 501 Mich 852.

Wells Fargo Bank, N.A. (Wells Fargo), as trustee for Option One Mortgage Loan Trust 2005-2 Asset Backed Certificates, Series 2005-2, filed a complaint in the Mackinac Circuit Court against SBC IV REO, LLC (SBC) and Capitol National Bank (Capitol) to claim priority of its assigned mortgage interest on the basis of a purported discharge of mortgage and equitable subrogation. In this case, a loan obtained by two individuals (the mortgagors) and secured by a "new" mortgage in 2005 (the Option One mortgage) was used, in part, to fully satisfy and discharge the original mortgage, with both mortgages being held by Option One Mortgage Corporation (Option One). The first mortgage was recorded in December 2003, and the second was recorded in May 2005. During the interim, a second and different mortgagee, Capitol, was granted a mortgage (the Capitol mortgage) to the same real property encompassed by the first mortgage, making Capitol a junior lienholder at the time of recordation in September 2004. The loan secured by the 2005 Option One mortgage exceeded the amount due under the original note, and the mortgagors, for the most part, pocketed the remaining loan proceeds, meaning that the new loan and mortgage involved more than a mere refinancing transaction; there was an increase in the principal amount. The closing on the Option One mortgage entailed a faxed discharge of mortgage from the assistant vice president for Capitol that was ultimately never recorded because, according to the assistant vice president's affidavit, the discharge was conditioned on no new money being lent and on the preparation and recordation of a mortgage to replace the discharged mortgage, neither of which conditions was met. The assistant vice president's affidavit was consistent with a Capitol loan presentation document that reflected a request by the mortgagors for Capitol to provide a discharge of mortgage conditioned on no new money being advanced and the recording of a replacement mortgage. Subordination of mortgages under MCL 565.391 was not attempted. Several years later, the mortgagors defaulted on the mortgage that had originally been recorded second in time. Foreclosure proceedings

were commenced by SBC, an assignee of Capitol's mortgage interest. SBC purchased the property at a sheriff's sale. Wells Fargo, an assignee of Option One, then instituted this action, alleging six separate counts and claiming priority of its assigned mortgage interest on the basis of the purported discharge of mortgage and equitable subrogation. Count I alleged failure to honor and record the discharge of mortgage, Count II alleged common-law indemnity, Count III alleged fraud and misrepresentation, Count IV alleged equitable subrogation, Count V alleged superior interest in land, and Count VI alleged invalid foreclosure. Wells Fargo also moved for a temporary restraining order (TRO), a show-cause order, and a preliminary injunction, seeking to toll the running of the redemption period arising out of the foreclosure sale. The court, William W. Carmody, J., initially entered an ex parte TRO and converted it to a preliminary injunction, but the court then reversed its position and dissolved and terminated the TRO and preliminary injunction, concluding that SBC had been a bona fide purchaser without notice of any alleged mortgage discharge. Both parties filed multiple motions for summary disposition. After two hearings, the court granted summary disposition in favor of defendants, concluding that "there wasn't a discharge" because the discharge of mortgage was subject to a "condition precedent" of being paid off, that the doctrine of equitable subrogation did not apply, and that the equitable-subrogation claim was time-barred under a six-year period of limitations pursuant to MCL 600.5813. Wells Fargo appealed.

The Court of Appeals *held*:

1. Counts I, II, III, V (in part), and VI of Wells Fargo's complaint were reliant on the purported discharge of mortgage that the assistant vice president for Capitol had faxed to the closing department of the title company handling the closing on the 2005 Option One mortgage. MCL 565.41(1) provides that, within the pertinent period, as prescribed by MCL 565.44(2), after a mortgage has been paid or otherwise satisfied, the mortgagee shall prepare a discharge of the mortgage, file the discharge with the register of deeds for the county where the mortgaged property is located, and pay the fee for recording the discharge. In this case, there was no dispute that the mortgagors did not pay off, satisfy, or fully perform the conditions of the Capitol mortgage, so there was no general statutory entitlement to a discharge of mortgage. Rather, this case presented an attempted subordination of mortgages, as between the Capitol and Option One mortgages, through the planned use of a dis-

charge of mortgage and a replacement mortgage, whereby Option One would retain its superior lien position despite recording the 2005 Option One mortgage *after* the 2004 Capitol mortgage had been recorded. The principles and rules governing the construction, application, and enforceability of contracts generally apply to subordination agreements. The law of contracts recognizes that some agreements are not binding at the outset with respect to a right to performance, entailing conditions precedent to performance. Given the uncontradicted affidavit executed by Capitol's assistant vice president, which was also consistent with the Capitol loan presentation document, as a matter of law, Option One and Capitol had, at most, a conditional subordination agreement. Under the conditional agreement, Capitol was obligated to discharge the mortgage and record the discharge, but only if no new money was lent to the mortgagors as part of the Option One mortgage and a replacement mortgage was prepared and recorded in favor of Capitol. There was no genuine issue of material fact that neither of these conditions was satisfied, nor that Capitol engaged in conduct to prevent the occurrence of the conditions. Accordingly, Capitol had no legal obligation to perform by way of honoring and recording the faxed discharge of mortgage; the purported discharge was ineffective and unenforceable in light of the conditions precedent and the failure of those conditions. Absent an enforceable promise to discharge the mortgage and record the discharge, there could be no unlawful failure to record the discharge, no basis for common-law indemnification, no foundation for fraud and misrepresentation, no reason to conclude that the Option One mortgage was the senior lien for purposes of the public record, and no grounds to invalidate SBC's foreclosure on the property. Therefore, the trial court did not err by summarily dismissing Counts I, II, III, V (as premised on the discharge), and VI of Wells Fargo's complaint, albeit for reasons that differed from those expressed by the trial court.

2. Count IV alleged equitable subrogation, which is available to place a new mortgage in the same priority as a discharged mortgage if the new mortgagee was the original mortgagee and the holders of any junior liens are not prejudiced as a consequence. Count IV was subsumed by Count V, which alleged mortgage superiority partly on the basis of equitable subrogation. The Capitol mortgage, which was not discharged, had priority over the subsequently recorded Option One mortgage, which was the junior or second mortgage upon its recordation in 2005, with the original Option One mortgage being satisfied and discharged. In light of these circumstances, Wells Fargo, as an assignee of Option One, turned to the doctrine of equitable subrogation in an

attempt to have the Option One mortgage placed in the same priority position that had been enjoyed by the original Option One mortgage. The trial court erroneously relied, in part, on the Court of Appeals' decision in *CitiMortgage, Inc v Mtg Electronic Registration Sys, Inc*, 295 Mich App 72 (2011), for rejecting Wells Fargo's equitable-subrogation argument. The framework enunciated in *CitiMortgage* did not indicate that equitable subrogation is wholly unavailable if funds are lent to a mortgagor above and beyond the amount needed to satisfy and discharge the original loan. With new money being lent and an increase in the principal amount, the extent of the available recovery would be diminished or the amount needed to redeem property would increase for the junior lienholder as compared to before the execution of the replacement mortgage, making the increase in the principal amount prejudicial should equitable subrogation be allowed. The approach set forth in Restatement Property, 3d, Mortgages, § 7.3, comment *b*, p 475, was adopted. This approach provides, in relevant part, that an increase in the principal amount will prejudice the holders of junior interests and that, unless the original mortgage validly secures future advances, it would be unfair to subordinate the intervening lienor to a replacement mortgage balance that it would have no reason to anticipate. Accordingly, Wells Fargo was not entitled to equitable subrogation in regard to the new or additional monies; its priority was lost to Capitol because permitting equitable subrogation with respect to the new monies that increased the principal amount to $520,000 when the balance owing on the original Option One mortgage was $453,109 would be prejudicial. Nothing in the record indicated that Capitol could have anticipated a replacement mortgage with an increase in the principal amount when Capitol made the loan and obtained its mortgage in 2004. Therefore, the trial court erred by dismissing Count V relative to the issue of equitable subrogation, but only to the extent that the court ruled that equitable subrogation was unavailable with respect to amounts not encompassing the new or additional monies; there was no error in excluding the new monies or the increase in the principal amount from being subject to equitable subrogation.

3. The trial court erred when it invoked the six-year period of limitations found in MCL 600.5813 because equitable subrogation is a mechanism to realign mortgage priorities as part of a suit to determine an interest in land under MCL 600.2932, and an action to quiet title, i.e., to determine an interest in real property, brought under MCL 600.2932 is subject to the 15-year period of limitations in MCL 600.5801(4). Wells Fargo's claim seeking to

determine an interest in land, and more specifically the priority of an interest, was pursued well within the applicable 15-year period of limitations; therefore, Wells Fargo was not precluded from presenting an equitable-subrogation argument. The fact that Wells Fargo was not a direct party to the Option One mortgage but an assignee did not alter the ruling regarding the availability of equitable subrogation because it is well established that an assignee stands in the shoes of an assignor, acquiring the same rights and being subject to the same defenses as the assignor. Furthermore, Wells Fargo's knowledge at the time of the assignment that the public record revealed the existence and superiority of the Capitol mortgage had no bearing on whether prejudice would be incurred by Capitol or SBC in permitting equitable subrogation.

4. A senior mortgagee who discharges its mortgage and takes a replacement mortgage cannot avail itself of equitable subrogation if it intended a subordination of its replacement mortgage to the existing junior mortgage. The documentary evidence established that Option One fully intended to retain its senior lien position at the time of the 2005 mortgage. The alleged failure by Option One thereafter to timely address the circumstances did not reveal an intent to subordinate its mortgage to the Capitol mortgage, but was more in the nature of neglect at worst.

5. MCL 565.29 dictates that a mortgagee who first obtains a mortgage but fails to record it loses to a subsequent mortgagee who obtains a mortgage relative to the same property and records the mortgage, so long as the subsequent mortgagee gave value for the mortgage and lacked notice of the first mortgage. In this case, SBC had notice of a possible priority claim by Wells Fargo at the time that SBC was assigned the Capitol mortgage in light of the public record and the fact that *CitiMortgage* had been the law in Michigan for approximately two years when SBC was assigned the Capitol mortgage. Additionally, SBC had knowledge of a separate quiet-title action instituted by Wells Fargo in 2013. For those reasons, SBC had notice of a possibility that the apparent priority of the Capitol mortgage might be in peril, thereby necessitating further inquiry. Accordingly, SBC was not a good-faith purchaser for purposes of MCL 565.29.

6. Restatement, § 7.3(a)(2) provides an exception to the doctrine of equitable subrogation to the extent that one who is protected by the recording act acquires an interest in the real estate at a time that the senior mortgage is not of record. In this case, the original Option One mortgage had not yet been discharged and was fully applicable when Capitol obtained its

mortgage; accordingly, § 7.3(a)(2) did not provide a basis to reject Wells Fargo's claim of equitable subrogation.

Affirmed in part; reversed in part; case remanded for further proceedings.

MORTGAGES — PRIORITY OF LIENS — EQUITY — EQUITABLE SUBROGATION — INCREASE IN PRINCIPAL AMOUNT.

Equitable subrogation is available to place a new mortgage in the same priority as a discharged mortgage if the new mortgagee was the original mortgagee and the holders of any junior liens are not prejudiced as a consequence; unless the original mortgage validly secures future advances, equitable subrogation is not available with respect to new monies that increase the principal amount because the increase in the principal amount would be prejudicial to the holders of junior interests; it is unfair to subordinate an intervening lienor to a replacement mortgage balance that it would have no reason to anticipate.

Kreis, Enderle, Hudgins & Borsos, PC (by *James D. Lance* and *Stephen J. Staple*), for Wells Fargo Bank, NA.

Kuhn Rogers, PLC (by *Gregory L. Jenkins* and *Matthew L. Boyd*), for SBC IV REO, LLC.

Lasky Fifarek, PC (by *John R. Fifarek*), for Capitol National Bank.

Before: MARKEY, P.J., and MURPHY and RONAYNE KRAUSE, JJ.

MURPHY, J. This case primarily concerns a purported discharge of mortgage and the doctrine of equitable subrogation, which "is available to place a new mortgage in the same priority as a discharged mortgage if the new mortgagee was the original mortgagee and the holders of any junior liens are not prejudiced as a consequence." *CitiMortgage, Inc v Mtg Electronic Registration Sys, Inc*, 295 Mich App 72, 81; 813 NW2d 332 (2011). The loan obtained by the mortgagors and se-

cured by the "new" mortgage at issue in this lawsuit was used, *in part*, to fully satisfy and discharge the original mortgage, with both mortgages being held by the same mortgagee. A second and different mortgagee had recorded its mortgage relative to the same real property during the interim, making it a junior lienholder at the time of recordation. The loan secured by the new mortgage exceeded the amount due under the original note, and the mortgagors, for the most part, pocketed the remaining loan proceeds. Therefore, the new loan and mortgage involved more than a mere refinancing transaction; there was an increase in the principal amount. The closing on the new mortgage entailed a faxed discharge of mortgage from the junior lienholder that was ultimately never recorded, given that, according to the junior lienholder, the discharge was conditioned on no new money being lent and on the preparation and recordation of a mortgage to replace the discharged mortgage, neither of which conditions was met. Subordination of mortgages under the process outlined in MCL 565.391 was not attempted. Several years later, the mortgagors defaulted on the mortgage that had originally been recorded second in time, and foreclosure proceedings were commenced by an assignee traced back to the one-time junior lienholder, resulting in the assignee's purchase of the real property at a sheriff's sale. An assignee of the mortgagee that had held the original and new mortgages then instituted the current action, alleging various causes of action and claiming priority of its assigned mortgage interest on the basis of the discharge of mortgage and equitable subrogation. The main questions posed in this appeal regard the validity of the discharge and the applicability of the doctrine of equitable subrogation under the described circumstances. Arguments in favor of the doctrine's applica-

bility and the discharge's validity were advanced by plaintiff, Wells Fargo Bank, N.A., as trustee for Option One Mortgage Loan Trust 2005-2 Asset Backed Certificates, Series 2005-2 (Wells Fargo). The trial court rejected Wells Fargo's attempt to employ equitable subrogation and the discharge to its benefit, granting summary disposition in favor of defendants, SBC IV REO, LLC (SBC) and Capitol National Bank (Capitol). Wells Fargo appeals as of right, and we hold that the discharge of mortgage was ineffective and unenforceable as a matter of law for failure to satisfy conditions precedent but that equitable subrogation is available to Wells Fargo, albeit to the exclusion of the new or additional monies. Accordingly, we affirm in part, reverse in part, and remand for further proceedings.

I. BACKGROUND

In December 2003, two individuals, as tenants in common, granted a mortgage to Option One Mortgage Corporation (Option One) on certain real property located in Mackinac County, securing a $449,000 loan made by Option One to the mortgagors under a promissory note. The mortgage was recorded that same month. In August 2004, the same mortgagors, joined by a spouse in order to bar any right of dower, granted a $400,000 mortgage to Capitol with respect to the same real property encompassed by the first mortgage, partially securing a loan in excess of $1 million. This mortgage was recorded in September 2004, and for purposes of this opinion and ease of reference, we shall refer to it as the Capitol mortgage.

In April 2005, the two mortgagors granted a "new" mortgage to Option One in regard to the real property, securing a $520,000 loan. According to the settlement statement pertaining to the closing, $458,109 of the

loan proceeds were used to pay off the entire balance on Option One's original mortgage, and after disbursements to cover settlement charges and delinquent taxes, the mortgagors received the remaining $34,566. This mortgage was recorded in May 2005, and we shall refer to it as the Option One mortgage.[1] In June 2005, Option One recorded a satisfaction of mortgage with respect to its original mortgage. There was no modification of the original Option One mortgage; rather, it was completely discharged and replaced. The satisfaction of mortgage provided that "Option One . . . has received full payment of [the] promissory note, acknowledged satisfaction of said mortgage and hereby directs the clerk of the Circuit Court of the above described county to cancel the same of record."

We must take a moment to explore the circumstances surrounding the closing relative to the Option One mortgage. A couple of months before the closing,[2] the title company prepared a commitment for title insurance in regard to the planned transaction, which acknowledged the Capitol mortgage and the original Option One mortgage in Schedule B, Section 1 of the commitment and which called for a discharge of those mortgages at the closing; otherwise, they would be shown as being excepted on the final title insurance policy. Closing instructions from Option One to the closing agent directed that the mortgage must record in "First Lien Position." Given the existence of the Capitol mortgage, the closing agent or someone from the title company contacted Capitol in order to obtain a discharge of the Capitol mortgage, conceptually allowing for a priority recording of the Option One

[1] With respect to the initial mortgage in 2003, we shall refer to it as the "original" Option One mortgage.

[2] The closing on the Option One mortgage took place on April 15, 2005.

mortgage upon discharge of the Capitol mortgage, followed by the recording of a newly prepared replacement mortgage in favor of Capitol, with Capitol thereby retaining its junior lienholder position.

An assistant vice president for Capitol faxed a discharge of mortgage to the title company's closing department. In an affidavit obtained for purposes of the litigation, the assistant vice president averred that she had faxed the discharge of mortgage under the belief that the Option One mortgage only entailed the refinancing of the original mortgage "**without** the new loan advancing any new money that would be secured with [the] new mortgage." She further averred:

> In response to the Title Company Request[,] I had prepared and executed the Discharge of Mortgage . . . , telefaxed the Discharge of Mortgage to the Title Company representative and advised the representative from the Title Company that the original Discharge of Mortgage would be provided and could be recorded upon confirmation that no new money was being loaned to [the mortgagors] and . . . that [the] Title Company would record the replacement [Capitol] Mortgage to secure [Capitol's] position. This would have been the standard practice of [Capitol], in that an original, effective, recordable discharge of mortgage would not be provided until either funds were obtained to pay-off the [Capitol] loan secured by the mortgage or [Capitol's] equity position was not in any way impaired and a replacement mortgage was prepared and recorded or to be recorded contemporaneous with the discharge. If the title company had requested an original, recordable discharge of mortgage, [Capitol's] practice would have been to provide it to the title company in escrow subject to an agreement that it could only be released and recorded when these conditions had been met.

The assistant vice president also indicated that the Capitol mortgage was not paid off, that the Option One

mortgage "was for an increased principal amount," and that no replacement mortgage was recorded on behalf or in favor of Capitol. And, therefore, the conditions precedent to Capitol's agreement to discharge the mortgage were never satisfied. In turn, according to the assistant vice president, Capitol did not record the discharge of mortgage, nor was a discharge ever effectively delivered.[3] In a letter from the title company to Option One dated April 15, 2005, Option One was informed that the closing had occurred, that the title company had "completely disbursed the mortgage in the amount of $520,000.00," and that the mortgage constituted "a valid first lien on the property, subject only to those encumbrances shown in Schedule B, Section II of [the] commitment."[4] In the title insurance policy dated May 2, 2005, there is an express exception for the Capitol mortgage, specifying that the policy did not insure against loss or damage arising out of the Capitol mortgage.

In August 2005, a few months after the closing on the Option One mortgage, one of the mortgagors conveyed his tenants-in-common interest in the property to the other mortgagor pursuant to a quitclaim deed. In May 2009, American Home Mortgage Servicing, Inc. (American Home), as successor-in-interest to Option

[3] In her affidavit, the assistant vice president additionally averred that a Capitol loan presentation document, which is part of the record, had been prepared by her or under her direction, reflecting a request by the mortgagors for Capitol to provide a discharge of mortgage conditioned on no new money being advanced and the recording of a replacement mortgage. The averment is consistent with the loan presentation document.

[4] We note that Schedule B, Section 2 of the title commitment did not refer to the Capitol mortgage, as suggested by SBC and Capitol. Instead, as stated earlier, it was Section 1 of Schedule B of the commitment that referred to the Capitol mortgage as well as to the original Option One mortgage.

One, assigned the Option One mortgage to Wells Fargo. However, in August 2011, Wells Fargo recorded an affidavit to expunge or rescind the assignment, claiming that it was not executed by an authorized signer for American Home. But then in March 2012, Sand Canyon Corporation, formerly known as Option One, executed and recorded an assignment that assigned the Option One mortgage to Wells Fargo. At the time of the instant litigation, Wells Fargo held the Option One mortgage. The lower court record contains various documents, including title worksheets contemplating foreclosure on the Option One mortgage, property reports, demands on the title insurance policy relative to the Option One mortgage, a fax seeking to obtain the discharge of mortgage, and law firm communications to its client, Option One and later Wells Fargo, that were dated from before the failed May 2009 assignment to Wells Fargo to after the successful March 2012 assignment to Wells Fargo. These documents made clear that, *for purposes of the public record at the register of deeds office*, the Capitol mortgage remained in existence, it had not been discharged, and it was superior to the Option One mortgage. The documents further reflected that Wells Fargo was well aware of these facts and the lack of a recorded discharge of mortgage before accepting the 2009 and 2012 assignments, although Wells Fargo did not appear to know the reasons why the discharge had not been recorded. Evidently, the Option One mortgage had been in default, but foreclosure proceedings were not pursued, ostensibly because of the Capitol mortgage conundrum.

On March 11, 2013, in an earlier, separate lawsuit, Wells Fargo filed a quiet-title action against Capitol, acknowledging the Option One and Capitol mortgages as well as Wells Fargo's status as an assignee of the

Option One mortgage and alleging that the Option One mortgage was superior. Wells Fargo asserted that Capitol's mortgage had "been paid off or otherwise satisfied, however no discharge of mortgage ha[d] been recorded and [Capitol's] mortgage remain[ed] in senior lien position," even though the Option One mortgage "was intended to be a senior mortgage on the Property." Wells Fargo further alleged that Capitol's "failure to record a discharge of mortgage [was] creating a cloud on [Wells Fargo's] claim to the Subject Property[.]" Wells Fargo asked the circuit court to discharge the Capitol mortgage, to terminate any interest in the property claimed by Capitol, and to recognize the Option One mortgage now held by Wells Fargo as the senior lien on the property.

On May 31, 2013, while Wells Fargo's quiet-title action remained pending, Capitol assigned its mortgage to SummitBridge Credit Investments IV, LLC (SummitBridge) upon SummitBridge's purchase of the underlying loan. The assignment was recorded on August 8, 2013. Also on August 8, 2013, Wells Fargo and Capitol stipulated to the dismissal of Wells Fargo's quiet-title action without prejudice, with the circuit court entering an order to that effect on August 20, 2013.[5] On August 27, 2013, SummitBridge assigned the Capitol mortgage to SBC, which was a Summit-

[5] In an e-mail to Wells Fargo from its attorney who had represented Wells Fargo in the quiet-title action, counsel stated:

> As previously discussed, this file was referred to our office for a quiet title action to remove a senior lien, however we cannot maintain a claim as our mortgage is in junior lien position to that of Capitol . . . . At the time of closing, there were two prior mortgages, however only one was paid off at closing, thus the Capitol mortgage was never paid off and remains in valid senior lien position. The QTA [quiet-title action] has been dismissed and I have attached a copy of the Order. We will be closing our file at this time.

Bridge affiliate. At the time of the instant litigation, SBC held the Capitol mortgage.

An asset manager connected to SummitBridge and SBC executed an affidavit in which he averred that, in entering into the loan purchase agreement and related assignment with Capitol, SummitBridge had relied on the Capitol mortgage being a first or senior mortgage on the real property. The asset manager further asserted that "[n]either SummitBridge nor SBC received any notice from Option One, Wells Fargo or any other entity or person of the existence of a copy or original of the document entitled 'Discharge of Mortgage' referenced in, and attached as Exhibit F, to Wells Fargo's Complaint [in the instant action], until on or about May 14, 2014." The asset manager additionally averred that had SummitBridge been informed of the allegations made by Wells Fargo concerning equitable subrogation and the purported discharge of the Capitol mortgage before SummitBridge's purchase of the Capitol loan, "it would have either not have entered into the Loan Purchase or would have otherwise paid a purchase price substantially less than that which was agreed thereunder."[6]

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[6] We note that the asset manager averred that SBC, as an assignee of the Capitol mortgage, "was made aware of the civil action filed by Wells Fargo against [Capitol] . . . in 2013," which was a reference to the dismissed quiet-title action. The asset manager did not state that SummitBridge had been aware of the pending quiet-title action when Capitol assigned its mortgage and sold the loan to SummitBridge in May 2013. Ultimately, the record does not indicate whether SummitBridge had knowledge of the quiet-title action against Capitol when Capitol sold its loan and assigned the mortgage to SummitBridge; the record does not contain a lis pendens related to the quiet-title action. The quiet-title action's mention of a discharge, as stated earlier, was couched in terms of the Capitol mortgage having "been paid off or otherwise satisfied." And there was no allegation that a discharge had been faxed or delivered for purposes of the closing on the Option One mortgage so as to allow the realignment of lien priority as described by

In a notice of foreclosure sale dated October 31, 2013, SBC indicated that there had been a default relative to the Capitol mortgage, with nearly $700,000 due and owing on the promissory note.[7] The foreclosure sale was scheduled for and conducted on December 5, 2013, and SBC purchased the property for $371,000 under a sheriff's deed. A six-month redemption period applied and was set to expire on June 4, 2014.

On May 22, 2014, Wells Fargo filed its complaint in the present action against Capitol and SBC, alleging six separate counts. In Count I of the complaint, Wells Fargo alleged that Capitol had unlawfully failed to discharge the Capitol mortgage. Wells Fargo asserted that Capitol had a statutory obligation to file or record the discharge of mortgage that had been faxed to the title company for purposes of the closing on the Option One mortgage. Wells Fargo further alleged that Option One had only agreed to the new mortgage on the condition that it would retain first priority lien position, that Capitol had induced Option One into proceeding with the closing and new mortgage by agreeing to the discharge, that Capitol faxed a discharge of mortgage to the closing agent, and that Capitol then failed to record the discharge. In Count II of the complaint, Wells Fargo alleged common-law indemnity, claiming that Capitol should indemnify Wells Fargo for any monies required to be paid in order to redeem the property. The basis for the indemnity claim was that Capitol's failure to honor and record the

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Capitol's assistant vice president and discussed earlier. There is no dispute that the Capitol mortgage was not paid off or otherwise satisfied.

[7] Although the Capitol mortgage was for $400,000, the underlying loan, as mentioned earlier, exceeded $1 million, and the loan was secured by not only the real property at issue here, but additional forms of collateral.

discharge of mortgage was wrongful. In Count III of the complaint, Wells Fargo alleged fraud and misrepresentation, once again relying on the underlying facts surrounding the faxed discharge of mortgage and Capitol's failure to record the discharge. In Count IV of the complaint, Wells Fargo assumed the record priority of the Capitol mortgage and alleged equitable subrogation, which, as explained in the opening paragraph of this opinion, "is available to place a new mortgage in the same priority as a discharged mortgage if the new mortgagee was the original mortgagee and the holders of any junior liens are not prejudiced as a consequence." *CitiMortgage*, 295 Mich App at 81. In Count V of the complaint, Wells Fargo alleged a claim to determine an interest in land under MCL 600.2932, contending that the Option One mortgage assigned to Wells Fargo was "superior to all other liens" that might encumber the property. Although not directly expressed in Count V, which constituted a quiet-title claim, the allegations contained therein in support of Wells Fargo's contention that it held the senior lien on the property essentially reflected reliance on the doctrine of equitable subrogation and on the unrecorded discharge of mortgage. In Count VI of the complaint, Wells Fargo alleged that the foreclosure by advertisement conducted by SBC was invalid because SBC had no interest in the property to foreclose upon in light of Capitol's discharge of the mortgage. As gleaned by review of the six counts in Wells Fargo's complaint, it becomes clear that the case ultimately boils down to two broad primary issues, i.e., the applicability of equitable subrogation and the validity and enforceability of the faxed discharge of mortgage.

Contemporaneous to the filing of its complaint, Wells Fargo filed a motion for a temporary restraining order (TRO), a show-cause order, and a preliminary

injunction, seeking to toll the running of the redemption period arising out of the foreclosure sale. On the day of the filing of the complaint and motion, the trial court entered an ex parte TRO, tolling the redemption period until further order of the court and setting the matter for a hearing on June 20, 2014. The hearing was conducted as scheduled, and by order dated June 23, 2014, the trial court converted the TRO to a preliminary injunction and extended the redemption period for 14 days. By amended order dated June 30, 2014, the trial court reversed its position and dissolved and terminated the TRO and preliminary injunction, concluding that SBC had been a bona fide purchaser without notice of any alleged mortgage discharge, and thus Wells Fargo could not establish a threat of irreparable harm or a likelihood of prevailing on the merits.

The parties filed multiple competing motions for summary disposition, and after entertaining oral argument on the issues at two hearings, the trial court entered a couple of orders denying Wells Fargo's motion for summary disposition and granting summary disposition in favor of SBC and Capitol for the reasons stated on the record at a hearing on May 22, 2015. At that hearing, the trial court initially observed that "there wasn't a discharge." The court stated that the discharge of the Capitol mortgage was subject to a "condition precedent" of being paid off and that "within two weeks' time, everybody knew that [the] mortgage was still there." With respect to equitable subrogation, the trial court found that *CitiMortgage* was distinguishable and did not support application of the doctrine, considering that, relative to the Option One mortgage, "the new money made it a new mortgage and not a refinance." The trial court also concluded that the equitable-subrogation claim was time-barred under a six-year statute of limitations and that preju-

dice would be incurred if the doctrine was invoked. For these reasons, the trial court granted summary disposition in favor of SBC on Counts IV (equitable subrogation), V (superior interest in land), and VI (invalid foreclosure), which were the only counts applicable to SBC, under MCR 2.116(C)(7), (8), and (10). The trial court indicated that Counts IV through VI were inapplicable to Capitol; nonetheless, the court granted summary disposition in favor of Capitol on those counts.

With respect to Counts I (failure to honor and record discharge of mortgage) and II (common-law indemnity), which were solely applicable to Capitol, the trial court granted summary disposition under MCR 2.116(C)(7) on the basis that the claims were time-barred pursuant to a six-year statute of limitations and under MCR 2.116(C)(8) for failure to state a claim. In regard to Count III (fraud and misrepresentation), which also pertained solely to Capitol, the trial court ruled:

> As to the fraud claims, the statute requires a clear and convincing demonstration that some fraud has occurred, and the Court just does not see it based on the pleadings and the arguments that have been made by Counsel.

Wells Fargo appeals as of right.

II. ANALYSIS

A. STANDARD OF REVIEW

We review de novo a trial court's ruling on a motion for summary disposition, *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157, 162; 809 NW2d 553 (2011), matters of statutory construction, *Snead v John Carlo, Inc*, 294 Mich App 343, 354; 813 NW2d 294 (2011), whether a cause of action is time-barred, *Caron v Cranbrook Ed Community*, 298 Mich App 629, 635;

828 NW2d 99 (2012), the applicability of equitable subrogation, *CitiMortgage*, 295 Mich App at 75, and questions of law generally, *id*.

B. SUMMARY DISPOSITION TESTS

The trial court relied on MCR 2.116(C)(7), (8), and (10) in ruling on the motions for summary disposition. With respect to MCR 2.116(C)(7), which provides, in part, for summary dismissal when an action is barred by a statute of limitations, this Court in *RDM Holdings, Ltd v Continental Plastics Co*, 281 Mich App 678, 687; 762 NW2d 529 (2008), observed:

> 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. *Id*. All factual allegations in the complaint must be 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.

Finally, with respect to the well-established principles governing a motion for summary disposition brought pursuant to MCR 2.116(C)(10), this Court in *Pioneer State Mut Ins Co v Dells*, 301 Mich App 368, 377; 836 NW2d 257 (2013), explained:

> In general, MCR 2.116(C)(10) provides for summary disposition when there is no genuine issue regarding any material fact and the moving party is entitled to judgment or partial judgment as a matter of law. A motion brought under MCR 2.116(C)(10) tests the factual support for a party's claim. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ. The trial court is not permitted to assess credibility, weigh the evidence, or resolve factual disputes, and if material evidence conflicts, it is not appropriate to grant a motion for summary disposition under MCR 2.116(C)(10). A court may only consider substantively admissible evidence actually proffered relative to a motion for summary disposition under MCR 2.116(C)(10). [Citations and quotation marks omitted.]

C. DISCUSSION

1. PURPORTED DISCHARGE OF CAPITOL MORTGAGE

Counts I, II, III, V (in part), and VI of Wells Fargo's complaint were reliant on the discharge of mortgage that the assistant vice president for Capitol had faxed to the closing department of the title company handling the closing on the 2005 Option One mortgage. Count I alleged an unlawful failure to discharge the mortgage and record the discharge; Count II alleged common-law indemnity predicated on a failure to

honor and record the discharge; Count III alleged fraud and misrepresentation for Capitol's failure to follow through and record the discharge as promised; Count V sought a determination that Wells Fargo's mortgage interest was superior to SBC's mortgage interest based, in part, on the discharge of the Capitol mortgage; and Count VI alleged that SBC's foreclosure was invalid because there was no mortgage to foreclose upon given the discharge.

Within the pertinent period, as prescribed by MCL 565.44(2), "after a mortgage has been paid or otherwise satisfied, the mortgagee . . . shall prepare a discharge of the mortgage, file the discharge with the register of deeds for the county where the mortgaged property is located, and pay the fee for recording the discharge." MCL 565.41(1). A mortgagee is liable for statutory and actual damages for refusing or neglecting to discharge a mortgage "after full performance of the condition of the mortgage, . . . or, if the mortgage is entirely due, after a tender of the whole amount due . . . ." MCL 565.44(1).

There is no dispute that the mortgagors did not pay off, satisfy, or fully perform the conditions of the Capitol mortgage, so there was no general statutory entitlement to a discharge of mortgage. Rather, this case presented an attempted subordination of mortgages, as between the Capitol and Option One mortgages, through the planned use of a discharge of mortgage and a replacement mortgage, whereby Option One would retain its superior lien position despite recording the 2005 Option One mortgage *after* the 2004 Capitol mortgage had been recorded. See *Black's Law Dictionary* (7th ed), p 68 (defining a "subordination agreement" as "[an] agreement by which one who holds an otherwise senior interest agrees to subordinate that

interest to a normally lesser interest . . .”). Stated otherwise, Option One and Capitol contemplated subordination of Capitol’s first lien to a second or junior lien, although not through the mechanism set forth in MCL 565.391.[8] The principles and rules governing the construction, application, and enforceability of contracts generally apply to subordination agreements. *Conagra, Inc v Farmers State Bank*, 237 Mich App 109, 131-132; 602 NW2d 390 (1999).

The law of contracts recognizes that some agreements are not binding at the outset with respect to a right to performance, entailing conditions precedent to performance. *Harbor Park Market, Inc v Gronda*, 277 Mich App 126, 131-132; 743 NW2d 585 (2007). In *Harbor Park*, this Court observed:

> A condition precedent . . . is a fact or event that the parties intend must take place before there is a right to performance. If the condition is not satisfied, there is no cause of action for a failure to perform the contract. However, . . .

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[8] MCL 565.391 provides:

> When any mortgagee named in any mortgage of property within this state, or the party or parties to whom such mortgage has been properly assigned of record, desire to waive the priority of said mortgage in favor of any other lien or mortgage, the holder thereof may in writing on said mortgage, or by separate instrument duly acknowledged and witnessed in the same manner as is provided for deeds and other instruments for the transfer of an interest in real estate, waive the priority of said mortgage in favor of any other mortgage or lien, to the extent of the lien of the mortgage so waived and such waiver when recorded whether upon the margin of the record, or as a separate instrument, shall be constructive notice thereof to all persons dealing with the mortgage, the lien of which has been so waived, or with property described in said mortgage, from the date of filing said waiver for record. If said waiver be a separate instrument, it shall be recorded in the same manner provided for the recording of discharges of mortgages, and the recorder shall be entitled to the same fees for recording waivers of priority as are charged for assignments and discharges of mortgages.

> promisors . . . cannot avoid liability on [a] contract for the failure of a condition precedent where they caused the failure of the condition. As the Supreme Court has stated, when a contract contains a condition precedent, there is an implied agreement that the promisor will place no obstacle in the way of the happening of such event. Where a party prevents the occurrence of a condition, the party, in effect, waives the performance of the condition. Hence, the performance of a condition precedent is discharged or excused, and the conditional promise made an absolute one. [*Id*. (citations, quotation marks, and ellipses omitted).]

In 1 Cameron, Michigan Real Property Law (3d ed), Real Estate Sale Contracts, § 15.45, pp 553-554, the author discussed conditions precedent in the context of real estate transactions, stating:

> Many real estate sale contracts contain conditions precedent that must be met before either the buyer or the seller has an obligation to proceed. A condition precedent is distinguished from a promise in that it creates no right or duty in itself but is merely a limiting or modifying factor. Rezoning, the availability of financing, tax abatement, and the ability of one party to sell or purchase other real estate are often the subject of common conditions precedent in real estate sale contracts. . . . Once a condition has been fulfilled, the contract ceases to be conditional. [Citations omitted.]

Given the uncontradicted affidavit executed by Capitol's assistant vice president, which was also consistent with the Capitol loan presentation document, see note 3 of this opinion, we conclude as a matter of law that Option One and Capitol had, at most, a conditional subordination agreement. Under the conditional agreement, Capitol was obligated to discharge the mortgage and record the discharge, but only if no new money was lent to the mortgagors as part of the Option One mortgage and a replacement mortgage was

prepared and recorded in favor of Capitol. There is no genuine issue of material fact that neither of these conditions was satisfied, nor that Capitol engaged in conduct to prevent the occurrence of the conditions. Accordingly, Capitol had no legal obligation to perform by way of honoring and recording the faxed discharge of mortgage; the purported discharge was ineffective and unenforceable.

Although the trial court alluded to a variety of reasons to dismiss the counts at issue, including expiration of the period of limitations, failure to state a claim, and the lack of clear and convincing evidence relative to the fraud and misrepresentation count, the court also found that "there wasn't a discharge."[9] Our holding is that there was no effective and valid discharge of the Capitol mortgage in light of the conditions precedent and the failure of those conditions, as conclusively established by the assistant vice president's affidavit and the loan presentation document, which evidence was not contradicted by any documentary evidence submitted by Wells Fargo. Absent an enforceable promise to discharge the mortgage and record the discharge, there could be no unlawful failure to record the discharge, no basis for common-law indemnification, no foundation for fraud and misrepresentation, no reason to conclude that the Option One mortgage was the senior lien for purposes of the public record, and no grounds to invalidate SBC's foreclosure on the property. Therefore, the trial court did not err by summarily dismissing Counts I, II, III, V (as premised on the discharge), and VI of Wells Fargo's complaint, albeit for reasons that differ from those expressed by

[9] The trial court subsequently mentioned the failure of a "condition precedent" coming to fruition but couched it in terms of the condition being the payoff of the Capitol mortgage.

the trial court. See *Snead*, 294 Mich App at 358. Given our holding, it is unnecessary to examine the other arguments posed by Wells Fargo regarding the disposed-of counts.

2. EQUITABLE SUBROGATION

In general, Michigan is a race-notice state under MCL 565.29, wherein the owner of an interest in land can protect his or her interest by properly recording it, and the first to record an interest typically has priority over subsequent purchasers or interest holders. *Coventry Parkhomes Condo Ass'n v Fed Nat'l Mtg Ass'n*, 298 Mich App 252, 256; 827 NW2d 379 (2012); *Richards v Tibaldi*, 272 Mich App 522, 539; 726 NW2d 770 (2006).[10] Before its amendment pursuant to 2008 PA 357, MCL 565.25 provided, in part, as follows:

> (1) . . . In the entry book of mortgages the register shall enter all mortgages and other deeds intended as securities, and all assignments of any mortgages or securities. . . .
>
> * * *

[10] MCL 565.29 provides, in relevant part:

> Every conveyance of real estate within the state hereafter made, which shall not be recorded as provided in this chapter, shall be void as against any subsequent purchaser in good faith and for a valuable consideration, of the same real estate or any portion thereof, whose conveyance shall be first duly recorded.

The term "conveyance" as used in MCL 565.29 "embrace[s] every instrument in writing, by which any estate or interest in real estate is created, aliened, *mortgaged* or assigned . . . ." MCL 565.35 (emphasis added); see also *Mich Fire & Marine Ins Co v Hamilton*, 284 Mich 417, 419; 279 NW 884 (1938) (stating that the race-notice statute applies to mortgages); *Coventry Parkhomes*, 298 Mich App at 256 (observing that MCL 565.29 and the principle that the first to record has priority apply to liens and mortgages); *Church & Church, Inc v A-1 Carpentry*, 281 Mich App 330, 345; 766 NW2d 30 (2008) (providing that MCL 565.29 "applies to mortgages"), vacated in part and aff'd in part on other grounds 483 Mich 885 (2009).

> (4) The instrument shall be considered as recorded at the time so noted and shall be notice to all persons except the recorded landowner subject to subsection (2), of the liens, rights, and interests acquired by or involved in the proceedings. *All subsequent owners or encumbrances shall take subject to the perfected liens, rights, or interests*. [1996 PA 526 (emphasis added).]

Under this statutory language, mortgages were subject to the satisfaction of the obligation on a mortgage note in the order in which the mortgages were recorded. *Ameriquest Mtg Co v Alton*, 273 Mich App 84, 93; 731 NW2d 99 (2006).[11] In *Ameriquest*, this Court held that "[b]ecause MCL 565.25(4) plainly provides for priority designation based on date of recordation," a party must allege and show fraud, mutual mistake, or some other unusual circumstance in order to invoke the doctrine of equitable subrogation. *Id*. at 99-100. The ruling in *Ameriquest* severely restricted the availability of equitable subrogation to mortgagees seeking to retain a senior lien position. See *id*. at 100 (MURPHY, J., concurring) (stating that our holding issued on the basis of MCL 565.25 "effectively abolishes the doctrine of equitable subrogation in its known form relative to mortgage priority and foreclosure disputes").

Pursuant to 2008 PA 357, the Legislature rewrote Subsection (1) of MCL 565.25 and entirely repealed and deleted Subsection (4) of the statute. In revisiting the doctrine of equitable subrogation following the ruling in *Ameriquest*, this Court, in *CitiMortgage*, 295 Mich App at 75, stated:

> Under Michigan's former race-notice recording statute, MCL 565.25(1) and (4), as amended by 1996 PA 526, a

[11] The *Ameriquest* panel noted that "Michigan's status as a recording priority jurisdiction has existed since, at least, 1897 CL 8980." *Ameriquest*, 273 Mich App at 93 n 3.

> first-recorded mortgage had priority over a later-recorded mortgage, and equity—and therefore equitable subrogation—was used by the courts to overcome the plain language of the statute only in the presence of unusual circumstances such as fraud or mutual mistake. . . . However, Michigan's recording statute was amended by 2008 PA 357, eliminating the former MCL 565.25(1) and (4). Because the analysis in *Ameriquest* relied on those former subsections, *Ameriquest* is no longer controlling. [Citations and quotation marks omitted.][12]

The parties do not dispute the general application of race-notice principles; therefore, as a starting point, the Capitol mortgage, which was not discharged, had priority over the subsequently recorded Option One mortgage, which was the junior or second mortgage upon its recordation in 2005, with the original Option One mortgage being satisfied and discharged. In light of these circumstances, Wells Fargo, as an assignee of Option One, turned to the doctrine of equitable subrogation in an attempt to have the Option One mortgage placed in the same priority position that had been enjoyed by the original Option One mortgage.

In *CitiMortgage*, this Court indicated "that the case-law . . . in Michigan is consistent with Restatement

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[12] In *Ameriquest*, this Court did not rely on or even cite the general race-notice statute, MCL 565.29, which is applicable to mortgages, although not nearly as precisely applicable as MCL 565.25. Thus, the *CitiMortgage* panel did not entertain the question whether the statutory theory underlying *Ameriquest* and the deconstruction of equitable subrogation might remain applicable, but under MCL 565.29 instead of the amended version of MCL 565.25. Moreover, such an argument was apparently not made in *CitiMortgage*. The parties here do not present an argument that *Ameriquest* should be resurrected or that *CitiMortgage* improperly relegated *Ameriquest* to the scrap heap of no-longer-controlling opinions. And *CitiMortgage* is binding precedent. MCR 7.215(J)(1). Accordingly, we decline to examine whether MCL 565.29 dictates the same limitations on the doctrine of equitable subrogation as those placed on the doctrine in *Ameriquest*.

Property, 3d, Mortgages, § 7.3, pp 472-473[.]" *CitiMortgage*, 295 Mich App at 76.[13] The *CitiMortgage* panel next examined the commentary to § 7.3 of the Restatement and then set forth its ruling:

> Of particular note, comment b to this section of the Restatement provides that "[u]nder § 7.3(a) a senior mortgagee that discharges its mortgage of record and records a

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[13] This Court proceeded to quote the entire Restatement section, which provides:

> (a) If a senior mortgage is released of record and, as part of the same transaction, is replaced with a new mortgage, the latter mortgage retains the same priority as its predecessor, except
>
> (1) to the extent that any change in the terms of the mortgage or the obligation it secures is materially prejudicial to the holder of a junior interest in the real estate, or
>
> (2) to the extent that one who is protected by the recording act acquires an interest in the real estate at a time that the senior mortgage is not of record.
>
> (b) If a senior mortgage or the obligation it secures is modified by the parties, the mortgage as modified retains priority as against junior interests in the real estate, except to the extent that the modification is materially prejudicial to the holders of such interests and is not within the scope of a reservation of right to modify as provided in Subsection (c).
>
> (c) If the mortgagor and mortgagee reserve the right in a mortgage to modify the mortgage or the obligation it secures, the mortgage as modified retains priority even if the modification is materially prejudicial to the holders of junior interests in the real estate, except as provided in Subsection (d).
>
> (d) If a mortgage contains a reservation of the right to modify the mortgage or the obligation as described in Subsection (c), the mortgagor may issue a notice to the mortgagee terminating that right. Upon receipt of the notice by the mortgagee, the right to modify with retention of priority under Subsection (c) becomes ineffective against persons taking any subsequent interests in the mortgaged real estate, and any subsequent modifications are governed by Subsection (b). Upon receipt of the notice, the mortgagee must provide the mortgagor with a certificate in recordable form stating that the notice has been received. [Restatement Property, 3d, Mortgages, § 7.3, pp 472-473.]

replacement mortgage does not lose its priority as against the holder of an intervening interest unless that holder suffers material prejudice." The associated Reporters' Note, voluminously citing many cases from other jurisdictions, explains that "[c]ourts routinely adhere to the principle that a senior mortgagee who discharges its mortgage of record and takes and records a replacement mortgage, retains the predecessor's seniority as against intervening lienors unless the mortgagee intended a subordination of its mortgage or 'paramount equities' exist."

. . . [W]e conclude that § 7.3 of the Restatement, limited to the situations described by the quoted commentary—specifically, cases in which the senior mortgagee discharges its mortgage of record and contemporaneously takes a replacement mortgage, as often occurs in the context of refinancing—is consistent with Michigan precedent. Thus limited, because § 7.3 of the Restatement reflects the present state of the law in Michigan, we hereby adopt it. We caution, however, that the lending mortgagee seeking subrogation and priority over an intervening interest relative to its newly recorded mortgage *must be the same lender* that held the original mortgage before the intervening interest arose; and, furthermore, any application of equitable subrogation is subject to a careful examination of the equities of all parties and potential prejudice to the intervening lienholder.

* * *

We [hold] that equitable subrogation is available to place a new mortgage in the same priority as a discharged mortgage if the new mortgagee was the original mortgagee and the holders of any junior liens are not prejudiced as a consequence. We further conclude that the Restatement, in the limited form in which we have adopted it, sets forth a reasonable and proper framework for determining whether junior lienholders have been prejudiced and whether the equities ultimately favor

> equitable subrogation. Because the trial court is the forum best suited to evaluating any prejudice and the competing equities, including making any relevant factual determinations, we remand this matter to the trial court to do so. [*CitiMortgage*, 295 Mich App at 77, 81 (citations omitted; initial two alterations and emphasis in original).]

CitiMortgage involved a fact pattern that is similar to the history in our case, except that there was no subordination attempt in *CitiMortgage* and, more importantly, *CitiMortgage* addressed a pure refinancing transaction, absent an increase in the principal amount and the lending of new or additional monies. This latter distinction served as a basis, in part, for the trial court's rejection of Wells Fargo's equitable-subrogation argument. We hold that the trial court erred in so ruling.[14]

The framework enunciated in *CitiMortgage* did not indicate that equitable subrogation is wholly unavailable if funds are lent to a mortgagor above and beyond the amount needed to satisfy and discharge the original loan. The Court observed that the theory underlying equitable subrogation is that a junior lienholder's position is left unchanged by the conduct of the lender seeking subrogation and that the junior lienholder is not wronged or otherwise prejudiced as a consequence. *CitiMortgage*, 295 Mich App at 80.[15]

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[14] We note that there is no dispute that the mortgagee relative to the original mortgage and the new mortgage was the same entity, Option One, thereby satisfying that component of equitable subrogation as required by *CitiMortgage*.

[15] We recognize that a junior lienholder becomes a senior lienholder upon recordation of the replacement mortgage and discharge of the original mortgage, but for ease of reference, we shall speak of the junior lienholder, meaning the intervening mortgagee that recorded its mortgage after the original mortgage was recorded but before the replacement or new mortgage was recorded.

When new money is added to an otherwise ordinary refinancing transaction, a junior lienholder's position generally will be changed to its detriment if equitable subrogation is permitted, but only to the extent of the increase in the principal amount. Absent the increase or new money, with all other pertinent variables remaining the same, the extent of the available recovery or the amount needed to redeem property arising out of any foreclosure proceedings would be the same for the junior lienholder as before the execution of the new or replacement mortgage. In other words, the junior lienholder's margin of protection would be unchanged upon invocation of equitable subrogation. With new money being lent and an increase in the principal amount, the extent of the available recovery would be diminished or the amount needed to redeem property would increase for the junior lienholder as compared to before the execution of the replacement mortgage, making the increase in the principal amount prejudicial should equitable subrogation be allowed. Stated otherwise, the junior lienholder's margin of protection would be reduced upon invocation of equitable subrogation. Simply put, the more money to which a mortgagee asserting equitable subrogation becomes entitled (or the greater the mortgagor's obligation under the replacement mortgage), the lesser protection or greater the potential loss for the junior lienholder.

Our view is consistent with language in comment *b*, p 475, of the Restatement, § 7.3, wherein it is stated:

> Other sorts of changes that may be made in the terms of a replacement mortgage are not so benign. *Obviously an increase in the principal amount will prejudice the holders of junior interests; see Illustration 2*. Unless the original mortgage validly secures future advances . . . , it would be unfair to subordinate the intervening lienor to a replace-

> ment mortgage balance that it would have no reason to anticipate. [Emphasis added.][16]

The Reporters' Note to Restatement, § 7.3 explains that "courts usually regard an increase in the mortgage interest rate or principal amount as causing a *pro tanto* loss of priority to any intervening liens." *Id*. at 485.[17]

We agree with and adopt the Restatement approach set forth in comment *b*, the illustrations, and the

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[16] Illustration 2 must be read in conjunction with Illustration 1, and those two illustrations provide as follows:

> 1. Mortgagor borrows $50,000 from Mortgagee–1 and gives Mortgagee–1 a promissory note for that amount secured by a mortgage on Blackacre. The mortgage obligation carries a fixed rate of interest and is to be amortized by fixed payments over 15 years. The mortgage is immediately recorded. Thereafter, Mortgagor borrows $10,000 from Mortgagee–2 and gives Mortgagee–2 a promissory note for that amount secured by a mortgage on Blackacre. The latter mortgage is promptly recorded. Two years later, when the balance on Mortgagee–1's mortgage is $49,000, Mortgagor and Mortgagee–1 agree to a replacement mortgage. Mortgagee–1 releases its original mortgage of record and Mortgagor delivers to Mortgagee–1 a new promissory note for $49,000 secured by a mortgage on Blackacre. The mortgage obligation carries the same fixed rate of interest as its predecessor and is evenly amortized over 20 years. A few days later, Mortgagee–1 records the replacement mortgage. The latter mortgage is senior to Mortgagee–2's mortgage.
>
> 2. The facts are the same as Illustration 1, except that the replacement mortgage delivered to Mortgagee–1 secures a $60,000 obligation. Mortgagee–1's replacement mortgage is senior to Mortgagee–2's mortgage *except to the extent of $11,000* and interest accruing thereon. [Restatement, § 7.3, comment *b*, p 476 (emphasis added).]

[17] We note that the initial interest rate on the original 2003 Option One mortgage was 8.100%, subject to possible increases based on market rates starting January 1, 2006. The interest rate could never go below 8.100% and had a ceiling of 14.100%. The 2005 Option One mortgage had an initial interest rate of only 6.900%, subject to possible increases based on market rates starting May 1, 2008. The interest rate could never go below 6.900% and had a ceiling of 12.900%. Both mortgages were for 30-year terms.

Reporters' Note as cited and discussed earlier. The original Option One mortgage was not a future advance mortgage,[18] and permitting equitable subrogation with respect to the new monies that increased the principal amount to $520,000 when the balance owing on the original Option One mortgage was $458,109 would be prejudicial. There is nothing in the record indicating that Capitol could have anticipated a replacement mortgage with an increase in the principal amount when Capitol made the loan to the mortgagors and obtained its mortgage in 2004. Accordingly, Wells Fargo is not entitled to equitable subrogation in regard to the new or additional monies given the resulting prejudice; priority was lost to the Capitol mortgage as to those funds.

Wells Fargo argues, however, that the issue of prejudice is irrelevant, invoking Restatement, § 7.3(c), p 473, which provides that "[i]f the mortgagor and mortgagee reserve the right in a mortgage to modify the mortgage or the obligation it secures, the mortgage as modified retains priority even if the modification is materially prejudicial to the holders of junior interests in the real estate . . . ." Paragraph 26 of the original Option One mortgage provided that "[t]his Security Instrument may be modified or amended . . . by an agreement in writing signed by Borrower and Lender." Wells Fargo contends that, given this language in the

[18] Restatement, § 7.3, comment *b*, p 475, notes the following regarding future advance mortgages:

> Where the original mortgage clearly states that it secures future advances and specifies no maximum monetary amount, the intervening lienor is not materially prejudiced. Since the intervenor takes its lien on notice that future advances are possible, it cannot validly claim injury based on the fact that the replacement mortgage exceeds the pre-release balance of its predecessor.

original Option One mortgage, equitable subrogation should apply to the entire 2005 Option One mortgage, including the new monies that were lent to the mortgagors, regardless of any prejudice. We first note that while the *CitiMortgage* panel quoted Restatement, § 7.3(c), it is not clear that it actually adopted that specific provision, particularly because the panel later stated that it was adopting Restatement, § 7.3 as limited to the situations described in the commentary that the Court had quoted, which commentary did not discuss mortgage-modification language. *CitiMortgage*, 295 Mich App at 77. Regardless, the 2005 Option One mortgage did not entail a mere modification of the original mortgage; rather, it was a true replacement mortgage, resulting in the satisfaction, discharge, and cancellation of the original mortgage in its entirety. Accordingly, we reject Wells Fargo's argument on this matter.

With respect to the question whether it would be prejudicial to apply equitable subrogation relative to lent funds *other than the new or additional monies*, Capitol's position would have been left unchanged, and thus we cannot identify any resulting prejudice. Indeed, the general overall reduction in the interest rate reflected in the 2005 Option One mortgage would likely have been favorable to Capitol, not prejudicial.[19] That said, there are a variety of other issues regarding the application of equitable subrogation that we must still review and resolve.

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[19] An *increase* in the interest rate may materially prejudice junior lienholders. Restatement, § 7.3, comment *b*, p 475. "The reason is that the junior interest-holder's margin of protection in the real estate is reduced to the extent that a higher interest rate, like an additional principal advance, increases the amount of the senior mortgage obligation." *Id*.

First, the trial court ruled that a claim of equitable subrogation is subject to a six-year period of limitations and that Wells Fargo's assertion of the doctrine was time-barred. The trial court, agreeing with SBC and Capitol, invoked the catch-all period of limitations found in MCL 600.5813, which provides that "[a]ll other personal actions shall be commenced within the period of 6 years after the claims accrue and not afterwards unless a different period is stated in the statutes." On appeal, Wells Fargo contends that the applicable limitations period for equitable subrogation is 15 years under MCL 600.2932 and MCL 600.5801(4).

The trial court's ruling reflected a misunderstanding of the doctrine of equitable subrogation. The doctrine is not a cause of action, such that it would be subject to its own statute of limitations. Rather, equitable subrogation, in the context of its desired employment in this case, is simply a mechanism to realign mortgage priorities as part of a suit to determine an interest in land under MCL 600.2932.[20] An action to quiet title, i.e., to determine an interest in real property, brought under MCL 600.2932 is subject to the 15-year limitations period in MCL 600.5801(4). *Adams v Adams (On Reconsideration)*, 276 Mich App 704, 719; 742 NW2d 399 (2007). Count IV of Wells Fargo's complaint alleged equitable subrogation, and Count V claimed a superior interest in land (quiet title), effectively on the basis of the debunked discharge of mortgage and

[20] MCL 600.2932(1) provides:

> Any person, whether he is in possession of the land in question or not, 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, whether the defendant is in possession of the land or not. [See also MCR 3.411.]

equitable subrogation. Confusion might have been minimized had Wells Fargo not alleged a separate count for equitable subrogation; the argument in favor of equitable subrogation simply should have been encompassed by the quiet-title count. An argument asserting equitable subrogation will effectively be precluded if a quiet-title action wherein the doctrine is raised is not maintained within the 15-year period of limitations applicable to quiet-title actions. But, technically, there is no limitations period specifically for equitable subrogation. Wells Fargo's claim seeking to determine an interest in land, and more specifically the priority of an interest, was pursued well within the applicable 15-year period of limitations; therefore, Wells Fargo was not precluded from presenting an equitable-subrogation argument.

With respect to the effect of the assignment of the Option One mortgage to Wells Fargo on the analysis concerning equitable subrogation, this Court has stated that "[i]t is well established that an assignee stands in the shoes of an assignor, acquiring the same rights and being subject to the same defenses as the assignor." *Coventry Parkhomes*, 298 Mich App at 256-257. Upon an assignment of a mortgage, the assignee, for all beneficial purposes, becomes a party to the mortgage, and "a mortgage assignee has the same priority rights as the original mortgage assignor." *Id*. at 257. In *CitiMortgage*, 295 Mich App at 78 n 2, this Court made clear that these general assignment principles pursuant to which an assignee stands in the shoes of the assignor are equally applicable for purposes of equitable-subrogation analysis. Accordingly, the fact that Wells Fargo was not a direct party to the Option One mortgage but an assignee does not alter our ruling regarding the availability of equitable subrogation. Further, our conclusion is not changed by the

fact that Wells Fargo was aware at the time of the assignment that the public record revealed the existence and superiority of the Capitol mortgage. To hold otherwise would stymie assignments and effectively preclude assignees from invoking equitable subrogation, which is only necessary to pursue in the first place when the public record reveals that another lien exists and is superior. Had it not been Wells Fargo as an assignee seeking equitable subrogation, it would have been the original mortgagee itself—Option One. And Wells Fargo's knowledge would have no bearing on whether prejudice would be incurred by Capitol or SBC in permitting equitable subrogation.

SBC and Capitol argue that equitable subrogation is not available because Option One had intended to subordinate the 2005 Option One mortgage to the Capitol mortgage, given that Option One realized early on that there was no effective discharge of the Capitol mortgage and that the Capitol mortgage had been excepted from coverage under the title insurance policy, yet Option One did nothing in response. The *CitiMortgage* panel, quoting the Reporters' Note to Restatement, § 7.3, p 483, observed that a senior mortgagee who discharges its mortgage and takes a replacement mortgage cannot avail itself of equitable subrogation if it intended a subordination of its replacement mortgage to the existing junior mortgage. *CitiMortgage*, 295 Mich App at 77. We conclude that, contrary to the claims of SBC and Capitol, the documentary evidence established that Option One did not intend to subordinate the 2005 Option One mortgage to the Capitol mortgage. Option One's closing instructions to the title company and the effort to obtain the discharge of mortgage from Capitol showed that Option One fully intended to retain its senior lien position at the time of the 2005 mortgage. The alleged failure

by Option One thereafter to timely address the circumstances did not reveal an intent to subordinate its mortgage to the Capitol mortgage but was more in the nature of neglect at worst.

Next, SBC argues that it was a bona fide purchaser for value and thus protected by MCL 565.29, which, again, provides:

> Every conveyance of real estate within the state hereafter made, which shall not be recorded as provided in this chapter, shall be void as against any subsequent purchaser in good faith and for a valuable consideration, of the same real estate or any portion thereof, whose conveyance shall be first duly recorded.

SBC contends that at the time it was assigned the Capitol mortgage in August 2013, it did not have actual or constructive notice of the original Option One mortgage given its discharge, nor did it have notice of Wells Fargo's equitable-subrogation claim.[21] SBC maintains that "the public record was replete [sic: devoid] of any evidence of an alleged valid superior mortgage on the same property" when SBC was assigned the mortgage.[22]

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[21] SBC's argument is poorly worded. We do not construe the argument as suggesting that the original Option One mortgage was no longer viewable at the register of deeds office upon recordation of the discharge of said mortgage, although the argument is susceptible to such an interpretation. If that is the argument, then it would fail because the original Option One mortgage would remain recorded and on display despite its discharge, and the discharge itself, which was recorded, referred to the existence of the original Option One mortgage. Therefore, SBC had notice of the original Option One mortgage. It appears that what SBC is attempting to contend is simply that it obtained the assignment without notice that Option One, and thus Wells Fargo, had a potentially viable priority claim, considering the recorded discharge of the original Option One mortgage that placed Capitol in the senior lien position.

[22] Although the trial court found that SBC had been a bona fide purchaser for value in dissolving and terminating the TRO and prelimi-

Under MCL 565.29, a bona fide or good-faith purchaser for value of an interest in real property may take priority over a prior conveyed interest. *Penrose v McCullough*, 308 Mich App 145, 152; 862 NW2d 674 (2014). "And a good-faith purchaser is one who purchases [property] without notice of any defect in the vendor's title." *Id*. A person having notice of a possible defect in title who fails to make further inquiry into the potential rights of a third party does not constitute a good-faith purchaser. *Id*. at 152-153. Notice, which can be actual or constructive, "is whatever is sufficient to direct attention of the purchaser of realty to prior rights or equities of a third party and to enable him to ascertain their nature by inquiry." *Id*. (citation and quotation marks omitted). Constructive notice involves imputed notice to a person regarding all matters properly of record. *Id*.

In the simplest of hypotheticals, MCL 565.29 dictates that a mortgagee who first obtains a mortgage but fails to record it loses to a subsequent mortgagee who obtains a mortgage relative to the same property and records the mortgage, so long as the subsequent mortgagee gave value for the mortgage and lacked notice of the first mortgage. In this case, SBC is not arguing that it did not have notice of the 2005 Option One mortgage, which was duly recorded. Rather, SBC is maintaining that it lacked notice that the Option One mortgage might potentially be given priority over the Capitol mortgage that was assigned to SBC under the doctrine of equitable subrogation. "A party's status as a bona fide purchaser for value is relevant only when there has

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nary injunction, the court did not rely on or address the principle in ruling on the motions for summary disposition. Given that the issue of whether SBC was a bona fide purchaser for value had been presented for consideration at summary disposition, we will address SBC's argument as a potential alternative basis to affirm the trial court's ruling.

been a *previously unrecorded conveyance*." *Trademark Props of Mich, LLC v Fed Nat'l Mtg Ass'n*, 308 Mich App 132, 142 n 4; 863 NW2d 344 (2014) (emphasis added), citing MCL 565.29.[23] The bona-fide-purchaser argument posed by SBC does not rely on a previously unrecorded conveyance that allegedly constituted a defect of which it had no notice. But SBC is not arguing that its bona-fide-purchaser status is irrelevant or that equitable subrogation is unavailable as a matter of law under MCL 565.29 simply because the Capitol mortgage was the senior mortgage on the public record. Instead, SBC appears to be maintaining that it had no notice of the possibility of an equitable-subrogation claim. Essentially, SBC is equating an equitable-subrogation interest (a prospective claim of equitable subrogation) to a "previously unrecorded conveyance," which equitable-subrogation interest can be defeated if a subsequent mortgagee acquires a mortgage for a valuable consideration and records it absent notice of a viable claim for equitable subrogation.

Assuming for the sake of argument that the premise of SBC's theory is sound, i.e., that a mortgage interest conveyed to a bona fide purchaser for value is superior to an earlier-arising, equitable-subrogation interest, which of course would be unrecorded, SBC cannot show that it was indeed a bona fide purchaser for value.[24]

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[23] It appears that the *Trademark Props* panel's point was that if there has been a previously recorded conveyance, the party recording that conveyance would generally prevail as being the first to record, making the subsequently recorded conveyance subordinate or junior and entirely undermining any bona-fide-purchaser claim, considering the existence of record notice. The panel did not address an equitable-subrogation claim.

[24] We do question the soundness of SBC's theory, considering that the whole purpose of the doctrine of equitable subrogation is to allow a mortgagee whose mortgage is the junior lien in the public record to attain senior lien status.

For the reasons set forth in the following paragraphs, the record was sufficient to have directed SBC's attention to the rights or equities of Option One's assignee Wells Fargo and enabled SBC to ascertain the nature of those rights or equities by inquiry. *Penrose*, 308 Mich App at 153. Therefore, SBC had notice of a possible priority claim by Wells Fargo at the time that SBC was assigned the Capitol mortgage.

First, *CitiMortgage* had been the law in Michigan for approximately two years when SBC was assigned the Capitol mortgage; therefore, in light of the public record showing the original 2003 Option One mortgage, the 2004 Capitol mortgage, the 2005 Option One mortgage, and the soon-thereafter discharge of the original Option One mortgage by Option One itself, SBC should have been aware of an available claim of equitable subrogation by Wells Fargo. Second, the affidavit by the asset manager for SummitBridge and SBC averred that "SBC was made aware of the civil action filed by Wells Fargo against [Capitol] . . . in 2013," which was a reference to the previous quiet-title suit brought by Wells Fargo. Although Wells Fargo did not assert an argument for equitable subrogation in the 2013 quiet-title action, Wells Fargo did claim that there had been a discharge of the Capitol mortgage and that it ultimately had superior title. While SBC was assigned the mortgage seven days after the quiet-title action was dismissed, the dismissal was without prejudice, leaving open the possibility of future litigation over priority of the mortgages. Under these circumstances, we conclude that SBC had notice of a possibility that the outwardly appearing priority of the Capitol mortgage might be in peril, thereby necessitating further in-

quiry. Accordingly, SBC was not a good-faith purchaser for purposes of MCL 565.29.[25]

Finally, Capitol argues that equitable subrogation is not available under Restatement, § 7.3(a)(2), which provides an exception to the doctrine "to the extent that one who is protected by the recording act acquires an interest in the real estate at a time that the senior mortgage is not of record." Assuming that *CitiMortgage* adopted this provision, the comment and illustration make clear that § 7.3(a)(2) applies in cases in which a senior mortgagee has recorded a discharge of its original mortgage but has yet to record its replacement mortgage, which was executed and used to satisfy the original mortgage, and a second mortgagee comes along and records its mortgage before the replacement mortgage is recorded. Restatement, § 7.3, comment *b*, p 476, and Illustration 6, p 478. In this case, the original Option One mortgage had not yet been discharged and was fully applicable when Capitol obtained its mortgage. Accordingly, § 7.3(a)(2) does not provide a basis to reject Wells Fargo's claim of equitable subrogation.

III. CONCLUSION

The trial court did not err by dismissing Counts I, II, III, V (mortgage discharge component), and VI of Wells Fargo's complaint, considering that the purported discharge of mortgage was ineffective and unenforceable as a matter of law for failure to satisfy conditions precedent. With respect to Count IV, which alleged equitable

[25] To the extent that SBC is contending that it needed to have notice that a claim for equitable subrogation had actually been asserted, whether in a court action or correspondence, before SBC was assigned the Capitol mortgage, we reject the argument. As indicated, notice can be actual or constructive, and an examination of the public record at the register of deeds office would have shown that the circumstances were ripe for a claim of equitable subrogation.

subrogation, we conclude that it was subsumed by Count V, which alleged mortgage superiority partly on the basis of equitable subrogation. And the trial court did err by dismissing Count V relative to the issue of equitable subrogation, but only to the extent that the court ruled that equitable subrogation was unavailable with respect to amounts not encompassing the new or additional monies. There was no error in excluding the new monies or the increase in the principal amount from being subject to equitable subrogation. We remand for entry of judgment in favor of Wells Fargo on Count V consistent with this opinion. To be clear, SBC retains title to the property purchased at the sheriff's sale, but that ownership interest is subject to Wells Fargo's equitably subrogated mortgage interest as outlined by our ruling. See MCL 600.3236.[26]

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Neither party having fully prevailed, we decline to award taxable costs pursuant to MCR 7.219.

MARKEY, P.J., and RONAYNE KRAUSE, J., concurred with MURPHY, J.

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[26] MCL 600.3236 provides:

> Unless the premises described in such deed shall be redeemed within the time limited for such redemption as hereinafter provided, such deed shall thereupon become operative, and shall vest in the grantee therein named, his heirs or assigns, all the right, title, and interest which the mortgagor had at the time of the execution of the mortgage, or at any time thereafter, except as to any parcel or parcels which may have been redeemed and canceled, as hereinafter provided; and the record thereof shall thereafter, for all purposes be deemed a valid record of said deed without being re-recorded, but no person having any valid subsisting lien upon the mortgaged premises, or any part thereof, created before the lien of such mortgage took effect, shall be prejudiced by any such sale, nor shall his rights or interests be in any way affected thereby.

PEOPLE v STEVENS

Docket No. 328097. Submitted November 1, 2016, at Lansing. Decided November 29, 2016, at 9:05 a.m.

Monica M. Stevens was convicted following a jury trial in the Shiawassee Circuit Court of third-offense operating while intoxicated, MCL 257.625. Defendant had a blood alcohol level of 0.25% when she was discovered in the driver's seat of her vehicle in the ditch next to a roadway; she smelled of alcohol and failed several field sobriety tests. The court, Matthew J. Steward, J., sentenced defendant to 22 to 90 months in prison and ordered defendant to pay $1,472, which included $774 in court costs. Defendant's minimum sentence exceeded the applicable sentencing guidelines range. Defendant appealed.

The Court of Appeals *held*:

1. In accordance with *People v Lockridge*, 498 Mich 358 (2015), and *People v Steanhouse*, 313 Mich App 1 (2015), the sentencing guidelines ranges are advisory, not mandatory, and this Court must review departure sentences for reasonableness. When determining the reasonableness of a sentence, an appellate court must determine whether the sentence violates the principle of proportionality. In general, a defendant is not entitled to resentencing if the trial court explains its reasons on the record for imposing a departure sentence. However, in accordance with *Steanhouse*, remand for proportionality review is appropriate if the departure sentence was imposed before the *Lockridge* decision. In this case, although the trial court detailed its reasons for the departure sentence, the sentence was imposed before *Lockridge* was decided. Accordingly, in conformity with *Steanhouse* and the remand procedures set forth in *United States v Crosby*, 397 F3d 103, 117-118 (CA 2, 2005), the case had to be remanded to determine what effect *Lockridge* would have had on defendant's sentence. Specifically, the trial court needed to determine whether it would have imposed the same sentence had it known the sentencing guidelines were not mandatory and to consider whether the sentence imposed was proportionate to the seriousness of the circumstances surrounding the offense and the offender.

2. The case also had to be remanded for the trial court to establish a factual basis for the court costs it had ordered defendant to pay.

Remanded.

O'CONNELL, J., dissenting, would have affirmed. Defendant was not entitled to resentencing under *Lockridge*. If, as in this case, a defendant does not challenge the scoring of his or her offense variables at sentencing on the basis of *Alleyne v United States*, 570 US ___ (2013), review is for plain error affecting the defendant's substantial rights. Remand is not necessary in this case because no error occurred. Specifically, the offense variables were correctly scored, there was no valid *Alleyne* challenge, and the trial court stated valid reasons on the record for the sentence it imposed. It would defy logic to conclude that the trial court would have imposed a lesser sentence had it been aware that the guidelines were merely advisory when the court, in fact, departed from the guidelines to impose a higher sentence. The decision in *Steanhouse* was contrary to the precepts of stare decisis, and this Court must follow the decision in *Lockridge* even though *Steanhouse* decided the issue differently. The *Lockridge* Court stated that no prejudice could result from the type of error involved in this case. Defendant could not show plain error; therefore, she was not entitled to relief.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Christopher M. Allen*, Assistant Attorney General, for the people.

Ann M. Prater, Attorney & Counselor At Law, PLLC (by *Ann M. Prater*), for defendant.

Before: RONAYNE KRAUSE, P.J., and O'CONNELL and GLEICHER, JJ.

GLEICHER, J. A jury convicted Monica M. Stevens of third-offense operating while intoxicated, MCL 257.625. The trial court departed upward from the guidelines and sentenced Stevens to 22 to 90 months' imprisonment. The court also ordered Stevens to pay a total of $1,472, including $774 in court costs. We now

remand for proportionality review as required by *People v Steanhouse*, 313 Mich App 1, 46-49; 880 NW2d 297 (2015), and for the trial court to articulate a factual basis for its imposition of costs.

I. BACKGROUND

On the evening of September 20, 2014, a passerby found Stevens behind the driver's seat of her vehicle, which was in a ditch alongside a roadway. Stevens admitted that she had been drinking for approximately nine hours. The Good Samaritan testified that Stevens smelled strongly of alcohol, slurred her speech, and stumbled her way out of the vehicle. A responding officer reported that Stevens failed several field sobriety tests, and a breathalyzer test indicated that her blood alcohol level was 0.25%. Stevens denied that she drove that evening. She testified that she fell asleep at her ex-husband's house and awoke in her car with no memory of how she got there. She claimed that her ex-husband drove her to the scene and then placed her in the driver's seat. The jury rejected this explanation and convicted Stevens as charged.

Before sentencing, the Department of Corrections scored all applicable offense and prior record variables and determined that Stevens's then-mandatory minimum sentencing guidelines range was 0 to 13 months. The trial court departed upward from the guidelines, sentencing Stevens to 22 to 90 months' imprisonment. In doing so, the court explained:

> Miss Stevens, I spent a lot of time on your case, and the Court staff will tell you that I took great care into fashioning a Sentence for you that I think is appropriate, and I don't think zero to 13 adequately handles this matter. I think that your matter presents substantial and compelling reasons to depart upwards from the recom-

mended guideline range. Your prior record variables are scored at 15 points based on two prior misdemeanor convictions and two prior low severity convictions. The guidelines in your case . . . don't adequately account for the following factors that the Court relies on in performing an upward departure.

You've had two previous convictions of OUIL Third. Two. This is your third, third. You've had extensive histories of alcohol related crimes, Miss Stevens. You've had a total of five OUILs, with a sixth that was dismissed in September of the year 2000. As I already mentioned, your blood alcohol level was [.]29.[1] The legal limit in the State of Michigan is [.]08, you were over three times the legal limit.

* * *

What's important is that this is your third felony for drunk driving, that's what's important.

Your previous and persistent failure to rehabilitate is important. Five previous courses of substance abuse counseling, four of which says you completed and were successful, yet you returned to drinking. Your prospects for rehabilitation are further lowered based on the fact that you've undergone community service for OUIL, work release, tether, and jail time. These previous sanctions along with the treatment that we've already talked about, has little positive effect on you, Miss Stevens.

You admit no responsibility in your description of this offense. In fact, you've argued that you're framed. I'm not basing your Sentence on this, not at all. I'm just pointing it out so this record reflects that, well, it further supports that rehabilitation is not a likely outcome. You're unlikely to rehabilitate, because you don't believe that you've done anything wrong. That suggests the need to emphasize punishment, and to protect society as primary goals for this Sentence.

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[1] It is unclear from the record where the trial court gleaned this number; the evidence at trial supported a 0.25% blood alcohol level.

> And Miss Stevens, any one of these factors that this court just placed on the record would keenly and irresistibly grab this Court's attention to the extent that the Court would be compelled to depart upward.
>
> * * *
>
> The Sentence I'm imposing is more proportional to this offense, because it accurately reflects the aggravating factors I've already discussed, and the need to impose a more severe sanction than those you've already faced.

Stevens now appeals her sentence.

II. DEPARTURE SENTENCE

July 29, 2015, marked a sea change in Michigan's sentencing jurisprudence. On that day, the Michigan Supreme Court ruled that the mandatory minimum sentence ranges of the legislative sentencing guidelines were unconstitutional as they required sentencing based on judicially found facts. *People v Lockridge*, 498 Mich 358, 364; 870 NW2d 502 (2015). To remedy this deficit, the Court severed the mandatory sentencing provisions and rendered the guidelines advisory only. *Id*.

In relation to departure sentences, *Lockridge*, 498 Mich at 392, instructed that appellate courts must conduct a reasonableness review. As noted by the dissent in this case, the Supreme Court stated in *Lockridge*, 498 Mich at 394, that a defendant cannot establish plain error supporting relief when the court imposed an upward departure sentence and explained its reasons on the record. However, in *Steanhouse*, 313 Mich App at 46-49, this Court held that when a trial court imposed a departure sentence before the resolution of *Lockridge*, we must remand for proportionality review pursuant to *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990), utilizing the procedure set forth in

United States v Crosby, 397 F3d 103, 117-118 (CA 2, 2005).

In *People v Masroor*, 313 Mich App 358, 373; 880 NW2d 812 (2015), a panel of judges requested a conflict panel to resolve a difference of opinion with *Steanhouse*. The vote fell short, however, and *Steanhouse* remains binding precedent. See *People v Masroor*, 313 Mich App 801 (2015). Accordingly, even if this Court believes a defendant's pre-*Lockridge* departure sentence is reasonable and adequately supported by the trial court's record statements, we must remand to allow the defendant an opportunity to reiterate his or her request for resentencing and then for continued proceedings consistent with *Crosby*. We are not permitted to presume that the lower court would have embarked on the same reasoning had it been aware that its judgment was controlled by *Milbourn*'s reasonableness analysis. Nor are we permitted to disregard the binding precedent of this Court.

Although the trial court in this case went to great lengths to support its sentencing decision, it did so on the assumption that the guidelines were mandatory and any departure had to be based on substantial and compelling reasons that keenly and irresistibly grabbed the court's attention. The court did not specifically consider, as required by *Steanhouse*'s readoption of the *Milbourn* standard, whether the sentence imposed was "proportionate to the seriousness of the circumstances surrounding the offense and the offender." *Milbourn*, 435 Mich at 636. We are bound to remand this case to the trial court pursuant to *Steanhouse*.

III. COSTS

Stevens also contends that the trial court improperly ordered her to pay $774 in unspecified court costs, in violation of MCL 769.1k. MCL 769.1k(1)(b)(*iii*), as

amended by 2014 PA 352, allows trial courts to impose state costs against a criminal defendant if "reasonably related to the actual costs incurred by the trial court . . . ." Under this statute, trial courts must "establish a factual basis" from which this Court can "determine whether the costs imposed were reasonably related to the actual costs incurred by the trial court." *People v Konopka (On Remand)*, 309 Mich App 345, 359-360; 869 NW2d 651 (2015). The prosecution agrees that the trial court did not establish this factual basis in this case and that remand is necessary.

Accordingly, we remand for further sentencing proceedings consistent with *Lockridge*, *Crosby*, and *Steanhouse*, and for the trial court to articulate a factual basis for its imposition of costs. We do not retain jurisdiction.

RONAYNE KRAUSE, P.J., concurred with GLEICHER, J.

O'CONNELL, J. (*dissenting*). I respectfully dissent. I write simply to state that regarding departure sentences, *People v Steanhouse*, 313 Mich App 1, 48; 880 NW2d 297 (2015), is in conflict with *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015). For that reason, this Court is required to follow the strictures set forth in the Supreme Court's *Lockridge* opinion. If the constraints set forth in the *Lockridge* opinion are followed, defendant, Monica M. Stevens, is not entitled to a remand for a *Crosby* hearing. See *United States v Crosby*, 397 F3d 103 (CA 2, 2005). I would affirm the well-reasoned decision of the learned trial court.

This case involves a departure sentence. It does not involve an *Alleyne*[1] Sixth Amendment challenge, nor

[1] *Alleyne v United States*, 570 US ___; 133 S Ct 2151; 186 L Ed 2d 314 (2013).

does it involve a challenge to the misscoring of the guidelines. In such instances, *Lockridge* compels us to review a defendant's sentence for plain error. If no error occurred, no remand is necessary. In the present case, no error has occurred. In my opinion, it defies logic to remand a case for resentencing when the offense variables (OVs) are correctly scored, when no valid *Alleyne* challenge exists, and when the trial court stated valid reasons for why its chosen sentence was more proportionate to both the offense and the offender.

This Court reviews for reasonableness, under an abuse-of-discretion standard, the trial court's decision to depart upward from the sentencing guidelines. *People v Masroor*, 313 Mich App 358, 373; 880 NW2d 812 (2015). The trial court abuses its discretion when its sentence is not proportional under *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990), and its progeny. *Masroor*, 313 Mich App at 373-374.

In imposing a departure sentence that exceeded the guidelines range by nine months, the trial court stated that the recommended sentence did not "adequately handle[] this matter" and that it would fashion an "appropriate" sentence. The trial court explained that the guidelines did not adequately account for Stevens's extensive history of alcohol-related crimes, including five prior convictions of operating while intoxicated, that Stevens's blood alcohol content was three times over the legal limit, or that Stevens had "previous and persistent failure to rehabilitate." Stevens had participated in five previous courses of alcohol abuse counseling but continued to drink. Finally, the trial court noted that Stevens did not admit responsibility for the crime and was not likely to be rehabilitated. The trial court specifically stated that its

sentence "is more proportionate to this offense, because it accurately reflects the aggravating factors I've already discussed, and the need to impose a more severe sanction than those you've already faced."

The recommended guidelines range for Stevens's sentence was 0 to 13 months' imprisonment. The trial court exceeded the guidelines range by nine months and sentenced Stevens to a term of 22 to 90 months' imprisonment. In my opinion, this was a reasonable and well-deserved sentence.

The *Lockridge* question at issue in this case is whether Stevens, a fifth-time drunk-driving offender, is entitled to be resentenced or at least entitled to a remand for a *Crosby* hearing. The answer to this question depends on whether Stevens can show plain error in her sentencing process. On appeal, Stevens does not contest the scoring of her guidelines, nor can she establish plain error. I therefore conclude that *Lockridge* addresses this issue perfectly: Stevens is not entitled to be resentenced.

In this case, I would adopt the identical reasons to apply as stated in my dissent in *People v Shank*, 313 Mich App 221, 228-230; 881 NW2d 135 (2015) (O'CONNELL, J., dissenting), as follows:

> If a defendant does not challenge the scoring of his or her offense variables (OVs) at sentencing on *Alleyne* grounds, our review is for plain error affecting that defendant's substantial rights. *Lockridge*, 498 Mich at 392. In this case, [defendant] did not challenge the scoring of his OV scores on *Alleyne* grounds. Our review is for plain error.
>
> To be entitled to relief under plain-error review, a defendant must show that the error affected the outcome of the lower court proceedings. *Id*. at 393. The *Lockridge* court aptly stated the application of the plain error doc-

trine in cases—like [defendant's]—in which the defendant did not preserve an *Alleyne* challenge below and the trial court departed upward:

> Because [the defendant] received an upward departure sentence that did not rely on the minimum sentence range from the improperly scored guidelines (and indeed, the trial court necessarily had to state on the record its reasons for departing from that range), *the defendant cannot show prejudice from any error* in scoring the OVs in violation of *Alleyne*. [*Id*. at 394 (emphasis altered).]

If a defendant's minimum sentence involved an upward departure, that defendant "necessarily cannot show plain error . . . ." *Id*. at 395 n 31. "It defies logic that the court in those circumstances would impose a lesser sentence had it been aware that the guidelines were merely advisory." *Id*.

In this regard, the *Steanhouse* Court's decision to remand in that case was contrary to the precepts of stare decisis. As in *Lockridge*, the trial court in *Steanhouse* departed upward from the recommended sentencing range. *Steanhouse*, 313 Mich App at 42. The defendant in *Steanhouse*, like the defendant in *Lockridge*, did not challenge the scoring of his OVs on *Alleyne* grounds. *Id*. The Court of Appeals in *Steanhouse* recognized that the defendant could not establish a plain error under *Lockridge*. However, the Court proceeded to review the defendant's sentence and remand for resentencing anyway, directly contrary to the language of *Lockridge* providing that the *Lockridge* defendant was not entitled to resentencing under the exact same circumstances.

I would follow *Lockridge* without declaring a conflict panel. The reason is simple—this Court need not convene a conflict panel to follow a rule articulated by the Supreme Court, even if a decision of this Court conflicts with the Supreme Court's decision. *Charles A Murray Trust v Futrell*, 303 Mich App 28, 49; 840 NW2d 775 (2013). Until the Supreme Court's decision is overruled by the Supreme Court itself, the rules of stare decisis

> require this Court to follow the Supreme Court's decision. *Paige v Sterling Hts*, 476 Mich 495, 524; 720 NW2d 219 (2006). This Court simply "does not have the authority to recant the Supreme Court's positions." *Murray Trust*, 303 Mich App at 49. Under the rule of stare decisis, this Court must follow a decision of the Supreme Court even if another panel of this Court decided the same issue in a contrary fashion. *Id*. Because *Steanhouse* ignored the clear directives of the Michigan Supreme Court, it is against the rules of stare decisis to follow the procedures in that case. I cannot in good conscience violate the rules articulated in *Lockridge*.
>
> A remand under *United States v Crosby*, 397 F3d 103 (CA 2, 2005), is used to determine whether prejudice resulted from an error. *People v Stokes*, 312 Mich App 181, 200-201; 877 NW2d 752 (2015). The *Lockridge* court stated that no prejudice could result from the type of "error" involved in this case. [Defendant] cannot show plain error; therefore, he is not entitled to relief. I conclude that a *Crosby* remand is not appropriate or necessary in this case. [Third alteration in *Shank*.]

I would affirm the trial court's well-reasoned decision in this matter. The sentence is proportionate both to the crime and the offender. No OVs have been misscored in violation of the *Alleyne* decision. No plain error has occurred. It is clearly a waste of judicial resources to remand this case to the trial court.[2]

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[2] This Court's recent opinion in *People v Ambrose*, 317 Mich App 556, 565; 895 NW2d 198 (2016), further supports my position:

> Further, even if we were to assume that the trial court erred by scoring OV 9 at 10 points, we would conclude that resentencing is not required. Under *People v Lockridge*, 498 Mich 358, 365; 870 NW2d 502 (2015), a trial court's departure from a defendant's recommended sentencing guidelines range is reviewed by this Court for reasonableness. Defendant has not challenged the trial court's departure from the guidelines as unreasonable. In light of the facts of this case, the trial court's lengthy articulation of its reasons for departing from the guidelines, and the minor extent of the departure, we hold that the departure was reasonable.

Although in *People v Biddles*, 316 Mich App 148, 156-158; 896 NW2d 461 (2016), we recently clarified the distinction between [*People v Francisco*, 474 Mich 82, 92; 711 NW2d 44 (2006)] errors and *Lockridge* errors, *Biddles* did not deal with an upward departure. We do not read *Biddles* as requiring remand for a *Francisco* error when we have determined (as in this case) that a sentencing departure is reasonable under *Lockridge* and that the sentence "did not rely on the minimum sentence range from . . . improperly scored guidelines . . . ." *Lockridge*, 498 Mich at 394; see also *People v Mutchie*, 468 Mich 50, 52; 658 NW2d 154 (2003) (holding that it was unnecessary to determine if there was a scoring error under OV 11 that required resentencing when the sentence imposed was a departure "above the recommended range in any event, and the court expressly stated the . . . reasons that justified the departure").

LAKIN v RUND

Docket No. 323695. Submitted September 14, 2016, at Detroit. Decided December 1, 2016, at 9:00 a.m. Leave to appeal denied 500 Mich 895.

Sanford N. Lakin and Cecilia J. Lakin brought an action in the Oakland Circuit Court against Sister Barbara Rund, St. Hugo of the Hills Catholic Church, and Monsignor Anthony Tocco, alleging that Rund's purported statements to Tocco that Sanford put a finger in Rund's chest and that she was afraid of him constituted defamation per se. Sanford confronted Rund after a church service because he had not been allowed to serve as a lector during the service. During the confrontation, Sanford allegedly put his finger on Rund's chest, causing her to fear him; Rund disclosed the confrontation to Tocco. Plaintiffs asserted that Rund's statements to Tocco were defamatory per se because the statements implied that Sanford committed a battery by touching Rund. The court, Shalina D. Kumar, J., granted in part and denied in part defendants' motion for summary disposition. Defendants sought leave to appeal. The Court of Appeals denied the application, and the Supreme Court, in lieu of granting leave to appeal, remanded the case to the Court of Appeals for consideration as on leave granted. 499 Mich 860 (2016).

The Court of Appeals *held*:

1. A battery is an intentional, unconsented, and harmful or offensive touching of the person of another, or of something closely connected with the person; it is not necessary for the touching to cause an injury to establish a battery. In Michigan, proof of intent to injure is necessary to establish a battery, and the element of intent may be established with circumstantial evidence. Viewing the evidence in the light most favorable to plaintiffs, the trial court correctly concluded that Rund's description of Sanford putting his finger on her imputed to Sanford the criminal offense of battery. Sanford's intent to engage in offensively and intentionally touching Rund could be inferred from the circumstantial evidence surrounding the confrontation.

2. To establish a claim of defamation, a plaintiff must prove that the defendant made a false and defamatory statement concerning the plaintiff, that the defendant told the unprivileged

communication to a third party, that the publisher of the statement was at least negligent in his or her disclosure, and that disclosure of the statement was actionable regardless of any special harm arising from the publication—which constitutes defamation per se—or that the publication caused special harm. The common law must be examined to determine whether defamation per se may be imputed from the commission of a particular crime.

3. The Court of Appeals is bound to follow decisions by the Michigan Supreme Court except when those decisions have clearly been overruled or superseded, and the Court of Appeals may not anticipatorily ignore a Supreme Court decision when the Court of Appeals determines that the foundation of that decision has been undermined. Accordingly, in accordance with *Taylor v Kneeland*, 1 Doug 67 (Mich, 1843), and *Mains v Whiting*, 87 Mich 172 (1891), words that charge a person with a crime do not constitute defamation per se unless the crime involved moral turpitude or would subject the person to an infamous punishment.

4. At common law, the phrase "moral turpitude" includes actions involving fraud, deceit, and intentional dishonesty. The criminal offense of battery does not involve moral turpitude. Whether a crime is infamous may be determined by the punishment that may be imposed. The phrase "infamous crime" means any felony punishable by imprisonment in state prison, which is consistent with the statutory definitions of "felony" in MCL 750.7 and MCL 761.1(g); crimes punishable by imprisonment of one year or less are misdemeanors and not infamous crimes. MCL 750.81(1) provides that a person who assaults or assaults and batters an individual, if no other punishment is prescribed by law, is guilty of a misdemeanor punishable by imprisonment for not more than 93 days; therefore, the punishment that may be imposed for the misdemeanor offense of battery does not constitute an infamous punishment. Accordingly, because the offense of assault does not involve moral turpitude or subject a person to an infamous punishment, a false accusation of battery does not constitute defamation per se.

Trial court order denying defendants' motion for summary disposition reversed and the case remanded for further proceedings.

1. TORTS — DEFAMATION PER SE — BATTERY.

In Michigan, words that charge a person with a crime do not constitute defamation per se unless the crime involves moral turpitude or subjects the person to an infamous punishment; a

false accusation of the misdemeanor offense of battery, MCL 750.81, does not constitute defamation per se because the offense does not involve moral turpitude or subject the person to infamous punishment.

2. WORDS AND PHRASES — DEFAMATION PER SE — BATTERY — MORAL TURPITUDE.

The phrase "moral turpitude" includes actions involving fraud, deceit, and intentional dishonesty; the misdemeanor offense of battery, MCL 750.81, does not involve moral turpitude.

3. WORDS AND PHRASES — DEFAMATION PER SE — BATTERY — INFAMOUS PUNISHMENT.

The phrase "infamous crime" means any felony punishable by imprisonment in state prison; the punishment that may be imposed for the misdemeanor offense of battery, MCL 750.81, does not constitute an infamous punishment.

Sanford N. Lakin, *in propria persona*, *Elkins & Associates, PLC* (by *Michael D. Elkins*), and *Bendure & Thomas* (by *Mark R. Bendure*) for Sanford N. Lakin and Cecilia J. Lakin.

Bodman PLC (by *Thomas Van Dusen* and *Thomas J. Rheaume, Jr.*) and *Bowen, Radabaugh & Milton, PC* (by *Thomas R. Bowen*), for Barbara Rund and St. Hugo of the Hills Catholic Church.

Before: BORRELLO, P.J., and MARKEY and RIORDAN, JJ.

PER CURIAM. This is a defamation case arising out of a confrontation between plaintiff Sanford N. Lakin[1] and defendant Sister Barbara Rund, following a service at defendant St. Hugo of the Hills Catholic Church. Sanford was disappointed that he had not been permitted to serve as a lector at the service. When Sanford sought the intervention of defendant Monsignor Anthony Tocco,[2] Sanford learned that Rund had

[1] Plaintiff Cecilia J. Lakin is also a party to this appeal.

[2] Tocco is not involved in this appeal.

told Tocco that Sanford put a finger in her chest during the confrontation and also that Rund was afraid of Sanford. Plaintiffs contend that Rund's statement imputed the criminal offense of battery; therefore, it was defamatory per se. The trial court granted in part and denied in part defendants' motion for summary disposition, ruling that by stating that Sanford "put a finger" in her chest, Rund asserted that Sanford willfully and offensively touched her and thus implied that Sanford had committed a battery. The trial court ruled that because Rund's statement described a criminal battery committed by Sanford, plaintiffs pleaded a claim of defamation per se that did not require proof of special damages. This Court denied defendants' application for leave to appeal.[3] Our Supreme Court, on defendants' further application for leave to appeal, issued an order stating that, in lieu of granting leave to appeal, it was remanding the case to this Court for consideration as on leave granted. *Lakin v Rund*, 499 Mich 860 (2016). The Court's order further stated:

> The Court of Appeals shall consider (1) whether publication of an allegedly false and defamatory statement imputing to another conduct constituting the criminal offense of battery is actionable irrespective of special harm, see, e.g., *Mains v Whiting*, 87 Mich 172, 180 (1891); *Taylor v Kneeland*, 1 Doug 67, 72 (Mich, 1843) (holding that words charging a person with a crime are not actionable per se unless the crime involves moral turpitude or would subject the person to an infamous punishment); and (2) whether the statement at issue in this case imputed to the plaintiff the criminal offense of battery. [*Lakin*, 499 Mich 860.]

We address the second question first. We review de novo a trial court's decision regarding a motion for

[3] *Lakin v Rund*, unpublished order of the Court of Appeals, entered March 26, 2015 (Docket No. 323695).

summary disposition under MCR 2.116(C)(8). *Smith v Stolberg*, 231 Mich App 256, 258; 586 NW2d 103 (1998). Such a motion tests the legal sufficiency of a claim and must be determined on the basis of the pleadings alone. *Id*. All factual allegations supporting the claim and any reasonable inferences that can be drawn from the facts are accepted as true. *Id*. A motion under MCR 2.116(C)(8) should only be granted when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *Thomas M Cooley Law Sch v Doe 1*, 300 Mich App 245, 262; 833 NW2d 331 (2013).

"A battery is an intentional, unconsented and harmful or offensive touching of the person of another, or of something closely connected with the person." *People v Reeves*, 458 Mich 236, 240 n 4; 580 NW2d 433 (1998). It is not necessary that the touching cause an injury. *People v Cameron*, 291 Mich App 599, 614; 806 NW2d 371 (2011). Further, because an attempt to commit a battery will establish an assault, *People v Starks*, 473 Mich 227, 234; 701 NW2d 136 (2005), "every battery necessarily includes an assault because a battery is the very 'consummation of the assault.' " *Cameron*, 291 Mich App at 614 (citation omitted); see also *People v Terry*, 217 Mich App 660, 662; 553 NW2d 23 (1996). While the common law did not require proof of intent, Michigan requires proving the "intent to injure in order to establish an assault and battery." *People v Datema*, 448 Mich 585, 599; 533 NW2d 272 (1995). "The intent of the defendant may be established by circumstantial evidence." *Terry*, 217 Mich App at 663.

According to plaintiffs, Rund told Tocco that Sanford had "put a finger" in her chest. We conclude that this statement, viewed in light of the circumstances to which it related, imputed to Sanford the criminal

offense of battery. See *Smith*, 231 Mich App at 258-259 (concluding that the defendant's alleged action of pushing the plaintiff into a bench constituted an intentional offensive battery; in other words, a battery). Sanford's intent to engage in an offensive, intentional touching of Rund by putting his finger in her chest can be inferred from the circumstantial evidence. *Terry*, 217 Mich App at 663. The complaint describes a heated argument between Sanford and Rund regarding her decision to allow another individual to serve as lector during the preceding church service. While defendants claim that the statement merely described Sanford as gesturing with his hands, when we view the complaint in the light most favorable to plaintiffs, *Johnson v Pastoriza*, 491 Mich 417, 435; 818 NW2d 279 (2012), it describes Sanford as putting his finger into Rund's chest in order to make a point during an argument. Placing one's finger in the chest of another, especially a nun, during an argument, can reasonably be seen as an offensive touching. Indeed, that Rund reported to Tocco that she was fearful of Sanford in connection with relating the incident also leads to the fair inference that the alleged touching was offensive to Rund. Therefore, we conclude that the trial court correctly ruled that Rund's statement imputed to Sanford the criminal offense of battery.

The more difficult question is "whether publication of an allegedly false and defamatory statement imputing to another conduct constituting the criminal offense of battery is actionable irrespective of special harm[.]" *Lakin*, 499 Mich at 860. Whether a party has pleaded all the elements of a cause of action presents a question of law that this Court reviews de novo. *In re Receiver of Venus Plaza*, 228 Mich App 357, 359-360; 579 NW2d 99 (1998).

The elements of a claim of defamation are:

> (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by publication. [*Mitan v Campbell*, 474 Mich 21, 24; 706 NW2d 420 (2005).]

In *Burden v Elias Bros Big Boy Restaurants*, 240 Mich App 723, 727-728; 613 NW2d 378 (2000), this Court held that "words charging the commission of a crime are defamatory per se, and hence, injury to the reputation of the person defamed is presumed to the extent that the failure to prove damages is not a ground for dismissal." Indeed, the common-law principle that words imputing the commission of a crime constitute defamation per se was used as a reference point in MCL 600.2911(1), which codified the common-law principle that imputing lack of chastity was defamatory per se. *Burden*, 240 Mich App at 728-729. MCL 600.2911(1) states, "Words imputing a lack of chastity to any female or male are actionable in themselves and subject the person who uttered or published them to a civil action for the slander in the same manner as the uttering or publishing of words imputing the commission of a criminal offense."

The issue presented in this case is whether defamation per se includes imputing the commission of every crime or "criminal offense," or whether it is limited to a smaller subset of crimes in accordance with the common law. With respect to MCL 600.2911(1), we note that our Supreme Court has held that "words and phrases that have acquired a unique meaning at common law are interpreted as having the same meaning

when used in statutes dealing with the same subject." *Pulver v Dundee Cement Co*, 445 Mich 68, 75; 515 NW2d 728 (1994). Indeed, the Legislature instructs in MCL 8.3a, with respect to statutes, "technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning." In addition, "when the Legislature codifies a judicially defined requirement [or term] without defining it itself, a logical conclusion is that the Legislature intended to adopt the judiciary's interpretation of that requirement [or term]." *Pulver*, 445 Mich at 75. Therefore, we conclude that what constitutes defamation per se with respect to imputing the commission of a crime or a criminal offense must be determined by examining the common law.

Our Supreme Court directs our attention to "*Taylor v Kneeland*, 1 Doug 67, 72 (Mich, 1843) (holding that words charging a person with a crime are not actionable per se unless the crime involves moral turpitude or would subject the person to an infamous punishment)[.]" *Lakin*, 499 Mich at 860. In *Taylor*, the Court considered whether the imputation of embezzlement was actionable per se. *Taylor*, 1 Doug at 66, 72. The Court held that "words charging a person with the embezzlement of goods are not actionable because the charge, if true, will not subject the party charged to an indictment for a crime involving moral turpitude, or subject him to an infamous punishment." *Id*. at 72 (citations omitted). Four decades after *Taylor* was decided, in a case in which the crime of murder was imputed, our Supreme Court, without citing any authority or discussing *Taylor*, opined that "false assertions, when they impute the commission of crime, are actionable . . . ." *Peoples v Detroit Post & Tribune Co*, 54 Mich 457, 462; 20 NW 528 (1884). That same year, the

Court held that falsely charging a person with theft constituted defamation per se. *Bacon v Mich Central R Co*, 55 Mich 224, 227; 21 NW 324 (1884). Again, the Court did not cite *Taylor* or any other authority, and it did not discuss whether theft involved moral turpitude or would subject the plaintiff to an infamous punishment. *Id*.

Our Supreme Court also refers our attention to *Mains*, 87 Mich at 180, in which the Court discussed four classes of "oral slander" that were actionable without having to show special damages, quoting *Pollard v Lyon*, 91 US 225, 226; 23 L Ed 308; 1 Otto 225 (1875). In *Mains*, the plaintiff was an attorney representing a client charged with embezzlement. *Mains*, 87 Mich at 173-175. The defendant was a witness for the prosecution and while being cross-examined by the plaintiff at a hearing on the case, stated, "You are the dirty sewer through which all the slums of this embezzlement have flowed" and "If that $20 had been turned over to you . . . , the company would never have seen 20 cents of it." *Id*. at 172-173. The trial court granted the defendant's motion to preclude presentation of evidence because the words did not impute a crime and special damages had not been alleged, so the court dismissed the case. *Id*. at 180. The Supreme Court reversed, concluding that the words alleged were actionable without special damages because they imputed a charge of dishonesty with respect to the plaintiff's profession as an attorney. *Id*. at 181. The Court determined that the "oral slander" fell within a category of words actionable without special damages: " 'Defamatory words falsely spoken of a party which prejudice such party in his or her profession or trade.' " *Mains*, 87 Mich at 180, quoting *Pollard*, 91 US at 226. The first category of slander actionable without proof of special damages was stated to be " '[w]ords falsely spoken of a person which impute to the party the

commission of some criminal offense involving moral turpitude for which the party, if the charge is true, may be indicted and punished.' " *Mains*, 87 Mich at 180, quoting *Pollard*, 91 US at 226. Although dictum,[4] this part of the quotation from *Pollard* in *Mains* reinforced the holding of *Taylor*.

Since *Mains* was decided, both our Supreme Court and this Court have issued inconsistent rulings regarding which accusations of criminal activity constitute defamation per se. In *Wilkerson v Carlo*, 101 Mich App 629, 632; 300 NW2d 658 (1980), this Court did not mention that a crime must involve moral turpitude or infamous punishment when it stated in dictum that "[a]n accusation of a commission of a crime, as here, is defamatory per se and is actionable without proof of special harm or loss of reputation on a deformation theory." This dictum[5] was followed in *Burden* when this Court again stated—without reference to the nature of the crime—that "words charging the commission of a crime are defamatory per se . . . ." *Burden*, 240 Mich App at 727-728. Other cases have simply followed *Bacon*, 55 Mich 224, and ruled that theft constitutes defamation per se without analyzing whether theft involves moral turpitude or would subject the plaintiff

[4] "Black's Law Dictionary (7th ed) defines obiter dictum as '[a] judicial comment made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (though it may be considered persuasive).' " *People v Higuera*, 244 Mich App 429, 437; 625 NW2d 444 (2001).

[5] The accusation in *Wilkerson* was that the plaintiff, an owner and trainer of race horses, engaged in a race-fixing scheme. The statement not only alleged a criminal offense but also adversely affected the plaintiff's employment. *Wilkerson*, 101 Mich App at 631-634. The issue was whether to apply the one-year statute of limitations for defamation or the three-year tort limitations period for interference with business relations; the Court held the latter applied despite the defamatory nature of the statements.

to an infamous punishment. See *Jones v Sears, Roebuck & Co*, 459 F2d 584, 587 (CA 6, 1972) (applying Michigan law in a diversity action); *Sias v Gen Motors Corp*, 372 Mich 542, 547; 127 NW2d 357 (1964); *Poledna v Bendix Aviation Corp*, 360 Mich 129, 137; 103 NW2d 789 (1960).

Despite these opinions, this Court has held in other proceedings that not all false accusations of criminal behavior in every circumstance will constitute defamation per se. *Kevorkian v American Med Ass'n*, 237 Mich App 1, 6, 12-13; 602 NW2d 233 (1999). This Court stated that "we decline plaintiff's invitation to hold as a matter of law that all accusations of criminal activity are automatically defamatory . . . ." *Id*. at 13. Regarding the plaintiff, who was famous for his advocacy of assisted suicide, the Court stated that the "plaintiff's reputation in the community, if not the nation, is such that the effect of more people calling him either a murderer or a saint is de minimis." *Id*. at 12. This Court has more recently cited *Kevorkian* for the proposition that "[n]ot all accusations of criminal activity are automatically defamatory." *Cooley Law Sch*, 300 Mich App at 268. So, caselaw since *Taylor* and *Mains* has not always clearly stated the common-law rule regarding when a false allegation of a criminal offense will constitute defamation per se.

Despite the inconsistent caselaw, our Supreme Court has recently reinforced that this Court "is bound to follow decisions by [our Supreme] Court except where those decisions have *clearly* been overruled or superseded, and *is not authorized to anticipatorily ignore our decisions where it determines that the foundations of a Supreme Court decision have been undermined*." *Associated Builders & Contractors v Lansing*, 499 Mich 177, 191-192; 880 NW2d 765 (2016). "[I]t is

the Supreme Court's obligation to overrule or modify case law if it becomes obsolete, and until this Court takes such action, the Court of Appeals and all lower courts are bound by that authority." *Boyd v W G Wade Shows*, 443 Mich 515, 523; 505 NW2d 544 (1993), overruled on other grounds by *Karaczewski v Farbman Stein & Co*, 478 Mich 28, 30, 44; 732 NW2d 56 (2007), itself overruled in part by *Bezeau v Palace Sports & Entertainment, Inc*, 487 Mich 455, 457; 795 NW2d 797 (2010). In *Taylor*, 1 Doug at 72, our Supreme Court held that words charging an individual with a crime only constitute defamation per se if the crime involves moral turpitude or would subject the person to an infamous punishment. While the Supreme Court in *Peoples*, 54 Mich at 462, did not mention the requirements of moral turpitude or infamous punishment, the crime alleged was the most serious felony, murder, and the Court did not clearly repudiate its earlier holding in *Taylor*. Furthermore, seven years later, the Supreme Court in *Mains* reinforced the requirement when noting that defamation per se included false allegations of a crime involving "moral turpitude for which the party, if the charge is true, may be indicted and punished." *Mains*, 87 Mich at 180 (quotation marks and citation omitted). Because *Taylor* has never been "clearly" overruled or superseded, it remains the controlling law in Michigan. *Associated Builders & Contractors*, 499 Mich at 191-192.

The question then becomes what constitutes moral turpitude and infamous punishment and whether battery falls within either of these categories. "Moral" is defined as "of or relating to principles of right and wrong in behavior." *Merriam-Webster's Collegiate Dictionary* (11th ed). "Turpitude" is defined as "vile or base character" or a "vile or depraved act." *Random House Webster's College Dictionary* (1996). *Black's Law Dic-*

tionary (10th ed) defines "moral turpitude" as "[c]onduct that is contrary to justice, honesty, or morality; esp. an act that demonstrates depravity." In the context of attorney discipline in Michigan, "moral turpitude" has been defined as involving "fraud, deceit, and intentional dishonesty for purposes of personal gain." *In re Grimes*, 414 Mich 483, 492; 326 NW2d 380 (1982) (quotation marks and citation omitted).

Other jurisdictions have given similar definitions to moral turpitude, stressing societal mores, ethics, and honesty. Texas has defined moral turpitude as "anything done knowingly contrary to justice, honesty, principle, or good morals." *Searcy v State Bar of Texas*, 604 SW2d 256, 258 (Tex Civ App, 1980). A crime involves moral turpitude in Ohio when "the act denounced by the statute offends the generally accepted moral code of mankind." *State v Deer*, 70 Ohio Law Abs 515, 517; 129 NE2d 667 (Ohio CP, 1955) (quotation marks and citation omitted). New York defines moral turpitude as "the quality of a crime involving grave infringement of the moral sentiment of the community . . . ." *People v Ferguson*, 55 Misc 2d 711, 715; 286 NYS2d 976 (1968) (quotation marks and citation omitted).

Consistently with these definitions, the majority of courts across the country have held that neither a simple assault nor a criminal battery involves moral turpitude. California courts, when examining the elements of the offenses, have held that simple assault, simple battery, and even felony battery are not offenses involving moral turpitude. *People v Thomas*, 206 Cal App 3d 689, 694; 254 Cal Rptr 15 (1988). The Supreme Court of South Carolina was unwilling to hold that even aggravated assault and battery invariably constitutes a crime involving moral turpitude.

State v Bailey, 275 SC 444, 446; 272 SE2d 439 (1980). Alabama courts have held that "battery does not involve moral turpitude. Moral turpitude signifies an inherent quality of baseness, vileness, depravity. Assaults and batteries are frequently the result of transient ebullitions of passion, to which a high order of men are liable, and do not necessarily involve any inherent element of moral turpitude." *Johnson v State*, 629 So 2d 708, 710 (Ala Crim App, 1993) (quotation marks and citation omitted). Georgia courts also do not recognize simple battery as a crime involving moral turpitude. *Jabaley v Mitchell*, 201 Ga App 477; 411 SE2d 545 (1991).

We note that at common law an assault and battery "was not an inherently dangerous act" and conviction required proof of "an intent to do 'wrong,' " although it was considered an offense that was "malum in se." *Datema*, 448 Mich at 599. At common law, an offense was considered *malum in se* when it was " 'condemned as wrong in and of itself by every sense of common decency and good morals . . . .' " *Id*. at 599 n 15, quoting *People v Townsend*, 214 Mich 267, 272; 183 NW 177 (1921). Still, considering the definitions of moral turpitude in Michigan and other jurisdictions, the persuasive authority in other jurisdictions that the offense of simple battery does not involve moral turpitude, and that no directly contrary Michigan authority exists, we hold that the crime of battery in Michigan does not involve moral turpitude.

Consequently, we must conclude that a false accusation of simple battery will only constitute defamation per se if the crime of battery subjects a plaintiff to an "infamous punishment." *Taylor*, 1 Doug at 72. Defendants assert that a battery conviction cannot subject an individual to an infamous punishment be-

cause battery is a misdemeanor offense. This argument has merit. "Whether a crime is infamous or not is not determined by the nature of the offense, but by the consequences to the individual by the punishment prescribed for such offense." *Attorney General ex rel O'Hara v Montgomery*, 275 Mich 504, 513; 267 NW 550 (1936) (citations omitted). "Crimes subject to infamous punishments are infamous crimes, and the term 'infamous crime' means any crime punishable by imprisonment in the State prison." *Id*., citing several United States Supreme Court cases, including *Ex parte Wilson*, 114 US 417; 5 S Ct 935; 29 L Ed 89 (1885). This definition of "infamous crime" corresponds to the statutory definitions of crimes classified as felonies. Under the Michigan Penal Code, MCL 750.1 *et seq*., a crime is either a "felony" or a "misdemeanor," MCL 750.6. A "felony" is "an offense for which the offender, on conviction may be punished by death, or by imprisonment in state prison." MCL 750.7. A "misdemeanor" is "[w]hen any act or omission, not a felony, is punishable according to law, by a fine, penalty or forfeiture, and imprisonment," MCL 750.8, or "any act [that] is prohibited by . . . statute, and no penalty for the violation of such statute is imposed," MCL 750.9. Similarly, under the Code of Criminal Procedure, MCL 760.1 *et seq*., a "felony" is "a violation of a penal law of this state for which the offender, upon conviction, may be punished by death or by imprisonment for more than 1 year or an offense expressly designated by law to be a felony." MCL 761.1(g). Furthermore, with certain exceptions, the Code of Criminal Procedure provides that for a criminal sentence of "imprisonment for a maximum of 1 year or less, the commitment or sentence shall be to the county jail of the county in which the person was convicted and not to a state penal institution." MCL 769.28. Therefore, under these definitions, an "infa-

mous crime" is a felony for which conviction may result in a prison sentence, while crimes that may be punished by imprisonment of one year or less are, in general, misdemeanors and not infamous crimes.[6]

Subsequently, our Supreme Court discussed the meaning of "infamous crime" in the context of whether a witness could be impeached with a prior misdemeanor conviction. *People v Renno*, 392 Mich 45; 219 NW2d 422 (1974). The *Renno* Court addressed whether the trial court erred by allowing the prosecutor to question the defendant about the details of his prior municipal-ordinance convictions of being drunk and disorderly. *Id*. at 50-51. The Court discussed that at common law persons convicted of infamous crimes were disqualified from testifying but that certain statutes[7] removed this disability while retaining the ability of a party to impeach a witness with a conviction for an infamous crime. *Id*. at 52-53. In discussing the types of crimes that were infamous at common law, the *Renno* Court quoted *People v Hanrahan*, 75 Mich 611, 620-621, 42 NW 1124 (1889), which in turn had noted

[6] At common law, the designation of an offense as a felony did not always follow the possible penalty. See, e.g., *Drennan v People*, 10 Mich 169, 175 (1861) (holding that statutory definitions control only statutory crimes and not whether an offense at common law was a felony or misdemeanor). In *Drennan*, the Court held that the larceny of goods of any value was a felony at common law, which justified the defendant's arrest without possession of a warrant. *Id*. at 177.

In addition, the statutory definitions are not free of conflict. See *People v Smith*, 423 Mich 427, 437-439; 378 NW2d 384 (1985) (discussing the differences between the definitions in the Penal Code and those of the Code of Criminal Procedure). The *Smith* Court held that offenses that the Legislature labeled "misdemeanors" but provided for imprisonment of up to two years were " 'felonies' for purposes of the habitual-offender, probation, and consecutive sentencing statutes" under the Code of Criminal Procedure. *Id*. at 445.

[7] See MCL 600.2158 and MCL 600.2159.

that constitutional safeguards applied when "on account of the nature of the punishment which may be inflicted, [a criminal offense] is classed as *infamous* . . . ." *Renno*, 392 Mich at 53-54 (quotation marks omitted). The Court also reviewed *Ex parte Wilson*, 114 US at 429, which held that "a crime punishable by imprisonment for a term of years at hard labor is an infamous crime," as the term is used in the Fifth Amendment. The part of the *Wilson* case that the *Renno* Court discussed noted that two kinds of infamous crimes existed at common law: those " 'respecting the mode of punishment' " and those " 'respecting the future credibility of the delinquent.' " *Renno*, 392 Mich at 54, quoting *Wilson*, 114 US at 422. Those infamous crimes affecting credibility " 'depended upon the character of his crime, and not upon the nature of his punishment.' " *Renno*, 392 Mich at 54, quoting *Wilson*, 114 US at 422. The latter category of infamous crimes included " 'treason, felony, forgery, and crimes . . . such as perjury, subornation of perjury, suppression of testimony by bribery, conspiring to accuse one of crime, or to procure the absence of a witness,' " but did not include " 'private cheats, such as the obtaining of goods by false pretences, or the uttering of counterfeit coin or forged securities.' " *Renno*, 392 Mich at 54, quoting *Wilson*, 114 US at 423. Turning to the municipal-ordinance violations at issue, the *Renno* Court held that they were not the sort that would disqualify a witness at common law; consequently, the Court "prohibit[ed] the further use of municipal ordinance or misdemeanor convictions used by the prosecution *solely for impeachment purposes*." *Renno*, 392 Mich at 55.

From *Renno*, and the authority it discussed, we learn that the meaning of "infamous" at common law may vary depending on the context in which it is used.

In the present case, we must start with the instruction of *Taylor*, 1 Doug at 72, that a false accusation of a crime is only defamatory per se if the crime involves "moral turpitude, or subject[s] him to *an infamous punishment*." (Emphasis added.) Thus, our focus must be on infamous crimes made so by the *punishment imposed*. In that regard, our Supreme Court held in *Montgomery*, 275 Mich at 513, that "the term 'infamous crime' means any crime punishable by imprisonment in the State prison." This definition is generally consistent with Michigan's statutory definitions of "felony," although certain crimes that the Legislature has labeled "misdemeanor" may also be considered a felony for purposes of the Code of Criminal Procedure and result in a prison sentence.[8] Thus, the holding of *Renno* concerning the credibility aspect of "infamous" is consistent with the holdings of both *Taylor* and *Montgomery*, which concern "infamous crimes" rendered so by the punishment that may be imposed. Because our Supreme Court has never "clearly" overruled *Montgomery*, nor has it been superseded, it remains the controlling law in Michigan. *Associated Builders & Contractors*, 499 Mich at 191-192.

MCL 750.81(1) states that "a person who assaults or assaults and batters an individual, if no other punishment is prescribed by law, is guilty of a misdemeanor punishable by imprisonment for not more than 93 days . . . ." If, however, a person is convicted of assault and battery, he or she may only be incarcerated in a county jail. See MCL 769.28. Applying our Supreme Court's holding in *Taylor* and *Montgomery*, we conclude that a conviction for battery would not subject an individual to an "infamous punishment if convicted,"

[8] See note 6 of this opinion.

Montgomery, 275 Mich at 513, such that a false accusation of battery would not constitute defamation per se, *Taylor*, 1 Doug at 72.

We reverse the trial court's order denying summary disposition to defendants and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

BORRELLO, P.J., and MARKEY and RIORDAN, JJ., concurred.

STATE TREASURER v BENCES

Docket No. 327657. Submitted October 11, 2016, at Detroit. Decided October 20, 2016. Approved for publication December 1, 2016, at 9:05 a.m.

The State Treasurer filed an action in the Lenawee Circuit Court against Bradley Bences (Bences), Randie Bences as successor power of attorney, Brian Bences, as power of attorney and joint receiver, and Monroe Bank & Trust, seeking reimbursement under the State Correctional Facility Reimbursement Act (SCFRA), MCL 800.401 *et seq*., of the costs associated with Bences's incarceration. Bences was convicted of various crimes in 2013 for stabbing John Burtle, and Bences was ordered to pay Burtle restitution in the amount of $108,589. The State Treasurer filed its SCFRA claim in May 2014, asserting that Bences was a state prisoner subject to the jurisdiction of the Michigan Department of Corrections and seeking reimbursement for his incarceration costs. Burtle moved to intervene in the SCFRA action. The court, Margaret M. S. Noe, J., denied the motion, reasoning that Burtle did not have a sufficient interest in the property in issue in the SCFRA claim to mandate his intervention because Burtle did not have a perfected interest arising from the restitution order. Burtle appealed.

The Court of Appeals *held*:

1. MCR 2.209(A)(3) provides that a person may intervene in an action by right when the applicant claims an interest relating to the property or transaction that is the subject of the action and is so situated that the disposition of the action may impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

2. MCL 769.1a(2) of the Code of Criminal Procedure, MCL 760.1 *et seq*.; MCL 780.766(2) of the Crime Victim's Rights Act (CVRA), MCL 780.751 *et seq*.; and Const 1963, art 1, § 24, require trial courts to award restitution to crime victims. Under MCL 769.1a(13) and MCL 780.766(13), a restitution order remains effective until it is satisfied in full; it is a judgment and lien against all of the defendant's property. The lien may be recorded as provided by law, and a restitution order may be enforced by the

prosecuting attorney, a victim, a victim's estate, or any other person named in the order to receive the restitution in the same manner as a judgment in a civil action or a lien. The CVRA does not explicitly state that restitution orders to victims take priority over the state's reimbursement claims under the SCFRA.

3. MCL 800.403(2) of the SCFRA grants the attorney general authority to seek reimbursement for the expense of the state of Michigan for the cost and care of a prisoner if the prisoner has sufficient assets. The plain and broad language of the SCFRA indicates a legislative intent to shift the burden of incarceration expenses to prisoners and from the taxpayers when possible. MCL 800.404(3) of the SCFRA provides that if a trial court concludes that a prisoner has assets subject to the SCFRA, the court must order any person possessing those assets to appropriate and apply the assets toward reimbursing the state. Under the SCFRA, the state is not a creditor as to the prisoner, and the statutory obligation created by the SCFRA is not a personal judgment or liability against the prisoner, but it is a lien on his or her estate. MCL 800.404a(1) provides the state with numerous ways in which it may obtain reimbursement, including the ability to use any remedy, interim order, or enforcement procedure allowed by law or court rule to restrain the prisoner from disposing of certain property pending a hearing to determine whether particular property should be applied to reimburse the state under the SCFRA. The Legislature intended to give the state's SCFRA claims priority over claims of other creditors because regular creditors do not have and are not entitled to the enforcement tools granted the state under MCL 800.404a(1) to seek reimbursement of the costs associated with a prisoner.

4. In this case, the trial court correctly denied Burtle's motion to intervene. Burtle did not have a perfected interest arising from the restitution order because he had failed to seek enforcement of the order beyond moving to intervene in the treasurer's SCFRA action; specifically, Burtle did not seek to enforce the restitution order in the same manner as a judgment in a civil action or a lien, and he therefore did not have a perfected interest in the assets sought by the treasurer in the SCFRA action. In addition, because the SCFRA grants the state specific authority to seek reimbursement of the associated costs of a prisoner's incarceration and broad tools to secure a prisoner's assets for reimbursement, but does not require a court entering a reimbursement order to consider any restitution the prisoner may owe a victim, the Legislature intended for the state's SCFRA claim to have priority over a restitution order entered under the CVRA.

Affirmed.

1. JUDGMENTS — CRIME VICTIM'S RIGHTS ACT — RESTITUTION ORDERS — PERFECTION OF INTEREST IN ORDERS.

The Crime Victim's Rights Act (CVRA), MCL 780.751 *et seq*., requires trial courts to award restitution to crime victims; MCL 780.766(13) of the CVRA provides that a restitution order is a judgment and lien against all of the criminal defendant's property, and to perfect an interest in the restitution order, a victim must enforce the order in the same manner as a judgment in a civil action or a lien.

2. PRISON AND PRISONERS — REIMBURSEMENT OF COSTS OF INCARCERATION — PRIORITY OVER RESTITUTION ORDERS.

The State Correctional Facility Reimbursement Act (SCFRA), MCL 800.401 *et seq*., creates an obligation on the part of a prisoner to pay the cost of care during incarceration and a right on the part of the state to reimbursement for that cost; a SCFRA claim has priority over the claims of other creditors, such as a victim's restitution order entered under the Crime Victim's Rights Act, MCL 780.751 *et seq*., because regular creditors do not have and are not entitled to the enforcement tools granted the state under MCL 800.404a(1) to seek reimbursement of the incarceration costs associated with a prisoner.

Bill Schuette, Attorney General, *B. Eric Restuccia*, Deputy Solicitor General, and *Allison M. Dietz*, Assistant Attorney General, for the State Treasurer.

Hooper Hathaway, PC (by *Oscar A. Rodriguez*), for John Burtle.

Before: GADOLA, P.J., and BORRELLO and STEPHENS, JJ.

GADOLA, P.J. Intervening-appellant, John Burtle, appeals as of right the trial court's stipulation of settlement and final order in an action between plaintiff, the State Treasurer; defendants-appellees, Bradley Bences (Bences), successor power of attorney Randie Bences, and power of attorney and joint receiver Bryan Bences; and defendant, Monroe Bank & Trust, pursuant to the State Correctional Facility Reim-

bursement Act (SCFRA), MCL 800.401 *et seq*. At issue in this appeal is an earlier order in which the trial court denied Burtle's motion to intervene in the SCFRA action. We affirm.

In 2013, Bences was convicted of assault with a dangerous weapon (felonious assault), MCL 750.226, among other crimes, for stabbing Burtle. The judgment of sentence ordered Bences to pay $108,589 in restitution, and the court entered an order on December 11, 2013, to remit funds for fines, costs, and assessments.

On May 27, 2014, the State Treasurer filed a complaint against defendants pursuant to the SCFRA, asserting that Bences was a state prisoner subject to the jurisdiction of the Michigan Department of Corrections, and seeking reimbursement for his incarceration costs. Burtle moved to intervene in the SCFRA action pursuant to MCR 2.209(A). Following a hearing, the trial court denied his motion.

On appeal, Burtle argues that the trial court abused its discretion by denying his motion to intervene because he had an interest in the SCFRA action as a result of the restitution order. Specifically, Burtle asserts that his payment under the restitution order should take priority over the State Treasurer's reimbursement claim under the SCFRA. We disagree.

"A trial court's decision on a motion to intervene is reviewed for an abuse of discretion." *Hill v L F Transp, Inc*, 277 Mich App 500, 507; 746 NW2d 118 (2008), citing *Vestevich v West Bloomfield Twp*, 245 Mich App 759, 761; 630 NW2d 646 (2001). "This Court reviews de novo a trial court's resolution of issues of law, including the interpretation of statutes and court rules." *Hill*,

277 Mich App at 507, citing *Cardinal Mooney High Sch v Mich High Sch Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991).

MCR 2.209(A)(3) provides that a person may intervene in an action by right

> when the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

" 'The rule for intervention should be liberally construed to allow intervention where the applicant's interests may be inadequately represented.' " *Hill*, 277 Mich App at 508, quoting *Neal v Neal*, 219 Mich App 490, 492; 557 NW2d 133 (1996). Nevertheless, " 'intervention may not be proper where it will have the effect of delaying the action or producing a multifariousness of parties and causes of action.' " *Hill*, 277 Mich App at 508, quoting *Precision Pipe & Supply, Inc v Meram Constr, Inc*, 195 Mich App 153, 157; 489 NW2d 166 (1992).

In this case, the trial court correctly concluded that Burtle did not have a sufficient interest in the property at issue in the State Treasurer's SCFRA action against Bences to mandate his intervention because he did not have a perfected interest arising from the restitution order. At the time Burtle moved to intervene, he had not yet filed a personal injury action against Bences. Although Burtle was awarded restitution as part of Bences's sentence, Burtle provided no evidence confirming that Bences failed to satisfy the restitution order, and he failed to seek enforcement of the order beyond moving to intervene in the State Treasurer's SCFRA action.

Trial courts are required to award restitution to crime victims. Const 1963, art 1, § 24; MCL 769.1a(2);[1] MCL 780.766(2);[2] *In re Lampart*, 306 Mich App 226, 232-233; 856 NW2d 192 (2014). Restitution must be made immediately, unless the court orders otherwise. MCL 769.1a(10); MCL 780.766(10). Further, both the Code of Criminal Procedure, MCL 760.1 *et seq*., and the Crime Victim's Rights Act (CVRA), MCL 780.751 *et seq*., provide that

> [a]n order of restitution . . . remains effective until it is satisfied in full. An order of restitution is a judgment and lien against all property of the defendant for the amount specified in the order of restitution. The lien may be recorded as provided by law. An order of restitution may be enforced by the prosecuting attorney, a victim, a victim's estate, or any other person or entity named in the order to receive the restitution in the same manner as a judgment in a civil action or a lien. [MCL 769.1a(13); MCL 780.766(13).]

Burtle does not allege, and the record contains no evidence, that Burtle sought to enforce the restitution order in the same manner as a judgment in a civil

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[1] MCL 769.1a(2) provides the following:

> Except as provided in [MCL 769.1a(8)], when sentencing a defendant convicted of a felony, misdemeanor, or ordinance violation, the court shall order, in addition to or in lieu of any other penalty authorized by law or in addition to any other penalty required by law, that the defendant make full restitution to any victim of the defendant's course of conduct that gives rise to the conviction or to the victim's estate.

[2] MCL 780.766(2) provides, in relevant part, the following:

> Except as provided in [MCL 780.766(8)], when sentencing a defendant convicted of a crime, the court shall order, in addition to or in lieu of any other penalty authorized by law or in addition to any other penalty required by law, that the defendant make full restitution to any victim of the defendant's course of conduct that gives rise to the conviction or to the victim's estate.

action or a lien. Therefore, Burtle did not have a perfected interest in the assets sought by the State Treasurer at the time the State Treasurer initiated the SCFRA action.

Furthermore, the court did not abuse its discretion by denying Burtle's motion to intervene because an SCFRA action is not the type of proceeding in which Burtle had the right to intervene. Pursuant to MCL 800.403(2) of the SCFRA,

> [i]f the attorney general . . . has good cause to believe that a prisoner has sufficient assets to recover not less than 10% of the estimated cost of care of the prisoner or 10% of the estimated cost of care of the prisoner for 2 years, whichever is less, the attorney general shall seek to secure reimbursement for the expense of the state of Michigan for the cost of care of that prisoner.

In so doing, the attorney general may file a complaint seeking reimbursement. MCL 800.404(1). The court must then "issue an order to show cause why the prayer of the complainant should not be granted." MCL 800.404(2). If the court concludes that a prisoner has assets subject to the SCFRA, it must order any person possessing those assets "to appropriate and apply the assets or a portion thereof toward reimbursing the state . . . ." MCL 800.404(3).

Under the SCFRA, "the state . . . is not a 'creditor,' nor is the relationship between a prisoner and the state a typical debtor-creditor relationship." *State Treasurer v Schuster*, 456 Mich 408, 419; 572 NW2d 628 (1998). Further, "the statutory obligation created by the SCFRA is not a 'personal judgment or liability against the prisoner,' but 'a lien upon his estate . . . .' " *State Treasurer v Sheko*, 218 Mich App 185, 189; 553 NW2d 654 (1996), quoting *Auditor General v Hall*, 300 Mich 215, 221; 1 NW2d 516 (1942). The SCFRA affords

the state a number of tools to secure a prisoner's assets for reimbursement that would not be available to the average creditor in a civil action. For example, without formal discovery, all prisoners must complete a form listing their assets. MCL 800.401b. The statute then provides:

> [T]o secure reimbursement under [the SCFRA], the attorney general may use any remedy, interim order, or enforcement procedure allowed by law or court rule including an ex parte restraining order to restrain the prisoner or any other person or legal entity in possession or having custody of the estate of the prisoner from disposing of certain property pending a hearing on an order to show cause why the particular property should not be applied to reimburse the state as provided for under this act. [MCL 800.404a(1).]

An ordinary creditor does not have, and is not entitled to, the unique statutory tools that are available to the state when it pursues a reimbursement claim under the SCFRA. This suggests that the Legislature intended to give these state reimbursement claims priority over the claims of other creditors. The mere fact that Burtle is a beneficiary of a restitution order likewise does not confer on him the same statutory advantages available to the state. Accordingly, it would be improper to allow Burtle, or any other potential creditor, to intervene in an SCFRA action between the state and a prisoner and thus benefit from these statutory tools.

Moreover, even if the court abused its discretion by denying Burtle's motion to intervene, the court's error was harmless. Despite Burtle's argument to the contrary, his restitution order would not have taken priority over the state's reimbursement claim under the SCFRA. The SCFRA grants the state access to most of a prisoner's assets for reimbursement. The statute

defines "assets" to mean "property, tangible or intangible, real or personal, belonging to or due a prisoner or former prisoner including income or payments to such prisoner from social security, worker's compensation, veteran's compensation, pension benefits, . . . or from any other source whatsoever . . . ." MCL 800.401a(a). The only property excluded from the definition is the prisoner's homestead up to $50,000 and money saved from wages paid to the prisoner while he or she was confined to a state correctional facility. MCL 800.401a(a)(*i*) and (*ii*). Further, when entering a reimbursement order, a court need only consider the prisoner's legal and moral obligations to his or her spouse, minor children, or other dependents. MCL 800.404(5).

In other words, " 'the plain and broad language of the reimbursement provisions at issue indicates a legislative intent to shift the burden of incarceration expenses to prisoners and from the taxpayers whenever possible.' " *State Treasurer v Snyder*, 294 Mich App 641, 647; 823 NW2d 284 (2011), quoting *Schuster*, 456 Mich at 418. The SCFRA does not require a court entering a reimbursement order to consider any restitution the prisoner may owe a victim. See MCL 800.404(5). This Court's opinion in *Sheko* further illustrates the broad grant of authority the Legislature gave to the state under the SCFRA. In *Sheko*, 218 Mich App at 186-187, the state filed a complaint under the SCFRA to intercept money a prisoner was going to receive as part of an arbitration award. This Court rejected the prisoner's argument that he preferred to pay the debts he owed to his brother first, concluding that

> any common-law right defendant may have had to prefer creditors does not apply to actions under the SCFRA. Accepting defendant's position would lead to the absurd result of the state receiving reimbursement only when a

> prisoner has no other financial obligations or, having other financial obligations, does not object to the state securing reimbursement from the prisoner's assets. [*Id*. at 188.]

The CVRA does not explicitly provide that restitution orders to victims take priority over the state's reimbursement claims under the SCFRA. Under MCL 780.766a(1) and (2), restitution payments take priority over "fines, costs, . . . assessments, probation or parole supervision fees, or other payments arising out of the same criminal proceeding . . . ." However, these statutory provisions make no reference to reimbursement pursuant to the SCFRA. Further, MCL 780.768 states that restitution must be paid by a prisoner before reimbursement under the SCFRA, but only in cases in which the prisoner has derived a profit from recollections of thoughts or feelings or the sale of memorabilia related to the offense committed by the prisoner. This suggests that restitution orders do not take priority over SCFRA claims under general circumstances. In sum, Burtle has not shown that he was entitled to intervene in the SCFRA action or that he was entitled to priority distribution over the state.

Affirmed.

BORRELLO and STEPHENS, JJ., concurred with GADOLA, P.J.

SARKAR v DOE

Docket Nos. 326667 and 326691. Submitted October 4, 2016, at Detroit. Decided December 6, 2016, at 9:00 a.m.

Fazlul Sarkar brought an action in the Wayne Circuit Court against John Doe and Jane Doe, alleging that anonymous comments posted on PubPeer Foundation's website, pubpeer.com, regarding the results of cancer-related research performed by Sarkar were defamatory and that the dissemination of those comments to certain universities and the public intentionally interfered with Sarkar's business expectancy with the University of Mississippi, interfered with his business relationship with Wayne State University, constituted an invasion of his privacy, and intentionally inflicted emotional distress. Sarkar conducted cancer research for Wayne State University beginning in 1989. In 2014, anonymous comments were posted on pubpeer.com that allegedly accused Sarkar of misconduct in relation to his cancer research and were critical of the published papers related to the research. In addition, one of the pubpeer.com commenters admitted that he or she had filed a formal complaint in 2013 with Wayne State University regarding Sarkar's research. In March 2014 Sarkar accepted a new position at the University of Mississippi, but the university rescinded the offer before he began working there after the university was anonymously notified of the negative public comments on pubpeer.com. When Sarkar later returned to Wayne State University in a nontenured position, an anonymous individual distributed a flyer to Wayne State University personnel that contained a screenshot from certain comments on pubpeer.com that were critical of Sarkar's research. Sarkar subpoenaed the records of PubPeer Foundation to discover the identity of the persons who had questioned the validity of Sarkar's research on pubpeer.com. PubPeer Foundation moved to quash the subpoena on First Amendment grounds. On March 9, 2015, the court, Sheila M. Gibson, J., granted PubPeer Foundation's motion to quash the subpoena with respect to the identities of those persons who had made the allegedly defamatory comments on pubpeer.com that were outlined in Paragraphs 40(a), (b), and (d), 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, and 56 of Sarkar's defamation claim and granted summary disposition in favor of defendants on

that portion of the defamation claim. On March 26, 2015, the trial court denied PubPeer Foundation's motion to quash the subpoena with respect to the identity of the person who had made the allegedly defamatory comment on pubpeer.com that was outlined in Paragraph 40(c) of Sarkar's defamation claim and denied defendants summary disposition on that portion of the defamation claim. In Docket No. 326667, the Court of Appeals granted Sarkar leave to appeal the March 9, 2015 order. In Docket No. 326691, the Court of Appeals granted PubPeer Foundation's application for leave to appeal the March 26, 2015 order. The Court of Appeals ordered the cases consolidated.

The Court of Appeals *held*:

1. An individual's right to freedom of speech is guaranteed by both the United States Constitution, US Const, Am I, and the Michigan Constitution, Const 1963, art 1, § 5. This right extends to an individual's speech over the Internet, regardless of whether the individual is identified or anonymous. However, the right to anonymous expression over the Internet does not extend to defamatory speech, which is not protected by either the United States Constitution or the Michigan Constitution. When a speaker outlines the factual basis for his or her conclusion, the speaker is protected against defamation claims by the First Amendment. A defendant's First Amendment interest in anonymity is adequately protected by MCR 2.302, which sets forth Michigan's procedures for a protective order, and MCR 2.116(C), which sets forth Michigan's procedures for summary disposition.

2. Consistent with *Ghanam v John Does*, 303 Mich App 522 (2014), when an anonymous defendant in a defamation suit is not shown to be aware of or involved with the lawsuit, some showing by the plaintiff and review by the trial court are required to balance the plaintiff's right to pursue a meritorious defamation claim against an anonymous critic's First Amendment rights. Specifically, a plaintiff must show that he or she has made reasonable efforts to provide the anonymous commenter with reasonable notice that he or she is the subject of a subpoena or motion seeking disclosure of the commenter's identity, and the trial court must evaluate the plaintiff's claims to determine whether the defamation claims were sufficient to survive a motion for summary disposition under MCR 2.116(C)(8), which tests the legal basis of the complaint on the pleadings alone. A facially deficient claim cannot survive a motion for summary disposition under Subrule (C)(8).

3. To establish a claim of defamation, a plaintiff must prove four elements: (1) a false and defamatory statement concerning

the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by publication. A party claiming defamation must plead a defamation claim with specificity by identifying the exact language alleged to be defamatory; quoting words or incomplete phrases from an Internet webpage is not specific enough to withstand a motion for summary disposition. A communication is defamatory if it tends to harm the reputation of another so as to lower him or her in estimation of the community or to deter a third person from associating or dealing with him or her. The dispositive question is whether a reasonable fact-finder could conclude that the statement implies a defamatory meaning. In Michigan, Internet message boards and similar communication platforms are generally regarded as containing statements of pure opinion rather than statements or implications of actual, provable fact.

4. Applying the *Ghanam* inquiry to both appeals in this case, Sarkar provided the anonymous defendants with reasonable notice of his defamation action because Sarkar posted his complaint on pubpeer.com. In Docket No. 326667, the trial court correctly granted PubPeer Foundation's motion to quash with regard to Paragraphs 41, 42, 44, 45, 46, 47, 50, 51, 52, 53, 54, 55, and 56 of the complaint, and summary disposition of the paragraphs in favor of defendants was appropriate under MCR 2.116(C)(8); the asserted defamation claims were facially deficient and unable to survive a motion for summary disposition under MCR 2.116(C)(8) because Sarkar failed to identify in those paragraphs the exact language of every allegedly defamatory statement. The trial court correctly granted PubPeer Foundation's motion to quash with regard to Paragraphs 40(a), (b) and (d), 43, 48, and 49 of the complaint, and summary disposition of the paragraphs in favor of defendants was appropriate under MCR 2.116(C)(8). Even though the language identified by Sarkar in the paragraphs was facially sufficient to support a defamation claim, the paragraphs were insufficient to survive a motion for summary disposition under MCR 2.116(C)(8); the statements were protected by the First Amendment because each paragraph reflected the respective speaker's opinion based on underlying facts that were available to readers on pubpeer.com. In Docket No. 326691, the trial court erred by denying PubPeer Foundation's motion to quash with regard to Paragraph 40(c) of the complaint, and summary disposition of the paragraph in favor of defendants was appropriate under MCR 2.116(C)(8). The

subparagraph—which set forth a commenter's anonymous statement on pubpeer.com that he or she had filed a formal complaint against Sarkar at Wayne State University and an e-mail from the university's administration that indicated it could not comment on or confirm whether a scientific-misconduct investigation was being conducted—was not capable of defamatory meaning because the speaker outlined the factual basis for his or her opinion and the posted Wayne State University reply was not a false assertion but rather a standard reply that it could not comment on or confirm whether the university was investigating Sarkar for research misconduct. Taken as a whole, the individual statements in the complaint that are critical of Sarkar's research were not capable of a defamatory meaning because the statements involved discussions between anonymous individuals who were critical of Sarkar's research and urged readers to review Sarkar's research to reach their own opinion.

5. Summary disposition of the portion of Sarkar's complaint related to the flyer that was allegedly distributed to Wayne State University personnel was not appropriate because the information contained in the flyer—that defendant was under senatorial investigation—was false. However, while the flyer contained a screenshot of the pubpeer.com webpage where the anonymous allegation was posted, PubPeer Foundation could not be compelled on remand to disclose the identities of the individuals who commented about Sarkar's research on pubpeer.com because there was no reasonable connection between the flyer and pubpeer.com. The anonymous statements were protected by the First Amendment, and the protection was not destroyed simply because an individual printed those comments and distributed them.

6. Sarkar abandoned his argument that the trial court impermissibly considered two affidavits when partially granting summary disposition because he failed to support the claim with record evidence; Sarkar similarly abandoned his argument that the trial court made impermissible factual inferences against him. Sarkar waived his argument that the trial court erred by requiring him to produce the flyer to opposing counsel because Sarkar's counsel did not object to the requirement and provided the document without complaint.

7. The trial court correctly granted PubPeer Foundation's motion to quash with regard to the remaining causes of action—intentional interference with Sarkar's business expectancy with the University of Mississippi, interference with his business relationship with Wayne State University, invasion of privacy, and

intentional infliction of emotional distress—to the extent those causes of action were based on the pubpeer.com comments determined to be protected by the First Amendment.

In Docket No. 326667, the March 9, 2015 order partially granting summary disposition of the defamation claim to defendants and partially granting PubPeer Foundation's motion to quash affirmed with regard to Paragraphs 40(a), (b), and (d), 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, and 56 of the complaint. On remand, remaining claims of defamation with regard to the distributed flyer, intentional interference with a business expectancy, intentional interference with a business relationship, invasion of privacy, and intentional infliction of emotional distress allowed to proceed but Sarkar not entitled to unmask speakers' identities on pubpeer.com with respect to the claims.

In Docket No. 326691, the March 26, 2015 order denying summary disposition of the defamation claim to defendants and denying PubPeer Foundation's motion to quash with respect to Paragraph 40(c) of the complaint reversed.

1. ACTIONS — DEFAMATION — ANONYMOUS DEFENDANTS — FIRST AMENDMENT PROTECTIONS.

When the plaintiff in a defamation case seeks disclosure of the identity of an anonymous Internet commenter, in order to balance the plaintiff's right to pursue a meritorious defamation claim against the critic's First Amendment right to remain anonymous, US Const, Am I, a plaintiff must show that he or she has made reasonable efforts to provide the anonymous commenter with reasonable notice that he or she is the subject of a subpoena or motion seeking disclosure of the commenter's identity, and the trial court must evaluate the plaintiff's claims to determine whether the defamation claims were sufficient to survive a motion for summary disposition under MCR 2.116(C)(8) (US Const, Am I; Const 1963, art 1, § 5).

2. ACTIONS — DEFAMATION — PLEADINGS — SPECIFICITY REQUIRED.

A party must plead a defamation claim with specificity by identifying the exact language alleged to be defamatory; quoting words or incomplete phrases from an Internet webpage is not specific enough to withstand a motion for summary disposition.

Nacht, Roumel, & Salvatore, PC (by *Nicholas Roumel*), for Fazlul Sarkar.

Boyle Burdett (by *Eugene H. Boyle, Jr*, and *H. William Burdett, Jr.*) for John Doe.

American Civil Liberties Union Fund of Michigan (by *Daniel S. Korobkin*), American Civil Liberties Union Foundation (by *Alex Abdo*), and *Jollymore Law Office, PC* (by *Nicholas J. Jollymore*), for PubPeer Foundation.

Amici Curiae:

Perkins Coie LLP (by *Hayley L. Berlin*, *Todd M. Hinnen*, and *John R. Tyler*) for Twitter, Inc., and Google Inc.

Butzel Long, PC (by *Robin Luce-Herrmann* and *Joseph E. Richotte*), and *Paul Alan Levy* for Public Citizen, Inc.

Sachs Waldman PC (by *Andrew Nickelhoff*) and *Shapiro Arator LLP* (by *Matthew J. Craig*) for Bruce M. Alberts and Harold E. Varmus.

Before: FORT HOOD, P.J., and GLEICHER and O'BRIEN, JJ.

O'BRIEN, J. The issues presented in these appeals boil down to one simple question: Are the identities of anonymous scientists who comment on other scientists' research online protected by the First Amendment?

I. FACTUAL AND PROCEDURAL BACKGROUND

According to his complaint, plaintiff, "Fazlul H. Sarkar, PhD, is a distinguished professor of pathology at Karmanos Cancer Center, Wayne State University

with a track record of cancer research over 35 years."[1] Sarkar began his research at Wayne State University in 1989, and "his work has led to the discovery of the role of chemopreventive agents in sensitization of cancer cells (reversal of drug resistance) to conventional therapeutics (chemo-radio-therapy)." Dr. Sarkar alleges that "[h]e is a perfect example of a true translational researcher bringing his laboratory research findings into clinical practice," that he "is involved in several collaborative projects including breast, lung, and pancreatic cancer," that "[h]e has published over 430 original scientific articles in peer-reviewed journals," that he has written or reviewed hundreds of articles and book chapters, that he has edited several books, that he has received numerous publicly funded grants, and that he has trained a variety of pre- and post-doctoral students. In short, it appears undisputed that he is well accomplished in the cancer-research community.

It is presumably these accomplishments that led to Sarkar pursuing employment with the University of Mississippi in 2013. According to Sarkar, the University of Mississippi presented him with the "anticipated terms of an offer of a position" in September 2013, which set forth several terms of employment, including, most notably, tenure, a $350,000 salary, $15,000 in relocation expenses, "[a] start up package of $750,000," and a variety of other benefits. In March 2014, the University of Mississippi formally offered Sarkar this

[1] All quotations in Section I of our opinion are from the pleadings submitted by the parties in the trial court. In reviewing a trial court's decision on a motion for summary disposition pursuant to MCR 2.116(C)(8), we are required to accept the factual allegations in the pleadings, including in the complaint, as true. *Wyoming Chiropractic Health Clinic, PC v Auto-Owners Ins Co*, 308 Mich App 389, 391; 864 NW2d 598 (2014). Accordingly, quoting the pleadings is appropriate.

position, he accepted, and he resigned from Wayne State University approximately two months later. Sarkar relocated to Oxford, Mississippi, shortly thereafter and was set to begin his employment with the University of Mississippi in July 2014. At some point, however, "his start date was adjusted to August 1, 2014 per later agreement and approval . . . ."

On June 19, 2014, however, the University of Mississippi rescinded Sarkar's offer of employment. According to Sarkar, the University of Mississippi was unwilling to "go forward with an employment relationship with [him] and [his] group" because of "allegations lodged in a public space and presented directly to colleagues [there] . . . ." In pertinent part, the University of Mississippi cited public comments made on pubpeer.com, which were apparently made known to the University of Mississippi by an anonymous individual.[2] After losing this employment opportunity with the University of Mississippi, Sarkar attempted to rescind his resignation with Wayne State University the following day, and Wayne State University allowed him to return, albeit in a nontenured position. After Sarkar learned he would be returning to Wayne State University, however, either the same or a different anonymous individual also distributed a flyer containing a screenshot from pubpeer.com to Wayne State University personnel.[3]

Obviously unhappy with the outcome of his employment offer with the University of Mississippi, the

[2] According to Sarkar's complaint, "Pubpeer.com . . . is a web site that describes itself as 'an online community that uses the publication of scientific results as an opening for fruitful discussion among scientists.' " Pubpeer.com appears to have been created by anonymous scientists, and scientists are permitted to comment on pubpeer.com anonymously as well.

[3] The contents of the flyer are discussed later in this opinion.

comments on pubpeer.com, and the distribution of the flyer to Wayne State University personnel, Sarkar pursued a variety of legal remedies, including this lawsuit. On October 9, 2014, Sarkar filed this five-count lawsuit against defendants, "John and/or Jane Doe(s)." Sarkar alleged, in pertinent part, that the comments made on pubpeer.com were defamatory, that the comments made on pubpeer.com and forwarded to the University of Mississippi intentionally interfered with a business expectancy, that the comments made on pubpeer.com and forwarded to Wayne State University intentionally interfered with a business relationship, that the posting of an e-mail from Wayne State University personnel on pubpeer.com and in public constituted an invasion of privacy, and that the circulation of the flyer was intended to inflict emotional distress.

In an attempt to learn the identities of the individual or individuals who were responsible for the actions at issue, Sarkar subpoenaed the records of appellant, PubPeer Foundation (PubPeer), the entity that operates pubpeer.com, seeking the following: "All identifying information, including but not limited to user names, IP addresses, email addresses, profile information, and any other identifying characteristics of all users who have posted any of the comments that were posted on your web site that are described in the attached complaint that was filed in Wayne county, MI." Although somewhat unclear from his complaint and subpoena, it appears that Sarkar sought all identifying information for approximately 30 comments made on pubpeer.com about his research. PubPeer objected, moving to quash the subpoena on First Amendment grounds.

Specifically, PubPeer argued that, in order to unmask the identity of the anonymous commenter or

commenters, Sarkar was required to prove that his claims could survive a motion for summary disposition. Asserting that Sarkar had failed to do so, PubPeer argued that the trial court should quash the subpoena.[4] Analyzing each comment at issue, PubPeer also argued that Sarkar failed to adequately plead the allegedly defamatory comments, that the allegedly defamatory comments were not capable of defamatory meaning, that the communications sent to or distributed at the universities were insufficiently connected to PubPeer, and that the balance of interests in this case favored preserving scientists' ability to anonymously comment on other scientists' research.

Sarkar responded, arguing that "[t]his case is not about free speech." Rather, he asserted, "[i]t is about tortious conduct that is destroying a man's life and career." Sarkar described the anonymous commenter or commenters as "an enemy [or enemies] hiding behind the anonymity afforded by the internet" who is or are "sabotaging" his career. Sarkar, relying on the fact that one John Doe had already filed an appearance, argued that no preliminary showing was required and that, at best, the appearing John Doe could seek a protective order on behalf of himself. Sarkar

[4] PubPeer also argued that Michigan courts should require that plaintiffs in defamation cases put forth evidence establishing a prima facie case of defamation before unmasking the identities of anonymous commenters as other jurisdictions have done. See, e.g., *Dendrite Int'l, Inc v Doe, No 3*, 342 NJ Super 134, 141-142; 775 A2d 756 (NJ Super Ct, 2001); see also *Doe No 1 v Cahill*, 884 A2d 451, 460-461 (Del, 2005). PubPeer, John Doe (an anonymous defendant who filed an appearance and is a party to this appeal), and amici curiae (Google Inc., Twitter, Inc., Public Citizen, Inc., Dr. Bruce M. Alberts, and Dr. Harold E. Varmus) raise this same argument on appeal. However, as explained later in this opinion and acknowledged by those parties, this Court has declined to do so in the past, and we are bound by that decision. MCR 7.215(J)(1).

also argued that his complaint was adequate, that he had alleged torts beyond defamation, that the confidential nature of misconduct proceedings had been breached, that the comments at issue were defamatory, and, ultimately, that disclosure of the commenters' identities was necessary to seek the legal remedy to which he was entitled.

A hearing on PubPeer's motion to quash was held on March 5, 2015. After hearing arguments similar to those already discussed, the trial court granted, in part, PubPeer's motion to quash.[5] Specifically, the trial court granted the motion in full with the exception of one subparagraph in Sarkar's complaint: Paragraph 40(c). The trial court reserved its ruling on Paragraph 40(c) for a later date after the parties were afforded additional time for supplemental briefing. A second hearing on PubPeer's motion to quash was held two weeks later on March 19, 2015. After reviewing the parties' supplemental briefs and hearing additional argument, the trial court denied PubPeer's motion to quash with respect to Paragraph 40(c).[6] These appeals followed. On April 20, 2015, the trial court granted PubPeer's motion to stay proceedings pending the outcome of these appeals.

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[5] An order reflecting the trial court's decision was entered on March 9, 2015, and it is that order Sarkar challenges on appeal in Docket No. 326667. This Court granted Sarkar's application for leave to appeal in Docket No. 326667 on August 27, 2015. *Sarkar v Doe*, unpublished order of the Court of Appeals, entered August 27, 2015 (Docket No. 326667).

[6] An order reflecting the trial court's decision was entered on March 26, 2015, and it is that order PubPeer challenges on appeal in Docket No. 326691. This Court granted PubPeer's application for leave to appeal in Docket No. 326691 on August 27, 2015. *Sarkar v Doe*, unpublished order of the Court of Appeals, entered August 27, 2015 (Docket No. 326691). The Court of Appeals ordered the appeals consolidated.

II. ARGUMENTS ON APPEAL

Generally, we review for an abuse of discretion a trial court's decision on whether to compel discovery. *Cabrera v Ekema*, 265 Mich App 402, 406; 695 NW2d 78 (2005). We review de novo however a trial court's decision to grant summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Similarly, constitutional issues, including the application of the First Amendment, are also reviewed de novo. *Smith v Anonymous Joint Enterprise*, 487 Mich 102, 111-112; 793 NW2d 533 (2010).

A. THE APPROPRIATE STANDARD

Sarkar first argues that the trial court's March 9, 2015 order must be reversed because the court erred by allowing PubPeer, a nonparty, to argue standards for summary disposition. Relatedly, Sarkar also argues that the trial court erroneously heightened the pleading standard for defamation as well as erroneously refused to consider a protective order pursuant to MCR 2.302. Ultimately, these arguments are each part of Sarkar's ultimate position before the trial court and before this Court on appeal: Sarkar argues that *Thomas M Cooley Law Sch v Doe 1*, 300 Mich App 245; 833 NW2d 331 (2013), not *Ghanam v John Does*, 303 Mich App 522; 845 NW2d 128 (2014), controls the outcome of this case. We will address each case in turn, as well as their application to this matter.

1. *THOMAS M COOLEY LAW SCHOOL v DOE 1*

In *Cooley*, an anonymous speaker created a website titled "THOMAS M. COOLEY LAW SCHOOL SCAM" on weebly.com. *Cooley*, 300 Mich App at 250. The speaker, who identified himself as a graduate of

Thomas M. Cooley Law School (Cooley or the school), described the school as " 'THE BIGGEST JOKE of all law schools,' " characterized the school as having an " 'open door' policy" for admission, criticized the school's attrition rate and administrative policies, cited rankings, described the school as " 'A DIPLOMA MILL,' " and called the school's graduates "unemployed." *Id*. at 251. The speaker "permitted visitors to post their own comments on the website, and frequently responded to the commentators," but he eventually "began to 'filter' comments, noting that he would delete 'any stupid or irrelevant comments or personal attacks[.]' " *Id*. (alteration in original).

Cooley eventually filed a lawsuit in the Ingham Circuit Court against multiple anonymous defendants, alleging defamation against the anonymous speaker who created the website as well as the other anonymous commenters. A California court subsequently granted Cooley's petition for a subpoena to compel California-based Weebly, Inc. (Weebly), the entity that operated weebly.com, "to produce documents that included [the speaker]'s user account information." *Id*. at 251-252. The anonymous speaker then moved in the Ingham Circuit Court to quash the subpoena or for a protective order, but, in the meantime, an employee of Weebly disclosed the speaker's identity to the school. *Id*. at 252. After learning the speaker's identity, the school filed an amended complaint that identified the speaker by his legal name. *Id*. In addressing the speaker's motion to quash or for a protective order, the trial court first struck the school's amended complaint and ordered that the school not continue discovery or disclose the speaker's identity further. *Id*. at 252-253. Ultimately, however, the trial court denied the speaker's motion to quash, reasoning that the speaker's statements at issue were slanderous per se and, there-

fore, not entitled to First Amendment protection under *Dendrite Int'l, Inc v Doe, No 3*, 342 NJ Super 134; 775 A2d 756 (NJ Super Ct, 2001), and *Doe No 1 v Cahill*, 884 A2d 451 (Del, 2005). *Cooley*, 300 Mich App at 253.

The speaker appealed, and this Court reversed and remanded the case. *Id*. at 272. Specifically, this Court held that the trial court abused its discretion by applying *Dendrite* and *Cahill* rather than Michigan law and also erred in other conclusions. *Id*. at 267-269. This Court explained, in pertinent part, as follows:

> We conclude that the trial court abused its discretion, which requires reversal. A trial court by definition abuses its discretion when it inappropriately interprets and applies the law. First, the trial court erroneously concluded that Michigan law does not adequately protect [the speaker's] interests, and then it erroneously adopted and applied foreign law. Second, the trial court's findings and conclusions in support of its position were erroneous. Third, the trial court did not state any reason supporting its decision to deny [the speaker's] alternative request for a protective order.
>
> After adopting the *Dendrite* and *Cahill* standards as Michigan law, the trial court appears to have considered only two alternatives: (1) that the subpoena should be quashed and Cooley's case dismissed, or (2) that the subpoena should not be quashed and the case should proceed with [the speaker's] name on the complaint. But Michigan law does not address only these polar opposites. [The speaker] also asked for a protective order under MCR 2.302(C). The trial court's order indicates that it denied [the speaker's] requests for a protective order "for reasons stated on the record." But the trial court did not state any reasons on the record to deny the protective order. The trial court appears not to have considered whether or to what extent to protect [the speaker's] identity after it determined not to quash the subpoena. On remand, the trial court should consider whether good cause exists to support [the speaker's] request for a protective order.

Next, the trial court ruled that defamatory statements per se were not entitled to First Amendment protections. The trial court was incorrect. Not all accusations of criminal activity are automatically defamatory. To put it simply, defamation per se raises the presumption that a person's reputation has been damaged. In that instance, a plaintiff's failure to prove damages for certain charges of misconduct would not require dismissal of the suit. Whether a plaintiff has alleged fault—which may require the plaintiff to show actual malice or negligence, depending on the status of the speaker and the topic of the speech—concerns an element separate from whether the plaintiff has alleged defamation per se. Thus, the trial court erroneously concluded that Cooley would not have to prove fault or other elements because the statements were defamatory per se.

More importantly, this erroneous determination was central to the considerations the trial court may balance when determining whether to issue a protective order. As noted above, a trial court may consider that a party seeking a protective order has alleged that the interests he or she is asking the trial court to protect are constitutionally shielded. But the trial court need not, and should not, confuse the issues by making a premature ruling—as though on a motion for summary disposition—while considering whether to issue a protective order before the defendant has filed a motion for summary disposition. The trial court should only consider whether good cause exists to issue a protective order, and to what extent to grant relief under MCR 2.302(C).

[The speaker] urges this Court to rule that Cooley has not pleaded legally sufficient claims for defamation and tortious interference with a business relationship. We conclude that [the speaker's] motion for a protective order did not present the appropriate time or place to do this. These rulings are best made in the context of a motion for summary disposition, when the trial court is testing the legal sufficiency of the complaint. The trial court's only concerns during a motion under MCR 2.302(C) should be whether the plaintiff has stated good

> cause for a protective order and to what extent to issue a protective order if it determines that one is warranted. [*Id*. (citations omitted).]

2. *GHANAM v JOHN DOES*

In *Ghanam*, 303 Mich App at 525, several anonymous speakers made what the plaintiff characterized as "false and malicious statements about plaintiff on an Internet message board called The Warren Forum." The statements at issue included allegations that the plaintiff was "involved in the disappearance and theft of approximately 3,647 tons of road salt from city storage facilities and of stealing tires from city garbage trucks and selling them." *Id*. Taking the position that these statements " 'prejudiced and caused harm to the Plaintiff in his reputation and office and held Plaintiff up to disgrace, ridicule, and contempt,' " the plaintiff filed a defamation lawsuit against the anonymous speakers and sought to depose a former city employee who "plaintiff believed . . . was affiliated with the website" to learn the speakers' identities. *Id*. at 525, 527.

The former city employee, a nonparty, "moved for a protective order against his deposition, arguing that the First Amendment protects a critic's right to anonymously comment about the actions of a public official and that the identities of the anonymous writers were subject to a qualified privilege." *Id*. at 527. Specifically, the former city employee "argued that before plaintiff could seek to compel the identification of the anonymous posters, he must produce sufficient evidence supporting each element of a cause of action for defamation against a public figure." *Id*. The trial court, without "consider[ing] or acknowledg-[ing] the First Amendment aspects involved," "merely

relied on the open and liberal discovery rules of Michigan" and denied the motion for a protective order. *Id*. at 527-528.

The former city employee appealed, and this Court reversed and remanded the case for further proceedings. *Id*. at 550. First, while it recognized that it was bound by *Cooley*, this Court nevertheless determined that "application of the *Cooley* protection scheme in the instant case, containing circumstances which *Cooley* declined to address, appears inadequate to protect the constitutional rights of an anonymous defendant who is unaware of pending litigation." *Id*. at 540. In light of this inadequate protection, this Court "conclude[d] that when an anonymous defendant in a defamation suit is not shown to be aware of or involved with the lawsuit, some showing by the plaintiff and review by the trial court are required in order to balance the plaintiff's right to pursue a meritorious defamation claim against an anonymous critic's First Amendment rights." *Id*. Consequently, this Court "impose[d] two additional requirements in an effort to balance" these competing interests: (1) "a plaintiff must have made reasonable efforts to provide the anonymous commenter with reasonable notice that he or she is the subject of a subpoena or motion seeking disclosure of the commenter's identity," and (2) "the plaintiff's claims must be evaluated by the court so that a determination is made as to whether the claims are sufficient to survive a motion for summary disposition under MCR 2.116(C)(8)." *Id*. at 541. Determining that there was nothing in the record that would satisfy either of those two additional requirements, this Court reversed and remanded for the entry of an order granting summary disposition in the anonymous speakers' favor. *Id*. at 543-550.

3. APPLICATION TO THIS CASE

In our view, this case does not fit neatly into the framework articulated by *Cooley* or *Ghanam*. As Sarkar argues, *Cooley* is similar in that it involved a defendant who had appeared. As PubPeer argues, however, *Cooley* differs in that it involved a defendant whose identity had already been disclosed to the plaintiff. That is, to date, the identities of the anonymous speakers in this case are not yet known by Sarkar.[7] On the other hand, as PubPeer argues, *Ghanam* is similar in that it involved a defendant whose identity had not yet been disclosed to the plaintiff. As Sarkar argues, however, *Ghanam* differs in that it involved a situation in which seemingly no defendants were aware of or had appeared in the matter. That is, as of now, one anonymous defendant is aware of and has filed an appearance in this matter. Given these differences, the protection schemes articulated in *Cooley* and *Ghanam*, while helpful, do not control the outcome of this case.

Nevertheless, it is our opinion that the framework as set forth in *Ghanam* is most appropriate here. In essence, Sarkar's position is simple: He argues that because a defendant has appeared, PubPeer cannot

[7] Additionally, and perhaps more importantly, *Cooley* is distinguishable from this matter in that *Cooley*, 300 Mich App at 252, involved a motion to quash or for a protective order filed by the anonymous speaker at issue, not a nonparty. See *id*. ("On August 5, 2011, Doe 1 filed a motion in the Ingham Circuit Court, requesting that it quash any outstanding subpoenas to Weebly or, alternatively, issue a protective order limiting or restricting Cooley's use or disclosure of his identifying information."). Conversely, this case involves a motion to quash by a nonparty relating, at least in part, to statements made by anonymous speakers who have not appeared. Therefore, while *Cooley* is still helpful to our analysis in this case, the circumstances presented in that case are not identical to those here as argued by Sarkar.

argue that the standards for summary disposition should apply to this issue. We cannot agree with this position.

"The First Amendment of the United States Constitution provides that 'Congress shall make no law . . . abridging the freedom of speech . . . .' " *Cooley*, 300 Mich App at 255-256, quoting US Const, Am I. Similarly, our "Michigan Constitution provides that '[e]very person may freely speak, write, express and publish his views on all subjects, being responsible for the abuse of such right; and no law shall be enacted to restrain or abridge the liberty of speech . . . .' " *Cooley*, 300 Mich App at 256, quoting Const 1963, art 1, § 5 (alteration in original).[8] The United States Constitution protects an individual's "speech over the Internet to the same extent as speech over other media," and this remains true regardless of whether the individual identifies himself or herself or remains anonymous. *Cooley*, 300 Mich App at 256. Stated again, "The United States Supreme Court has . . . determined that 'an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.' " *Id*., quoting *McIntyre v Ohio Elections Comm*, 514 US 334, 342; 115 S Ct 1511; 131 L Ed 2d 426 (1995). However, "[t]he right to anonymous expression over the Internet does not extend to defamatory speech, which is not protected by the First Amendment." *Ghanam*, 303 Mich App at 534.

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[8] Because "[t]he United States and Michigan Constitutions provide the same protections of the freedom of speech," and Michigan's Constitution is not interpreted more broadly than that of the federal Constitution on that issue, "this Court may consider federal authority when interpreting the extent of Michigan's protections of free speech." *Cooley*, 300 Mich App at 256.

While courts in other jurisdictions have tried, "[t]o very different extents," "to balance a defendant's right to speak anonymously against a plaintiff's interest in discovering the information necessary to prosecute its defamation claims," *Cooley*, 300 Mich App at 257, this Court has clearly held that "Michigan's procedures for a protective order, when combined with Michigan's procedures for summary disposition, adequately protect a defendant's First Amendment interests in anonymity," *id*. at 264, and we are bound by that decision, MCR 7.215(J)(1).[9] Thus, as recognized by *Cooley*, 300 Mich App at 259-264, it is this state's procedures for protective orders and summary disposition that control in this circumstance.

A party commences a civil action when he or she files a complaint with the court. *Id*. at 259. After doing so, a party is permitted to " 'obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action[.]' " *Id*. at 260, quoting MCR 2.302(B)(1). Generally, "Michigan follows a policy of open and broad discovery." *Cooley*, 300 Mich App at 260. Nevertheless, "a trial court should protect parties from excessive, abusive, or irrelevant discovery requests" by issuing a protective order when appropriate. *Id*. at 260-261. In deciding whether to issue a protective order, courts use the procedure set forth in MCR 2.302(C). *Id*. at 261. Relatedly, courts may also grant summary disposition under MCR 2.116(C)(8) when the opposing party has failed to state a viable claim. *Id*. Summary disposition should be granted under Subrule (C)(8) "if the claim is so clearly unen-

[9] In *Cooley*, 300 Mich App at 266-267, a panel of this Court expressly refused to adopt *Dendrite*, reasoning that any expansion beyond the Michigan rules of civil procedure would be better accomplished by the Legislature.

forceable as a matter of law that no factual development could possibly justify the opposing party's right to recovery." *Id*. at 262. As this Court explained in *Cooley*, *id*., "[t]he availability and application of summary disposition is important in this case because summary disposition is an essential tool to protect First Amendment rights."

However, when an anonymous defendant has not appeared, it is clear that he or she is completely unable to seek summary disposition of unviable claims; stated differently, when an anonymous defendant has not appeared, it is clear that he or she is completely unable to use an (and arguably the most) important tool to protect his or her First Amendment rights. This is precisely the concern that was identified in *Ghanam*:

> In the present case, no defendant was notified of the lawsuit and no defendant had been involved with any of the proceedings, which means that there was no one to move for summary disposition under MCR 2.116(C)(8). Thus, one of the two protections that *Cooley* relied upon is conspicuously absent. Further, when defendants are not aware of and not involved with a lawsuit, any protection to be afforded through the entry of a protective order under MCR 2.302(C) is *contingent* upon a nonparty, e.g., the Internet service provider, asserting the defendants' First Amendment rights. Thus, application of the *Cooley* protection scheme in the instant case, containing circumstances which *Cooley* declined to address, appears inadequate to protect the constitutional rights of an anonymous defendant who is unaware of pending litigation. [*Ghanam*, 303 Mich App at 539-540.][10]

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[10] As indicated earlier in this opinion, Sarkar argues on appeal that the appearance of one anonymous speaker, in and of itself, renders *Ghanam* wholly inapplicable. We cannot agree. The practical implications of such an understanding are unacceptable. In essence, that understanding would require that the appearing anonymous speaker represent the interests of all anonymous speakers, and that is simply

Consequently, under *Ghanam*, 303 Mich App at 540, "when an anonymous defendant in a defamation suit is not shown to be aware of or involved with the lawsuit, some showing by the plaintiff and review by the trial court are required in order to balance the plaintiff's right to pursue a meritorious defamation claim against an anonymous critic's First Amendment rights." In this case, that requires Sarkar to satisfy the two additional requirements imposed by the *Ghanam* panel: (1) Sarkar "must have made reasonable efforts to provide the anonymous commenter with reasonable notice that he or she is the subject of a subpoena or motion seeking disclosure of the commenter's identity," and (2) Sarkar's "claims must be evaluated by the court so that a determination is made as to whether the claims are sufficient to survive a motion for summary disposition under MCR 2.116(C)(8)." *Id*. at 541. With respect to the reasonable-notice requirement, there is no dispute in this case that reasonable notice was provided, and we see no reason to address this issue further.[11] Therefore,

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unacceptable in cases, such as this one, in which the anonymous speakers made different statements. There is simply no legal authority that would support a conclusion that the appearance of one anonymous speaker somehow affects the anonymity protections afforded to other anonymous, but nonappearing, speakers simply because they happened to comment on the same website. Furthermore, Sarkar's position overlooks the fact that *Ghanam* expressly held that a motion for summary disposition, whether made by an anonymous speaker or a nonparty, is not required: "This evaluation [of the plaintiff's claims under MCR 2.116(C)(8)] is to be performed *even if there is no pending motion for summary disposition before the court*." *Ghanam*, 303 Mich App at 541 (emphasis added). Accordingly, the trial court was required to perform this MCR 2.116(C)(8) evaluation regardless of whether PubPeer, an anonymous speaker, or any other individual or entity moved for summary disposition.

[11] The record reflects that a copy of Sarkar's complaint was posted to pubpeer.com. It also appears that this lawsuit, as well as the underlying allegation, has generated significant publicity in the cancer-research community. In sum, while neither party expressly agrees or disagrees

the primary issue we need to address here is whether the second requirement—that is, whether Sarkar's claims could survive a motion for summary disposition under MCR 2.116(C)(8)—is satisfied. We conclude that it is not.

As indicated earlier in this opinion, a motion for summary disposition pursuant to MCR 2.116(C)(8) may be filed "when the opposing party has failed to state a claim on which relief can be granted." *Cooley*, 300 Mich App at 261. A motion for summary disposition pursuant to Subrule (C)(8) "tests the legal basis of the complaint on the pleadings alone." *Id*. Therefore, all factual allegations made in the complaint must be viewed in a light most favorable to the nonmoving party and accepted as true. *Id*. at 261-262. "The trial court will grant the motion if the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify the opposing party's right to recovery." *Id*. at 262.

In Michigan, a defamation claim requires proof of four elements:

> "(1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by publication." [*Smith*, 487 Mich at 113, quoting *Mitan v Campbell*, 474 Mich 21, 24; 706 NW2d 420 (2005).][12]

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that the reasonable-notice requirement was satisfied, it appears insignificant and is largely irrelevant in light of our conclusion with respect to the second requirement.

[12] With respect to the third element, we note that Sarkar appears to be a limited-purpose public figure. Therefore, he is required to prove that the anonymous speakers acted with actual malice in making the statements at issue. *VandenToorn v Bonner*, 129 Mich App 198, 207; 342

At issue on appeal is whether the statements identified in Sarkar's complaint are capable of defamatory meaning. "A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him" *Smith*, 487 Mich at 113 (citation and quotation marks omitted). "To be considered defamatory, statements must assert facts that are 'provable as false.' " *Ghanam*, 303 Mich App at 545, quoting *Milkovich v Lorain Journal Co*, 497 US 1, 19; 110 S Ct 2695; 111 L Ed 2d 1 (1990). " 'The dispositive question . . . is whether a reasonable fact-finder could conclude that the statement implies a defamatory meaning.' " *Ghanam*, 303 Mich App at 545, quoting *Smith*, 487 Mich at 128. "The context and forum in which statements appear also affect whether a reasonable reader would interpret the statements as asserting provable facts," and this Court has recognized "that Internet message boards and similar communication platforms are generally regarded as containing statements of pure opinion rather than statements or implications of actual, provable fact." *Ghanam*, 303 Mich App at 546-547. "Whether a statement is actually capable of defamatory meaning is a preliminary question of law for the court to decide." *Id*. at 544.

Accordingly, to determine whether Sarkar's defamation claim could survive a motion for summary disposition under MCR 2.116(C)(8), we are tasked with analyzing each allegedly defamatory statement identified in his complaint.[13]

NW2d 297 (1983). Nevertheless, because none of the comments at issue is capable of defamatory meaning, we need not address whether the record reflects any indication of actual malice.

[13] At the outset, it must be noted that, as a matter of law, facially deficient claims cannot survive a motion for summary disposition under

a. PARAGRAPHS 41, 42, 44, 45, 46, 47, 50, 51, 52, 53, 54, 55, AND 56

Paragraphs 41, 42, 44, 45, 46, 47, 50, 51, 52, 53, 54, 55, and 56 of Sarkar's complaint state, in full, as follows:

> 41. At https://pubpeer.com/publications/16546962 there are comments that conclude that certain figures are "identical" to others, accusing him of research misconduct.
>
> 42. At https://pubpeer.com/publications/21680704 there are comments that conclude that certain figures show "no vertical changes," are the "same bands," and are "identical" to others, also accusing him of research misconduct.
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> * * *
>
> 44. At https://pubpeer.com/publications/2D67107831 BCCB85BA8EC45 A72FCEF, another discussion takes place among anonymous posters, accusing Dr. Sarkar of "sloppiness" of such magnitude that it calls into question the scientific value of the papers. The comments further demand a "correction" with a "public set of data to show that the experiments exist," falsely stating that the data were false and that the experiments were fabricated.
>
> 45. An unregistered submission on the URL as #44 above doubts that the authors have taken "physics" and that they have decided to "show the world" fabricated

---

MCR 2.116(C)(8). *Ghanam*, 303 Mich App at 543. Accordingly, because " '[a] plaintiff claiming defamation must plead a defamation claim with specificity by identifying the exact language that the plaintiff alleges to be defamatory,' " our review of whether statements are capable of defamatory meaning so as to survive a motion for summary disposition is limited to those statements that are specifically identified in the complaint. *Id*. at 543, quoting *Cooley*, 300 Mich App at 262 (alteration in original). We have therefore elected to quote, *in full*, each paragraph at issue in Sarkar's complaint. We would also note, however, that while we have attempted to copy the formatting used by Sarkar in his complaint as closely as possible, some spacing differs minimally.

data. The same, or perhaps a different unregistered submission concludes: "One has to wonder how this was not recognized earlier by the journals, reviewers, funding agencies, study sections, and the university. Something is broken in our system."

46. At https://pubpeer.com/publications/21680704, *"Inactivation of AR/TMPRSS2-ERG/Wnt signaling networks attenuates the aggressive behavior of prostate cancer cells,"* accusations include "no vertical changes . . . problematic," and "same image."

47. On July 24, 2014, at https://pubpeer.com/publications/22806240, *"Activated K-Ras and INK4a/Arf deficiency promote aggressiveness of pancreatic cancer by induction of EMT consistent with cancer stem cell phenotype,"* a comment made from "Peer 3" contains the comment "There seems to be a lot more 'honest errors' to correct," with the quotes communicating that they were not honest errors.

* * *

50. The dialogue set forth in #49 above urges the PubPeer "community" to target Dr. Sarkar, and contains a false statement, as the Plaintiff has previously replied to PubPeer comments [November 10, 2013 submission apologizing for the inadvertent error and promising a correction at this page: https://pubpeer.com/publications/170E31360970BE43408F4AC52E57FD, *"CXCR2 Macromolecular Complex in Pancreatic Cancer: A Potential Therapeutic Target in Tumor Growth."*]

51. The interaction between anonymous posters in the paragraphs above suggests that multiple users are independently conversing about Dr. Sarkar and making false accusations about him. On information and belief, these are from the same person pretending to have a dialogue with someone else, or persons working in concert.

52. For example, a "dialogue" between two allegedly different posters took place on July 24, 2014. These posters, "Peer 1" and "Unregistered Submission," each posted in the

middle of the night, one responding to the other just 56 minutes later. See: https://pubpeer.com/publications/A3845DA138FC83780CB5071ED74AEC, *"Concurrent Inhibition Of NF-Kappab, Cyclooxygenase-2, And Epidermal Growth Factor Receptor Leads To Greater Anti-Tumor Activity In Pancreatic Cancer."* This is either a very odd coincidence that two scientists were independently reading the same page regarding Dr. Sarkar (in the example stated in this paragraph, a page regarding a 2010 paper that at the time had only had 151 views) — on the same day, in the middle of the night; or drawing a reasonable inference from these facts, it's the same person feigning a dialogue; or two persons working in concert with one another.

53. These probably fake dialogues are an attempt to falsely communicate that there are more scientists concerned about Dr. Sarkar, and more persons communicating accusations, than there actually are. This is significant because there are so many criticisms of Dr. Sarkar that rely on the sheer number of PubPeer comments as an indication that he must be engaged in misconduct. See, for example, the examples cited at paragraphs 40 (d) and 48, above.

54. Another example of a tactic to artificially increase accusations of misconduct is to make a single comment on old papers. Similar to what is stated in paragraph 53 above, this too is significant because there are so many comments that rely on the sheer number of *papers with comments* on PubPeer (as opposed to the total number of omments, *cf*. ¶ 53) to indicate misconduct:

a. There are two comments at this page: https://pubpeer.com/publications/5A875EBFF7D16C8CCE342257412E5B, *"B-DIM Impairs Radiation-Induced Survival Pathways Independently Of Androgen Receptor Expression and Augments Radiation Efficacy in Prostate Cancer."* These two comments are in April and July, 2014, concerning a 2012 paper with no previous comments. This indicates someone intentionally seeking to increase the number of papers with comments on PubPeer.

b. Below is a comment simply inviting the reader to perform a search on Dr. Sarkar, at https://pubpeer.com/publications/58FE2E47C6FEB3BE00367F26BF7A83,*"P53-Independent Apoptosis Induced By Genistein In Lung Cancer Cells."* The comment has nothing at all to do with that 1999 paper, but instead is intended for the reader to search and see how many of Dr. Sarkar's papers have been commented about on PubPeer:

> **Unregistered Submission:**
> (April 21st, 2014 1:33am UTC)
>
> 1994-2014 here:
> https://pubpeer.com/search?q=Sarkar+FH

c. Another comment was made on July 24, 2014 at 7:04 AM from "Peer 1" at https://pubpeer.com/publications/997E578FC0B61F6BAE1974D4051157, *"Mitochondrial Dysfunction Promotes Breast Cancer Cell Migration and Invasion through HIF1a Accumulation via Increased Production of Reactive Oxygen Species."* THIS DOUBLED THE AMOUNT OF COMMENTS ON THIS 2006 PAPER.

d. A July 13, 2014 comment was made about a 2005 paper that previously had no comments: https://pubpeer.com/publications/6B44D6D4111B59BAB78E642C8D1758, *"Molecular Evidence for Increased Antitumor of Gemcitabine by Genistein in Vitro and in Vivo Using an Orthopedic Model of Pancreatic Cancer."*

e. All told, there are 42 papers with Dr. Sarkar as lead researcher that have garnered only one comment on PubPeer, many of them extremely recent comments on relatively old papers.

55. The comment that was made [as set forth in paragraph 54(d)] appears innocuous on its face, merely stating that one illustration appears to be the same as another one, but "flipped." This would meet PubPeer's guidelines that it was permissible to state that one illustration appears the same as another. The comment is as follows:

> **Unregistered Submission:**
> (July 13th, 2014 6:26pm UTC)
>
> Compare Fig. 3B and Fig. 3D [AT http://cancerres.aacrjournals.org/content/65/19/9064.full.pdf+html]
>
> When Colo357 lane for 0 and 25 in 3B is flipped it looks similar to the control and genistein in Fig. 3D for Colo357.
>
> 56. However, while that comment communicates that these are the same illustration, they are in fact not — they are clearly different illustrations to the untrained eye. As such, this is another false accusation of research misconduct. While some PubPeer comments do point out illustrations that appear similar, others like this example are not. Accordingly, the comment set forth in this paragraph is false, made in bad faith, and defamatory. [Bracketed material in original.]

After reviewing these paragraphs, we conclude that they are facially deficient and unable to survive a motion for summary disposition under MCR 2.116(C)(8). As stated earlier in this opinion, "[a] plaintiff claiming defamation must plead a defamation claim with specificity by identifying the exact language that the plaintiff alleges to be defamatory." *Ghanam*, 303 Mich App at 543 (citation and quotation marks omitted; alteration in original).[14] In this case, minimal language is specifically identified in these paragraphs in the complaint, and Sarkar apparently relies on the

[14] See also *Royal Palace Homes, Inc v Channel 7 of Detroit, Inc*, 197 Mich App 48, 57; 495 NW2d 392 (1992) ("Plaintiffs must plead precisely the statements about which they complain."); *Gonyea v Motor Parts Fed Credit Union*, 192 Mich App 74, 77; 480 NW2d 297 (1991) ("These elements must be specifically pleaded, including the allegations with respect to the defamatory words, the connection between the plaintiff and the defamatory words, and the publication of the alleged defamatory words."); *Cooley*, 300 Mich App at 266 ("[U]nder Michigan law, the plaintiff must allege the exact defamatory statements.").

trial court and this Court to visit pubpeer.com and learn the underlying science at issue to determine whether the statement constitutes a potentially defamatory accusation. In essence, we would be left searching the cited webpages with the hope of finding comments that do or do not support his claim. This is his, not our, burden, and we decline to do so for him.[15] For this reason, the statements at issue in Paragraphs 41, 42, 44, 45, 46, 47, 50, 51, 52, 53, 54, 55, and 56 are not capable of defamatory meaning. Accordingly, defendants are entitled to summary disposition pursuant to MCR 2.116(C)(8) with respect to these paragraphs, and the trial court correctly granted PubPeer's motion to quash in this regard.[16]

b. PARAGRAPHS 40(a), (b), AND (d), 43, 48, AND 49

Paragraphs 40(a), (b), and (d), 43, 48, and 49 of Sarkar's complaint however identify, at least to a certain extent, the exact language at issue; accord-

[15] To be clear, we are holding that Michigan law requires a plaintiff to specifically identify *every* statement that he or she claims is capable of defamatory meaning. In this case, Sarkar quotes certain words, quotes some phrases, and provides citations to various webpages. This is insufficient. Indeed, the majority of the webpages that Sarkar cites have changed and no longer include the words or phrases that he quotes. For example, the webpage cited in Paragraph 41 of the complaint includes approximately 63 comments, the majority of which were made after he filed the complaint in this case. The comments were made between November 2013 and October 2016, beginning with invitations to "please compare" certain figures that appear similar and ending with a link to an article on retractionwatch.com that summarizes a Wayne State University investigation that found Sarkar had engaged in misconduct.

[16] Nevertheless, we do recognize that ordinarily a plaintiff may be given an opportunity to amend a facially deficient complaint. See MCR 2.116(I)(5). However, for the reasons discussed later in this opinion, allowing Sarkar to amend his complaint would be futile, and it is therefore unnecessary.

ingly, we are able to provide meaningful review.[17] These paragraphs provide, in full, as follows:

> 40. At and commenting from *"Down-regulation of Notch-1 contributes to cell growth inhibition and apoptosis in pancreatic cancer cells"* [https://pubpeer.com/publications/16546962]
>
> a. In this discussion, "Peer 1's" commentary begins with an invitation for the reader to compare certain illustrations with others. But then an unregistered submission links to another page, where someone sarcastically asserted that a paper "[Used] the same blot to represent different experiment(s). I guess the reply from the authors would be inadvertent errors in figure preparation."
>
> b. Perhaps that same unregistered submission complains, "You might expect the home institution to at least look into the multiple concerns which have been rasied." *(sic)* This statement is defamatory. Given the regulatory scheme described above that requires such investigations only where there are "good faith" complaints of "alleged research misconduct" [deliberate fabrication, falsification, or plagiarism], this unknown author has accused Dr. Sarkar of deliberate misconduct.
>
> * * *
>
> d. The discussion that follows attack's [sic] Dr. Sarkar's character and expresses an invitation for his current employer (Wayne State), his potential future employer (the University of Mississippi), the National Institute of Health, and even the Department of Defense to investigate and take negative action against Dr. Sarkar:

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[17] We should note that we are assuming, for purposes of Paragraphs 40(a), (b), and (d), 43, 48, and 49, that Sarkar's complaint sufficiently identified the allegedly actionable statements. While we still believe that some of these paragraphs or subparagraphs are inadequate, we feel that we are able to provide meaningful review and choose to do so. Nevertheless, providing a citation to a webpage and quoting words or incomplete phrases is *not* sufficient.

Unregistered Submission:
(June 19th, 2014 1:11pm UTC)

Talking about the Board of Governors, see this public info

http://prognosis.med.wayne.edu/article/board-of-governors-names-dr-sarkar-a-distinguished-professor

Peer 2:
(June 19th, 2014 7:52pm UTC)

"currently funded by five National Institutes of Health RO1grants"

That probably works out at about $200k per PubPeer comment. I should think that NIH must be pretty happy with such high productivity.

Unregistered Submission:
(June 20th, 2014 9:44am UTC)

just letting you know that the award for doing what he/she allegedly did is promotion a prestigious position at a different institution. Strange http://www.umc.edu/news_and_publications/thisweek.aspx?type=thisweek&date=6%2F9%2F2014 [*link is to the University of Mississippi site announcing Dr. Sarkar's hire*]

Unregistered Submission:
(June 20th, 2014 5:30pm UTC)

The last author is now correcting "errors" in several papers. Hopefully he will be able to address and correct the more than 45 papers (spanning 15 years of concerns: 1999-2014), which were all posted in PubPeer.

Peer 2:
(June 20th, 2014 6:39pm UTC)

From the newsletter:

"Sarkar has published more than 525 scholarly articles"

> . . . nearly 50 of which have attracted comments on PubPeer!
>
> It's not hard to imagine why Wayne State may not have fought to keep him. And presumably the movers and shakers at the University of Mississippi Medical Center didn't know that they should check out potential hires on PubPeer (they just counted the grants and papers). I wonder which institution gets to match up NIH grants with papers on PubPeer.
>
> It can only be a matter of time, grasshopper, but that time may still seem long. You saw it first on PubPeer.
>
> * * *
>
> **Unregistered Submission:**
> (July 5th, 2014 12:58am UTC)
>
> From a look at this PI's funding on NIH website it seems this lab has received over $13 million from NIH during the last 18 years. An online CV shows he has received DOD funds as well, bring the federal fund total close to $20 million. Why isn't the NIH and DOD investigating? The problems came to light only because they were gel photos. What else could be wrong? Figures, tables could be made-up or manipulated as well.
>
> The problems on PubPeer is for about 50 papers-all based on image analysis. That is just 10% of the output from this lab (or $2 million worth of federal dollars). What about the other 90%? Sadly this is what happens when research output becomes a numbers game. An equivalent PI would be happy to have just 50 high impact papers properly executed, that moves the research field forward. This lab has 500; but now it will be very difficult to figure out the true scientific value of any of them. Sad!
>
> * * *

43. At https://pubpeer.com/publications/22806240, there are comments that state: "You are correct: using the same blot to represent different experiment(s). I guess the reply from the authors would be "inadvertent errors in figure

preparation," which also accuse him of research misconduct and sarcastically noting that any defense to the contrary would be inadequate.

* * *

48. At https://pubpeer.com/publications/88B8619C6BD964F6EDDD98AD8ECE47, *"Inhibition of Nuclear Factor Kappab Activity by Genistein Is Mediated via Notch-1 Signaling Pathway in Pancreatic Cancer Cells,"* a discussion takes place between an unregistered submitter and "Peer 1," accusing significant misconduct, as follows:

> **Unregistered Submission:**
> (March 29th, 2014 11:20pm UTC)
>
> The last author has more than 20 papers commented in Pubpeer.
>
> **Peer 1:**
> (March 30th, 2014 10:07am UTC)
>
> "The last author has more than 20 papers commented in Pubpeer."
>
> He's been very productive.
>
> Presumably the journals know and his university knows. How long would it have taken for you to find out from them? Still counting.
>
> **Unregistered Submission:**
> (May 17th, 2014 7:38pm UTC)
>
> An Erratum to a report this previous PubPeer comment has been published by the authors in Int J Cancer. 2014 Apr 15;134(8):E3. In the erratum, the authors state that: "An error occurred during the creation of the composite figure for Fig-5B (Rb) and Fig-6B (I?B?) which has recently been uncovered although it has no impact on the overall findings and conclusions previously reported"
>
> Not so fast!
>
> See additional concerns (band recycling, not addressed in Erratum) in Figure 4A and Figure 6; here:

> http://imgur.com/LVa2cVc
> http://i.imgur.com/4ARd2Mp.png
> http://i.imgur.com/miK0HGw.png
>
> Based on these issues, can we agree with the authors that "an ERROR occurring during the creation of the composite figures" and that these (and previous "errors") have "NO IMPACT on the overall findings and conclusions previously reported"?

49. At https://pubpeer.com/publications/0189A776A6094A60759DB718F9C535, *"Foxm1 Is a Novel Target of a Natural Agent in Pancreatic Cancer,"* there are two comments that seem to be finishing each other's thought:

> **Unregistered Submission:**
> (July 23rd, 2014 6:37pm UTC)
>
> FH Sarkar has never replied to any of the Pubpeer comments.
>
> **Peer 1:**
> (July 23rd, 2014 10:31pm UTC)
>
> but if we send our concerns to his institution and the journals involved, hopefully there will be changes. . . .

Assuming that these paragraphs are facially sufficient, we nevertheless conclude that they are also unable to survive a motion for summary disposition under MCR 2.116(C)(8). While we are unable to find any Michigan caselaw specifically addressing comments of this nature, other jurisdictions, both federal and state, have addressed similar issues on many occasions. In doing so, they have recognized "that when a speaker outlines the factual basis for his conclusion, his statement is protected by the First Amendment." *Partington v Bugliosi*, 56 F3d 1147, 1156 (CA 9, 1995).[18]

[18] While not binding, we are permitted to consider caselaw from other jurisdictions as persuasive. *Travelers Prop Cas Co of America v Peaker*

This is true even if the speaker expresses his or her

Servs, Inc, 306 Mich App 178, 188; 855 NW2d 523 (2014). We find the Ninth Circuit's reasoning in *Partington* persuasive and quote it at length below:

> Reading each of the statements in context, we find that the statements themselves, as well as the implications that Partington attributes to them, do not represent assertions of objective fact. When one reads the first passage in context, it is clear that Bugliosi does not claim to know the reason for the defense lawyers' failure to bring out the existence of the contradiction; rather, he speculates on the basis of the limited facts available to him. The passage clearly represent [sic] Bugliosi's personal interpretation of the available information and not a verifiable factual assessment of Partington's conduct. As the Seventh Circuit has noted:
>
> > A statement of fact is not shielded from an action for defamation by being prefaced with the words "in my opinion," but if it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable.
>
> With regard to the second statement, Bugliosi merely outlines a set of facts, allowing the reader to draw his own conclusion about them. Even if we were to attribute to Bugliosi's statement the implication that Partington contends arises from it—that Partington represented his client poorly—Bugliosi can only be said to have expressed his own opinion after having outlined all of the facts that serve as the basis for his conclusion.
>
> The courts of appeals that have considered defamation claims after *Milkovich* have consistently held that when a speaker outlines the factual basis for his conclusion, his statement is protected by the First Amendment. As the Fourth Circuit noted, "[b]ecause the bases for the . . . conclusion are fully disclosed, no reasonable reader would consider the term anything but the opinion of the author drawn from the circumstances related." Similarly, the District of Columbia Circuit has noted that " '[b]ecause readers understand that such supported opinions represent the writer's interpretation of the facts presented, and because the reader is free to draw his or her own conclusions based on those facts, this type of statement is not actionable in defamation.' " Finally, the First Circuit has held that, as long as the author presents the factual basis for his statement, it can only be read as his "personal conclusion about the information presented, *not as a statement of*

opinion anonymously. *Cooley*, 300 Mich App at 256. Each of these paragraphs reflects the speaker's opinion based on underlying facts that are available to the reader. Specifically, Sarkar expressly admits in his complaint that the comment at issue in Paragraph 40(a) "begins with an invitation for the reader to compare certain illustrations with others," the comment at issue in Paragraph 40(b) was in response to the same underlying facts as Paragraph 40(a), and the comment at issue in Paragraph 40(d) is in response to those underlying facts as well. Similarly, the comments at issue in Paragraphs 43, 48, and 49 are all also part of discussions based on underlying facts that are available on the same webpages on pubpeer.com. These are precisely the type of opinion statements that state and federal courts have consistently held are protected by the First Amendment, and we believe the same should be true in Michigan as well. Accordingly, summary disposition pursuant to MCR 2.116(C)(8) was appropriate with respect to Paragraphs 40(a), (b), and (d), 43, 48, and 49, and the trial court correctly granted PubPeer's motion to quash in this regard.

c. PARAGRAPH 40(c)

In light of these conclusions, we are left with only one comment—that addressed in Paragraph 40(c)—that Sarkar alleges is capable of defamatory meaning. Indeed, it is the comment addressed in this subpara-

fact." . . . Thus, we join with the other courts of appeals in concluding that when an author outlines the facts available to him, thus making it clear that the challenged statements represent his own interpretation of those facts and leaving the reader free to draw his own conclusions, those statements are generally protected by the First Amendment. [*Partington*, 56 F3d at 1156-1157 (citations omitted; alterations in original).]

graph, and only the comment addressed in this subparagraph, that the trial court concluded was capable of defamatory meaning, and it is this subparagraph that is at issue in PubPeer's appeal in Docket No. 326691. Paragraph 40(c) of the complaint provides, in entirety, as follows:

> c. Then an unregistered user (likely the same one, given the context) reveals that s/he is either a person at Wayne State University who made a formal complaint against Dr. Sarkar, or is otherwise privy to the a [sic] person who did so:
>
> **Unregistered Submission:**
> (June 18th, 2014 4:51pm UTC)
>
> Has anybody reported this to this institute?
>
> **Unregistered Submission:**
> (June 18th, 2014 5:43pm UTC)
>
> Yes, in September and October 2013 the president of Wayne State University was informed several times.
>
> The Secretary to the Board of Governors, who is also Senior Executive Assistant to the President Wayne State University, wrote back on the 11th of November 2013:
>
> "Thank you for your e-mail, which I have forwarded to the appropriate individual within Wayne State University. As you are aware, scientific misconduct investigations are by their nature confidential, and Wayne would not be able to comment on whether an inquiry is under way, or if so, what its status might be."
>
> "Thank you for bringing this matter to our attention."

On appeal, Sarkar claims that the trial court's decision with respect to Paragraph 40(c) was correct because the statement at issue "is a clear indication that [the speaker] is alleging that Dr. Sarkar committed research misconduct – which is a public accusa-

tion at the very heart of Dr. Sarkar's case (and contrary to PubPeer's denials that such an accusation was never made on their web site)." The trial court apparently agreed to an extent, opining that "there could be an inference that this was of a nature to attempt to defame Dr. Sarkar." Ultimately, it appears that Sarkar argues and that the trial court concluded that these statements—in context and when coupled with the public disclosure of the Wayne State University e-mail—are capable of defamatory meaning. We cannot agree with this reasoning.

The contents of the e-mail, even when released to the public, are no more defamatory than the other comments discussed in this opinion. It reflects, drawing inferences in a light most favorable to Sarkar, *Cooley*, 300 Mich App at 261-262, that the e-mail sender, i.e., the individual from Wayne State University, was "not . . . able to comment on whether an inquiry [presumably a scientific misconduct inquiry] into your allegations is under way, or if so, what its status might be." Other than reaffirming the intent of the speaker, i.e., the PubPeer commenter, the publication of this e-mail did not make any false assertions that were otherwise capable of defamatory meaning. As already stated in this opinion, "when a speaker outlines the factual basis for his conclusion, his statement is protected by the First Amendment." *Partington*, 56 F3d at 1156. This is true regardless of whether the speaker later publicizes the actions that he or she took based on that subjective opinion. Accordingly, we disagree that the statements at issue in Paragraph 40(c) are sufficient to survive summary disposition or entitled Sarkar to learn the identities of the anonymous speakers. Accordingly, the trial court should have granted summary disposition and PubPeer's motion

to quash with respect to Paragraph 40(c) as well.[19]

d. THE STATEMENTS AS A WHOLE

Sarkar additionally argues that, while the individual statements taken in isolation may not appear capable of defamatory meaning, a reasonable person reviewing the entirety of the comments regarding Sarkar's research on pubpeer.com would find them defamatory. In essence, it is Dr. Sarkar's position that all criticism of his research on pubpeer.com is defamatory and therefore not protected by the First Amendment. For similar reasons as those articulated with respect to Paragraphs 40, 43, 48, and 49, we conclude that the anonymous speakers' criticism of Sarkar's research, even when reviewed as a whole and in the appropriate context, is not capable of a defamatory meaning.

As stated earlier in this opinion, the First Amendment protects an individual's right to speak anonymously. *Cooley*, 300 Mich App at 256. However, defamatory statements are not entitled to this same protection. *Ghanam*, 303 Mich App at 534. "To be considered defamatory, statements must assert facts that are 'provable as false.' " *Id*. at 545 (citation omit-

[19] Sarkar also argues that by quoting the e-mail in a public post on pubpeer.com, the commenter violated various federal laws involving the confidentiality of research-misconduct investigations. However, he fails to fully develop this argument and he also fails to provide sufficient legal support for his claim to allow for meaningful review. Accordingly, we deem the argument abandoned. *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003). In any event, we do not believe that the public disclosure of this e-mail—which specifically refused to confirm that Wayne State University was conducting a scientific-misconduct investigation of Sarkar's research—constitutes a violation of any federal laws that require confidentiality in research-misconduct investigations. See, e.g., 42 CFR 93.108 (2005).

ted). Nevertheless, state and federal courts alike have consistently held that "when a speaker outlines the factual basis for his conclusion, his statement is protected by the First Amendment." *Partington*, 56 F3d at 1156. That is, when a speaker presents a factual basis for the opinion he or she reached, the opinion is not capable of defamatory meaning. *Id*.

Applying those rules to the facts of this case, we cannot conclude that the comments made on pubpeer.com regarding Sarkar are capable of defamatory meaning. In short, Sarkar is asking this Court to hold that the anonymity of individuals who engage in critical discussions of his work is not protected by the First Amendment, and we simply cannot do so. Had this been a situation in which, for example, speakers had falsely stated that he was found guilty of research misconduct, our conclusion may well have been different. *But that is not what is before us*. Rather, the situation before us involves discussions between anonymous individuals who are, at least to some extent, critical of Sarkar's research. At best, some of the speakers opine that Sarkar *should* be investigated for research misconduct, and their opinions in that regard are protected by the First Amendment. Indeed, their discussions repeatedly invite readers to review Sarkar's research for themselves and reach their own conclusions, and we are not inclined to chill this type of constitutionally protected speech. Accordingly, we conclude that summary disposition is appropriate under MCR 2.116(C)(8) with respect to the comments made on pubpeer.com about Sarkar.[20] For similar reasons, PubPeer's motion to quash should have been granted in full.

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[20] See also *Orr v Argus-Press Co*, 586 F2d 1108, 1114-1115 (CA 6, 1978) (differentiating between a statement that "the plaintiff sits around in his back yard with a drink in his hand and therefore must be an

e. THE FLYER

As already indicated, we conclude that the statements posted on pubpeer.com that were identified in Sarkar's complaint are not capable of defamatory meaning. Therefore, with respect to those statements, summary disposition pursuant to MCR 2.116(C)(8) is appropriate. However, the flyer that was allegedly distributed to Wayne State University personnel presents a different issue. According to Sarkar, the distributed flyer implied that he was under senatorial investigation when in fact he was not. Accepting that allegation as true, we agree that summary disposition pursuant to MCR 2.116(C)(8) with respect to Sarkar's defamation claim based on that flyer is inappropriate at this time. With that being said, it is still necessary for us to determine whether, and to what extent, Sarkar is permitted to unmask the identities of commenters on pubpeer.com as it relates to that flyer, and it is our view that he is not entitled to unmask the identities of any of those commenters. Stated simply, there is no reasonable connection between the flyer and pubpeer.com. While the flyer included a screenshot of a webpage on pubpeer.com, pubpeer.com is a public website available to, *literally*, everyone. While Sarkar asks this Court to assume the flyer was likely distributed by someone who criticized his research on pubpeer.com and therefore unmask the identities of all the individuals who have commented on his research on that website—we simply cannot do so. In short, individuals are entitled under the First Amendment to make anonymous statements, and the mere fact that someone later prints some of those anonymous statements and distributes them does not suddenly destroy

alcoholic," which is not actionable, and a statement that "the plaintiff is an alcoholic," which is actionable) (citation and quotation marks omitted).

that protection. Accordingly, we conclude that while Sarkar's defamation claim may nevertheless proceed, he is not entitled to discovery from PubPeer in this regard.

B. EVIDENCE BEYOND THE PLEADINGS

On appeal, Sarkar also argues that the trial court's March 9, 2015 order must be reversed because the court erred by considering affidavits, erred by making factual inferences against him, and erred by requiring the production of evidence. In essence, Sarkar argues that the trial court misapplied MCR 2.116(C)(8) under *Ghanam*. As stated earlier in greater detail, a motion for summary disposition under MCR 2.116(C)(8) may be filed "when the opposing party has failed to state a claim on which relief can be granted." *Cooley*, 300 Mich App at 261. The motion "tests the legal basis of the complaint on the pleadings alone." *Id*. This standard requires that all factual allegations made in the complaint be viewed in a light most favorable to the nonmoving party and accepted as true. *Id*. at 261-262.

1. AFFIDAVITS

Sarkar claims on appeal that the trial court impermissibly considered two affidavits in reaching its decision, which is undisputedly prohibited by MCR 2.116(C)(8). However, Sarkar does not point to anything in the record to support his claim that the trial court actually considered the affidavits in reaching its decision.[21] Therefore, this argument is abandoned.

[21] Sarkar argues, in pertinent part, as follows:

> The court's error in considering the (C) (8) factors was compounded when it considered the affidavit of Dr. Krueger (opining about Dr. Sarkar's research) attached to PubPeer's motion. Even

Peterson Novelties, Inc, 259 Mich App at 14. Moreover, we are unable to find any mention of these affidavits by the trial court in the entire record. Accordingly, this claim of error is meritless.

2. FACTUAL INFERENCES

Next, Sarkar claims on appeal that the trial court impermissibly made factual inferences against him, which is also undisputedly prohibited by MCR 2.116(C)(8). Again, however, Sarkar does not identify anything in the record to support his claim that the trial court made any factual inferences against him.[22] Accordingly, this argument is abandoned as well. *Id*. Moreover, as with his argument with respect to the

> assuming *arguendo* that the court were permitted to consider (C)(8) factors on the motion to quash, MCR 2.116 does not permit reference to affidavits in determining a (C)(8) motion by its plain language: "Only the pleadings may be considered when the motion is based on subrule (C)(8) or (9)."
>
> * * *
>
> As argued above, because there was an appearing defendant, PubPeer was not permitted under *Cooley* to argue the standards of MCR 2.116 (C)(8). The error was exacerbated by PubPeer's submission of two affidavits in support of their motion. They may not submit them, and this court may not consider them. Specifically, their expert's affidavit must be completely disregarded, and it is not harmless, because its focus was that the anonymous commenters' statements were substantially true and not defamatory – an argument the lower court considered.

As is obvious from this quotation, Sarkar identifies nothing in the record to support his claim that the trial court considered these affidavits. In essence, Sarkar asks this Court to assume that, because they are included in the record, the trial court impermissibly relied on them, and that is certainly not an assumption we are willing to make.

[22] Sarkar argues, in pertinent part, as follows:

> Furthermore, clear precedent requires that all factual allegations and the inferences to be drawn from there are to be taken in the light most favorable to the non-moving party and taken as true. However, the court's remarks at oral argument repeatedly

affidavits, we are unable to find any indication in the record that the trial court made any factual inferences in one party's favor over the other. Therefore, this claim of error is also meritless.

3. PRODUCTION OF EVIDENCE

Additionally, Sarkar argues that the trial court's March 9, 2015 order must be reversed because the court required him to produce evidence in support of his claims.[23] This claim of error is meritless as well. While it is true the trial court requested Sarkar's counsel to provide PubPeer's counsel with a copy of the distributed document, Sarkar does not cite, and we are unable to find, any authority to support the proposition

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assumed an interpretation of the pleadings favorable to the defendant. That is improper when considering the pleadings alone. . . .

* * *

As argued in the first section, because there was an appearing defendant, PubPeer was not permitted under *Cooley* to even argue the standards of MCR 2.116 (C) (8). The error was compounded by the court's interpretation of all of Dr. Sarkar's factual allegations, and the inferences therefrom, in a light favorable to PubPeer.

Again, Dr. Sarkar fails to identify anything in the record to support his claim that the trial court made factual inferences against him other than to generally point to the tone of the trial court's "remarks." In essence, Sarkar is asking us to search the record for him in hopes of finding something to support this assertion, and it is not our duty to do so.

[23] Specifically, Sarkar argues, in entirety, as follows:

PubPeer argued, and the court agreed, that plaintiff was required to produce evidence at this stage, to wit: the document that suggested Dr. Sarkar was under U.S. Senate inquiry. The transcript will indicate that after the court directed plaintiff produce this document, a copy was handed over on the record to the attorneys for PubPeer. For the same reasons set forth above, that any analysis under MCR 2.116 (C) (8) must be based on the pleadings alone, this was plain error.

that this request requires reversal. Accordingly, this argument is also abandoned. *Id*. Furthermore, Sarkar's attorney expressly stated that he was "happy" to allow PubPeer's counsel an opportunity to review the document. Consequently, even if not abandoned, we deem the issue waived. *The Cadle Co v Kentwood*, 285 Mich App 240, 254-255; 776 NW2d 145 (2009). Moreover, this request, which appears to have been made for convenience purposes only, i.e., to allow PubPeer's counsel to know what document Sarkar's counsel was referring to, has no effect on the application of the First Amendment in this matter.

C. REMAINING CAUSES OF ACTION

Sarkar lastly argues that the trial court's March 9, 2015 order must be reversed because the court did not separately consider his other four causes of action. Specifically, Sarkar contends that, assuming the First Amendment prohibits the unmasking of the identities of the anonymous commenters with respect to his defamation claim, he is nevertheless entitled to learn their identities with respect to his other four claims. However, First Amendment protections "are not exclusive to defamation claims." *Ireland v Edwards*, 230 Mich App 607, 624; 584 NW2d 632 (1998). That is, the same First Amendment protections apply whether Sarkar is trying to unmask the speakers' identities in a defamation lawsuit or any other type of lawsuit. *Id*.[24] To the extent Sarkar claims that the defamation

[24] Stated differently, when the alleged tortious conduct "is a defendant's utterance of negative statements concerning a plaintiff, privileged speech [protected by the First Amendment] is a defense." *Lakeshore Community Hosp, Inc v Perry*, 212 Mich App 396, 401; 538 NW2d 24 (1995).

claim is distinguishable from the others because the other claims rely solely on conduct completely separate from the comments on pubpeer.com, we agree that summary disposition under MCR 2.116(C)(8) in that respect would be improper.[25] However, like with the flyer, any conduct that is completely separate from the comments on pubpeer.com is not reasonably connected so as to allow discovery of the anonymous speakers' identities. Therefore, while the other claims may proceed, PubPeer's motion to quash with respect to those claims was nevertheless properly granted. See *Hustler Magazine, Inc v Falwell*, 485 US 46, 56; 108 S Ct 876; 99 L Ed 2d 41 (1988) ("We conclude that public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with 'actual malice' . . . .").[26]

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[25] It should be noted, however, that Sarkar's complaint does *not* identify completely separate conduct as he claims. Rather, his complaint expressly identifies the comments on pubpeer.com as the basis or at least as part of the basis for more than just his defamation claim. For example, while Sarkar claims that the additional causes of action cite completely separate conduct, his intentional infliction of emotional distress claim expressly relies on "false statements made on PubPeer[.]" Thus, we feel it necessary to clearly state that, to the extent his other causes of action rely in any way upon the statements made on pubpeer.com, those causes of action may not proceed on remand because they are premised on constitutionally protected speech.

[26] Relatedly, we completely reject the idea that only the defamation claim is subject to First Amendment limitations. Using that logic, if Sarkar simply dismissed his defamation claim and continued with the other four claims with respect to the statements on pubpeer.com, there would be no First Amendment protection, and that is directly contrary to the United States and Michigan Constitutions as well as caselaw from Michigan, other states, and the federal courts, including the United States Supreme Court.

III. CONCLUSION

Accordingly, the trial court's March 5, 2015 and March 19, 2015 orders are affirmed in part and reversed in part, and this matter is remanded for further proceedings consistent with this opinion. Specifically, the trial court's March 5, 2015 order partially granting summary disposition to defendants and partially granting PubPeer's motion to quash is affirmed, and its March 26, 2015 order denying summary disposition to defendants and denying PubPeer's motion to quash with respect to Paragraph 40(c) is reversed. Nevertheless, to the extent either order dismissed Sarkar's defamation claim with respect to the distributed flyer or his intentional interference with a business expectancy, intentional interference with a business relationship, invasion of privacy, or intentional infliction of emotional distress claims, we conclude that the trial court did so erroneously. Those claims may proceed; however, we hold that Sarkar is not entitled to unmask the identities of any speakers on pubpeer.com with respect to those claims due to the anonymity protections afforded by the First Amendment.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. As the prevailing party, PubPeer may tax costs pursuant to MCR 7.219.

FORT HOOD, P.J., and GLEICHER, J., concurred with O'BRIEN, J.

PEOPLE v DIMAMBRO

Docket Nos. 323251 and 332319. Submitted November 9, 2016, at Detroit. Decided December 6, 2016, at 9:05 a.m. Leave to appeal denied 501 Mich 895.

Ronald A. Dimambro, Jr., was convicted by a jury in the Macomb Circuit Court of first-degree felony murder, MCL 750.316(1)(b), and first-degree child abuse, MCL 750.136b(2), in connection with the death of the two-year-old child of his former girlfriend. In the days before his death, the child had suffered a series of injuries while in defendant's care. According to defendant, he had called 911 after finding the child limp and unresponsive. The child was taken to the hospital, where surgeries to repair the child's brain damage were unsuccessful. The child died after being removed from a respirator. At trial, the prosecution presented testimony from Dr. Mary Lu Angelilli, a pediatrician who was familiar with this case and who was certified as an expert in the field of child abuse, and Dr. Daniel Spitz, the chief medical examiner for Macomb County, who had conducted the autopsy on the child. The defense presented expert testimony from Dr. Bader Cassin, the former medical examiner for Washtenaw County. In Docket No. 323251, defendant appealed his convictions as of right and also moved for a new trial and an evidentiary hearing under *People v Ginther*, 390 Mich 436 (1973), to determine whether he had received ineffective assistance of counsel. The Court of Appeals granted the motion to remand for a *Ginther* hearing. At the outset of the hearing, the prosecution indicated that it had just received 32 pictures from the child's autopsy that had not previously been provided to the parties or the experts. The hearing was postponed to allow the defense to review the photographs, and the Court of Appeals granted the parties' stipulated motion to expand the scope of the remand proceedings to include any issues related to the newly disclosed photographs. At the rescheduled hearing, Dr. Ljubisa Dragovic, the medical examiner for Oakland County, testified that the photographs showed that the bruising on the child's brain was caused by the surgeries that had been performed on the child. After the hearing, defendant filed a supplemental brief, arguing that the prosecution's failure to disclose the photographs to the defense required a new trial under *Brady v*

Maryland, 373 US 83 (1963), which held that the suppression by the prosecution of material evidence that is favorable to the defendant violates the defendant's right to due process. The trial court entered an opinion and order granting defendant's motion for a new trial, concluding that defendant had demonstrated a *Brady* violation and established that defense counsel had provided ineffective assistance. The prosecution moved for reconsideration or to reopen the proofs so that the court could hear testimony from Spitz and Cassin. The trial court denied the prosecution's motion. In Docket No. 332319, the prosecution applied for leave to appeal the trial court's order granting defendant's motion for a new trial and its order denying the prosecution's motion for reconsideration. The Court of Appeals granted the prosecution's application and consolidated the appeals.

The Court of Appeals *held*:

The trial court correctly concluded that the suppression of the photographs constituted a *Brady* violation that required a new trial. A *Brady* violation occurs when the prosecution has suppressed evidence that is material and favorable to the accused. For *Brady* purposes, the government is responsible for evidence within its control, even if the evidence is unknown to the prosecution. Although due process does not generally require the prosecution to seek and find exculpatory evidence or to search for evidence that will support a defendant's case, the individual prosecutor does have a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police. In this case, the photographs at issue were under the control of Spitz, who is a county medical examiner. Under the county medical examiners act, MCL 52.201 *et seq*., a county medical examiner is required to investigate the cause and manner of death of a person in several circumstances, including if the person died by violence or the death was unexpected, and may be required to testify on behalf of the state in matters that arise as the result of such investigations. Given a county medical examiner's duty to act on the government's behalf in cases involving violent or unexpected deaths in Michigan, the medical examiner may be understood as acting on the government's behalf in a particular case, and knowledge of evidence within the medical examiner's control may be imputed to the government, even if unknown to the prosecution. Further, the photographs were favorable to the defense because they provided a basis for impeaching the testimony of Spitz, who had concluded that the bruising on the child's brain was the result of nonaccidental blunt-force trauma, whereas Dragovic testified that the photo-

graphs showed that the bruising was the result of surgeries. Finally, the photographs were material because there was a reasonable probability that, had they been disclosed to the defense, the result of the proceeding would have been different.

Trial court order granting motion for new trial affirmed; case remanded for further proceedings.

JANSEN, P.J., dissenting, would have reversed and held that no *Brady* violation occurred because a county medical examiner does not fall within the scope of the government for purposes of determining whether the prosecution suppressed evidence and because the photographs at issue were not material, given that Cassin's trial testimony regarding the effect of the surgeries encompassed that of Dragovic with regard to the photographs and the fact that other evidence supported the conviction. She further disagreed with the trial court's reliance on Dragovic's testimony because he was not originally involved in the trial.

CRIMINAL LAW — EVIDENCE — SUPPRESSION BY PROSECUTION — *BRADY* VIOLATIONS — COUNTY MEDICAL EXAMINERS.

A violation of a defendant's due-process rights occurs under *Brady v Maryland*, 373 US 83 (1963), when the prosecution suppresses evidence that is material and favorable to the defendant; under *Brady*, the government is responsible for evidence within its control, even when the evidence is unknown to the prosecution; in Michigan, responsibility for evidence within a county medical examiner's control may be imputed to the government for *Brady* purposes (MCL 52.201 *et seq*.).

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Eric J. Smith*, Prosecuting Attorney, *Joshua D. Abbott*, Chief Appellate Attorney, and *Joshua Van Laan*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Erin Van Campen*) for defendant.

Before: JANSEN, P.J., and MURPHY and RIORDAN, JJ.

RIORDAN, J. In Docket No. 323251, defendant appeals as of right his jury trial convictions of first-degree felony murder, MCL 750.316(1)(b), and first-degree child

abuse, MCL 750.136b(2). He was sentenced to life imprisonment for his felony-murder conviction and 15 to 25 years' imprisonment for his child-abuse conviction, with 338 days of jail credit. While his appeal was pending, we granted his motion to remand this case for an evidentiary hearing.[1] After holding the evidentiary hearing, the trial court granted defendant's motion for a new trial.

In Docket No. 332319, the prosecution appeals by leave granted[2] the trial court's order granting defendant's motion for a new trial. We affirm the trial court's order granting defendant's motion for a new trial and remand for further proceedings.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This case arises from the death of Damian Sutton, the two-year-old child of defendant's former girlfriend. The child went into a coma on August 21, 2013, and died on August 27, 2013. At the time, the child and his mother were living with defendant and his parents. In the days before August 21, 2013, the child had been injured during a series of incidents that had occurred while he was in defendant's care. Within a few days or a week before he went into the coma, he also had fallen while sitting on top of phone books that had been stacked on top of a bar stool. Defendant's parents and the child's mother provided conflicting reports about whether the child acted normally after the bar stool incident.

On August 21, 2013, the child's mother did not notice anything unusual about the child's behavior

[1] *People v Dimambro*, unpublished order of the Court of Appeals, entered May 22, 2015 (Docket No. 323251).

[2] *People v Dimambro*, unpublished order of the Court of Appeals, entered April 15, 2016 (Docket No. 332319).

before she left for work at approximately 3:40 p.m. After she left, defendant was alone with the child until approximately 5:00 p.m. During his interview with the police, defendant indicated that he had left the child in a playpen for a period of time in order to answer a phone call. When defendant returned, he noticed that something seemed off about the child. Then, when defendant picked up the child, he went limp. Defendant ultimately called his father for help and then called 911.

When the police arrived, the child was unresponsive and critically ill. The child was taken to Henry Ford Hospital and then transferred to Children's Hospital, at which time he was in a coma and put on a respirator. Six days later, the child's mother decided to remove the child from his respirator because of the extent of his brain damage and because surgeries to aid the child were unsuccessful. After the child died, defendant was charged with first-degree child abuse and first-degree felony murder.

At trial, the prosecution presented testimony from Nikki Sutton, the child's mother; Lieutenant Michael Mackenzie, a paramedic who responded to the scene on August 21, 2013; Dr. Mary Lu Angelilli, a pediatrician from the Children's Hospital of Michigan who was familiar with this case and who was certified as an expert in the field of child abuse;[3] Deputy Bret Sypniewski, an evidence technician who collected evidence related to this case in August 2013; Jason Foltz, defendant's half-brother; Madison Foltz, defendant's niece and Foltz's daughter, who testified that, among other things, she had seen defendant shake the child in the past; Detective Eric Ehrler, who was the officer in

[3] Notably, Angelilli testified that the injuries in this case could be consistent with abusive head trauma.

charge of the case and who had interviewed defendant on August 21, 2013; and Dr. Daniel Spitz, the chief medical examiner for Macomb County, who completed the autopsy in this case. The defense presented testimony from Kit Dimambro, defendant's mother; Leslie Clarke, who was acquainted with defendant and had no knowledge concerning the facts of this case; Alison Cucchiara, defendant's friend and previous girlfriend who also had no knowledge about this case; and Dr. Bader Cassin, a medical examiner who testified as an expert witness. Defendant ultimately was convicted of first-degree felony murder, MCL 750.316(1)(b), and first-degree child abuse, MCL 750.136b(2).

After filing a claim of appeal in this Court, defendant filed a motion to remand so that he could move for a new trial in the trial court and develop the factual record necessary for appellate review of his claims that he had received ineffective assistance of counsel. We granted defendant's motion to remand in May 2015, and he subsequently moved for a new trial in the trial court on the basis of the two claims for ineffective assistance of counsel that he had raised in his brief on appeal.

A *Ginther*[4] hearing was scheduled for June 30, 2015. At the beginning of the hearing, one of the prosecutors stated:

> Last night I discussed the hearing with the medical examiner regarding the testimony of [Oakland County Medical Examiner Dr. Ljubisa J.] Dragovic, who's going to testify today, and this morning, when I got to the office, I had a disk containing 33 pictures that I don't believe we've ever seen, and I can't imagine that they would have ever seen it, given the testimony and everything I've reviewed.

[4] *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973).

> I can't be sure that they didn't get it, but I think it's safer to err on the side of them not getting it at this moment.

The hearing was adjourned so that the defense could have the opportunity to review the new photographs. Subsequently, we granted the parties' stipulated motion to expand the scope of the remand proceedings to include any issues related to the newly disclosed photographs.[5]

The evidentiary hearing was ultimately held on September 2, 2015, and September 15, 2015. The parties stipulated that Spitz had provided 32 photographs to the prosecution on June 29, 2015, and that the photographs had not previously been provided to the prosecution, the defense, or Cassin, the defense expert.[6] The trial court also heard testimony from Dragovic, defendant's trial counsel, Dr. Chris A. Van Ee, and Imran Syed, an attorney who contacted defense counsel before trial.

After the hearing, defendant filed a supplemental brief in support of his motion for a new trial. Along with his earlier arguments that he was entitled to a new trial because his trial counsel was ineffective, he argued that the prosecution's failure to disclose the photographs to the defense was a *Brady*[7] violation and that the *Brady* violation also entitled him to a new trial. The prosecution disagreed, rejecting defendant's claims and arguing that defendant's motion should be denied.

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[5] *People v Dimambro*, unpublished order of the Court of Appeals, entered July 14, 2015 (Docket No. 323251).

[6] Notably, before trial, defense counsel filed a motion in which he requested "a copy of any and all supplemental reports and interviews, statements, photographs and evidence," and a motion in which he expressly requested preservation of "the autopsy photographs, medical examiners [sic] notes[,] and documents."

[7] *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963).

In January 2016, the trial court entered an opinion and order granting defendant's motion for a new trial, concluding that defendant had demonstrated a *Brady* violation and had established that defense counsel provided ineffective assistance. The prosecution then moved for reconsideration or, in the alternative, to reopen the proofs so that the court could hear testimony from Spitz and Cassin. The trial court denied the prosecution's motion in March 2016.

On April 6, 2016, the prosecution applied for leave to appeal the trial court's order granting defendant's motion for a new trial and its order denying the prosecution's motion for reconsideration. We granted the prosecution's application and consolidated Docket No. 332319 with Docket No. 323251.[8]

II. *BRADY* VIOLATION

The parties dispute whether the trial court properly determined that a *Brady* violation had occurred in this case. We agree with defendant that the trial court properly concluded that, whether inadvertent or not, (1) the prosecution suppressed the photographs for *Brady* purposes, despite the fact that the medical examiner had sole possession of them, (2) the photographs were favorable to defendant, and (3) the photographs were material in this case.[9]

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[8] *People v Dimambro*, unpublished order of the Court of Appeals, entered April 15, 2016 (Docket No. 332319).

[9] The prosecution emphasizes numerous purported inaccuracies in the trial court's factual findings in this matter. As explained later in this opinion, the record clearly demonstrates that defendant established the factual basis of a *Brady* violation. To the extent that any of the trial court's factual findings were inaccurate, we conclude that none of the inaccuracies warrants reversal of its opinion and order granting defendant's motion for a new trial.

A. STANDARD OF REVIEW

A trial court's decision on a motion for new trial is reviewed for an abuse of discretion, which "occurs when the trial court renders a decision falling outside the range of principled decisions." *People v Rao*, 491 Mich 271, 279; 815 NW2d 105 (2012). "Underlying questions of law are reviewed de novo, while a trial court's factual findings are reviewed for clear error[.]" *People v Terrell*, 289 Mich App 553, 559; 797 NW2d 684 (2010) (citations omitted). Similarly, "[t]his Court reviews due process claims, such as allegations of a *Brady* violation, de novo." *People v Stokes*, 312 Mich App 181, 189; 877 NW2d 752 (2015). Pursuant to MCR 6.431(B), "[a] trial court may grant a new trial to a criminal defendant on the basis of any ground that would support reversal on appeal or because it believes that the verdict has resulted in a miscarriage of justice." *Terrell*, 289 Mich App at 559 (quotation marks and citations omitted).

B. ANALYSIS

As the Michigan Supreme Court explained in *People v Chenault*, 495 Mich 142, 149; 845 NW2d 731 (2014), the United States Supreme Court held in *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963), "that 'the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.' " The essential components of a *Brady* violation are as follows: " 'The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and preju-

dice must have ensued.' " *Chenault*, 495 Mich at 149-150, quoting *Strickler v Greene*, 527 US 263, 281-282; 119 S Ct 1936; 144 L Ed 2d 286 (1999). "Stated differently, the components of a 'true *Brady* violation' are that: (1) the prosecution has suppressed evidence (2) that is favorable to the accused and (3) that is material." *Chenault*, 495 Mich at 150 (punctuation omitted).

1. SUPPRESSION BY THE PROSECUTION

The parties dispute whether the prosecution's expert witness, Macomb County Medical Examiner Daniel Spitz, falls within the scope of "the government" such that the prosecution's failure to learn of and disclose 32 additional autopsy photographs under Spitz's control qualifies as a suppression of evidence.

> The government is held responsible for evidence within its control, even evidence unknown to the prosecution, *Kyles v Whitley*, 514 US 419, 437; 115 S Ct 1555; 131 L Ed 2d 490 (1995), without regard to the prosecution's good or bad faith, *United States v Agurs*, 427 US 97, 110; 96 S Ct 2392; 49 L Ed 2d 342 (1976) ("If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor."). [*Chenault*, 495 Mich at 150.]

Accordingly, even though due process does not generally require the prosecution to "seek and find exculpatory evidence" or to search for evidence that will support a defendant's case, *People v Coy*, 258 Mich App 1, 21; 669 NW2d 831 (2003), "the individual prosecutor [does have] a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police," *Kyles*, 514 US at 437.

The prosecution argues in its brief on appeal that defendant failed to fulfill the first prong of the test

because "it is absolutely undisputed that the prosecution never suppressed the additional autopsy photographs when that evidence was under the sole possession and control of the medical examiner," who "does not fall under the prosecution's control." (Emphasis omitted.)[10] We conclude that it is clear from the county medical examiners act, MCL 52.201 *et seq*., that evidence under the control of a county medical examiner constitutes evidence within the control of the government for *Brady* purposes in Michigan. Pursuant to MCL 52.202(1), "[a] county medical examiner or deputy county medical examiner *shall investigate* the cause and manner of death of an individual" in several circumstances, including if "[t]he individual dies by violence" or if "[t]he individual's death is unexpected." MCL 52.202(1)(a) and (b) (emphasis added). See also MCL 52.205. Under MCL 52.212, "[a]ny and all medical examiners or their deputies may *be required to testify in behalf of the state* in any matter arising as the result of any investigation required under this act, and *shall testify in behalf of the state* and shall receive such actual and necessary expenses as the court shall allow." (Emphasis added.) On the basis of these statutes, the Michigan Supreme Court concluded in *Maiden v Rozwood*, 461 Mich 109, 132; 597 NW2d 817 (1999), that a county medical examiner's "duty is owed to the state," and it explained that a medical examiner fulfills his or her statutory duty to investigate violent deaths by communicating his or her medical findings to the prosecution and testifying on behalf of the prosecution regarding the results of his or her investigation, *id*. at 132-133.

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[10] In support of its claim, the prosecution relies on an unpublished opinion. Unpublished opinions are not binding on this Court, see MCR 7.215(C)(1), and we are not persuaded by the prosecution's characterization of the case.

In sum, it is apparent that a county medical examiner is expected to work closely with the prosecution in cases related to the investigation of an unexpected or violent death and is expected to testify on the prosecution's behalf. Notably, the United States Supreme Court does not limit the prosecution's duty to learn of favorable evidence to only the police or law enforcement agencies, but, instead, extends this duty to any "others acting on the government's behalf . . . ." *Kyles*, 514 US at 437. Therefore, given a county medical examiner's duty to act on the government's behalf in cases involving violent or unexpected deaths in Michigan, we conclude that (1) the medical examiner may be understood as "acting on the government's behalf" in a particular case, *Kyles*, 514 US at 437, and (2) responsibility for evidence within the medical examiner's control may be imputed to the government, even if "unknown to the prosecution," *Chenault*, 495 Mich at 150, citing *Kyles*, 514 US at 437.

Further, the record shows that defense counsel specifically asked for all the autopsy photographs before trial. Notably, he filed a motion, after receiving the initial set of discovery materials from the prosecution, that requested "any and all supplemental" photographs and evidence, and he filed another motion that expressly requested preservation of "the autopsy photographs, medical examiners [sic] notes[,] and documents."

Therefore, we conclude that the trial court properly determined that, as defined by *Brady*, the prosecution "suppressed" evidence.

2. FAVORABILITY

Next, we agree with defendant that, contrary to the prosecution's claims, the trial court properly concluded that the photographs were favorable to the defense.

> Evidence is favorable to the defense when it is either exculpatory or impeaching. *Giglio v United States*, 405 US 150, 154; 92 S Ct 763; 31 L Ed 2d 104 (1972) ("When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this general rule [of *Brady*]."), quoting *Napue v Illinois*, 360 US 264, 269; 79 S Ct 1173; 3 L Ed 2d 1217 (1959). [*Chenault*, 495 Mich at 150.]

The record confirms that the photographs provided a basis for impeaching Spitz's testimony.

First, Spitz testified that he was aware that the child had undergone "a variety of medical intervention[s]" before the autopsy was performed, but the fact that the child had undergone medical intervention did not impede his ability to determine the cause and manner of death. He testified that the child in this case sustained "blunt force trauma or blunt force injuries," and he believed, in light of the bruising on the exterior and interior of the scalp, that there were two separate impacts on the right side of the head, which he believed were from separate and discrete contacts. He also testified that there was bruising on the surface of the brain on the right side, which was underneath the areas of impact on the scalp, and explained that the entire brain was swollen as a result of the injury. He specifically described the bruising on the brain as "directly underlying the piece of bone that had been removed by the surgeon" and "extend[ing] into the deeper layers of the brain[.]"

His observation of bruising on the brain was a significant component of his findings, as he repeatedly mentioned it in conjunction with his opinions regarding the amount of force that would have been necessary to inflict the injuries in this case. It is apparent from his testimony that his observations of the bruising affected his ultimate conclusion that the child's

injuries were a result of blunt-force trauma; that his injuries were caused by a force greater than that generated by a household accident, such as a short or low-level fall; and that his injuries resulted from "non-accidental inflicted trauma," such that the child's death was a homicide.

However, Dragovic testified, on the basis of the additional 32 photographs, that the bruising on the surface of the cortex of the brain solely resulted from medical intervention and that he saw no "evidence of any other bruising documented specifically on the cortex of the brain that is not related to the surgery." Additionally, he specifically confirmed that he was only able to determine that the bruises on the brain were "all the result of complications of surgical procedure" because he was given the additional 32 photographs to review. He ultimately concluded that the "major flaw" in Spitz's findings was "[t]he misrepresentation of the damage of the right-half of Damian Sutton's brain," meaning that what Dragovic saw as the consequence of the doctor's attempts, through surgical intervention, to save the child's life, Spitz saw as inflicted head trauma.[11] Stated differently, Dragovic believed, after reviewing all the photographs as well as the other evidence provided by the defense, that the medical evidence in this case did not support Spitz's conclusion that it can be determined, from the nature of injury alone, that the injury was intentionally inflicted, especially given the age of the child and the physical circumstances.

Moreover, Dragovic recognized that the right side of the child's brain was swollen because of the medical intervention, but he unequivocally testified that the

[11] Dragovic believed that Cassin "hinted at that" during the trial, "but he did not expand beyond that at all."

swelling did not necessarily mean that the injury sustained by the child was intentionally inflicted. Rather, he explained that the brain was evenly swollen at the time of the radiographic imaging according to the hospital reports, and the fact that there was swelling before the surgical intervention did not indicate whether the injury was intentional; instead, the swelling was simply "the reaction of the brain to the injury." In light of all of this evidence, Dragovic testified that while he perceived no issues with the manner in which Spitz conducted his neurological examination, he had "problems with [his] interpretations at the time of the trial because there was no evidence" that supported his conclusions.

The prosecution contends that defendant's trial expert, Cassin, "testified to everything Dragovic did even without ever seeing the photographs. Thus, those photographs had absolutely no value to the defense, whether impeachment or otherwise." (Emphasis omitted.) This claim is contrary to the record. As previously explained, Dragovic provided testimony directly linked to the new photographs that undermined Spitz's conclusions, particularly on the issue of whether the child's injuries were intentionally inflicted. Additionally, as discussed further below, Dragovic's testimony was not cumulative to Cassin's. Further, given Dragovic's favorable testimony specifically based on the newly disclosed photographs, the clear differences between Dragovic's and Cassin's testimony, and the undisputed fact that Cassin did not have the additional photographs at his disposal when he testified at trial, the trial court's conclusion that the undisclosed photographs were favorable to defendant was not "based on wild speculation," contrary to the prosecution's claims.

3. MATERIALITY

> To establish materiality, a defendant must show that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v Bagley*, 473 US 667, 682; 105 S Ct 3375; 87 L Ed 2d 481 (1985). This standard "does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal . . . ." *Kyles*, 514 US at 434. The question is whether, in the absence of the suppressed evidence, the defendant "received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id*. In assessing the materiality of the evidence, courts are to consider the suppressed evidence collectively, rather than piecemeal. *Id*. at 436. [*Chenault*, 495 Mich at 150-151.]

In this case, Dragovic agreed with Cassin that a subdural hemorrhage, like that present in this case, most likely resulted from the child's head striking a nonyielding surface and that the child's cause of death was blunt-force trauma of the head or complications therefrom, which resulted in brain swelling and a subdural hemorrhage. Likewise, as the prosecution contends, Cassin and Dragovic did provide similar opinions regarding whether the evidence in this case demonstrated that the child's injuries were intentionally inflicted. Cassin opined that it is always difficult to distinguish between "[a]ccident and intent," and reiterated multiple times that he was not convinced that the child's death was a homicide in this case given the lack of any indication of intent.[12]

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[12] Notably, though, he expressly testified that he could not rule out homicide in this case, although he later clarified that "without that indication of intent, we can't distinguish specifically between homicide and accident."

However, the undisclosed photographs, and Dragovic's expert opinion based on those photographs, undermined Spitz's conclusions regarding the cause of the bruising on the child's brain and, therefore, challenged Spitz's conclusion that the child's injuries were intentionally inflicted.[13] Cassin did not provide similar testimony. Cassin opined generally that "[s]urgical intervention can significantly complicate the injury finding and make the interpretation of injury finding difficult, if not actually impossible, in some details." Then, Cassin noted that Spitz's autopsy report indicated that blunt-force trauma occurred on the right side of the head and that surgical intervention also occurred on that side of the head. Notably, he made no reference to the effect of surgical intervention on the bruising on the brain; he only stated that the "surgical events" "cause[d] changes in the *scalp* that had not been there . . . since the injury or injuries had been sustained."[14] (Emphasis added.) Given this testimony, Dragovic disagreed that his opinion was the exact same as Cassin's. Dragovic explained that he did not believe that Cassin "had the availability of critical evidence to consider the distinction between the reported bruise of the brain and the artifact created by surgical procedure." Therefore, as Dragovic concluded during the *Ginther* hearing, although Cassin briefly mentioned the possibility that a medical intervention could affect the medical examiner's conclusions, he did

[13] Likewise, Dragovic's testimony also indirectly challenged the validity of Angelilli's conclusion that the child's injury in this case was nonaccidental and intentionally inflicted as well as her conclusion that the child was abused, although these conclusions were not based on the appearance of the brain.

[14] Cassin similarly stated: "So, by the time [the] autopsy had occurred, there were those conflicting findings. And I say conflicting, only because injuries and surgical change all give the same amount of change, which is *hemorrhage into the scalp*." (Emphasis added.) Dragovic also recognized that Cassin was referring to the scalp in his testimony.

not provide any concrete evidence in this regard that was favorable to defendant, because, in Dragovic's words, Cassin "did not have anything to say here it is, here is the evidence."[15]

Therefore, it is apparent that Dragovic's testimony was not merely cumulative to Cassin's testimony. It is clear that the undisclosed photographs provided a basis for the defense to directly challenge Spitz's conclusion that the autopsy revealed that the child's injuries were intentionally inflicted. Given the importance of expert testimony in cases like this one, which involve issues of abusive head trauma but include no eyewitnesses, no physical evidence confirming the cause of death, and no explicit intent to kill, see *People v Ackley*, 497 Mich 381, 397; 870 NW2d 858 (2015), Dragovic's testimony regarding the importance of the undisclosed photographs demonstrates that there is a reasonable probability that the outcome of the trial might have been different had the photographs been disclosed to the defense, see *Chenault*, 495 Mich at 150-151. Likewise, given the significance of the photographic evidence, it does not appear that defendant received "a trial resulting in a verdict worthy of confidence" without it. *Id*. at 151 (quotation marks and citation omitted).

For these reasons, the trial court properly concluded that defendant is entitled to a new trial based on the government's failure to disclose the 32 photographs before trial.[16]

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[15] In its brief on appeal, the prosecution characterizes Cassin's testimony regarding bleeding on and around the child's brain as being equivalent to Dragovic's testimony regarding the bruising of the brain. In reviewing the experts' testimony in its entirety, we conclude that this characterization is unfounded.

[16] Given our conclusion that defendant is entitled to a new trial on the basis of a *Brady* violation, we need not consider, in the alternative, whether defendant is entitled to a new trial on ineffective-assistance-of-counsel grounds.

III. CONCLUSION

The trial court properly granted defendant's motion for a new trial because the prosecution's failure to disclose the 32 photographs constituted a *Brady* violation.

Affirmed.

MURPHY, J., concurred with RIORDAN, J.

JANSEN, P.J. (*dissenting*). I respectfully dissent. I would reverse the trial court's order granting defendant's motion for a new trial and affirm defendant's convictions and sentences. I do not believe that a *Brady*[1] violation occurred in this case for two reasons. First, I do not believe that the medical examiner falls within the scope of the "government" for purposes of determining whether the prosecution suppressed evidence. Second, I do not believe that the 32 photographs from the neurological portion of the autopsy were material.

I. SUPPRESSION OF EVIDENCE

As stated in the majority opinion, in order to establish a *Brady* violation, three elements must be established: "(1) the prosecution has suppressed evidence; (2) that is favorable to the accused; and (3) that is material." *People v Chenault*, 495 Mich 142, 150; 845 NW2d 731 (2014). With regard to the requirement that the prosecution suppressed evidence, our Supreme Court has explained that the government is responsible for evidence within its control, even if that evidence is unknown to the prosecution. *Id*. The United States Supreme Court has explained that "the indi-

[1] *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963).

vidual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles v Whitley*, 514 US 419, 437; 115 S Ct 1555; 131 L Ed 2d 490 (1995).

I disagree with the majority's conclusion that a medical examiner falls within the scope of the "government" for purposes of establishing a *Brady* violation. My disagreement with the majority stems from the fact that a medical examiner has a separate set of duties, independent of the prosecution, to determine the cause and manner of suspicious deaths. Our Supreme Court has established that a county medical examiner's duties are owed to the state. See *Maiden v Rozwood*, 461 Mich 109, 132; 597 NW2d 817 (1999). The county medical examiners act, MCL 52.201 *et seq*., details the duties that a medical examiner owes to the state. Specifically, MCL 52.202 provides that a medical examiner or deputy medical examiner has a duty to investigate the cause and manner of a death under certain circumstances, including when "[t]he individual dies by violence" or "[t]he individual's death is unexpected." MCL 52.202(1). The county medical examiner is therefore required to investigate suspicious deaths and come to an independent conclusion on the cause and manner of death. The medical examiner is not under the control of the prosecution. Unlike with the police or other law enforcement agencies, the prosecution would have no way of knowing if any documents created by the medical examiner were missing. Therefore, I conclude that the medical examiner is not within the same category as a police officer or other investigator working on behalf of the prosecution. See, e.g., *People v Stern*, 270 App Div 2d 118, 119; 704 NYS2d 569 (2000) (concluding that documents in the possession of the chief medical examiner could not be attributed to

the prosecution because the medical examiner's office was not a law enforcement agency).[2]

The majority points out that the medical examiner may be required to testify on behalf of the state at trial. While it is true that "[a]ny and all medical examiners or their deputies *may* be required to testify in behalf of the state in any matter arising as the result of any investigation required under this act," MCL 52.212 (emphasis added), the medical examiner's duty is broader than simply obtaining evidence on behalf of the prosecution. MCL 52.212 provides that the medical examiner *may* be required to testify on behalf of the state, suggesting that the medical examiner is not bound to make findings regarding the cause and manner of death that are favorable to the prosecution, but rather is required to testify on behalf of the prosecution when the medical examiner's testimony aligns with the prosecution's theory of the case. Accordingly, I conclude that a medical examiner does not constitute the "government" for the purposes of determining whether the prosecution suppressed evidence.

II. MATERIALITY

I also disagree with the majority's conclusion that the 32 photographs were material. As outlined in the majority opinion, in order to establish that the evidence was material, "a defendant must show that 'there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' " *Chenault*, 495 Mich at 150 (citation omitted). Further, " '[a] "reasonable probability" is a probability sufficient to under-

[2] While cases from foreign jurisdictions are not binding on this Court, they may be persuasive. See *People v Daniels*, 311 Mich App 257, 268 n 4; 874 NW2d 732 (2015).

mine confidence in the outcome.' " *Id*. (citation omitted). "The question is whether, in the absence of the suppressed evidence, the defendant 'received a fair trial, understood as a trial resulting in a verdict worthy of confidence.' " *Id*. at 150-151 (citation omitted).

First, Dr. Cassin's testimony regarding the effect of the surgical intervention on the right side of the child's head encompassed the testimony provided by Dr. Dragovic. At trial, Dr. Spitz opined that the injury to the child's brain was intentionally inflicted and that the manner of death was homicide. He explained during the course of discussing his autopsy findings that the bruising on the child's brain indicated that there was a direct injury to the brain underneath the area of impact. In other words, the bruising on the child's brain was the result of the forceful contact of the child's head with a nonyielding object. Dr. Spitz explained that he was aware that the child had undergone medical intervention, but explained that this did not affect his ability to determine the cause and manner of the child's death. In contrast, during the *Ginther*[3] hearing, Dr. Dragovic testified that the bruising on the child's brain was related to the surgical intervention following the incident and was not a direct result of the child's injury. Dr. Dragovic concluded that it was impossible to determine whether the injury was intentionally inflicted solely from the nature of the injury.

Dr. Cassin also testified that the surgical intervention performed on the right side of the child's head made it difficult, if not impossible, to interpret the injury finding. Dr. Cassin noted in his report that "bruising was described in the scalp and on the right side of the brain," thus indicating that he was aware of

[3] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

the bruising on the child's brain. He testified, "Surgical intervention can significantly complicate the injury finding and make the interpretation of injury finding difficult, if not actually impossible, in some details." When pressed for additional details, Dr. Cassin clarified as follows:

> *Q*. Well, specifically, with this case, is there anything relevant with the surgical site or surgical intervention and the -- I believe it's Dr. Sptiz's [sic] autopsy report indicating blood [sic] head trauma to the right side of the head.
>
> *A*. Yes, it did. And the surgical intervention that you mention also happened *on the right side of the head*. [Emphasis added.]

Thus, contrary to the majority's conclusion, Dr. Cassin *did* testify that the surgical intervention performed on the right side of the child's head complicated, or even rendered impossible, the interpretation of the child's injuries. While Dr. Cassin did not specifically opine regarding the effect of the surgical intervention on the cortex of the child's brain, his testimony regarding the effect of the surgical intervention broadly encompassed the entire right side of the head. The testimony effectively contained the same conclusion that Dr. Dragovic made during the *Ginther* hearing.

In fact, Dr. Dragovic testified to this effect during the *Ginther* hearing, explaining that Dr. Cassin came to the same conclusion that he did regarding the surgical intervention, but did not have the photographic evidence to support his opinion:

> *Q*. Is there something that would change based on those 32 photos that you were given?
>
> All you're saying is he didn't have the 32 photos. Based on the 32 photos you have, what are you saying that's different than Dr. Cassin? What's [sic] what I'm asking you.

> *A*. I am saying that there is no evidence of brain contusion there; that the contusions are all the result of complications of surgical procedure. That's what I'm saying.
>
> *Q*. Isn't that exactly what Dr. Cassin testified to?
>
> *A*. It's pretty -- that was his thought. But, he did not have anything to say here it is, here is the evidence.

Dr. Dragovic explained that although Dr. Cassin had come to the same conclusion, Dr. Cassin lacked the photographic evidence to support his position, which caused Dr. Cassin to be "limited in his assessment." However, as even Dr. Dragovic recognized, Dr. Cassin's conclusion regarding the effect of the surgical intervention on the injury finding was essentially the same as Dr. Dragovic's testimony.

As the majority noted, Dr. Cassin's testimony was similar to Dr. Dragovic's testimony in several other important respects. Both doctors testified that the injury was most likely the result of blunt-force trauma stemming from the child's head hitting a nonyielding surface. Most notably, both medical examiners testified that it was not possible to determine from the nature of the injury whether the injury was intentionally inflicted. Thus, both experts ultimately came to the same conclusion regarding the manner of death. Dr. Cassin's testimony establishes that he provided the solid expert defense to which defendant was entitled. Accordingly, I do not believe that there is a reasonable probability that, had the photographic evidence been disclosed to the defense, the result of the proceeding would have been different.

I further disagree with the trial court's reliance on the testimony of Dr. Dragovic in determining that the 32 photographs were material. Dr. Dragovic did not testify at trial and was not otherwise involved in the

case until after the trial concluded. Although the majority opinion assumes that Dr. Dragovic would have testified at trial, or that another expert would have testified to the same conclusions regarding the photographs, defendant's trial attorney did not testify at the *Ginther* hearing that he would have sought to admit additional expert testimony as the result of receiving the 32 photographs. Dr. Dragovic's testimony, therefore, does not establish that the testimony presented *at trial* would have been different had the defense received the 32 photographs. I do not believe it is proper for the trial court to consider the opinion of an expert who was not involved in the original case. It is possible for the defense in any case, once the trial is complete, to find an expert whose testimony is at variance with the expert testimony presented at trial. Therefore, I believe it is improper to consider the opinion of an expert who was not involved in the original trial.

Furthermore, neither Dr. Cassin nor Dr. Spitz testified at the *Ginther* hearing regarding the effect that the 32 photographs would have had on their testimony. Without the testimony of Dr. Cassin at the *Ginther* hearing, it is impossible to determine whether he would have referred to the 32 photographs as additional support for his conclusions regarding the effect of the surgical intervention on the child's head or whether he would have come to the same conclusion as Dr. Dragovic regarding the significance of the 32 photographs. Additionally, approximately 290 photographs *were* provided to the defense before trial. The evidence provided to the defense was sufficient for Dr. Cassin to form an opinion on behalf of the defense. Therefore, the evidence that was provided to the defense diminishes the materiality of the 32 additional photographs.

Finally, I believe that these 32 photographs cannot be viewed in isolation from the other evidence of guilt presented by the prosecution. Instead, I believe that it is necessary to examine the additional testimony and evidence presented at trial in order to determine whether the 32 photographs were material.

Additional testimony was presented at trial on behalf of the prosecution. For example, defendant's 10-year-old niece testified that defendant shook the child on occasion, slapped the child, and told his niece that he hated the child and wished the child would die. Further, the parties do not contest the fact that defendant was watching the child during the time leading up to the child's death and was left alone with the child. According to the child's mother, the child was acting normal when the child's mother left him that afternoon in defendant's care.

Defendant did not provide a concrete explanation for the child's death. Instead, the prosecution presented at trial the videotape of defendant's highly incriminating police interview, in which defendant initially stated that the child went limp after defendant left him alone in his playpen. According to defendant's initial story, the child was fine when defendant placed him in the playpen, but was symptomatic almost immediately after defendant removed him from the playpen. During the course of the police interview, defendant admitted to hitting the child in the head with a ball while playing catch during the time that he was watching the child. He then added that the child fell out of his arms and hit his head while defendant was holding him. He finally admitted that he shook the child for up to 30 seconds because the child was crying. Defendant's constant alterations to his story and his admission that he shook and dropped the child bolsters the prosecu-

tion's argument that defendant intentionally caused the child's injuries.

Additionally, Dr. Angelilli, who testified as an expert in pediatrics and child abuse, opined that the child's injuries were nonaccidental and were intentionally inflicted. She testified that the explanations for the injury provided by the defense, such as the child falling off of a bar stool or falling out of defendant's arms, would have resulted in less severe injuries. She also explained that the child would have been symptomatic immediately following the fatal injury. Importantly, Dr. Angelilli testified as follows:

> *Q*. Now, Doctor, in your opinion, as an expert in the field of pediatrics and child abuse, what is your opinion in this case?
>
> *A*. I think that Dami[a]n was abused. I think this is child abuse.
>
> *Q*. And you've already stated non-accidental inflicted trauma.
>
> *A*. Yes, and I'm actually certain of that.

Thus, Dr. Angelilli's testimony provided an independent basis for the jury to find that defendant abused the child, resulting in the fatal injury.

The majority notes in a footnote that Dr. Dragovic's testimony indirectly challenges the validity of Dr. Angelilli's conclusions, but also acknowledges that Dr. Angelilli's conclusions were not based on the appearance of the brain. I fail to see how Dr. Dragovic's testimony regarding the 32 photographs challenges the validity of Dr. Angelilli's testimony. As the majority acknowledges, Dr. Angelilli did not rely on the appearance of the child's brain in rendering her opinion. Dr. Angelilli's expert testimony also did not rely on Dr. Spitz's autopsy report. Accordingly, I conclude that Dr.

Dragovic's testimony regarding the 32 photographs does not affect the validity of Dr. Angelilli's opinion.[4] Dr. Angelilli's expert testimony, therefore, provided an additional basis for the jury to conclude that defendant intentionally caused the fatal injury.

In light of the additional incriminating evidence presented at trial, I do not believe that there is a reasonable probability that, had the prosecution disclosed the photographs to the defense before trial, the result of the proceeding would have been different. Put another way, in the absence of the 32 photographs, defendant received a trial resulting in a verdict worthy of confidence. Therefore, I conclude that there was no *Brady* violation in this case because the medical examiner did not constitute the "government" for the purposes of establishing whether the prosecution suppressed evidence, and the 32 photographs were not material. I would reverse the trial court's order granting defendant a new trial and affirm defendant's convictions and sentences.

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[4] To the extent that the majority implies that Dr. Dragovic's conclusion regarding the manner of death was contrary to Dr. Angelilli's conclusion that the injury was intentionally inflicted, Dr. Cassin came to the same conclusion as Dr. Dragovic regarding the manner of death, and Dr. Angelilli's opinions were therefore refuted by Dr. Cassin's testimony.

PEOPLE v WILLIAMS

Docket No. 330853. Submitted August 2, 2016, at Grand Rapids. Decided December 6, 2016, at 9:10 a.m.

Jamari M. Williams was charged in the 60th District Court under MCL 750.479c, which makes it a felony to knowingly and willfully make any statement to a peace officer that the person knows is false or misleading regarding a material fact in a criminal investigation. Defendant was questioned regarding his whereabouts after defendant discovered his pregnant girlfriend's murdered body in their shared apartment, and defendant told police that he and two friends had been riding around in a car that evening. When investigators asked defendant his exact whereabouts and the names of those who rode with him that evening, defendant denied making any stops in addition to the several that he had already revealed, and he gave the names of two individuals. The police subsequently learned that the car was briefly at the apartment during the time frame in which the homicide likely occurred and that an additional passenger had been present in the car. Following a preliminary examination, the district court, Maria L. Hoopes, J., bound defendant over to the Muskegon Circuit Court as charged. Defendant challenged the bindover, contending that his omissions did not fall within the ambit of the statute. The circuit court, Timothy G. Hicks, J., denied defendant's motion to quash the bindover and dismiss the case as well as defendant's motion for reconsideration. Defendant sought leave to appeal in the Court of Appeals, and the Court of Appeals granted the application. *People v Williams*, unpublished order of the Court of Appeals, entered February 11, 2016 (Docket No. 330853).

The Court of Appeals *held*:

MCL 750.479c(1)(b) provides that when a witness agrees to speak with a peace officer conducting a criminal investigation, the witness may not knowingly and willfully make any statement to the peace officer that the person knows is false or misleading regarding a material fact in that criminal investigation. The plain meaning of "misleading statement" encompasses statements that leave out key details because a willful, knowing omission of

pertinent information about a crime may lead the police down a fruitless path, permit the destruction of evidence while the police look in another direction, enable the escape of the actual culprit, or precipitate the arrest of an innocent person. In this case, defendant "said no" when asked if he made any stops other than the ones he voluntarily revealed, an answer that indisputably qualified as a false statement and brought the charged conduct within the statute's compass. Defendant's failure to reveal the apartment stop and the presence of a third confederate in the car fell within the reach of the statute's "misleading" aspect and provided probable cause to believe that defendant violated MCL 750.479c(1)(b). Furthermore, defendant's argument that an omission is not a "statement" failed. The ordinary meaning of the term "statement" includes verbal and written expressions of something, and an answer to a question necessarily represents an expression; therefore, a statement that omits relevant information may qualify as false or mislead an investigating officer. Accordingly, the plain language of MCL 750.479c(1)(b) permits the prosecution of people who deliberately mislead the police by withholding material information. Because the plain language of MCL 750.479c(1)(b) permitted defendant's prosecution for withholding information, and because probable cause existed to believe that defendant's conduct satisfied this standard, the district court did not err by binding him over for trial, and the circuit court correctly rejected defendant's appeal of that decision.

Affirmed.

CRIMINAL LAW — CRIMINAL INVESTIGATIONS — "FALSE OR MISLEADING" STATEMENTS — DELIBERATELY WITHHOLDING MATERIAL INFORMATION.

MCL 750.479c(1)(b) provides that when a witness agrees to speak with a peace officer conducting a criminal investigation, the witness may not knowingly and willfully make any statement to the peace officer that the person knows is false or misleading regarding a material fact in that criminal investigation; a statement that omits relevant information may qualify as false or mislead an investigating officer; the plain language of MCL 750.479c(1)(b) permits the prosecution of people who deliberately mislead the police by withholding material information.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *D. J. Hilson*, Prosecuting Attorney, and *Charles F. Justian*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Thomas G. Oatmen*) for defendant.

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

GLEICHER, J. The police questioned defendant, Jamari Williams, after Williams discovered his pregnant girlfriend's murdered body in their shared apartment. Williams revealed that he and two friends had passed the evening of his girlfriend's death by riding around in a car. The investigators probed Williams's exact whereabouts and the names of those who rode with him, extracting a time line of the journey. Williams denied making any stops in addition to the several that he revealed. The police subsequently learned that the car had parked briefly at Williams's apartment complex during the time frame in which the homicide likely occurred. They also determined that an additional passenger had been present in the car.

The prosecution charged Williams under MCL 750.479c, which makes it a felony to "[k]nowingly and willfully make any statement to [a] peace officer that the person knows is false or misleading regarding a material fact in [a] criminal investigation." Following a preliminary examination, the district court bound Williams over to the Muskegon Circuit Court as charged. Williams challenged the bindover, contending that his omissions did not fall within the ambit of the statute. The circuit court denied Williams's motion, and we granted Williams's application for leave to appeal. We hold that the plain language of the statute permits the prosecution of people who deliberately mislead the police by withholding material information and that probable cause exists that Williams satisfies this standard. We affirm.

I

The evidence in this case comes to us from Williams's preliminary examination. Shortly after Williams reported his girlfriend's death, the Muskegon Township Police Department launched a homicide investigation. Officers brought Williams to the police department for questioning; he was not in custody, and he remained cooperative throughout. Sergeant David Wypa interviewed Williams throughout the course of 8 to 10 hours, with breaks. Wypa asked Williams to provide a time line of his whereabouts before his discovery of the body. According to Wypa, the two went over the time line "several times and he gave me some locations of where he was at" during the hours in question. Wypa also questioned Williams about the people with him that evening, and Williams "specifically" identified "just" two: Bre Laddie and Manuel Smith.

Wypa did not "specifically" ask Williams if Williams had returned to the apartment complex during the evening, instead focusing on "where his locations were throughout the night." Wypa elaborated, "Throughout the interview process I asked him if he had -- did -- was there any other stops that they had made other than the ones that he had told me and he said no." Wypa learned from another witness that the car containing Williams had returned to the apartment complex's parking lot several hours before Williams found the body. When confronted with this information, Williams admitted that he had neglected to tell the officers about this stop.

Sergeant Timothy Thielbar questioned Williams six days later. During their conversation, Williams volunteered that a third person, Deshannon Redd, had been

in the car that evening. Williams claimed he had forgotten about Redd when he was first interviewed.

Defense counsel opposed a bindover, asserting that Williams had not knowingly and willfully made any false statements or representations and had readily admitted to having inadvertently omitted certain facts after his memory was refreshed. The district court rejected this plea, concluding that the language of MCL 750.479c(1)(a) and (1)(b) "contemplate concealing information or misleading by way of omission of facts." The relevant statutory language provides:

> (1) Except as provided in this section, a person who is informed by a peace officer that he or she is conducting a criminal investigation shall not do any of the following:
>
> (a) By any trick, scheme, or device, knowingly and willfully conceal from the peace officer any material fact relating to the criminal investigation.
>
> (b) Knowingly and willfully make any statement to the peace officer that the person knows is false or misleading regarding a material fact in that criminal investigation.

Williams reframed his argument in the circuit court by contending that the district court had conflated the elements of the offense set out in Subsection (1)(a) with those of Subsection (1)(b); counsel pointed out that Williams had been charged only under Subsection (1)(a). Williams urged that MCL 750.479c(1)(a) and (b) are modeled on 18 USC 1001(a)(1) and (a)(2) and therefore permit prosecution for a material omission under Subsection (1)(a) only on proof of willful nondisclosure by means of a "trick, scheme, or device." The relevant sections of the federal statute state:

> (a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—

> (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
>
> (2) makes any materially false, fictitious, or fraudulent statement or representation; or
>
> (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;
>
> shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both. If the matter relates to an offense under chapter 109A, 109B, 110, or 117, or section 1591, then the term of imprisonment imposed under this section shall be not more than 8 years. [18 USC 1001.]

As to MCL 750.479c(1)(b), Williams insisted that the evidence supported merely an omission, not a false or misleading *statement*.

The prosecution conceded that it had a better argument under MCL 750.479(1)(b) than (1)(a) and announced that it would not pursue the charge under the latter subsection. In a written opinion and order, Judge Timothy Hicks noted that MCL 750.479c(1)(b) has not been interpreted since it was enacted in 2012 and that the Legislature did not define what constituted a false or misleading statement for the purposes of that statute. Judge Hicks observed that *Black's Law Dictionary* (10th ed) "defines the *adjective* misleading as 'delusive; calculated to be misunderstood' while defining the *verb* mislead as '[t]o cause (another person) to believe something that is not so, whether by words or silence, action or inaction; to deceive.' " He ruled that Williams's omission of relevant information regarding his whereabouts conformed to these definitions:

> Here, Williams knowingly provided his account of events to a peace officer with the actual knowledge that the officer was investigating his girlfriend's homicide. His

> omission of material facts, perhaps not a direct falsehood for the purposes of MCL 750.479c, temporarily misled the investigation as it excluded him as a suspect.

Judge Hicks denied Williams's motion to quash the bindover and dismiss the case, and later denied Williams's motion for reconsideration. We granted leave to appeal. *People v Williams*, unpublished order of the Court of Appeals, entered February 11, 2016 (Docket No. 330853).

II

When a witness agrees to speak with a peace officer conducting a criminal investigation, the witness may not "[k]nowingly and willfully make any statement . . . that the person knows is false or misleading regarding a material fact . . . ." MCL 750.479c(1)(b). This case presents us with the first opportunity to address whether this language embraces passive failures to disclose material facts as well as outright lies. We hinge our decision on the Legislature's use of the phrase "false or misleading." Statements that omit material information may qualify as false or mislead an investigating officer. Evidence that Williams failed to inform Wypa of his stop at his apartment and the name of his third confederate provides probable cause to believe that Williams violated MCL 750.479c(1)(b) and supports the circuit court's affirmance of the district court's bindover decision.

We review de novo a district court's decision that certain conduct falls within the scope of a criminal law. *People v Henderson*, 282 Mich App 307, 312; 765 NW2d 619 (2009). In so doing, "our obligation is to discern and give effect to the Legislature's intent as expressed in the words of the statute." *Pohutski v City of Allen Park*, 465 Mich 675, 683; 641 NW2d 219 (2002). "When the

language is unambiguous, we give the words their plain meaning and apply the statute as written." *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 202; 731 NW2d 41 (2007).

We agree with Williams that MCL 750.479c(1)(a) and (1)(b) bear some similarities to 18 USC 1001(a)(1) and (a)(2). The initial subsections of both statutes declare that a person divulging information to the government may not employ a "trick, scheme, or device" to "conceal" material information. But the language of MCL 750.479c(1)(b) diverges significantly from that of 18 USC 1001(a)(2). Michigan's statute prohibits knowingly and willfully making a statement regarding a material fact "that the person knows is false or misleading." The federal statute punishes statements or representations that are "materially false, fictitious, or fraudulent." We need not speculate on why our Legislature selected words differing from those chosen by Congress, and we do not profess expertise in the federal courts' application of the phrase "materially false, fictitious, or fraudulent" to information withheld or omitted.[1] Rather, we look to common parlance and Michigan caselaw as our guides to the meaning of the words at hand: "false or misleading."

According to Sergeant Wypa, Williams "said no" when asked if he had made any stops other than the ones he voluntarily revealed. This answer indisputably qualifies as a false statement and brings the charged conduct within the statute's compass. Further,

[1] Our abbreviated review of federal law suggests that a person who conceals or withholds information from a federal agent is indeed subject to prosecution under 18 USC 1001(a)(2). See *United States v Manning*, 526 F3d 611, 620 (CA 10, 2008) (defendant omitted financial assets from a statement to a probation officer).

Williams's failure to reveal the apartment stop and the presence of Redd in the car falls within the reach of the statute's "misleading" aspect. In *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 114; 754 NW2d 259 (2008), our Supreme Court defined the word "mislead" as "1. to lead or guide in the wrong direction. 2. to lead into error of conduct, thought, or judgment; lead astray." (Citation and quotation marks omitted.) An affirmatively false statement—a bald-faced lie—may turn an investigator's attention away from the true perpetrator or the source of valuable evidence. In that sense, it misleads. And a willful, knowing omission of pertinent information about a crime may lead the police down a fruitless path, permit the destruction of evidence while the police look in another direction, enable the escape of the actual culprit, or precipitate the arrest of an innocent person. The plain meaning of a "misleading statement" surely encompasses statements that leave out key details.

Williams insists that an omission is not a "statement" and therefore falls outside Subsection (1)(b)'s prohibition against making "any statement . . . that the person knows is false or misleading . . . ." The statute provides no definition of the term "statement." Once again, we apply the ordinary meaning of the word rather than definitions flowing from the law of hearsay. While nonassertive omissions may not qualify as "statements" under MRE 801(a), in general parlance "statements" include verbal and written expressions of something. An answer to a question necessarily represents an expression. It may mislead the listener by omitting relevant information. Suppose an attorney unlicensed to practice law in Michigan attempts to argue a motion in a circuit court. When asked by the judge whether she is qualified to practice in Michigan, the attorney replies, "Judge, I've been practicing law

for 25 years." The attorney has said something that excluded a material fact: she lacks a Michigan license. By making the statement, the attorney attempted to mislead the judge. And what about the teenager who, when asked how his algebra class went, responds, "just fine," despite that he failed to attend it? Williams's answers to Wypa's questions are akin to these examples: statements omitting information that lead the interrogator in a wrong direction.

At the preliminary-examination stage, we cannot know whether the prosecutor will be able to marshal sufficient proof that a defendant "knowingly and willfully" left out certain details. At trial, Williams's claim that he simply forgot about the stop and Redd's presence due to physical and emotional exhaustion may prevail. And we acknowledge that because the police interrogated Williams in a noncustodial setting, he was not informed of his right to remain silent or that he could be prosecuted for omitting anything material in his voluntary retelling of the evening's events. The plain language of the statute conveys the Legislature's intent to hold fully responsible for accuracy and candor those who provide information to peace officers in the course of a criminal investigation. Because the plain language of MCL 750.479c(1)(b) permits Williams's prosecution for withholding information, we affirm the decision to bind him over for trial.

We affirm.

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

ATTORNEY GENERAL v BOARD OF STATE CANVASSERS

TRUMP v BOARD OF STATE CANVASSERS

Docket Nos. 335947 and 335958. Submitted December 6, 2016, at Lansing. Decided December 6, 2016, at 6:15 p.m. Leave to appeal denied 500 Mich 907.

The Michigan Attorney General and President-elect Donald J. Trump filed separate complaints for mandamus in the Court of Appeals against the Board of State Canvassers (the Board) and the Director of Elections, asking that the Court of Appeals compel the Board to reject the November 30, 2016 petition of Green Party presidential candidate and intervening defendant, Jill Stein, that requested a recount of the votes cast in the November 8, 2016 general election for the office of President of the United States. The Attorney General and President-elect Trump also asked that the Court of Appeals compel the Board to cease any and all efforts to conduct the requested recount. On November 28, 2016, the Board certified the results of the November 8, 2016 presidential election in Michigan, and the final vote tallies were as follows: 2,279,543 votes for Republican Party candidate Donald Trump; 2,268,839 votes for Democratic Party candidate Hillary Clinton; 172,136 votes for Libertarian Party candidate Gary Johnson; and 51,463 votes for Green Party candidate Jill Stein. Stein's vote total was approximately 1.07% of the nearly 4.8 million votes cast in Michigan for the office of United States President. On November 30, 2016, Stein and 10 of her electors petitioned the Board for a manual recount of the votes, alleging that they were "aggrieved on account of fraud or mistake in the canvass of the votes by the inspectors of election, and/or the returns made by the inspectors, and/or by the Board of County Canvassers, and/or by the Board of State Canvassers." On December 1, 2016, President-elect Trump filed objections to the recount petition, alleging that Stein was not "aggrieved" under MCL 168.879(1)(b) because she had no chance of winning Michigan's electoral votes as the result of a recount. Stein filed a response to the objections, asserting that MCL 168.879(1)(b) only required her to allege generally that she was aggrieved and that the statute did not require her to meet any particular standard or offer proof to demonstrate her aggrieved

status. On December 2, 2016, the Board met to consider the petition, and the Board voted 2-2 on whether to approve the recount petition, resulting in the petition being deemed approved. By order of the United States District Court for the Eastern District of Michigan, the recount began on Monday, December 5, 2016. *Stein v Thomas*, 222 F Supp 3d 539 (ED Mich, 2016).

The Court of Appeals *held*:

1. MCL 168.879(1)(b) provides the authority by which a candidate may petition for a recount. Under MCL 168.879(1)(b), a candidate voted for at a primary or election for an office may petition for a recount of the votes if all of the following requirements are met: the petition alleges that the candidate is aggrieved on account of fraud or mistake in the canvass of the votes by the inspectors of election or the returns made by the inspectors, or by a board of county canvassers or the board of state canvassers; the petition shall contain specific allegations of wrongdoing only if evidence of that wrongdoing is available to the petitioner; and if evidence of wrongdoing is not available, the petitioner is only required to allege fraud or a mistake in the petition without further specification. The requirement in MCL 168.879(1)(b) that a candidate seeking a recount allege that he or she "is aggrieved on account of fraud or mistake in the canvass of the votes" is clear and unambiguous. While the statute does not define the term "aggrieved," dictionary definitions provide its plain and ordinary meaning. MCL 168.879(1)(b) requires that the candidate allege a loss or injury that resulted from fraud or mistake in the canvassing of votes. Accordingly, to meet the "aggrieved" candidate requirement under MCL 168.879(1)(b), the candidate must be able to allege a good-faith belief that but for mistake or fraud, the candidate would have had a reasonable chance of winning the election.

2. Mandamus is the appropriate remedy for a party seeking to compel action by election officials, and the issuance of a writ of mandamus rests within the discretion of the Court of Appeals. The Court of Appeals will only issue a writ of mandamus if the party seeking mandamus meets four requirements: (1) the party seeking the writ has a clear legal right to performance of the specific duty sought, (2) the defendant has the clear legal duty to perform the act requested, (3) the act is ministerial, and (4) no other remedy exists that might achieve the same result. In this case, the first requirement was met because the parties did not dispute that the Attorney General or President-elect Trump had a clear legal right to have the Board perform its statutory duties.

Second, the Board had a clear legal duty to deny the petition because the petition was not made by a candidate who was "aggrieved on account of fraud or mistake." Stein's petition for a recount merely parroted the language of MCL 168.879(1)(b); the petition lacked even the most general allegations from which the Board could infer that a recount would change the outcome of the election in Stein's favor. Moreover, the 2,228,080 difference in vote totals between President-elect Trump and Stein ensured that no change in the vote totals was reasonably likely to change the previously announced result. Accordingly, Stein's petition failed to meet the requirements of MCL 168.879(1)(b) because she did not allege, and could not allege in good faith, that she was "aggrieved on account of fraud or mistake in the canvass of the votes" for the office of President of the United States. Third, the act of rejecting the recount petition on purely legal grounds was ministerial; no exercise of discretion was required. Fourth, no other legal remedy existed that would have achieved the same result as rejecting Stein's petition. Because all four requirements were met, the requests of the Attorney General and President-elect Trump for issuance of a writ of mandamus were granted.

3. The Board's argument that its clear legal duties did not include a determination of whether a party is aggrieved was untenable because MCL 168.879(1) conditions a candidate's right to petition for a recount on the submission of a petition that satisfies the statute's requirements: "[a] candidate voted for at a primary or election for an office may petition for a recount of the votes *if all of the following requirements are met*[.]" When read in conjunction with MCL 168.882(3), which requires that the Board "rule on the objections raised to the recount petition," MCL 168.879(1) creates a clear legal duty to accept only those petitions that satisfy the requirements in MCL 168.879 and to reject those petitions that do not.

Requests of the Attorney General and President-elect Trump for issuance of a writ of mandamus granted; Board of State Canvassers directed to reject Stein's November 30, 2016 recount petition; jurisdiction retained.

1. ELECTIONS — BOARD OF STATE CANVASSERS — RECOUNT PETITIONS — WORDS AND PHRASES — "AGGRIEVED" CANDIDATE.

MCL 168.879(1)(b) provides that a candidate voted for at a primary or election for an office may petition for a recount of the votes if all of the following requirements are met: the petition alleges that the candidate is aggrieved on account of fraud or mistake in the canvass of the votes by the inspectors of election or the returns

made by the inspectors, or by a board of county canvassers or the board of state canvassers; the petition shall contain specific allegations of wrongdoing only if evidence of that wrongdoing is available to the petitioner; and if evidence of wrongdoing is not available, the petitioner is only required to allege fraud or a mistake in the petition without further specification; MCL 168.879(1)(b) is clear and unambiguous; MCL 168.879(1)(b) requires that the candidate allege a loss or injury that resulted from fraud or mistake in the canvassing of votes; to meet the "aggrieved" candidate requirement under MCL 168.879(1)(b), the candidate must be able to allege a good-faith belief that but for mistake or fraud, the candidate would have had a reasonable chance of winning the election.

2. ELECTIONS — BOARD OF STATE CANVASSERS — RECOUNT PETITIONS — CLEAR LEGAL DUTIES.

MCL 168.879(1) conditions a candidate's right to petition for a recount on the submission of a petition that satisfies the statute's requirements and, when read in conjunction with MCL 168.882(3), creates a clear legal duty to accept only those petitions that satisfy the requirements in MCL 168.879 and to reject those petitions that do not; the Board of State Canvassers has a clear legal duty to determine whether a party is aggrieved.

Bill Schuette, Attorney General, *Carol L. Isaacs*, Chief Deputy Attorney General, *Matthew Schneider*, Chief Legal Counsel, *Bursch Law PLLC* (by *John Bursch*), Special Assistant Attorney General, and *Kathryn M. Dalzell*, Assistant Solicitor General, for the Attorney General.

Aaron D. Lindstrom, Solicitor General, and *Denise C. Barton*, *Heather S. Meingast*, *Erik A. Grill*, and *Adam Fracassi*, Assistant Attorneys General, for the Board of State Canvassers and the Director of Elections.

Dykema Gossett, PLLC (by *Gary P. Gordon* and *Jason T. Hanselman*), *Honigman Miller Schwartz and Cohn LLP* (by *John D. Pirich*), *Jones Day* (by *Chad A.*

Readler), and *Doster Law Offices, PLLC* (by *Eric E. Doster*), for Donald J. Trump.

Goodman Acker, PC (by *Mark Brewer*), and *Emery Celli Brinckerhoff & Abady LLP* (by *Jessica Clarke* and *Hayley Horowitz*) for Jill Stein.

Before: O'CONNELL, P.J., and MARKEY and MURRAY, JJ.

PER CURIAM. The Attorney General and President-elect Donald J. Trump have filed separate complaints for mandamus, each asking this Court to compel the Board of State Canvassers (the Board) to reject the November 30, 2016 petition of Green Party presidential candidate Dr. Jill Stein that requested a recount of the votes cast in the November 8, 2016 general election for the office of President of the United States and to cease any and all efforts to conduct the requested recount. Both the Attorney General and President-elect Trump assert, in part, that Dr. Stein's petition failed to meet the requirements of MCL 168.879(1)(b) because she is not an aggrieved candidate. We agree and issue a writ of mandamus.

I. FACTUAL BACKGROUND

Michigan voters cast their ballots for the office of United States President in the general election of November 8, 2016. On November 28, 2016, the Board certified the results of the presidential election in Michigan. The final vote tallies certified by the Board are as follows: 2,279,543 votes for Republican Party candidate Donald Trump; 2,268,839 votes for Democratic Party candidate Hillary Clinton; 172,136 votes for Libertarian Party candidate Gary Johnson; and 51,463 votes for Green Party candidate Dr. Jill Stein.

Dr. Stein's vote total is approximately 1.07% of the nearly 4.8 million votes cast in Michigan for the office of United States President.

On November 30, 2016, Dr. Stein and 10 of her electors petitioned the Board for a manual recount of the votes cast for the office of United States President. The petition reads, in pertinent part, as follows:

> I, Jill Stein, a candidate for the office of the President of the United States in an election held on November 8, 2016, petition the Board of State Canvassers for a recount of the votes cast for this office. The undersigned members of my slate of electors join me in this Petition.
>
> I and the undersigned members of my slate of electors, individually and collectively, are aggrieved on account of fraud or mistake in the canvass of the votes by the inspectors of election, and/or the returns made by the inspectors, and/or by the Board of County Canvassers, and/or by the Board of State Canvassers.
>
> I request that all of the precincts and absent voter counting board (AVCB) precincts within the State of Michigan be recounted by hand count.

On December 1, 2016, President-elect Trump filed objections to the recount petition. The President-elect objected, in part, on the basis that Dr. Stein was not "aggrieved" under MCL 168.879(1)(b) because she had no chance of winning Michigan's electoral votes as the result of a recount.

That same day, Dr. Stein filed a response to the objections, asserting that MCL 168.879(1)(b) only required her to allege generally that she was aggrieved. She further asserted that the statute did not require her to meet any particular standard or offer proof to demonstrate her aggrieved status.

The Board met on December 2, 2016, to consider the petition and rule on the objections. The Board dead-

locked, voting 2-2 on whether to approve the recount petition. This deadlock resulted in the petition being deemed approved. By order of the United States District Court for the Eastern District of Michigan, the recount began on Monday, December 5, 2016. *Stein v Thomas*, 222 F Supp 3d 539 (ED Mich, 2016).

II. JURISDICTION AND STANDARD OF REVIEW

This Court has original jurisdiction to entertain actions for mandamus against state officers. MCR 7.203(C)(2); *Citizens Protecting Michigan's Constitution v Secretary of State*, 280 Mich App 273, 282; 761 NW2d 210 (2008). We consider de novo whether the defendant had a clear legal duty to perform and whether the plaintiff had a clear legal right to performance of that duty. *Citizens for Protection of Marriage v Bd of State Canvassers*, 263 Mich App 487, 491-492; 688 NW2d 538 (2004).

III. REQUIREMENTS FOR MANDAMUS

"Mandamus is the appropriate remedy for a party seeking to compel action by election officials." *Citizens Protecting Michigan's Constitution*, 280 Mich App at 283. This Court will only issue a writ of mandamus if the party seeking mandamus meets four requirements:

> (1) the party seeking the writ has a clear legal right to performance of the specific duty sought, (2) the defendant has the clear legal duty to perform the act requested, (3) the act is ministerial, and (4) no other remedy exists that might achieve the same result. [*Id*. at 284.]

This Court may also "enter any judgment or order or grant further or different relief as the case may require[.]" MCR 7.216(A)(7). The issuance of a writ of

mandamus rests within the discretion of this Court. *Rental Props Owners Ass'n of Kent Co v Kent Co Treasurer*, 308 Mich App 498, 518; 866 NW2d 817 (2014). "The plaintiff bears the burden of demonstrating entitlement to the extraordinary remedy of a writ of mandamus." *Citizens for Protection of Marriage*, 263 Mich App at 492.

IV. DUTIES OF THE BOARD OF STATE CANVASSERS AND DIRECTOR OF ELECTIONS

A clear legal right is a right "clearly founded in, or granted by, law; a right which is inferable as a matter of law from uncontroverted facts regardless of the difficulty of the legal question to be decided." *Rental Props Owners Ass'n*, 308 Mich App at 519 (quotation marks and citation omitted). The parties do not dispute that the Attorney General or President-elect Trump has a clear legal right to have the Board perform its statutory duties. The question presented is whether the Board has a clear legal duty to perform the acts requested—that is, whether the Board had a clear legal duty to deny Dr. Stein's petition for a recount.

The Board is an agency having no inherent power—"[a]ny authority it may have is vested by the Legislature, in statutes, or by the Constitution." *Citizens for Protection of Marriage*, 263 Mich App at 492. MCL 168.879(1)(b) provides the authority by which a candidate may petition for a recount:

> (1) A candidate voted for at a primary or election for an office may petition for a recount of the votes if all of the following requirements are met:
>
> * * *
>
> (b) The petition alleges that the candidate is aggrieved on account of fraud or mistake in the canvass of the votes by

> the inspectors of election or the returns made by the inspectors, or by a board of county canvassers or the board of state canvassers. The petition shall contain specific allegations of wrongdoing only if evidence of that wrongdoing is available to the petitioner. If evidence of wrongdoing is not available, the petitioner is only required to allege fraud or a mistake in the petition without further specification.

MCL 168.882(2) allows a candidate to file a counterpetition challenging the petition for a recount. MCL 168.882(3) provides, in pertinent part, that "the board of state canvassers shall rule on the objections raised to the recount petition." MCL 168.883 requires the Board to "investigate the facts set forth in said petition and cause a recount of the votes cast . . . ."

The Attorney General and President-elect Trump each allege that the Board had a clear legal duty to deny the petition because the petition was not made by a candidate who was "aggrieved on account of fraud or mistake." We agree.

When interpreting a statute, this Court's primary goal is to ascertain the intent of the Legislature. *Rental Props Owners Ass'n*, 308 Mich App at 508. We first review the language itself because the words of the statute provide the most reliable evidence of the Legislature's intent. *Id*. We afford every word and phrase of the statute its plain and ordinary meaning unless otherwise statutorily defined. *Id*. We may consult a dictionary to give words their common and ordinary meanings. *Id*. If the statute's language is clear and unambiguous, we may not engage in judicial construction. *Id*. When interpreting law governing elections, we must construe the statutes "as far as possible in a way which prevents the disenfranchisement of voters through the fraud or mistake of others." *Kennedy v Bd of State Canvassers*, 127 Mich App 493, 496-497; 339 NW2d 477 (1983).

MCL 168.879(1)(b) does not define the term "aggrieved." Nor has this Court defined "aggrieved" in this specific context. Therefore, we look to dictionary definitions to provide the common and ordinary meaning of the word.

MCL 168.879(1)(b) is clear and unambiguous. It requires that the candidate seeking a recount allege that he or she "is aggrieved on account of fraud or mistake in the canvass of the votes . . . ." "Aggrieved" is defined as "[h]aving suffered loss or injury; damnified; injured." *Black's Law Dictionary* (2d ed). Aggrieved also means "suffering from an infringement or denial of legal rights," *Merriam-Webster's Collegiate Dictionary* (11th ed), or "([o]f a person or entity) having legal rights that are adversely affected; having been harmed by an infringement of legal rights," *Black's Law Dictionary* (10th ed).

Assigning the term "aggrieved" its plain and ordinary meaning, MCL 168.879(1)(b) requires that the candidate allege a loss or injury that resulted from fraud or mistake in the canvassing of votes. As previously noted, the Attorney General and President-elect argue that, in the context of an election, a candidate suffers a loss or injury—and thus is "aggrieved" for purposes of MCL 168.879(1)(b)—by losing an election the candidate would have won but for errors in the counting of votes. They are correct that, under such circumstances, a candidate would be aggrieved for purposes of MCL 168.879(1)(b).

This commonly understood definition of aggrieved is consistent with our courts' previous statements regarding petitions for recount. For instance, the Michigan Supreme Court has noted that a party's petition was sufficient to invoke a right to a recount when "slight changes in one or all of the wards specified, if in relator's favor, without corresponding changes in favor

of Mr. Culver [the winner], will be sufficient to change the result announced." *Ward v Culver*, 144 Mich 57, 59; 107 NW 444 (1906).[1]

Similarly, MCL 168.880a(1) provides that "[a] recount of all precincts in the state shall be conducted at any time a statewide primary or election shall be certified by the board of state canvassers as having been determined by a vote differential of 2,000 votes or less." This indicates that our Legislature has recognized the same remedial purpose of recounts. See also *Mich Ed Ass'n Political Action Comm v Secretary of State*, 241 Mich App 432, 440; 616 NW2d 234 (2000) (quoting former Attorney General Frank Kelley, who stated that "[t]he purpose of a recount is to determine whether the results of the first count of the ballots should stand or should be changed because of a fraud or mistake in the canvass of the votes . . .") (citation and quotation marks omitted).

For these reasons, we conclude that, to meet the "aggrieved" candidate requirement under MCL 168.879(1)(b), the candidate must be able to allege a good-faith belief that but for mistake or fraud, the candidate would have had a reasonable chance of winning the election.[2]

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[1] See also *McKenzie v Bd of City Canvassers of the City of Port Huron*, 70 Mich 147, 148-150; 38 NW 11 (1888) (holding that the candidate's petition was sufficient when it alleged that he lost the election by four votes and mistakes or fraudulent acts resulted in the underreporting of votes actually cast for the petitioning candidate and the overreporting of votes for the candidate's opponent, such that if the votes had been correctly tabulated, the petitioning candidate would have won); *Kennedy*, 127 Mich App at 495-497 (holding that the candidate's petition was sufficient when the candidate lost by 17 votes and "only a slight change in the totals would have been sufficient to change the outcome of the election").

[2] The appellate courts of this state have long recognized, in the context of the law, that the term "aggrieved" contemplates an actual

The Board argues that its clear legal duties do not include a determination of whether a party is an aggrieved party. The Board asserts that, under MCL 168.882(3) and MCL 168.883, the Board has only two legal duties to perform regarding recount petitions: to rule on the objections to the petition offered by any opposing candidate and to investigate the facts set forth in the petition. According to the Board, its members satisfied their duties in this case because they met, considered, and ruled on the objections.

We find the Board's position untenable. MCL 168.879(1) conditions a candidate's right to petition for a recount on the submission of a petition that satisfies that statute's requirements, clearly stating that "[a] candidate voted for at a primary or election for an office may petition for a recount of the votes *if all of the following requirements are met*[.]" (Emphasis added.) When read in conjunction with the Board's obligation under MCL 168.882(3) to rule on objections to a petition, MCL 168.879(1) creates a clear legal duty to accept only those petitions that satisfy the requirements in MCL 168.879 and to reject those petitions that do not.[3]

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injury that adversely affects or prejudices the substantial rights of a party. *Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286, 291-292; 715 NW2d 846 (2006); *Ford Motor Co v Jackson (On Rehearing)*, 399 Mich 213, 226 n 9; 249 NW2d 29 (1976) (opinion by COLEMAN, J.); *In re Estate of Trankla*, 321 Mich 478, 482; 32 NW2d 715 (1948); *Spires v Bergman*, 276 Mich App 432, 441-442; 741 NW2d 523 (2007); *Maxwell v Dep't of Environmental Quality*, 264 Mich App 567, 571; 692 NW2d 68 (2004). A party "is not aggrieved by a mere possibility of injury arising from some unknown and future contingency," *Ford Motor Co*, 399 Mich at 226 n 9 (opinion by COLEMAN, J.), or by being merely disappointed over a certain outcome, *Federated Ins Co*, 475 Mich at 291.

[3] Our conclusion is consistent with this Court's prior recognition that a petition for a writ of mandamus is the proper tool to enforce the provisions of MCL 168.879. See *Santia v Bd of State Canvassers*, 152 Mich App 1, 6; 391 NW2d 504 (1986).

V. APPLICATION TO DR. STEIN

A review of candidate Stein's petition for a recount reveals that she merely parroted the language of MCL 168.879(1)(b) in her petition. The petition lacks even the most general allegations from which the Board could infer that a recount would change the outcome of the election in Dr. Stein's favor. The vote totals for President-elect Trump and Dr. Stein cannot be characterized as close, nor will a slight change in these totals be sufficient to change the outcome of the election: President-elect Trump received 2,279,543 votes, and Dr. Stein received 51,463 votes. The 2,228,080 difference in vote totals ensures that no change in the vote totals is reasonably likely to change the previously announced result in Dr. Stein's favor.

Indeed, Dr. Stein readily admits that she is unlikely to change the result previously announced. Under these circumstances, we conclude that Dr. Stein's petition failed to meet the requirements of MCL 168.879(1)(b) because she has not alleged, and cannot allege in good faith, that she "is aggrieved on account of fraud or mistake in the canvass of the votes" for the office of President of the United States. Under these circumstances, the Board had a clear legal duty to reject Dr. Stein's petition.

The act of rejecting the petition is ministerial. "A ministerial act is one in which the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment." *Hillsdale Co Senior Servs, Inc v Hillsdale Co*, 494 Mich 46, 58 n 11; 832 NW2d 728 (2013) (quotation marks and citation omitted). There is no exercise of discretion required in the rejection of a recount petition on purely legal grounds. Finally, we

are convinced that no other legal remedy exists that would achieve the same result as rejecting Dr. Stein's petition.

Accordingly, we grant the requests of the Attorney General and President-elect Trump for issuance of a writ of mandamus.[4] We direct the Board of State Canvassers to reject the November 30, 2016 petition of candidate Stein that precipitated the current recount process. We retain jurisdiction.

O'CONNELL, P.J., and MARKEY and MURRAY, JJ., concurred.

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[4] We recognize that the United States District Court for the Eastern District of Michigan entered a temporary restraining order that affirmatively required that the Secretary of State commence the recount before the expiration of the two-day waiting period required by MCL 168.882(3). *Stein*, 222 F Supp 3d at 545. That decision did not address the threshold issue presented in this case—whether Stein is an aggrieved candidate—so there is no conflict between our decisions. Additionally, the second footnote in the Eastern District's opinion recognized the possibility that this Court would halt the recount. *Id*. at 545 n 2.

ST JOHN MACOMB-OAKLAND HOSPITAL v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Docket No. 329056. Submitted December 6, 2016, at Detroit. Decided December 8, 2016, at 9:00 a.m.

St. John Macomb-Oakland Hospital filed a complaint in the Macomb Circuit Court under the no-fault act, MCL 500.3101 *et seq*., against State Farm Mutual Automobile Insurance Company to recover payment for medical services St. John had provided to Nuo Dusaj for a closed head injury he sustained in an automobile accident. Dusaj had coordinated no-fault insurance and health insurance as permitted by MCL 500.3109a. Dusaj's health insurer was Blue Cross Blue Shield of Michigan, and his no-fault insurer was State Farm. Magellan Behavioral of Michigan, Inc., administered Blue Cross's mental health program. Blue Cross, through Magellan, denied St. John's claim for payment, asserting that St. John's treatment of Dusaj was not medically necessary. St. John did not appeal that determination. Instead, St. John sought payment from State Farm. State Farm also refused to pay, prompting St. John to file its complaint against State Farm. State Farm moved for summary disposition under MCR 2.116(C)(10), arguing that St. John failed to make reasonable efforts to obtain payment from Blue Cross. The trial court, James M. Biernat, Sr., J., denied State Farm's motion for summary disposition because there existed a genuine issue of material fact regarding whether St. John had made reasonable efforts to obtain payment from Blue Cross. State Farm moved for reconsideration under MCR 2.119(F). State Farm claimed that the trial court's opinion had improperly shifted to State Farm the burden of proving that St. John did not make reasonable efforts to obtain payment for the services it had provided to Dusaj. The court agreed, granted State Farm's motion for reconsideration, and dismissed the case. St. John appealed.

The Court of Appeals *held*:

An insured's health insurer is primarily liable for an insured's medical expenses when the insured has opted for coordinated insurance coverage under MCL 500.3109a. Under coordinated coverage, a no-fault insurer is not liable to pay the medical

expenses that a health insurer is required to pay. In this case, Dusaj's no-fault insurance policy called for a reduction in benefits owed according to the amount paid or payable by Blue Cross. The payable expenses—those required to be paid by the health insurer—are expenses deemed "available" from the health insurer. An insured must procure payment from his or her health insurer to the extent that coverage is available from the health insurer. That a health insurer is required to pay for certain expenses means that an injured person or a provider must make reasonable efforts to obtain those available payments from the health insurer before seeking payment from the no-fault insurer. In this case, St. John made reasonable efforts to obtain payment from Blue Cross when it properly filed a claim with Blue Cross. Blue Cross denied St. John's claim after a physician reviewed Dusaj's medical records and determined that treatment was not medically necessary. St. John was not required to appeal Blue Cross's medical necessity determination to show that it had made reasonable efforts to obtain benefits available from Blue Cross. Requiring an insured or a provider to engage in a lengthy appeals process would not further the no-fault act's purpose of ensuring prompt compensation for an insured's injuries. The trial court erred by dismissing St. John's complaint because St. John produced sufficient evidence to establish that it made reasonable efforts to obtain payment from Blue Cross and was denied on the basis that treatment was not medically necessary.

Reversed and remanded.

INSURANCE — NO-FAULT INSURANCE — COORDINATED COVERAGE — PROVIDER'S OBLIGATION TO MAKE REASONABLE EFFORTS TO OBTAIN PAYMENT OF TREATMENT EXPENSES FROM HEALTH INSURER.

An insured's health insurer is primarily liable for medical expenses resulting from a motor vehicle accident when the insured has opted for coordinated coverage with his or her no-fault insurance; a no-fault insurer is not obligated to pay benefits when benefits are available from the health insurer; to establish that the benefits were not available from the health insurer, a medical provider seeking payment from the no-fault insurer must show that reasonable efforts were made to obtain benefits from the health insurer; the medical provider need not appeal the health insurer's determination that treatment was not medically necessary in order to establish that the provider made reasonable efforts to obtain payment from the health insurer (MCL 500.3101 *et seq*.).

Law Offices of Bruce K. Pazner, PC (by *Bruce K. Pazner*), for St. John Macomb-Oakland Hospital.

Hewson & Van Hellemont, PC (by *Grant O. Jaskulski*), for State Farm Mutual Automobile Insurance Co.

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

JANSEN, P.J. Plaintiff appeals as of right the trial court's order granting defendant's motion for reconsideration and dismissing the case. We reverse and remand for further proceedings consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

This case arises from injuries sustained by the insured, Nuo Dusaj, during a December 9, 2011 car accident. Dusaj maintained a policy of no-fault insurance with defendant, and he had coordinated no-fault insurance and health insurance. His no-fault policy provided that the no-fault benefits would be reduced by an amount "paid or payable" under Dusaj's health insurance plan. Dusaj suffered a closed head injury as a result of the accident, and a physician recommended that Dusaj be admitted to plaintiff's partial-day hospitalization program for closed head injuries. Dusaj was admitted to the program, and plaintiff filed a claim with Dusaj's health insurer, Blue Cross Blue Shield of Michigan (Blue Cross), requesting payment for services Dusaj received starting on May 6, 2013.

On November 14, 2013, Magellan Behavioral of Michigan, Inc. (Magellan), which was authorized to administer Blue Cross's mental health program, sent a letter to Dusaj, informing him that the partial-day

hospitalization treatment was not medically necessary and that Magellan was unable to authorize the treatment. The letter explained that a physician advisor, who was a board-certified psychiatrist, came to that determination after reviewing the medical record. The letter further indicated that an internal appeal was available as the first step in the appeals process and that a patient, provider, or facility could request an appeal.

An attached document detailed a provider's appeal rights. The document explained that a provider could request an internal appeal within 180 days after receipt of the denial letter and that a determination would be made within 30 calendar days. The document indicated that "[i]f treatment services are imminent or ongoing, or the patient's condition is unstable or emergent, an expedited appeal may be requested verbally and conducted telephonically. . . . We reply to urgent appeals within the lesser of one business day or 72 hours." The document further stated that if the provider disagreed with the internal appeal determination, the provider could request in writing an external review within 30 calendar days of the appeal decision letter. An independent review organization would then review the request, and the provider would be notified of the decision within 30 calendar days of the receipt of the request.

On January 9, 2014, a representative for plaintiff sent a letter to Magellan, indicating that a similar denial letter was needed with regard to an October 22, 2012 partial-day hospitalization admission in order for plaintiff to request that defendant pay for the partial-day hospitalization treatment related to that admission.

After seeking payment from defendant, plaintiff filed a complaint in the Macomb Circuit Court, contending that defendant breached its no-fault contract with Dusaj by refusing to pay no-fault benefits for the medical services plaintiff provided to Dusaj. Defendant moved for summary disposition under MCR 2.116(C)(10), contending that plaintiff failed to make reasonable efforts to obtain payment from Blue Cross/Magellan. Defendant argued that plaintiff failed to provide any evidence regarding what plaintiff had submitted to Blue Cross/Magellan or that plaintiff had appealed the medical necessity determination.

Plaintiff filed a response opposing defendant's motion for summary disposition, in which plaintiff contended that its January 9, 2014 follow-up letter to Magellan demonstrated that plaintiff made reasonable efforts, but that Blue Cross/Magellan refused to pay for the services. The trial court issued an opinion and order denying defendant's motion for summary disposition on the basis that there was a genuine issue of material fact on the issue of reasonable efforts. The court reasoned:

> Defendant, in effect, argues that plaintiff has just not tried hard enough to convince [Blue Cross] to pay for the medical treatments, and in this regard is therefore not entitled to benefits from State Farm. It appears that plaintiff hospital was not convinced that [Blue Cross]/Magellan's multi-tiered appeal process was going to net them any beneficial results. Plaintiff was not seeking duplicative coverage, and it made reasonable efforts to obtain payments from [Blue Cross]/Magellan to no avail. The Court finds a question of fact as to whether plaintiff hospital made reasonable efforts to obtain payments, and whether the multi-tiered review and appeal process could be considered beyond reasonable.

Defendant subsequently moved for reconsideration, arguing that plaintiff failed to submit evidence showing that it made reasonable efforts to obtain payment from Blue Cross/Magellan and contending that the court's prior opinion improperly shifted to defendant the burden of proving that Blue Cross/Magellan made an incorrect determination and that Blue Cross's policy should cover plaintiff's claim. The trial court agreed, and in a two-page opinion and order, the court determined that it had improperly shifted the burden of proof to defendant and that plaintiff failed to present any evidence demonstrating that it made reasonable efforts to obtain payment from Blue Cross/Magellan. Therefore, the court granted defendant's motion for reconsideration and dismissed the case.

II. STANDARD OF REVIEW

We review for an abuse of discretion a trial court's decision on a motion for reconsideration. *Frankenmuth Ins Co v Poll*, 311 Mich App 442, 445; 875 NW2d 250 (2015). " 'An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes.' " *Id*. (citation omitted). We review de novo the trial court's ruling on a motion for summary disposition. *Id*. "The trial court properly grants a motion for summary disposition under MCR 2.116(C)(10) when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Id*.

> When a motion under subrule (C)(10) is made and supported as provided in this rule, 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. [MCR 2.116(G)(4).]

III. REASONABLE EFFORTS STANDARD

The issue presented in this case is whether plaintiff supplied evidence that it made reasonable efforts to obtain payments that were available from Blue Cross/Magellan before seeking payment from defendant. Specifically, the parties dispute whether plaintiff was required to appeal Blue Cross/Magellan's medical necessity determination before seeking payment from defendant. Plaintiff argues that the trial court abused its discretion when it granted defendant's motion for reconsideration and dismissed the case and that plaintiff was not required to appeal the denial of its claim for health insurance benefits. We agree.

The trial court dismissed the case following reconsideration of its initial opinion and order denying defendant's motion for summary disposition. MCR 2.119(F), the court rule governing motions for reconsideration, provides:

> (1) Unless another rule provides a different procedure for reconsideration of a decision . . . , a motion for rehearing or reconsideration of the decision on a motion must be served and filed not later than 21 days after entry of an order deciding the motion.
>
> (2) No response to the motion may be filed, and there is no oral argument, unless the court otherwise directs.
>
> (3) Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error.

The issue in this case is governed by the no-fault act, MCL 500.3101 *et seq*. MCL 500.3105(1) provides, "Under personal protection insurance an insurer is liable to pay benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle, subject to the provisions of this chapter." MCL 500.3107(1)(a) adds, in part, that personal protection insurance (PIP) benefits are payable for "[a]llowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation."

MCL 500.3109a permits an individual to coordinate his or her no-fault insurance policy and other health and accident insurance policies at a reduced premium rate. MCL 500.3109a; *Farm Bureau Gen Ins Co v Blue Cross Blue Shield of Mich*, 314 Mich App 12, 21; 884 NW2d 853 (2016). "The intent of [MCL 500.3109a] is to eliminate duplicative recovery for services and to contain insurance and healthcare costs." *Farm Bureau*, 314 Mich App at 21. When an individual chooses to coordinate his or her no-fault and health insurance coverage, the health insurer becomes primarily liable for medical expenses. *Id*. In that circumstance, the no-fault insurer is not liable for medical expenses that the health insurer is required to pay for or provide. *Tousignant v Allstate Ins Co*, 444 Mich 301, 303; 506 NW2d 844 (1993). Therefore, the individual is required to obtain payment from the health insurer "to the extent of the health coverage *available* from the health insurer." *Id*. at 307 (emphasis added). Our Supreme Court has stated that the term "payable," which appears in the no-fault contract at issue in this case, is the functional equivalent of the phrase "required to be provided." *Id*. at 312. In *Tousignant*, our Supreme Court cited its previous decision in *Perez v State Farm*

Mut Auto Ins Co, 418 Mich 634, 645; 344 NW2d 773 (1984), which dealt with workers' compensation and no-fault benefits, for the proposition that the phrase "required to be provided" "means that the *injured person is obliged to use reasonable efforts to obtain payments that are available* from [the health] insurer." *Id*. (quotation marks omitted). Therefore, a plaintiff must make reasonable efforts to obtain payments that are available from the health insurer in order to establish that the benefits are not payable by the health insurer. See *id*.

The parties dispute what actions plaintiff was required to take in order to establish that it made reasonable efforts to obtain payment from Blue Cross/Magellan. In *Tousignant*, the plaintiff coordinated her no-fault insurance with her health insurance, which was provided through a health maintenance organization (HMO). *Tousignant*, 444 Mich at 303-304. The plaintiff sought treatment outside of her HMO plan. *Id*. at 305. The no-fault insurer informed the plaintiff that it would only cover medical care by a physician outside of the HMO if a physician within the HMO referred her to the out-of-network physician. *Id*. The plaintiff did not contend that necessary care was unavailable within the HMO. *Id*. The no-fault insurer refused to pay for the services, contending that the HMO was required to provide the services. *Id*. Our Supreme Court concluded that because the plaintiff did not claim that the HMO would not or could not provide the medical care she needed, there was no basis for concluding that the benefits were not required to be provided by the health insurer. *Id*. at 312-313.

The Court's decision in *Tousignant* suggests that a plaintiff must take some action toward receiving payment from the health insurer before seeking payment

from the no-fault insurer. However, the Court did not specify the exact actions that a plaintiff must take in order to establish that the plaintiff made reasonable efforts to obtain payment from the health insurer. The plaintiff in *Tousignant* made no efforts to obtain available benefits from her HMO, leading our Supreme Court to hold that there was no basis to conclude that the benefits were not available. See *id*. In contrast, in this case, plaintiff *did* attempt to obtain payment of medical expenses when it filed a claim with Blue Cross/Magellan. The denial letter indicates that plaintiff submitted medical records to Blue Cross/Magellan that a physician reviewed in determining that the treatment was not medically necessary. There is no indication that plaintiff failed to follow the proper procedure for filing the claim. Following the denial of the claim, plaintiff contended that the partial-day hospitalization treatment was unavailable because Blue Cross/Magellan denied its claim under a medical necessity standard. Plaintiff did not seek duplicative recovery from Blue Cross/Magellan and defendant, but instead, plaintiff sought to obtain payment from the insured's no-fault insurer after the insured's health insurer denied payment. Accordingly, we conclude that plaintiff made reasonable efforts to obtain payment from Blue Cross/Magellan and that plaintiff was not required to appeal the medical necessity determination in order to establish that it made reasonable efforts to obtain payments that were available from the health insurer.

We find that the reasoning in *Adanalic v Harco Nat'l Ins Co*, 309 Mich App 173; 870 NW2d 731 (2015), applies in this context. In *Adanalic*, this Court decided the issue whether a no-fault insurer was excused from paying benefits because the plaintiff had a workers' compensation claim that he could pursue even after an

initial denial of workers' compensation benefits. *Id*. at 184-189. Both the no-fault insurer and the workers' compensation insurer denied the plaintiff benefits for his injuries. *Id*. at 178. The relevant statute at issue in the case provided that when workers' compensation benefits are available to an employee sustaining an injury in the course of employment, then no-fault benefits are not available. *Id*. at 186.

Although the issue in *Adanalic* did not involve the reasonable efforts standard, this Court briefly discussed the reasonable efforts requirement, stating that the standard " 'does not, in light of the underlying purpose of the no-fault act, call for a potentially lengthy and costly effort . . . .' " *Adanalic*, 309 Mich App at 186 n 8, quoting *Perez*, 418 Mich at 650.[1] This statement leads us to conclude that a plaintiff does not need to engage in the potentially lengthy and costly effort of challenging a medical necessity determination in order to obtain health insurance benefits before proceeding to obtain payment from the no-fault insurer.

Further, in determining whether the no-fault insurer was responsible for payment of the plaintiff's expenses, this Court reasoned as follows:

> Both the workers' compensation system and the no-fault system are intended to provide limited, but *prompt* payment of benefits to injured persons in order to assure medical care, rehabilitation, and income replacement. It is [the no-fault insurer's] position that when the employer and the no-fault insurer disagree on which of these two

[1] Although *Adanalic* involved workers' compensation benefits, our Supreme Court in *Tousignant* cited its earlier decision in *Perez* in articulating the reasonable efforts standard, suggesting that the standard is the same in both contexts—workers' compensation and health insurance. See *Tousignant*, 444 Mich at 312; *Perez*, 418 Mich at 645-646 (opinion by LEVIN, J.).

> systems is primarily applicable, the injured person is to receive no benefits at all until each of the two insurers is satisfied that its assertion of denial has been fully adjudicated. We reject the notion that because an individual may be covered by two broad systems of insurance, he is not entitled to any benefits whatsoever for however long it takes to adjudicate a dispute about which system is obligated to provide benefits. Indeed, requiring an employee to engage in lengthy workers' compensation litigation before being paid PIP benefits "is wholly inadequate to accomplish the no-fault act's purpose of providing assured, adequate, and prompt recovery for economic loss arising from motor vehicle accidents." [*Adanalic*, 309 Mich App at 187, quoting *Perez*, 418 Mich at 650 (emphasis added).]

The *Adanalic* Court went on to explain that the term "available" was used in order to prevent duplicative recovery under both workers' compensation and no-fault insurance, and that there was no duplicative recovery because the plaintiff was denied workers' compensation benefits. *Id*. at 188. Accordingly, this Court concluded that workers' compensation benefits were not available and that the plaintiff's no-fault insurer was not entitled to withhold payment of PIP benefits. *Id*. at 189.

Although this Court's decision in *Adanalic* involved workers' compensation benefits, the same reasoning applies equally in this case. As in *Adanalic*, plaintiff did not receive payment because neither insurer took responsibility for payment of plaintiff's medical expenses. The purpose of the no-fault act cannot be realized by requiring an injured person to engage in a potentially lengthy appeals process with the health insurance company. Defendant's position would prevent an injured person from receiving benefits from the no-fault insurer until the insured's appeal of the health insurer's denial was fully adjudicated. This is entirely

at odds with the no-fault act's underlying policy of ensuring prompt payment for economic losses. Further, the purpose of the coordinated benefits statute is to prevent duplicative recovery, and plaintiff would not receive benefits from two sources in this case because Blue Cross/Magellan denied plaintiff's claim. Therefore, we conclude that a plaintiff is not required to appeal a health insurer's medical necessity determination in order to establish that reasonable efforts were made to obtain payment from the health insurer.

Defendant relies, in large part, on this Court's recent decision in *Farm Bureau* for the proposition that plaintiff was required to appeal the denial. In *Farm Bureau*, the insured, Julie Klein, received skilled nursing services from Spectrum Health Rehab and Nursing Center (Spectrum). *Farm Bureau*, 314 Mich App at 14. Klein's health insurer was Blue Cross Blue Shield (Blue Cross), and Blue Cross had a participation agreement with Spectrum under which Spectrum assumed financial responsibility for the services that it provided to the insured. *Id*. The agreement required Spectrum to follow Blue Cross's preauthorization requirements and detailed the appeals process for an initial denial of a preauthorization request. *Id*. at 16. Blue Cross approved and paid for 14 days of skilled nursing treatment, but denied Spectrum's request for additional time. *Id*. at 14-15. Instead of appealing that decision, Spectrum submitted the claim to Farm Bureau, Klein's no-fault insurer. *Id*. at 15. Farm Bureau paid under protest. *Id*.

This Court concluded that under the "unique circumstances" in the case, namely Spectrum's assumption of liability for the medical expenses, neither the no-fault insurer nor the health insurer was responsible for payment of the medical expenses. *Id*. at 20-21. This

Court explained that the provisions in the agreement between Blue Cross and Spectrum were dispositive because Spectrum had agreed to assume full financial responsibility for claims that were denied as medically unnecessary, unless the insured accepted financial responsibility in writing. *Id*. at 23. This Court explained that "with respect to Farm Bureau, the effect of Spectrum's participating provider agreement is to relieve Klein from responsibility for paying for Spectrum's services, and, because Klein has no legal responsibility for the medical costs, Farm Bureau has no obligation to pay for these expenses under MCL 500.3107(1)(a)." *Id*.

This Court noted, during its discussion of the issue, that although there were mechanisms permitting Klein or Spectrum to contest the denial of the preauthorization request, neither Klein nor Spectrum challenged the denial. *Id*. at 24. Indeed, the evidence in the record suggested that Spectrum did not seek an appeal of the denial because there was a secondary insurer. *Id*. at 24 n 3. This Court explained, "Spectrum's decision not to contest Blue Cross's medical necessity denial and its decision not to seek preapproval at a later time does not, without the assumption of liability by Klein, render Farm Bureau liable as a secondary payer." *Id*. at 24-25. Instead, because Klein did not have any legal responsibility for the expenses, the costs were not "incurred" by her, and, as Klein's no-fault insurer, Farm Bureau was not liable for payment. *Id*. at 25.

Farm Bureau does not control the outcome in this case because the dispositive fact in *Farm Bureau* was Spectrum's contract with Blue Cross. This Court concluded that because Spectrum contracted with Blue Cross to assume financial liability for the claim, the insured party did not "incur" the expense, and there-

fore, Farm Bureau was not liable for the expense under MCL 500.3107(1)(a). *Id*. at 23. In contrast, there is no indication that plaintiff in this case had a similar participation agreement with Blue Cross/Magellan indicating that plaintiff would assume full financial responsibility for medical services deemed medically unnecessary. Although this Court in *Farm Bureau* mentioned the fact that Spectrum did not appeal the medical necessity determination, this Court's discussion of the issue pertained to the fact that Spectrum could have attempted to avoid liability under the provider agreement by seeking an appeal of Blue Cross's decision. *Id*. at 24 n 3. This Court did not suggest that an insured person or a provider *must* seek an appeal of a health insurer's decision in order to pursue payment from a no-fault insurer. Instead, the holding of *Farm Bureau* is limited to the "unique circumstance" of the provider agreement between Spectrum and Blue Cross. Accordingly, *Farm Bureau* does not require that an individual or a provider appeal a medical necessity determination in order to establish that reasonable efforts were made to obtain payments that were available from the health insurer.

IV. MOTION FOR RECONSIDERATION

We conclude that the trial court abused its discretion by granting the motion for reconsideration. The court improperly concluded that it had shifted the burden of proof to defendant. Instead, in its initial opinion and order, the court noted that plaintiff presented evidence regarding whether it made reasonable efforts to obtain payment from Blue Cross/Magellan. The trial court's initial conclusions did not constitute improper burden shifting. The court also erroneously concluded, without explanation, that plaintiff failed to

present evidence establishing that it had made reasonable efforts to obtain payment from Blue Cross/Magellan. Contrary to the trial court's determination, plaintiff presented evidence establishing that it sought payment from Blue Cross/Magellan and that its claim for benefits was denied on the basis that the treatment was not medically necessary. We therefore conclude that plaintiff presented sufficient evidence to establish that it made reasonable efforts to obtain payment from Blue Cross/Magellan. We further conclude that plaintiff was not required to present evidence that it appealed the denial in order to establish that it made reasonable efforts to obtain payment from Blue Cross/Magellan. To conclude otherwise would be contrary to the no-fault act's purpose of providing assured, adequate, and prompt recovery for economic losses stemming from motor vehicle accidents.

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

CAVANAGH and BOONSTRA, JJ., concurred with JANSEN, P.J.

MILOT v DEPARTMENT OF TRANSPORTATION

Docket No. 329728. Submitted December 7, 2016, at Lansing. Decided December 8, 2016, at 9:05 a.m. Leave to appeal denied 501 Mich 868.

Catherine Milot brought an action in the Court of Claims against the Department of Transportation (the Department), alleging that the Department failed to maintain a portion of a highway in reasonable repair after her vehicle struck an open or dislodged manhole cover, causing the vehicle to roll over. Plaintiff sent the Department her notice of intent to sue, and the notice included the names of witnesses at the scene of the accident, but it did not include the names of two witnesses who had not seen the accident but could testify about the extent of plaintiff's alleged pain, suffering, and memory loss as a result of the accident. The Department moved for summary disposition on the basis of governmental immunity, asserting that the highway exception to governmental immunity, MCL 691.1404, required that plaintiff identify the two witnesses in her notice of intent to sue because those two witnesses had knowledge of the extent of plaintiff's injuries after the accident. Plaintiff responded that MCL 691.1404(1) only required her to identify witnesses to the occurrence of the accident and that because the two witnesses had not actually seen the accident, she properly did not include them in her notice of intent. The court, CYNTHIA D. STEPHENS, J., denied the Department's motion for summary disposition, ruling that MCL 691.1404 did not require the identification of the two witnesses because an individual must have witnessed events related to the actual accident to be considered a witness under MCL 691.1404. The Department appealed.

The Court of Appeals *held*:

MCL 691.1402(1) provides that a governmental agency with jurisdiction over a highway must maintain the traveled portion of the highway in reasonable repair. Under MCL 691.1404(1), to sue a governmental agency for failing to maintain a highway in reasonable repair, a plaintiff must "serve a notice on the governmental agency of the occurrence of the injury and the defect" within 120 days of the injury, and "[t]he notice shall specify the exact location and nature of the defect, the injury sustained and

the names of the witnesses known at the time by the claimant." The word "the" preceding the word "occurrence" indicates that the occurrence occurs during a discrete period of time—namely, the time of the accident. Furthermore, MCL 691.1404(1) groups several items into a list, and each of the items included in this list—"the names of the witnesses," "the exact location and nature of the defect," and "the injury sustained"—refers to the accident itself. Therefore, under MCL 691.1404(1), "the names of the witnesses" are the names of those persons who witnessed the occurrence of the injury and the defect, and a plaintiff must list on his or her notice of intent the names of those witnesses who have pertinent information about the accident itself, not all witnesses who have knowledge of the subsequently revealed extent of the plaintiff's injuries. In this case, because neither of the two witnesses at issue actually witnessed the occurrence of the accident, MCL 691.1404(1) did not require plaintiff to identify them in her notice of intent. The Court of Claims properly denied the Department's motion for summary disposition.

Affirmed.

GOVERNMENTAL IMMUNITY — HIGHWAY EXCEPTION — DEFECTS IN HIGHWAYS — NOTICE OF THE INJURY AND DEFECT — WORDS AND PHRASES — "NAMES OF THE WITNESSES."

Under MCL 691.1404(1), to sue a governmental agency for failing to maintain a highway in reasonable repair, a plaintiff must serve a notice on the governmental agency of the occurrence of the injury and the defect within 120 days of the injury, and the notice shall specify the exact location and nature of the defect, the injury sustained, and the names of the witnesses known at the time by the claimant; under MCL 691.1404(1), "the names of the witnesses" are the names of those persons who witnessed the occurrence of the injury and the defect; a plaintiff must list on his or her notice of intent the names of those witnesses who have pertinent information about the accident itself, not all witnesses who have knowledge of the subsequently revealed extent of the plaintiff's injuries.

Law Offices of Michael J. Morse, PC (by *Michael J. Morse*, *Eric M. Simpson*, and *Lewis A. Melfi*), for Catherine Milot.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief

Legal Counsel, and *Philip L. Bladen*, Assistant Attorney General, for the Department of Transportation.

Before: M. J. KELLY, P.J., and O'CONNELL and BECKERING, JJ.

O'CONNELL, J. Defendant, Department of Transportation (the Department), appeals as of right the trial court's decision denying its motion for summary disposition under MCR 2.116(C)(7) (governmental immunity) and allowing the suit of plaintiff, Catherine Milot, to proceed. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

In March 2011, Milot was driving to work when her car struck an open or dislodged manhole cover, causing her vehicle to roll over. Milot required physical therapy and eventual surgery for related neck injuries. Milot also alleged that she subsequently suffered memory loss and forgot normal things she should remember, such as her son's birthday and the way to get to work.

When Milot sent the Department her notice of intent to sue in May 2011, she included the names of witnesses at the scene of the accident, but she did not include the names of her friend Gail Gay or her daughter Ashley Anger. Milot testified at her deposition that Gay saw Milot's overturned truck on her way to work but did not witness the accident. Gay assisted Milot by driving her home from the hospital and allowing Milot to follow her to work when Milot could not remember how to get there. Anger assisted Milot in a variety of ways, including eventually allowing Milot to live with her. Milot indicated in a later witness list and at her deposition that Gay and Anger could testify about the extent of her pain, suffering, and memory loss.

In June 2015, the Department moved for summary disposition under MCR 2.116(C)(7) on the basis of governmental immunity. The Department asserted that the highway exception to governmental immunity, MCL 691.1404, required Milot to identify Gay and Anger as potential witnesses in her notice of intent to sue because Gay and Anger had knowledge of the extent of Milot's injuries after the accident. Milot responded to the motion by contending that MCL 691.1404(1) only required her to identify witnesses to the occurrence of the accident. According to Milot, because neither Gay nor Anger witnessed the accident, she properly did not include them in her notice of intent.

The trial court agreed with Milot, ruling that MCL 691.1404 did not require Milot to identify Gay or Anger in her notice of intent. The trial court reasoned that to be a witness for the purposes of MCL 691.1404, the individual "must have witnessed events related to the actual accident." Accordingly, the trial court denied the Department's motion for summary disposition.

The Department now appeals.

II. STANDARDS OF REVIEW

This Court reviews de novo the trial court's decision on a motion for summary disposition under MCR 2.116(C)(7). *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 202; 731 NW2d 41 (2007). A defendant is entitled to summary disposition under MCR 2.116(C)(7) if the plaintiff's claims are barred because of immunity granted by law. *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008). If reasonable minds could not differ on the legal effects of the facts, it is a question of law whether governmental immunity

bars a plaintiff's claim. *Snead v John Carlo, Inc*, 294 Mich App 343, 354; 813 NW2d 294 (2011).

We review de novo the applicability of governmental immunity and the statutory exceptions to governmental immunity. *Moraccini v Sterling Hts*, 296 Mich App 387, 391; 822 NW2d 799 (2012).

> When construing a statute, this Court's primary goal is to give effect to the intent of the Legislature. We begin by construing the language of the statute itself. When the language is unambiguous, we give the words their plain meaning and apply the statute as written. [*Rowland*, 477 Mich at 202.]

III. ANALYSIS

The crux of the Department's argument is that the highway exception to governmental immunity requires a plaintiff to list in her notice of intent all witnesses to her injuries, regardless of whether those witnesses were present for or observed the actual incident. We disagree.

The governmental tort liability act, MCL 691.1401 *et seq*., provides "broad immunity from tort liability to governmental agencies whenever they are engaged in the exercise or discharge of a governmental function[.]" *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 595; 363 NW2d 641 (1984), citing MCL 691.1407. A plaintiff may only sue a governmental entity in tort if the suit falls within one of the enumerated statutory exceptions to governmental immunity. *Moraccini*, 296 Mich App at 392. This Court broadly construes the scope of governmental immunity and narrowly construes its exceptions. *Id*.

One of these exceptions is that a governmental agency with jurisdiction over a highway must maintain the traveled portion of the highway in reasonable

repair. MCL 691.1402(1); *Glancy v Roseville*, 457 Mich 580, 584; 577 NW2d 897 (1998). But to sue the agency for failing to maintain the highway in reasonable repair, the plaintiff must provide the agency with notice of the defect within 120 days of the injury:

> (1) As a condition to any recovery for injuries sustained by reason of any defective highway, the injured person, within 120 days from the time the injury occurred, except as otherwise provided in [MCL 691.1404(3)] shall serve a notice on the governmental agency of the occurrence of the injury and the defect. The notice shall specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant.
>
> (2) . . . If required by the legislative body or chief administrative officer of the responsible governmental agency, the claimant shall appear to testify, if he is physically able to do so, and shall produce his witnesses before the legislative body, a committee thereof, or the chief administrative officer, or his deputy, or a legal officer of the governmental agency as directed by the legislative body or chief administrative officer of the responsible governmental agency, for examination under oath as to the claim, the amount thereof, and the extent of the injury. [MCL 691.1404.]

The main purpose of this notice is "to provide the governmental agency with an opportunity to investigate the claim while the evidentiary trail is still fresh and, additionally, to remedy the defect before other persons are injured." *Burise v City of Pontiac*, 282 Mich App 646, 652; 766 NW2d 311 (2009) (quotation marks, citation, and brackets omitted). If the plaintiff does not include the name of a known witness in the notice, the plaintiff's notice is defective, and the trial court should grant summary disposition in favor of the governmental agency. *Id*. at 655.

We conclude that, when read in context, these provisions indicate that the relevant witnesses under MCL 691.1404 are those persons who witnessed the "occurrence of the injury and the defect." In other words, the plaintiff must list on his or her notice of intent the names of those witnesses who have pertinent information about the accident itself, not all witnesses who have knowledge of the subsequently revealed extent of the plaintiff's injuries.

We must read the statute as a whole, and "statutory provisions are *not* to be read in isolation[.]" *Robinson v Lansing*, 486 Mich 1, 15; 782 NW2d 171 (2010). This Court reads the provisions of statutes reasonably and in context, and it reads subsections of cohesive statutory provisions together. *Id*. When words are grouped in a list, this Court gives the words related meanings. *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 114; 754 NW2d 259 (2008).

MCL 691.1404(1) requires notice regarding "the *occurrence* of the injury and the defect." (Emphasis added.) When read in context, the witnesses mentioned later in MCL 691.1404(1) are thus those witnesses related to the occurrence of the injury itself. Additionally, the word "the" preceding the word "occurrence" indicates that the occurrence occurs during a discrete period of time—namely, the time of the accident. The phrase "the names of the witnesses" is also part of a list. That list also includes the items "the exact location and nature of the defect" and "the injury sustained." Because these words are grouped in a list, we conclude that we should give the items related meanings. Each of these items—the location, nature of the defect, injury sustained, and names of witnesses—refers to the accident itself.

Contrary to the Department's assertion, interpreting MCL 691.1404(1) as requiring the plaintiff to list the witnesses to the accident itself does not render meaningless the requirement in MCL 691.1404(2) that the plaintiff present his or her witnesses to testify should the agency so request. Because the purpose of the notice is to investigate the claim and remedy the defect, *Burise*, 282 Mich App at 652, the ability to call those witnesses to the accident itself may assist the Department in investigating the claim and, if necessary, in remedying the defect before any similar injuries occur. The witnesses to the accident may be able to provide the Department with insight into the mechanism and severity of the injury at the accident site, thus giving the Department insight into the likelihood of reoccurrence and into the urgency of making any necessary repairs.

We find additional support in this Court's recent decision in *Streng v Bd of Mackinac Co Rd Comm'rs*, 315 Mich App 449; 890 NW2d 680 (2016). This Court has recently held that we must construe MCL 691.1404 together with MCL 224.21(3) because these statutes are *in pari materia*. *Id*. at 461-462. MCL 224.21(3) provides that the plaintiff must state the time and place where the injury occurred and "the names of any witnesses *to the accident* . . . ." (Emphasis added.) While this case does not concern county roads, we consider *Streng* to be persuasive. It would be contrary to logic to require that the plaintiff identify the witnesses to the accident when the accident occurs on county roads but not to require that the plaintiff identify additional witnesses solely because the accident occurred on a noncounty road.

Accordingly, we conclude that, under MCL 691.1404(1), "the names of the witnesses" are the

names of those persons who witnessed the occurrence. In this case, because neither Anger nor Gay witnessed the accident, MCL 691.1404(1) did not require Milot to identify them in her notice of intent.

Finally, we reject the Department's contention that the trial court inappropriately relied on *Rule v Bay City*, 12 Mich App 503; 163 NW2d 254 (1968), and we decline to address whether that case was wrongly decided. In *Rule*, this Court held that "[t]he mere presence of a person at the scene of an accident does not make that person a witness." *Id*. at 506-507. In that case, the plaintiff's daughter was in a nearby car when the plaintiff tripped; the daughter saw the plaintiff fall but did not see what caused the accident. *Id*. at 506. We need not decide whether *Rule* was correctly decided, and we decline to do so in this case. The statutory language of MCL 691.1404 supported the trial court's ruling. We need go no further to conclude that the trial court properly declined to grant summary disposition under MCR 2.116(C)(7) on the basis of a defect in Milot's notice of intent.

We affirm.

M. J. KELLY, P.J., and BECKERING, J., concurred with O'CONNELL, J.

PEOPLE v SMITH

Docket No. 328533. Submitted December 7, 2016, at Lansing. Decided December 13, 2016, at 9:00 a.m.

Chaz Smith was originally sentenced in the Eaton Circuit Court, Janice K. Cunningham, J., to 120 days in the county jail and two years' probation for breaking and entering with intent to commit a felony, MCL 750.110; first-degree retail fraud, MCL 750.356c; and resisting or obstructing a police officer, MCL 750.81d. However, the court subsequently revoked his probation and sentenced him as a second-offense habitual offender, MCL 769.10, to concurrent prison terms of 33 to 180 months for his breaking-and-entering conviction, 33 to 90 months for his first-degree retail-fraud conviction, and 24 to 36 months for his resisting-and-obstructing conviction after he pleaded guilty to violating his probation by stealing a drug test from Meijer and violating his curfew. After defendant stole the property, a police officer commanded him to stop, but defendant ran from the officer and jumped over a fence. Defendant subsequently entered a camper in the yard of a nearby home, locked the camper, and refused to come out when the police commanded him to do so. Because the owner of the camper did not have keys to unlock the camper's door, police asked and received the owner's permission to break a window to gain entry. Following his sentencing, defendant filed an application in the Court of Appeals for delayed leave to appeal, which the Court denied in an unpublished order, entered September 8, 2015. Smith sought leave to appeal in the Supreme Court, and the Supreme Court remanded the case to the Court of Appeals for consideration as on leave granted. 499 Mich 924 (2016).

The Court of Appeals *held*:

1. Under MCL 777.49(b), the sentencing court must assess 15 points for Offense Variable (OV) 19 if 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 interference with the administration of justice or the rendering of emergency services. Under MCL 777.49(c), the sentencing court must assess 10 points if the offender otherwise

interfered with or attempted to interfere with the administration of justice. In this case, defendant argued that he only should have been assessed 10 points as opposed to 15 points for OV 19 because he did not use force or the threat of force against the arresting officers. It was undisputed that defendant did not use physical force against the police officers or anyone else; however, a score of 15 points under OV 19 is required if force or the threat of force is used against the property of another. Because MCL 777.49(b) requires that the offender be the individual who uses force or the threat of force against the property of another, the force used by the police officer against the camper was not sufficient to sustain a score of 15 points under MCL 777.49(b). However, defendant did commit the crime of breaking and entering a structure with the intent to commit a felony when he entered the camper. Under MCL 750.110(1), the elements of breaking and entering a structure with the intent to commit a felony are: (1) the defendant broke into a structure, (2) the defendant entered the structure, and (3) at the time of the breaking and entering, the defendant intended to commit a felony. 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. In this case, defendant exerted force against the property of another by opening the door to the camper, he entered the camper, and he intended to commit the felony of resisting or obstructing a police officer. Accordingly, the trial court did not err by assessing 15 points for OV 19.

2. Judicial fact-finding beyond facts admitted by the defendant or found by the jury to score OVs that mandatorily increase the floor of the guidelines minimum sentence range violates the Sixth Amendment right to a jury trial. The phrase "admitted by the defendant" means formally admitted by the defendant to the court in a plea, in testimony, by stipulation, or by some similar or analogous means. In this case, defendant's sentence was not constrained by improper judicial fact-finding in violation of the Sixth Amendment because defendant admitted, while pleading guilty, that he ran from the police and broke into the camper; therefore, defendant admitted the facts necessary to support a score of 15 points for OV 19.

Affirmed.

SENTENCES — SENTENCING GUIDELINES — OFFENSE VARIABLE 19 — SCORING OFFENSE VARIABLES — INTERFERENCE WITH THE ADMINISTRATION OF JUSTICE — USE OF FORCE AGAINST PROPERTY.

Under MCL 777.49(b), the sentencing court must assess 15 points for Offense Variable 19 if 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(b) requires that the offender, not a police officer, be the individual who uses force or the threat of force against the property of another; use of any amount of force to open a door or window, no matter how slight, is sufficient under MCL 777.49(b).

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Douglas R. Lloyd*, Prosecuting Attorney, and *Brent E. Morton*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *David Herskovic*) for defendant.

Before: M. J. KELLY, P.J., and O'CONNELL and BECKERING, JJ.

M. J. KELLY, P.J. Defendant, Chaz Smith, pleaded guilty to breaking and entering with intent to commit a felony, MCL 750.110; first-degree retail fraud, MCL 750.356c; and resisting or obstructing a police officer, MCL 750.81d. In September 2014, under the terms of a sentencing agreement, Smith originally was sentenced to 120 days in the county jail and two years' probation as part of the Eaton Circuit Court's priority drug-court program. In 2015, Smith pleaded guilty to violating his probation by stealing a drug test from Meijer and violating his curfew. The trial court revoked his probation and sentenced him as a second-offense habitual offender, MCL 769.10, to concurrent prison terms of 33 to 180 months for his breaking-and-entering conviction, 33 to 90 months for his first-degree retail-fraud conviction, and 24 to 36 months for his resisting-and-obstructing conviction. Smith filed an application for

delayed leave to appeal, which we denied.[1] Smith then sought leave to appeal in our Supreme Court, and the Supreme Court remanded the case to this Court for consideration as on leave granted. *People v Smith*, 499 Mich 924 (2016). For the reasons stated in this opinion, we affirm.

I. BASIC FACTS

On May 22, 2014, Smith stole property from a Meijer store. Loss-prevention personnel saw him attempt to enter vehicles in the parking lot before heading into a residential neighborhood. A police officer searching for Smith spotted him lying in a grassy area. Smith admitted at his plea hearing that when he saw the officer, he ran. The officer commanded Smith to stop, but Smith got away by jumping over a fence. A canine unit was called in and tracked Smith to a locked camper in the yard of a nearby home. Smith admitted that he entered the camper to hide from the police. The camper's owner did not have keys to unlock the door. However, with the owner's permission, the police broke a window to gain entry. Smith did not immediately exit the camper, and when he did, he refused to comply with police commands and had to be physically taken into custody.

II. OFFENSE VARIABLE 19

A. STANDARD OF REVIEW

Smith argues that the trial court erred in assessing 15 points for Offense Variable (OV) 19. "Under the sentencing guidelines, the circuit court's factual deter-

[1] *People v Smith*, unpublished order of the Court of Appeals, entered September 8, 2015 (Docket No. 328533).

minations are reviewed for clear error and must be supported by a preponderance of the evidence." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). "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." *Id*.

B. ANALYSIS

"Our primary task in construing a statute is to discern and give effect to the intent of the Legislature." *People v Williams*, 268 Mich App 416, 425; 707 NW2d 624 (2005). "In discerning legislative intent, this Court gives effect to every word, phrase, and clause in the statute" and "must consider both the plain meaning of the critical words or phrases as well as their placement and purpose in the statutory scheme." *Id*. Further, we "must avoid a construction that would render any part of a statute surplusage or nugatory." *Id*. "If the statutory language is clear and unambiguous, then no judicial construction is necessary or permitted." *People v Campbell*, 316 Mich App 279, 298; 894 NW2d 72 (2016).

OV 19 addresses an offender's "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. In assessing points under OV 19, a court may consider the offender's conduct after the completion of the sentencing offense. *People v Smith*, 488 Mich 193, 200; 793 NW2d 666 (2010). The sentencing court must assess 15 points if:

> 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(b).]

However, the court must only assess 10 points if "[t]he offender otherwise interfered with or attempted to interfere with the administration of justice." MCL 777.49(c). "[T]he plain and ordinary meaning of 'interfere with the administration of justice' for purposes of OV 19 is to oppose so as to hamper, hinder, or obstruct the act or process of administering judgment of individuals or causes by judicial process." *People v Hershey*, 303 Mich App 330, 343; 844 NW2d 127 (2013). Moreover, "OV 19 is generally scored for conduct that constitutes an attempt to avoid being caught and held accountable for the sentencing offense." *People v Sours*, 315 Mich App 346, 349; 890 NW2d 401 (2016).

Hiding from the police constituted an interference with the administration of justice because it was done for the purpose of hindering or hampering the police investigation. See *Hershey*, 303 Mich App at 343. Smith concedes that his actions interfered with the administration of justice; however, he argues that because he did not use force or the threat of force *against the arresting officers* in the process, he should only have been assessed 10 points under MCL 777.49(c). We have previously determined that an offender's threat to kill his or her victim to prevent the victim from reporting a crime would warrant a score of 15 points for OV 19. *People v McDonald*, 293 Mich App 292, 300; 811 NW2d 507 (2011). Moreover, it is axiomatic that an offender's actual use of force, such as restraining or physically harming a victim, would also justify a score of 15 points if the force was used to prevent the victim from reporting a crime. See *People v Passage*, 277 Mich App 175, 179-181; 743 NW2d 746 (2007) (upholding a score of 15 points when the of-

fender physically struggled with loss-prevention personnel and attempted to kick them). In this case, it is undisputed that Smith did not use physical force against either the police officers or anyone else. However, a score of 15 points under OV 19 is not only required when force or the threat of force is used against a person. It is also required if force or the threat of force is used against the property of another.

We have not had occasion to determine what actions constitute the use or threatened use of force against the property of another for purposes of scoring OV 19. The prosecutor argues that Smith's decision to hide in the camper and his refusal to come out of the camper when the police commanded him to do so resulted in the destruction of the camper window by the police. However, the statute plainly requires that the offender, not the police, must be the individual who uses force or the threat of force against the property of another. MCL 777.49(b). Therefore, the force used by the police officer against the camper is not sufficient to sustain a score of 15 points under MCL 777.49(b).

The word "force" is defined, in relevant part, as "strength or energy exerted or brought to bear : cause of motion or change[.]" *Merriam-Webster's Collegiate Dictionary* (11th ed). Therefore, if an offender threw a victim's cell phone into a lake, such action necessarily would involve the use of force against the property of another. Likewise, if the offender threatened to throw a victim's cell phone into the lake, then the action would involve the threatened use of force against the property of another. In either case, if the reason for the offender's action was to prevent or discourage the victim from reporting a crime, then the offender's actions would constitute interference with the administration of justice that would justify a score of 15 points under OV 19.

Although Smith did not threaten a victim's property or physically destroy the camper in which he hid, he committed the crime of breaking and entering a structure with the intent to commit a felony when he entered the camper. The elements of breaking and entering a structure with the intent to commit a felony are: (1) the defendant broke into a structure, (2) the defendant entered the structure, and (3) at the time of the breaking and entering, the defendant intended to commit a felony. MCL 750.110(1).[2] "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." *People v Toole*, 227 Mich App 656, 659; 576 NW2d 441 (1998). Therefore, when Smith broke into the camper, he exerted force against the property of another by opening the door.[3] Accordingly, the trial court did not err in assessing 15 points for OV 19.[4]

III. JUDICIAL FACT-FINDING

A. STANDARD OF REVIEW

Smith next argues that his sentence was improperly inflated by judicial fact-finding in violation of the Sixth Amendment. We review de novo whether a defendant's

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[2] In this case, the felony Smith intended to commit inside the camper was resisting or obstructing a police officer.

[3] See also *People v Pierce*, 272 Mich App 394, 398; 725 NW2d 691 (2006) ("[B]y its nature, breaking and entering involves the use of physical force, or the substantial risk that physical force may be used, against the property of another in the commission of the offense.").

[4] Because we conclude that the trial court did not err in scoring OV 19, we need not address Smith's argument that his trial lawyer provided ineffective assistance when he failed to object to the scoring of OV 19 on the grounds raised on appeal. See *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000).

sentence violates the Sixth Amendment. *People v Lockridge*, 498 Mich 358, 373; 870 NW2d 502 (2015).

B. ANALYSIS

In *Lockridge*, our Supreme Court held that Michigan's sentencing scheme violated the Sixth Amendment right to a jury trial to the extent that it requires "judicial fact-finding beyond facts admitted by the defendant or found by the jury to score offense variables (OVs) that *mandatorily* increase the floor of the guidelines minimum sentence range . . . ." *Id*. at 364. As used in *Lockridge*, the phrase "admitted by the defendant" means "*formally* admitted by the defendant *to the court* in a plea, in testimony, by stipulation, or by some similar or analogous means." *People v Garnes*, 316 Mich App 339, 344; 891 NW2d 285 (2016). In this case, while pleading guilty, Smith admitted that he ran from the police after stealing property from Meijer and that he broke into the camper in order to hide from the police. Thus, the facts necessary to support a score of 15 points were admitted by Smith, and his sentence was not constrained by improper judicial fact-finding in violation of the Sixth Amendment.

Affirmed.

O'CONNELL and BECKERING, JJ., concurred with M. J. KELLY, P.J.

PEOPLE v JOSE

Docket No. 328603. Submitted December 8, 2016, at Detroit. Decided December 13, 2016, at 9:05 a.m.

Terrence L. Jose was convicted following a jury trial in the Oakland Circuit Court, Daniel P. O'Brien, J., of first-degree criminal sexual conduct. Defendant appealed his conviction and moved to remand his case for an evidentiary hearing on his claim that he received ineffective assistance of counsel. The Court of Appeals granted defendant's motion to remand in an unpublished order, entered January 2, 2013 (Docket No. 311478). The circuit court subsequently granted defendant's motion for a new trial on the basis of ineffective assistance of counsel. The prosecution sought leave to appeal, and the Court of Appeals denied the prosecution's application in an unpublished order, entered September 20, 2013 (Docket No. 317688). The Supreme Court also denied the prosecution's application for leave to appeal. 495 Mich 939 (2014). The circuit court appointed an attorney to represent defendant on retrial, and the order appointing counsel provided "that Defendant is to repay the County of Oakland for any costs for a Court-appointed attorney and any other costs incurred by the County in this case." The prosecution decided not to proceed with a retrial and voluntarily dismissed the charge, which was reflected in the docket entries by a *nolle prosequi* order. On August 14, 2014, the circuit court entered an order paying defendant's appointed counsel $900 for the work he performed representing defendant before retrial. Defendant subsequently received notices stating that he owed the county $900 for the cost of his court-appointed counsel, and defendant moved to vacate the circuit court's order requiring that he reimburse the county for that cost. The circuit court denied defendant's motion, and defendant appealed.

The Court of Appeals *held*:

1. MCL 768.34 provides that no prisoner or person under recognizance who shall be acquitted by verdict or discharged because no indictment has been found against him, or for want of prosecution, shall be liable for any costs or fees of office or for any charge for subsistence while he was in custody. In this case, defendant was a person under recognizance after being released on

bond pending appeal, and he was discharged for want of prosecution given that the prosecution declined to proceed to trial and instead filed a *nolle prosequi*. Therefore, pursuant to the plain language of MCL 768.34, defendant was not liable for any costs. The clear statutory directive contained in MCL 768.34 precludes a trial court from ordering reimbursement of any costs—including the cost of court-appointed counsel—for a defendant whose prosecution is suspended or abandoned. Accordingly, the trial court erred when it failed to vacate its August 14, 2014 order requiring defendant to reimburse the county.

2. Contrary to the prosecution's argument that MCL 768.34 is directed at reimbursement of the costs of incarceration, not attorney fees, the plain statutory language of MCL 768.34 provides that the statute applies to three types of reimbursement: costs, fees of office, or charges for subsistence. The statute sets these three types of costs apart, which shows that they are to be treated separately. Only the last of these three—charges for subsistence—involves costs associated with a defendant's incarceration, and defendant was not ordered to reimburse the charges associated with his subsistence during his incarceration; he was ordered to reimburse the costs of his appointed counsel. Under the plain statutory language, the trial court was forbidden to assess any costs against defendant, who was discharged after the prosecution decided not to pursue the charges.

3. MCR 6.005(C) provides that if a defendant is able to pay part of the cost of a lawyer, the court may require contribution to the cost of providing a lawyer and may establish a plan for collecting the contribution. There is a difference between an order for contribution (which suggests an ongoing obligation during the term of the appointment) and an order for reimbursement (which suggests an obligation arising after the term of appointment has ended). MCL 768.34 forbids reimbursement, and in this case, the court never determined that defendant was able to pay part of the cost of a lawyer and never required contribution under MCR 6.005(C). Accordingly, there was no authority for the court to order reimbursement pursuant to MCR 6.005(C).

Trial court's June 3, 2015 order reversed; case remanded for the trial court to enter an order vacating the August 14, 2014 order that required defendant to reimburse the county for attorney fees.

1. COSTS — IMPOSITION OF COURT COSTS — COURT-APPOINTED COUNSEL — REIMBURSEMENT.

MCL 768.34 provides that no prisoner or person under recognizance who shall be acquitted by verdict or discharged because no

indictment has been found against him, or for want of prosecution, shall be liable for any costs or fees of office or for any charge for subsistence while he was in custody; the clear statutory directive contained in MCL 768.34 precludes a trial court from ordering reimbursement of any costs—including the cost of court-appointed counsel—for a defendant whose prosecution is suspended or abandoned.

2. COSTS — IMPOSITION OF COURT COSTS — COURT-APPOINTED COUNSEL — REIMBURSEMENT.

MCL 768.34 provides that the statute applies to three types of reimbursement: costs, fees of office, or charges for subsistence; the statute sets these three types of costs apart, which shows that they are to be treated separately.

3. COSTS — IMPOSITION OF COURT COSTS — COURT AUTHORITY — ORDER REQUIRING CONTRIBUTION.

MCR 6.005(C) provides that if a defendant is able to pay part of the cost of a lawyer, the court may require contribution to the cost of providing a lawyer and may establish a plan for collecting the contribution; there is a difference between an order for contribution (which suggests an ongoing obligation during the term of the appointment) and an order for reimbursement (which suggests an obligation arising after the term of appointment has ended); MCR 6.005(C) does not give the court authority to order reimbursement.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, and *Ahmad M. Roby*, Assistant Oakland County Corporation Counsel, for the people.

State Appellate Defender (by *Brett DeGroff*) for defendant.

Before: SAAD, P.J., and METER and MURRAY, JJ.

MURRAY, J. Defendant was granted leave to appeal[1] the June 3, 2015 order of the Oakland Circuit Court

[1] *People v Jose*, unpublished order of the Court of Appeals, entered February 1, 2016 (Docket No. 328603).

that denied defendant's motion to vacate an August 14, 2014 order requiring defendant to reimburse Oakland County for the costs of assigned counsel. We reverse the June 3, 2015 order and remand for the trial court to enter an order vacating the August 14, 2014 order, as defendant is not required to reimburse the county for attorney fees.

I. BACKGROUND

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct. Defendant was accused of digitally penetrating his five-year-old daughter, who lived with defendant's former girlfriend. There was no physical evidence of penetration, and defendant denied the accusations and argued that his former girlfriend convinced the child to falsely accuse him. Defendant's trial counsel attempted to establish that the former girlfriend was still bitter about breaking up with defendant, but counsel was unsuccessful in an attempt to confront her with hostile cell phone text messages that she apparently sent to defendant. On cross-examination, the former girlfriend simply denied sending defendant any text messages, and defendant's trial counsel neither obtained any of her telephone records in advance of trial nor managed to get the text messages admitted into evidence.

Defendant appealed his conviction and moved to remand his case for a *Ginther*[2] hearing, which this Court granted on January 2, 2013.[3] The circuit court granted defendant's motion for a new trial, concluding that trial counsel's failure to properly authenticate the hostile text messages and get them admitted as evi-

[2] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

[3] *People v Jose*, unpublished order of the Court of Appeals, entered January 2, 2013 (Docket No. 311478).

dence denied defendant the effective assistance of trial counsel.[4] We subsequently denied the prosecutor's application for leave to appeal,[5] as did our Supreme Court.[6]

On February 25, 2014, the circuit court appointed Todd Kaluzny to represent defendant on retrial. Relevant to this appeal, the order states "that Defendant is to repay the County of Oakland for any costs for a Court-appointed attorney and any other costs incurred by the County in this case." The prosecutor subsequently decided not to proceed with a retrial and voluntarily dismissed the charge, which is reflected in the circuit court docket entries by a "final nolle prosequi" on August 7, 2014, and the filing of an "order — nolle prosequi" on December 5, 2014.[7] Importantly, on August 14, 2014, the circuit court entered an order paying defendant's appointed trial counsel $900 for the work he performed representing defendant before retrial.

Although defendant was free from criminal charges and released from custody, he received notices stating that he owed the county $900 for the cost of his court-appointed counsel. Relying upon MCL 768.34, defendant moved to vacate the circuit court's order requiring that he reimburse the county for the cost of his court-appointed counsel, arguing that someone who had charges dismissed through *nolle prosequi* was

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[4] Defendant withdrew his appeal in Docket No. 311478 after the circuit court granted his motion for a new trial. *People v Jose*, unpublished order of the Court of Appeals, entered September 20, 2013 (Docket No. 311478).

[5] *People v Jose*, unpublished order of the Court of Appeals, entered September 20, 2013 (Docket No. 317688).

[6] *People v Jose*, 495 Mich 939 (2014).

[7] Capitalization altered.

not required to reimburse the county for the cost of appointed counsel. The circuit court denied defendant's motion.

II. ANALYSIS

Defendant's sole argument is that, pursuant to the plain language of MCL 768.34, the trial court erred by refusing to vacate its order requiring defendant to reimburse the county for the cost of his appointed counsel. Defendant presents a preserved issue of statutory interpretation that we review de novo. *People v Hartwick*, 498 Mich 192, 209; 870 NW2d 37 (2015).

Both parties agree that defendant's claim requires interpretation of a statute. As our Supreme Court stated in *People v Miller*, 498 Mich 13, 22-23; 869 NW2d 204 (2015):

> As with any statutory interpretation, we must give effect to the Legislature's intent by focusing first on the statute's plain language. When statutory language is clear and unambiguous, we assume that the Legislature intended its plain meaning and we enforce the statute as written. [Citations omitted.]

The statute at issue in this case is MCL 768.34, which provides:

> No prisoner or person under recognizance who shall be acquitted by verdict or discharged because no indictment has been found against him, or for want of prosecution, shall be liable for any costs or fees of office or for any charge for subsistence while he was in custody.

As applied to defendant, the operative words of the statute may be stated as follows: "No prisoner or person under recognizance who shall be . . . discharged . . . for want of prosecution, shall be liable for any costs . . . ." This straightforward language applies

directly to defendant's situation, as after being released on bond pending retrial, he was a "person under recognizance."[8] He was subsequently "discharged . . . for want of prosecution" because the prosecutor declined to proceed to trial and instead filed a *nolle prosequi*.[9] Therefore, pursuant to the plain language of MCL 768.34, defendant was not "liable for *any* costs." (Emphasis added.)

As we recognized in *People v Nowicki*, 213 Mich App 383, 387; 539 NW2d 590 (1995), a court's authority to require reimbursement of the expense of court-appointed counsel has been a settled matter since at least 1970. See also *People v Bohm*, 393 Mich 129, 130 (1974); *Davis v Oakland Circuit Judge*, 383 Mich 717, 720; 178 NW2d 920 (1970); *People v LaPine*, 63 Mich

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[8] "[A] recognizance is a common law obligation, and by the common law the sureties may be bound separately from their principal[.]" *People v Dennis*, 4 Mich 609, 615 (1857). Also, "[a] recognizance is said to be an obligation of record, with condition to be void on performance of some act specified. It is entered into either before some court of record, or before a magistrate out of court, and afterwards enrolled in a court of record . . . . If the condition was the performance of some act in court—as to appear and answer, or to give evidence, or prosecute—the breach is to be adjudged by the court and entered of record when it occurs . . . . A recognizance binding a party to appear in court, is said to be forfeited if he fail to appear, be the cause of his absence what it may[.]" *Lang v People*, 14 Mich 439, 442-443 (1866).

[9] "In Michigan, normally nolle prosequi is a dismissal without prejudice which does not preclude initiation of a subsequent prosecution." *People v McCartney*, 72 Mich App 580, 585; 250 NW2d 135 (1976), citing *People v Reagan*, 395 Mich 306, 317; 235 NW2d 581 (1975). In order to obtain a *nolle prosequi*, the prosecutor must state on the record the reasons for seeking such an order. *People v Glass (After Remand)*, 464 Mich 266, 278; 627 NW2d 261 (2001). In the petition for *nolle prosequi*, the prosecutor stated that after meeting with the witnesses in preparation for the retrial, it was learned that the minor victim did not want to proceed to trial again, and without her testimony, the prosecutor could not sustain the burden of proof. Based on this representation, the court granted the petition and entered an order of *nolle prosequi* dismissing the case.

App 554, 556-558; 234 NW2d 700 (1975).[10] But as we noted in *People v Lavan*, 53 Mich App 220, 222; 218 NW2d 797 (1974), a case in which an acquitted defendant attempted to rely on MCL 768.34 as authority for an *award* of costs and fees, "[t]he statute merely states that an acquitted person cannot be made to pay for the administrative expenses incurred by the state in the prosecution of the case against him. It does not grant defendant the power to have his costs taxed to the state."

We hold that the clear statutory directive contained in MCL 768.34 precludes a trial court from ordering reimbursement of any costs—including the cost of court-appointed counsel—for a defendant whose prosecution is suspended or abandoned. Because that is what occurred here, the trial court erred when it failed to vacate its August 14, 2014 order requiring defendant to reimburse the county.

The prosecutor alternatively argues that there was authority for the court to order reimbursement pursuant to MCR 6.005(C). This court rule relates to the appointment of counsel for indigent defendants and provides:

> Partial Indigency. If a defendant is able to pay part of the cost of a lawyer, the court may require contribution to the cost of providing a lawyer and may establish a plan for collecting the contribution.

We recognized in *Nowicki* that there is a difference between an order for contribution to the cost of a court-appointed attorney by a defendant who is only

[10] The Legislature subsequently amended MCL 769.1k in 2005 to specifically provide authority for a trial court to order reimbursement for the expenses of providing legal assistance to the defendant as part of the sentence. MCL 769.1k(1)(b)(*iii*). See generally *People v Cunningham*, 496 Mich 145, 151-152; 852 NW2d 118 (2014).

partially indigent as a condition for the appointment of the attorney and reimbursement of the cost of an appointed attorney following a defendant's conviction:

> MCR 6.005(C) provides for a defendant's contribution to the cost of providing a lawyer where the defendant "is able to pay part of the cost of a lawyer." However, the 1989 staff comment to MCR 6.005(C) provides that "[t]his subrule pertains to contribution and should not be construed as authorizing subsequent reimbursement." This subrule is based on 1 ABA Standards for Criminal Justice (2d ed), Standard 5-6.2: "The ability to pay part of the cost of adequate representation should not preclude eligibility." See 1989 staff comment. Before the adoption of this court rule, the Michigan Supreme Court adopted § 6.2 (Partial Eligibility) of the ABA Standards relating to Providing Defense Services in addressing the problem of representation of an individual who, although perhaps "not impecunious, [is nevertheless] indigent insofar as ability to hire a competent lawyer." [*People v*] *Bohm*, [393 Mich] at 130. Rather than preclude eligibility, the Court held that the defendant was entitled to counsel. *Id*. We believe MCR 6.005(C) addresses this concern and accordingly provides for contribution by a defendant "able to pay part of the cost of a lawyer." However, this subsection does not preclude trial courts from ordering subsequent reimbursement of expenses paid for court-appointed counsel. [*Nowicki*, 213 Mich App at 386-387 n 3.]

Thus, we have differentiated between an order for "contribution" (which suggests an ongoing obligation during the term of the appointment) and "reimbursement" (which suggests an obligation arising after the term of appointment has ended).[11] The applicable stat-

[11] The dictionary definitions of "contribution" are: (1) "a payment (as a levy or tax) imposed by military, civil, or ecclesiastical authorities usu. for a special or extraordinary purpose" and (2) "the act of contributing[.]" *Merriam-Webster's Collegiate Dictionary* (11th ed). By way of contrast, the definitions of "reimburse" are: (1) "to pay back to someone : REPAY" and (2) "to make restoration or payment of an equivalent to[.]" *Id*.

ute, MCL 768.34, forbids reimbursement, and the trial court ordered "that Defendant is to repay the County of Oakland for any costs for a Court-appointed attorney and any other costs incurred by the County in this case." The court never determined that defendant was "able to pay part of the cost of a lawyer" and never "require[d] contribution." MCR 6.005(C).

Finally, we reject the prosecutor's argument that the statute is directed at reimbursement of the costs of incarceration, not attorney fees. This argument cannot be squared with the plain statutory language, which states that the statute applies to three types of reimbursement: costs, fees of office, or charges for subsistence. MCL 768.34. It is only the last of these three that involves the costs associated with a defendant's incarceration, and the fact that the statute sets these three types of costs apart shows that they are to be treated separately. Defendant was not ordered to pay back the charges associated with his subsistence during his incarceration; he was ordered to reimburse the costs of his appointed counsel. This is clearly the first of the three types of assessments—a type of "cost"—and under the plain statutory language, the trial court was forbidden to assess *any* costs against a defendant who was discharged after the prosecution decided to no longer pursue the charges.

We reverse the June 3, 2015 order and remand for the trial court to enter an order vacating the August 14, 2014 order that required defendant to reimburse the county for attorney fees. We do not retain jurisdiction.

SAAD, P.J., and METER, J., concurred with MURRAY, J.

PORT SHELDON BEACH ASSOCIATION v DEPARTMENT OF ENVIRONMENTAL QUALITY

Docket No. 328483. Submitted December 7, 2016, at Lansing. Decided December 13, 2016, at 9:10 a.m. Leave to appeal denied 500 Mich 1022.

Port Sheldon Beach Association (the Association) brought an action against the Department of Environmental Quality (the DEQ) in the Court of Claims, arguing that the western lakeward boundary of its critical dune area (CDA) was a fixed boundary line, and thus the new sand that had accreted to the west of that fixed boundary was not subject to the sand dune protection and management act (SDPMA), MCL 324.35301 *et seq*., because that new area was not part of the CDA. The Association owned three undeveloped beach parcels between the developed, residential portion of its summer resort and the shore of Lake Michigan; the western border of the Association's properties was on Lake Michigan. Since 1989, the shoreline of Lake Michigan has moved considerably farther out to the west, and the Association wanted to remove dune grass and groom a portion of the new sand that had accreted, but the Association was advised by the DEQ that it could not do so because the area was within the CDA. All three of the Association's parcels bordering Lake Michigan were undisputedly subject to the SDPMA, which regulates sand dune mining in designated sand dune areas near the Great Lakes shoreline. A CDA is a geographic area designated in the 1989 Atlas of Critical Dune Areas (the 1989 Atlas), which is a collection of maps, organized by township, with each map showing the location of the CDAs for that township. A map of Port Sheldon Township is included in the 1989 Atlas, and the issue in this case was whether the western border of the CDA as depicted on the Port Sheldon Township map was a fixed boundary line or a meander line. Both parties moved for summary disposition. The Court of Claims, CYNTHIA D. STEPHENS, J., granted summary disposition in favor of the DEQ, concluding that the map was drawn to show that the area designated by the atlas as a CDA extended to the water's edge, which appeared to be a meander line along the lake. The Association filed a motion for reconsideration, which was denied. The Association appealed.

The Court of Appeals *held*:

1. A meander line does not constitute a boundary line; a meander line is an artificial line that describes the "meandering" course of a body of water and indicates that the boundary is the water's edge. If a surveyor does not use a meander line, the boundary line is fixed and constant. The SDPMA, MCL 324.35301 *et seq*., provides that certain areas of Michigan are CDAs, and MCL 324.35301(c) defines CDA as a geographic area designated in the 1989 Atlas. In this case, the statutory language was silent with regard to whether the western border on the Port Sheldon Township map was meant to be a fixed boundary or whether it was meant to be treated as a meander line; however, the Legislature incorporated the 1989 Atlas into the statute, and the statute contains a map depicting the boundary lines for the CDA at issue in this case. Review of the maps contained in the 1989 Atlas showed three situations. First, like the Port Sheldon Township map, the overwhelming majority of the township maps showed that the lakeward line was precisely the same as the shoreline of the bordering Great Lake. Second, for a number of township maps, there was some land between the boundary line between the CDA and the shoreline of the bordering Great Lake. Finally, in a few townships, the lakeward boundary line extended beyond the shoreline and slightly into the water of the bordering Great Lake. From this review, it was plain that the Legislature expressly intended that the CDAs would not extend to the water's edge in particular instances, whereas in other situations the CDA was intended to be on the water's edge or beyond the water's edge. Because the Port Sheldon Township map unambiguously showed that the lakeward boundary extended to the water's edge, it was plain that the Legislature did not intend the lakeward boundary line to be fixed but instead intended it to be at the water's edge.

2. MCL 324.35311 provides, in relevant part, that the DEQ may review the 1989 Atlas, evaluate the accuracy of the designations of CDAs, and recommend to the Legislature any changes or underlying criteria revisions to the 1989 Atlas that would provide more precise protection to the targeted resource. The DEQ has no authority under MCL 324.35311 to adjust a CDA's boundaries; MCL 324.35311 merely allows qualified experts appointed by the DEQ to recommend that the Legislature make changes, and the Legislature is under no obligation to accept the changes.

3. MCL 324.35312(3) provides, in relevant part, that a local unit of government may regulate additional lands as CDAs if the lands are determined by the local unit of government to be essential to the hydrology, ecology, topography, or integrity of a

CDA and that the local unit of government shall provide within its zoning ordinance for the protection of lands that are within 250 feet of a CDA if those lands are determined by the local unit of government to be essential to the hydrology, ecology, topography, or integrity of a CDA. The "additional lands" that can be regulated are limited only by the requirement that they are essential to a CDA. Those lands do not have to be within 250 feet or within any range; their protection is identical to the protection afforded to a CDA so long as they are essential to a CDA. If the local unit unilaterally determines that lands within 250 feet of a CDA are essential to the CDA, then "the protection" in the local zoning ordinance is triggered. Only lands within 250 feet of a CDA can receive protection, the extent of which is established in the zoning ordinance. Finally, the 250-foot limit extends around the entire boundary of the CDA.

4. MCL 324.35312(4) authorizes the DEQ to regulate "additional lands" from MCL 324.35312(3) if a local unit lacks an approved zoning ordinance. However, the Subsection (4) "additional lands" cannot extend more than 250 feet from the landward boundary (as opposed to the lakeward boundary) of a CDA unless the local unit authorizes further extension. MCL 324.35312(4) also permits the DEQ to regulate "additional land" not extending more than 250 feet from the landward boundary of a CDA if it determines that the 1989 Atlas contains an inaccurately mapped CDA. Because Subsection (4) only allows an extension from the *landward* boundary, the DEQ cannot add land on the *lakeward* boundary under the guise of "extending" the landward boundary towards the shore.

Affirmed.

1. WATERS AND WATERCOURSES — BOUNDARIES — MEANDER LINES.

A meander line does not constitute a boundary line; a meander line is an artificial line that describes the "meandering" course of a body of water and indicates that the boundary is the water's edge.

2. WATER AND WATERCOURSES — BOUNDARIES — DESIGNATION OF CRITICAL DUNE AREAS.

MCL 324.35311 provides, in relevant part, that the Department of Environmental Quality (the DEQ) may review the 1989 Atlas of Critical Dune Areas (the 1989 Atlas), evaluate the accuracy of the designations of critical dune areas (CDAs), and recommend to the Legislature any changes or underlying criteria revisions to the 1989 Atlas that would provide more precise protection to the targeted resource; the DEQ has no authority under

MCL 324.35311 to adjust a CDA's boundaries; MCL 324.35311 merely allows qualified experts appointed by the DEQ to recommend that the Legislature make changes, and the Legislature is under no obligation to accept the changes.

3. WATER AND WATERCOURSES — BOUNDARIES — DESIGNATION OF CRITICAL DUNE AREAS — REGULATION OF ADDITIONAL LANDS.

The "additional lands" that can be regulated as critical dune areas (CDAs) under MCL 324.35312(3) are limited only by the requirement that they are essential to a CDA; those lands do not have to be within 250 feet or within any range; their protection is identical to the protection afforded to a CDA so long as they are essential to a CDA; if the local unit unilaterally determines that lands within 250 feet of a CDA are essential to the CDA, then "the protection" in the local zoning ordinance is triggered; only lands within 250 feet of a CDA can receive protection, the extent of which is established in the zoning ordinance; the 250-foot limit extends around the entire boundary of the CDA.

4. WATER AND WATERCOURSES — BOUNDARIES — DESIGNATION OF CRITICAL DUNE AREAS — REGULATION OF ADDITIONAL LANDS — LANDWARD BOUNDARIES.

MCL 324.35312(4) authorizes the Department of Environmental Quality (the DEQ) to regulate "additional lands" from MCL 324.35312(3) if a local unit lacks an approved zoning ordinance; the Subsection (4) "additional lands" cannot extend more than 250 feet from the landward boundary (as opposed to the lakeward boundary) of a critical dune area (CDA) unless the local unit authorizes further extension; MCL 324.35312(4) also permits the DEQ to regulate "additional land" not extending more than 250 feet from the landward boundary of a CDA if it determines that the 1989 Atlas contains an inaccurately mapped CDA; because Subsection (4) only allows an extension from the *landward* boundary, the DEQ cannot add land on the *lakeward* boundary under the guise of "extending" the landward boundary toward the shore.

William J. Heaphy for Port Sheldon Beach Association.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Jaclyn S. Levine*, Assistant Attorney General, for the Department of Environmental Quality.

Before: M. J. KELLY, P.J., and O'CONNELL and BECKERING, JJ.

PER CURIAM. In this case involving the boundary of a critical dune area, plaintiff, Port Sheldon Beach Association (the Association), appeals as of right a Court of Claims order granting summary disposition in favor of defendant, the Department of Environmental Quality (the DEQ), under MCR 2.116(C)(10) (no genuine issue of material fact) and (I)(2) (opposing party entitled to judgment). For the reasons stated in this opinion, we affirm.

I. BASIC FACTS

The Association is a nonprofit corporation organized and operated as a summer resort and park association pursuant to MCL 455.1 *et seq*. Located in Port Sheldon Township, the Association owns three undeveloped beach parcels between the developed, residential portion of its resort and the shore of Lake Michigan. The western border of the Association's properties is on Lake Michigan. All three of the Association's parcels bordering Lake Michigan are undisputedly subject to the sand dune protection and management act (SDPMA), MCL 324.35301 *et seq*.

The SDPMA was enacted in 1976 to regulate sand dune mining in designated sand dune areas near the Great Lakes shoreline. 1976 PA 222, enacting MCL 281.651 to MCL 281.664, recodified at MCL 324.63701 to MCL 324.63714.[1] Relevant to this appeal, the

[1] The Legislature amended the original SDPMA in 1989 to regulate other activities within the sand dune areas (in addition to mining). 1989 PA 146; 1989 PA 147. Further amendment of the SDPMA occurred in 1994. 1994 PA 135. That same year, all environmental protection acts, including the SDPMA, were recodified into the Natural Resources and

SDPMA provides that certain areas of Michigan are critical dune areas (CDAs). The act defines the term CDA as "a geographic area designated in the 'atlas of critical dune areas' dated February 1989 . . . ." MCL 324.35301(c). The 1989 Atlas of Critical Dune Areas (the 1989 Atlas) is essentially a collection of maps, organized by township, with each map showing the location of the CDAs for that township. At issue in this case is the CDA located in Port Sheldon Township, which is shown on the Port Sheldon Township map in the 1989 Atlas.[2] According to the Association, since 1989 the shoreline of Lake Michigan has moved considerably farther out to the west, by at least 150 feet, and the change in the shoreline is not from reliction (recession of water) but from the beach growing by

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Environmental Protection Act, MCL 324.101 *et seq*. 1994 PA 451. The recodification resulted in the bifurcation of the SDPMA, with the provisions concerning the regulation of these new activities becoming Part 353, the sand dune protection and management act, MCL 324.35301 *et seq*., and the provisions concerning the regulation of mining becoming Part 637, the sand dune mining act, MCL 324.63701 *et seq*.

[2] An index of the maps contained in the 1989 Atlas is available online. DEQ, *Atlas of Critical Dunes - Township Maps of Critical Dune Areas* <https://www.michigan.gov/deq/0,4561,7-135-3311_4114_4236-70207--,00.html> (accessed December 2, 2016) [https://perma.cc/9ZGS-CNJT]. There is also a statewide map showing the distribution of all the CDAs. DEQ, *Political Townships Containing Designated Critical Dune Areas* <https://www.michigan.gov/documents/deq/lwm_sanddunes_statewide_CDA_262858_7.pdf> (accessed December 2, 2016) [https://perma.cc/AN97-2LGC]. The Port Sheldon Township map can be viewed online. DEQ, *Port Sheldon Township Critical Dune Areas* <https://www.michigan.gov/documents/deq/sanddunes_port_sheldon_twp_262823_7.pdf> (accessed December 2, 2016) [https://perma.cc/QD82-QEPG]. The lines encompassing the CDAs in the 1989 Atlas were hand drawn on Michigan Resource Information System base maps. Michigan Geographic Data Library, Center for Geographic Information, *Critical Dune Area - Statewide* <http://www.mcgi.state.mi.us/mgdl/Critical_Dunes/metadata/critical_dune.htm> (accessed December 2, 2016) [https://perma.cc/8VPP-8Y4X].

accretion.[3] The Association wanted to remove dune grass and groom a portion of its property, but the Association was advised by the DEQ that it could not do so because the area was within the CDA.

In December 2014, the Association filed the instant suit. The parties moved for summary disposition. The Association argued that the western boundary, i.e., the lakeward boundary, of the CDA was fixed, and thus the new sand that had accreted to the west of that fixed boundary was not subject to the SDPMA because it was not part of the CDA. The DEQ argued that the CDA boundary extends to the shore of Lake Michigan, and as a result, the "new" accreted land in the gap between the "old" shoreline in the 1989 Atlas and the current shoreline of Lake Michigan is subject to the SDPMA.

The Court of Claims granted summary disposition in the DEQ's favor, reasoning as follows:

> This Court agrees with [the DEQ's] interpretation of the atlas as incorporated into MCL 324.35301(c); the Court is not persuaded that the atlas designated a CDA with a fixed western edge on the shoreline. The map is drawn to show that the area designated by the atlas as CDA extends to the water's edge. The edge of the CDA as depicted appears like a meander line along the lake. "When a plat shows a lot is bounded by the meander line of a lake, the grant of land is to the water's edge." *Mumaugh v McCarley*, 219 Mich App 641, 649; 558 NW2d 433 (1996), citing *Gregory v LaFaive*, 172 Mich App 354, 361; 431 NW2d 511 (1988). In a similar way, where the

[3] The Association asserts that the accretion was caused by jetties built in the mid-1960s that start at the mouth of the Pigeon Lake channel and extend out into Lake Michigan. As sand drifts along the shoreline, the sand becomes trapped by the jetties and accumulates. Regardless of whether the accretion was caused by jetties or by some other means, it is undisputed that the shoreline has been extended since the 1989 Atlas was incorporated into the SDPMA.

> atlas used a meander line with respect to the CDA, the designated CDA extends to the water's edge, even as the waterline fluctuates.

The Association filed a motion for reconsideration, which was denied. This appeal followed.

II. BOUNDARY OF THE CRITICAL DUNE AREA

A. STANDARD OF REVIEW

The Association argues that the lower court erred by granting summary disposition in favor of the DEQ. A trial court's decision whether to grant a motion for summary disposition is reviewed de novo, *Brown v Brown*, 478 Mich 545, 551; 739 NW2d 313 (2007), and the proper interpretation of a statute is a question of law that this Court also reviews de novo, *Burleson v Dep't of Environmental Quality*, 292 Mich App 544, 548; 808 NW2d 792 (2011). Although an agency interpretation of a statute is not binding on this Court, "the construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration and ought not to be overruled without cogent reasons." *Id*. (citation and quotation marks omitted).

B. ANALYSIS

The issue is whether the western border of the CDA as depicted on the Port Sheldon Township map is a fixed boundary line or a meander line.[4] Resolution of the issue requires us to interpret the SDPMA and,

[4] Although cases discussing meander lines typically do so in relation to a property conveyance to determine whether the property conveyed includes riparian rights, it is equally applicable in this case in which a survey of the dunes was performed, and the relevant map shows Lake Michigan to be one of the boundaries.

more specifically, the Port Sheldon Township map that is incorporated into the statute by virtue of its inclusion in the 1989 Atlas. A meander line does not constitute a boundary line. It is an artificial line that describes the "meandering" course of a body of water (typically a river or stream, but also a lake's shoreline), and it indicates that the boundary is the water's edge. See *Farabaugh v Rhode*, 305 Mich 234, 242; 9 NW2d 562 (1943) ("[T]he meander line of Lake Michigan is a line of description and not one of boundary . . . ."); *Hilt v Weber*, 252 Mich 198, 208-209; 233 NW 159 (1930). If a surveyor does not use a meander line, the boundary line is fixed and constant. See *Black's Law Dictionary* (9th ed) (defining "meander line"). Therefore, if the western line of the CDA as depicted on the Port Sheldon Township map is a meander line, then the water's edge of Lake Michigan is the true western boundary of the CDA. *Porter v Selleck*, 236 Mich 655, 661; 211 NW 261 (1926) ("It has been decided again and again that the meander line is not a boundary, but that the body of water whose margin is meandered is the true boundary.") (citation and quotation marks omitted). Conversely, if the line is a fixed boundary line, then the strip of land between the line depicted on the Port Sheldon Township map and the water's edge is not part of the CDA and is accordingly not subject to the SDPMA.

The primary goal of statutory interpretation is to identify and give effect to the intent of the Legislature. *Booker v Shannon*, 285 Mich App 573, 575; 776 NW2d 411 (2009). We first look to the specific language of the statute in determining the intent of the Legislature. *People v Droog*, 282 Mich App 68, 70; 761 NW2d 822 (2009). In this case, the statutory language is silent with regard to whether the western border on the Port Sheldon Township map is meant to be a fixed boundary

or whether it is meant to be treated as a meander line. However, the Legislature incorporated the 1989 Atlas into the statute, and the statute contains a map depicting the boundary lines for the CDA at issue in this case. "When interpreting deeds and plats, Michigan courts seek to effectuate the intent of those who created them." *Tomecek v Bavas*, 482 Mich 484, 490-491; 759 NW2d 178 (2008) (opinion by KELLY, J.). "It is a well-established rule of statutory construction that provisions of a statute must be construed in light of the other provisions of the statute to carry out the apparent purpose of the Legislature." *Farrington v Total Petroleum, Inc*, 442 Mich 201, 209; 501 NW2d 76 (1993). Further, "[t]he changes in an act must be construed in light of the act's predecessor statutes and the law's historical development." *Huron Behavioral Health v Dep't of Community Health*, 293 Mich App 491, 498; 813 NW2d 763 (2011).

Review of the maps contained in the 1989 Atlas shows three situations. First, like the Port Sheldon Township map, the overwhelming majority of the township maps show that the lakeward line is precisely the same as the shoreline of the bordering Great Lake. Second, for a number of township maps, there is some land between the boundary line between the CDA and the shoreline of the bordering Great Lake.[5]

[5] See the maps for Wawatam Township, Bay Mills Township, Bear Creek and Little Traverse Townships, and Leelanau Township: DEQ, *Wawatam Township Critical Dune Areas* <https://www.michigan.gov/documents/deq/lwm_sanddunes_wawatam_twp_262871_7.pdf> (accessed December 2, 2016) [https://perma.cc/93CF-EFMS]; DEQ, *Bay Mills Township Critical Dune Areas* <https://www.michigan.gov/documents/deq/sanddunes_bay_mills_twp_262180_7.pdf> (accessed December 2, 2016) [https://perma.cc/8JEG-BTCL]; DEQ, *Bear Creek & Little Traverse Townships Critical Dune Areas* <https://www.michigan.gov/documents/deq/ lwm_sanddunes_bear_creek_little_traverse_twp_262188_7.pdf> (ac-

Finally, in a few townships, the lakeward boundary line extends beyond the shoreline and slightly into the water of the bordering Great Lake.[6] From this review of the maps in the 1989 Atlas, it is plain that the Legislature expressly intended that the CDAs would not extend to the water's edge in particular instances, whereas in other situations the CDA was intended to be on the water's edge or beyond the water's edge. Given that the map in this case unambiguously shows that the lakeward boundary extends to the water's edge, it is plain that the Legislature did not intend the lakeward boundary line to be fixed but instead intended it to be at the water's edge as depicted. See *St Clair Co v Lovingston*, 90 US 46, 63; 23 L Ed 59 (1874) ("Where a survey and patent show a river to be one of the boundaries of the tract, it is a legal deduction that there is no vacant land left for appropriation between the river and the river boundary of such tract.").

The Association makes several arguments as to why, contrary to the map showing the lakeward boundary at the water's edge, the Legislature unambiguously intended that the lakeward boundary line was fixed, such that, in light of the subsequent changes in the shoreline, the western boundary line no longer extends to the water's edge. We address each argument in turn.

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cessed December 2, 2016) [https://perma.cc/J94P-SXT2]; DEQ, *Leelanau Township Critical Dune Areas* <https://www.michigan.gov/documents/deq/lwm_sanddunes_leelanau_twp_C_267489_7.pdf> (accessed December 2, 2016) [https://perma.cc/CPV3-QYXX].

[6] See DEQ, *Gilmore and Blaine Townships Critical Dune Areas* <https://www.michigan.gov/documents/deq/lwm_sanddunes_gilmore_blaine_twp_262051_7.pdf> (accessed December 2, 2016) [https://perma.cc/CC8V-9SVY], and DEQ, *Crystal Lake Township Critical Dune Areas* <https://www.michigan.gov/documents/deq/lwm_sanddunes_crystal_lake_twp_262008_7.pdf> (accessed December 2, 2016) [https://perma.cc/5VN5-765N].

First, the Association argues that the Legislature's use of the word "designated" when defining a CDA shows that the action of designating an area as a CDA was finished when the statute was enacted. See MCL 324.35301(c) (providing that a CDA is "a geographic area designated in the 'atlas of critical dune areas' dated February 1989 . . ."). Although the past-tense use of the word "designated" does imply an action that is complete, what was designated was depicted in the 1989 Atlas, which, as we have already noted, unambiguously provides that the lakeward boundary extends to the water's edge. By contrast, as noted earlier, the areas designated for some other townships did not extend to the water's edge.

Second, the Association also argues that interpreting a line placed precisely on the margin of Lake Michigan as a meander line is precluded because the SDPMA specifically provides mechanisms for adjusting CDA boundaries. In support, the Association directs us to MCL 324.35311, which provides:

> Beginning with the effective date of the 2012 act that amended this section and once every 10 years thereafter, the department may appoint a team of qualified ecologists, who may be employed by the department or may be persons with whom the department enters into contracts, to review "the atlas of critical dune areas" dated February 1989. The review team shall evaluate the accuracy of the designations of critical dune areas within the atlas and shall recommend to the legislature any changes to the atlas or underlying criteria revisions to the atlas that would provide more precise protection to the targeted resource.

The DEQ, however, has no authority under this provision to adjust a CDA's boundaries. Instead, this provision allows the DEQ to appoint qualified experts to evaluate the accuracy of the 1989 Atlas and then

recommend changes that improve its accuracy to the Legislature. The Legislature is under no obligation to accept the changes. Moreover, given that MCL 324.35311 was enacted in 2012, we do not find it persuasive as to whether the Legislature originally intended the lakeward boundary line to run along the water's edge even if the exact boundary of the water's edge moved. MCL 324.35311, as enacted by 2012 PA 297.

Next, the Association argues that MCL 324.35312(3) and (4) allow the DEQ to extend the CDA, which, in turn, shows that the Legislature contemplated a fixed boundary. MCL 324.35312(3) and (4) provide:

> (3) A local unit of government may by an affirmative vote of its governing body following a public hearing regulate additional lands as critical dune areas under this part as considered appropriate by the planning commission if the lands are determined by the local unit of government to be essential to the hydrology, ecology, topography, or integrity of a critical dune area. A local unit of government shall provide within its zoning ordinance for the protection of lands that are within 250 feet of a critical dune area, if those lands are determined by the local unit of government to be essential to the hydrology, ecology, topography, or integrity of a critical dune area.
>
> (4) If a local unit of government does not have an approved zoning ordinance, the department may regulate additional lands described in subsection (3). However, the lands added by the department shall not extend more than 250 feet from the *landward boundary* of a critical dune area, unless, following a public hearing, an affirmative vote of the governing body of the local unit of government authorizes a further extension. If the director determines that the mapping of a critical dune area designated in the "atlas of critical dune areas" dated February 1989 was inaccurate, the department may regulate additional lands. However, the lands added by the department shall

> not extend more than 250 feet from the *landward boundary* of a critical dune area. [Emphasis added.]

Pursuant to the first sentence of MCL 324.35312(3), based on a recommendation from the planning commission, and provided that the statutory procedural requirements are satisfied, the local unit may regulate "additional lands as critical dune areas" so long as they are "essential to the hydrology, ecology, topography, or integrity" of a CDA. The second sentence of MCL 324.35312(3) requires a local unit to establish a zoning ordinance to provide for the protection of "lands that are within 250 feet" of a CDA if the local unit determines that "those lands" are "essential to the hydrology, ecology, topography, or integrity" of a CDA. The "additional lands" that can be regulated pursuant to the first sentence are limited only by the requirement that they are essential to a CDA. Those lands do not have to be within 250 feet or within any range; their protection is identical to the protection afforded to a CDA so long as they are essential to a CDA. Under the second sentence, the local unit unilaterally determines if lands that are within 250 feet of a CDA are essential to a CDA. If so, that will trigger "the protection" in the local zoning ordinance. Only lands within 250 feet of a CDA can receive "the protection," the extent of which is established in the zoning ordinance and not by reference to CDA protections as in the first sentence. Finally, under the second sentence, the 250-foot limit extends around the entire boundary of the CDA.

MCL 324.35312(4) authorizes the DEQ to regulate "additional lands" from Subsection (3) if a local unit lacks an approved zoning ordinance. "Additional lands" means the land "described" in the first sentence of Subsection (3). However, the Subsection (4) "additional lands" cannot extend more than 250 feet from

the landward boundary (as opposed to the lakeward boundary) of a CDA unless the local unit authorizes further extension. The statute also permits the DEQ to regulate "additional land" not extending more than 250 feet from the landward boundary of a CDA if it determines that the 1989 Atlas contains an inaccurately mapped CDA. Therefore, under these statutory provisions, the DEQ only has a limited ability to extend the boundaries of a CDA. Because Subsection (4) only allows an extension from the *landward* boundary, it is plain that the DEQ *cannot* add land on the lakeward boundary under the guise of "extending" the landward boundary toward the shore.

The Association next argues that the trial court allowed the DEQ to bring this property under its CDA jurisdiction without any showing that it qualifies as the type of unique, irreplaceable, fragile resource that the SDPMA was intended to protect.[7] However, given that the Legislature clearly intended the CDA to extend to the water's edge, we see no reason for the DEQ to establish that the areas so designated by the Legislature meet the protective rationale set forth in MCL 324.35302(a).

The Association also argues that the situation in this case is similar to the pier-related beaches in Holland and Grand Haven, both of which the Legislature expressly omitted from the 1989 Atlas. However, given that the Legislature expressly omitted those beaches, whereas for the property in question in this case, the

[7] MCL 324.35302(a), as amended by 2012 PA 297, provides:

> The critical dune areas of this state are a unique, irreplaceable, and fragile resource that provide significant recreational, economic, scientific, geological, scenic, botanical, educational, agricultural, and ecological benefits to the people of this state and to people from other states and countries who visit this resource.

Legislature depicted the boundary extending to the water's edge. We do not find reference to the situation in Holland and Grand Haven applicable.

The Association further suggests that, because the DEQ's website and other resources show the property at issue with the lines from the 1989 Atlas rather than the "real" lines that go to the current water's edge, the DEQ has attempted to perpetrate a fraud on the public, pretending that the CDA boundaries were in one location while secretly hiding a more expansive interpretation to be used when convenient. However, all of these materials came with disclaimers and were not presented as absolutely accurate and authoritative, so the Association did not reasonably rely on these materials to its detriment. Moreover, these documents all show the 1989 Atlas boundaries, which contain lines that were placed precisely on the margin of Lake Michigan.

Finally, in its reply brief, the Association argues that "the Atlas depicts supposedly flexible lakeshore CDA boundaries in the exact same way it depicts supposedly inflexible non-lakeshore CDA boundaries." The Association also asserts that this Court must treat the boundaries in the 1989 Atlas as fixed because treating the boundaries otherwise would constitute an impermissible subsequent amendment to the 1989 Atlas. However, the Association's argument overlooks that if the Legislature intended the lines placed precisely on the margin of Lake Michigan to set the boundary at Lake Michigan, then nothing has changed with that document since 1989.

Affirmed.

M. J. KELLY, P.J., and O'CONNELL and BECKERING, JJ., concurred.

PEOPLE v SHAMI

Docket No. 327065. Submitted September 8, 2016, at Detroit. Decided December 15, 2016, at 9:00 a.m. Affirmed in part, reversed in part, and case remanded to the Wayne Circuit Court 501 Mich ___.

Sam Molasses, LLC, a tobacco retail shop, underwent an administrative tobacco inspection, after which the operator of the tobacco retail shop, Samer Shami, was charged with violating the Tobacco Products Tax Act (TPTA), MCL 205.421 *et seq*., by possessing tobacco without the proper invoices, MCL 205.426(1) and (2) and MCL 205.428(3), manufacturing tobacco products without a license, MCL 205.423(1) and MCL 205.428(3), and filing false tobacco tax returns, MCL 205.427(2). After a preliminary examination in the 19th District Court, Salem Salamey, J., Shami was bound over to the Wayne Circuit Court for trial on the charges of possessing tobacco without the proper invoices and manufacturing tobacco products without a license. The district court dismissed the tax return charges because Shami was not responsible for filing, or authorized to file, tax returns for Sam Molasses. In the circuit court, Shami moved to quash the bindover and dismiss the remaining charges against him, and the prosecution moved to add charges for tax evasion. The circuit court, Alexis A. Glendening, J., granted Shami's motion, dismissed the charges against Shami, and denied the prosecution's motion to bring additional charges. The prosecution appealed.

The Court of Appeals *held*:

1. MCL 205.426(1) requires a retailer to keep proper records of its tobacco inventory, including invoices for tobacco purchased during the previous four months. A "retailer" under the TPTA is a person who operates a business for the purpose of selling tobacco at retail. The definition includes a person who exercises control over the day-to-day operations of the business even if the person, like Shami, does not own the business. In this case, Shami was a retailer for purposes of the TPTA, and the obligation of keeping proper invoices fell to him. MCL 205.426(2) further requires that the invoices contain specific information including the name brand of the tobacco product received. In this case, Shami did not have at the place of business all the invoices for the past four months related to the tobacco products sold at Sam Molasses. In

addition, the brand name of the tobacco did not appear on some of the invoices either kept at the store or obtained shortly after the inspection. Because Shami did not possess the past four months of invoices for the tobacco products being sold at Sam Molasses and because some of the invoices did not contain all the required information, the circuit court erred when it dismissed the charge against Shami for improper recordkeeping.

2. MCL 205.423(1) prohibits a person from possessing tobacco for sale as a manufacturer without a license, and a "manufacturer" under MCL 205.422(m)(*i*) of the TPTA is a person who manufactures or produces a tobacco product. The TPTA does not define "manufactures or produces," but a dictionary definition of "manufacture" indicates that the plain meaning of "manufacture" is to make into a usable product or to make by hand from raw materials. A dictionary definition of "produce" includes to manufacture, to cause to have existence, and to compose, create, or bring out by physical effort. And under MCL 205.422(m)(*ii*), the term "manufacturer" includes someone who rolls cigarettes from loose tobacco for the consumption of others. Therefore, when read in context, under MCL 205.422(m)(*i*), any change in the form or delivery method of tobacco qualifies as manufacturing. In this case, Shami's conduct in mixing different tobacco products to create a new blend, repackaging the mixture, and labeling it with a brand name unique to Sam Molasses, constituted manufacturing or producing for purposes of the TPTA because it changed the form or delivery method of the tobacco. The circuit court therefore erred by quashing the bindover and dismissing the manufacturing charge.

Reversed and remanded.

TAXATION — TOBACCO PRODUCTS TAX ACT — LICENSE TO MANUFACTURE REQUIRED — DEFINITION OF MANUFACTURING.

For purposes of the Tobacco Products Tax Act, MCL 205.421 *et seq*., "manufacture" means any change in the form or delivery method of tobacco; blending or mixing two or more flavors of tobacco, repackaging the mixture, and labeling it with a brand name unique to the retailer constitutes the manufacture of tobacco products for which a license is required.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Daniel C. Grano*, Assistant Attorney General, for the people.

Varnum LLP (by *Thomas J. Kenny*) for defendant.

Before: GADOLA, P.J., and WILDER and METER, JJ.

GADOLA, P.J. Following an administrative tobacco inspection, defendant was charged with violating the Tobacco Products Tax Act (TPTA), MCL 205.421 *et seq*., by possessing tobacco products without proper invoices, MCL 205.426(1) and (2) and MCL 205.428(3), manufacturing tobacco products without a license, MCL 205.423(1) and MCL 205.428(3), and filing three false tobacco tax returns, MCL 205.427(2). Following a preliminary examination, the district court bound defendant over on the charges of possessing tobacco products without proper invoices and manufacturing tobacco products without a license. Thereafter, the circuit court quashed the bindover and dismissed the two charges. The prosecution now appeals the circuit court's order as of right. We reverse and remand for reinstatement of the two charges against defendant.

I. FACTUAL AND PROCEDURAL HISTORY

On May 1, 2013, the Department of Treasury (Treasury) and the Michigan State Police conducted an administrative tobacco inspection of Sam Molasses, LLC (the LLC), a tobacco retail store in Dearborn, Michigan. Alisha Nordman, an employee of Treasury's Tobacco Tax Enforcement Unit, testified at defendant's preliminary examination that between 2007 and 2013, the LLC was licensed "as a secondary wholesaler and an unclassified acquirer of other tobacco products" pursuant to MCL 205.423. According to Nordman, defendant's wife, Fadia Shami, was the party named on the LLC's licenses. However, according to Sergeant Stephanie Cleland, who also participated in the inspec-

tion and testified at defendant's preliminary examination, when the tax enforcement team came to the retail store to conduct the inspection, a store clerk called defendant rather than his wife. When defendant arrived, he told Cleland that his wife owned the store "on paper only; that she did not have any role at the store and that he took care of the day to day operations."

Nordman testified that before the inspection, she acquired up to four years of the LLC's previous tax returns in order to examine the products sold at the store and to look at the LLC's invoices to compare them with what the company reported on its tax returns. During the inspection, defendant produced several invoices from a distributor called El Tahan. Nordman testified that she became concerned when she discovered that the labels on several plastic tubs of tobacco in the LLC's inventory did not match any of the tobacco flavors listed on the invoices. When she questioned defendant about the discrepancy, he told her that he "mix[ed] two or three blends, flavors of tobacco together to come up with a special blend that was subsequently . . . put in these plastic tubs."

Cleland explained that during the inspection the tax enforcement team demanded the LLC's invoices for the last four years, but defendant was only able to produce some of the records. Defendant then contacted El Tahan, which forwarded its remaining invoices two days later. After examining the El Tahan invoices produced by defendant, Cleland determined that the invoices did not comply with the TPTA because they did not list the trade name or brand of the tobacco, did not list the weight of the product, and did not list the tobacco flavors. Cleland also testified that some tobacco in the LLC's inventory did not match the container labels. According to Cleland, when she ques-

tioned defendant about the discrepancy, he told her that he repackaged and relabeled the tobacco for resale.

Treasury employee Douglas R. Miller testified that, in order to file an electronic tobacco tax return on behalf of an LLC, a licensee must submit a form designating the persons who have "responsibility or authorization to file the . . . return." Miller explained that the relevant tax forms for the LLC listed Hassan Sharara and Mohamed Hammoud as the persons responsible for filing the LLC's tobacco tax returns during the period at issue.

Treasury employee Kevin Spitzley testified that he received the El Tahan invoices after the inspection. Spitzley determined that the LLC filed a tobacco tax return every month between April 2011 and March 2013, which was required by the TPTA, but there were discrepancies in the reporting for each return. Specifically, Spitzley testified that the LLC reported zero purchases or underreported the actual dollar amount of purchases each month, which resulted in approximately $451,000 in unpaid tobacco taxes during the relevant period.

At the close of the preliminary examination, defendant's attorney moved to dismiss the charges. Defense counsel argued that defendant could not be held liable for any failure to keep proper invoices because he was not the licensee under the TPTA. Counsel further argued that the court should dismiss the manufacturing charge because (1) blending separate kinds of tobacco did not constitute manufacturing, (2) the prosecution failed to produce evidence regarding the wholesale price of the tobacco, and (3) any improper manufacturing should be attributed to the LLC, rather than to defendant as an individual. Lastly, defense counsel

argued that the three charges of filing improper tax returns should be dismissed because the prosecution failed to present evidence that defendant "had tax specific responsibility or that he file[d] these returns."

The district court denied defendant's motion with respect to the charges of improper keeping of invoices and manufacturing, concluding that "a prudent examination" of the El Tahan invoices should have put defendant on notice that the invoices were inappropriate. The district court further concluded that defendant's act of blending separate kinds of tobacco "create[d] a distinctive product or new character" sufficient to constitute manufacturing under the TPTA. Accordingly, the district court bound defendant over on these two charges. However, the court granted defendant's motion with respect to the charges of improper filing of tax returns because it concluded that there was no evidence that defendant was authorized to file, or responsible for filing, tax returns on behalf of the LLC.

Defendant then moved in the circuit court to dismiss the charges. Defendant first argued that the charge for improper keeping of invoices should be dismissed because the El Tahan invoices properly identified the trade name or brand of the "generic Water Pipe Tobacco" purchased by the LLC as "Water Pipe Tobacco Class 1." He further argued that mixing or blending different kinds of tobacco did not constitute manufacturing because manufacturing requires the "transformation of raw material into a new or different article."

The prosecution argued that the district court properly bound defendant over on the charge of the improper keeping of invoices because the El Tahan invoices failed to sufficiently identify the trade name or brand of the tobacco. In addition, evidence at the

preliminary examination showed that the invoices were not stored at the location where the tobacco was sold. The prosecution further argued that the district court properly bound defendant over on the charge of improper manufacturing because defendant manufactured a tobacco product without a license by blending tobacco to create new flavors and by "canning, labeling, and boxing hookah products under his own label."[1]

The circuit court concluded that defendant could not be held liable for any improper keeping of invoices because he was not the licensee or the retailer of the tobacco products. The court also determined that "blending two types of hookah tobacco does not constitute manufacturing." Accordingly, the circuit court granted defendant's motion with respect to both charges.

II. STANDARDS OF REVIEW

We review a district court's decision to bind a defendant over for trial for an abuse of discretion. *People v Crippen*, 242 Mich App 278, 281; 617 NW2d 760 (2000). We review de novo a circuit court's ruling on a motion to quash a bindover. *Id*. at 282. "Where there is no abuse of discretion by the district court, a trial court's decision to quash the information should be reversed." *People v Hampton*, 194 Mich App 593, 596; 487 NW2d 843 (1992). This case also presents issues of statutory interpretation, which we review de novo. *People v Gardner*, 482 Mich 41, 46; 753 NW2d 78 (2008).

[1] The prosecution also moved to amend the information to add tax evasion charges against defendant under a theory of aiding and abetting. The circuit court denied the prosecution's motion after concluding that there was no basis to find that defendant was authorized to file, or responsible for filing, the LLC's tax returns. The prosecution does not contest this ruling on appeal.

III. DISCUSSION

A. IMPROPER KEEPING OF INVOICES

The TPTA imposes a tax on the sale and distribution of tobacco products and prescribes penalties and remedies, including criminal sanctions, for violations of the act. MCL 205.421 *et seq*. Under the act, "a person shall not purchase, possess, acquire for resale, or sell a tobacco product as a manufacturer, wholesaler, secondary wholesaler, vending machine operator, unclassified acquirer, transportation company, or transporter in this state unless licensed to do so." MCL 205.423(1). Relevant to the invoice issue raised on appeal, MCL 205.426(1) requires a "manufacturer, wholesaler, secondary wholesaler, vending machine operator, transportation company, unclassified acquirer, or retailer" to "keep a complete and accurate record of each tobacco product manufactured, purchased, or otherwise acquired." The record must "include a written statement containing the name and address of both the seller and the purchaser, the date of delivery, the quantity, the trade name or brand, and the price paid for each tobacco product purchased." MCL 205.426(1). MCL 205.426(1) also requires a retailer to keep "a true copy of all purchase orders, invoices, bills of lading, and other written matter substantiating the purchase or acquisition of each tobacco product at the location where the tobacco product is offered for sale for a period of 4 months from the date of purchase or acquisition." "If a tobacco product . . . is found in a place of business or otherwise in the possession of a wholesaler, secondary wholesaler, vending machine operator, unclassified acquirer, transporter, or retailer . . . without proper substantiation by invoices or other records as required by this section, the presump-

tion shall be that the tobacco product is kept in violation of this act." MCL 205.426(6).

On appeal, the prosecution argues that the circuit court erred by dismissing the charge of improper keeping of invoices because the evidence showed that defendant did not keep the required invoices at the location where the tobacco products were sold. We agree. As stated above, MCL 205.426(1) requires a retailer to keep a true copy of all required invoices "*at the location where the tobacco product is offered for sale for a period of 4 months from the date of purchase or acquisition*." (Emphasis added.) During the administrative tax inspection, defendant could not produce all of the El Tahan invoices because they were not kept at the retail store where the tobacco was offered for sale. Instead, El Tahan had to send the invoices directly to the police. Several of the invoices sent by El Tahan listed the purchase dates for tobacco products as being less than four months before the May 1, 2013 administrative inspection. Therefore, the evidence showed that defendant failed to keep a true copy of the invoices "at the location where the tobacco product is offered for sale for a period of 4 months from the date of purchase or acquisition." MCL 205.426(1). This evidence of improper recordkeeping sufficiently supported the district court's decision to bind defendant over on the charge of possessing tobacco products without proper invoices in violation of the TPTA.[2]

[2] The parties also dispute on appeal whether the El Tahan invoices properly identified the trade name or brand of the tobacco purchased for purposes of MCL 205.426. The TPTA does not define "trade name or brand," and neither the TPTA nor any relevant authority clarifies the specificity with which an invoice must describe a tobacco product sold. In this case, the El Tahan invoices described the tobacco as "Water pipe tobacco—Class I." It is unclear whether this description adequately identifies for purposes of the TPTA the trade name or brand of tobacco

B. INDIVIDUAL LIABILITY

Next, the prosecution argues that the circuit court erred by dismissing the charge of improper keeping of invoices because, although defendant was not the licensee, he could be held criminally liable for improper recordkeeping because he managed the day-to-day operations of the LLC's retail store. We agree. Defendant was criminally charged under MCL 205.428(3), which states that "[a] person who possesses, acquires, transports, or offers for sale contrary to this act . . . tobacco products other than cigarettes with an aggregate wholesale price of $250.00 or more . . . is guilty of a felony . . . ." MCL 205.422(o) defines a "person" as "an individual, partnership, fiduciary, association, limited liability company, corporation, or other legal entity." Therefore, under the plain language of the TPTA, an individual can be criminally liable for violations of the act.

Defendant's underlying violation of the TPTA was based on MCL 205.426(1), which requires a tobacco retailer "[to] keep a complete and accurate record of each tobacco product manufactured, purchased, or otherwise acquired." As discussed earlier in this opinion, MCL 205.426(1) further requires "a retailer" to "keep as part of the records a true copy of all purchase orders, invoices, bills of lading, and other written matter substantiating the purchase or acquisition of each tobacco product at the location where the tobacco product is offered for sale for a period of 4 months from the date of purchase or acquisition."

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purchased by the LLC. However, because the El Tahan invoices were not kept at the location where the tobacco was offered for sale, we need not resolve this issue to nonetheless conclude that the evidence was sufficient to allow the district court to bind defendant over on the charge.

The TPTA defines "retailer" as "a person other than a transportation company who operates a place of business for the purpose of making sales of a tobacco product at retail." MCL 205.422(q). This Court recently held that "[w]hen MCL 205.426(1) and MCL 205.422(q) are read together and in the proper context, it is evident that the Legislature intended the term 'retailer' to . . . refer to a person who directs or manages the business—to someone who has control over the business's day-to-day operations." *People v Assy*, 316 Mich App 302, 311; 891 NW2d 280 (2016) (citation omitted). The Court then concluded that "[i]f a person or entity has control over the day-to-day operations of a 'place of business for the purpose of making sales of a tobacco product at retail,' that person is a retailer notwithstanding that he or she does not own the place of business." *Id*., quoting MCL 205.422(q). Accordingly, a person who manages the day-to-day operations of a tobacco retail store is obligated to comply with the recordkeeping requirements of MCL 205.426(1) "or risk being charged with the possession of tobacco products in contravention of the Tobacco Act." *Assy*, 316 Mich App at 310.

In this case, it is undisputed that the LLC was a place of business for selling tobacco products at retail. During the administrative tobacco inspection, defendant told members of the tax enforcement team that his wife owned the store, but she "did not have any role at the store" and he "took care of the day to day operations." Because defendant admitted that he directed and managed the day-to-day operations of the retail store, he is properly classified as a "retailer" for purposes of the TPTA and was therefore obligated to comply with the recordkeeping requirements of MCL 205.426(1). See *Assy*, 316 Mich App at 311. MCL 205.428(3) imposed criminal liability when he violated

that obligation. Therefore, the district court did not abuse its discretion by binding defendant over on the charge of improper keeping of invoices, and the circuit court erred by quashing the bindover and dismissing the charge.

C. MANUFACTURING UNDER THE TPTA

Finally, the prosecution argues that the circuit court erred by dismissing the manufacturing charge against defendant because defendant improperly possessed tobacco as a manufacturer without a license. We agree. MCL 205.423(1) states that a person "shall not purchase, possess, acquire for resale, or sell a tobacco product as a manufacturer . . . unless licensed to do so." MCL 205.428(3) imposes criminal liability for violating the TPTA and states that a person is guilty of a felony if he or she "possesses, acquires, transports, or offers for sale . . . tobacco products other than cigarettes with an aggregate wholesale price of $250.00 or more" in a manner contrary to the TPTA. The TPTA defines "manufacturer" as any of the following:

> (*i*) A person who manufactures or produces a tobacco product.
>
> (*ii*) A person who operates or who permits any other person to operate a cigarette making machine in this state for the purpose of producing, filling, rolling, dispensing, or otherwise generating cigarettes. [MCL 205.422(m).]

The TPTA does not define "manufactures or produces" for purposes of MCL 205.422(m)(*i*), and there is no binding authority directly on point, so the precise meaning of these terms is an issue of first impression for this Court.

When interpreting statutory language, courts must give "plain meaning to the words actually used" in the

statute. *People v Williams*, 491 Mich 164, 175; 814 NW2d 270 (2012). If the statute defines a term, the statutory definition controls. *People v Schultz*, 246 Mich App 695, 703; 635 NW2d 491 (2001). However, when a statute fails to define a term, as with the terms "manufactures" and "produces" in this case, we presume "that the Legislature intended for the words to have their ordinary meaning." *People v Hardy*, 494 Mich 430, 440; 835 NW2d 340 (2013). Courts may consult dictionary definitions to ascertain the plain and ordinary meaning of undefined statutory terms. *People v Denio*, 454 Mich 691, 699; 564 NW2d 13 (1997).

Merriam-Webster's Collegiate Dictionary (11th ed) defines the verb form of "manufacture" as "to make into a product suitable for use" and "to make from raw materials by hand or by machinery[.]" It further defines the verb form of "produce" as "to make available for public exhibition or dissemination," "to cause to have existence or to happen : BRING ABOUT . . . to give being, form, or shape to : MAKE; [*especially*] : MANUFACTURE," and "to compose, create, or bring out by . . . physical effort[.]" *Id*. In light of these definitions, manufacturing for purposes of the TPTA simply requires a change from the original state of an object or material to a state that makes it more suitable for its intended use. The context of MCL 205.422(m)(*i*) in the TPTA indicates that a mere change in the form or delivery method of tobacco is sufficient to constitute manufacturing or producing under the act. As the prosecution points out on appeal, the definition of "manufacturer" in MCL 205.422(m)(*ii*) includes someone who simply rolls cigarettes from loose tobacco.[3]

[3] An individual who "manufactures" cigarettes for self-consumption and in his or her own dwelling is not a "manufacturer" for purpose of the TPTA. MCL 205.422(m)(*ii*).

Therefore, the statutory context suggests that any change in the form or delivery method of tobacco, rather than a specific type or method of change, constitutes manufacturing under the TPTA.

Applying the law to the facts in this case, defendant manufactured or produced tobacco for purposes of the TPTA when he mixed different flavors of tobacco and repackaged the mixture because he changed, however slightly, the form or delivery method of the tobacco. Specifically, defendant admitted to Nordman during the inspection that he "mix[ed] two or three blends, flavors of tobacco together to come up with a special blend . . . ." He also explained to Cleland that he repackaged the tobacco in tins and labeled it "360," his own label, before offering the tobacco for sale. These activities amounted to manufacturing a new product that defendant held out for sale as defendant's own brand. Accordingly, the district court did not abuse its discretion by binding defendant over on the improper-manufacturing charge, and the circuit court erred by quashing the bindover and dismissing the charge.

Reversed and remanded for further proceedings consistent with this opinion.

WILDER and METER, JJ., concurred with GADOLA, P.J.

In re BAIL BOND FORFEITURE

Docket No. 328784. Submitted November 2, 2016, at Lansing. Decided December 15, 2016, at 9:05 a.m.

Antoine J. Stanford was charged with uttering and publishing, MCL 750.249, and operating a vehicle with a suspended license, MCL 257.904, in the Eaton Circuit Court. Appellant, Leo's Bail Bonds Agency Company, Inc., as agent for Roche Surety and Casualty Company, Inc., became defendant's surety on a bail bond for this matter in the amount of $10,000. On January 14, 2015, defendant defaulted on his bond obligation when he failed to appear at a pretrial hearing, and on January 20, 2015, the court, Janice K. Cunningham, J., issued an order revoking defendant's release and forfeiting the bond. The court served notice to appellant via first-class mail. The certificate of mailing attached to the order stated that it was served on appellant on January 21, 2015, seven days after defendant's default, as required by MCL 765.28(1); however, appellant asserted that the notice was postmarked January 22, 2015, which was eight days after defendant's default. Appellant failed to appear at a show-cause hearing held on February 20, 2015, and on February 24, 2015, the court entered judgment against appellant for $10,000, the full amount of bail. Appellant was later notified that a 20% late fee had been added to its obligation as a result of its failure to timely pay the judgment. Appellant moved to vacate the judgment of bond forfeiture, arguing that notice was untimely under MCL 765.28(1). The court denied the motion, concluding that notice was timely pursuant to MCR 3.604(I)(2); that the date of service of notice was January 21, 2015, as stated on the judgment's certificate of mailing, rather than January 22, 2015, the date that the notice was postmarked; that a conflict existed between MCR 3.604(I)(2) and MCL 765.28(1) regarding "the procedural requirements for service"; that MCR 3.604(I)(2) was controlling over MCL 765.28(1); and that the 20% late fee on the judgment was proper under MCL 600.4803(1) because the penalty was separate from the judgment. Appellant then appealed.

The Court of Appeals *held*:

MCL 765.28(1) provides, in relevant part, that after a default is entered, the court shall give each surety immediate notice not

to exceed seven days after the date of the failure to appear; the notice shall be served upon each surety in person or left at the surety's last known business address; each surety shall be given an opportunity to appear before the court on a day certain and show cause why judgment should not be entered against the surety for the full amount of the bail or surety bond; and if good cause is not shown for the defendant's failure to appear, the court shall enter judgment against the surety on the recognizance for an amount determined appropriate by the court but not more than the full amount of the bail, or if a surety bond has been posted, the full amount of the surety bond. MCR 3.604(I)(2) provides that notice of the hearing on the motion for judgment must be given to the surety or the owner of the security in the manner prescribed in MCR 2.107, and the notice may be mailed to the address stated in the bond or stated when the security was furnished unless the surety or owner has given notice of a change of address. MCL 765.28(1) and MCR 3.604(I)(2) do not conflict. MCL 765.28(1) sets forth the procedure for providing a surety notice of a default, and MCR 3.604(I)(2) sets forth the procedure to provide notice of a hearing on a motion for judgment against the surety; these are two separate and distinct events. Under MCL 765.28(1), a surety must receive immediate notice not to exceed seven days after the date of the failure to appear. In this case, the trial court did not mail notice until the eighth day; therefore, the notice of default itself was not timely under MCL 765.28(1) or MCR 3.604(I)(2). In contrast, notice of the hearing on the motion to enter judgment against the surety was timely pursuant to MCR 3.604(I)(2) because a notice of hearing was mailed on January 22, 2015, for a hearing scheduled for February 20, 2015, which complied with the requirements in MCR 3.604(I)(2) and MCR 2.107(3). Although the surety clearly had proper notice of the motion to enter judgment, that notice did not obviate the fact that the surety did not receive proper notice of the default itself. Because the court failed to give the surety immediate notice within seven days, the surety was not required to pay the surety bond.

Reversed and remanded for further proceedings.

BAIL — SURETY BONDS — FORFEITURE — NOTICE.

MCL 765.28(1), which sets forth the procedure for providing a surety notice of a default, and MCR 3.604(I)(2), which sets forth the procedure to provide notice of a hearing on a motion for judgment against a surety, do not conflict; these are two separate and distinct events; even if a surety received proper notice of a

> motion to enter judgment, that notice does not obviate the requirement that the surety must receive proper notice of the default itself.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Douglas R. Lloyd*, Prosecuting Attorney, and *Cohl, Stoker & Toskey, PC* (by *Timothy M. Perrone*), for the people.

Michael S. Mahoney, PC (by *Michael S. Mahoney*), for Leo's Bail Bonds Agency Company, Inc., as agent in fact of Roche Surety and Casualty Company, Inc.

Before: RONAYNE KRAUSE, P.J., and O'CONNELL and GLEICHER, JJ.

PER CURIAM. Appellant, the agent for the surety on a bail bond provided for defendant in a criminal matter, appeals as of right the circuit court's decision denying its motion to vacate forfeiture of bond. The court concluded that appellant had received timely notice of defendant's default, and the court also concluded that a late penalty assessed against appellant for failure to timely pay the judgment was proper. We conclude that the notice was not timely, so we reverse and remand for further proceedings.

I. BACKGROUND FACTS

Defendant Antoine Stanford was charged with uttering and publishing, MCL 750.249, and operating with a suspended license, MCL 257.904. Appellant, as agent for Roche Surety and Casualty Company, Inc., became defendant's surety on a bail bond for this matter in the amount of $10,000. On or about January 14, 2015, defendant defaulted on his bond obligation when he failed to appear at a pretrial hearing. On January 20, 2015, the circuit court issued an order revoking defen-

dant's release and forfeiting the bond. The court served notice to appellant via first-class mail. The certificate of mailing attached to the order stated that it was served on appellant on January 21, 2015, seven days after defendant's default, as required by MCL 765.28(1).[1] However, appellant asserted that the notice was postmarked January 22, 2015, which was *eight* days after defendant's default, in violation of the statute. Moreover, appellant asserted that it was without "actual notice" of defendant's default and entry of the order until it received the notice in the mail on January 23, 2015.

Appellant failed to appear at a show-cause hearing held on February 20, 2015. On February 24, 2015, the circuit court entered judgment against appellant for $10,000, the full amount of bail. Appellant was later notified that a 20% late fee had been added to its obligation as a result of its failure to timely pay the judgment, raising appellant's obligation to $12,000.

Appellant moved to vacate the judgment of bond forfeiture, arguing that notice was not provided within seven days of defendant's default as required by MCL 765.28(1) and therefore was untimely. The court de-

[1] MCL 765.28(1) provides, in relevant part:

> If default is made in any recognizance in a court of record, the default shall be entered on the record by the clerk of the court. After the default is entered, the court shall give each surety immediate notice not to exceed 7 days after the date of the failure to appear. The notice shall be served upon each surety in person or left at the surety's last known business address. Each surety shall be given an opportunity to appear before the court on a day certain and show cause why judgment should not be entered against the surety for the full amount of the bail or surety bond. If good cause is not shown for the defendant's failure to appear, the court shall enter judgment against the surety on the recognizance for an amount determined appropriate by the court but not more than the full amount of the bail, or if a surety bond has been posted the full amount of the surety bond.

nied the motion on the grounds that notice was timely pursuant to MCR 3.604(I)(2)[2] and that the date of service of notice was January 21, 2015, as stated on the judgment's certificate of mailing, rather than January 22, 2015, the date that the notice was postmarked. The court also concluded that there was a conflict between MCR 3.604(I)(2) and MCL 765.28(1) as to "the procedural requirements for service" and that the court rule was controlling over the statute. The court's decision was based, in part, on a memorandum from the State Court Administrative Office (SCAO), in which the SCAO concluded that the court rule controlled because the subject of the conflict was procedural in nature, citing *Donkers v Kovach*, 277 Mich App 366, 373; 745 NW2d 154 (2007). Finally, the trial court concluded that the 20% late fee on the judgment was proper under MCL 600.4803(1) because the penalty was "separate" from the judgment, so the judgment was not for more than the "full amount of the surety bond" in violation of MCL 765.28(1).

II. STANDARD OF REVIEW

Questions of statutory interpretation are questions of law that are reviewed de novo. *In re McEvoy*, 267 Mich App 55, 59; 704 NW2d 78 (2005). Questions relating to the proper interpretation of court rules are also questions of law that are reviewed de novo. *Marketos v American Employers Ins Co*, 465 Mich 407, 412;

[2] MCR 3.604(I)(2) provides:

> Notice of the hearing on the motion for judgment must be given to the surety or the owner of the security in the manner prescribed in MCR 2.107. The notice may be mailed to the address stated in the bond or stated when the security was furnished unless the surety or owner has given notice of a change of address.

633 NW2d 371 (2001). "In interpreting a statute, we apply the rule of ordinary usage and common sense." *People v Kelly*, 186 Mich App 524, 528; 465 NW2d 569 (1990).

III. STATUTE AND COURT RULE DO NOT CONFLICT

MCL 765.28(1) and MCR 3.604(I)(2) do not conflict. MCL 765.28(1) is the procedure for providing a surety notice of a default. MCR 3.604(I)(2), on the other hand, is the procedure to provide notice of a hearing on a motion for judgment. These are two separate and distinct events. A default must be entered before a hearing to enter judgment on the default. In any event, the court rule itself would resolve any conflict, if such a conflict otherwise exists. MCR 3.604(A) states that the "rule applies to bonds given under the Michigan Court Rules and the Revised Judicature Act, *unless* a rule *or statute* clearly indicates that a different procedure is to be followed." (Emphasis added.) Therefore, even if MCL 765.28(1) set forth a procedure that affected the same event or subject addressed by the court rule, by the court rule's own terms, the statute would still control.

IV. NOTICE OF DEFAULT WAS INEFFECTIVE

Service was not timely under MCL 765.28(1) or MCR 3.604(I)(2).[3] Under MCL 765.28(1), a surety must

[3] MCR 3.604(I)(2) directs us to MCR 2.107(C)(3) as the procedure for service. MCR 2.107(C)(3) states: "Mailing a copy under this rule means enclosing it in a sealed envelope with first class postage fully prepaid, addressed to the person to be served, and depositing the envelope and its contents in the United States mail. Service by mail is complete at the time of mailing." However, as noted by appellant, postage was not fully prepaid until January 22, 2015; therefore, service was not completed until January 22, 2015.

receive "immediate notice not to exceed 7 days after the date of the failure to appear." See also MCR 6.106(I)(2) (stating that the court may order a surety bond forfeited if a defendant has failed to comply with the conditions of release and that the court must immediately mail notice of the forfeiture to anyone who posted bond). However, the trial court did not even mail the notice until the eighth day. Therefore, the notice was not timely.

In contrast, notice of the hearing on the motion to enter judgment against the surety was timely pursuant to MCR 3.604(I)(2). A notice of hearing was mailed by the court on January 22, 2015, for a hearing scheduled for February 20, 2015, which complies with the requirements in MCR 3.604(I)(2) and MCR 2.107(C)(3). Nevertheless, although the surety clearly had proper notice of the motion to enter judgment, that does not obviate the fact that the surety did not receive proper notice of the default itself.

A similar issue was addressed in *In re Bail Bond Forfeiture*, 496 Mich 320; 852 NW2d 747 (2014). In that case, our Supreme Court determined that the purpose of MCL 765.28 is to protect the public interest as well as the rights of third persons. *Id*. at 339-340. Moreover, the difficulty that a surety might face in apprehending a defendant when the court fails to provide timely notice of the defendant's default increases with time. See *id*. at 334. As a remedy for this failure, the Supreme Court held:

> When a public entity does not perform its statutory obligations in a timely manner, and fails to respect the statutory preconditions to its exercise of authority, it lacks the authority to proceed as if it had. In this case, the consequence is that the court cannot require the surety to pay the surety bond because the court failed to provide the surety notice within seven days of defendant's failure to

> appear, as the statute clearly requires. Any other interpretation of the statute would render the seven-day notice requirement entirely nugatory. [*Id*. at 336.]

In this case, the court failed to give the surety immediate notice within seven days; therefore, the court cannot require the surety to pay the surety bond. We therefore reverse the trial court and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

RONAYNE KRAUSE, P.J., and O'CONNELL and GLEICHER, JJ., concurred.

MICHIGAN GUN OWNERS, INC v ANN ARBOR PUBLIC SCHOOLS

Docket No. 329632. Submitted December 13, 2016, at Detroit. Decided December 15, 2016, at 9:10 a.m. Leave to appeal sought.

Plaintiffs, Michigan Gun Owners, Inc., and Ulysses Wong, brought an action in the Washtenaw Circuit Court against Ann Arbor Public Schools (AAPS) and Jeanice K. Swift, challenging three AAPS policies that banned the possession of firearms in schools and at school-sponsored events. Plaintiffs asserted that AAPS was a "local unit of government" under MCL 123.1101 and that state law preempts a local unit of government from regulating the possession of firearms. The parties filed dispositive cross-motions, submitting the sole legal issue in this case—preemption—to the circuit court. The court, Carol A. Kuhnke, J., concluded that MCL 123.1101, which defines a "local unit of government," did not control the outcome of the case because MCL 123.1101 did not include the term "school district" in its list of local units of government. The court then used the four-factor preemption analysis set forth in *People v Llewellyn*, 401 Mich 314, 323-324 (1977), ultimately concluding that there was no express preemption, no legislative history supporting preemption, and no single body of law or cohesive scheme regulating guns such that preemption could be implied and that the nature of firearm regulation did not demand exclusive state regulation. The court granted AAPS's motion for summary disposition and dismissed plaintiffs' complaint with prejudice. Plaintiffs appealed.

The Court of Appeals *held*:

1. MCL 28.425o(1)(a) provides, in relevant part, that an individual licensed to carry a concealed pistol shall not carry a concealed pistol on the premises of a school or school property except that a parent or legal guardian of a student of the school is not precluded from carrying a concealed pistol while in a vehicle on school property if he or she is dropping the student off at the school or picking up the student from the school. MCL 28.425o(1)(a) imposes a blanket prohibition on carrying a concealed pistol on school grounds subject to certain specific and limited exceptions. The statute does not expressly forbid additional regulation or declare that its subparts supersede any other

school-related firearm rules. In this case, no conflict existed between MCL 28.425o(1)(a) and the AAPS policies; in fact, the AAPS policies specifically acknowledged that MCL 28.425o(1)(a) controls the ability of concealed pistol license holders to carry a concealed pistol under the distinct circumstances conforming to the statute. Therefore, there was no express preemption.

2. MCL 123.1101(b) defines the term "local unit of government" to mean "a city, village, township, or county." In *Capital Area Dist Library v Mich Open Carry, Inc*, 298 Mich App 220, 231-232, 236 (2012) (*CADL*), the Court of Appeals held that although a district library established pursuant to the District Library Establishment Act, MCL 397.171 *et seq*., is not "a city, village, township, or county," a district library is "a quasi-municipal corporation" and therefore a "local unit of government." The *CADL* Court determined that because the city and county that formed the Capital Area District Library were precluded from regulating firearms pursuant to MCL 123.1102, it made no sense to permit their stepchild—a library—from doing so. However, in this case, no corresponding parallels existed. School districts are not formed, organized, or operated by cities, villages, townships, or counties; school districts exist independently of those bodies. While a district library enjoys a general ability to "supervise and control" its property, MCL 397.182(1)(f), the Legislature has specifically allocated to school districts very broad powers of self-governance, which specifically include "[p]roviding for the safety and welfare of pupils while at school or a school sponsored activity," MCL 380.11a(3)(b). The distinct differences between local units of government and school districts influenced the conclusion that *CADL* did not govern this case.

3. The four factors set forth in *Llewellyn* provide the framework for evaluating a question concerning preemption: (1) when state law expressly provides that the state's authority to regulate in a specified area of the law is to be exclusive, there is no doubt that municipal regulation is preempted; (2) preemption of a field of regulation may be implied upon an examination of legislative history; (3) the pervasiveness of the state regulatory scheme may support a finding of preemption; while the pervasiveness of the state regulatory scheme is not generally sufficient by itself to infer preemption, it is a factor that should be considered as evidence of preemption; and (4) the nature of the regulated subject matter may demand exclusive state regulation to achieve the uniformity necessary to serve the state's purpose or interest. In this case, (1) no express state law provision

existed that specified exclusive regulation of this area of law; importantly, the Legislature did not include schools or school districts in its list of local units of government defined in MCL 123.1102 even though the Legislature has explicitly identified school districts as local units of government for many other purposes; (2) contrary to plaintiffs' assertion that the legislative history cited in *CADL*—which expressed concern that local regulation of gun control would result in a "patchwork" of ordinances—supported preemption, this fragment of legislative history was useless because it spoke to ordinances and local units of government rather than to schools; (3) while firearms are pervasively regulated in Michigan, this fact, standing alone, did not compel a conclusion that preemption existed, particularly in light of relevant segments of a multifaceted statutory framework that evinced the Legislature's intent to *prohibit* weapons in schools rather than to rein in a district's ability to control the possession of weapons on its campuses; additionally, the pervasiveness of the Legislature's use of the phrase "weapon free school zones" in 26 different laws telegraphed an unmistakable objective that no weapons were to be allowed in schools and weighed against the preemption of a district policy affirming that its schools will remain "weapon-free"; and (4) weighing the policy choices, there was no possibility of meaningful confusion or burdening of law enforcement; instead, the AAPS policy ensured a safe learning environment for students in conjunction with MCL 380.11a(3)(b), which broadly empowers school districts to provide for the safety and welfare of students while at school or a school-sponsored activity. The circuit court properly concluded that application of the *Llewellyn* factors counseled against a finding of field preemption.

Affirmed.

1. WEAPONS — FIREARMS — SCHOOLS — CONSTITUTIONAL LAW — PREEMPTION.

MCL 28.425o(1)(a) provides, in relevant part, that an individual licensed to carry a concealed pistol shall not carry a concealed pistol on the premises of a school or school property except that a parent or legal guardian of a student of the school is not precluded from carrying a concealed pistol while in a vehicle on school property if he or she is dropping the student off at the school or picking up the student from the school; MCL 28.425o(1)(a) does not expressly forbid additional regulation or declare that its subparts supersede any other school-related firearm rules.

2. WEAPONS — FIREARMS — SCHOOLS — WORDS AND PHRASES — "LOCAL UNIT OF GOVERNMENT."

MCL 123.1101(b) defines the term "local unit of government" to mean "a city, village, township, or county"; a school district is not a local unit of government under MCL 123.1101(b).

Makowski Legal Group, PLC (by *James J. Makowski* and *Steven E. Sundeen*), for Michigan Gun Owners, Inc., and Ulysses Wong.

Collins & Blaha, PC (by *William J. Blaha* and *Julia M. Melkić*), for Ann Arbor Public Schools and Jeanice K. Swift.

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

GLEICHER, J. The issue presented is whether state law preempts Ann Arbor Public School policies banning the possession of firearms in schools and at school-sponsored events. We hold that it does not, and we affirm the judgment of the circuit court.

I

In April 2015, defendant Ann Arbor Public Schools (AAPS) promulgated three policies that together ban the possession of firearms on school property and at school-sponsored activities. Policy 5400 empowers the board of education and the superintendent "to formulate policies and procedures that effectively protect students and employees from potential acts or threats of violence and that also protect the District against potential lawsuits that might result from that potential or threat of violence." Policy 5400 further provides that "the presence of a dangerous weapon" on school property constitutes an emergency as defined by the Michigan Department of Education, *MI Ready Schools:*

Emergency Planning Toolkit (2011),[1] "pending the removal of that dangerous weapon from the premises." The Toolkit sets forth "three common response strategies" applicable in emergencies: evacuation, sheltering within a building, and a lockdown to restrict the movement of persons.[2]

Policy 5410 "designates all property owned or leased by the [AAPS] 'Dangerous Weapon & Disruption-Free Zones.' " This regulation announces the district's "commitment to the least disruptive school environment possible by refusing" access to school property to any person who "causes either actual or a reasonable forecast of material disruption to the educational process." Policy 5420 "declares all properties owned or leased by AAPS as Dangerous Weapon and Disruption-Free Zones" and bars any "person in possession of a dangerous weapon," including a firearm, from "remain-[ing] on property owned or leased by AAPS at any time when students are at school, en route to or from school or at a school sponsored activity . . . ." Officers of public law enforcement agencies are excluded from the reach of this rule. Licensed concealed pistol carriers are prohibited from carrying a concealed pistol on school property "except . . . as expressly authorized by MCL 28.425o."

Shortly after AAPS announced these policies, plaintiffs, Michigan Gun Owners, Inc., and Ulysses Wong, challenged them. Wong possesses a concealed pistol license and is the parent of a minor child who attends AAPS. Plaintiffs' complaint asserts that Michigan law

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[1] The Toolkit is available online at <http://www.michigan.gov/documents/safeschools/MI_Ready_Schools_Emergency_Planning_Toolkit_370277_7.pdf> (accessed November 30, 2016) [https://perma.cc/4J48-U4RT].

[2] See page 27 of the Toolkit.

allows Wong to openly carry a pistol on school property because "[s]tate law preempts a local unit of government from regulating the possession" of firearms. According to Wong and Michigan Gun Owners, AAPS qualifies as a "local unit of government."

By filing dispositive cross-motions, the parties submitted the sole legal issue in this case—preemption—to the circuit court.[3] AAPS argued that Michigan law confers on public school districts the right to address the safety and welfare of the students and prevent disruption to the educational environment by enacting policies such as those in question. No state statute conflicts with this authority, AAPS urged, and caselaw governing preemption does not undermine school districts' power to regulate firearms on their premises.

Primarily relying on this Court's decision in *Capital Area Dist Library v Mich Open Carry, Inc*, 298 Mich App 220; 826 NW2d 736 (2012) (*CADL*), plaintiffs contended that state law allows certain individuals to carry guns on school property in specific circumstances and preempts any attempts by local units of government to regulate firearms. Michigan's statutory regulation of firearms is so pervasive, plaintiffs insist, that the entire firearms field is preempted and school districts are foreclosed from any rulemaking regarding firearms.

The circuit court began its analysis with the statute at the heart of *CADL*, MCL 123.1102, which states:

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[3] The parties agree that the Second Amendment has no role to play in this case. See *Dist of Columbia v Heller*, 554 US 570, 626; 128 S Ct 2783; 171 L Ed 2d 637 (2008) ("[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings . . . .").

> A local unit of government shall not impose special taxation on, enact or enforce any ordinance or regulation pertaining to, or regulate in any other manner the ownership, registration, purchase, sale, transfer, transportation, or possession of pistols, other firearms, or pneumatic guns, ammunition for pistols or other firearms, or components of pistols or other firearms, except as otherwise provided by federal law or a law of this state.[4]

In relation to this statute, the Legislature defined a "local unit of government" as "a city, village, township, or county." MCL 123.1101(a). A school district is not included in that list, the circuit court observed, and is not an entity controlled or authorized by "a city, village, township, or county." Therefore, the court concluded, MCL 123.1101 does not control the outcome of this case.

The court then turned to the question of whether by enacting MCL 123.1101 the Legislature intended to completely preempt the field of firearm legislation, thereby precluding a school district's firearm policies. The circuit court correctly recognized that this inquiry hinges on the application of four factors set forth in *People v Llewellyn*, 401 Mich 314, 323-324; 257 NW2d 902 (1977):

> First, where the state law expressly provides that the state's authority to regulate in a specified area of the law is to be exclusive, there is no doubt that municipal regulation is pre-empted.
>
> Second, pre-emption of a field of regulation may be implied upon an examination of legislative history.
>
> Third, the pervasiveness of the state regulatory scheme may support a finding of pre-emption. While the pervasiveness of the state regulatory scheme is not

[4] The statute was amended to add pneumatic guns after *CADL* issued. See 2015 PA 29.

> generally sufficient by itself to infer pre-emption, it is a factor which should be considered as evidence of pre-emption.
>
> Fourth, the nature of the regulated subject matter may demand exclusive state regulation to achieve the uniformity necessary to serve the state's purpose or interest. [Citations omitted.]

Considering these factors, the circuit court concluded that there was no express preemption, no legislative history supporting preemption, no single body of law or cohesive scheme regulating guns such that preemption could be implied, and that the nature of firearm regulation did not demand exclusive state regulation. The court subsequently entered an order granting AAPS's motion for summary disposition and dismissing plaintiffs' complaint with prejudice. Plaintiffs appeal that order.

II

Plaintiffs first contend that the AAPS weapons policies directly contradict MCL 28.425o. That statute provides, in relevant part, as follows:

> (1) Subject to subsection (5), an individual licensed under this act to carry a concealed pistol, or who is exempt from licensure under [MCL 28.432a(1)(h)], shall not carry a concealed pistol on the premises of any of the following:
>
> (a) A school or school property except that a parent or legal guardian of a student of the school is not precluded from carrying a concealed pistol while in a vehicle on school property, if he or she is dropping the student off at the school or picking up the student from the school. As used in this section, "school" and "school property" mean those terms as defined in . . . MCL 750.237a.

* * *

(5) Subsections (1) and (2) do not apply to any of the following:

(a) An individual licensed under this act who is a retired police officer, retired law enforcement officer, or retired federal law enforcement officer.

(b) An individual who is licensed under this act and who is employed or contracted by an entity described under subsection (1) to provide security services and is required by his or her employer or the terms of a contract to carry a concealed firearm on the premises of the employing or contracting entity.

(c) An individual who is licensed as a private investigator or private detective under the professional investigator licensure act, 1965 PA 285, MCL 338.821 to 338.851.

(d) An individual who is licensed under this act and who is a corrections officer of a county sheriff's department or who is licensed under this act and is a retired corrections officer of a county sheriff's department, if that individual has received county sheriff approved weapons training.

(e) An individual who is licensed under this act and who is a motor carrier officer or capitol security officer of the department of state police.

(f) An individual who is licensed under this act and who is a member of a sheriff's posse.

(g) An individual who is licensed under this act and who is an auxiliary officer or reserve officer of a police or sheriff's department.

(h) An individual who is licensed under this act and who is any of the following:

(*i*) A parole, probation, or corrections officer, or absconder recovery unit member, of the department of corrections, if that individual has obtained a Michigan department of corrections weapons permit.

(*ii*) A retired parole, probation, or corrections officer, or retired absconder recovery unit member, of the depart-

> ment of corrections, if that individual has obtained a Michigan department of corrections weapons permit.
>
> (i) A state court judge or state court retired judge who is licensed under this act.
>
> (j) An individual who is licensed under this act and who is a court officer.

Plaintiffs argue that because MCL 28.425o(1)(a) addresses the right of concealed pistol license holders to carry a concealed pistol on school property in certain circumstances, AAPS's policy banning weapons is expressly preempted.

We read the statute differently. MCL 28.425o(1)(a) imposes a blanket *prohibition* on carrying a concealed pistol on school grounds ("shall not") subject to certain specific and limited exceptions. The statute does not expressly forbid additional regulation or declare that its subparts supersede any other school-related firearm rules. More to the point, AAPS Policy 5420 specifically references and acknowledges that MCL 28.425o controls the ability of concealed pistol license holders to carry a concealed pistol under the distinct circumstances conforming to the statute. We find no conflict between the statute and the AAPS policies, and thus no express preemption. Moreover, as discussed in greater detail in the next section, this statute's virtually categorical *limitation* of the presence of weapons in educational settings strongly implies that the Legislature intended this enactment to curtail the carrying of weapons in public schools.

III

Plaintiffs' second argument centers on their contention that *CADL* governs this case. We find *CADL* readily distinguishable.

As always, we begin with the language of the statute. In MCL 123.1101(b), the Legislature defined the term "local unit of government" to mean "a city, village, township, or county."[5] In *CADL*, this Court held that although a district library established pursuant to the District Library Establishment Act, MCL 397.171 *et seq*., is not "a city, village, township, or county," a district library is "a quasi-municipal corporation" and therefore a "local unit of government." *CADL*, 298 Mich App at 231-232, 236. *CADL* reasoned that because a district library is established by two local units of government, it is swept within the reach of MCL 123.1102, which expressly prohibits the enactment of any regulation relating to the possession of firearms by "local units of government." *Id*. at 237.

CADL's holding rested on a judgment that district libraries are so closely akin to the local units of government listed in MCL 123.1101(b) that the same regulatory scheme should apply. In essence, the *CADL* Court determined that because the city and county that formed the Capital Area District Library were precluded from regulating firearms pursuant to MCL 123.1102, it made no sense to permit their stepchild—a library—from doing so. No corresponding parallels exist here. School districts are not formed, organized, or operated by cities, villages, townships, or counties; school districts exist independently of those bodies. "Leadership and general supervision over all public education, including adult education and instructional programs in state institutions, except as to institutions of higher education granting baccalaureate degrees, is vested in a state board of education." Const 1963, art 8, § 3. While a district library enjoys a general ability to

[5] At the time *CADL* was issued, the pertinent definition was located in Subdivision (a) of the statute.

"[s]upervise and control" its property, MCL 397.182(1)(f), the Legislature has specifically allocated to school districts very broad powers of self-governance, which specifically include "[p]roviding for the safety and welfare of pupils while at school or a school sponsored activity":

> A general powers school district has all of the rights, powers, and duties expressly stated in this act; may exercise a power implied or incident to a power expressly stated in this act; and, except as otherwise provided by law, may exercise a power incidental or appropriate to the performance of a function related to operation of a public school and the provision of public education services in the interests of public elementary and secondary education in the school district, including, but not limited to, all of the following:
>
> (a) Educating pupils. In addition to educating pupils in grades K-12, this function may include operation of preschool, lifelong education, adult education, community education, training, enrichment, and recreation programs for other persons. . . .
>
> * * *
>
> (b) Providing for the safety and welfare of pupils while at school or a school sponsored activity or while en route to or from school or a school sponsored activity. [MCL 380.11a(3).]

The close connection between district libraries and the cities or counties that established them informed *CADL*'s analysis of the *Llewellyn* factors. The distinct differences between local units of government and school districts likewise influence our calculus and our conclusion that *CADL* does not govern this case.

IV

We turn to plaintiffs' final argument—that MCL 123.1102 impliedly preempts any school-district-

generated firearm policy because the statute fully occupies the regulatory field. The *Llewellyn* framework guides our evaluation of this question. We agree with the circuit court that application of the *Llewellyn* factors counsels against a finding of field preemption.

The first *Llewellyn* factor asks whether the state law cited as preemptive "expressly provides that the state's authority to regulate in a specified area of the law is to be exclusive . . . ." *Llewellyn*, 401 Mich at 323. As we have stated, no such provision exists. It bears repeating that the statute on which plaintiffs rely does not include schools or school districts in its list of "local units of government," despite that for many other purposes, the Legislature has explicitly identified school districts as "local units of government." See, e.g., MCL 550.1951 (including "school districts" within the definition of "local unit of government" in an act providing that certain entities are subject to the Patient's Right to Independent Review Act, MCL 550.1901 *et seq*.); MCL 286.942(g) (including "school district[s]" within the definition of "local unit of government" for purposes of the Rural Development Fund Act, MCL 286.941 *et seq*.); and MCL 123.381 (including "school district[s]" within the definition of "local unit of government" in an act concerning the construction of water and waste supply systems).

The second *Llewellyn* factor requires us to consider legislative history.[6] Plaintiffs point to the House Legis-

[6] We note that in the almost 40 years that have passed since our Supreme Court's decision in *Llewellyn*, the Supreme Court's views regarding the propriety of judicial reliance on legislative history have changed considerably. For example, in *People v Gardner*, 482 Mich 41, 57, 58; 753 NW2d 78 (2008), the Court discussed the many "problems inherent in preferring judicial interpretation of legislative history to a plain reading of the unambiguous text" and expressed a decided preference for "historical facts" about "the Legislature's affirmative acts" rather

lative Analysis we cited in *CADL*, reciting that MCL 123.1102 "was designed to address the 'proliferation of local regulation regarding firearm ownership, sale, and possession' and the 'concern that continued local authority to enact and enforce gun control ordinances may result in the establishment of a patchwork of ordinances.' " *CADL*, 298 Mich App at 236. We find this fragment of legislative history useless, as it speaks to ordinances and local units of government rather than to schools. As no other legislative history has been presented to us, we conclude that this factor does not support preemption.

The third *Llewellyn* factor concerns "the pervasiveness of the state regulatory scheme." *Llewellyn*, 401 Mich at 323. Firearms are indeed pervasively regulated in Michigan. In MCL 28.425a(5), the Legislature commanded that the Legislative Service Bureau "compile the firearms laws of this state, including laws that apply to carrying a concealed pistol, and . . . provide copies of the compilation in an electronic format to the department of state police."[7] The statutes referencing firearms consume almost 200 pages of paper. Included are several provisions in the Revised School Code, MCL 380.1 *et seq*. For example, MCL 380.1163 requires schools to develop "model gun safety instruction program[s]." MCL 380.1311(2) permits a school board to expel a pupil who "possesses in a weapon free school zone a weapon that constitutes a dangerous weapon . . . ." MCL 380.1313(2) authorizes a school

than "staff analyses of legislation." "[R]esort to legislative history of any form is proper *only* where a genuine ambiguity exists in the statute. Legislative history cannot be used to create an ambiguity where one does not otherwise exist." *In re Certified Question from the United States Court of Appeals for the Sixth Circuit*, 468 Mich 109, 115 n 5; 659 NW2d 597 (2003).

[7] That compilation is available to all at <https://www.legislature.mi.gov/Publications/ Firearms.pdf> (accessed November 30, 2016) [https://perma.cc/3ZSE-SWQK].

official to confiscate a dangerous weapon in the possession of a pupil. And the full compilation includes MCL 28.425o(1)(a), which we cited earlier, as well as penal statutes such as MCL 750.234d, which provides:

> (1) Except as provided in subsection (2), a person shall not possess a firearm on the premises of any of the following:
>
> (a) A depository financial institution or a subsidiary or affiliate of a depository financial institution.
>
> (b) A church or other house of religious worship.
>
> (c) A court.
>
> (d) A theatre.
>
> (e) A sports arena.
>
> (f) A day care center.
>
> (g) A hospital.
>
> (h) An establishment licensed under the Michigan liquor control act, [MCL 436.1 to MCL 436.58].
>
> (2) This section does not apply to any of the following:
>
> (a) A person who owns, or is employed by or contracted by, an entity described in subsection (1) if the possession of that firearm is to provide security services for that entity.
>
> (b) A peace officer.
>
> (c) A person licensed by this state or another state to carry a concealed weapon.
>
> (d) A person who possesses a firearm on the premises of an entity described in subsection (1) if that possession is with the permission of the owner or an agent of the owner of that entity.
>
> (3) A person who violates this section is guilty of a misdemeanor punishable by imprisonment for not more than 90 days or a fine of not more than $100.00, or both.[8]

[8] Despite that MCL 750.234d(2)(c) permits concealed weapon holders to carry concealed weapons in "[a] court," our Supreme Court has promulgated an administrative order barring the presence of *all* weap-

Yet another penal statute relevant to this case addresses "weapon free school zones," which are defined as "school property and a vehicle used by a school to transport students to or from school property." MCL 750.237a(6)(e). This statute sets out penalties for individuals who engage in firearm offenses in a weapon free school zone and specifically provides that "an individual who possesses a weapon in a weapon free school zone is guilty of a misdemeanor . . . ." MCL 750.237a(4). This subsection does not apply, however, to individuals licensed to carry a concealed weapon, a "peace officer," or certain designated others. MCL 750.237a(5).

Given this panoply of firearm laws, we most certainly agree that firearms are pervasively regulated in Michigan. But this fact, standing alone, does not compel us to infer preemption. "While the pervasiveness of the state regulatory scheme is not generally sufficient by itself to infer pre-emption, it is a factor which should be considered as evidence of pre-emption." *Llewellyn*, 401 Mich at 324. Here, relevant segments of a multifaceted statutory framework evince the Legislature's intent to *prohibit* weapons in schools rather than to rein in a district's ability to control the possession of weapons on its campuses.

Among the statutes regulating firearms compiled by the Legislative Service Bureau are 26 different laws specifically referencing "weapon free school zones." These four words telegraph an unmistakable objective regarding guns and schools; indeed, we find it hard to

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ons in court facilities unless approved by the chief judge. Administrative Order No. 2001-1, 463 Mich cliii (2001). Many circuit courts have issued their own policies banning the presence of weapons. See, e.g., Oakland County Circuit and Probate Courts, Joint Administrative Order No. 2012-06J <https://www.oakgov.com/courts/circuit/Documents/ao/2012-06J.pdf> (accessed November 30, 2016) [https://perma.cc/N4UM-EZX3].

imagine a more straightforward expression of legislative will. The Legislature contemplated that this repeatedly invoked phrase would be interpreted to mean exactly what it says—no weapons are allowed in schools. Viewing the AAPS policies against this statutory backdrop, we infer that firearm policies consistent with the "weapon free school zone" concept are unobjectionable. Field preemption analysis does not permit us to ignore this statutory language simply because there are many statutes regulating firearms. To the contrary, the pervasiveness of the Legislature's use of the phrase "weapon free school zones" presses against the preemption of a district policy affirming that its schools will remain "weapon-free."

Llewellyn's fourth factor asks whether "the nature of the regulated subject matter may demand exclusive state regulation to achieve the uniformity necessary to serve the state's purpose or interest." *Id*. Given that the Legislature has never expressly reserved to itself the ability to regulate firearms in schools, our evaluation of this factor requires us to weigh policy choices.

Plaintiffs insist that a "patchwork" of differing school policies will create "confusion" and will "burden" the police and the public. We find no merit in this argument. The Legislature has broadly empowered school districts to "[p]rovid[e] for the safety and welfare of pupils while at school or a school sponsored activity or while en route to or from school or a school sponsored activity." MCL 380.11a(3)(b). Indisputably, the Legislature recognized that different school districts would employ different methods and strategies to accomplish this goal. Most parents of school-age children send those children to schools located within a single school district. Most parents easily learn and adapt to the policies and procedures applicable to their

children's schools and district. We discern no possibility of meaningful "confusion" or burdening of law enforcement. To the contrary, the AAPS policy ensures that the learning environment remains uninterrupted by the invocation of emergency procedures that would surely be required each and every time a weapon is openly carried by a citizen into a school building.

We affirm.

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

MICHIGAN OPEN CARRY INC v CLIO AREA SCHOOL DISTRICT

Docket No. 329418. Submitted December 13, 2016, at Detroit. Decided December 15, 2016, at 9:15 a.m. Leave to appeal sought.

Michigan Open Carry Inc. and Kenneth Herman (collectively, plaintiffs) brought an action in the Genesee Circuit Court against the Clio Area School District (CASD), Fletcher Spears III, and Katrina Mitchell (collectively, defendants), alleging that CASD's policy banning the possession of firearms in the district's schools and at school-sponsored events—even when the owner of the weapon had a concealed pistol permit and openly carried the weapon—violated state law. In 1996, CASD promulgated a weapons policy that prohibited school visitors from possessing, storing, making, or using a weapon in any setting that is under its board of education's control and supervision. With certain exceptions, none which applied to this case, the prohibition applied regardless of whether the visitor was otherwise authorized by law to possess the weapon, including if the visitor held a concealed weapons permit. In 2013 and 2014, Herman attempted to visit his child's elementary school while openly carrying a pistol for which he possessed a concealed pistol license, but he was denied access because of his open-carry possession. The court, Archie L. Hayman, J., granted summary disposition in favor of plaintiffs, reasoning that as a whole, MCL 750.237a(1), (4), and (5) and MCL 28.425o(1)(a) do not prohibit an individual who is licensed to carry a concealed pistol from openly possessing the pistol in a weapons-free school zone. Defendants appealed.

The Court of Appeals *held*:

1. The United States Constitution, US Const, Am II, and the 1963 Michigan Constitution, Const 1963, art 1, § 6, guarantee citizens the right to bear arms, but the right is not unlimited. With certain exceptions set forth in MCL 28.425o(5)—for example, retired police officers, or an individual hired to provide security—MCL 28.425o(1)(a) provides, in part, that an individual licensed to carry a concealed pistol may not carry a concealed pistol on the premises of a school or school property, with the exception that a parent or legal guardian of a student of the school may carry a concealed pistol while in a vehicle on school property if he or she

is dropping the student off at the school or picking up the student from the school. The statute does not expressly forbid additional regulations or declare that it supersedes any other school-related firearm rules. In this case, although CASD's weapons policy did not refer to MCL 28.425o, the district's policy provided exceptions to its ban consistent with the statute, and there was therefore no conflict between the district's policy and the statute. In other words, CASD's weapons policy was not preempted by MCL 28.425o(1)(a).

2. *Capital Area Dist Library v Mich Open Carry, Inc*, 298 Mich App 220 (2012)—which concluded that because a district library is a quasi-municipal corporation, MCL 123.1102 prohibited the library, as a "local unit of government," from enacting any regulation related to the possession of firearms—did not control the outcome of this case. Unlike district libraries that are similar to the local units of government listed in MCL 123.1101(b), school districts are not formed, organized, or operated by cities, villages, townships, or counties but exist independently of those bodies. Moreover, MCL 397.182(1)(f) specifically grants school districts very broad powers of self-governance. Under MCL 380.11a(3)(b), those powers include "[p]roviding for the safety and welfare of pupils while at school or a school sponsored activity."

3. Under *People v Llewellyn*, 401 Mich 314 (1977), a four-factor test must be considered to evaluate whether a state law preempts local regulation: (1) whether the state law expressly provides that the state's authority to regulate in a specified area of the law is to be exclusive, (2) whether legislative history impliedly supports preemption, (3) whether the specified area of law is pervasively regulated, and (4) whether the nature of the regulated subject matter may demand exclusive state regulation to achieve the uniformity necessary to serve the state's purpose or interest. In this case, the trial court erred by failing to consider the *Llewellyn* factors. Applying the factors, no state statute expressly provides that the state's authority to regulate weapons in a school district is exclusive. Legislative history does not support preemption, and while firearms are widely regulated in Michigan, the statutory framework evinces an intent by the Legislature to prohibit weapons in schools, rather than curtail a district's ability to control the possession of weapons on its campuses. Finally, exclusive state regulation of weapons in schools is not necessary because there is no possibility of meaningful confusion if school districts are allowed to promulgate individual weapons policies. Accordingly, the trial court erred by concluding that state law preempts CASD's weapons policy that

prohibits the possession of firearms, concealed or openly carried, in the district's schools or on school property.

Order granting motion for summary disposition in favor of plaintiffs reversed.

Dean G. Greenblatt, PLC (by *Dean G. Greenblatt*), for plaintiffs.

Giarmarco, Mullins & Horton, PC (by *Timothy J. Mullins* and *John L. Miller*), for defendants.

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

PER CURIAM. The issue presented is whether state law preempts Clio Area School District policies banning the possession of firearms in schools and at school-sponsored events. We hold that it does not, and we reverse the judgment of the circuit court.

I

On June 5, 1996, defendant Clio Area School District (CASD) promulgated Policy 7217, which currently[1] provides:

> The Board of Education prohibits visitors from possessing, storing, making, or using a weapon in any setting that is under the control and supervision of the Board including, but not limited to, property leased, owned, or contracted for by the Board, a school-sponsored event, or in a Board-owned vehicle.

* * *

[1] The policy quoted in this opinion is the most current version, which was revised on February 11, 2016. The differences between this version and the one in effect when the complaint was filed do not affect the outcome of this case.

The term "weapon" means any object which, in the manner in which it is used, is intended to be used, or is represented, is capable of inflicting serious bodily harm or property damage, as well as endangering the health and safety of persons. Weapons include, but are not limited to, firearms, guns of any type, including spring, air and gas-powered guns, (whether loaded or unloaded), that will expel a BB, pellet, or paint balls[,] knives, razors, clubs, electric weapons, metallic knuckles, martial arts weapons, ammunition, and explosives or any other weapon described in 18 U.S.C. 921.

This prohibition applies regardless of whether the visitor is otherwise authorized by law to possess the weapon, including if the visitor holds a concealed weapons permit. The following are the exceptions to this policy:

A. weapons under the control of law enforcement personnel;

B. items approved by a principal as part of a class or individual presentation under adult supervision, if used for the purpose of and in the manner approved (working firearms and ammunition shall never be approved);

C. theatrical props that do not meet the definition of "weapon" above, used in appropriate settings;

D. starter pistols used in appropriate sporting events.

These restrictions shall not apply in the following circumstances to persons who are also properly licensed to carry a concealed weapon:

A. A parent or legal guardian of a student of the school may carry a concealed weapon while in a vehicle on school property, if s/he is dropping the student off at the school or picking up the student from the school and any person may carry a concealed weapon solely in the parking lot.

B. A county corrections officer, a member of a Sheriff's posse, a police or sheriffs reserve or auxiliary officer, or a State Department of Corrections parole or corrections officer, a private investigator, a Michigan State Police motor carrier officer or Capitol security officer, a State

> court judge, a security officer required by the employer to carry a concealed weapon while on the premises, a court officer.
>
> C. A retired police or law enforcement officer, a retired Federal law enforcement officer, or a retired State court judge.

Signs advising of this policy are placed at every CASD school and warn violators that they will be denied admittance.

In September 2013, plaintiff Kenneth Herman attempted to visit his child's elementary school while openly carrying a pistol for which he possessed a concealed pistol license. Herman claimed he was thereafter denied access to the school on several occasions in 2013 and 2014 for his open pistol possession. Finally, in November 2014, CASD threatened to summon authorities if Herman again attempted to enter the building with his weapon.

As a result of these incidents, Herman and plaintiff Michigan Open Carry Inc. filed suit against the district and certain district officials.[2] Plaintiffs' complaint asserts that Michigan law allows Herman to openly carry a pistol on school property because state law preempts a local unit of government from regulating the possession of firearms. According to plaintiffs, CASD qualifies as a "local unit of government."

Defendants sought summary disposition, arguing that Michigan law confers on public school districts the right to address the safety and welfare of the students and prevent disruption to the educational environment by enacting policies such as that in question. Defen-

[2] At time the complaint was filed in this case, defendant Fletcher Spears III was the CASD superintendent, and defendant Katrina Mitchell was the principal of the Edgerton Elementary School in the CASD.

dants also cited *Davis v Hillsdale Community Sch Dist*, 226 Mich App 375; 573 NW2d 77 (1997), for the proposition that a school district has plenary power to ban weapons from its premises. No state statute conflicts with this authority, CASD urged, and caselaw governing preemption does not encompass the ability of school districts to regulate firearms on their premises.

Primarily relying on this Court's decision in *Capital Area Dist Library v Mich Open Carry, Inc*, 298 Mich App 220; 826 NW2d 736 (2012) (*CADL*), plaintiffs contended that state law allows certain individuals to carry guns on school property in specific circumstances and preempts any attempts by local units of government to regulate firearms. Michigan's statutory regulation of firearms is so pervasive, plaintiffs insisted, that the entire firearms field is preempted, and school districts are foreclosed from any rulemaking regarding firearms. More specifically, plaintiffs asserted that the CASD policy contradicted and therefore was preempted by MCL 123.1102, which provides:

> A local unit of government shall not impose special taxation on, enact or enforce any ordinance or regulation pertaining to, or regulate in any other manner the ownership, registration, purchase, sale, transfer, transportation, or possession of pistols, other firearms, or pneumatic guns, ammunition for pistols or other firearms, or components of pistols or other firearms, except as otherwise provided by federal law or a law of this state.[3]

In resolving this case, the circuit court declared that "the outcome of this case is relatively simple." US Const, Am 2, and Const 1963, art 1, § 6, entitle citizens to bear arms. But, the court noted, that right "is not

[3] The statute was amended to add pneumatic guns after *CADL* issued. See 2015 PA 29.

unlimited." For example, in *Dist of Columbia v Heller*, 554 US 570, 626; 128 S Ct 2783; 171 L Ed 2d 637 (2008), the United States Supreme Court held that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings . . . ."[4] The circuit court continued:

> The Michigan Legislature has seen fit to pass certain laws limiting the right of individual[s] to possess firearms specifically with respect to the issue in this case, an individual shall not possess a concealed weapon in a weapons-free school zone, MCL [750.237a(1)]. An individual shall not possess a weapon in a weapons free school zone – that's MCL [750.237a(4)] – unless that individual is licensed to carry a concealed weapon, MCL [750.237a(5)]. An individual licensed to carry a concealed pistol shall not carry a concealed pistol on school property; that's MCL [28.425o(1)(a)]; however, a parent or guardian licensed to carry a concealed pistol, may carry that pistol concealed while in a vehicle on school property either dropping the student off at school or picking the student up from school.
>
> When you read this law as a whole and these statutes as a whole, these statutes do not prohibit an individual, who is licensed to carry a concealed pistol from openly possessing a pistol in a weapons free school zone. The Michigan Legislature evidently has not seen fit to completely prohibit individuals from possessing firearms on school property.

The circuit court distinguished the current case from *Davis*, noting that *Davis* permitted a school

[4] On appeal, defendants cite *Heller* and posit that citizens do not have an unlimited Second Amendment right to possess arms on school property. The circuit court accepted that proposition, and we need not address it further.

district to direct the discipline of students possessing weapons, not to "do anything that it wants" to exclude pistols from its properties. And given the pervasive nature of the state statutes, the court rejected CASD's challenge against preemption.

In relation to plaintiffs' arguments, the circuit court found *CADL* controlling. The court ruled that the school district was "a quasi-municipal corporation," just like the district library in *CADL*, rendering the cases "virtually identical." According to the court, *CADL* "held that the Michigan Legislature has occupied the field of firearm regulation to such an extent that State law preempts a quasi-municipal corporation's attempts to regulate in that same field." Accordingly, the circuit court granted summary disposition and entered a declaratory judgment in plaintiffs' favor, thereby invalidating CASD's firearms ban. Defendants appeal that ruling.

II

We first address plaintiffs' contention that the CASD weapons policy directly contradicts MCL 28.425o, which provides, in relevant part, as follows:

> (1) Subject to subsection (5), an individual licensed under this act to carry a concealed pistol, or who is exempt from licensure under [MCL 28.432a(1)(h)], shall not carry a concealed pistol on the premises of any of the following:
>
> (a) A school or school property except that a parent or legal guardian of a student of the school is not precluded from carrying a concealed pistol while in a vehicle on school property, if he or she is dropping the student off at the school or picking up the student from the school. As used in this section, "school" and "school property" mean those terms as defined in . . . MCL 750.237a.

* * *

(5) Subsections (1) and (2) do not apply to any of the following:

(a) An individual licensed under this act who is a retired police officer, retired law enforcement officer, or retired federal law enforcement officer.

(b) An individual who is licensed under this act and who is employed or contracted by an entity described under subsection (1) to provide security services and is required by his or her employer or the terms of a contract to carry a concealed firearm on the premises of the employing or contracting entity.

(c) An individual who is licensed as a private investigator or private detective under the professional investigator licensure act, 1965 PA 285, MCL 338.821 to 338.851.

(d) An individual who is licensed under this act and who is a corrections officer of a county sheriff's department or who is licensed under this act and is a retired corrections officer of a county sheriff's department, if that individual has received county sheriff approved weapons training.

(e) An individual who is licensed under this act and who is a motor carrier officer or capitol security officer of the department of state police.

(f) An individual who is licensed under this act and who is a member of a sheriff's posse.

(g) An individual who is licensed under this act and who is an auxiliary officer or reserve officer of a police or sheriff's department.

(h) An individual who is licensed under this act and who is any of the following:

(*i*) A parole, probation, or corrections officer, or absconder recovery unit member, of the department of corrections, if that individual has obtained a Michigan department of corrections weapons permit.

(*ii*) A retired parole, probation, or corrections officer, or retired absconder recovery unit member, of the depart-

> ment of corrections, if that individual has obtained a Michigan department of corrections weapons permit.
>
> (i) A state court judge or state court retired judge who is licensed under this act.
>
> (j) An individual who is licensed under this act and who is a court officer.

Plaintiffs argue that because MCL 28.425o(1)(a) addresses the right of concealed pistol license holders to carry a concealed pistol on school property in certain circumstances, CASD's policy banning weapons is expressly preempted.

We resolved this very issue in the companion case placed before this Court, *Mich Gun Owners, Inc v Ann Arbor Pub Sch*, 318 Mich App 338, 347; 897 NW2d 768 (2016):

> We read the statute differently. MCL 28.425o(1)(a) imposes a blanket *prohibition* on carrying a concealed pistol on school grounds ("shall not") subject to certain specific and limited exceptions. The statute does not expressly forbid additional regulation, or declare that its subparts supersede any other school-related firearm rules. More to the point, [Ann Arbor Public Schools (AAPS)] Policy 5420 specifically references and acknowledges that MCL 28.425o controls the ability of concealed pistol license holders to carry a concealed pistol under the distinct circumstances conforming to the statute. We find no conflict between the statute and the AAPS policies, and thus no express preemption. Moreover, as discussed in greater detail in the next section, this statute's virtually categorical *limitation* of the presence of weapons in educational settings strongly implies that the Legislature intended this enactment to curtail the carrying of weapons in public schools.

The CASD policy does not expressly reference MCL 28.425o. However, it does provide exceptions to its ban

consistent with the statute. We discern no conflict between the district policy and statute in this case either.

III

Defendants assert that CASD's firearms policy is consistent with state law permitting school districts to make their schools "gun free zones." For this reason, *CADL* is readily distinguishable from the current action.

As provided in *Mich Gun Owners*, 318 Mich App at 348-349:

> As always, we begin with the language of the statute. In MCL 123.1101(b), the Legislature defined the term "local unit of government" to mean "a city, village, township, or county."[5] In *CADL*, this Court held that although a district library established pursuant to the District Library Establishment Act, MCL 397.171 *et seq*., is not "a city, village, township, or county," a district library is "a quasi-municipal corporation" and therefore a "local unit of government." *CADL*, 298 Mich App at 231-232, 236. *CADL* reasoned that because a district library is established by two local units of government, it is swept within the reach of MCL 123.1102, which expressly prohibits the enactment of any regulation relating to the possession of firearms by "local units of government." *Id*. at 237.
>
> *CADL*'s holding rested on a judgment that district libraries are so closely akin to the local units of government listed in MCL 123.1101(b) that the same regulatory scheme should apply. In essence, the *CADL* Court determined that because the city and county that formed the Capital Area District Library were precluded from regulating firearms pursuant to MCL 123.1102, it made no sense to permit their stepchild—a library—from doing so. No corresponding parallels exist here. School districts are not formed, organized, or operated by cities, villages, townships or counties; school districts exist independently

of those bodies. "Leadership and general supervision over all public education, including adult education and instructional programs in state institutions, except as to institutions of higher education granting baccalaureate degrees, is vested in a state board of education." Const 1963, art 8, § 3. While a district library enjoys a general ability to "[s]upervise and control" its property, MCL 397.182(1)(f), the Legislature has specifically allocated to school districts very broad powers of self-governance, which specifically include "[p]roviding for the safety and welfare of pupils while at school or a school sponsored activity":

> A general powers school district has all of the rights, powers, and duties expressly stated in this act; may exercise a power implied or incident to a power expressly stated in this act; and, except as otherwise provided by law, may exercise a power incidental or appropriate to the performance of a function related to operation of a public school and the provision of public education services in the interests of public elementary and secondary education in the school district, including, but not limited to, all of the following:
>
> (a) Educating pupils. In addition to educating pupils in grades K-12, this function may include operation of preschool, lifelong education, adult education, community education, training, enrichment, and recreation programs for other persons. . . .
>
> * * *
>
> (b) Providing for the safety and welfare of pupils while at school or a school sponsored activity or while en route to or from school or a school sponsored activity. [MCL 380.11a(3).]

The close connection between district libraries and the cities or counties that established them informed *CADL*'s analysis of the *Llewellyn*[5] factors. The distinct differences

[5] *People v Llewellyn*, 401 Mich 314; 257 NW2d 902 (1977).

between local units of government and school districts likewise influence our calculus and our conclusion that *CADL* does not govern this case.

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[5] At the time *CADL* was issued, the pertinent definition was located in Subdivision (a) of the statute.

IV

The circuit court also committed clear legal error by accepting plaintiffs' claim that state law preempts school district policies against the possession of firearms. The *Llewellyn* framework guides our evaluation of this question, a framework the circuit court ignored in rendering judgment. And application of the *Llewellyn* factors counsels against a finding of field preemption.

Again, as held by this Court in *Mich Gun Owners*, 318 Mich App at 350-355:

> The first *Llewellyn* factor asks whether the state law cited as preemptive "expressly provides that the state's authority to regulate in a specified area of the law is to be exclusive . . . ." *Llewellyn*, 401 Mich at 323. As we have stated, no such provision exists. It bears repeating that the statute on which plaintiffs rely does not include schools or school districts in its list of "local units of government," despite that for many other purposes, the Legislature has explicitly identified school districts as "local units of government." See, e.g., MCL 550.1951 (including "school districts" within the definition of "local unit of government" in an act providing that certain entities are subject to the Patient's Right to Independent Review Act, MCL 550.1901 *et seq*.); MCL 286.942(g) (including "school district[s]" within the definition of "local unit of government" for purposes of the Rural Development Fund Act, MCL 286.941 *et seq*.); and MCL 123.381 (including "school district[s]" within the definition of "local

unit of government" in an act concerning the construction of water and waste supply systems).

The second *Llewellyn* factor requires us to consider legislative history.[6] Plaintiffs point to the House Legislative Analysis we cited in *CADL*, reciting that MCL 123.1102 "was designed to address the 'proliferation of local regulation regarding firearm ownership, sale, and possession' and the 'concern that continued local authority to enact and enforce gun control ordinances may result in the establishment of a patchwork of ordinances.' " *CADL*, 298 Mich App at 236. We find this fragment of legislative history useless, as it speaks to ordinances and local units of government rather than to schools. As no other legislative history has been presented to us, we conclude that this factor does not support preemption.

The third *Llewellyn* factor concerns "the pervasiveness of the state regulatory scheme." *Llewellyn*, 401 Mich at 323. Firearms are indeed pervasively regulated in Michigan. In MCL 28.425a(5), the Legislature commanded that the Legislative Service Bureau "compile the firearms laws of this state, including laws that apply to carrying a concealed pistol, and . . . provide copies of the compilation in an electronic format to the department of state police."[7] The statutes referencing firearms consume almost 200 pages of paper. Included are several provisions in the Revised School Code, MCL 380.1 *et seq*. For example, MCL 380.1163 requires schools to develop "model gun safety instruction program[s]." MCL 380.1311(2) permits a school board to expel a pupil who "possesses in a weapon free school zone a weapon that constitutes a dangerous weapon . . . ." MCL 380.1313(2) authorizes a school official to confiscate a dangerous weapon in the possession of a pupil. And the full compilation includes MCL 28.425o(1)(a), which we cited earlier, as well as penal statutes such as MCL 750.234d, which provides:

> (1) Except as provided in subsection (2), a person shall not possess a firearm on the premises of any of the following:

(a) A depository financial institution or a subsidiary or affiliate of a depository financial institution.

(b) A church or other house of religious worship.

(c) A court.

(d) A theatre.

(e) A sports arena.

(f) A day care center.

(g) A hospital.

(h) An establishment licensed under the Michigan liquor control act, [MCL 436.1 to MCL 436.58].

(2) This section does not apply to any of the following:

(a) A person who owns, or is employed by or contracted by, an entity described in subsection (1) if the possession of that firearm is to provide security services for that entity.

(b) A peace officer.

(c) A person licensed by this state or another state to carry a concealed weapon.

(d) A person who possesses a firearm on the premises of an entity described in subsection (1) if that possession is with the permission of the owner or an agent of the owner of that entity.

(3) A person who violates this section is guilty of a misdemeanor punishable by imprisonment for not more than 90 days or a fine of not more than $100.00, or both.[8]

Yet another penal statute relevant to this case addresses "weapon free school zones," which are defined as "school property and a vehicle used by a school to transport students to or from school property." MCL 750.237a(6)(e). This statute sets out penalties for individuals who engage in firearm offenses in a weapon free school zone and specifically provides that "an individual who possesses a weapon in a weapon free school zone is guilty of a misdemeanor . . . ." MCL 750.237a(4). This subsection does not apply, however, to individuals licensed

to carry a concealed weapon, a "peace officer," or certain designated others. MCL 750.237a(5).

Given this panoply of firearm laws, we most certainly agree that firearms are pervasively regulated in Michigan. But this fact, standing alone, does not compel us to infer preemption. "While the pervasiveness of the state regulatory scheme is not generally sufficient by itself to infer pre-emption, it is a factor which should be considered as evidence of pre-emption." *Llewellyn*, 401 Mich at 324. Here, relevant segments of a multifaceted statutory framework evince the Legislature's intent to *prohibit* weapons in schools, rather than to rein in a district's ability to control the possession of weapons on its campuses.

Among the statutes regulating firearms compiled by the Legislative Service Bureau are 26 different laws specifically referencing "weapon free school zones." These four words telegraph an unmistakable objective regarding guns and schools; indeed, we find it hard to imagine a more straightforward expression of legislative will. The Legislature contemplated that this repeatedly invoked phrase would be interpreted to mean exactly what it says—no weapons are allowed in schools. Viewing the AAPS policies against this statutory backdrop, we infer that firearm policies consistent with the "weapon free school zone" concept are unobjectionable. Field preemption analysis does not permit us to ignore this statutory language simply because there are many statutes regulating firearms. To the contrary, the pervasiveness of the Legislature's use of the phrase "weapon free school zones" presses against the preemption of a district policy affirming that its schools will remain "weapon-free."

Llewellyn's fourth factor asks whether "the nature of the regulated subject matter may demand exclusive state regulation to achieve the uniformity necessary to serve the state's purpose or interest." *Id*. Given that the Legislature has never expressly reserved to itself the ability to regulate firearms in schools, our evaluation of this factor requires us to weigh policy choices.

Plaintiffs insist that a "patchwork" of differing school policies will create "confusion" and will "burden" the police and the public. We find no merit in this argument. The Legislature has broadly empowered school districts to "[p]rovid[e] for the safety and welfare of pupils while at school or a school sponsored activity or while en route to or from school or a school sponsored activity." MCL 380.11a(3)(b). Indisputably, the Legislature recognized that different school districts would employ different methods and strategies to accomplish this goal. Most parents of school-age children send those children to schools located within a single school district. Most parents easily learn and adapt to the policies and procedures applicable to their children's schools and district. We discern no possibility of meaningful "confusion" or burdening of law enforcement. To the contrary, the AAPS policy ensures that the learning environment remains uninterrupted by the invocation of emergency procedures that would surely be required each and every time a weapon is openly carried by a citizen into a school building.

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[6] We note that in the almost 40 years that have passed since our Supreme Court's decision in *Llewellyn*, the Supreme Court's views regarding the propriety of judicial reliance on legislative history have changed considerably. For example, in *People v Gardner*, 482 Mich 41, 57, 58; 753 NW2d 78 (2008), the Court discussed the many "problems inherent in preferring judicial interpretation of legislative history to a plain reading of the unambiguous text" and expressed a decided preference for "historical facts" about "the Legislature's affirmative acts" rather than "staff analyses of legislation." "[R]esort to legislative history of any form is proper *only* where a genuine ambiguity exists in the statute. Legislative history cannot be used to create an ambiguity where one does not otherwise exist." *In re Certified Question from the United States Court of Appeals for the Sixth Circuit*, 468 Mich 109, 115 n 5; 659 NW2d 597 (2003).

[7] That compilation is available to all at <https//:www.legislature.mi.gov/Publications/Firearms.pdf> (accessed November 30, 2016) [https://perma.cc/3ZSE-SWQK].

[8] Despite that MCL 750.234d(2)(c) permits concealed weapon holders to carry concealed weapons in "[a] court," our Supreme Court has promulgated an administrative order barring the presence of *all* weapons in court facilities unless approved by the chief judge. Administrative Order No. 2001-1, 463 Mich cliii (2001). Many circuit courts have issued their own policies banning the presence of weapons. See, e.g., Oakland County Circuit and Probate Courts, Joint Administrative Order No. 2012-06J <https://www.oakgov.com/courts/circuit/Documents/ao/2012-06J.pdf> (accessed November 30, 2016) [https://perma.cc/N4UM-EZX3].

V

However, we must note our agreement with the circuit court's conclusion that *Davis* is not applicable to the current matter. In *Davis*, 226 Mich App at 377-378, the Hillsdale Community School District implemented a policy requiring expulsion of students found in possession of a "weapon in a weapon free school zone." BB guns fell within the policy's definition of "weapon" or "dangerous weapon." *Id*. at 378. Two students expelled for BB gun possession filed suit, complaining that the policy conflicted with and therefore was preempted by MCL 380.1311. *Id*. at 378-379. The statute mandated expulsion of students possessing weapons on school grounds, but did not specifically include BB guns within the definition of "weapon." *Id*. at 379 & n 3.

The circuit court in *Davis* accepted the preemption argument, but this Court reversed. *Id*. at 379, 381. In doing so, this Court reasoned that local school boards have " 'inherent power to define disciplinable acts' " and manage student behavior. *Id*. at 382, quoting *Widdoes v Detroit Pub Sch*, 218 Mich App 282, 287; 553 NW2d 688 (1996). There is no precedent establishing a school district's inherent power to direct the behavior of nonstudent citizens. Given the vastly

different interests at play, we cannot accept defendants' claim that *Davis* controls the preemption question in this case.

We reverse.

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

In re THOMPSON

Docket No. 333294. Submitted December 13, 2016, at Detroit. Decided December 15, 2016, at 9:20 a.m.

The Department of Health and Human Services (DHHS) petitioned the Genesee Circuit Court, Family Division, simultaneously seeking jurisdiction over respondent-mother's child, JT, and termination of respondent-mother's parental rights to JT. At the termination hearing, but before determining whether jurisdiction was appropriate, the court, Duncan M. Beagle, J., concluded that termination of respondent-mother's parental rights was supported under several MCL 712A.19b(3) factors and that termination was in JT's best interests. At the very end of the termination hearing, DHHS counsel requested that the court make a finding with regard to jurisdiction, and the court determined that it had jurisdiction over the child. No adjudication hearing ever occurred. Respondent-mother appealed.

The Court of Appeals *held*:

Child protective proceedings have long been divided into two distinct phases: the adjudicative phase and the dispositional phase. In order to have an initial disposition, there must first be an adjudication. While termination of parental rights may be ordered at the initial dispositional hearing, several conditions must first be met, one of which being that the trier of fact found by a preponderance of the evidence at the adjudicative hearing that the child came within the jurisdiction of the court. In this case, no adjudication trial took place; rather, the court skipped right to termination, took the evidence in one sitting, and reached a termination decision before considering whether jurisdiction was appropriate. The failure to adjudicate respondent-mother before proceeding to disposition was a fatal flaw in these proceedings.

Adjudication and termination orders vacated; case remanded for further proceedings.

PARENT AND CHILD — CHILD PROTECTIVE PROCEEDINGS — JURISDICTION — ADJUDICATION AND DISPOSITION.

Child protective proceedings have long been divided into two distinct phases: the adjudicative phase and the dispositional

phase; in order to have an initial disposition, there must first be an adjudication; the failure to adjudicate a respondent before proceeding to disposition is a fatal flaw in child protective proceedings.

David S. Leyton, Prosecuting Attorney, and *Matthew J. Smith*, Assistant Prosecuting Attorney, for the Department of Health and Human Services.

Nicholas R. D'Aigle for respondent-mother.

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

PER CURIAM. A decade ago, this Court held that a parent's rights to his or her child may only be terminated at the initial disposition if the circuit court *first* finds grounds to exercise jurisdiction over the child. Here, the circuit court conducted only a termination hearing and considered jurisdiction as an afterthought. Accordingly, we vacate the adjudicative and termination orders and remand to the circuit court to handle these proceedings in the manner and order dictated by law.

I. BACKGROUND

In September 2014, the circuit court terminated respondent-mother's rights to two children, who were then nine and six years old, based on the 2006 and 2013 deaths of the children's infant siblings due to unsafe sleeping conditions. Respondent hid from the court and the authorities that she was then pregnant with her fifth child.

JT was born in November 2014, and the Department of Health and Human Services (DHHS) immediately filed a petition simultaneously seeking jurisdiction over the child and termination of respondent's parental

rights. The court authorized the petition on November 19, and JT was placed in unrelated foster care upon his release from the hospital.

On January 23, 2015, the circuit court heard testimony from a Child Protective Services investigator, the foster-care worker assigned to this case, and respondent-mother. At the close of testimony, attorneys for the DHHS and the minor child made closing arguments focused solely on the termination grounds. The court then iterated its findings and determined that termination of respondent's parental rights was supported under several MCL 712A.19b(3) factors. The court also concluded that termination was in JT's best interests.

Only at the close of the court's termination decision was jurisdiction considered. DHHS counsel queried, "Judge, will you make a record in terms of the findings as to jurisdiction . . . [?]" The court replied:

> I'm glad you did. Oftentimes with these cases, we already have jurisdiction, but we didn't. Having found clear and convincing evidence, I don't think there's much question that there is more than a preponderance of evidence that the Court should take jurisdiction in this matter.
>
> So, the Court will make a finding that the Court will, in fact, take jurisdiction over the minor child, [JT], in addition to my earlier findings that there should be termination.

Respondent now appeals.[1]

II. ANALYSIS

The failure to adjudicate respondent before proceeding to disposition was a fatal flaw in these proceedings.

[1] Respondent challenges the delay to her appeal caused by the circuit court misplacing her appellate claim and request for counsel. Counsel has been appointed, and this Court accepted respondent's appeal as of right. There is no further relief that can be granted in this regard.

"Child protective proceedings have long been divided into two distinct phases: the adjudicative phase and the dispositional phase." *In re AMAC*, 269 Mich App 533, 536; 711 NW2d 426 (2006). During the adjudicative phase, the court considers the propriety of taking jurisdiction over the subject child. *In re Sanders*, 495 Mich 394, 404; 852 NW2d 524 (2014). This can be done in two ways. First, a parent may plead to the allegations in a jurisdictional petition, thereby bringing the child under the court's protection. MCR 3.971; *Sanders*, 495 Mich at 405; *AMAC*, 269 Mich App at 536. Second, the parent may demand a trial (bench or jury) to contest the allegations. MCR 3.972; *Sanders*, 495 Mich at 405; *AMAC*, 269 Mich App at 536.

Respondent did not plead to jurisdictional grounds. A review of the hearing transcript reveals that no adjudication trial took place; rather, the court skipped right to termination. It would be a mischaracterization to say that termination occurred at the initial disposition. In order to have an initial disposition, there must *first* be an adjudication. As described in *AMAC*, 269 Mich App at 537-538:

> Termination of parental rights may be ordered at the initial dispositional hearing. MCR 3.977(E); see, also, MCL 712A.19b(4). However, several conditions must be met, including (1) that the original or amended petition requested termination, (2) *that the trier of fact found by a preponderance of the evidence at the adjudicative hearing that the child came within the jurisdiction of the court*, and (3) that at the initial dispositional hearing, the court finds by clear and convincing legally admissible evidence that had been introduced at the adjudicative hearing or the plea proceeding or that is introduced at the dispositional hearing that a statutory ground for termination is established, "unless the court finds by clear and convincing evidence, in accordance with the rules of evidence as

> provided in subrule (G)(2), that termination of parental rights is not in the best interests of the child." MCR 3.977(E). [Emphasis added.]

In *AMAC*, the circuit court conducted an adjudicative hearing and took jurisdiction over the child in relation to the respondent-parent. But the court then proceeded to terminate the respondent's parental rights without moving into the dispositional phase. This could not be done. This Court held that the dispositional hearing could be conducted "immediately following the adjudicative hearing," but the two could not be converged such that there was no distinction. *AMAC*, 269 Mich App at 538.

Here, the melding happened in reverse. The circuit court failed to conduct an adjudicative trial. Instead, the court took evidence in one sitting and reached a termination decision before considering whether jurisdiction was appropriate. The court put the dispositional cart before the adjudicative horse. This was procedurally unsound.

Accordingly, we must vacate and remand for further proceedings consistent with this opinion. We do not retain jurisdiction. Given this resolution, we need not reach respondent's remaining appellate challenges.

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

PEOPLE v LATZ

Docket No. 328274. Submitted November 1, 2016, at Lansing. Decided December 20, 2016, at 9:00 a.m.

Callen T. Latz, a medical-marijuana patient, was charged in the 65A District Court with illegal transportation of marijuana, MCL 750.474. Defendant moved to dismiss the charge, and the court, Richard D. Wells, J., denied defendant's motion. Defendant then pleaded guilty subject to his right to appeal the legality of the statute, which he asserted was an unconstitutional amendment of the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*., and was superseded by the MMMA. Defendant appealed in the Clinton Circuit Court, and the circuit court, Randy L. Tahvonen, J., affirmed the district court's denial of defendant's motion after hearing oral argument. Defendant appealed.

The Court of Appeals *held*:

MCL 750.474 provides that a person shall not transport or possess usable marijuana in or upon a motor vehicle or any self-propelled vehicle designed for land travel unless the usable marijuana is enclosed in a case that is carried in the trunk of the vehicle or, if the vehicle does not have a trunk, enclosed in a case that is not readily accessible from the interior of the vehicle. MCL 333.26427(e) provides that all other acts inconsistent with the MMMA do not apply to the medical use of marijuana as provided for by the MMMA. MCL 750.474 was enacted in 2012, and the MMMA went into effect in 2008. Therefore, defendant's argument that the MMMA superseded MCL 750.474 failed because, as a general matter, for one act to supersede another, the superseding act must occur later in time. However, because courts are not bound by the labels a party gives to an argument but rather by the substance of the argument, the gravamen of defendant's argument was that the MMMA preempted MCL 750.474. Assuming that defendant was in compliance with the MMMA, which was not in dispute, the question was whether an irreconcilable conflict existed between the MMMA and MCL 750.474, and if so, whether the MMMA precluded defendant's conviction. Because MCL 750.474 expressly refers to MCL 333.26423(h)—which de-

fines medical use of marijuana, in part, as the transportation of marijuana—and seeks to place additional requirements on the transportation of marijuana beyond those imposed by the MMMA, MCL 750.474 subjects persons in compliance with the MMMA to prosecution despite compliance with the MMMA. Accordingly, MCL 750.474 was impermissible. Because MCL 750.474 was not part of the MMMA, defendant, as an MMMA-compliant medical-marijuana patient, could not be prosecuted for violating it.

Defendant's conviction reversed; case remanded for an entry of judgment in defendant's favor.

O'CONNELL, J., dissenting, disagreed with the majority's application of a traditional legal analysis to resolve the interplay between MCL 750.474 and the MMMA, instead offering a three-factor analysis that could be applied to all subsequent legislation involving the MMMA: (1) the new law is presumed constitutional on its face; (2) the party challenging the facial constitutionality of the new law must establish that no set of circumstances exists under which the law would be valid, keeping in mind the fact that a law might operate unconstitutionally under some conceivable set of circumstances is insufficient; and (3) the two laws must be reviewed for positive conflict, such that the two laws cannot consistently stand together. Under this framework, if the defendant would be immune from prosecution under the new law if he or she complied with the MMMA, then the laws consistently stand together. Applying the analysis to this case, (1) MCL 750.474 was presumed constitutional, (2) defendant did not establish that no set of circumstances existed under which MCL 750.474 would be valid, and (3) there was no positive conflict in the laws because MCL 750.474 did not modify, change, or alter any provisions of the MMMA, nor was it inconsistent with the medical use of marijuana. MCL 750.474, a statute that regulates the time, place, and manner in which marijuana can be transported in a motor vehicle, did not encroach on the MMMA's limited protections against the enforcement of the penal code provisions against the transportation of marijuana. The MMMA's scope of immunity included immunity from prosecution under MCL 750.474; however, the MMMA's immunity is only available to those individuals who are in compliance with the MMMA. Accordingly, Judge O'CONNELL would have concluded that MCL 750.474 was a validly enacted law, but because defendant did not demonstrate his entitlement to immunity under the MMMA, the case should have been remanded to the trial court to determine whether defendant was MMMA-compliant.

CONTROLLED SUBSTANCES — MARIJUANA — MEDICAL MARIJUANA — MICHIGAN MEDICAL MARIHUANA ACT — TRANSPORTATION OF MARIJUANA IN A MOTOR VEHICLE.

MCL 750.474 provides that a person shall not transport or possess usable marijuana in or upon a motor vehicle or any self-propelled vehicle designed for land travel unless the usable marijuana is enclosed in a case that is carried in the trunk of the vehicle or, if the vehicle does not have a trunk, enclosed in a case that is not readily accessible from the interior of the vehicle; MCL 333.26427(e) of the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*., provides that all other acts inconsistent with the MMMA do not apply to the medical use of marijuana as provided for by the MMMA; MCL 750.474 subjects persons in compliance with the MMMA to prosecution despite compliance with the MMMA; accordingly, MCL 750.474 is impermissible.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Charles D. Sherman*, Prosecuting Attorney, and *Brian A. Ameche*, Assistant Prosecuting Attorney, for the people.

The Nichols Law Firm, PLLC (by *Joshua M. Covert*), for defendant.

Amicus Curiae:

William J. Vailliencourt, Jr., for the Prosecuting Attorneys Association of Michigan.

Before: RONAYNE KRAUSE, P.J., and O'CONNELL and GLEICHER, JJ.

RONAYNE KRAUSE, P.J. Defendant, Callen Latz, a medical-marijuana patient, appeals by leave granted an order affirming the denial of his motion to dismiss his charge of illegal transportation of marijuana, MCL 750.474. Defendant pleaded guilty subject to his right to appeal the legality of the statute, which he asserts was an unconstitutional amendment of the Michigan

Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*., and was "superseded" by the MMMA. We reverse and remand.

This Court reviews de novo issues of statutory interpretation. *People v Miller*, 498 Mich 13, 16-17; 869 NW2d 204 (2015). The goal of statutory interpretation is to ascertain and apply the intent of the drafter, which is the Legislature in the case of legislatively enacted statutes like MCL 750.474 and the electorate in the case of voter-initiated statutes like the MMMA. *People v Hartwick*, 498 Mich 192, 209-210, 210 n 28; 870 NW2d 37 (2015). The best evidence of that intent is the plain language used, and courts do not evaluate the wisdom of any statute or act. *Id*. at 210. Statutes are read "as a whole," *People v Jones*, 301 Mich App 566, 578; 837 NW2d 7 (2013), and we give "every word . . . meaning," *id*., quoting *People v Peltola*, 489 Mich 174, 181; 803 NW2d 140 (2011) (quotation marks omitted). "If a statute specifically defines a term, the statutory definition is controlling." *People v Lewis*, 302 Mich App 338, 342; 839 NW2d 37 (2013). We "must avoid a construction that would render any part of the statute[s] surplusage or nugatory." *Id*. at 341. "If the statutory language is clear and unambiguous," the inquiry stops. *Braska v Challenge Mfg Co*, 307 Mich App 340, 352; 861 NW2d 289 (2014).

In its entirety, MCL 750.474 provides:

> (1) A person shall not transport or possess usable marihuana as defined in section 26423 of the public health code, 1978 PA 368, MCL 333.26423,[1] in or upon a motor

[1] This probably should have referred to "section 3 of the Michigan medical marihuana act, 2008 IL 1, MCL 333.26423." MCL 750.474, compiler's notes of the Legislative Service Bureau, available at <https://perma.cc/JBM7-6UJ9>. We find this error of no importance and note it only for completeness.

> vehicle or any self-propelled vehicle designed for land travel unless the usable marihuana is 1 or more of the following:
>
> (a) Enclosed in a case that is carried in the trunk of the vehicle.
>
> (b) Enclosed in a case that is not readily accessible from the interior of the vehicle, if the vehicle in which the person is traveling does not have a trunk.
>
> (2) A person who violates this section is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than $500.00, or both.

MCL 750.474 was enacted by 2012 PA 460. Thus, it was enacted *after* the enactment of the MMMA, which went into effect with the passage of 2008 IL 1. Therefore, defendant's argument that the MMMA "superseded" MCL 750.474 must fail. *Black's Law Dictionary* (10th ed) defines "supersede" as "[t]o annul, make void, or repeal by taking the place of . . . ." As a general matter, for one act to supersede another, the superseding act must occur later in time.

Nevertheless, courts are not bound by the labels a party gives to an argument but rather by the substance of the argument. See *In re Traub Estate*, 354 Mich 263, 278-279; 92 NW2d 480 (1958); *Wilcox v Moore*, 354 Mich 499, 504; 93 NW2d 288 (1958); *Tipton v William Beaumont Hosp*, 266 Mich App 27, 33; 697 NW2d 552 (2005). It is clear to us that, however defendant chose to articulate it, the gravamen of his argument is that the MMMA preempts MCL 750.474. In the absence of any dispute whether defendant was in compliance with the MMMA,[2] we presume that he was in compliance. We perceive the question before us to be, in substance,

[2] Insofar as we can determine from the record, the prosecution disputed whether defendant had completely followed all proper procedures in seeking the matter dismissed under the MMMA, but there

whether an irreconcilable conflict exists between the MMMA and MCL 750.474 under the circumstances of this case, and if so, whether the MMMA precludes defendant's conviction.

If such an irreconcilable conflict exists, the MMMA clearly and unambiguously *does* preclude defendant's conviction. The MMMA states that "[a]ll other acts . . . inconsistent with this act do not apply to the medical use of marihuana as provided for by this act." MCL 333.26427(e). Therefore, if another statute is inconsistent with the MMMA such that it punishes the proper use of medical marijuana, the MMMA controls, and the person properly using medical marijuana is immune from punishment. *People v Koon*, 494 Mich 1, 7; 823 NW2d 724 (2013) (holding that a portion of the Michigan Vehicle Code was "inconsistent with the MMMA," so it did "not apply to the medical use of marijuana"). See also *Ter Beek v City of Wyoming*, 495 Mich 1, 20-21; 846 NW2d 531 (2014) (holding that a city "[o]rdinance directly conflict[ed] with the MMMA by . . . impos[ing] . . . a penalty . . . on a registered qualifying patient whose medical use of marijuana [fell] within the scope of [the MMMA's] § 4(a)'s immunity" and that the MMMA preempted the ordinance) (quotation marks and citations omitted); *Braska*, 307 Mich App at 357-359, 365 (holding that the MMMA conflicted with a portion of the Michigan Employment Security Act (MESA), MCL 421.1 *et seq*., the MMMA preempted the MESA, and persons complying with the MMMA were, therefore, immune from penalty under the MESA).

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appears to be no dispute that defendant possessed a valid medical marijuana registry patient identification card, MCL 333.26423(m), at all relevant times.

The prosecution attempts to analogize MCL 750.474 to laws governing the transportation of alcohol. This comparison is inapt under the circumstances. If, hypothetically, marijuana were to be decriminalized generally with no other particular qualifications, *then* the comparison would make sense because, obviously, the Legislature would remain completely within its rights to regulate, *inter alia*, the manner in which marijuana could be transported when possessed for *recreational* purposes. Furthermore, a person *illegally* possessing marijuana could be properly charged with illegally transporting it in addition to illegally possessing it. Neither scenario would affect the special status afforded to marijuana possessed for *medical* purposes, and, in fact, MCL 750.474(1) expressly refers to "usable marihuana" under the MMMA rather than marijuana generally. In other words, if the Legislature treated marijuana like alcohol, then the prosecution's analogy to alcohol would make sense. It is manifestly apparent that a significant percentage of the population would *like* the Legislature to do so, but that is not, at present, the state of the law.[3]

"Under the MMMA, . . . '[t]he medical use of marihuana is allowed . . . to the extent that it is carried out in accordance with the provisions of th[e] act.' " *Hartwick*, 498 Mich at 209, quoting MCL 333.26427(a) (brackets in original). If persons comply with the MMMA, then the MMMA grants those persons "broad" "immunity" from prosecution. MCL 333.26424(a); *Braska*, 307 Mich App at 357-358. As noted, there is no dispute, at least for the purposes of

[3] We express no opinion as to the wisdom of the present—or of any hypothetical future—state of the law; we merely note the theoretical consequences thereof.

this appeal, that defendant was in compliance with the MMMA. The MMMA defines medical use as the "acquisition, possession, . . . use, . . . delivery, transfer, *or transportation* of marihuana . . . relating to the administration of marihuana to treat or alleviate a registered qualifying patient's debilitating medical condition or" "associated" "symptoms." MCL 333.26423(h) (emphasis added). MCL 750.474 expressly refers to this provision and unambiguously seeks to *place additional requirements* on the transportation of medical marijuana beyond those imposed by the MMMA. Thus, MCL 750.474 clearly subjects persons in compliance with the MMMA to prosecution despite that compliance. MCL 750.474 is therefore impermissible. *Koon*, 494 Mich at 7; *Braska*, 307 Mich App at 357-358. Because MCL 750.474 is not part of the MMMA, defendant, as an MMMA-compliant medical-marijuana patient, cannot be prosecuted for violating it.

Because this conclusion is dispositive of the instant appeal, we exercise judicial restraint and decline to consider defendant's constitutional argument. Defendant's conviction is reversed, and we remand for entry of a judgment in his favor. We do not retain jurisdiction.

GLEICHER, J., concurred with RONAYNE KRAUSE, P.J.

O'CONNELL, J. (*dissenting*). I respectfully dissent. The majority opinion applies a traditional legal analysis to resolve the interplay between MCL 750.474, the newly enacted illegal-transportation-of-marijuana statute, and the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*. The majority concludes that the two statutes are inconsistent and that the MMMA preempts MCL 750.474. Because I discern that such an analysis is impractical and not viable, I respectfully

offer a workable solution to resolve this unending imbroglio.[1]

I would conclude that there is no irreconcilable conflict between the MMMA and MCL 750.474 and that this defendant may have immunity from prosecution. Accordingly, I would remand this case to the trial court for a factual determination of whether defendant is in compliance with the MMMA. If defendant is in compliance, then defendant should have immunity from prosecution, and the trial court should dismiss the charges.

I. THE TRADITIONAL ANALYSIS IS FLAWED

Defendant argues that an irreconcilable conflict exists between the MMMA and MCL 750.474. Under a traditional analysis, the majority agrees and concludes that the MMMA preempts MCL 750.474. I disagree.

The traditional analysis, which the majority attempts to follow,[2] requires courts to examine the interplay between the new law and old laws. Unfortunately, the MMMA is not a traditional law. The MMMA does not create any sort of affirmative right under state law to use or possess marijuana. *People v Kolanek*, 491 Mich 382, 393-394; 817 NW2d 528 (2012). The MMMA also does not repeal any drug laws contained in the Public Health Code, MCL 333.1101 *et seq*., or the

[1] The trial courts of this state are split: six district courts and three circuit courts have concluded the transportation statute is valid and enforceable, while six district courts and two circuit courts have ruled it either unconstitutional or invalid under the MMMA. The split in the circuit courts is empirical evidence that applying a traditional analysis to the MMMA obfuscates the interpretation of the act.

[2] Two traditional methodologies exist to challenge the constitutionality of a legislative enactment: a "facial" challenge and an "as applied" challenge. The majority opinion does not distinguish between the two.

Michigan Penal Code, MCL 750.1 *et seq*. It does not attempt to amend, revise, or change any existing laws in the state of Michigan. Accordingly, possession of marijuana remains a misdemeanor offense under MCL 333.7403(2)(d), and the manufacture of marijuana remains a felony under MCL 333.7401(2)(d).[3] See *Kolanek*, 491 Mich at 394.

Instead, we must view the MMMA for what it really is: an antienforcement law. The MMMA "merely provides a procedure through which seriously ill individuals using marijuana for its palliative effects can be identified and protected from prosecution under state law." *People v Redden*, 290 Mich App 65, 93; 799 NW2d 184 (2010) (O'CONNELL, P.J., concurring). This remarkable type of law renders a traditional analysis flawed, and reviewing the MMMA from a traditional standpoint only allows the public to fall further into the abyss of confusion surrounding which actions are permissible under the MMMA.[4]

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[3] Since possession of marijuana is illegal in the state of Michigan, MCL 750.474 regulates how an illegal substance is to be transported in a motor vehicle. A statute regulating the transportation of an illegal substance appears at first blush to be a bit odd. If marijuana is an illegal substance, why regulate how it is to be transported? It would appear that those individuals not in compliance with the MMMA can be charged with both possession of marijuana and illegal transportation of marijuana.

[4] In my concurring opinion in *Redden*, I warned against interpreting the MMMA in a piecemeal fashion because doing so would create confusion. I attempted to establish a framework for the law to keep confusion to a minimum. Hundreds or more medical-marijuana cases have worked their way through our court system. If my original framework had been adhered to, some citizens would have retained their freedom, property, liberty, and legal fees, and townships, cities, police, and prosecutors would have saved valuable resources in their quest to interpret the act. With a heavy heart I warn: here we go again. The new acts appear to be a compromise between competing forces that can only lead to confusion, consternation, and more chaos. I strongly

The majority opinion exemplifies why a traditional analysis is unworkable when attempting to apply it to an antienforcement law:

> MCL 750.474 expressly refers to this provision and unambiguously seeks to *place additional requirements* on the transportation of medical marijuana beyond those imposed by the MMMA. Thus, MCL 750.474 clearly subjects persons in compliance with the MMMA to prosecution despite that compliance. MCL 750.474 is therefore impermissible.

The majority's traditional analysis leads it to conclude that any law that is not in compliance with the MMMA is impermissible. This over-broad and sweeping announcement turns the MMMA upside down. I conclude the opposite: because the MMMA merely provides immunity to individuals who comply with the act, it is not intended to nullify all existing or future marijuana-related laws in the penal and health codes. Instead, it provides immunity for individuals from new laws as long as they comply with the MMMA.

II. A SIMPLER ANALYSIS FOR THE MMMA

The analysis for interaction between the MMMA and MCL 750.474, when viewed from my perspective, is quite uncomplicated, causes no confusion, and can be applied to all subsequent legislation involving the MMMA.

First, we begin with the presumption that laws are constitutional. *United States v Salerno*, 481 US 739, 745; 107 S Ct 2095; 95 L Ed 2d 697 (1987); *Phillips v Mirac, Inc*, 470 Mich 415, 422; 685 NW2d 174 (2004). Second, the party challenging the facial constitutional-

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suggest that whoever is put in charge of the new framework immediately promulgate clear and concise administrative rules for implementation, something clearly lacking under both the MMMA and the new legislative enactments.

ity of the act "must establish that no set of circumstances exists under which the [a]ct would be valid. The fact that the . . . [a]ct might operate unconstitutionally under some conceivable set of circumstances is insufficient . . . ." *Salerno*, 481 US at 745. Third, we must review for "positive conflict" between the laws, such that the two laws "cannot consistently stand together." See *Ter Beek v City of Wyoming*, 495 Mich 1, 11; 846 NW2d 531 (2014) (quotation marks and citation omitted). If the defendant would be immune from prosecution under the new law if he or she complied with the MMMA, then the laws consistently stand together.[5]

If I were to analogize the MMMA to an existing process, I would conclude that it is similar to the Bill of Rights contained in the United States Constitution. The Bill of Rights places limitations on the powers of the federal government. See *Woodland v Mich Citizens Lobby*, 423 Mich 188, 204; 378 NW2d 337 (1985). Similarly, the MMMA, in part, places limitations on drug laws in the state of Michigan. The Bill of Rights does not preempt any law concerning expression—some regulations, such as neutral time, place, and manner regulations, may be acceptable. *Jott, Inc v Clinton Charter Twp*, 224 Mich App 513, 527; 569 NW2d 841 (1997). This is the framework that I would apply to the MMMA's antienforcement provisions.

III. APPLYING THIS ANALYSIS

The only question before this Court is whether the MMMA provides immunity for the illegal transportation of marijuana. My answer is a simple "yes."

[5] Under my analysis, a different result would have occurred in the case of *Ter Beek*. The *Ter Beek* opinion could have concluded that the City of Wyoming had the constitutional right to enact City of Wyoming Code of Ordinances, § 90-66, but that Ter Beek had an immunity card and was therefore immune from prosecution under the ordinance.

First, I presume that MCL 750.474 is constitutional. Second, defendant has not established that no set of circumstances exists under which MCL 750.474 would be valid. Third, I then conclude that there is no positive conflict in the laws. The purpose of MCL 750.474 is to regulate the transportation of marijuana in a motor vehicle. Defendant's arguments aside, MCL 750.474 does not modify, change, or alter any provisions of the MMMA, nor is it inconsistent with the medical use of marijuana.

The MMMA defines "[m]edical use of marihuana" as "the acquisition, possession, cultivation, manufacture, extraction, use, internal possession, delivery, transfer, or transportation of marihuana, marihuana-infused products, or paraphernalia relating to the administration of marihuana to treat or alleviate a registered qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition." MCL 333.26423(h). MCL 750.474 is to the MMMA what a time, place, and manner restriction is to the First Amendment: MCL 750.474 is narrowly tailored to serve the public safety interest in keeping marijuana out of the reach of drivers who are operating motor vehicles. And granting defendant protections against the sanctions in MCL 750.474 if defendant complies with the MMMA does not annul MCL 750.474; rather, it recognizes that defendant has protection under state law for MMMA-compliant behavior.

It is not impossible to comply with both the MMMA and MCL 750.474. The regulations on the transportation of marijuana in MCL 750.474 do not conflict with the MMMA's limited state-law immunity for certain medical-marijuana uses, and the MMMA does not stand as an impediment to the accomplishment and

execution of the full purposes and objectives of MCL 750.474. The two legislative acts are fully compatible.

In this case, the parties do not dispute that MCL 750.474 regulates the manner in which marijuana can be transported in a motor vehicle, nor do the parties dispute that an individual whose medical use of marijuana falls within the scope of the protections in MCL 333.26424(a) from "penalty in any manner" has immunity from prosecution under MCL 750.474. The parties' limited dispute is the scope of the protection afforded under MCL 333.26424(a). Stated another way, a statute that regulates the time, place, and manner in which marijuana can be transported in a motor vehicle does not encroach on the MMMA's limited protections against the enforcement of the penal code provisions against the transportation of marijuana. Because the MMMA's scope of immunity for individuals who comply with MCL 333.26424(a) is broad and includes immunity from "penalty in any manner," it would include immunity from prosecution under MCL 750.474.

However, the MMMA's immunity is only available to those individuals who are in compliance with the strictures of the MMMA. The MMMA provides limited immunity against the enforcement of MCL 750.474. The trial court has not addressed this compliance issue, and therefore, under my analysis, a remand to the trial court is necessary to determine whether defendant is in compliance with the MMMA. If defendant is in compliance with the MMMA, defendant has immunity from prosecution, and the charge must be dismissed.

I would conclude that MCL 750.474 is a validly enacted law. But because defendant has not demonstrated his entitlement to immunity under the

MMMA, this case requires remand to the trial court to determine whether defendant is MMMA-compliant.

I would remand for further proceedings consistent with this opinion. I would not retain jurisdiction.[6]

[6] I note that were I not advocating for a different analysis for the interpretation of the MMMA, I would agree with the amicus brief that MCL 750.474 does not prohibit the possession or transportation of marijuana; it simply regulates the manner in which individuals may transport marijuana. Therefore, MCL 750.474 would not be inconsistent with the strictures of the MMMA, and MCL 333.26427(e) would not be applicable to the facts of this case.

DEPARTMENT OF HEALTH AND HUMAN SERVICES v GENESEE CIRCUIT JUDGE

Docket No. 334491. Submitted December 14, 2016, at Detroit. Decided December 20, 2016, at 9:05 a.m.

The Department of Health and Human Services (the DHHS) brought an action for superintending control in the Court of Appeals against Genesee Circuit Court Judge Geoffrey L. Neithercut, seeking to dissolve three protective orders and to order the circuit court not to enter further orders limiting the DHHS, the Department of Environmental Quality, and other agencies from exercising their respective statutory authority in Genesee County to monitor lead-testing, to investigate and monitor an outbreak of legionellosis, and to advise the public of health risks resulting from the lead levels in the Flint municipal water system. In 2014, the city of Flint switched its municipal water source to the Flint River, which resulted in citizens being exposed through the drinking water to high levels of lead and the bacterium *Legionella*, which causes a severe, sometimes deadly, respiratory disorder called legionellosis. McLaren Flint hospital, certain state departments (including the DHHS), and others were parties to various criminal and civil lawsuits that were filed in Genesee County regarding the tainted water; some of the defendants charged with crimes were employed by the DHHS. To minimize the risk of *Legionella* transmission in the future, the DHHS worked with the Genesee County Health Department and the federal Centers for Disease Control and Prevention, and the DHHS sought to investigate the methods used by McLaren to remediate the increased cases of legionellosis that were treated by the hospital in 2014 and 2015. McLaren refused the DHHS's request for access to documents and other information related to those legionellosis cases on the basis of ongoing discovery in the various civil and criminal lawsuits and the potential conflicts of interest between the hospital and the state's departmental agencies also involved in those lawsuits. Neithercut thereafter issued three protective orders without the proponents of the orders filing a motion for protective order and without a hearing on the record regarding the orders; the orders effectively barred the DHHS from obtaining any information from McLaren regarding public health-

related data and all scientific records related to people treated at the hospital for legionellosis. Neithercut, the Genesee County Prosecutor, McLaren, and Special Counsel Todd F. Flood (collectively, the interested parties) opposed the DHHS's complaint for superintending control. The Court of Appeals granted the DHHS's complaint and ordered the parties to proceed to a full hearing on the merits in the same manner as an appeal of right.

The Court of Appeals *held*:

1. In accordance with MCR 7.203(B)(1) and MCR 7.216(A)(3) and (7), the interested parties' lack-of-jurisdiction argument could be dispensed with by construing DHHS's motion for superintending control as an application for leave to appeal the protective orders and by granting the application.

2. Under MCR 6.201(E), a circuit court may enter a protective order in a criminal case on motion and a showing of good cause. The circuit court did not have authority under MCR 6.201(E) to issue the protective orders in this case. Although some of the defendants charged with crimes in connection with the Flint water crisis were employed by the DHHS, the protective orders in this case were not issued in any of those pending criminal cases. Moreover, even if the criminal cases had been assigned to Neithercut—and there was no evidence those cases were assigned to the judge—the MCR 6.201(E) requirements of a motion, a showing of good cause, and the creation of a record at a hearing were not followed before the orders were issued. The broad scope of the protective orders was also an abuse of the circuit court's authority because there was no evidence that Judge Neithercut exercised any discretion before issuing the protective orders.

Protective orders vacated.

Aaron D. Lindstrom, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Joseph E. Potchen*, *Darrin F. Fowler*, and *Santiago Rios*, Assistant Attorneys General, for the Department of Health and Human Services.

The Williams Firm, PC (by *Kendall B. Williams* and *Timothy R. Winship*), for Genesee Circuit Court Judge Geoffrey L. Neithercut.

Todd F. Flood, Special Counsel, *Janet A. Napp*, Special Assistant Attorney General, and *David S. Leyton*, for the people.

Cline, Cline & Griffin (by *Walter P. Griffin*, *J. Brian MacDonald*, and *Megan R. Mulder*) and *Michael P. Manley* for McLaren Flint.

Amicus Curiae:

Benjamin C. Mizer, Principal Deputy Assistant Attorney General, *Barbara L. McQuade*, United States Attorney, *Peter A. Caplan*, Assistant United States Attorney, *Margaret M. Dotzel*, Acting General Counsel, and *Michael S. Raab* and *Gerard Sinzdak*, Appellate Staff Attorneys, for the United States Department of Health and Human Services.

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

GLEICHER, J. This action for superintending control arises from the Flint water crisis, a public health disaster catalyzed by the city of Flint's switch to the Flint River as its municipal water source. Due to the city's failure to utilize chemicals to control corrosion, lead leached from the pipes and contaminated the water. But toxic lead exposure was not the only scourge delivered upon Flint's people through their new water supply.

According to the Flint Water Advisory Task Force (Task Force) appointed by Governor Rick Snyder, "[t]he specific events that led to the water quality debacle [and] lead exposure" also led to "heightened *Legionella* susceptibility." Flint Water Advisory Task Force, *Final Report* (March 2016), p 1, available at <https://www.michigan.gov/documents/snyder/FWATF_FINAL_REPORT_21March2016_517805_7.pdf> (accessed December 15, 2016) [https://perma.cc/9USH-2MB2]. *Legionella* is a bacterium that causes a severe, sometimes deadly respiratory disorder called legionellosis or, col-

loquially, Legionnaires' disease. See Centers for Disease Control and Prevention, *Legionella* <http://www.cdc.gov/legionella/about/> (accessed December 15, 2016) [https://perma.cc/W83K-3Y2J]. Efforts made by the Michigan Department of Health and Human Services (MDHHS or DHHS) to investigate legionellosis cases at McLaren Flint Hospital (McLaren) were stymied when a Genesee Circuit judge issued three protective orders barring the DHHS from obtaining any information from McLaren relating to the hospital's legionellosis outbreak. The protective orders, signed on June 27, August 17, and August 24, 2016, are the subjects of this action.

The circuit court entered the protective orders at the behest of three entities: McLaren, Todd F. Flood (the special assistant attorney general appointed by Attorney General Bill Schuette to investigate the water crisis), and the Genesee County prosecutor. These parties filed no petitions in the circuit court seeking the protective orders, the circuit court created no record before issuing them, and no case numbers were assigned to any actions giving rise to the protective orders. Legal representatives of the DHHS were not invited to take part in the court's in-chambers discussions with counsel seeking the protective orders. This Court granted the DHHS's complaint for superintending control. *Dep't of Health & Human Servs v Genesee Circuit Judge*, unpublished order of the Court of Appeals, entered September 14, 2016 (Docket No. 334491).

According to the entities who successfully obtained them, the protective orders are unreviewable by this Court under the rubric of superintending control. We need not decide that question, as we instead construe the DHHS's complaint in this Court as an application for leave, and we grant it. We now vacate the protective orders.

I

The events leading to the Flint water crisis are the subject of numerous articles in the press, several comprehensive judicial opinions,[1] and the Task Force Final Report already cited. While the contamination of Flint's water began in April 2014, the events precipitating this action commenced two years later with a letter written by Dr. Eden Wells, the chief medical executive of the DHHS, to the president and CEO of McLaren. Dr. Wells explained that "the MDHHS has been supporting the Genesee County Health Department in an investigation of the increases in legionellosis reported between spring of 2014 and fall 2015," and that "[p]art of the public health response to legionellosis outbreaks involves review and documentation of remediation actions that were employed to minimize disease transmission." Information provided to the DHHS indicated that McLaren "has taken significant measures in an effort to prevent further disease transmission" in its facilities. The DHHS offered to work with McLaren to "better understand those actions and confirm their effectiveness as we enter the summer, when risk for *Legionella* transmission increases." Dr. Wells proposed a site visit led by the DHHS, the Genesee County Health Department, and "an expert team from the CDC [the federal Centers for Disease Control and Prevention], including epidemiologists, microbiologists, and environmental health experts."

Dr. Wells's letter outlined the objectives of the visit, which centered on minimizing the risk of *Legionella* transmission. She asked that a number of documents be produced during the site visit, including an audit of

[1] *Concerned Pastors for Social Action v Khouri*, 194 F Supp 3d 589 (ED Mich, 2016); *Mason v Lockwood, Andrews & Newman, Inc*, 842 F3d 383 (CA 6, 2016).

lab reports of positive *Legionella* tests, "[c]hemical, physical, and microbiological monitoring test results" conducted at McLaren, and a "description (with timeline) of *Legionella* remediation efforts."

McLaren responded in a May 6, 2016 letter signed by Walter P. Griffin, an attorney for the hospital. Griffin denied the DHHS's site visit request, explaining:

> As you are aware, there are various lawsuits in which McLaren-Flint is a party and to which other departments, including your departments, are also named parties. Although the claims against each of the defendants in the suits may vary, the essence of the claims concern[s] the issue of lead in the water in Genesee County and the incidents of increased Legionella in the water supplied to McLaren-Flint by the City of Flint. Based upon the allegations, it is impossible for McLaren-Flint to respond to your request since discovery is ongoing in these cases and conflicts may exist between your departments and McLaren-Flint. Further, discovery is subject to Federal and Circuit Court Rules.

Assistant Attorney General Darrin Fowler and Genesee County Chief Assistant Prosecuting Attorney Celeste Bell sought reconsideration of McLaren's position in a June 15, 2016 letter to Griffin. The attorneys acknowledged McLaren's liability concerns, but emphasized that "McLaren-Flint's paramount interest and responsibility is to take all steps necessary to ensure a safe and effective infection control program going forward." They urged that "[c]oncerns about potential financial liability related to past illnesses should not deter McLaren-Flint from taking prudent actions to ensure the health and safety of current and future patients." The letter pointed out that the Legislature has bestowed on the DHHS "broad discretion in responding to, and preventing, the spread of disease

and other public health threats," and threatened that DHHS might "seek judicial assistance" to achieve the goals outlined in the April letter.

On June 21, 2016, a different attorney, Michael P. Manley, penned McLaren's answer. Manley advised that his representation of the hospital encompassed both "the numerous civil claims" and "the criminal investigations" emanating from the Flint water crisis and referenced a telephone call with Fowler. According to Manley, the Genesee County prosecutor's office had issued an investigative subpoena to McLaren, and McLaren planned to comply. The information provided pursuant to the subpoena "is deemed confidential," Manley related, and the prosecutor's office "has stated they will sign a protective order." Manley pledged that the prosecutor's office would "turn this information over to you" under the protective order. A list of items to be turned over, prepared by attorney Griffin, was attached to Manley's letter.[2]

The next development is shrouded in mystery. On June 27, 2016, Genesee Circuit Judge Geoffrey Neithercut issued the first of three protective orders. According to the brief filed by Judge Neithercut's counsel in this Court, the orders resulted from "various meetings and other communications." None of the "meetings and other communications" took place on the record. Nor did the proponents of the first protective order file a petition or other document setting forth good cause for the issuance of a protective order or outlining the legal basis for such an order. Although the order limits the ability of the DHHS to obtain information from McLaren, counsel for the DHHS was not present at the

[2] The items included McLaren's 2001 policy for its water management program, a draft of its 2016 Water Safety & Management Plan, a copy of test results for *Legionella* in the water, and a map of McLaren.

meetings and had no notice of the private meetings between the circuit court and counsel for the protective order proponents.

The first paragraph of the June 27 protective order declares that the court "reviewed the Subpoena dated May 11, 2016, issued to McLaren-Flint Hospital" and then states that "all discovery material provided hereafter to the Genesee County Prosecutor's Office by McLaren-Flint . . . pursuant to . . . 'The City of Flint Water Crisis' shall be confidential . . . ." Although awkwardly worded, the next sentence purports to prohibit disclosure of the information and to "bind all other individuals, groups, institutions, agencies, or otherwise, who receive such confidential information" to the terms of the protective order. The order permitted McLaren to "designate any document it produces as confidential by stamping" it as such, thereby limiting its disclosure to the prosecutor's office "and investigative bodies under their control . . . ." The order continued:

> It is recognized by the Court there are multiple civil actions related to McLaren-Flint . . . and may be others filed hereafter in court[s] of competent jurisdiction to which this Protective Order precludes any party to any actions, naming McLaren-Flint . . . from receiving said materials which are marked "CONFIDENTIAL."

Three attorneys stipulated to and signed the protective order: Griffin, Manley, and Karen Hanson, a Genesee County assistant prosecutor.

On August 12, 2016, Fowler wrote to Judge Neithercut advising that "lawyers representing McLaren Flint and the Genesee County Prosecutors office will be contacting you soon to clarify the protective order . . . ." Fowler suggested that the attorneys believed that the order "may impede McLaren's ability to provide" infor-

mation to the DHHS regarding its *Legionella* investigation. He pressed the court to "clarify the order" by confirming that the DHHS should be allowed access to those documents in McLaren's possession necessary to the DHHS's investigation. Fowler pledged that the DHHS would adhere to the protective order "in regards to the limited use and sharing of this material" and would ensure that the CDC did the same.

McLaren and the prosecutor's office returned to Judge Neithercut, this time accompanied by Special Assistant Attorney General Flood or one of his delegates. Fowler was not invited; in fact, his request that the order be "clarified" by including the DHHS in the circle of document recipients was turned on its head. After another off-the-record, ex parte proceeding, Judge Neithercut ordered that all discovery material produced by McLaren would be deemed confidential and off-limits to the DHHS. This order delegated to both McLaren and the Genesee County prosecutor the power to "designate any document" or other item produced by McLaren as confidential. "Without prior written consent of the Genesee County Prosecutor's Office and/or the Attorney General – Office of Special Counsel and/or United States Attorney General," the order continued, "the [DHHS] and the Michigan Department of Environmental Quality (MDEQ) and/or it's [sic] associates, employees and/or contractors, shall be prohibited from receiving any discovery" of the information produced by McLaren "during the pendency of the Flint Water Crisis Investigation" and "subsequent indictments . . . ."

In addition to prohibiting disclosure of public health-related data to the DHHS, Judge Neithercut directed the manner in which the *Legionella* investigation would proceed:

> Genesee County Health Department is directed to contact [the CDC] directly for assistance involving any and all issues, testing, analysis required involving any lead and/or legionella issues, water testing, and any other assistance needed for the City of Flint Water Crisis issues being investigated by the Genesee County Health Department during the pendency of the Flint Water Crisis as detailed above.
>
> McLaren Hospital is directed to contact Genesee County Health Department instead of MDHHS and/or MDEQ for any assistance required by McLaren Hospital involving any future issue relating to the City of Flint Water Crisis during the pendency of the Flint Water Crisis as detailed above.
>
> Without the prior written consent of the producing party and/or Genesee County Prosecutor's Office, no document may be shown to or discussed with any individuals, groups, institutions, agencies, or otherwise, who receive such confidential information except as provided by subsequent Order of the Court or by this Protective Order.

Attorneys Hanson, Griffin, Manley, and Flood stipulated to and signed this protective order.

A third ex parte protective order followed fast on the heels of the second. The rationale for the issuance of the third protective order remains obscure. Once again, no record was created and no motions were filed. The third order, dated August 24, 2016, does not expressly revoke the second, but apparently operates in addition to it. The third order adds that "[w]ith the exception of automatic reporting requirements," the DHHS is prohibited from receiving any information absent the "prior written consent" of the entities named in the previous order. The order widens the scope of the previous protective order by excluding from DHHS view virtually any scientific records related to *Legionella*:

> This Protective Order specifically applies to, but is not limited to any and all disclosure of the above protected information by phone and/or in person, emails, letters, text messages, and includes: documents[,] photographs, medical records, environmental data, samples, isolates (samples containing a single strain of concentrated *Legionella*)[,] DNA samples from water collected at any time in the City of Flint and/or McLaren-Flint Hospital, DNA samples from water containing non-isolated genetic material from every bacteria present in the samples, audio or radio recordings and any other information in any form relating to the Flint Water Crisis investigation.

The third order reiterates that the DHHS is not entitled to obtain the information it sought from McLaren, but allows for some limited administrative actions:

> Documents considered 'CONFIDENTIAL' or portions thereof, may only be provided and disclosed to the Genesee County Prosecutor's Office[,] their designees and investigative bodies under their control, which may include principals involved with Flint Water Crisis from the Attorney General's Office – Special Prosecution Team investigating the Flint Water Crisis with Spec. AG Todd F. Flood as lead counsel and designees, the U.S. Attorney General [and] their designees, principals of the Genesee County Health Department and their designees. This permissible disclosure shall include all associates, paralegals and employees of the above named entities to the extent reasonably necessary to render professional services in the investigation(s).
>
> McLaren-Flint Hospital, Genesee County Health Department and/or CDC are directed to continue any and all automatic reporting of any current and/or future lead and/or legionella cases as required by MDHHS to ensure proper services are provided to any and all victims of Lead and/or Legionella.
>
> MDHHS is directed to continue any and all automatic reporting as required to McLaren-Flint Hospital, Genesee

> County Health Department and/or CDC any current and/or future lead and/or legionella cases to ensure proper services are provided to any and all victims of Lead and/or Legionella.

In bold print the order proclaims that it "does not prohibit MDHHS, [the Genesee County Health Department] and/or CDC and/or McLaren-Flint Hospital from working together and sharing information, investigation(s), etc on any issue not related to Lead and/or Legionella." The same group of lawyers signed and stipulated to this order.

One day after the third protective order issued, the DHHS filed this original action for superintending control against the sole named defendant, Genesee Circuit Judge Geoffrey L. Neithercut. This Court granted the complaint for superintending control and ordered that the case "shall proceed to a full hearing on the merits in the same manner as an appeal of right." All three proponents of the orders filed briefs in this Court, and their counsel participated in oral argument.

II

The DHHS challenges the protective orders on separation of powers grounds, while the parties defending the orders—Judge Neithercut, the Genesee County prosecutor, McLaren, and Special Assistant Attorney General Flood—insist that this Court lacks jurisdiction to consider the DHHS's argument. According to the proponents of the protective orders, the DHHS is not entitled to an order of superintending control because it has adequate alternate remedies: "intervention," an action for injunctive relief, or a motion to modify or quash the protective orders. Further, the proponents assert, good cause existed for the orders in that actions or inactions of the DHHS are part and

parcel of ongoing criminal investigations. Allowing the DHHS access to the information, the proponents maintain, would be akin to allowing "the fox in the henhouse," undermining the criminal investigation and opening the door to fabricating or tampering with evidence.

Although we review for an abuse of discretion the circuit court's decision whether to grant a protective order, *In re Pott*, 234 Mich App 369, 373; 593 NW2d 685 (1999), we review de novo whether the circuit court applied the correct legal standards in determining whether to issue a protective order in the first place, see *Beach v Lima Twp*, 489 Mich 99, 106; 802 NW2d 1 (2011).

III

We dispense with the issue of our jurisdiction quite simply by construing the DHHS's motion for superintending control as an application for leave to appeal the three protective orders and by granting it. MCR 7.203(B)(1); MCR 7.216(A)(3) and (7).

IV

The DHHS urges us to hold that Judge Neithercut overstepped constitutional boundaries by issuing orders that restricted the DHHS's ability to fulfill its statutory duties to protect the public health. The "widely accepted and venerable rule of constitutional avoidance" counsels that we first consider whether statutory or general law concepts are instead dispositive. *People v McKinley*, 496 Mich 410, 415-416; 852 NW2d 770 (2014). We hold that Judge Neithercut lacked any legal authority to issue the protective orders and vacate them on that ground.

We begin with Judge Neithercut's contention that he entered the protective orders pursuant to his authority under MCR 6.201(E). At oral argument, counsel for the proponents confirmed that MCR 6.201(E) supplied the sole legal basis for Judge Neithercut's actions.[3] We find this court rule inapposite. MRE 6.201 governs discovery in criminal cases. See also MCR 6.001(A) (stating that the rules in Subchapters 6.000 to 6.500 "govern matters of procedure in criminal cases cognizable in the circuit courts and in courts of equivalent criminal jurisdiction"). Subrule (E) permits a court to enter a protective order in a criminal case "[o]n motion and a showing of good cause." The rule continues:

> In considering whether good cause exists, the court shall consider the parties' interests in a fair trial; the risk to any person of harm, undue annoyance, intimidation, embarrassment, or threats; the risk that evidence will be fabricated; and the need for secrecy regarding the identity of informants or other law enforcement matters. On motion, with notice to the other party, the court may permit the showing of good cause for a protective order to be made in camera. If the court grants a protective order, it must seal and preserve the record of the hearing for review in the event of an appeal.

The parties advise that there are ongoing criminal cases pending against nine individuals in connection with the Flint water crisis and that some of these defendants were employed by the DHHS. But the protective orders were not issued in any pending criminal case. Even assuming that the relevant criminal cases are assigned to Judge Neithercut (no such evidence has been provided to us), we find it telling

[3] During oral argument, counsel for the proponents mentioned that the circuit court had issued an investigative subpoena to McLaren. The proponents begrudgingly conceded, however, that the protective orders were not entered as part of the investigative subpoena proceedings.

that the attorneys for the defendants in those cases were not notified of the protective order proceedings or invited to take part in them. Furthermore, none of the prerequisites for obtaining a protective order set forth in MCR 6.201(E) were fulfilled. No motions were filed, no showing of good cause was made, and no record was created. Therefore, we wholly reject the suggestion that MCR 6.201(E) supplied Judge Neithercut with authority to issue these protective orders.

The protective order proponents have identified no other legal standard that arguably might support entry of the three protective orders. The special prosecutor's delegate argued that the protective orders were necessary to protect the general "integrity" of the ongoing criminal prosecutions. When questioned, however, the attorney was unable to articulate any facts or legal theories illustrating how the DHHS's execution of its statutory duties might hinder the special prosecutor's ability to marshal or protect evidence. Nor are we able to understand how a public health investigation conducted by a state agency pursuant to statutory authority could possibly impair the ongoing prosecutions. Any evidence supporting this claim should have been presented to the circuit court, on the record, after notice to all interested parties, including the DHHS and the defendants in the criminal actions.

In addition to our finding that the circuit court lacked legal authority to issue the protective orders, we hold that the broad scope of the orders constituted an abuse of Judge Neithercut's discretion. We have no evidence that the circuit court exercised any discretion before issuing the protective orders. "[T]he failure to exercise discretion when called on to do so constitutes an abdication and hence an abuse of discretion." *People v Stafford*, 434 Mich 125, 134 n 4; 450 NW2d 559

(1990). Furthermore, an order restricting the flow of information to a state agency, or curtailing a state agency's ability to fulfill its statutory mandate, cannot rest on catchy phrases or naked assertions devoid of factual support. And nothing more than that has been presented to this Court.

We highlight that in vacating the three protective orders, we have not remanded for further proceedings. Because there were no proceedings of record in the circuit court, a remand is unwarranted.

We vacate the three protective orders. We do not retain jurisdiction.

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

STENZEL v BEST BUY CO, INC

Docket No. 328804. Submitted December 6, 2016, at Lansing. Decided December 22, 2016, at 9:00 a.m. Part II(C) vacated and special panel convened 318 Mich App 801. Opinion of the special panel reported at 320 Mich App 262. Leave to appeal granted 501 Mich ___.

Paulette Stenzel brought an action in the Ingham Circuit Court against Best Buy Co., Inc., alleging negligence, breach of contract, and breach of warranty. In May 2015, Stenzel amended her complaint to add claims against Samsung Electronics America, Inc. Stenzel had purchased a Samsung refrigerator/freezer from Best Buy, which Best Buy delivered to her home and installed. About two days later, Stenzel returned home to find that the refrigerator had begun spraying water onto her kitchen floor. Stenzel was unsuccessful in her attempts to stop the water, and a Best Buy employee directed her to shut off the water line for her home. Stenzel then attempted to clean up the standing water in her kitchen because she was concerned about water damage. She used towels to wipe her kitchen floor, placed the wet towels in a basket, and dragged the basket through her living room, down two steps in her sunroom, and across the sunroom in order to get the towels outside to dry. When Stenzel was walking through her sunroom a second time in an attempt to drag the basket with a second load of towels outside, she fell and broke her leg and ankle. Stenzel testified that she fell because her feet were wet or because the floor in the sunroom was wet from dragging the basket of wet towels through the room. Best Buy moved for summary disposition, and the court, Rosemarie E. Aquilina, J., granted the motion, concluding that Stenzel had failed to establish causation. Samsung also moved for summary disposition, and the court similarly granted the motion, concluding that Stenzel had again failed to establish causation and that her claims against Samsung were barred by the statute of limitations. Stenzel appealed.

The Court of Appeals *held*:

1. To establish causation, a plaintiff must establish both cause in fact and legal cause, i.e., proximate cause. The cause in fact element generally requires showing that "but for" the defendant's actions, the plaintiff's injury would not have occurred. Legal cause normally involves examining the foreseeability of

consequences and whether a defendant should be held legally responsible for such consequences. In this case, the conduct that created a risk of harm was either Best Buy installing the refrigerator improperly or Samsung providing a defective refrigerator, which caused a significant quantity of water to spray from the refrigerator and onto the kitchen floor. While cleaning that water up to prevent water damage, Stenzel slipped in her sunroom on what she described as "wet." Although she was not certain whether the wetness came from water on her foot or whether it came from water on the floor, she was absolutely certain that it was from one or the other. Viewed in the light most favorable to Stenzel, a reasonable jury could infer that it was more likely than not that water leaked from the laundry basket onto the floor while Stenzel was dragging the basket outside or, alternatively, that it was more likely than not that Stenzel's feet were wet because of the water in the kitchen, which came from the refrigerator. But for Best Buy's and Samsung's negligence, Stenzel would not have had water on either her feet or the floor in the sunroom, and she would not have fallen while cleaning up the water caused by the defective refrigerator. Accordingly, the trial court erred by dismissing the case on the basis of its conclusion that there was no cause in fact. With regard to legal cause, the fact that Stenzel slipped and fell in the sunroom, not the kitchen, after she saw the water and stopped it from flowing from the refrigerator was not an intervening cause breaking the chain of causation because the intervening act, i.e., cleaning up the mess, was reasonably foreseeable. Moreover, whether Stenzel was comparatively at fault was a question of fact for the jury. Accordingly, the trial court also erred by dismissing the case on the basis of its conclusion that Stenzel had not established proximate cause.

2. MCL 600.2957(2) states that upon motion of a party within 91 days after identification of a nonparty, the court shall grant leave to the moving party to file and serve an amended pleading alleging one or more causes of action against that nonparty and that a cause of action added under MCL 600.2957(2) is not barred by a period of limitation unless the cause of action would have been barred by a period of limitation at the time of the filing of the original action. MCR 2.112(K) was intended to implement MCL 600.2957. In *Williams v Arbor Home, Inc*, 254 Mich App 439 (2002), vacated in part on other grounds 469 Mich 898 (2003), the Court held that, reading the court rule and statute in conjunction, leave of the court is required before an amended pleading adding a nonparty becomes effective. Under *Williams*, Samsung was never properly added to the lawsuit, and Stenzel's claims against Samsung were barred by the statute of limitations because

Stenzel did not seek leave to add Samsung as a party. *Williams* was wrongly decided, but it had to be followed under MCR 7.215(J)(1). Were it not for *Williams*, the Court would have held that because Stenzel followed the requirements of MCR 2.112(K)(4), she properly added Samsung as a party and her amended complaint was timely because it related back to the date of her original complaint. The convening of a special conflict panel of the Court was requested under MCR 7.215(J)(2) and (3).

Affirmed in part and reversed in part.

Nolan, Thomsen & Villas, PC (by *Lawrence P. Nolan*), for Paulette Stenzel.

Garan Lucow Miller, PC (by *Paul E. Tower* and *Caryn A. Ford*), for Best Buy Co., Inc.

Dykema Gossett PLLC (by *Paul L. Nystrom*) for Samsung Electronics America, Inc.

Before: M. J. KELLY, P.J., and O'CONNELL and BECKERING, JJ.

M. J. KELLY, P.J. Plaintiff, Paulette Stenzel, appeals as of right the trial court's orders granting summary disposition in favor of defendants, Best Buy Co., Inc. (Best Buy) and Samsung Electronics America, Inc. (Samsung). For the reasons stated in this opinion, we affirm the trial court's order granting summary disposition in favor of Samsung but reverse the trial court's order granting summary disposition in favor of Best Buy.

I. BASIC FACTS

This case arises from Stenzel's purchase of a Samsung refrigerator/freezer (the refrigerator) from Best Buy. According to Stenzel, Best Buy delivered the appliance to her home and installed it. As part of the installation, Best Buy connected the refrigerator's ice

maker and water dispenser to the existing water line in the home. About two days later, Stenzel returned home to find that the refrigerator had begun spraying water through the dispenser on its front door and onto her kitchen floor. Stenzel unsuccessfully attempted to stop the water by adjusting a water or ice dispenser lever, pressing buttons on the control panel, and, at the direction of a Best Buy employee, trying to disconnect the flow of water to the refrigerator using a valve at the back of the appliance. When none of those steps worked, the Best Buy employee directed her to shut off the water line for her home, which she did after climbing a ladder in her basement into a crawl space under her kitchen. Stenzel testified that when she was in the crawl space, she discovered that water had leaked through the floor into the crawl space. Further, she testified that the coating of water in the kitchen extended partially around an island counter that was three-and-a-half to four feet away from the refrigerator.

Stenzel testified that she was frantic to clean up the standing water because she was concerned about water damage. She explained that she took every towel available and covered almost the entire surface where water had been standing. Stenzel testified that she first attempted to wring the wet towels out in the sink, but there was too much water. She then put some of the towels into a lattice laundry basket. Because it was heavy with water and wet towels, she dragged the basket through her living room, down two steps in her sunroom, and across the sunroom in order to get the towels outside. After hanging the towels, she returned for a second load. According to Stenzel, when she was walking through her sunroom in an attempt to drag the basket with the second load of towels outside, her "foot went out from under [her]," and she fell and broke her leg and ankle. She testified

that she fell because her feet were wet or because the floor in the sunroom was wet from dragging the basket of wet towels through the room.

In April 2014, Stenzel brought suit against Best Buy, alleging negligence, breach of contract, and breach of warranty. In May 2015, she amended her complaint to add claims against Samsung. Best Buy moved for summary disposition, which the trial court granted in April 2015 after concluding that Stenzel had failed to establish causation. Samsung also moved for summary disposition, which the trial court granted in July 2015 after concluding that Stenzel had again failed to establish causation and that her claims against Samsung were barred by the statute of limitations.

II. SUMMARY DISPOSITION

A. STANDARD OF REVIEW

Stenzel argues that the trial court erred by granting summary disposition in favor of Best Buy and Samsung. This Court reviews de novo a trial court's ruling on a motion for summary disposition. *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 279; 769 NW2d 234 (2009). Under MCR 2.116(C)(10), a party may be entitled to summary disposition if there is no genuine issue with respect to any material fact and the moving party is entitled to judgment as a matter of law. *Id*. at 278. All documentary evidence submitted by the parties is considered in the light most favorable to the nonmoving party. *Id*.

B. CAUSATION

In order to establish causation, a plaintiff must establish both cause in fact and legal cause, i.e.,

proximate cause. *Skinner v Square D Co*, 445 Mich 153, 162-163; 516 NW2d 475 (1994). "The cause in fact element generally requires showing that but for the defendant's actions, the plaintiff's injury would not have occurred." *Id*. at 163. Legal cause "normally involves examining the foreseeability of consequences, and whether a defendant should be held legally responsible for such consequences." *Id*. Here, the trial court found that Stenzel had failed to establish either cause in fact or proximate cause.

In *Skinner*, our Supreme Court explained:

> The plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant. [*Id*. at 165 (citation and quotation marks omitted).]

Here, the record reflects that a significant quantity of water leaked from the refrigerator and onto the floor. While cleaning that water up to prevent water damage, Stenzel slipped in her sunroom on what she described as "wet." Although she was not certain whether the wetness came from water on her foot or whether it came from water on the floor, she was absolutely certain that it was from one or the other. Her testimony further established that she was barefoot while cleaning up and that she had attempted to clean the water up by laying down towels, which she then dragged through the sunroom in a lattice laundry basket. Viewed in the light most favorable to Stenzel, a reasonable jury could infer that it is more likely than not that water leaked from the laundry basket onto the floor while she was dragging the

basket out. Alternatively, a jury could infer that it is more likely than not that Stenzel's feet were wet because of the water in the kitchen, which came from the refrigerator.[1] Accordingly, on this record, but for Best Buy's and Samsung's alleged negligence, Stenzel would not have had water on either her feet or the floor in the sunroom, and she would not have fallen while cleaning up the water caused by the defective refrigerator. The trial court erred by dismissing the case on the basis of its conclusion that there was no cause in fact.

Best Buy and Samsung argue that even if cause in fact is established, Stenzel still failed to establish proximate cause because it was not foreseeable that she would injure herself in a different room after she succeeded in stopping the water from spraying from the refrigerator. Proximate cause is "such cause as operates to produce particular consequences without the intervention of any independent, unforeseen cause, without which the injuries would not have occurred." *Babula v Robertson*, 212 Mich App 45, 54; 536 NW2d 834 (1995). In order for an injury to be proximately caused by a defendant's actions, "the injury must be the natural and probable consequence of a negligent act or omission, which under the circumstances, an ordinary prudent person ought reasonably to have foreseen might probably occur as a result of his negligent act." *Dawe v Dr Reuven Bar-*

[1] Samsung suggests that the "wet" on Stenzel's feet could have come from outside. However, there is nothing in the record that indicates whether there was anything outside that could have caused Stenzel's feet to become wet, i.e., there is no testimony that it was raining, that the grass outside was wet, etc. Therefore, given that this theory is based wholly on speculation with no basis in the record, it is not sufficient to establish a genuine dispute of fact with regard to where the water on Stenzel's feet came from.

Levav & Assoc, PC (On Remand), 289 Mich App 380, 393-394; 808 NW2d 240 (2010) (citation and quotation marks omitted). Proximate cause is usually a factual issue to be decided by the trier of fact, but if the facts bearing on proximate cause are not disputed and if reasonable minds could not differ, the issue is one of law for the court. *Nichols v Dobler*, 253 Mich App 530, 532; 655 NW2d 787 (2002).

In this case, the conduct that created a risk of harm was either Best Buy installing the appliance improperly or Samsung providing a defective appliance, causing water to spray from the appliance and onto the kitchen floor. A foreseeable, natural, and probable consequence of water on the floor is that someone may slip and fall after coming into contact with the water. The fact that Stenzel slipped and fell in the sunroom, not the kitchen, after she saw the water and stopped it from flowing from the refrigerator is not an intervening cause breaking the chain of causation because the intervening act, i.e., cleaning up the mess, was reasonably foreseeable. See *McMillian v Vliet*, 422 Mich 570, 576; 374 NW2d 679 (1985) ("An intervening cause breaks the chain of causation and constitutes a superseding cause which relieves the original actor of liability, unless it is found that the intervening act was 'reasonably foreseeable.' "). Moreover, the fact that Stenzel slipped after becoming aware of the water goes to whether or not she was comparatively at fault, which is a question of fact for the jury. See *Poch v Anderson*, 229 Mich App 40, 51; 580 NW2d 456 (1998). Accordingly, on this record, the trial court erred by granting summary disposition on the basis of its conclusion that there was no proximate cause.

C. AMENDMENT ADDING SAMSUNG*

Stenzel also argues that the trial court erred by dismissing her claims against Samsung on the grounds that the claims were barred by the statute of limitations. The period of limitations for product liability or negligence claims is three years. MCL 600.5805(10) and (13). Stenzel's claim against Samsung was filed outside the limitations period. However, she argues that because she added Samsung as a party within 91 days of Samsung being named as a nonparty at fault, her amended complaint relates back to the date of her original complaint, which was filed within the limitations period. Samsung, however, argues that because Stenzel amended her complaint without leave of the court under MCR 2.112(K)(4), the relation-back provision in MCL 600.2957(2) does not apply.

MCL 600.2957(2) provides:

> Upon motion of a party within 91 days after identification of a nonparty, the court shall grant leave to the moving party to file and serve an amended pleading alleging 1 or more causes of action against that nonparty. A cause of action added under this subsection is not barred by a period of limitation unless the cause of action would have been barred by a period of limitation at the time of the filing of the original action.

"MCR 2.112(K) was essentially intended to implement MCL 600.2957." *Holton v A+ Ins Assoc, Inc*, 255 Mich App 318, 324; 661 NW2d 248 (2003). MCR 2.112(K)(2) provides that "the trier of fact shall not assess the fault

* Reporter's Note: Part II(C) of this opinion was vacated in its entirety by *Stenzel v Best Buy Co, Inc*, 318 Mich App 801 (2017). That order also convened a special panel to resolve a conflict between this case and *Williams v Arbor Home, Inc*, 254 Mich App 439; 656 NW2d 873 (2002), vacated in part on other grounds 469 Mich 898 (2003).

of a nonparty unless notice has been given as provided in this subrule." MCR 2.112(K)(3) sets forth the requirements that a party must follow in order to allege that a nonparty is wholly or partially at fault. MCR 2.112(K)(4), the provision at issue in this case, provides what an opposing party must do after receiving notice of a nonparty at fault:

> A party served with a notice under this subrule may file an amended pleading stating a claim or claims against the nonparty within 91 days of service of the first notice identifying that nonparty. The court may permit later amendment as provided in MCR 2.118.

Notably, unlike the statute, the court rule does not require leave of the court to file an amended complaint adding a nonparty if the amended complaint is filed within 91 days of the notice identifying the nonparty. Further, unlike the statute, the court rule does not expressly provide that the amended complaint will relate back to the date of the original complaint.

This case is controlled by the holding in *Williams v Arbor Home, Inc*, 254 Mich App 439; 656 NW2d 873 (2002), vacated in part on other grounds 469 Mich 898 (2003). In that case, we addressed whether an amended pleading adding a nonparty is effective in the absence of a motion seeking leave of the court to amend the pleadings. We concluded that:

> The court rule plainly allows a plaintiff to file an amended complaint adding a nonparty but *does not specifically mention* whether leave of the court is also required. The statute, on the other hand, states that leave of the court is indeed required. As argued by defendants, the statute therefore merely includes more detail than the court rule. Moreover, the court rule specifically refers to MCL 600.2957, see MCR 2.112(K)(1), and the statute is again specifically mentioned in the staff comment to the 1997 amendment of MCR 2.112. The staff comment to the

> 1997 amendment indicates that the court rule was essentially meant to implement the statute. *Reading the court rule and the statute in conjunction, we conclude that leave of the court is indeed required before an amended pleading adding a nonparty becomes effective.*
>
> Because plaintiff did not seek leave of the court to add [a second defendant, the Michigan Elevator Company (MEC),] as a party, MEC was never properly added to this lawsuit. [*Id*. at 443-444 (second emphasis added).]

Under *Williams*, Samsung was never properly added to the lawsuit because Stenzel did not seek leave of the court to add it as a party.

Were we not bound by *Williams*,[2] we would follow the reasoning of Judge O'CONNELL in his partial dissent in that case. In *Williams*, Judge O'CONNELL stated:

> I concur with the majority opinion that the sole issue in this case involves the application of MCR 2.112(K)(4). I also concur with the majority opinion that plaintiff's amended complaint complies with the requirements set forth in MCR 2.112(K). However, I disagree with the majority's opinion that there exists no conflict between MCR 2.112(K)(4) and MCL 600.2957(2). I also disagree with the majority's conclusion that plaintiff, who complied with the requirements of the court rule, should be denied access to the appellate courts. Therefore, I would allow the appeal to proceed.
>
> In my opinion, the majority achieves three unacceptable results in this case. First, the decision is in conflict with *Staff v Johnson*, 242 Mich App 521; 619 NW2d 57 (2000) (HOOD, P.J., writing for the majority; O'CONNELL, J., dissenting on other grounds). Second, the majority effectively denies plaintiff any appellate review of the lower court decision because plaintiff followed the court rules exactly. Third, the decision subjects numerous Michigan attorneys to malpractice claims for the common practice of filing an amended complaint without leave granted. In

[2] See MCR 7.215(J)(1).

Staff, [242 Mich App] at 531, Judge HOOD held that MCR 2.112(K) and MCL 600.2957(2) were in conflict. Then, Judge HOOD concluded, "the conflict between the court rules and the statute is resolved in favor of the court rules because it involves a matter of procedure." [*Id*.] at 533, citing *McDougall v Schanz*, 461 Mich 15, 26; 597 NW2d 148 (1999). The majority, using what can best be described as a process of smoke and mirrors, concludes that the present subsections of the court rules and the statute are not in conflict. I prefer to use previous case law that is exactly on point to conclude that a conflict exists. I also note that this issue would not exist unless the parties had already confronted this conflict between the statute and the court rule.

In my opinion, the conflict is extremely simple. The court rule provides that under the present factual situation, leave of the court is not required to file an amended complaint. MCR 2.112(K)(4). On the other hand, the statute implies that leave of the court must be obtained before filing an amended complaint. MCL 600.2957(2). Ordinary common sense dictates that either plaintiff is required to obtain leave of the court to file an amended complaint, or plaintiff is not required to obtain leave of the court. Hence, a conflict exists. I concur with Judge HOOD's conclusion in *Staff*, *supra*, that the issue whether a plaintiff must file for leave to amend a complaint is a matter of procedure, and, therefore, the court rule controls. See also *McDougall*, *supra*.

Even if I accepted the majority's dubious logic concerning the interplay between the statute and the court rule, I would not penalize the plaintiff for precisely following the court rule. The unintended consequences of the majority's opinion is that numerous competent attorneys in this state will now be subject to legal malpractice lawsuits for precisely following the court rules.

In my opinion, plaintiff should be allowed access to the appellate courts to argue his substantive appellate issues. Therefore, I would allow the appeal to proceed. [*Williams*, 254 Mich App at 444-446 (O'CONNELL, J., concurring in part and dissenting in part).]

Following that approach, we would conclude that because Stenzel followed the requirements set forth in MCR 2.112(K)(4), she properly added Samsung as a party, and her amended complaint was timely because it related back to the date of her original complaint.[3] However, because we are bound by *Williams*, we affirm

[3] Alternatively, we conclude that *Williams* was wrongly decided for the reasons stated by Judge ZAHRA in his concurrence in *Bint v Doe*, 274 Mich App 232; 732 NW2d 156 (2007). In *Bint*, Judge ZAHRA stated:

> I write separately because I disagree with the conclusion reached in *Staff v Johnson*, 242 Mich App 521; 619 NW2d 57 (2000), that there is a conflict between MCR 2.112(K) and MCL 600.2957(2).
>
> In *Staff*, the plaintiff argued that MCL 600.2957(2) extended the period of limitations for parties added pursuant to MCR 2.112(K). [*Id.*] at 530. This Court rejected the literal meaning of the statute and concluded that the statute conflicts with the court rule. *Id*. at 531. This Court further concluded that statutes of limitations are procedural, and, therefore, the court rule prevails over the statute. *Id*. at 533.
>
> *Staff* wrongly concluded that a conflict exists between the court rule and the statute. A conflict does not exist merely because the court rule uses the permissive word "may" while the statute uses the mandatory word "shall." The court rule addresses the conduct of the parties. A party served with a notice of a nonparty being at fault may file an amended pleading within 91 days of receipt of the notice. The permissive word "may" is used in the court rule because a plaintiff controls his or her pleadings and cannot be required to amend a complaint. By contrast, the statute is directed at the conduct of the court. The statute provides that if a plaintiff elects to file a motion to amend within 91 days of receipt of a notice of a nonparty being at fault, the court "shall grant leave to the moving party . . . ." MCL 600.2957(2).
>
> The statute and the court rule are consistent. The plaintiff may elect to amend the complaint. If the plaintiff so elects, the court shall grant the amendment. There being no conflict between the statute and the court rule, we are bound to implement the remainder of MCL 600.2957(2), which provides that a "cause of action added under this subsection is not barred by a period of limitation unless the cause of action would have been barred by a period of limitation at the time of the filing of the original action."

the trial court's order and request that this Court convene a special conflict panel, MCR 7.215(J)(2) and (3).

Affirmed in part and reversed in part.

O'CONNELL and BECKERING, JJ., concurred with M. J. KELLY, P.J.

> Applying this statutory provision to the facts of the present case, it is clear that the cause of action asserted against defendants, although brought nine years after the events occurred, is timely because the claim against defendants, had it been asserted in the original action, would have been timely. If the Legislature did not intend such stale claims to be initiated under MCL 600.2957(2), it is for the Legislature, not the courts, to say so. [*Bint*, 274 Mich App at 237-238 (ZAHRA, P.J., concurring).]

We recognize that in his *Williams* dissent, Judge O'CONNELL found that *Staff* correctly identified a conflict between the court rule and the statute, whereas in his *Bint* concurrence, Judge ZAHRA found that there was no conflict. However, we believe that, regardless of whether there is a conflict between the court rule and the statute, *Williams* was wrongly decided. If there is a conflict between the court rule and the statute, then *Williams* was wrongly decided for the reasons stated by Judge O'CONNELL in his *Williams* dissent. If there is no conflict between the court rule and the statute, then *Williams* was wrongly decided for the reasons stated by Judge ZAHRA in his concurrence in *Bint*.

BERTIN v MANN

Docket No. 328885. Submitted December 13, 2016, at Detroit. Decided December 27, 2016, at 9:00 a.m. Leave to appeal sought.

Kenneth Bertin brought a negligence action against Douglas Mann in the Oakland Circuit Court, seeking damages for the injuries he incurred after Mann accidentally struck him with a golf cart while the two were golfing. Before trial, in response to defendant's motion to determine the applicable standard of care to be included in the jury instructions, the court, Martha D. Anderson, J., ruled that plaintiff was required to show that defendant had acted with reckless misconduct to establish liability in accordance with *Ritchie-Gamester v City of Berkley*, 461 Mich 73 (1999). After a trial, the jury concluded that defendant's actions did not amount to reckless misconduct, and the court entered a judgment of no cause of action. Plaintiff appealed.

The Court of Appeals *held*:

1. The trial court erred by ruling that plaintiff was required to establish that defendant acted with reckless misconduct rather than ordinary negligence. The reckless-misconduct standard set forth in *Ritchie-Gamester* applies to coparticipants in recreational activities on the ground that they voluntarily subjected themselves to the risks that are inherent in those activities. However, because the risks posed by a golf cart are not inherent in the game of golf, and because there was no evidence that the use of a golf cart was required on the course where the accident occurred in this case, the reckless-misconduct standard from *Ritchie-Gamester* did not apply.

2. The civil liability act, MCL 257.401 *et seq*.—a part of the Michigan Vehicle Code (MVC), MCL 257.1 *et seq*.—did not require the application of the ordinary-negligence standard in this case. Even assuming that a golf cart was a motor vehicle for purposes of the MVC, MCL 257.401(1)—the provision that addresses the right of a person to bring a civil action for damages resulting from a violation of the MVC or for negligent operation by the owner or operator of a motor vehicle—would not have applied because defendant was neither the owner nor the operator of the golf cart as those terms were defined by the MVC when the accident occurred.

Jury verdict vacated; trial court order reversed; case remanded for further proceedings.

ACTIONS — NEGLIGENCE — STANDARD OF CARE — RECREATIONAL ACTIVITIES — INHERENT RISKS — GOLFING — GOLF CARTS.

A plaintiff who brings an action for injuries caused by a defendant's negligent operation of a golf cart generally must establish that the defendant acted with ordinary negligence rather than reckless misconduct absent evidence that the use of a golf cart was required at the time of the incident; the risks posed by a golf cart are not otherwise inherent in the game of golf.

Bendure & Thomas (by *Mark R. Bendure*) for plaintiff.

Secrest Wardle (by *Sidney A. Klingler*) for defendant.

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

RIORDAN, J. Plaintiff appeals as of right the trial court's entry of a judgment of no cause of action in favor of defendant following the jury's verdict that defendant did not engage in reckless misconduct while operating a motorized golf cart at the Farmington Hills Golf Club. The only issue in this appeal is whether the trial court correctly ruled before trial that the applicable standard of care for the operation of a golf cart is reckless misconduct and not ordinary negligence. For the reasons stated in this opinion, we vacate the jury's verdict, reverse the trial court's order finding that reckless misconduct is the applicable standard in this case, and remand for further proceedings consistent with this opinion.

I. FACTUAL BACKGROUND

This case arises from an accident involving a golf cart driven by defendant, which occurred while plain-

tiff and defendant were golfing together on May 22, 2013. Except for the parties' differing accounts of how defendant struck plaintiff, the underlying facts of this case are not in dispute.

According to plaintiff, while the parties were at the 17th hole, defendant hit his golf ball onto the green, and plaintiff's ball landed to the right of the green. Plaintiff then drove the cart toward his ball and parked it in nearby rough off the green. While defendant remained in the passenger seat, plaintiff got out of the cart and grabbed his putter and wedge, intending to use the latter to chip the ball onto the green. However, after laying his putter on the ground, plaintiff struck his ball too hard, it traveled farther than plaintiff intended, and it stopped on the other side of the green. Plaintiff then picked up the putter from where he had set it on the ground and began to walk toward his ball. Plaintiff did not believe that he stepped in front of the cart while walking, because he was moving in the opposite direction of the cart. After he had gone about 10 to 15 feet, defendant drove the cart and struck plaintiff in the buttocks. Plaintiff was pushed forward and knocked to the ground from the impact. After the impact, plaintiff rolled to the right, and the cart struck him a second time, running over his leg.

Defendant's recollection was similar to plaintiff's except with regard to the cart. Defendant testified that after he took a shot to get his ball on the green, he returned to the cart, intending to drive it to the other side of the green so that it would be ready for them to drive to the tee box for the next hole. Defendant thought plaintiff was to the right and slightly behind the cart, not in front of it. Defendant based his conclusion on the direction that he had seen plaintiff walk from the cart,

not on actually seeing plaintiff's location. Defendant started the cart and began to turn left toward a cart path. However, "the minute [defendant] hit the accelerator[,] [plaintiff] was in front of [the cart]." Defendant testified that, before driving into plaintiff, he had looked to see if there was anyone in front of the cart and he saw no one. Thus, defendant claims the first time that he noticed plaintiff was when the impact occurred. According to defendant, the cart struck plaintiff in the lower legs and knocked him over. Defendant did not recall the cart then rolling over plaintiff's leg.

In April 2014, plaintiff filed a complaint primarily alleging that defendant acted "with active negligence" and "without due care and caution" when he struck plaintiff. In particular, plaintiff alleged, among other things, that defendant breached his duty to safely, dependably, and reliably operate the golf cart in order to ensure plaintiff's safety and, as a result, caused plaintiff to sustain serious injuries and incur significant damages.

In his answer, defendant largely denied plaintiff's allegations and expressly denied plaintiff's allegations of negligence and carelessness. However, defendant also raised two affirmative defenses: (1) the event was an unforeseeable accident, and (2) plaintiff's own negligence or comparative negligence was the sole cause or a contributing cause to the injuries and damages claimed by plaintiff.

Before trial, plaintiff filed a motion in limine through which he requested that the trial court hold that defendant was negligent as a matter of law on the basis of his deposition testimony so that the case would proceed to trial only on the issue of damages. In response, defendant argued that plaintiff's filing of a motion in limine was improper because it was, in

effect, an untimely motion for summary disposition on the issue of negligence that cited a lower—and incorrect—standard of review. Accordingly, defendant argued that the trial court should deny plaintiff's motion and allow the issue of negligence to proceed to trial because the events that transpired on the golf course were factually disputed, essentially consisting of plaintiff's word against defendant's word. In addition, defendant asserted that, under *Ritchie-Gamester v City of Berkley*, 461 Mich 73; 597 NW2d 517 (1999), "reckless misconduct" was the standard of care applicable in this case because the parties were coparticipants in a recreational activity when the incident occurred. Defendant further argued that plaintiff was not entitled to a dispositive ruling on the issue of negligence because plaintiff misstated the proper standard of care that defendant owed to plaintiff, and plaintiff could not establish that defendant was, in fact, reckless. The trial court denied plaintiff's motion without prejudice, explaining at the motion hearing that it believed that this issue involved factual questions for the jury to decide. It did not explicitly decide the applicable standard of care.

Later, the parties further disputed the standard of care when they filed their proposed jury instructions, prompting defendant to file a motion to settle the instructions.[1] The trial court ultimately agreed with

[1] Most relevant to this appeal, defendant contended that a reckless-misconduct standard applies in this case under *Ritchie-Gamester* because the parties were engaged in a recreational activity, a game of golf, when the accident occurred, and injuries related to a golf cart are an inherent risk of golf. Plaintiff disagreed that the *Ritchie-Gamester* standard applies in this case because Michigan caselaw recognizes that the standard does not apply in all circumstances involving recreational activities, both Michigan and federal caselaw have held that the recreational activities doctrine does not apply to activities involving

defendant that a reckless-misconduct standard applies in this case because "it is involved with the game of golf." Accordingly, the court entered an order granting defendant's motion to settle the jury instructions and accepting defendant's proposed instructions based on the reckless-misconduct standard. It later denied plaintiff's motion for reconsideration.

At trial, the parties provided testimony regarding their respective observations and opinions of defendant's conduct in this case, and plaintiff ultimately agreed that defendant was, at most, being "careless and not paying attention" when the collision occurred. The trial court denied each party's motion for a directed verdict at the close of the proofs. Ultimately, the jury concluded that defendant's actions did not constitute reckless misconduct, and the trial court entered a judgment of no cause of action against plaintiff.

Plaintiff appeals as of right from the trial court's judgment, arguing that the trial court applied an incorrect standard of care.

II. STANDARD OF REVIEW

The standard of care that a defendant owes to a plaintiff is a question of law that we review de novo. *Sherry v East Suburban Football League*, 292 Mich App 23, 27; 807 NW2d 859 (2011); see also *In re Petition of Attorney General for Investigative Subpoenas*, 274 Mich App 696, 698; 736 NW2d 594 (2007).

III. ANALYSIS

This case presents an issue of first impression in Michigan. As we will discuss further, the parties were,

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off-road vehicles (ORVs) because they are motorized vehicles, and the golf cart in this case constitutes a motorized vehicle.

without dispute, coparticipants in a recreational activity. Under the broad language in *Ritchie-Gamester*, 461 Mich at 75, "coparticipants in recreational activities owe each other a duty not to act recklessly." However, as plaintiff emphasizes, *Ritchie-Gamester* does not establish that *any* coparticipant conduct that causes injury during a recreational activity must meet the reckless-misconduct standard. See *id*. at 89 n 9. Likewise, even though numerous golf-related cases in Michigan and other jurisdictions have applied the reckless-misconduct standard when a participant was injured by a golf ball or a golf club, we have not found a single Michigan case, or a case in any other jurisdiction, in which the driver of an injury-causing golf cart during a game of golf was held to any standard other than ordinary negligence.

Therefore, although the language in *Ritchie-Gamester* may superficially support a decision in favor of defendant, a thorough reading of that opinion—along with an examination of relevant caselaw, the rules of the game of golf, and secondary sources—compels us to conclude that golf-cart injuries are not a risk inherent in the game of golf and that the trial court erred when it ruled that a reckless-misconduct standard, instead of an ordinary-negligence standard, applies in this case.

A. *RITCHIE-GAMESTER*

In *Ritchie-Gamester*, 461 Mich at 75, 77, the plaintiff's injuries resulted from an accidental collision with the defendant while the parties were skating during an "open skate" at an ice arena. The Court reviewed caselaw from Michigan and other jurisdictions, *id*. at 77-85, and crafted the guiding principles for liability between coparticipants in recreational activities in

Michigan, *id*. at 85-89. It explained: "A person who engages in a recreational activity is temporarily adopting a set of rules that define that particular pastime or sport. In many instances, the person is also suspending the rules that normally govern everyday life." *Id*. at 86. The Court concluded that no matter how the elevated standard is described or justified (for example, as having notice of the inherent risks, as "consent[ing] to the inherent risks," as assuming the risks, etc.), "the basic premise is the same: When 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 86-87 (emphasis added). The Court noted that "there are foreseeable, built-in risks of harm" in all recreational activities, including both contact and noncontact sports and team as well as individual activities. *Id*. at 88.

In light of these principles, the Court adopted the following standard of care in recreational activities cases:

> With these realities in mind, we join the majority of jurisdictions and adopt reckless misconduct as the minimum standard of care for coparticipants in recreational activities. We believe that this standard most accurately reflects the actual expectations of participants in recreational activities. As will be discussed in more detail below, we believe that participants in recreational activities do not expect to sue or be sued for mere carelessness. A recklessness standard also encourages vigorous participation in recreational activities, while still providing protection from egregious conduct. Finally, this standard lends itself to common-sense application by both judges and juries. [*Id*. at 89.]

The Court further clarified the scope of the reckless-misconduct standard as follows:

> Surely all who participate in recreational activities do so with the hope that they will not be injured by the clumsiness or over-exuberant play of their coparticipants. However, we suspect that reasonable participants recognize that skill levels and play styles vary, and that an occasional injury is a foreseeable and *natural part of being involved in* recreational activities, however the "informal and formal rules" are structured and enforced.
>
> . . . When a player steps on the field, she must recognize that an injury may occur, but she does not know whether she will be injured, or whether she will inadvertently injure another player. We do not believe that a player expects an injury, even if it results from a rule violation, to give rise to liability. Instead, *we think it more likely that players participate with the expectation that no liability will arise unless a participant's actions exceed the normal bounds of conduct associated with the activity*. [*Id*. at 94 (emphasis added).]

Thus, the Court adopted the recklessness standard specifically on the basis of the usual expectation of participants that liability will only arise with regard to conduct that exceeds the normal bounds of the conduct associated with a given activity. It is also clear that the Court did not articulate a specific test for determining whether an injury arose from an inherent risk of an activity or whether it was tangential to the sport in which the parties were engaged.

Additionally, the Court clarified in a footnote that the broad language of its holding does not indicate that a reckless-misconduct standard must be applied in all cases that seem to involve conduct arising from a recreational activity: "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.

In this case, the parties do not dispute that golfing, in general, constitutes a recreational activity, as demonstrated by the Michigan Supreme Court's reliance on and quotation of *Hathaway v Tascosa Country Club, Inc*, 846 SW2d 614, 616-617 (Tex App, 1993), which expressly extended the " 'reckless or intentional' " standard applicable in the context of " 'competitive contact sports' " to the sport of golf, and in which the plaintiff had been hit by an errant shot. *Ritchie-Gamester*, 461 Mich at 88 (citation omitted). However, the parties dispute whether the use of a golf cart falls within the scope of activities involved in the game of golf that would be subject to the reckless-misconduct standard established under *Ritchie-Gamester*. In particular, plaintiff contends that injuries arising from the use of a golf cart do not fall within the *Ritchie-Gamester* framework for two reasons: (1) the operation of a golf cart constitutes the operation of a motor vehicle, not participation in a recreational activity,[2] and (2) the use of a golf cart, and the risks presented by a golf cart, are not inherent risks of golf. We will address each argument in turn.

B. MOTOR VEHICLE

Plaintiff first asserts that the applicable standard in this case is that of ordinary negligence because a golf cart, like the off-road vehicles (ORVs) at issue in

[2] The trial court disagreed with plaintiff's reasoning that driving a golf cart on a golf course is equivalent to driving an ORV, reasoning that some, although not all, ORVs can be driven on roads and fall under the Michigan Vehicle Code (MVC), MCL 257.1 *et seq*., but golf carts are not permitted on roads and are not subject to the MVC. Without addressing the accuracy of the trial court's premises in light of, e.g., MCL 257.660 (allowing the operation of low-speed vehicles on a roadway), we note that MCL 257.657a now expressly allows the operation of golf carts on roadways. 2014 PA 491, effective January 13, 2015.

Van Guilder v Collier, 248 Mich App 633; 650 NW2d 340 (2001), is a motor vehicle and, therefore, subject to the civil liability provisions of the Michigan Vehicle Code (MVC), MCL 257.1 *et seq*. We reject this line of reasoning.[3]

As plaintiff recognizes, we have held that the MVC may control in recreational cases under certain circumstances. In *Van Guilder*, 248 Mich App at 635-637, we specifically addressed the applicability of *Ritchie-Gamester*, ultimately concluding that the applicable standard of care is negligence in the operation of an ORV.

> The instant case . . . is distinguishable from *Ritchie-Gamester*. In that case, the Court primarily focused its analysis on injuries sustained during the course of recreational activities that typically or foreseeably involve physical contact between coparticipants. To the contrary, a person operating a motorized recreation vehicle does not reasonably expect or anticipate the risk of physical contact, nor is such risk an obvious or necessary danger inherent to its normal operation. The *Ritchie-Gamester* Court did not contemplate injuries that occur as a result of physical contact between two such vehicles. This distinction is dispositive. We decline to adopt defendant's speculative conclusion that our Supreme Court intended that a recklessness standard of care apply with regard to the operation of motorized recreation vehicles simply because they are usually used for recreational purposes. The operation of

[3] While there may be some support for plaintiff's claim—see Anno: *Liability for Injury Incurred in Operation of Power Golf Cart*, 66 ALR4th 622, 629, § 2[a] ("The driver of a golf cart may be liable for injuries caused to either the passenger or some other patron on the golf course as a result of the driver's negligent operation of the golf cart. This liability is similar to the liability imposed on a person who operates any other motor vehicle in a negligent manner and causes personal injuries to another.")—Michigan law does not compel the conclusion that ordinary negligence is always the standard for liability that applies to the recreational use of motor vehicles.

> motor vehicles, including ORVs, is not governed by the "rules of the game," but by the law. [*Van Guilder*, 248 Mich App at 636-637.]

In reaching this conclusion, we also noted that multiple statutes apply to ORVs. *Id*. at 637-638. Our reasoning relied on the definitions of "motor vehicle" and "vehicle" provided by MCL 257.33 and MCL 257.79, respectively, and we noted that statutes specifically addressing ORVs had originally been in the MVC but were repealed and reenacted in large part under the Natural Resources and Environmental Protection Act by 1995 PA 58. *Van Guilder*, 248 Mich App at 637-638, 638 n 4. In reading the relevant statutes as one law under the doctrine of *in pari materia*, we held that "an ORV is a motor vehicle for purposes of the civil liability act[, MCL 257.401]; therefore, liability may be imposed for its negligent operation." *Id*. at 639.

Whether the civil liability act, MCL 257.401 *et seq*.—a part of the MVC—similarly applies to carts driven on a golf course also appears to be an issue of first impression in Michigan. The only provision of the civil liability act that has the potential of applying to a cart being operated on a golf course is MCL 257.401(1),[4] which states, in relevant part:

> This section shall not be construed to limit the right of a person to bring a civil action for damages for injuries to

[4] Under MCL 257.601, the traffic laws under Chapter VI of the MVC only apply to the operation of vehicles on highways, unless a different location is indicated in a particular section. We conclude that the liability provisions under Chapter VI do not apply in this case and that MCL 257.601 does not affect the application of the liability provisions of MCL 257.401(1) regarding the negligent operation of a motor vehicle in other circumstances. MCL 257.657a, a section of the MVC, regulates the operation of golf carts on city and village streets, but that statute went into effect on January 13, 2015, *after* the events in this case occurred, and it is irrelevant because it does not address the operation of golf carts on golf courses.

> either person or property resulting from a violation of this act by the owner or operator of a motor vehicle or his or her agent or servant. The owner of a motor vehicle is liable for an injury caused by the negligent operation of the motor vehicle whether the negligence consists of a violation of a statute of this state or the ordinary care standard required by common law.

Even if we assume, without deciding, that a golf cart is a motor vehicle for purposes of the MVC, see MCL 257.33 (defining "motor vehicle") and MCL 257.79 (defining "vehicle"), MCL 257.401(1) does not apply to the golf cart or parties at issue in the instant case.

The first sentence provides that "this section" (i.e., MCL 257.401) does not limit the right of a plaintiff to bring a civil action against the owner or operator of a motor vehicle for "a violation of *this act*." MCL 257.401(1) (emphasis added). However, that sentence does not apply to this case because plaintiff has not identified a violation of the MVC and defendant was not, at the time of the accident, an "owner or operator." It is undisputed that defendant did not own the golf cart, and the version of MCL 257.36 in effect at the time of the accident provided, " 'Operator' means every person, other than a chauffeur, who is in actual physical control of a motor vehicle *upon a highway*,"[5] and the golf cart was not driven on a highway. MCL 257.36(1), as enacted by 1949 PA 300 (emphasis added). The subsequent sentences of MCL 257.401(1) provide for the liability of an *owner* of a motor vehicle "whether the negligence consists of a violation of a statute of this state or the ordinary care standard required by common law." But, again, defendant was not the owner of the cart, and there is no claim that the owner of the

[5] The amendment of MCL 257.36 by 2013 PA 231, effective March 27, 2014, does not change the analysis.

cart breached its duty of ordinary care in entrusting operation of the cart to defendant.

Accordingly, we conclude that plaintiff's reliance on the reasoning in *Van Guilder*, 248 Mich App at 636-639, based on MCL 257.401 and the MVC, is unavailing.

C. INHERENT RISK

Next, plaintiff argues that the trial court erred by concluding that the reckless-misconduct standard applies in this case under *Ritchie-Gamester* because motorized golf carts are not an inherent risk of golf or an inherent component of the game. In considering the specific facts of this case, see *Ritchie-Gamester*, 461 Mich at 89 n 9, we agree that the risks posed by the golf cart were not risks inherent in the game of golf. Accordingly, we conclude that the instant case is distinguishable from the class of recreational activities to which *Ritchie-Gamester* applies and, therefore, the trial court erred by ruling that the reckless-misconduct standard applies to plaintiff's claims. Cf. *Van Guilder*, 248 Mich App at 636-637.

The inherent risks of golf have not been comprehensively delineated by the courts of this state. "Inherent risk" is defined similarly by both legal and lay dictionaries. *Black's Law Dictionary* (10th ed), p 1524, defines "inherent risk" as:

> 1. A risk that is necessarily entailed in a given activity and involves dealing with a situation that carries a probability of loss unless action is taken to control or correct it. 2. A fairly common risk that people normally bear whenever they decide to engage in a certain activity.
>
> A risk is inherent in an activity if the ordinary participant would reasonably consent to the risk, and the risk

> cannot be tailored to satisfy the idiosyncratic needs of any particular participant like the plaintiff. [Quotation marks and citation omitted.]

Similarly, lay dictionaries have defined "inherent" as "involved in the constitution or essential character of something: belonging by nature or habit: INTRINSIC," *Merriam-Webster's Collegiate Dictionary* (11th ed); "1. existing in someone or something as a permanent and inseparable element, quality, or attribute," *Random House Webster's Unabridged Dictionary* (2d ed);[6] and "existing in something as a permanent, essential, or characteristic attribute," *New Oxford American Dictionary* (3d ed).

Consistent with these definitions, courts in other jurisdictions have concluded that " '[a] risk is inherent in a sport if its elimination (1) would chill vigorous participation in the sport[] and (2) would alter the fundamental nature of the activity.' " *Yoneda v Tom*, 110 Hawaii 367, 376; 133 P3d 796 (2006), quoting *Sanchez v Hillerich & Bradsby Co*, 104 Cal App 4th 703, 713; 128 Cal Rptr 2d 529 (2002) (alterations in original). Similarly, this Court has previously noted the following while interpreting the Ski Area Safety Act, MCL 408.321 *et seq*., which precludes ski-area liability for "dangers that inhere in that sport insofar as the dangers are obvious and necessary," MCL 408.342(2):

> [T]he list of "obvious and necessary" risks assumed by a skier under the statute involves those things resulting from natural phenomena, such as snow conditions or the terrain itself; natural obstacles, such as trees and rocks; and types of equipment that are inherent parts of a ski

[6] *Random House Webster's Unabridged Dictionary* (2d ed) also includes the following as synonyms for "inherent": innate, native, inbred, and ingrained.

> area, such as lift towers and other such structures or snow-making or grooming equipment when properly marked. These are all conditions that are *inherent* to the sport of skiing. *It is safe to say that, generally, if the "dangers" listed in the statute do not exist, there is no skiing*. [*Schmitz v Cannonsburg Skiing Corp*, 170 Mich App 692, 696; 428 NW2d 742 (1988) (emphasis added).]

Courts have used similar reasoning regarding the inherent risks of golf. Long before the advent of golf carts, golfers were held not liable for errant balls "sliced" unexpectedly into fellow golfers, see, e.g., *Legal Questions Relating to Golfing and Golf Courses*, 31 Scottish Law Review 194, 198 (1915), citing *Andrew v Stevenson*, 13 SLT 581 (Edinburgh Sheriff Court, 1905), and more recent courts have frequently acknowledged that missed shots and errant golf balls frequently fly in unintended directions, see, e.g., *Yoneda*, 110 Hawaii at 374-379 (concluding, after considering cases from different jurisdictions, that errant shots are an inherent risk of golf); *Dilger v Moyles*, 54 Cal App 4th 1452, 1455; 63 Cal Rptr 2d 591 (1997); *Hathaway*, 846 SW2d at 616-617 (stating that "[b]ecause of the great likelihood of these unintended and offline shots, it can indeed be said that the risk of being inadvertently hit by a ball struck by another competitor is built into the game of golf," and recognizing that it is common knowledge that bad shots may occur in the absence of any negligence); 27A Am Jur 2d, Entertainment and Sports Law, § 86, pp 482-483; 53 ALR4th 282; Lang, *A Good Ride Spoiled: Legal Liability and Golf Carts*, 23 Marq Sports L Rev 393, 393 (2013). Likewise, courts have explicitly and implicitly recognized that swinging golf clubs are an inherent risk of golf as well. See, e.g., *Schick v Ferolito*, 167 NJ 7, 18; 767 A2d 962 (2001); *Havens v Kling*, 277 App Div 2d 1017,

1018; 715 NYS2d 812 (2000); *Nesbitt v Bethesda Country Club, Inc*, 20 Md App 226, 232-233, 232 n 1; 314 A2d 738 (1974).

Unlike these traditional aspects of the game of golf, carts did not become commonplace in golf matches until relatively recently.[7] As the United States Supreme Court explained in *PGA Tour, Inc v Martin*, 532 US 661, 683-685; 121 S Ct 1879; 149 L Ed 2d 904 (2001), golf carts became a common accessory to the game during the 1950s, as an advancement in the manner in which equipment was transported during the game:

> [T]he use of carts is not itself inconsistent with the fundamental character of the game of golf. From early on, the essence of the game has been shotmaking—using clubs to cause a ball to progress from the teeing ground to a hole some distance away with as few strokes as possible. That essential aspect of the game is still reflected in the very first of the Rules of Golf, which declares: "The Game of Golf consists in playing a ball from the *teeing ground* into the hole by a *stroke* or successive strokes in accordance with the rules." Rule 1–1, Rules of Golf, App. 104 (emphasis in original). Over the years, there have been many changes in the players' equipment, in golf course design, in the Rules of Golf, and in the method of transporting clubs from hole to hole. Originally, so few clubs were used that each player could carry them without a bag. Then came golf bags,

[7] Golf carts were not produced until the 1940s. *A Good Ride Spoiled*, 23 Marq Sports L Rev at 394. The oldest state or federal case that we could find involving the liability of an allegedly negligent golf-cart driver to his injured passenger is *Gillespie v Chevy Chase Golf Club*, 187 Cal App 2d 52, 55; 9 Cal Rptr 437 (1960), which held that the plaintiff's actions contributing to the overturning of the cart were sufficient to preclude recovery under the plaintiff's theory of liability under the doctrine of res ipsa loquitur. In *PGA Tour, Inc v Martin*, 532 US 661, 683 n 39; 121 S Ct 1879; 149 L Ed 2d 904 (2001), the United States Supreme Court noted that the first recorded rules of golf were published in 1744, more than 200 years before the *Gillespie* opinion was issued.

> caddies, carts that were pulled by hand, and eventually motorized carts that carried players as well as clubs. "Golf carts started appearing with increasing regularity on American golf courses in the 1950's. Today they are everywhere. And they are encouraged. For one thing, they often speed up play, and for another, they are great revenue producers." [Citations omitted.]

The *Martin* Court found that the use of golf carts would not "fundamentally alter the nature" of the game of golf in the context of an Americans with Disabilities Act claim,[8] and noted that the official Rules of Golf are silent as to whether players are required to walk as they travel from hole to hole, such that walking is not a fundamental component of the game:

> There is nothing in the Rules of Golf that either forbids the use of carts or penalizes a player for using a cart. That set of rules, as we have observed, is widely accepted in both the amateur and professional golf world as the rules of the game. The walking rule that is contained in petitioner's hard cards, based on an optional condition buried in an appendix to the Rules of Golf, is not an essential attribute of the game itself. [*Id*. at 685.]

The *Martin* Court reasoned:

> To be sure, the waiver of an essential rule of competition for anyone would fundamentally alter the nature of petitioner's tournaments. As we have demonstrated, however, the walking rule is at best peripheral to the nature of petitioner's athletic events, and thus it might be waived in individual cases without working a fundamental alteration. [*Id*. at 689.]

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[8] *Martin*, 532 US at 664-665, considered whether the Americans with Disabilities Act of 1990, 42 USC 12101 *et seq*., "protects access to professional golf tournaments by a qualified entrant with a disability" and, most relevant to the instant case, "whether a disabled contestant may be denied the use of a golf cart because it would 'fundamentally alter the nature' of the tournaments, [42 USC] 12182(b)(2)(A)(ii), to allow him to ride when all other contestants must walk."

Given these facts, the United States Supreme Court held that allowing a golfer with a disability to use a cart during a tournament—the rules of which prohibited the use of golf carts—did not fundamentally alter the nature of the game. *Id*. at 690.

Consistently with the Supreme Court's observations, the current version of the USGA *Rules of Golf*, effective January 1, 2016, still includes no provision that forbids, penalizes, or requires the use of golf carts, nor did the version of the rules in effect at the time of the incident in this case. See United States Golf Association and R&A Rules Limited, *Rules of Golf* <http://www.usga.org/content/dam/usga/pdf/CompleteROGbook.pdf> (accessed December 5, 2016) [https://perma.cc/Y92N-TNJJ] (2012 Rules); [https://www.usga.org/content/dam/usga/pdf/2016%20Rules/2016-rulesofgolf-USGAUSGAfinal.pdf> [https://perma.cc/RU8X-NJM7] (2016 Rules).[9] Likewise, the only reference to walking in the rules is an optional provision in an appendix pertaining to local rules and conditions of competition, which states, "If it is desired to require players to walk in a competition, the following condition is recommended," and provides a sample provision concerning unauthorized forms of transportation. 2012 Rules at 142; 2016 Rules at 159.

[9] The only provisions that refer to golf carts in the Rules of Golf are the following: (1) under the etiquette section, a provision stating that players should leave their bags or carts in a position that will allow them to move quickly to the next tee as soon as they are done playing; (2) under the section discussing care of the golf course, a provision stating that players should strictly observe local notices regarding the movement of golf carts; and (3) under the definitions section, a provision stating that the word "equipment" includes a golf cart and explaining whether a cart will be deemed the equipment of multiple players when it is being shared or moved by more than one player. 2012 Rules at 20, 21, and 24-25; 2016 Rules at 28, 29, and 33.

Accordingly, in light of (1) the United States Supreme Court's observations in *Martin*, (2) the fact that golf carts are not referred to as an inherent component of golf in the current USGA Rules of Golf, and (3) the fact that there is no evidence in the instant case that the golf course where the accident occurred *required* the use of golf carts,[10] we conclude that risks related to golf carts are not inherent risks of the game of golf. Just as walking is not an essential attribute of golf itself, *Martin*, 532 US at 685, using a golf cart is not a fundamental or inherent characteristic of golf.[11] Rather, golf carts are a convenience, which—when used during a game of golf on a golf course—make traversing a golf course, and transporting equipment, less strenuous, and they have no basis in, or relationship to, the underlying activity or rules of golf, principally swinging a club in the attempt to strike a ball.

Notably, in *Forman v Kreps*, 2016-Ohio-1604, ¶¶ 29-31; 50 NE3d 1 (Ohio App, 2016), the Seventh District of the Court of Appeals of Ohio came to the

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[10] Compare *Forman v Kreps*, 2016-Ohio-1604, ¶¶ 27-28; 50 NE3d 1 (Ohio App, 2016).

[11] We do, however, agree with defendant, as well as the United States Supreme Court and other courts and observers, that golf carts are now a ubiquitous part of the game. See, e.g., *Martin*, 532 US at 685; *A Good Ride Spoiled*, 23 Marq Sports L Rev at 394. However, even though that fact may lead to the conclusion that accidents involving carts are *foreseeable*, a *foreseeable* aspect of the game is not necessarily an *inherent* aspect. Compare *Black's Law Dictionary* (10th ed) (defining "foreseeability" as "[t]he quality of being reasonably anticipatable") with the definitions of "inherent" previously discussed. Cf. MCL 600.2966 (precluding governmental tort liability for "an injury to a firefighter or police officer that arises from the normal, *inherent, and foreseeable* risks of the firefighter's or police officer's profession") (emphasis added); *Ritchie-Gamester*, 461 Mich at 94 (implicitly recognizing a difference between something's being foreseeable and being natural); *Forman*, 2016-Ohio-1604 at ¶¶ 29-30 (implicitly recognizing a difference between something's being foreseeable and being customary or ordinary).

same conclusion that we do and used similar reasoning when it considered a nearly identical issue (i.e., whether an assumption-of-risk instruction applied, under Ohio's version of the recreational activities doctrine, to a case involving a plaintiff who was injured when his golfing companion hit him from behind with a golf cart):

> In *Coblentz v. Peters*, 11th Dist. No. 2004–T–0017, 2005-Ohio-1102, 2005 WL 583793, the Eleventh District [of the Court of Appeals of Ohio] considered whether the use of a cart was an inherent part of the sport of golf.
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> > We must stress that a golfer assumes the ordinary risks of the game, i.e., being struck by an errant golf ball or club. Thus, . . . where individuals engage in recreational or sports activities, they assume the ordinary risks of the game, and courts apply a recklessness standard in order to determine liability. In the instant matter, the trial court improperly applied a recklessness rather than a negligence standard.
> >
> > Although many golfers use motorized golf carts, a motorized golf cart, unlike a golf ball or club, is not incidental to the game of golf. As such, because a golf cart is not an actual part of the sport of golf, appellant had no reason to assume that he would be struck and injured by a golf cart since it is not an ordinary risk of the game. The incident at issue does not involve conduct that is a foreseeable, customary part of the sport of golf. Thus, a negligence standard should have been applied.
>
> *Id*. at ¶ 20–21.
>
> The Eleventh District's analysis that risks which are considered ordinary and foreseeable are those that will be present in any incarnation of the recreational activity is consistent with our conclusion in *Kelly*[*v Roscoe*, 185 Ohio App 3d 780; 2009 Ohio 4279; 925 NE2d 1006 (2009)], where we held that the risk "must be one that is so inherent to the

> sport or activity that it cannot be eliminated." *Kelly* at ¶ 20.
>
> As the nonuse of a cart does not prevent a person from engaging in golf—while the nonuse of a ball or club would—it cannot be considered an inherent part of the game. As such, the risk of being injured by a golf cart does not become an ordinary and foreseeable risk. The magistrate did not abuse his discretion in refusing to give an assumption of the risk jury instruction. [Citations omitted.]

Therefore, we conclude that risks related to golf carts are not risks inherent in the game of golf, as the sport of golf would exist and remain virtually unchanged in the absence of golf carts. Cf. *Schmitz*, 170 Mich App at 696; *Yoneda*, 110 Hawaii at 376. Accordingly, the trial court erred by ruling that a reckless-misconduct standard of care applies in this case. Given the absence of any common-law or statutory rule imposing a higher standard, the applicable standard is ordinary negligence.[12] See *Sherry*, 292 Mich App at 29

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[12] We were unable to find any cases holding the driver of an injury-causing golf cart to a standard of reckless misconduct. Rather, our review of caselaw from other jurisdictions has revealed multiple cases against the drivers of golf carts in which a negligence standard has been applied or assumed. See, for example, the cases cited in Anno: *Liability for Injury Incurred in Operation of Power Golf Cart*, 66 ALR4th 622, 644-648, §§ 3-8, and *A Good Ride Spoiled*, 23 Marq Sports L Rev 393. See also, e.g., *Goodwin v Woodbridge Country Club, Inc*, 170 Conn 191, 192; 365 A2d 1158 (1976) (considering an appeal from verdict against the defendants for negligent operation of a golf cart).

However, we also note that a New York court stated—in the context of a case concerning the liability of a golf course with regard to a plaintiff who was injured while operating a golf cart that slipped on wet leaves—that golfers are deemed to assume the risks of evident physical features of a golf course and "are 'held to a common appreciation of the fact that there is a risk of injury from improperly used carts[.]' " *Rose v Tee-Bird Golf Club, Inc*, 116 App Div 3d 1193, 1193; 984 NYS2d 210 (2014), quoting *Brust v Town of Caroga*, 287 App Div 2d 923, 925; 731 NYS2d 542 (2001). But it subsequently stated, "Nevertheless, liability may be found

(reasoning, after it determined that a reckless-misconduct standard did not apply under the facts of that case, that an ordinary negligence standard applied). See also *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157, 170, 171-172; 809 NW2d 553 (2011) (recognizing the general "common-law duty to exercise reasonable care and avoid harm when one acts"); *Chunko v LeMaitre*, 10 Mich App 490, 494-495; 159 NW2d 876 (1968) (recognizing a common-law duty of ordinary care in operating a motor vehicle).

We cannot assume from the jury's verdict finding that defendant did not commit reckless misconduct (a higher standard than negligence, see *Ritchie-Gamester*, 461 Mich at 84-85) that the jury also would have concluded that defendant did not act negligently. Additionally, it is apparent from the parties' testimony at trial that there remains a question of fact, for the jury to decide, as to whether defendant breached his duty of ordinary care. See *Case v Consumers Power Co*, 463 Mich 1, 6-7; 615 NW2d 17 (2000) (explaining what constitutes ordinary care in negligence cases); *Funk v Tessin*, 275 Mich 312, 326; 266 NW 362 (1936) (approving a similar explanation of due care in the context of a case involving a pedestrian struck from behind by a motor vehicle). Therefore, we remand this case for further proceedings consistent with this opinion.

IV. CONCLUSION

The trial court applied an incorrect standard of care. Therefore, we vacate the jury's verdict, reverse the trial court's order finding that reckless misconduct, as opposed to ordinary negligence, is the applicable stan-

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where the participant proves a dangerous condition over and above the usual dangers that are inherent in the sport[.]" *Rose*, 116 App Div 3d at 1193 (quotation marks and citations omitted).

dard under the circumstances of this case, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

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

BRUNT ASSOCIATES, INC v DEPARTMENT OF TREASURY
(ON RECONSIDERATION)

Docket No. 328253. Submitted November 4, 2016, at Lansing. Decided January 3, 2017, at 9:00 a.m.

Brunt Associates, Inc., filed a petition in the Tax Tribunal, challenging a determination by the Department of Treasury that petitioner was liable under the Use Tax Act (UTA), MCL 205.91 *et seq*., for use taxes owed for the period November 1, 2005, through December 31, 2009. Petitioner is in the business of producing and installing custom office furnishings and interior finishes—including custom cabinetry, decorative panels, and freestanding furniture—for commercial applications. Petitioner paid no use tax during the relevant audit period but instead remitted sales tax for the business under the General Sales Tax Act (GSTA), MCL 205.78 *et seq*. The tribunal rejected petitioner's argument that it was exempt from use tax because it was an industrial processor for purposes of the UTA under MCL 205.94o. The tribunal upheld the assessment of use taxes, finding that because petitioner affixed its products to the realty of its customers, either actually or constructively, petitioner was a contractor for purposes of the UTA and was therefore liable for use tax on all its products, regardless of how they were affixed to the customers' realty. Petitioner appealed. The Court of Appeals, OWENS, P.J., and HOEKSTRA and BECKERING, JJ., affirmed the tribunal's order. Petitioner moved for reconsideration, arguing that the panel misconstrued the law related to the UTA when it decided the case. The Court of Appeals granted reconsideration and vacated its prior opinion in this case.

On reconsideration, the Court of Appeals *held*:

1. MCL 205.93(1) of the UTA provides that every person in Michigan who purchases tangible personal property is subject to a use tax for the privilege of using, storing, or consuming tangible personal property in the state. The provisions of the UTA complement those of the GSTA and were designed to avoid both taxes being imposed on the same property. Accordingly, MCL 205.94(1)(c)(*i*) and (2) provide that a person who purchases

property for resale is exempt from paying use tax as long as the purchaser resells the property.

2. Although the term "contractor" is not defined by the UTA or the GSTA, Mich Admin Code, R 205.71(1) defines the term to include only prime, general, and subcontractors directly engaged in the business of constructing, altering, repairing, or improving real estate for others. Rule 205.71(6) further provides that when a manufacturer affixes its product to real estate for others, it qualifies as a contractor and must remit use tax on the inventory value of the property at the time the property is converted to the contract, which value includes all the costs of manufacturing, fabricating, and processing. For purposes of the UTA, the fact that an item is removable is not dispositive of whether it is attached, constructively or actually, to realty. To determine whether personal property is sufficiently affixed to real property to be treated as part of realty, a court must consider the so-called three-part fixture test: (1) whether the property was actually or constructively annexed to the real estate, (2) whether the property was adapted or applied to the use or purpose of that part of the realty to which the property in question is connected or appropriated, and (3) whether the property owner intended to make the property a permanent accession to the realty. In determining whether property is tangible personal property or real property, the permanence of property affixed need not be in perpetuity; it is sufficient if the item is intended to remain where affixed until worn out, until the purpose to which the realty is devoted is accomplished, or until the item is superseded by another item more suitable for the purpose.

3. Applying the three-part fixture test, the tribunal correctly determined that under Mich Admin Code, R 205.71, petitioner is a manufacturer and contractor directly engaged in the business of constructing, altering, repairing, or improving real estate for others and as such is liable for use tax; petitioner is not a retailer whose sales transactions are subject to sales tax. Petitioner physically attached some of its products to its customers' buildings with screws, bolts, clips, or fasteners, or constructively attached them by means of the products' size or weight. In addition, petitioner manufactured many products to fit the specific needs and space of its customers, which supports the conclusion that those products were adapted to the use or purpose of that part of the customers' buildings to which they were attached, and the products—for example, wall paneling, lecture hall desks, and large nurses' stations—were clearly permanent accessions to realty given the nature of the products.

4. MCL 205.94o of the UTA exempts from the use tax property that is sold to persons engaged in industrial processing. MCL 205.94o(7)(a) defines the phrase "industrial processing" as the activity of converting or conditioning tangible personal property by changing the form, composition, quality, combination, or character of the property for ultimate sale at retail or for use in the manufacturing of a product to be ultimately sold at retail or affixed to and made a structural part of real estate located in another state. Under MCL 205.94o(7)(b), the phrase "industrial processor" is defined as a person who performs the activity of converting or conditioning tangible personal property for ultimate sale at retail or use in the manufacturing of a product to be ultimately sold at retail or affixed to and made a structural part of real estate located in another state. However, MCL 205.94o(5)(a) provides that tangible personal property that is permanently affixed and becomes a structural part of real estate does not qualify for the industrial-processing exemption. In this case, the tribunal correctly determined that petitioner was not entitled to the industrial-processing exemption. Petitioner does not qualify as an industrial processor as defined by MCL 205.94o(7)(b) because it does not manufacture products for ultimate sale at retail, and there was also no evidence that petitioner manufactures products for use in the manufacturing of a product to be ultimately sold at retail or affixed to and made a structural part of real estate located in another state.

Tribunal order upholding assessment of use tax affirmed.

1. TAXATION — USE TAX ACT — WORDS AND PHRASES — CONTRACTORS.

For purposes of a contractor's tax liability under the Use Tax Act, MCL 205.91 *et seq*., Mich Admin Code, R 205.71(1), defines the term "contractor" to include only prime, general, and subcontractors directly engaged in the business of constructing, altering, repairing, or improving real estate for others; under Rule 205.71(6), when a manufacturer affixes its product to real estate for others, it qualifies as a contractor.

2. TAXATION — USE TAX ACT — TEST — PROPERTY AFFIXED TO REALTY.

For purposes of a contractor's tax liability under the Use Tax Act, MCL 205.91 *et seq*., when a manufacturer affixes its product to real estate for others, it qualifies as a contractor and must remit use tax on the inventory value of the property at the time the property is converted to the contract; the fact that an item is removable is not dispositive of whether it is attached, constructively or actually, to realty; to determine whether personal prop-

> erty is sufficiently affixed to real property to be treated as part of realty, and therefore subject to use tax, a court must consider: (1) whether the property was actually or constructively annexed to the real estate, (2) whether the property was adapted or applied to the use or purpose of that part of the realty to which the property in question is connected or appropriated, and (3) whether the property owner intended to make the property a permanent accession to the realty. [Mich Admin Code, R 205.71(6).]

Fraser Trebilcock Davis & Dunlap, PC (by *Paul V. McCord*), for petitioner.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Randi M. Merchant*, Assistant Attorney General, for respondent.

ON RECONSIDERATION

Before: OWENS, P.J., and HOEKSTRA and BECKERING, JJ.

PER CURIAM. Petitioner, Brunt Associates, Inc., appeals by right a final order and judgment of the Michigan Tax Tribunal holding petitioner liable for a use-tax deficiency. At the time of the hearing, petitioner owed $305,234.52 in use tax, plus accruing interest. For the reasons stated in this opinion, we affirm the tribunal's decision.

I. STATEMENT OF FACTS

Petitioner is a domestic for-profit company in the business of producing and installing custom office furnishings and interior finishes—such as custom cabinetry, decorative panels, and freestanding furniture—for commercial applications. In August 2006, respondent, the Department of Treasury, opened a sales- and

use-tax audit of petitioner's books that eventually covered the period November 1, 2005 through December 31, 2009. The auditor found that petitioner had reported no use tax during the audit period and had actually remitted sales tax for the business, instead of the appropriate use tax. The auditor further found that petitioner is a real property contractor that did not make any sales at retail and concluded that petitioner owed $284,082 in use tax, plus $41,674 in interest, for a total of $325,756.[1] On September 28, 2010, respondent issued petitioner a notice of intent to assess, followed by a final assessment on December 7, 2010.

On October 9, 2013,[2] petitioner filed a verified petition in the Tax Tribunal, alleging that it did not owe use taxes, that it had not engaged in activity during the audit period that would produce use taxes, and that the transactions for which the auditor had assessed use taxes involved customers with tax exemptions. In a prehearing statement submitted several months later, petitioner alleged that it was an industrial processor, that it made sales of tangible personal property at retail, and that it made retail sales to

[1] On May 5, 2014, respondent amended the audit using additional information provided by petitioner. The amendment resulted in a $21,152.52 increase in use tax owed, bringing petitioner's total use-tax deficit to $305,236, excluding interest.

[2] The timeliness of the petition is not at issue. Respondent mailed the final assessment to petitioner's address of record in December 2010. However, respondent did not mail the final assessment to petitioner's authorized representative. In *Fradco, Inc v Dep't of Treasury*, 495 Mich 104, 113-115; 845 NW2d 81 (2014), Michigan's Supreme Court held that the appeal period from a final assessment did not begin to run until the respondent provided actual notice to both the taxpayer, MCL 205.28(1)(a), and the taxpayer's personal representative as provided in the taxpayer's written request, MCL 205.8. For this reason, the appeals period in the instant case began to run on September 19, 2013, the date petitioner's representative received actual notice of the final assessment. Therefore, the petition in this case was timely.

tax-exempt customers. With the tribunal's permission, petitioner amended its petition to accord with its prehearing claims. Petitioner further indicated that the "furniture, fixtures, cabinets, shelves, and decorative panels" it installs retain the character of tangible personal property after installation, are removable without impairing the value of the realty, and do not serve the function of the realty. Respondent answered by calling attention to petitioner's response to a question in respondent's first set of interrogatories in which petitioner stated that it was a "carpentry contractor" and "does not sell products, only carpentry services." Petitioner moved to withdraw and amend its answers to respondent's first set of interrogatories. The tribunal denied petitioner's request, but allowed the amended answers to remain part of the record as supplemental responses.

At the tribunal hearing, Brian Brunt, petitioner's manager, explained that petitioner is a "finish carpentry contractor" that produces and installs custom office furnishings and interior finishes, such as reception desks, nurses stations, cabinets, and finished components for break rooms, typically in consultation with a design team. He explained that petitioner manufactures the custom-ordered pieces in its workshop, delivers them to jobsites, and uses its own workforce to install them. Brunt said that some of the furnishings and finishes were attached to customers' buildings with screws, bolts, clips, or fasteners, but could be removed without damaging the realty. Larger freestanding furnishings, such as reception desks, although transported in sections, reassembled at the job site, and held in place by their size and weight, could also be removed without causing damage. Brunt surmised from his experience working with the general contractors and interior designers that they had not

intended for petitioner's products to be permanent affixations to realty. Brunt explained that petitioner's furnishings, cabinets, and wall panels were decorative and that nothing required engineer's drawings or structural approval.

David Rea, petitioner's accountant, testified that, based on his knowledge, petitioner was a manufacturer/retailer, not a manufacturer/contractor. He opined that the items petitioner sells to customers meet the definition of tangible personal property under the General Sales Tax Act (GSTA), MCL 205.78 *et seq*., and that the definition of tangible personal property was essentially identical under the Use Tax Act (UTA), MCL 205.91 *et seq*. He further opined that things that could be moved and put into a different room had nothing to do with constructing, altering, or repairing real estate.

Testifying with regard to her audit findings, respondent's auditor, Stephanie R. Mitchell, said she determined that petitioner was a contractor and not a retailer from the initial audit conference with Rea, in which she was informed that petitioner did not maintain an inventory, provide a publication list or price list, or make retail sales. She also based her determination on the nature of petitioner's business activities and her conclusion that the items fabricated by petitioner did not retain their character as tangible personal property because petitioner affixed the items to the realty of its customers. She testified that she derived her understanding of petitioner's business from petitioner's business classification, a discussion with Rea, a review of petitioner's website explaining their business activities, and a discussion with her supervisor. The auditor denied that her conclusion that petitioner was a contractor would change even if cer-

tain pieces of furniture and equipment were not attached to realty, and she affirmed that freestanding desks and other items would be considered permanently affixed to realty for purposes of the audit.

Both parties submitted posthearing briefs, summing up the arguments they had advanced at the hearing. Petitioner argued that it was a retailer because it manufactured tangible personal property for sale, with installation, for the use and consumption of its customers. Petitioner further argued that it was entitled to an industrial-processor exemption because it "changes the form, composition, quality, combination or character of tangible personal property for ultimate sale at retail." Finally, petitioner asserted that it was not a contractor because "the manufactured products never become a permanent affixation to the realty after installation." Respondent argued that petitioner was a real-property contractor and was not entitled to an industrial-processing exemption because it did not ultimately sell its products at retail.

In a written opinion and judgment, the tribunal found that petitioner affixed its products to the realty of its customers, either actually or constructively, and concluded that petitioner is a contractor liable for use tax on all its products, regardless of how they were affixed to customers' realty. The tribunal further concluded that petitioner was not entitled to an industrial-processing exemption, and it affirmed respondent's final use-tax assessment of $305,234.52 plus interest. After the tribunal denied petitioner's motion for reconsideration, petitioner filed a timely appeal in this Court.

II. ANALYSIS

Petitioner first contends that the tribunal erred by concluding that it was a construction contractor en-

gaged in the business of constructing, altering, repairing, or improving the real estate of others. We disagree. Because fraud has not been asserted, our "review of a decision by the Tax Tribunal is limited to determining whether the tribunal erred in applying the law or adopted a wrong principle; its factual findings are conclusive if supported by competent, material, and substantial evidence on the whole record." *Mich Bell Tel Co v Dep't of Treasury*, 445 Mich 470, 476; 518 NW2d 808 (1994). "Substantial evidence must be more than a scintilla of evidence, although it may be substantially less than a preponderance of the evidence required in most civil cases." *Dow Chem Co v Dep't of Treasury*, 185 Mich App 458, 463; 462 NW2d 765 (1990). To the extent that resolution of an issue involves a question of statutory interpretation, review is de novo, with the agency's interpretation given "respectful consideration." *Devonair Enterprises, LLC v Dep't of Treasury*, 297 Mich App 90, 96; 823 NW2d 328 (2012).

Under MCL 205.93(1) of the UTA, every person[3] in Michigan who purchases tangible personal property is subject to a use tax "for the privilege of using, storing, or consuming tangible personal property in this state . . . ." "The provisions of the [UTA] complement those of the [GSTA] and were generally designed to avoid the imposition of both use and sales tax on the same property." *Granger Land Dev Co v Dep't of Treasury*, 286 Mich App 601, 608; 780 NW2d 611 (2009). Therefore, a person who purchases property for resale is exempt from paying use tax as long as the purchaser does in fact resell the property. MCL 205.94(1)(c)(*i*) and (2). Exemption statutes are strictly

[3] For purposes of the UTA, the term "person" includes firms. MCL 205.92(a).

construed in favor of the taxing unit. *Mich Baptist Homes & Dev Co v City of Ann Arbor*, 396 Mich 660, 670; 242 NW2d 749 (1976). "[T]he burden is on a claimant to establish clearly his right to exemption, and an alleged grant of exemption will be strictly construed and cannot be made out by inference or implication but must be beyond reasonable doubt." *Evanston YMCA Camp v State Tax Comm*, 369 Mich 1, 8; 118 NW2d 818 (1962) (quotation marks and citation omitted).

It is undisputed that petitioner is a manufacturer. The question is whether petitioner is a retailer liable only for sales tax or a contractor liable for use tax. Neither the GSTA nor the UTA defines "contractor"; however, Mich Admin Code, R 205.71 provides the following guidance:

> (1) "Contractor" includes only prime, general, and subcontractors directly engaged in the business of constructing, altering, repairing, or improving real estate for others.
>
> * * *
>
> (6) Where a manufacturer affixes his product to real estate for others, he qualifies as a contractor and shall remit use tax on the inventory value of the property at the time the property is converted to the contract which value shall include all costs of manufacturing, fabricating, and processing.

The dispositive issue with regard to whether petitioner is a contractor is whether petitioner "affixes [its] product to real estate for others." Mich Admin Code, R 205.71(6).

Petitioner argues that it is not a contractor because, although it affixes some of its furnishings and finishes to the real estate of its customers by using bolts, clips,

fasteners, or screws, these products, as well as its freestanding furniture, can easily be removed without damaging the product or diminishing the value of the customer's realty. However, contrary to petitioner's implication, that an item is removable is not dispositive of whether it is attached to realty. See *Miedema Metal Bldg Sys, Inc v Dep't of Treasury*, 127 Mich App 533; 338 NW2d 924 (1983) (affirming that grain bins bolted to a concrete foundation but easily removable were attached to realty nonetheless). The unobtrusiveness of the hardware petitioner uses to attach its products and the alleged ease and speed with which its products, whether attached or freestanding, can be removed in no way negates the fact that petitioner physically attaches some of its products to its customers' buildings and constructively attaches others. See *Velmer v Baraga Area Sch*, 430 Mich 385, 395; 424 NW2d 770 (1988) (indicating that, although not bolted to the floor, the milling machine at issue was constructively "affixed" to realty by reason of its weight).

In like vein, petitioner asserts that its products retained their character of tangible personal property after installation, and petitioner contends that the tribunal committed legal error when it failed to use the "three-part fixture test"[4] to determine whether petitioner's products were sufficiently attached to its customers'

[4] To determine whether personal property is sufficiently affixed to real property such that it should be treated as part of the realty, Michigan courts examine:

> "(1) whether the property was actually or constructively annexed to the real estate; (2) whether the property was adapted or applied to the use or purpose of that part of the realty to which the property in question is connected or appropriated; and (3) whether the property owner intended to make the property a permanent accession to the realty." [*Granger Land Dev Co*, 286 Mich App at 611, quoting *Tuinier v Bedford Charter Twp*, 235 Mich

realty to consider them as part of the realty. We conclude that this argument is without merit.

In the case at bar, the first two prongs of this test were not in dispute. Brunt testified that petitioner's products were physically attached to customers' realty with screws, bolts, clips, or fasteners, or constructively attached by means of the products' size or weight. In addition, Brunt testified that petitioner manufactures products to fit the specific needs and space of its customers, which indicates that petitioner's products were adapted to the use or purpose of that part of the customers' buildings to which they were attached.

That petitioner's products were intended to be permanent accessions to realty is clear from the nature of the products (wall paneling, lecture hall desks, large nurses' stations, etc.), the essential functions they fulfill in the businesses of petitioner's customers, and their actual or constructive attachment to customers' buildings. Further, petitioner testified that, once attached, its products are rarely removed, and then only for repair, after which they are reinstalled. See *Tuinier v Bedford Charter Twp*, 235 Mich App 663, 668; 599 NW2d 116 (1999) (noting that, with regard to intent, the "permanence required is not equated with perpetuity. It is sufficient if the item is intended to remain where affixed until worn out, until the purpose to which the realty is devoted is accomplished or until the item is superseded by another item more suitable for the purpose") (quotation marks and citation omitted). On these facts, the tribunal found that petitioner is a contractor who affixed its products to realty and is subject to use tax under Mich Admin Code, R 205.71(6).

App 663, 668; 599 NW2d 116 (1999); see also *Sequist v Fabiano*, 274 Mich 643, 645; 265 NW 488 (1936).]

In light of the foregoing, we conclude that the tribunal's finding that petitioner manufactures product that it affixes to the real estate of others, either actually or constructively, is conclusive because it is supported by competent, material, and substantial evidence on the whole record. *Mich Bell Tel Co*, 445 Mich at 476. We further conclude that the tribunal did not err by applying the law or adopt a wrong principle when it concluded that petitioner is a "manufacturer" and "contractor" that "affixes [its] product to real estate for others" and is "directly engaged in the business of constructing, altering, repairing, or improving real estate for others." Mich Admin Code, R 205.71.

Petitioner next contends that the tribunal erred by denying its claim to an industrial-processing exemption and by failing to apportion its industrial-processing claim properly.[5] We disagree.

We first turn to the question whether petitioner is entitled to an industrial-processing exemption. MCL 205.94o of the UTA exempts from the use tax property sold to persons engaged in industrial processing. MCL 205.94o(7) provides the following relevant definitions:

> (a) "Industrial processing" means the activity of converting or conditioning tangible personal property by changing the form, composition, quality, combination, or character of the property for ultimate sale at retail or for use in the manufacturing of a product to be ultimately sold at retail or affixed to and made a structural part of real estate located in another state. . . .
>
> (b) "Industrial processor" means a person who performs the activity of converting or conditioning tangible personal

[5] An industrial-processing exemption "is limited to the percentage of exempt use to total use determined by a reasonable formula or method approved by the department [of treasury]." MCL 205.94o(2).

> property for ultimate sale at retail or use in the manufacturing of a product to be ultimately sold at retail or affixed to and made a structural part of real estate located in another state.

Property that is not eligible for an industrial-processing exemption includes "[t]angible personal property permanently affixed and becoming a structural part of real estate . . . ." MCL 205.94o(5)(a). Petitioner contends that it is an industrial processor because it converts or conditions tangible personal property for ultimate sale at retail. Petitioner further contends that the exception to the industrial-processing exemption does not apply to it because its products, even if affixed, are not a "structural part of real estate."

However, as already explained, petitioner does not manufacture products for "ultimate sale at retail," and there is no record evidence that petitioner manufactures products for "use in the manufacturing of a product to be ultimately sold at retail or affixed to and made a structural part of real estate located in another state." MCL 205.94o(7)(b). Consequently, petitioner does not meet the statutory criteria for characterization as an "industrial processor." Because petitioner is not an industrial processor, we need not address the issue of apportionment under MCL 205.94o(2).

Affirmed.

OWENS, P.J., and HOEKSTRA and BECKERING, JJ., concurred.

CASSIDY v CASSIDY

Docket Nos. 328004, 328024, and 333319. Submitted December 14, 2016, at Detroit. Decided January 10, 2017, at 9:00 a.m. Leave to appeal denied 501 Mich 908.

Plaintiff, Rodene J. Cassidy, filed for divorce in the Genesee Circuit Court, Family Division, after confirming that defendant, Robert F. Cassidy, Jr., had been having an affair with Mary Hansen, his former coworker. Plaintiff learned that defendant had "loaned" Hansen hundreds of thousands of dollars for the purchase and remodeling of a home on East Ellen Street in Fenton, Michigan. Following 15 days of testimony and argument, the court, F. Kay Behm, J., concluded that defendant and Hansen had engaged in concerted activity and conspired to defraud plaintiff of her rightful share in the marital estate. The court ordered that defendant pay plaintiff $1,000 per month in spousal support, that defendant and Hansen jointly pay plaintiff $162,470.50 with regard to the property settlement, and that defendant pay plaintiff $150,619.88 in attorney fees. When defendant failed to make these payments, plaintiff moved for an order to show cause. After several hearings were conducted, the court issued an order holding defendant in contempt of court for his failure to comply with court orders and sentencing defendant to the county jail on weekends for a period of 10 days or until he paid the attorney fees. In Docket No. 328004, Hansen appealed the judgment of divorce, claiming that the court erred by failing to grant Hansen summary disposition on plaintiff's claim under the Uniform Fraudulent Transfer Act (UFTA), MCL 566.31 *et seq*., and that she was entitled to a jury trial on plaintiff's third-party claim against her. Alternatively, Hansen argued that the trial court erred by requiring that she repay more than the loan amount and by placing a lien on the East Ellen Street home in favor of a nonparty to the divorce action. In Docket No. 328024, defendant appealed the judgement of divorce, challenging the division of the marital estate, the spousal support order, and the order awarding attorney fees to plaintiff. In Docket No. 333319, by delayed application for leave to appeal, defendant challenged the contempt order. The Court of Appeals consolidated the three appeals.

The Court of Appeals *held*:

1. An award of spousal support is reviewed for an abuse of discretion. A trial court's decision to award spousal support includes consideration of a number of factors, but it is not subject to any rigid formula; the decision should reflect what is reasonable and just under the circumstances of each case. Additionally, if the court finds that a party has voluntarily reduced the party's income, then the court may impute additional income in order to arrive at an appropriate alimony award. In this case, the trial court imputed an income in the amount of $100,000 to defendant. Defendant complained that the amount was unfair, but defendant had asked for imputation of that very amount on the first day of trial. Even if defendant had not requested that particular amount, the trial court was within its right to impute $100,000 in income to defendant, who held an M.B.A. from Harvard and had consistently earned well over that amount throughout the parties' marriage.

2. A trial court's findings of fact with regard to the distribution of the marital estate will not be reversed unless clearly erroneous. Equity serves as the goal for property division in divorce actions. Although marital property need not be divided equally, it must be divided equitably in light of a court's evaluation of the parties' contributions, faults, and needs. The trial court must consider all relevant factors but must not assign disproportionate weight to any one circumstance. In this case, contrary to defendant's assertion, the trial court did not give undue weight to defendant's fault for the breakdown of the marital relationship. The trial court was not focused only on defendant's extramarital affair, but it was also focused on a number of other factors, including defendant's conduct involving a concerted attempt to conceal marital assets, the parties' disparate earning abilities, the parties' disparate health issues, and the parties' contributions to the marital estate. The trial court did not clearly err with regard to distribution of the marital estate. Additionally, defendant's argument that the trial court erred by making him solely responsible for the parties' tax liability was deemed moot because defendant had requested an independent investigation on the matter, and the completed investigation demonstrated that plaintiff held the status of an innocent spouse.

3. A trial court reviews for clear error findings of fact pertaining to an award of attorney fees. In a divorce action, attorney fees are awarded only as necessary to enable a party to prosecute or defend a suit but are also authorized when the requesting party has been forced to incur expenses as a result of the other party's

unreasonable conduct in the course of litigation. MCR 3.206(C)(2) provides two independent bases for awarding attorney fees and expenses: MCR 3.206(C)(2)(a) allows payment of attorney fees based on one party's inability to pay and the other party's ability to do so, and MCR 3.206(C)(2)(b) considers only a party's bad behavior without reference to the parties' ability to pay. In this case, the trial court did not award attorney fees based only on defendant's alleged wrongdoing; instead, the trial court found that both provisions of MCR 3.206(C)(2) were in play. The trial court awarded plaintiff attorney fees on the basis of plaintiff's inability to pay (and defendant's ability to pay) coupled with defendant's conduct. Contrary to defendant's argument that the trial court impermissibly relied on Hansen's conduct in awarding plaintiff attorney fees, the trial court concentrated on defendant's continuous deception and patterns of behavior, which included, among other things, failing to comply with discovery, lying to the court, failing to pay spousal support, failing to pay the mortgage on the marital home, and taking a number of actions without court permission.

4. There is no error in failing to conduct an evidentiary hearing if the parties created a sufficient record of evidence to review the issue and the court fully explained the reasons for its decision. When calculating the reasonableness of attorney fees, trial courts use the following factors: (1) the professional standing and experience of the attorney; (2) the skill, time, and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client. Trial courts also use the eight factors found in Rule 1.5(a) of the Michigan Rules of Professional Conduct. The trial court should first use reliable surveys or other credible evidence of the legal market to determine the reasonable hourly rate that represents the fee customarily charged in the locality for similar legal services. Next, the trial court should multiply that number by the reasonable number of hours expended in the case. Finally, the trial court should briefly discuss its view of the remaining factors to determine whether the factors justify an upward or downward adjustment. In this case, the trial court provided a detailed explanation for why it awarded plaintiff attorney fees, including a calculation of the reasonableness of the fees charged by plaintiff's counsel, who had more than 35 years of experience litigating domestic relations matters and who charged a reasonable hourly rate and retainer when compared to the statewide average rates for attorneys of comparable experience. Additionally, because there was a sufficient record to review the issue and because the

court fully explained the reasons for its decision, the trial court did not err by failing to conduct an evidentiary hearing.

5. The jurisdiction of a divorce court is strictly statutory and limited to determining the rights and obligations between the husband and wife to the exclusion of third parties. However, an exception to this general rule exists when a party alleges fraud. Third parties can be joined in the divorce action only if they have conspired with one spouse to defraud the other spouse of a property interest. There is no right to a jury trial when the third party has been named as a party. The trial court properly joined Hansen as a third party because the court determined that Hansen and defendant conspired to defraud plaintiff. Because Hansen was named as a party, the trial court correctly determined that Hansen was not entitled to a jury trial.

6. A constructive trust may be imposed when it is necessary to do equity or to prevent unjust enrichment, such as when property has been obtained through fraud. The trial court concluded that defendant and Hansen conspired to attempt to defraud plaintiff out of her rightful share in the marital estate, and this conclusion was unassailable on the basis of the record. Because the evidence clearly demonstrated that defendant and Hansen acted in concert to deprive plaintiff of her rightful share of the marital assets, the trial court, exercising its equitable powers, correctly determined that a constructive trust existed.

7. The trial court did not err by placing a lien on the East Ellen Street home in an amount greater than the amount that Hansen had "borrowed" from defendant. The trial court determined that funds defendant had received from a company that he managed were his wages, and therefore those funds constituted marital money.

8. Whether contempt is civil or criminal depends on the character and purpose of the punishment imposed. When a contempt action is civil, there is no need to find that defendant willfully disobeyed an order of the court; it is enough that defendant simply violated his duty to obey the court. In a civil contempt proceeding, the accused must be accorded rudimentary due process, i.e., notice and an opportunity to present a defense. In this case, the contempt was civil: the trial court determined that defendant had the ability to pay plaintiff's attorney fees but had not done so despite the court order. With regard to due process, there was no question that defendant was made well aware that incarceration was a possible sanction if he was found in contempt of court: defendant had acknowledged his awareness that incarceration was a possibility at several hearings, including

during a hearing on plaintiff's motion to show cause and during defendant's contempt hearing. A review of the record indicated that defendant feared incarceration; therefore, he was aware that incarceration was a possibility. Accordingly, there was no merit to defendant's claim that he was deprived of due process.

9. A court speaks through its written orders and judgments, not through its oral pronouncements. Therefore, despite defendant's argument that the written order of incarceration was harsher than the trial court's verbal order at the hearing, the order controlled. However, the trial court's statement at the hearing did not inherently conflict with the written order because the trial court's statement that defendant might receive some leniency depending on overcrowding was in no way a promise. Additionally, there was no record evidence to support defendant's theory that he was punished for pursuing a due-process claim.

Affirmed.

DIVORCE — THIRD PARTIES — FRAUD — RIGHT TO JURY TRIAL.

The jurisdiction of a divorce court is strictly statutory and limited to determining the rights and obligations between the husband and wife to the exclusion of third parties, but an exception to this general rule exists when a party alleges fraud; third parties can be joined in the divorce action if they have conspired with one spouse to defraud the other spouse of a property interest; there is no right to a jury trial when the third party has been named as a party.

Foley & Mansfield, PLLP (by *Howard I. Wallach* and *Gregory M. Meihn*), for Rodene J. Cassidy.

Neil C. Szabo for Robert F. Cassidy, Jr.

Garan Lucow Miller, PC (by *Robert D. Goldstein*), for Mary Hansen.

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

K. F. KELLY, P.J. In Docket No. 328004, Mary Hansen (Hansen) appeals by right a judgment of divorce, claiming, among other things, that she was entitled to a jury trial on plaintiff Rodene Cassidy's third-party

claim against her. In Docket No. 328024, defendant, Robert Cassidy, Jr., appeals by right the same order, challenging the division of the marital estate, spousal support, and an award of attorney fees. In Docket No. 333319, defendant challenges by delayed application for leave to appeal a contempt order requiring defendant to spend 10 days in jail unless or until he purged himself of contempt by paying plaintiff's attorney fees. Finding no errors warranting reversal, we affirm in all three cases.

I. BASIC FACTS

Plaintiff and defendant were married on June 7, 1997. They both were previously married and have adult children with their former spouses, but they do not have children with one another. Plaintiff filed for divorce in October 2012 after confirming that defendant had been having an affair with Hansen, his former coworker. After the proceedings began, plaintiff learned that in the two years before plaintiff filed for divorce, defendant had given Hansen hundreds of thousands of dollars toward the purchase and remodeling of a home on East Ellen Street in Fenton, Michigan. Plaintiff estimated that defendant had given Hansen over $500,000. Defendant readily admitted that Hansen received over $300,000. Early in the proceedings, defendant claimed that the money represented Hansen's "wages." Later, defendant argued that the money was simply his form of "consumption" of marital property. However, by the time of trial, defendant classified the money as a "loan" that he fully expected Hansen to pay back.

Much of the divorce trial was focused on whether defendant and Hansen, who had been named as a defendant, conspired to defraud plaintiff of her share of

the marital estate. Defendant believed that the breakdown of the marriage came as a result of plaintiff's drug use and gambling such that there was "enough blame to go around." He agreed that the money he "loaned" to Hansen should be considered part of the marital estate but denied that he and Hansen acted in concert to thwart plaintiff's share of the marital estate. Defendant freely acknowledged his infidelity but denied that the affair with Hansen began before the summer of 2012.

In contrast, plaintiff argued that the affair likely began back in 2009 when Hansen and defendant worked together at Signature Management Team. Plaintiff believed that defendant funneled money to Hansen with the purpose of depriving plaintiff of her share of the marital estate. Plaintiff claimed to be generally ignorant of the parties' financial situation, having no idea just how much defendant earned or what he did with the money over the course of their marriage. Early in their marriage, defendant sold his company, Lube Zone, for a substantial profit. Plaintiff believed that when the parties spent money, it was from the proceeds of the sale.

Following 15 days of testimony and argument, Genesee Circuit Court Judge F. Kay Behm found that defendant and Hansen engaged in concerted activity and conspired to defraud plaintiff of her rightful share in the marital estate. The trial court ordered, *inter alia*, that a constructive trust existed over the East Ellen Street home.

In Docket No. 328004, Hansen appeals as of right the judgment of divorce, claiming that the trial court erred by failing to grant Hansen summary disposition on plaintiff's claim under the Uniform Fraudulent Transfer Act (UFTA), MCL 566.31 *et seq*. Specifically,

Hansen argues that the UFTA does not apply to the circumstances of this case because plaintiff was not a creditor at the time of the transfer and because there was no active concealment of assets. Hansen further argues that the trial court erred by striking Hansen's jury demand. Alternatively, Hansen argues that the trial court erred by requiring Hansen to pay back more than the loan amount and by placing a lien in favor of ConRadical, a company defendant had managed that was a nonparty to the divorce action.

In Docket No. 328024, defendant appeals the same order, challenging the division of the marital estate, which included substantial tax liability as a result of significant underreporting of income for a number of years. Rather than treat the tax liability jointly, the trial court determined that defendant was solely responsible for the tax burden and that plaintiff was, in effect, an innocent spouse. Defendant also challenges the $1,000 per month spousal support order as well as an award of over $150,000 in attorney fees to plaintiff.

Finally, in Docket No. 333319, by delayed application for leave to appeal, defendant challenges a later contempt order requiring him to spend 10 days in jail unless or until he paid plaintiff's attorney fees. The trial court previously found defendant in civil contempt of court based on his failure to pay spousal support, failure to pay plaintiff's attorney fees, and failure to pay the property settlement. Defendant argues that he was denied due process because he did not receive notice of the possibility that he would be incarcerated and because the trial court's written order was harsher than the trial court's oral pronouncement. He asks that the matter be remanded before a different judge.

The appeals have been consolidated to facilitate appellate review.

II. DOCKET NO. 328024

A. SPOUSAL SUPPORT

The trial court made the following detailed findings of fact:

> 34. The Court finds that the past relations and conduct of the parties favors Ms. Cassidy in this case because she worked full time at General Motors for 30 years, helped raise Mr. Cassidy's daughter, was faithful to her husband, supported Mr. Cassidy for many years during the marriage where he reported no income while Mr. Cassidy lied about the affair with Ms. Hansen, transferred hundreds of thousands of dollars from the marital estate into Ms. Hansen's possession, custody and control to purchase, remodel, expand and furnish the Pond House, later using the equity in that property to purchase a lot on Mackinaw [sic] Island and repeatedly lied in this case in affidavits, his trial testimony and in other representations to the Court.
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> 35. The Court finds that the parties have been married for just under 18 years.
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> 36. The Court finds that Mr. Cassidy has the ability and education to work and make a substantial income, whereas Ms. Cassidy had a 30 year career at General Motors from which she retired, her skills no longer make her readily employable in a meaningful capacity, her age of 58 is a detriment to her finding any significant employment and her health having suffered [a] stroke and being hospitalized for 6 days during trial, as well as having a heart monitor surgically implanted in her chest militate against her obtaining any significant employment.
>
> 37. The Court finds that Ms. Cassidy's superior financial condition at the time of the marriage and her steady employment enabled Mr. Cassidy to work as he desired

although most of his entrepreneurial efforts were not successful. Mr. Cassidy is employable with his education and experience.

38. The Court finds that Ms. Cassidy is 58 and Mr. Cassidy is 53.

39. The Court finds that Mr. Cassidy has the ability to pay spousal support and that he is intentionally under employed. Mr. Cassidy can earn at least $100,000 per year given his experience and education. Ms. Cassidy does not have the ability to pay spousal support. Ms. Cassidy earns approximately $36,000 and has the ability to earn a relatively small additional amount through part-time and/or minimum wage employment.

40. The Court finds that the present situation of the parties weighs in favor of Ms. Cassidy being awarded spousal support.

41. The Court finds that Ms. Cassidy needs spousal support to maintain a reasonable standard of living and Mr. Cassidy has the ability to pay spousal support.

42. The Court finds that Mr. Cassidy testified regarding some recent health concerns that arose during the trial, however, there was no testimony that any of his health issues are preventing him from obtaining meaningful gainful employment. Ms. Cassidy, however, suffers from diabetes, has a narrowing of her carotid arteries, recently suffered a stroke and has had a heart monitor surgically transplanted in her chest.

43. The Court finds that the prior standard of living of the parties, which Mr. Cassidy still enjoys in part due to his relationship with Ms. Hansen and living in her home bought with Cassidy family money free of charge (at least until the Fenton home became encumbered by the two home equity loans in the spring and summer of 2014), while Ms. Cassidy is homeless and has moved twice since selling the former marital home now living with a friend, weighs in favor of Ms. Cassidy being awarded spousal support. Neither party has legal obligations to support others. The Michigan Supreme Court has held that spousal support should be awarded in an amount sufficient to

ensure that the wife is not deprived of her right to support and at a level commensurate with that which she would have enjoyed had the marriage survived.

44. The Court finds that Ms. Cassidy contributed substantially to the joint estate sharing her premarital home equity with Mr. Cassidy and permitting him to earn nothing for several years of the marriage, while he unsuccessfully worked on projects that never materialized or generated any meaningful income to the family. Mr. Cassidy contributed significantly to the marriage when he was receiving the RMR Development, LLC stream of payments and he hid them from Ms. Cassidy.

45. The Court finds that Mr. Cassidy is at fault in causing the divorce, while he and Ms. Hansen are at fault in increasing the costs of prosecuting this case because of their conduct both before and while this case has been pending including, but not limited to, lying to the Court, failing to fully and accurately respond to discovery requests and misleading Ms. Cassidy and the Court.

46. The Court finds that Mr. Cassidy has been living with Ms. Hansen in the Fenton property since at least October 2012 and this cohabitation has enabled him not to obtain full time employment.

47. The Court finds that general principles of equity strongly weigh in favor of Ms. Cassidy being awarded spousal support.

48. The Court finds that there are others factors relevant to this case supporting an award of spousal support including 1) Mr. Cassidy and Ms. Hansen have effectively eliminated any possibility for using the Fenton Pond House property to obtain a loan to restore some of the transferred marital assets to Ms. Cassidy; 2) other marital assets may have either been depleted or sufficiently hidden that they cannot be discovered; and 3) Ms. Cassidy supported Mr. Cassidy during his years of attempting to develop his own businesses.

49. The Court therefore finds that Ms. Cassidy is entitled to spousal support, until her death or remarriage or until further order of the Court, whichever occurs first,

> which shall be tax deductible to Mr. Cassidy and taxable income to Ms. Cassidy under the Internal Revenue Service code.

Our Court has detailed the standard for reviewing a spousal support award:

> It is within the trial court's discretion to award spousal support, and we review a spousal support award for an abuse of discretion. . . . An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes. The object in awarding spousal support is to balance the incomes and needs of the parties so that neither will be impoverished; spousal support is to be based on what is just and reasonable under the circumstances of the case. We review for clear error the trial court's factual findings regarding spousal support. A finding is clearly erroneous if, after reviewing the entire record, we are left with the definite and firm conviction that a mistake was made. If the trial court's findings are not clearly erroneous, we must determine whether the dispositional ruling was fair and equitable under the circumstances of the case. We must affirm the trial court's dispositional ruling unless we are convinced that it was inequitable. [*Loutts v Loutts*, 298 Mich App 21, 25-26; 826 NW2d 152 (2012) (quotation marks and citations omitted).]

The trial court's spousal support award was not an abuse of discretion. MCL 552.23(1) provides:

> Upon entry of a judgment of divorce or separate maintenance, if the estate and effects awarded to either party are insufficient for the suitable support and maintenance of either party and any children of the marriage who are committed to the care and custody of either party, the court may also award to either party the part of the real and personal estate of either party and spousal support out of the real and personal estate, to be paid to either party in gross or otherwise as the court considers just and reasonable, after considering the ability of either party to pay and the character and situation of the parties, and all the other circumstances of the case.

While a trial court's decision to award spousal support is not subject to any rigid formula and should reflect what is reasonable and just under the circumstances of each case, *Loutts*, 298 Mich App at 30, a trial court should consider:

> (1) the past relations and conduct of the parties, (2) the length of the marriage, (3) the abilities of the parties to work, (4) the source and amount of property awarded to the parties, (5) the parties' ages, (6) the abilities of the parties to pay alimony, (7) the present situation of the parties, (8) the needs of the parties, (9) the parties' health, (10) the prior standard of living of the parties and whether either is responsible for the support of others, (11) contributions of the parties to the joint estate, (12) a party's fault in causing the divorce, (13) the effect of cohabitation on a party's financial status, and (14) general principles of equity. [*Myland v Myland*, 290 Mich App 691, 695; 804 NW2d 124 (2010), quoting *Olson v Olson*, 256 Mich App 619, 631; 671 NW2d 64 (2003).]

Additionally, "[t]he voluntary reduction of income may be considered in determining the proper amount of alimony." *Moore v Moore*, 242 Mich App 652, 655; 619 NW2d 723 (2000). "If a court finds that a party has voluntarily reduced the party's income, the court may impute additional income in order to arrive at an appropriate alimony award." *Id*. In order to aid in appellate review, a trial court should make specific factual findings as to each of the relevant factors. *Myland*, 290 Mich App at 695.

The trial court imputed an income in the amount of $100,000 to defendant. Defendant now complains that this was unfair, but he assented to and, in fact, requested that the trial court impute that amount. On the first day of trial, defense counsel requested: "we ask that you impute his income to $100,000.00 to $120,000.00 per year."

> "Invited error" is typically said to occur when a party's own affirmative conduct directly causes the error. For example, in *Vannoy v City of Warren*, 386 Mich 686, 690; 194 NW2d 304 (1972), this Court explained that a party cannot seek appellate review of an instruction that he himself requested, saying, "Assuming error as claimed, that error comes within the purview of what of tradition and common sense is known as 'invited error.' " Appellate review is precluded because when a party invites the error, he waives his right to seek appellate review, and any error is extinguished. [*People v Jones*, 468 Mich 345, 352 n 6; 662 NW2d 376 (2003).]

Similarly, in the context of judicial estoppel, "[i]t is settled that error requiring reversal may only be predicated on the trial court's actions and not upon alleged error to which the aggrieved party contributed by plan or negligence." *Lewis v LeGrow*, 258 Mich App 175, 210; 670 NW2d 675 (2003). In any event, even if defendant had not requested this particular amount, the trial court was within its right to impute such an income to defendant, who holds a Harvard M.B.A. and is eminently employable. Defendant consistently earned well over $100,000—reported, unreported, or otherwise—throughout the parties' marriage.

To the extent defendant complains that the trial court erred in assessing fault and in determining the relative health of both parties, these issues go to the credibility of the witnesses. "We defer to the special ability of the trial court to judge the credibility of witnesses." *In re White*, 303 Mich App 701, 711; 846 NW2d 61 (2014).

B. DISTRIBUTION OF THE MARITAL ESTATE

Our Court has noted:

> In deciding issues on appeal involving division of marital property, this Court first reviews the trial court's

> findings of fact. Findings of fact, such as a trial court's valuations of particular marital assets, will not be reversed unless clearly erroneous. A finding is clearly erroneous if, after a review of the entire record, the reviewing court is left with the definite and firm conviction that a mistake was made. If the trial court's findings of fact are upheld, this Court must decide whether the dispositive ruling was fair and equitable in light of those facts. The dispositional ruling is discretionary and will be affirmed unless this Court is left with a firm conviction that the division was inequitable. [*Butler v Simmons-Butler*, 308 Mich App 195, 207-208; 863 NW2d 677 (2014) (citations omitted).]

Equity serves as the goal for property division in divorce actions. *Sparks v Sparks*, 440 Mich 141, 159; 485 NW2d 893 (1992). Although marital property need not be divided equally, it must be divided equitably in light of a court's evaluation of the parties' contributions, faults, and needs. *Id*.

> We hold that the following factors are to be considered wherever they are relevant to the circumstances of the particular case: (1) duration of the marriage, (2) contributions of the parties to the marital estate, (3) age of the parties, (4) health of the parties, (5) life status of the parties, (6) necessities and circumstances of the parties, (7) earning abilities of the parties, (8) past relations and conduct of the parties, and (9) general principles of equity. There may even be additional factors that are relevant to a particular case. For example, the court may choose to consider the interruption of the personal career or education of either party. The determination of relevant factors will vary depending on the facts and circumstances of the case. [*Id*. at 159-160 (citation omitted).]

The trial court must consider all relevant factors but "not assign disproportionate weight to any one circumstance." *Id*. at 158. This Court defers to a trial court's findings of fact stemming from credibility determinations. *Id*. at 147.

Defendant complains that the trial court gave undue weight to defendant's fault. "Marital misconduct is only one factor among many and should not be dispositive." *Id*. at 163. Instead, fault should be considered "in conjunction with all the other relevant factors." *Id*. Fault "is not a punitive basis for an inequitable division." *McDougal v McDougal*, 451 Mich 80, 90; 545 NW2d 357 (1996). Here, it is clear that the trial court did not give undue weight to defendant's fault for the breakdown of the marital relationship. That defendant engaged in an extramarital affair and was the cause of the breakdown of the marriage is not seriously in dispute, despite defendant's attempt to paint plaintiff as what can only be described as a marijuana-hazed casino junkie. Moreover, the trial court was not focused only on defendant's extramarital affair, but it was focused on defendant's *conduct* involving a concerted attempt to conceal marital assets both during and after the parties' separation. Additionally, the trial court did not merely focus on defendant's poor behavior, but it also considered a number of other factors, including the parties' disparate earning abilities, the parties' disparate health issues, and the parties' contributions to the marital estate. If anything, the trial court took great pains to evenly distribute the marital estate in spite of its finding that plaintiff was entitled to the greater share.

To the extent that defendant argues that the trial court erred by making him solely responsible for the parties' tax liability, we find the issue to be moot where defendant has received the relief he requested. *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998) ("An issue is deemed moot when an event occurs that renders it impossible for a reviewing court to grant relief."). In his appellate brief, defendant requested that "the tax liability provision be ordered

eliminated from the Judgment of Divorce allowing the IRS to do an independent investigation that would be binding on the parties." Although the provision has not been struck, plaintiff has demonstrated through a permitted expansion of the record that an IRS investigation was completed and that she enjoys the status of an innocent spouse.

C. ATTORNEY FEES

"We review for an abuse of discretion a trial court's award of attorney fees in a divorce action." *Richards v Richards*, 310 Mich App 683, 699; 874 NW2d 704 (2015). An abuse of discretion occurs when the result falls outside the range of principled outcomes. *Keinz v Keinz*, 290 Mich App 137, 141; 799 NW2d 576 (2010). "[F]indings of fact on which the trial court bases an award of attorney fees are reviewed for clear error." *Richards*, 310 Mich App at 700. "A finding is clearly erroneous if we are left with a definite and firm conviction that a mistake has been made." *Gates v Gates*, 256 Mich App 420, 432-433; 664 NW2d 231 (2003).

Although defendant seems to argue that, as a matter of law, he was entitled to an evidentiary hearing on the issue of attorney fees, he does not dispute that the attorney's hourly rate was reasonable, nor does he dispute that the number of hours the attorney spent on the case was reasonable. Instead, defendant's argument is narrowly focused. He contends that: (1) he should not be responsible for paying fees that were incurred as a result of a third party's misconduct (Hansen); and (2) he should not be responsible for paying fees that resulted from plaintiff's civil action against Hansen. Neither of these claims has merit. A review of the record reveals that the trial court con-

centrated on *defendant's* vexatious behavior during the divorce proceeding. Additionally, although Hansen was named as a third party, the entire proceeding was a "divorce proceeding" because the litigation was focused primarily on the East Ellen home and determining whether it should be considered part of the marital estate.

MCL 552.13(1) provides that a trial court may require a party "to pay any sums necessary to enable the adverse party to carry on or defend the action . . . ." Likewise, MCR 3.206(C) provides:

> (1) A party may, at any time, request that the court order the other party to pay all or part of the attorney fees and expenses related to the action or a specific proceeding, including a post-judgment proceeding.
>
> (2) A party who requests attorney fees and expenses must allege facts sufficient to show that
>
> (a) the party is unable to bear the expense of the action, and that the other party is able to pay, or
>
> (b) the attorney fees and expenses were incurred because the other party refused to comply with a previous court order, despite having the ability to comply.

In a divorce action, attorney fees are "awarded only as necessary to enable a party to prosecute or defend a suit but are also authorized when the requesting party has been forced to incur expenses as a result of the other party's unreasonable conduct in the course of litigation." *Richards*, 310 Mich App at 700 (citation and quotation marks omitted). Accordingly, "MCR 3.206(C)(2) provides two independent bases for awarding attorney fees and expenses." *Id*. "Whereas MCR 3.206(C)(2)(a) allows payment of attorney fees based on one party's inability to pay and the other party's ability to do so, MCR 3.206(C)(2)(b) considers only a party's behavior, without reference to the ability to

pay." *Richards*, 310 Mich App at 701. Therefore, MCR 3.206(C)(2)(b) is focused on a party's bad behavior. The *Richards* Court approvingly cited the court rule's staff comments:

> "The April 1, 2003, amendment of MCR 3.206(C), effective September 1, 2003, was suggested by the Michigan Judges Association to (1) reduce the number of hearings that occur because of a litigant's vindictive or wrongful behavior, (2) shift the costs associated with wrongful conduct to the party engaging in the improper behavior, (3) remove the ability of a vindictive litigant to apply financial pressure to the opposing party, (4) create a financial incentive for attorneys to accept a wronged party as a client, and (5) foster respect for court orders." [*Richards*, 310 Mich App at 701.]

Contrary to defendant's claims, the trial court did not award attorney fees based *only* on defendant's alleged wrongdoing; instead, the trial court found that *both* provisions of the court rule were at play. It was plaintiff's inability to pay (and defendant's ability to pay) coupled with defendant's conduct that caused the trial court to award plaintiff her attorney fees. In its findings of fact, the trial court noted:

> 69. The Court finds that in domestic relations cases, attorney fees are authorized by both statute and court rule. Attorney fees may be awarded when a party needs financial assistance to prosecute or defend the suit. "An award of legal fees in a divorce action is authorized when it is necessary to enable the party to carry on or defend the suit." Legal fees "may also be awarded when the party requesting payment has been forced to incur them as a result of the other party's unreasonable conduct in the course of the litigation." That is, "a party should not be required to invade assets to satisfy attorney fees when the party is relying on the same assets for support."
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> 70. The Court finds all three of the above factors exist in this case. First, Ms. Cassidy's $36,600 annual pension

is insufficient to prosecute a case of this magnitude. Second, the vast majority of the expenses incurred in this case are a direct result of the misconduct of Mr. Cassidy and Ms. Hansen. Third, Ms. Cassidy has been forced to not only invade her separate and marital property within her control to pay her attorney fees, but those assets are now depleted and Ms. Cassidy is in debt to her counsel in the amount of $103,500.88 through April 15, 2015.

71. The Court finds that where there is a claim of misconduct justifying an award of attorney fees, as there is in this case, the Court must find that the party's conduct was unreasonable, that a causal connection existed between that misconduct and the fees incurred, and the fees incurred were reasonable. Things like providing false interrogatory answers, violation of a court order compelling discovery, signing a document in violation of the court rules, and filing frivolous claims or defenses, all justify the Court exercising its discretion and awarding attorney fees if they are "reasonable" or "actual." In an appropriate case, fees due to misconduct can be in the hundreds of thousands of dollars.

72. The Court finds Mr. Cassidy's conduct here has been unreasonable and it was a substantial cause of the fees and expenses incurred by Ms. Cassidy in prosecuting this case.

73. The Court finds the court rule requires that the party requesting the fees must allege facts sufficient to show that he or she is "unable to bear the expense of the action, and that the other party is able to pay." A determination that a party is entitled to attorney fees does not decide the amount of the award. In determining the reasonableness of attorney fees, a trial court should consider the professional standing and experience of the attorney, the skill and labor involved, the amount in question and the results achieved, the difficulty of the case, the expenses incurred, and the nature and length of the professional relationship with the client. Generally, no evidentiary hearing is necessary when there is an otherwise-sufficient record to support a finding of reasonableness.

* * *

76. The Court finds Ms. Cassidy receives approximately $36,600 per year from her retirement pension before deductions for taxes, medical and dental coverage and life insurance. On the other hand, Mr. Cassidy is an entrepreneur who had multiple business interests and who, by his own admission, has diverted funds of at least $364,000 to Ms. Hansen (not including the $70,000 from ConRadical), while keeping details of family resources, expenses and assets secret from Ms. Cassidy.

77. The Court finds Mr. Cassidy's January 2012 credit application indicates he made $200,000 per year . . . and one year later a similar application indicated he made $150,000 per year . . . while two affidavits he signed claimed he only made $52,000 per year. More importantly, however, his documented W-2 income in 2012 was $144,822 and in 2013 was $120,111. Mr. Cassidy also received $132,942 from RMR in 2012.

78. The Court finds Mr. Cassidy, on the other hand, has claimed for almost two years that he is not employed and has been unable to find employment despite having [a] mechanical engineering degree from Michigan Tech and an MBA from Harvard Business School.

79. The Court finds Mr. Cassidy's claim that he cannot find employment in an expanding economic environment is not credible.

80. The Court finds that in order for Ms. Cassidy to be effectively represented and obtain her fair share of the marital assets, spousal support and payment of her attorney fees, she needed to retain a highly qualified, tenacious and experienced family law litigator to discover what Mr. Cassidy sought to hide and cover-up.

* * *

84. The Court finds in September of 2013 a stipulated order was entered permitting Ms. Cassidy to sell the former marital home and certain portions of the proceeds were considered her separate property.

85. The Court finds with that separate property, Ms. Cassidy bought a vacant lot for $72,722 upon which she intended to build a new home, because she is now homeless, and deposited the remaining $94,238 in the bank to build the home.

86. The Court finds that, unfortunately, Mr. Cassidy has successfully caused Ms. Cassidy to spend the remaining balance from the sale of the martial home, plus more, to prosecute this case.

* * *

88. The Court finds Ms. Cassidy did not have the ability to retain her counsel because of the unique circumstances of this case and the efforts to which Mr. Cassidy has gone to deceive his wife and this Court. Ms. Cassidy was kept in the dark with regard to financial matters in connection with this marriage. Accordingly, she needed the assistance of an experienced family law practitioner to assist in the investigation and prosecution of this case.

89. The Court finds this has been a difficult, time-consuming and laborious case primarily because of the conduct of Mr. Cassidy and Ms. Hansen. By way of example, the Court made an extraordinary decision to issue an ex-parte order for seizure of computers, which has resulted in significant information being disclosed that otherwise would have been hidden from Ms. Cassidy, but took considerable time, effort and legal expertise to research and present to the Court before such an order could even be considered. A considerable amount of time has been spent on frivolous matters raised by Mr. Cassidy like requests to modify the interim order entered by this Court without factual support or justification; having to obtain an order for alternate service because Ms. Hansen was intentionally avoiding being served; requesting show causes against Mr. Cassidy for not providing discovery in a timely manner that was so bad this Court ultimately took it upon itself to show cause the non-parties refusing to honor subpoe-

nas; having to ask the Court for permission to remediate the home following a flood when Mr. Cassidy confiscated the underinsured insurance proceeds check and forged Ms. Cassidy's name on it so there was no money to fix the basement; replying to a request for a personal protection order; replying to a motion for a protective order by Ms. Hansen as to some initial discovery requests that were rejected with the exception of production of Ms. Hansen's Social Security number and one other minor item; responding to a request that Ms. Cassidy submit to substance abuse testing, which she stipulated to, but which Mr. Cassidy never followed through on in spite of the stipulated order; replying to a request to exclude potential witnesses from the courtroom; considerable time and effort related to the scheduling of the deposition of Ms. Cassidy's daughter's deposition [sic] on two occasions that were then canceled each time by Mr. Cassidy; and numerous other such exercises in gamesmanship, rather than addressing the substantive issues in an upstanding and forthright manner.

* * *

96. The Court finds Ms. Cassidy would not have been able to uncover all of the lies and deceit committed by her husband and Ms. Hansen without the assistance of such a highly qualified family law litigator on her retirement pension of approximately $36,600 per year before taxes, insurance and other routine deductions. Moreover, the court rule authorizes the payment of attorney fees and expenses where the other party refused to comply with a court order, despite having the ability to do so, which has been a major problem in this case. Similarly, case law authorizes an award of attorney fees and expenses necessitated by the improper conduct of the opposing spouse and the record is replete with instances of such conduct by Mr. Cassidy. In this case, Ms. Cassidy earns approximately $500 per week from her retirement pension before deductions for taxes, medical and dental coverage and life insurance. On the other hand, Mr. Cassidy is an entrepreneur who had several business interests and who has

> diverted funds to his employee/girlfriend, while keeping details of family resources, expenses and assets secret from Ms. Cassidy. [Citations omitted.]

Defendant argues that the record does not support the trial court's award of attorney fees because the trial court improperly focused on a nonparty to the divorce case, Mary Hansen. However, it is clear from the trial court's findings that the trial court was not focused on Hansen's conduct, but on *defendant's* conduct, which happened to include Hansen at times, but also included bad behavior independent of Hansen, such as failing to comply with discovery, lying to the court, trading in his Cadillac for a Volt without court permission, failing to pay spousal support, failing to pay the mortgage on the marital home, dissolving ConRadical without court permission, and hiding proceeds of the sale of his H-1 Hummer. The trial court concentrated on *defendant's* continuous deception and pattern of behavior.

We likewise reject defendant's attempt to argue that attorney fees were unwarranted because there was a civil complaint against Hansen. As will be discussed in more detail below, in order to properly distribute the marital estate, the trial court had to first determine the estate's assets, including deciding how to handle the East Ellen Street home. Therefore, no matter how it was labeled, the entire proceeding was still a "divorce proceeding" to determine the size and distribution of the marital estate.

Finally, defendant also complains, in the most cursory fashion imaginable, that the trial court erred by failing to conduct an evidentiary hearing on the reasonableness of the fees. The entirety of his argument is as follows:

> These are legitimate concerns[1] that not only were the attorney fees not related to the divorce between the parties, but it was error not to conduct a hearing on the reasonableness of the fees incurred.
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> * * *
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> These attorney fees were obviously challenged by Defendant-Appellant. In his final summation Defendant-Appellant's divorce attorney argued:
>
> > In 15 days of trial and several days of testimony by Ms. Cassidy, I've heard about attorney fees and how attorney fees are a burden, but when you look at the case law and court rule regarding attorney fees, you have to have some showing of the reasonableness, what they're used for, things like that. There was no testimony, whatsoever, from Ms. Cassidy as to what her final attorney bill is, what the money was spent on, therefore, obviously, no opportunity for me to cross-exam or challenge those attorney fees. There was never an attorney fee requested on the record by Ms. Cassidy. Anything that you have in the proposed finding[s] of fact and conclusions of law doesn't matter. They have to testify as to what is necessary. You can't say, well, 15 days of trial, that sounds reasonable to me. I have no ability to cross-exam whatsoever . . .
>
> The attorney fees were erroneously awarded to Plaintiff-Appellee. The matter must be reversed. [Citation omitted.]

In the lower court, defendant never challenged either the hourly rates or the work performed, concentrating primarily on the "non-divorce" argument. The affidavits and copious billings submitted by plaintiff and presented to the trial court were not contested either.

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[1] The argument that the attorney fees were not incurred in the "divorce" action.

Therefore, the issue could be deemed to be abandoned. We will nevertheless address defendant's argument.

"Where . . . the party opposing the taxation of costs challenges the reasonableness of the fee requested, the trial court should inquire into the services actually rendered before approving the bill of costs." *Miller v Meijer, Inc*, 219 Mich App 476, 479; 556 NW2d 890 (1996). However, there is no error in failing to conduct an evidentiary hearing if "the parties created a sufficient record to review the issue, and the court fully explained the reasons for its decision." *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 113; 593 NW2d 595 (1999).

The Court in *Smith v Khouri*, 481 Mich 519, 529; 751 NW2d 472 (2008) (opinion by TAYLOR, C.J.), first detailed what trial courts have been doing when calculating attorney fees, such as using the factors found in *Wood v Detroit Auto Inter-Ins Exch*, 413 Mich 573, 588; 321 NW2d 653 (1982), that were derived from *Crawley v Schick*, 48 Mich App 728, 737; 211 NW2d 217 (1973). The factors are: "(1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client." *Smith*, 481 Mich at 529 (opinion by TAYLOR, C.J.) (citation and quotation marks omitted). The *Smith* Court also recognized that many trial courts had been consulting the eight factors found in Rule 1.5(a) of the Michigan Rules of Professional Conduct, which are:

> "(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particu-

> lar employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent." [*Id*. at 529-530, quoting MRPC 1.5(a).]

The Supreme Court further noted that trial courts have not limited themselves to only consulting the factors listed above. *Id*. at 530.

Recognizing that "some fine-tuning" was required, the *Smith* Court instructed that when determining an attorney fee pursuant to MCR 2.403, trial courts should first determine the "reasonable hourly rate [that] represents the fee customarily charged in the locality for similar legal services," and the trial court should use "reliable surveys or other credible evidence of the legal market." *Id*. at 530-531. The Court emphasized that the burden is on the fee applicant to produce satisfactory evidence " 'that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.' " *Id*. at 531, quoting *Blum v Stenson*, 465 US 886, 895 n 11; 104 S Ct 1541; 79 L Ed 2d 891 (1984). The Court then instructed that trial courts should multiply that number by the "reasonable number of hours expended in the case." *Smith*, 481 Mich at 531 (opinion by TAYLOR, C.J.). The Court again emphasized that "[t]he fee applicant bears the burden of supporting its claimed hours with evidentiary support." *Id*. at 532. After this initial baseline figure has been calculated, "in order to aid appellate review, a trial court should briefly discuss its view of the remaining [*Wood* and MRPC] factors" and whether such factors justify an upward or downward adjustment. *Id*. at 531.

Regarding the reasonableness of plaintiff's attorney fees, the trial court noted:

> 81. The Court finds counsel for Ms. Cassidy has been a family law practitioner for almost 36 years; is a member of the Family Law Section of the State Bar of Michigan; Chairperson of an Attorney Discipline Board hearing panel; twice been named a "Top Lawyer" by *dbusiness* Magazine in the areas of family law, general practice and business law, named in Strathmore's Who's Who and by The Marquis Who's Who Publications Board. He is an equity partner in the national law firm of Foley & Mansfield, PLLP having approximately 145 lawyers nationwide in 10 offices in 8 states and is the managing partner of the Ferndale and Grand Rapids offices.
>
> 82. The Court finds Mr. [Howard I.] Wallach has also served as the president of three community organizations, i.e. the Jewish Community Council of Metropolitan Detroit, Michigan Region of the Anti-Defamation League and the Michigan branch of the Israel Cancer Association. He recently completed his third term in 10 years as president of the Farmington Public Schools Board of Education.
>
> 83. The Court finds all of the above speak to Mr. Wallach's qualifications and stature in the community, which have been acknowledged by this Court on several occasions in comments made addressing the quality and professionalism in the pleadings filed and presentation in this matter.
>
> * * *
>
> 87. The Court finds that Ms. Cassidy's counsel's reduced hourly rate of $250 per hour for an attorney with over 35 years of experience litigating domestic relations matters, the labor and skill involved, as well as the results already achieved in this case more than justify the amount requested for what has been necessary to continue to unravel the web of lies, deceit and cheating woven by Mr. Cassidy and Ms. Hansen.
>
> * * *

90. The Court finds the State Bar conducts a scientific survey on the economics of the practice of law periodically that includes a multi-layered analysis of attorney fees charged by lawyers throughout the state in various areas of practice.

91. The Court finds the most recent State Bar report (the Report) was published in the Bar Journal in July 2014.

92. The Court finds the fees customarily charged in the locality can be established by testimony or empirical data found in surveys and other reliable reports . . . something more than anecdotal statements to establish the customary fee for the locality.

93. The Court finds the Report makes it clear the $250 per hour Ms. Cassidy is being charged is unquestionably reasonable. For example, the average hourly rate for a managing partner is $282 per hour; for an equity partner $333 per hour and for an attorney with between 31 and 35 years' experience is $276 per hour. Although Mr. Wallach's firm has about 145 attorneys nationwide, the Ferndale office has 13 attorneys, which if in a single office, means the average hourly rate is $290.

94. The Court finds geographically, the average hourly rate in Flint is $238, while for Genesee County the average hourly rate is $241. Statewide, family law attorneys average $221 per hour and those is [sic] the 75th percentile average $250. Mr. Wallach's current hourly rate for family law matters is $325.

95. The Court finds, therefore, the initial retainer of $2,500 and an hourly rate of $250 per hour was reasonable for Ms. Cassidy to pay to initiate this action. Moreover, those figures are in the middle to low range of fees charged by attorneys in Michigan according to the 2014 Economics of Law Practice Attorney Income and Billing Rates Summary Report.

* * *

97. The Court therefore finds that Ms. Cassidy is entitled to an award of attorney fees and expenses for her

> unpaid attorney fees in the amount of $103,500.88 through April 15, 2015 to be paid by Mr. Cassidy. The Court also finds that Ms. Cassidy is entitled to an additional award of attorney fees and expense[s] to be paid by Mr. Cassidy in the amount of $44,119.00 which represents Ms. Cassidy's half of the marital property generated from the sale of the marital home (and spent on attorney fees) for a total of $150,619.88 in attorney fees awarded to Ms. Cassidy and against Mr. Cassidy. [Citations omitted.]

The trial court provided a detailed explanation for why it awarded plaintiff attorney fees. Not only did plaintiff lack the ability to pay the fees without invading marital assets, but she was also forced to incur an exorbitant amount of fees in prosecuting and defending the case as a result of defendant's bad behavior. As the trial court noted, "[T]he Register of Actions documents an extraordinary number of motions (approximately 45) requiring approximately 12 hearing dates, approximately 6 mandatory settlement conferences, several other miscellaneous hearing dates, extensive briefing and various discovery disputes, not to mention 15 days of trial." The trial court judge was all too familiar with every nuance of the case, having been the only judge to handle it over a number of years. There was no error in failing to conduct an evidentiary hearing given the fact that there was a sufficient record to review the issue, and the court fully explained the reasons for its decision.

III. DOCKET NO. 328004

As a result of zealous representation and some creative legal arguments, Hansen's attorney led plaintiff's attorney and the trial court into an unnecessary dialogue regarding what "cause of action" was raised against Hansen and, once plaintiff settled on the UFTA, whether Hansen was entitled to a jury trial.

Those inquiries were unnecessary given the trial court's express equitable power in the divorce proceeding to determine and distribute the marital estate. This power includes the ability to adjudicate issues that impact a third party's property rights. The trial court—as a matter of equity and without a jury—may determine whether a third party has acted in concert with a spouse to deprive the other spouse of his or her share of the marital estate. If the answer is "yes," then the trial court may fashion a remedy to ensure an equitable division of marital assets. In such a situation, there is no need to specify or enumerate a separate cause of action against the third party; instead, the action against the third party is incidental to the divorce. Once this case is given proper context, Hansen's arguments regarding the UFTA and the right to a jury trial become superfluous.

"This Court has long recognized that the jurisdiction of a divorce court is strictly statutory and limited to determining the rights and obligations between the husband and wife, to the exclusion of third parties . . . ." *Estes v Titus*, 481 Mich 573, 582-583; 751 NW2d 493 (2008) (citation and quotation marks omitted). That general rule has an exception, however. "When fraud is alleged, third parties can be joined in the divorce action only if they have conspired with one spouse to defraud the other spouse of a property interest."[2] *Id*. at 583. In such circumstances, "[t]he door

[2] This concept is not new. In a decision from the 1920s, our Supreme Court held that "divorce suits are special statutory proceedings, limited to litigating domestic relations between husband and wife, to the exclusion of third parties, who can only be brought in as defendants where it is alleged that they have conspired with the husband to transfer property subject to plaintiff's claim for alimony with intent to defraud her." *Przeklas v Przeklas*, 240 Mich 209, 212; 215 NW 306 (1927).

of the equity court is open to hear a claim that a fraud has been perpetrated on the court." *Berg v Berg*, 336 Mich 284, 289; 57 NW2d 889 (1953). *Berg* confirmed that "[t]hird persons may be made defendants in an action for divorce where it is charged that such persons have conspired with the husband with intent to defraud the wife out of her interest in property." *Id*. at 288. In *Berg*, the trial court allowed a wife's sister to intervene so that she could demonstrate that the husband and the wife's guardian ad litem had committed fraud upon the trial court by withholding facts regarding the wife's involuntary confinement as well as the nature and extent of the parties' assets. *Berg* obviously addressed a situation different from the case at bar. In *Berg*, the third party sought to intervene as a means of protecting her sister. Here, the issue is whether Hansen was properly brought into the case. Nevertheless, *Berg* clearly stands for the proposition that third parties may be involved in divorce proceedings when there has been fraud.

In *Smela v Smela*, 141 Mich App 602, 604; 367 NW2d 426 (1985), a wife's parents brought a third-party action in a divorce proceeding, claiming that they had loaned the parties money to purchase their marital home. The parents sought a lien on the home to secure the debt. While the wife understood the money to be a loan, the husband had considered the money a gift. *Id*. The issue at trial was whether the money was a loan and how it was to be allocated upon divorce. Although neither party challenged the trial court's jurisdiction over the third-party claim, this Court found "that question so basic as to be dispositive." *Id*. at 605. This Court determined that there was no basis for allowing the parents to intervene when they could have initiated an independent action to recover their loan. *Id*. Again, as in *Berg*, the third party sought to intervene

in the divorce case, whereas here, Hansen was brought into the case against her will. Nevertheless, the *Smela* Court reiterated that, while the general rule is that "[t]he circuit court has no jurisdiction in a divorce proceeding to adjudicate the rights of any party other than the husband and wife" and "Michigan divorce statutes do not permit the courts to order conveyance of property or interests in property to third parties," one exception exists "where a third party has conspired with a husband or a wife to defraud the other spouse out of his or her property rights." *Id*.

In *Donahue v Donahue*, 134 Mich App 696, 705; 352 NW2d 705 (1984), the trial court determined that the husband and his parents actively concealed assets from the wife. Our Court determined that the trial court was within its right to adjudicate the rights of a third party:

> Although Dr. and Mrs. Donahue [the husband's parents] were not made parties to the suit, they were represented by counsel at trial, they testified at length, and they were cross-examined. Likewise, their pretrial depositions were used in examination. Accordingly, we hold that the trial court was well within its jurisdiction and right to determine whether Dr. Donahue and his wife or defendant were the owners of the certificate of deposit and the bearer bonds. [*Id*.]

Ultimately, this Court held that the trial court correctly concluded that the certificates bore sufficient indicia of ownership to justify the trial court's finding that they belonged to the husband and were, therefore, part of the marital estate. *Id*. at 706-708.

In *Wiand v Wiand*, 178 Mich App 137, 146; 443 NW2d 464 (1989), the husband complained that the trial court erred by including assets in the marital estate that belonged to his brother. This Court began

its analysis by confirming that "[e]ven assuming that defendant's brother's rights were affected by this judgment of divorce, an exception to the rule that a court cannot affect the rights of nonparties is applicable when it is claimed that a third party has conspired with one spouse to deprive the other of his or her rightful interest in the marital estate." *Id*. The Court concluded:

> In this case, the lower court specifically found that defendant and his brother had conspired to deprive plaintiff of her rightful share of the marital estate. Defendant's brother was never made a party to the divorce action, and he was apparently not represented by counsel at trial. He did, however, testify at length at trial on at least two separate days and was subjected to thorough cross-examination. The major distinction between this case and *Donahue* . . . was the lack of representation here. We are not convinced that that difference is significant in this case. Defendant's brother apparently knew about this divorce action well in advance of trial and knew of plaintiff's allegations that defendant possessed a legal or equitable interest in properties that defendant claimed were owned solely by his brother. Although the record does not reflect defendant's brother's educational background or his professional training, if any, it reveals that defendant's brother was a very knowledgeable and experienced businessman with an ownership interest in several corporations. We find that *Donahue* controls this case and allows for the inclusion in the judgment of a dispositive provision involving property allegedly owned by defendant's brother. Simply, we find no error in the lower court's determination as to which assets belong within the marital estate. [*Id*. at 147-148.]

In *Thames v Thames*, 191 Mich App 299, 301; 477 NW2d 496 (1991), a husband created an irrevocable trust for the benefit of the parties' child, which included stock and a life insurance policy. Though the husband claimed that he set up the trust without

knowing that the wife had filed for divorce, the trial court found otherwise and concluded that the husband had established the trust to place the particular assets beyond the wife's reach. *Id*. Our Court affirmed with the following analysis:

> A divorce case is equitable in nature, and a court of equity molds its relief according to the character of the case. Once the court acquires jurisdiction, it will do what is necessary to accord complete equity and to conclude the controversy. Generally, a court has no authority to adjudicate the rights of third parties in divorce actions. An exception to the general rule exists when it is claimed that a third party has conspired with one spouse to deprive the other spouse of an interest in the marital estate. The court, therefore, has authority to find that assets were fraudulently transferred to a third party to deprive a spouse of an interest in marital property. It follows that another exception exists for situations like the one before us. One spouse cannot deprive the other of an interest in the marital estate by transferring marital property into a trust for the benefit of a third party. Having reviewed the record in this case, we are not left with a definite and firm conviction that a mistake has been committed. The trial court's findings are not clearly erroneous. Accordingly, we affirm the trial court's determination that the trust corpus was an asset of the marital estate subject to division between the parties. [*Id*. at 302 (citations omitted).]

Given that a trial court may adjudicate the rights of third parties even when they are not named as parties, as in *Donahue* and *Wiand*, it follows that there is no right to a jury trial when the third party has been named as a party. Instead, the trial court has the inherent authority to craft an outcome to create the equitable division of assets even if that outcome touches upon a third party. "A divorce case is equitable in nature, and a court of equity molds its relief according to the character of the case; once a court of equity

acquires jurisdiction, it will do what is necessary to accord complete equity and to conclude the controversy." *Schaeffer v Schaeffer*, 106 Mich App 452, 457; 308 NW2d 226 (1981). One such method is creation of a constructive trust. Our Supreme Court has described when it is appropriate to impose a constructive trust:

> A constructive trust may be imposed where such trust is necessary to do equity or to prevent unjust enrichment . . . . Hence, such a trust may be imposed when property has been obtained through fraud, misrepresentation, concealment, undue influence, duress, taking advantage of one's weakness, or necessities, or any other similar circumstances which render it unconscionable for the holder of the legal title to retain and enjoy the property . . . . Accordingly, it may not be imposed upon parties who have in no way contributed to the reasons for imposing a constructive trust. The burden of proof is upon the person seeking the imposition of such a trust. [*Kammer Asphalt Paving Co, Inc v East China Twp Sch*, 443 Mich 176, 188; 504 NW2d 635 (1993) (citations and quotation marks omitted).]

Similarly, an equitable lien exists "only in those cases where the party entitled thereto has been prevented by fraud, accident or mistake from securing that to which he was equitably entitled." *Cheff v Haan*, 269 Mich 593, 598; 257 NW 894 (1934).

The trial court concluded that defendant and Hansen acted fraudulently. Conspiracy to commit fraud requires proof of the following elements: (1) a material representation was made; (2) it was false; (3) when it was made it was known to be false or made recklessly without any knowledge of its truth or falsity; (4) it was made with intent that it would be acted upon by the plaintiff; and (5) the plaintiff acted in reliance upon it and thereby suffered injury. *Zaremba Equip, Inc v Harco Nat'l Ins Co*, 280 Mich App 16, 38-39; 761 NW2d

151 (2008). "It is generally recognized that fraud may be consummated by suppression of facts and of the truth, as well as by open false assertions . . . since a suppression of the truth may amount to a suggestion of falsehood. In order for the suppression of information to constitute silent fraud there must be a legal or equitable duty of disclosure." *Hord v Environmental Research Institute of Mich (After Remand)*, 463 Mich 399, 412; 617 NW2d 543 (2000), quoting *US Fidelity & Guaranty Co v Black*, 412 Mich 99, 125; 313 NW2d 77 (1981) (citations and quotation marks omitted).

The trial court concluded that "[t]he evidence establishes Mr. Cassidy and Ms. Hansen engaged in concerted activity and conspired to attempt to defraud Ms. Cassidy out of her rightful share in the marital estate." This finding and conclusion is unassailable based on the record before us. In keeping with her right to assess the credibility of the witnesses before her, the trial court judge found credible plaintiff's testimony that defendant, on more than one occasion, denied that he was engaged in an extramarital affair with Hansen. Had plaintiff known about the affair, she would have divorced him. More importantly, defendant lied to plaintiff about where Hansen got the money to build the house on East Ellen Street. Defendant told plaintiff that Hansen had secured loans and had also received a substantial amount of money from her divorce. Neither of these assertions was true, and plaintiff relied on them to her detriment. The evidence clearly demonstrated that defendant and Hansen acted in concert to deprive plaintiff of her rightful share of the marital assets. The trial court, exercising its equitable powers, correctly determined that a constructive trust existed.

Finally, Hansen argues that the trial court erred by placing a lien on the East Ellen Street home in an

amount greater than the $364,000 Hansen "borrowed" from defendant. She claims that the judgment includes the $70,000 Hansen received from ConRadical, a company that defendant managed, and that the trial court had no authority to require Hansen to pay ConRadical back. Defendant's attorney objected when plaintiff's attorney began questioning Hansen about the use of ConRadical funds, but the trial court correctly determined that "if the money had instead gone to him as wages, then that would be marital money." It is obvious from the record that the trial court did nothing to adjudicate ConRadical's rights; instead, the trial court determined that the ConRadical funds Hansen received were defendant's "wages" and were in addition to the over $360,000 that defendant admitted to "loaning" Hansen. The trial court included the $70,000 as part of the "loan" Hansen received from defendant.

IV. DOCKET NO. 333319

On appeal, defendant does not challenge the trial court's finding that defendant was in contempt of court; instead, defendant claims that he was denied due process when the trial court ordered him to jail when he had no prior notice and when the trial court's written order for contempt contained harsher terms than what the trial court had verbally indicated at the hearing. The issue, therefore, is very narrow. We note that at all times defendant was represented by counsel and that the trial court found that defendant had the present ability to pay his obligations, a finding defendant does not appeal. See *Turner v Rogers*, 564 US 431; 131 S Ct 2507, 2511; 180 L Ed 2d 452 (2011). "Whether a party has been afforded due process is a question of law, subject to review de novo." *In re Contempt of Henry*, 282 Mich App 656, 668; 765 NW2d 44 (2009).

Plaintiff filed a motion to show cause why defendant should not be held in contempt of court in July 2015 after defendant failed to comply with the trial court's June 3, 2015 judgment of divorce and the uniform spousal support order. Specifically, plaintiff alleged that defendant: (1) failed to comply with his obligation to pay plaintiff $1,000 per month in spousal support (retroactive to May 2015); (2) failed to make any payment on the $162,470.50 property settlement in which he was jointly liable with Hansen; and (3) failed to pay plaintiff's attorney fees. After taking testimony from plaintiff, defendant, defendant's appellate counsel, and Hansen, the trial court determined that defendant was in contempt for failing to make full payment on his spousal support obligation. The trial court further concluded that defendant failed to pay any amount towards plaintiff's attorney fees. In particular, the trial court noted defendant's present ability to pay his obligations: "Defendant appears to have more income or resources than he claims and is simply choosing to use those resources on personal expenditures rather than complying with the Court's orders." The trial court noted that defendant had recently purchased a new vehicle, representing to the lending institution that his income was $50,000, yet recently testified in a related civil suit that, as of September 2015, he had only earned $10,000. The trial court detailed defendant's lavish spending in the face of his professed poverty. Defendant, through Hansen, had expended a significant amount on attorney fees for the divorce action, the civil action, and the IRS action. The trial court was also unpersuaded that defendant had done what he could do to find gainful full-time employment. Having found defendant in contempt of court, the trial court gave defendant until the next hearing date to demonstrate to the court how he would purge himself of the contempt.

As of the March 4, 2016 hearing, defendant had essentially purged himself of contempt regarding past spousal support obligations. The trial court noted that "even if I assume that he's current on spousal support there's still a question about paying towards property settlement and paying towards the attorney fees." The trial court was clearly focused on defendant's failure to pursue the promissory note against Hansen. Defendant testified: "I've spoken to Mary Hansen about it. Her position is, she understands that she owes the money, she's not willing to begin working that down while it's--while the property is encumbered and if I--I guess, if I want to sue her to try and get some [of] it, I--I could start a lawsuit." He continued to reside at the East Ellen Street address with Hansen. The trial court ruled:

> I had hoped that there would be some type of effort towards resolving this matter and moving forward as a whole beyond just the spousal support. I mean, Ms. Hansen is paying $1,500.00 but that doesn't [alleviate] Mr. Cassidy's obligation to pay the other $1,500.00 of the $3,000.00 that I ordered he pay toward the property settlement. So he hasn't paid anything on that and so he remains in contempt of court in that regard without any kind of real plan at this point.
>
> So he's got a job where he's making two--$3,000.00 a month and the same--same problems that I had at . . . trial, is that he continues to drive a brand new car, that's what I'm assuming. I mean, people who are flat broke don't go buy new cars without showing, in my mind, some level of disregard or flaunting their disrespect for court orders, that's how I see it. In addition to the other things noted in my orders.
>
> So, he continues to not collect on or take any action with regard to the money that's due to him; he continues to live in the house as far as I know, essentially, for free. He still remains in contempt of court and . . . I don't know

> what else to do. I mean, I've given Mr. Cassidy time and time again and he seems like he does just only what he has to and nothing more. As long as it--you know, as much as he has to sacrifice and . . . no more.

The trial court then ordered defendant to 10 days in jail. The following exchange took place:

> [*Defendant's Attorney*]: Just a--is the incarceration based on failure to pay the property settlement[?]
>
> *The Court*: It's failure to pay the attorney fees and it's the failure to--and it's a sanction. I can punish him for failing to follow court orders. I can't force--I can't--
>
> [*Defendant's Attorney*]: For civil contempt.
>
> *The Court*: For failing to follow court orders. I can punish him for failing to follow court orders, which he has failed to do.
>
> [*Defendant's Attorney*]: That--that would make it criminal not civil. Civil is strictly purging.
>
> *The Court*: If he pays before the time his sentence is done then, I guess--the amounts that are due then, I guess, he's purged his payment so I'll add that, that if he pays before the end of those ten days then he will no longer be required to appear at the jail.

Following a discussion regarding whether the trial court could properly order defendant to pay the property settlement via contempt proceedings,[3] plaintiff and the trial court agreed that the contempt—and defendant's ability to purge the contempt—was premised on his failure to pay attorney fees. The contempt order specifically provides: "Defendant may purge his contempt by paying $150,619.88 in previously awarded attorney fees."

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[3] "Michigan law is clear that property-settlement provisions of a divorce judgment may not be enforced by contempt proceedings." *Guynn v Guynn*, 194 Mich App 1, 2; 486 NW2d 81 (1992).

MCL 600.1701(f) provides, in pertinent part:

> The supreme court, circuit court, and all other courts of record, have power to punish by fine or imprisonment, or both, persons guilty of any neglect or violation of duty or misconduct in all of the following cases:
>
> * * *
>
> (f) Parties to actions, attorneys, counselors, and all other persons for disobeying or refusing to comply with any order of the court for the payment of temporary or permanent alimony or support money or costs made in any action for divorce or separate maintenance.

MCL 600.1715 further provides:

> (1) Except as otherwise provided by law, punishment for contempt may be a fine of not more than $7,500.00, or imprisonment which, except in those cases where the commitment is for the omission to perform an act or duty which is still within the power of the person to perform shall not exceed 93 days, or both, in the discretion of the court. . . .
>
> (2) If the contempt consists of the omission to perform some act or duty that is still within the power of the person to perform, the imprisonment shall be terminated when the person performs the act or duty or no longer has the power to perform the act or duty, which shall be specified in the order of commitment, and pays the fine, costs, and expenses of the proceedings, which shall be specified in the order of commitment.

"[T]he primary purpose of the contempt power is to preserve the effectiveness and sustain the power of the courts. Because the power to hold a party in contempt is so great, it carries with it the equally great responsibility to apply it judiciously and only when the contempt is clearly and unequivocally shown." *In re Contempt of Auto Club Ins Ass'n*, 243 Mich App 697, 708; 624 NW2d 443 (2000) (citation and quotation

marks omitted). "[T]here are three sanctions which may be available to a court to remedy or redress contemptuous behavior: (1) criminal punishment to vindicate the court's authority; (2) coercion, to force compliance with the order; and (3) compensatory relief to the complainant." *In re Contempt of Dougherty*, 429 Mich 81, 98; 413 NW2d 392 (1987).

Whether contempt is civil or criminal depends upon "the character and purpose of the punishment imposed." *In re Contempt of Rochlin*, 186 Mich App 639, 644; 465 NW2d 388 (1990). In this case, where defendant had the ability to pay, the contempt was civil as it was "intended to coerce the defendant to do the thing referred by the order for the benefit of the complainant." *Dougherty*, 429 Mich at 99 (citation and quotation marks omitted). "Civil contempt proceedings seek compliance through the imposition of sanctions of indefinite duration, terminable upon the contemnor's compliance or inability to comply." *DeGeorge v Warheit*, 276 Mich App 587, 592; 741 NW2d 384 (2007). "Although civil sanctions may also have a punitive effect, the sanctions are primarily coercive to compel the contemnor to comply with the order." *Id*. Where a contempt action is civil, there is no need to find that defendant willfully disobeyed an order of the court; it is enough that defendant simply violated his duty to obey the court. *In re Contempt of United Stationers Supply Co*, 239 Mich App 496, 501; 608 NW2d 105 (2000).

Our Court has held:

> No person may be deprived of life, liberty, or property without due process of law. US Const, Am XIV, § 1; Const 1963, art 1, § 17; *Hinky Dinky Supermarket, Inc v Dep't of Community Health*, 261 Mich App 604, 605-606, 683 NW2d 759 (2004). The essence of the right of due process is the principle of fundamental fairness. *In re Adams Estate*, 257 Mich App 230, 233-234, 667 NW2d 904 (2003).

> The concept of due process is flexible, and analysis of what process is due in a particular proceeding depends on the nature of the proceeding, the risks involved, and the private and governmental interests that might be affected. [*In re Contempt of Henry*, 282 Mich App at 669.]

"[I]n a civil contempt proceeding, the accused must be accorded rudimentary due process, i.e., notice and an opportunity to present a defense, and the party seeking enforcement of the court's order bears the burden of proving by a preponderance of the evidence that the order was violated." *Porter v Porter*, 285 Mich App 450, 456-457; 776 NW2d 377 (2009).

There is absolutely no question that defendant was made well aware that incarceration was a possible sanction if he was found in contempt of court. At the August 10, 2015 hearing, the following exchange took place:

> *The Court*: All right, so we have some discussion as to--discussion as to whether this is civil contempt or criminal court--my law clerk thinks it's actually for settlement property may rise to the level of criminal contempt. I am going to proceeding [sic] on my belief and Mr. Wallach's [plaintiff's attorney] representation that we are dealing strictly with civil contempt at this point in time.
>
> That being said, Mr. Cassidy, I have sworn you in and you've stated your name for the record. Do you understand, sir, that you are here for civil contempt of court proceedings, in particular, it has been alleged that . . . you have failed to pay spousal support as required by the Court; you have failed to pay a property settlement; that you have failed to pay attorney fees as ordered by this Court. Sir, do you understand those allegations?
>
> *Mr. Cassidy*: I understand the allegations.
>
> *The Court*: All right. Sir, if you are found guilty of civil contempt of court I may order any of the following sanctions: a fine of not more than $7,500.00; costs and expenses of the proceedings; damages to the injured party

> including attorney fees; incarceration until there's compliance with the court order or until compliance is no longer possible. Do you understand the possible sanctions, sir?
>
> *Mr. Cassidy*: I understand.
>
> * * *
>
> *The Court*: And at this time, Mr. Cassidy, do you understand that you are entitled to a trial conducted in accordance with the Michigan Rules of Evidence?
>
> *Mr. Cassidy*: Yes.
>
> *The Court*: All right, and you understand the rights that go with a trial, is that correct?
>
> *Mr. Cassidy*: Yes.
>
> *The Court*: All right. So we will set the matter for trial.

Defendant acknowledged his awareness that incarceration was a possibility at other moments as well. At the September 21, 2015 hearing on plaintiff's motion to show cause, defense counsel asked for an adjournment and, during argument, noted, "I mean, we're in a county where, God forbid if my client's sentenced to incarceration, you have a crowded jail generally." Counsel later noted that plaintiff's position "that the Court has the ability to hold somebody in contempt and put them in jail for nonpayment of property settlement is very radical . . . ." On the first day of the contempt hearing, defendant testified, "[A]ssuming I'm not in jail, I can have income opportunities." And defendant later testified, "I know but I'm trying to keep myself out of jail so pardon me if I'm--if I'm trying to clarify something." On the second day of the contempt hearing, defendant testified that he was having health problems, which he attributed partly to "the stress of thinking about having to spend time in jail." Defense counsel also argued that defendant did not have the

ability to pay attorney fees: "and if he doesn't have the ability to pay, he can't be held in civil contempt and if, God forbid, he's jailed, okay, he can't be jailed for--if--if it's determined that his ability to pay is exhausted . . . ." Defense counsel argued:

> So, it's our request that you deny the motion to hold him in contempt and also consider the following, he says that things are getting better; they don't sound like they're awesomely better but there does sound like there's some hope for improvement in his situation and aside from his health which is a very, very real concern and, you know, everything clearly will unravel if he is in jail and not able to work to the extent that he's, at least, got something going with [a former Harvard colleague].

Plaintiff's attorney responded:

> [W]hat I was trying to suggest and I think, frankly, neither I nor my client want to see Mr. Cassidy go to jail for an extended period of time to the point where you certainly have the power and authority to put him on a work release program so that he has to spend nights and weekends until whatever period of time you say is appropriate or he complies with whatever order you're going to issue as a result of these proceedings because maybe that will open up his eyes enough so that he starts to get the message, I don't know. Everything else that we've tried in this case [has] not done that yet . . . .

The trial court's December 10, 2015 order likewise provides:

> The Court reserves a ruling on sanctions until the parties appear on February 23, 2016. At that time, Defendant may present proof of efforts he has made to comply with the Court's orders, including proof that he is up to date with the spousal support and cash payment awards. In addition, Defendant may present a plan to the Court of how he will purge himself of the contempt. In the event that Defendant is not up to date through February on spousal support and the monthly installments toward the

> cash payment, the Court's sanctions may include incarceration, with or without work release as the Court may determine, until Defendant pays the full amount due.

There is no merit to defendant's claim that he was deprived of due process. A rudimentary review of the record reveals that defendant feared incarceration and, as such, was clearly aware that incarceration was a possibility.

Defendant next claims that the written order of incarceration was harsher than the trial court's verbal order at the hearing. At the hearing regarding the judgment on sanctions, the trial court indicated:

> So what I am going to--like I said, I--I don't know what else to do so I am going to sentence Mr. Cassidy to ten days in jail to be served on the weekends and I will prepare--and he will be required to report to the jail at eight a.m. on Saturday mornings and he will likely be released early Sunday morning which the sheriff will likely count as two days not one. So he will be required to serve those. It's up to the sheriff, depending on the crowding and overcrowding at the jail . . . .

The trial court's March 4, 2016 order provides that defendant was sentenced to the Genesee County Jail on weekends commencing at 10:00 a.m. Saturday until at least 5:00 p.m. on Sunday for a period of 10 days, from March 5, 2016, until April 3, 2016.

As an initial matter, "a court speaks through its written orders and judgments, not through its oral pronouncements." *In re Contempt of Henry*, 282 Mich App at 678. Thus, to the extent that the trial court's oral pronouncement varied from the actual order, the order controls. However, the trial court's statement at the hearing does not inherently conflict with the written order. The trial court's indication that defendant *might* receive some leniency depending on overcrowd-

ing was in no way a promise. Moreover, there is no record support for defendant's claim that the written order was "harsher" as punishment for defendant's claim at the hearing that he had been deprived of due process. In fact, defendant's arguments at the March 4, 2015 hearing echoed defendant's repeated previous claims that the trial court was attempting to impermissibly use a contempt proceeding to enforce a property disposition and that the proceeding was criminal, not civil, in nature. There is no record evidence to support defendant's theory that he was punished for pursuing a due-process claim.

Having found that there is no need for remand, there is no need to explore whether a new judge is necessary.

Affirmed. Having prevailed in full on all three appeals, plaintiff may tax costs. MCR 7.219.

GLEICHER and SHAPIRO, JJ., concurred with K. F. KELLY, P.J.

PEOPLE v EVERETT

Docket No. 328660. Submitted January 10, 2017, at Detroit. Decided January 17, 2017, at 9:00 a.m. Leave to appeal denied 500 Mich 1060.

Donnie Everett was convicted following a jury trial in the Wayne Circuit Court of second-degree murder, MCL 750.317, three counts of assault with intent to commit murder (AWIM), MCL 750.83, two counts of assault with intent to do great bodily harm less than murder (AWIGBH), MCL 750.84, being a felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. During an argument that involved numerous people, defendant fired multiple gunshots, killing a three-year-old child, injuring three individuals, and shooting at but not injuring two other individuals. The prosecution indicated that defendant's girlfriend, Brittany Dawning, was a witness it intended to produce for trial and did so by marking an "X" next to Dawning's name on the endorsed witness list it provided to defendant before trial. However, the prosecution wrote the words "and/or" next to Dawning's name—as well as the names of other witnesses—purportedly marking Dawning and those other witnesses as so-called alternative witnesses who might not be called at trial. During the trial, the court granted the prosecution's request to dismiss Dawning as a witness. The court, Shannon N. Walker, J., granted the request, concluding that because the prosecution did not expressly endorse Dawning as a witness but instead endorsed her in the alternative, she could be removed from the witness list without the prosecution demonstrating good cause for her removal. Defendant, who was charged with five counts of AWIM, also requested that the trial court instruct the jury on AWIGBH as a lesser included offense with respect to the five counts of AWIM. The court granted defendant's request with respect to the two complainants who were not shot but denied the request with regard to the three complainants who had suffered gunshot wounds during the argument. Defendant appealed.

The Court of Appeals *held*:

1. MCL 767.40a requires the prosecution to attach to a criminal information a list of all witnesses the prosecution might

call for trial as well as all known res gestae witnesses, to update the list as additional witnesses become known, and to provide the defendant a list of endorsed witnesses, in other words, those the prosecution intends to call at trial. The purpose of MCL 767.40a is to provide notice to the accused of potential witnesses. Accordingly, MCL 767.40a(3) provides that 30 days before the trial, the prosecution must send to the defendant or his or her attorney a list of the witnesses the prosecution intends to produce at trial, but every endorsed witness does not have to be called. In that regard, MCL 767.40a(4) provides that the prosecution may add or delete endorsed witnesses from the list if the defendant stipulates the amendment or upon leave of the court and for good cause shown. If the prosecution fails to produce an endorsed witness who has not been properly excused, the circuit court has discretion to fashion a remedy, which may include a missing-witness instruction; M Crim JI 5.12 allows a jury to infer that a missing witness's testimony would have been unfavorable to the prosecution's case.

2. In this case, the trial court abused its discretion by allowing the prosecution to remove Dawning from its witness list without considering, when defendant refused to stipulate removal of her name as an endorsed witness, whether good cause existed for the removal. Under MCL 767.40a(4), because defendant did not stipulate the removal of Dawning as an endorsed witness, the prosecution was obligated to either produce Dawning at trial or demonstrate good cause for removing her from the witness list. MCL 767.40a(3) does not allow witnesses to be endorsed in the alternative; to hold otherwise would allow the prosecution to add or delete witnesses from its list of endorsed witnesses without the statutorily required showing of good cause or the agreement of the defendant. Therefore, the trial court abused its discretion by failing to operate within the legal framework of MCL 767.40a. However, even though the trial court did not address the issue, the prosecution demonstrated good cause for Dawning's removal from the witness list because the prosecution was unable to locate Dawning and there was the potential that Dawning's Fifth Amendment right against self-incrimination would have prevented her testimony; defendant also failed to develop a record to support his claim that he was prejudiced by Dawning not testifying at trial. Reversal of defendant's conviction was not required because defendant was unable to demonstrate prejudice affecting his substantial rights. Defendant's claim that the trial court should have given the jury the missing-witness instruction, M Crim JI 5.12, was not preserved by request in the trial court. The trial court was not required to

sua sponte give the instruction because it was not clear from the record that the prosecution had failed to exercise due diligence in locating Dawning to testify. Because the evidence admitted at trial against defendant was overwhelming, it was not more probable than not that a different outcome would have resulted had the trial court given the missing-witness instruction.

3. Trial courts must clearly present the case to the jury and instruct on the applicable law. A necessarily included lesser offense is an offense in which the elements of the lesser offense are completely subsumed in the greater offense. A requested instruction on a lesser included offense is proper when the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it. AWIGBH is a lesser included offense of AWIM; the two offenses are separated by the intent required in that AWIM requires an actual intent to kill while AWIGBH does not. Failure to instruct on a lesser included offense undermines reliability in the verdict, requiring reversal when the evidence clearly supports instruction on the lesser included offense but the instruction is not given.

4. Defendant's instructional-error argument—that the trial court erred by failing to instruct the jury on the lesser included offense of AWIGBH for the AWIM charges related to the three complainants who survived gunshot wounds—lacked merit. Even if the trial court erred by denying defendant's request for the lesser included offense instruction, defendant was unable to demonstrate that failure to give the instruction undermined the reliability of the jury's verdict because the evidence clearly supported the conclusion that defendant acted with the specific intent to kill the three complainants.

Affirmed.

CRIMINAL LAW — WITNESSES — LISTED PROSECUTION WITNESSES — REMOVAL OF WITNESSES FROM LIST.

MCL 767.40a(3) requires that 30 days before trial, the prosecution must send to the defendant or his or her attorney a list of witnesses the prosecution intends to produce at trial; under MCL 767.40a(4), the prosecution may only add or delete endorsed witnesses from the witness list if the defendant stipulates the amendment or upon leave of the court and for good cause shown; the prosecution may not endorse a witness in the alternative to avoid following the MCL 767.40a process for removing a witness from the prosecution's witness list.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Jason W. Williams*, Chief of Research, Training, and Appeals, and *Toni Odette*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Peter Jon Van Hoek*) for defendant.

Before: TALBOT, C.J., and JANSEN and HOEKSTRA, JJ.

PER CURIAM. A jury convicted defendant, Donnie Everett, of second-degree murder, MCL 750.317, three counts of assault with intent to commit murder (AWIM), MCL 750.83, two counts of assault with intent to do great bodily harm less than murder (AWIGBH), MCL 750.84, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant as a second-offense habitual offender, MCL 769.10, to concurrent terms of 40 to 60 years' imprisonment for the second-degree murder conviction, 18 to 30 years' imprisonment for each AWIM conviction, 3 to 15 years' imprisonment for each AWIGBH conviction, and 3 to 7 years' imprisonment for the felon-in-possession conviction. Those sentences were to run consecutively to a two-year term of imprisonment imposed for the felony-firearm conviction. Defendant appeals as of right. For the reasons explained in this opinion, we affirm.

Defendant stood trial for the shooting death of three-year-old Amiracle Williams, the nonfatal shooting of Frieda Tiggs,[1] Demetrius Williams, and Tkira

[1] We note that some of the lower court documents spell Tiggs's name "Fredia."

Steen, and assaults on Chinetta Williams and Johnetta Williams. The shootings stemmed from an argument between teenaged Johnetta and her former friend, Lashay Davis. On the day of the shooting, Lashay and several of her supporters arrived at a home occupied by Amiracle and her family. Lashay and Johnetta then engaged in a physical altercation outside the house, which escalated to the point that several young men and women joined in the fray. Eventually, multiple gunshots were fired.

According to the evidence, defendant brought a gun to the scene and fired several shots, including shots at the house occupied by Amiracle, Demetrius, and Tkira. Defendant also fired directly at Frieda while she lay on the ground, and he fired in the direction of Chinetta and Johnetta while they were outside the home. Amiracle was tragically shot and killed during these events, and Demetrius, Tkira, and Frieda all suffered gunshot wounds. After the shooting, defendant fled the scene with others, he stated that he shot "the momma and the daughter," and he gave a backpack containing his gun to a neighbor. Given evidence that others at the scene also fired shots, the prosecution presented alternative theories based on defendant's guilt as either a principal or an aider or abettor. The jury convicted defendant as already noted. Defendant now appeals as of right.

I. ENDORSED WITNESS

Defendant first argues that the trial court abused its discretion when it granted the prosecution's request to dismiss a witness detainer for defendant's girlfriend, Brittany Dawning, who was also present at the scene of the shooting. More fully, defendant argues that Dawning was an endorsed witness whom the prosecution

was obligated, pursuant to MCL 767.40a(3), to produce for trial. At a minimum, defendant contends that, if the prosecution could not produce Dawning, the trial court should have given a missing witness instruction. In contrast, the prosecution maintains on appeal that Dawning was an "and/or," i.e., "an *alternative* witness, meaning that the prosecution never guaranteed she would be called." Because she was not "expressly" endorsed, the prosecution maintains—and the trial court agreed—that Dawning could be removed from the witness list without a showing of good cause. Alternatively, the prosecution argues on appeal that there was good cause for deleting Dawning from the witness list and that, in any event, defendant is not entitled to relief on appeal because he has not shown prejudice.

A. STANDARD OF REVIEW

We review for an abuse of discretion a trial court's decision to permit the prosecution to add or delete witnesses. *People v Callon*, 256 Mich App 312, 326; 662 NW2d 501 (2003). "A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes." *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008). A trial court necessarily abuses its discretion when it makes an error of law. *People v Al-Shara*, 311 Mich App 560, 566; 876 NW2d 826 (2015). An abuse of discretion may also occur when a trial court "operates within an incorrect legal framework." *People v Hine*, 467 Mich 242, 250-251; 650 NW2d 659 (2002).

In comparison, statutory interpretation presents a question of law that this Court reviews de novo. *People v Steele*, 283 Mich App 472, 482; 769 NW2d 256 (2009). "Our purpose when interpreting a statute is to deter-

mine and give effect to the Legislature's intent." *People v Armstrong*, 305 Mich App 230, 243; 851 NW2d 856 (2014). "We begin by examining the plain language of the statute; where that language is unambiguous, we presume that the Legislature intended the meaning clearly expressed—no further judicial construction is required or permitted, and the statute must be enforced as written." *People v Barrera*, 278 Mich App 730, 736; 752 NW2d 485 (2008) (citation omitted).

B. ANALYSIS

The prosecution's obligation to identify and produce witnesses is governed by MCL 767.40a, which, in relevant part, states:

> (1) The prosecuting attorney shall attach to the filed information a list of all witnesses known to the prosecuting attorney who might be called at trial and all res gestae witnesses known to the prosecuting attorney or investigating law enforcement officers.
>
> (2) The prosecuting attorney shall be under a continuing duty to disclose the names of any further res gestae witnesses as they become known.
>
> (3) Not less than 30 days before the trial, the prosecuting attorney shall send to the defendant or his or her attorney a list of the witnesses the prosecuting attorney intends to produce at trial.
>
> (4) The prosecuting attorney may add or delete from the list of witnesses he or she intends to call at trial at any time upon leave of the court and for good cause shown or by stipulation of the parties.
>
> (5) The prosecuting attorney or investigative law enforcement agency shall provide to the defendant, or defense counsel, upon request, reasonable assistance, including investigative assistance, as may be necessary to locate and serve process upon a witness. The request for assistance shall be made in writing by defendant or

> defense counsel not less than 10 days before the trial of the case or at such other time as the court directs. If the prosecuting attorney objects to a request by the defendant on the grounds that it is unreasonable, the prosecuting attorney shall file a pretrial motion before the court to hold a hearing to determine the reasonableness of the request.

In summary, under MCL 767.40a, "the prosecutor has a duty to attach to the information a list of all witnesses the prosecutor might call at trial and of all known res gestae witnesses, to update the list as additional witnesses became known, and to provide to the defendant a list of witnesses the prosecution intended to call at trial." *People v Koonce*, 466 Mich 515, 520-521; 648 NW2d 153 (2002). The underlying purpose of the statute is to provide notice to the accused of potential witnesses. *Callon*, 256 Mich App at 327.

Primarily at issue in the present case is the prosecution's obligation under MCL 767.40a(3) to provide defendant a list of endorsed witnesses, i.e., a list of witnesses the prosecution intends to produce at trial. As made plain by the statute, this list must be provided to a defendant not less than 30 days before trial. MCL 767.40a(3). The prosecution may add or delete witnesses from this list "at any time," provided that the defendant stipulates to the amendment or "upon leave of the court and for good cause shown." MCL 767.40a(4). Accordingly, in the absence of a defendant's agreement to remove a witness, the prosecution must make a showing of good cause to delete a witness from the list. *People v Duenaz*, 306 Mich App 85, 104; 854 NW2d 531 (2014). Unless the prosecution seeks to delete a witness from its witness list as provided in MCL 767.40a, "[a] prosecutor who endorses a witness under MCL 767.40a(3) is obliged to exercise due dili-

gence to produce that witness at trial."[2] *People v Eccles*, 260 Mich App 379, 388; 677 NW2d 76 (2004). See also *People v Wolford*, 189 Mich App 478, 484; 473 NW2d 767 (1991). If the prosecution fails to produce a witness who has not been properly excused, the trial court has discretion in fashioning a remedy for the violation of MCL 767.40a, which may include a missing witness instruction. *People v Perez*, 469 Mich 415, 420; 670 NW2d 655 (2003); *People v Burwick*, 450 Mich 281, 298; 537 NW2d 813 (1995).

In this case, the prosecution's witness list provided to defendant before trial states:

> The names of the witnesses known to the People in the above-entitled case are listed below. The witnesses the People intend to produce at trial, pursuant to [MCL] 767.40a(3), are designated by an "X" in the boxes to the left.

Following this explanation is a list of more than 60 names, including Brittany Dawning. Notably, an "X" appears in a box to the left of Dawning's name, indicating that she was one of the witnesses that the prosecution intended to produce at trial pursuant to MCL 767.40a(3). However, Dawning's name, like numerous other witnesses on the list, is also marked by a handwritten "&/or" designation. The form provides no explanation of what this "&/or" designation is meant to signify.

At trial, near the end of the prosecution's proofs, the prosecutor stated that she had "determined not to call" Dawning, and she moved the trial court to dismiss the witness detainer for Dawning. Defendant objected to

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[2] "The inability of the prosecution to locate a witness listed on the prosecution's witness list after the exercise of due diligence constitutes good cause to strike the witness from the list." *People v Canales*, 243 Mich App 571, 577; 624 NW2d 439 (2000).

the prosecutor's motion, asserting that Dawning was an endorsed witness who should be produced at trial. The prosecutor responded that Dawning had only been "endorsed in the alternative."[3] At that time, defendant objected to the use of an "and/or" witness designation on the prosecution's witness list. Nevertheless, accepting the "and/or" designation on the witness list as an endorsement in the alternative, the trial court granted the prosecutor's motion to dismiss the witness retainer without addressing whether there was good cause to remove Dawning from the witness list.[4]

In our judgment, the trial court's decision to allow removal of Dawning from the prosecution's witness list without consideration of whether there was good cause to do so was an abuse of discretion because there is no statutory basis for endorsing a witness in the alternative. A category of endorsed alternative witness simply does not exist under MCL 767.40a. Instead, the statute sets forth three types of witnesses and the prosecution's specific obligations with respect to each type of witness at various stages in the proceedings. There are witnesses the prosecution might call at trial who are listed with the information, MCL 767.40a(1); known res gestae witnesses, MCL 767.40a(1) and (2); and, finally, endorsed witnesses whom the prosecution intends to produce at trial, MCL 767.40a(3) and (4). See *Koonce*, 466 Mich at 520-521.

In particular, under MCL 767.40a(1), when filing the information, the prosecution must attach a list of known witnesses who might be called as well as all known res gestae witnesses. The prosecution is not

[3] As discussed later in this opinion, the prosecutor also asserted that there was good cause to remove Dawning from the witness list.

[4] According to the trial court, it is not "uncommon for the prosecutor to list witnesses in the alternative . . . ."

required to produce at trial the witnesses listed with the information, *Wolford*, 189 Mich App at 483; but, under MCL 767.40a(2), the prosecution has a continuing duty to disclose further res gestae witnesses as they become known. Then, not less than 30 days before trial, the prosecution must provide a defendant with a list of endorsed witnesses whom the prosecution "intends to produce" at trial. MCL 767.40a(3). At that point, by endorsing witnesses for trial, the prosecution notifies a defendant of a more defined plan of action, moving beyond simple disclosure of known res gestae witnesses and those known witnesses that might be called. That is, the fact that the prosecution "intends" to produce a witness at trial establishes that the prosecution has the production of this witness "in mind as a purpose or goal." *Merriam-Webster's Collegiate Dictionary* (11th ed). Once the prosecution endorses a witness, the prosecution is obligated to exercise due diligence to produce that witness for trial. *Eccles*, 260 Mich App at 388.

This list of endorsed witnesses is by no means set in stone, nor is it a guarantee that a witness will be produced at trial.[5] The prosecution may seek to remove a witness from the witness list, but to do so the prosecution must either make a showing of good cause or obtain a stipulation from the defendant. MCL 767.40a(4); *Duenaz*, 306 Mich App at 104. By the same token, witnesses not endorsed may not be called at trial unless the defendant agrees or the prosecution

[5] We note that the prosecution's responsibility is to produce the endorsed witness at trial. MCL 767.40a(3). While the prosecution has an obligation to make endorsed witnesses available, every endorsed witness does not have to be called at trial. See *People v Joseph*, 24 Mich App 313, 320; 180 NW2d 291 (1970). See also MCR 6.416 ("Subject to the rules in this chapter and to the Michigan rules of evidence, each party has discretion in deciding what witnesses and evidence to present.").

adds to the list of endorsed witnesses "upon leave of the court and for good cause shown." MCL 767.40a(4); *Callon*, 256 Mich App at 327. In other words, by endorsing witnesses, the prosecution commits to a course of conduct that may only be altered in accordance with MCL 767.40a(4) "upon leave of the court and for good cause shown or by stipulation of the parties."

Nowhere in this detailed framework does the statute provide for the possibility that a witness may be endorsed in the alternative. Rather, the statute is quite plain: the prosecution either intends to call a witness, in which case the witness is endorsed under MCL 767.40a(3), or the prosecution does not intend to call a witness, in which case the witness is not endorsed under MCL 767.40a(3) and the witness may only be called if the witness list is amended in the manner provided for in MCL 767.40a(4). There is no in-between "alternative" witness who may or may not be produced on the whim of the prosecution. Indeed, the prosecution's proposed "and/or" designation would wholly subvert the plain requirements of the statute by creating a new category of alternative witnesses who are handily endorsed should the prosecution choose to call such a witness, but conveniently not endorsed should the prosecution decide not to produce the witness. In other words, the prosecution proposes an end-run around the statutory requirements that would allow the prosecution to add or delete witnesses from its list of endorsed witnesses without the statutorily required showing of good cause or the agreement of the defendant. Such a practice is not contemplated by the statute, and it is a violation of the clearly articulated manner for adding witnesses to, and removing witnesses from, the endorsed witness list as provided in MCL 767.40a(3) and (4). Consequently, we hold that when providing a

defendant with the list of witnesses the prosecution "intends to produce" at trial, a witness may not be "endorsed in the alternative" as an "and/or" witness.

It follows that in this case, as a matter of law, Dawning could not have been endorsed in the alternative. Instead, given the "X" marked next to Dawning's name on the witness list, it is plain that the prosecution intended to produce Dawning at trial in accordance with MCL 767.40a(3). Consequently, to remove her name from the witness list, the prosecution was required to comply with MCL 767.40a(4). Under MCL 767.40a(4), given defendant's objection to the removal of Dawning's name from the witness list, the prosecution was required to make a showing of good cause. See *Duenaz*, 306 Mich App at 104. By allowing Dawning's removal from the witness list without making a determination of good cause, the trial court abused its discretion by failing to operate in the legal framework set forth in MCL 767.40a. See *Hine*, 467 Mich at 250-251.

Having concluded that the trial court failed to operate within the statutory framework, the question becomes whether this error entitles defendant to appellate relief. In this respect, to warrant reversal for a violation of MCL 767.40a, "defendant must show that he was prejudiced by noncompliance with the statute." *Duenaz*, 306 Mich App at 104. See also *Callon*, 256 Mich App at 328. Moreover, as the appellant in this case, defendant bears the burden of providing this Court "with a record to verify the factual basis of any argument upon which reversal [might be] predicated." *People v Elston*, 462 Mich 751, 762; 614 NW2d 595 (2000). Ultimately, "[e]rror in the admission or exclusion of evidence does not warrant reversal if, in light of the other properly admitted evidence, it does not

affirmatively appear more probable than not that a different outcome would have resulted without the error." *Duenaz*, 306 Mich App at 105.

On the record before us, we are persuaded that defendant has not established the prejudice necessary to warrant reversal. In particular, the error in this case is ultimately the trial court's failure to make a determination of good cause before removing Dawning from the witness list. However, while the trial court did not reach the issue, the prosecutor presented the trial court with information regarding good cause, including the prosecutor's exercise of due diligence insofar as there was a witness detainer for Dawning, the prosecutor could not locate Dawning even after "looking high and low for her for some period of time," and, according to the prosecutor, Dawning had "made it clear . . . she was not going to be found . . . ."[6] See *Canales*, 243 Mich App at 577 ("The inability of the prosecution to locate a witness listed on the prosecution's witness list after the exercise of due diligence constitutes good cause to strike the witness from the list."). In contrast, defendant did not request factual development regarding the issue of good cause either during or after trial, *Elston*, 462 Mich at 762; *Steele*, 283 Mich App at 482; and, on appeal, defendant points to nothing in the lower court record to suggest that the prosecutor lacked good cause for removing Dawning from the prosecution's witness list. Absent some evidence to refute the prosecutor's assertions regarding Dawning, there is no reason to disbelieve the

[6] In addition to these representations regarding due diligence, the prosecutor also noted the likelihood that Dawning's Fifth Amendment right against self-incrimination would have prevented the prosecutor from eliciting her testimony. See *People v Steanhouse*, 313 Mich App 1, 16; 880 NW2d 297 (2015) ("Because [the witness] invoked his Fifth Amendment privilege against self-incrimination and refused to testify, neither the prosecution nor the defense could call [him] as a witness.").

prosecutor's representations as an officer of the court bound by a duty of candor. See *People v Garland*, 286 Mich App 1, 8; 777 NW2d 732 (2009). And, on this record, defendant has not shown that he was prejudiced by the trial court's failure to actually address the issue of good cause.

Moreover, although defendant claims on appeal that he was "severely prejudiced by [Dawning's] failure to appear for trial," there is no evidence regarding how Dawning would have testified. It is known from other witnesses' testimony that Dawning was among those who joined Lashay in confronting Johnetta; but there is no indication of the testimony she would have offered, meaning that it cannot be concluded on this record that defendant would have benefited from her testimony. Once again, defendant made no effort to expand the trial court record to establish the factual basis of his assertion that he was prejudiced by Dawning's failure to appear.[7] Cf. *Elston*, 462 Mich at 762. Further, while we agree with defendant that the prosecution's "and/or" designation was specious, we note that this designation was made weeks before trial. If defendant had concerns about ensuring Dawning's

[7] To establish prejudice, defendant generally notes the jury's inability to assess Dawning's credibility and demeanor, and in doing so he compares his case to *People v Bean*, 457 Mich 677; 580 NW2d 390 (1998), *People v Dye*, 431 Mich 58; 427 NW2d 501 (1988), and *People v James (After Remand)*, 192 Mich App 568; 481 NW2d 715 (1992). However, while these cases discussed the prosecution's exercise of due diligence in producing a witness, the discussions took place in the context of the Confrontation Clause and whether the prosecution could introduce prior testimony of the respective witnesses under MRE 804(b)(1). In other words, while the witness did not appear, the jury was presented with past testimony from the witness and left unable to assess the witness's demeanor first-hand. This did not occur in this case. Rather, Dawning's failure to testify meant that the jury did not hear any evidence from her. For that reason, there is no merit to defendant's suggestion that prejudice arose because the jury could not evaluate Dawning's credibility.

presence at trial, he could have objected to the prosecution's witness list before trial or named Dawning as a defense witness and even requested the prosecution's assistance in locating Dawning. See MCL 767.40a(5). Yet defendant did not ask for the prosecution's assistance before trial, and defendant waited until trial to offer any sort of objection to the alternative witness designation. See *Callon*, 256 Mich App at 328 (concluding that by "waiting to object" to the prosecution's witness list defense counsel had engaged in "the 'gamesmanship' that MCL 767.40a was designed to preclude"). Even when defendant objected during trial to the removal of Dawning's name from the prosecution's witness list, defendant gave no indication that he wished to call Dawning, and he did not ask for a continuance to locate Dawning or to otherwise prepare for the change to the prosecution's witness list. See *People v Herndon*, 246 Mich App 371, 403; 633 NW2d 376 (2001); *People v Cyr*, 113 Mich App 213, 224; 317 NW2d 857 (1982). These facts simply do not support the assertion that defendant was prejudiced by the prosecution's failure to produce Dawning.

Finally, we note that defendant argues on appeal that the trial court should have provided a missing witness instruction to the jury as provided in M Crim JI 5.12. However, defendant failed to request the missing witness jury instruction during his trial and thus failed to preserve the issue for appellate review. See *People v Sabin (On Second Remand)*, 242 Mich App 656, 657; 620 NW2d 19 (2000). "This Court reviews unpreserved challenges to jury instructions for plain error affecting a party's substantial rights." *People v Jackson (On Reconsideration)*, 313 Mich App 409, 421; 884 NW2d 297 (2015). See also MCL 768.29. To avoid forfeiture of an unpreserved claim, "the defendant bears the burden of establishing that: (1) error oc-

curred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected substantial rights." *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003). "Reversal is warranted only when the plain, unpreserved error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity, or public reputation of the judicial proceedings independent of the defendant's innocence." *Id*.

"A criminal defendant is entitled to have a properly instructed jury consider the evidence against him." *People v Armstrong*, 305 Mich App 230, 239; 851 NW2d 856 (2014) (quotation marks and citation omitted). "Accordingly, 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). At issue in this case is the missing witness instruction, M Crim JI 5.12, which would have allowed the jury to infer that Dawning's testimony would have been unfavorable to the prosecution's case. In particular, the instruction states:

> [*State name of witness*] is a missing witness whose appearance was the responsibility of the prosecution. You may infer that this witness's testimony would have been unfavorable to the prosecution's case.

A missing witness instruction should be given if the trial court finds a lack of due diligence on the part of the prosecution in seeking to produce an endorsed witness. *Eccles*, 260 Mich App at 388-389.

On the facts of this case, defendant has not shown plain error in the trial court's failure to sua sponte give a missing witness instruction. Such an instruction was not clearly or obviously required in this case because, as we have discussed, it is not apparent from the record

that the prosecution failed to exercise due diligence. See *id*.; *People v Young*, 472 Mich 130, 143; 693 NW2d 801 (2005). Moreover, given the considerable evidence that defendant brought a gun to the scene and fired his weapon repeatedly, we cannot conclude that a missing witness instruction would have affected the outcome of the proceedings, particularly when defendant had been charged as both a principal and aider or abettor. There were numerous eyewitness accounts as well as physical evidence to support the conclusion that defendant repeatedly fired his weapon. On these facts, we cannot conclude that the outcome would have been different had the jury been instructed under M Crim JI 5.12 to infer that testimony from Dawning, i.e., defendant's girlfriend, would have been unfavorable to the prosecution. Overall, defendant has not shown plain error, and he is not entitled to relief simply because the trial court failed to give a missing witness instruction.

II. JURY INSTRUCTIONS

Next, defendant argues that the trial court erred by failing to instruct the jury on AWIGBH as a lesser included offense of AWIM.

"We review a claim of instructional error involving a question of law de novo, but we review the trial court's determination that a jury instruction applies to the facts of the case for an abuse of discretion." *People v Mitchell*, 301 Mich App 282, 286; 835 NW2d 615 (2013) (quotation marks and citation omitted). Even when instructional error occurs, "[r]eversal is warranted only if after an examination of the entire cause, it shall affirmatively appear that it is more probable than not that the error was outcome determinative." *Id*. (quotation marks and citation omitted). The defendant bears the burden of "establishing that the error undermined

the reliability of the verdict." *People v Hawthorne*, 474 Mich 174, 184; 713 NW2d 724 (2006).

"It is the function of the trial court to clearly present the case to the jury and instruct on the applicable law." *McKinney*, 258 Mich App at 162. "Necessarily included lesser offenses are offenses in which the elements of the lesser offense are completely subsumed in the greater offense." *People v Nickens*, 470 Mich 622, 626; 685 NW2d 657 (2004) (quotation marks and citation omitted). "[A] requested instruction on a necessarily included lesser offense is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it." *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002). See also *People v Reese*, 466 Mich 440, 447; 647 NW2d 498 (2002). Failure to instruct on a lesser included offense undermines reliability in the verdict only "when the evidence 'clearly' supports the lesser included instruction, but the instruction is not given." *Cornell*, 466 Mich at 365. In analyzing whether the evidence "clearly" supports the instruction, we must consider the "entire cause," including evidence that has been offered to support the greater offense. *Id*.

AWIGBH is a lesser included offense of AWIM. *People v Brown*, 267 Mich App 141, 150-151; 703 NW2d 230 (2005). These offenses "are distinguishable from each other by the intent required of the actor at the time of the assault." *Id*. at 148. That is, AWIM requires an actual intent to kill that is not a part of AWIGBH.[8] *Id*. at 151. See also *People v Stevens*, 306 Mich App 620, 628; 858 NW2d 98 (2014).

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[8] We disagree with the prosecution's assertion that the element of intent was not "disputed" at trial. See *Reese*, 466 Mich at 447. While defendant primarily argued at trial that he was not the shooter

In this case, defendant was charged with five counts of AWIM. Each count was related to a different complainant. At trial, defendant asked the court to instruct the jury on AWIGBH as a lesser included offense with respect to all five counts of AWIM. The trial court granted defendant's request with respect to Johnetta and Chinetta, the two victims who were not shot during the events. In contrast, the trial court denied the request with respect to Frieda, Demetrius, and Tkira, all of whom suffered gunshot wounds.

Even assuming the trial court's decision not to give the lesser included instruction on AWIGBH was erroneous, defendant has not met his burden of establishing that this error undermined the reliability of the jury's verdict with respect to the AWIM convictions. The evidence presented at trial demonstrated that defendant brought a gun to the scene. He then stood outside of the home, shooting at the front door where Demetrius and Tkira were seen standing during most of the melee. Several spent casings from defendant's gun were found outside on the ground in areas defendant was seen standing. With respect to the shooting of Frieda, both Chinetta and Frieda testified that defendant pointed his gun directly at Frieda and shot her. Indeed, Demetrius, Tkira, and Frieda all suffered gunshot wounds.[9] And, of course, a child in the home

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responsible for Amiracle's death or the other victims' injuries, defense counsel did question the intent involved. Using Frieda as an example, defense counsel stated that she "had fell [sic] on the ground, she was immobile and she's wounded in the leg. If he was trying to kill them, wouldn't you shoot them in the head[?] That's not how she was shot. She was shot in an exchange of gunfire."

[9] In contending that the jury would have returned a lesser verdict with regard to these victims, defendant relies heavily on the fact that the jury returned a lesser verdict with respect to the charges relating to Chinetta and Johnetta. However, the evidence was noticeably less conclusive with regard to Chinetta and Johnetta in light of distinguish-

with Demetrius and Tkira was killed. After the shooting, defendant fled the scene, he stated that he shot "the momma and the daughter," and he attempted to conceal his weapon when he gave his backpack containing his gun to a neighbor. Considering these facts, the evidence does not "clearly" support the conclusion that defendant only intended AWIGBH; rather, it demonstrates that defendant acted with the specific intent to kill Frieda, Demetrius, and Tkira.[10] On this record, the trial court's failure to give the requested instruction cannot be said to have undermined the reliability of the verdict.

Affirmed.

TALBOT, C.J., and JANSEN and HOEKSTRA, JJ., concurred.

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ing circumstances between the victims, including the lack of injury suffered by Chinetta and Johnetta. We note that actual injury—while admissible as evidence of an actor's intent—is not an element of either AWIM or AWIGBH. See *Stevens*, 306 Mich App at 628-629; *Brown*, 267 Mich App at 147. We do not suggest that injury may be used to conclusively distinguish between an actor's intent relative to AWIM and AWIGBH. Nonetheless, on the facts of this case, considering the entire cause and the differences between the respective victims, we are not persuaded that the jury's lesser finding of AWIGBH relating to Johnetta and Chinetta undermines the reliability of the AWIM verdicts returned with respect to Frieda, Demetrius, and Tkira.

[10] "Intent to kill may be inferred from all the facts in evidence," including use of a deadly weapon, taking aim at a victim, injury to the victim, evidence of flight, and attempts to hide evidence. *People v Henderson*, 306 Mich App 1, 11-12; 854 NW2d 234 (2014).

MAKI ESTATE v COEN

Docket No. 328704. Submitted January 10, 2017, at Detroit. Decided January 19, 2017, at 9:00 a.m. Leave to appeal denied 501 Mich 879.

Michael P. Maki, as plenary guardian of Tyler J. Maki's estate, brought an action in the Oakland Circuit Court against Victor Coen, Sommers Schwartz, PC, Phoebe J. Moore, Phoebe J. Moore, PC, and John C. Burns, alleging that defendants owed Tyler, as their client, a duty of care to provide services as would attorneys of ordinary learning and judgment. Tyler was born with a congenital birth defect in 1994, and Tyler's family brought a medical malpractice lawsuit on Tyler's behalf against his medical care providers. Defendant Sommers Schwartz, PC, represented Tyler in that lawsuit, which was settled in 1998; the medical providers agreed to pay an immediate cash settlement and regular payments from a structured annuity. Defendant Victor Coen, who represented Tyler's conservator, Mandy Maki-Childs, did not include the structured settlement income on the annual accounts he prepared in connection with the conservatorship, and Maki-Childs was removed as conservator. Tyler's new conservator, Heidi Brown, filed suit against Maki-Childs in 2009 for Maki-Childs's failure to account for the funds during her conservatorship, and defendant John C. Burns represented Brown in that lawsuit. Defendant Phoebe J. Moore, founder of Phoebe J. Moore, PC (collectively, the Moore defendants), replaced Brown as Tyler's conservator in 2011. Maki was appointed plenary guardian over both Tyler's estate and person, and Maki sued defendants on behalf of Tyler's estate, specifically alleging that Coen and his employer, Summer Schwartz, PC (collectively, the Coen defendants), violated their duty of care in connection with the legal services they provided to Maki-Childs during her conservatorship, that the Moore defendants did not timely pursue and preserve Tyler's claims against the Coen defendants, and that Burns should have discovered any meritorious cause of action against the Coen defendants during his representation of conservator Brown. All defendants moved for summary disposition. The Coen defendants asserted that Michigan's statute of repose for legal malpractice, MCL 600.5838b, barred the claim, that the tolling provision of MCL 600.5851(1) did not apply, and

that the estate lacked standing as the real party in interest because Coen's client—the only person entitled to file a malpractice claim—was conservator Maki-Childs. The Moore defendants asserted that the estate lacked standing to file a lawsuit against the Coen defendants. Burns asserted that he had no attorney-client relationship with the estate and that the estate was not the real party in interest. The court, Shalina D. Kumar, J., granted summary disposition in favor of defendants, concluding that only Maki-Childs had standing to sue the Coen defendants and that there was no need to reach the statute-of-repose argument because the standing issue was dispositive. The estate moved for reconsideration, which the court denied. The estate appealed.

The Court of Appeals *held*:

1. MCR 2.201(B) provides that an action must be prosecuted in the name of a real party in interest; the claim must be prosecuted by the party who, by the substantive law in question, owns the claim that is asserted in the complaint. A real party in interest is one who is vested with the right of action on a given claim, although the beneficial interest may be in another. MCL 700.5423(2)(z) provides, in pertinent part, that a conservator may employ an attorney to perform necessary legal services or to advise or assist the conservator in the performance of the conservator's administrative duties, even if the attorney is associated with the conservator, and act without independent investigation upon the attorney's recommendation. The language in MCL 700.5423(2)(z) focuses solely on the services and assistance provided to the conservator, which establishes that the attorney represents the conservator in the performance of his or her duties, not the estate. This language contrasts with language from the former Revised Probate Code (RPC), MCL 700.1 *et seq*., which provided that the attorney rendered assistance on behalf of the estate. Because the Legislature removed the language from the RPC and replaced it with language indicating that the attorney provides legal services and assistance to the conservator, see 1998 PA 386, the plain language of MCL 700.5423(2)(z) establishes that an attorney hired by a conservator represents the conservator and does not have an attorney-client relationship with the estate. In this case, because the Coen defendants represented only Maki-Childs, the estate was not the real party in interest and therefore could not assert malpractice against the Coen defendants. Similarly, the estate's claims against Burns and the Moore defendants failed because the estate was not the client of the Coen defendants. The trial court properly determined that the estate was not the real party in interest with regard to the

legal malpractice claim. Accordingly, the estate's remaining arguments—whether the estate's legal malpractice claim was barred by the statute of repose and whether defendants held themselves out as representing the estate—were not considered.

2. The estate's reliance on *Steinway v Bolden*, 185 Mich App 234, 237-238 (1990), in which the Court concluded that the attorney represented the estate, was misplaced because that case was decided on the basis of the former RPC language that has since been replaced with MCL 700.5423(2)(z). Additionally, *Steinway* was not binding pursuant to MCR 7.215(J)(1) because *Steinway* was published before November 1, 1990.

3. Contrary to the estate's argument that it was able to bring a tort-based cause of action against the Coen defendants because the estate was a third-party beneficiary of the contract between Coen and Maki-Childs, the estate never pleaded that it or Tyler was a named beneficiary of the contract between Coen and Maki-Childs. The estate asserted that Coen and the other defendant attorneys knew that their services were for Tyler's benefit; however, mere knowledge of a benefit to a third party is not enough. Therefore, the estate's failure to plead its status as a third-party beneficiary of a contract between Coen and Maki-Childs was fatal to its third-party-beneficiary theory of malpractice liability.

Affirmed.

ESTATES AND PROTECTED INDIVIDUALS CODE (EPIC) — ATTORNEY AND CLIENT — CONSERVATORS — ATTORNEYS HIRED BY CONSERVATORS.

MCL 700.5423(2)(z) provides, in pertinent part, that a conservator may employ an attorney to perform necessary legal services or to advise or assist the conservator in the performance of the conservator's administrative duties, even if the attorney is associated with the conservator, and act without independent investigation upon the attorney's recommendation; the plain language of MCL 700.5423(2)(z) establishes that an attorney hired by a conservator represents the conservator in the performance of his or her duties; the attorney does not have an attorney-client relationship with the estate.

Blaske & Blaske, PLC (by *Thomas H. Blaske*), and *Speaker Law Firm, PLLC* (by *Liisa R. Speaker*), for the Estate of Tyler J. Maki.

Collins Einhorn Farrell PC (by *Trent B. Collier*) for Victor Coen and Sommers Schwartz, PC.

Bensinger, Cotant & Menkes, PC (by *Roger W. Zappa*), for Phoebe J. Moore and Phoebe J. Moore, PC.

Starr, Butler, Alexopoulos & Stoner, PLLC (by *Scott D. Stoner*), for John C. Burns.

Before: TALBOT, C.J., and JANSEN and HOEKSTRA, JJ.

JANSEN, J. Plaintiff appeals as of right the order granting defendants' motion for summary disposition. We affirm.

I. FACTS AND PROCEDURAL HISTORY

This case arises from the 1994 birth of Tyler Maki (Tyler), who was born with a congenital birth defect. Tyler's family filed a medical malpractice action on Tyler's behalf against his medical care providers, and defendant Sommers Schwartz, PC, represented Tyler in the medical malpractice suit. The parties settled the lawsuit in 1998, and the medical providers agreed to pay an immediate cash settlement and provide Tyler with regular payments from a structured annuity.

Tyler's mother, Mandy Maki-Childs, was his conservator from November 1998 until October 2006. Defendant Victor Coen represented Maki-Childs in connection with her duties as Tyler's conservator. According to plaintiff, Coen did not include the structured settlement income on the annual accounts he prepared in connection with the conservatorship. Coen allegedly excluded the settlement income because the settlement had confidential terms and because a letter from the probate judge did not, in his opinion, require an accounting of the funds. Plaintiff contends that problems developed because of Maki-Childs's failure to account for the settlement funds, and she was removed as conservator.

Tyler's new conservator, Heidi Brown, filed suit against Maki-Childs in 2009 for her failure to account for the settlement funds during her conservatorship. Defendant John C. Burns represented Brown in that lawsuit. In October 2011, the court entered a judgment against Maki-Childs in the amount of $673,958.15, and Maki-Childs filed for bankruptcy. Defendant Phoebe J. Moore, founder of defendant Phoebe J. Moore, PC (collectively, the Moore defendants), replaced Brown as Tyler's conservator in December 2011.

Tyler's father, Michael Paul Maki, was appointed plenary guardian over both Tyler's estate and person. Maki sued defendants on behalf of Tyler's estate (hereinafter, plaintiff), alleging that they "owed Tyler, as their client," a duty of care to provide services as would attorneys of ordinary learning and judgment. Plaintiff alleged that Coen and his employer, Sommers Schwartz, PC (collectively, the Coen defendants), violated their duty of care in connection with the legal services they provided to Maki-Childs during her conservatorship. The complaint specified that the Moore defendants did not timely pursue and preserve plaintiff's claims against the Coen defendants. The complaint similarly alleged that defendant Burns should have discovered any meritorious cause of action against the Coen defendants during his representation of conservator Heidi Brown.

The Coen defendants moved for summary disposition under MCR 2.116(C)(7) (claim barred by statute of repose), (8) (failure to state claim), and (10) (no genuine issue of material fact). First, they asserted that Michigan's six-year statute of repose for legal malpractice, MCL 600.5838b, barred the claim and that the tolling provision of MCL 600.5851(1) did not apply. Second, they asserted that plaintiff lacked standing as

the real party in interest because Coen's client—the only person entitled to file a malpractice claim—was conservator Maki-Childs. Burns moved for summary disposition under MCR 2.116(C)(8) and (10), arguing that he had no attorney-client relationship with plaintiff and that plaintiff was not the real party in interest. The Moore defendants also moved for summary disposition under MCR 2.116(C)(8) and (10), arguing, in relevant part, that plaintiff lacked standing to file a lawsuit against the Coen defendants.

Plaintiff responded by contending that the suit against the Coen defendants was timely because the statute of limitations was tolled under MCL 600.5851(1) by Tyler's severe mental impairment. Further, plaintiff asserted that the statute of repose did not apply retroactively to bar plaintiff's claim. Plaintiff further argued that even if the court believed that plaintiff was not a client of the Coen defendants, they still owed plaintiff a duty as an intended and direct third-party beneficiary of the legal relationship between Coen and Maki-Childs. According to plaintiff, all arguments made with respect to the Coen defendants applied equally to Burns and the Moore defendants with the exception that Phoebe Moore was both a conservator and an attorney, so she owed a duty of care to plaintiff by statute.

The court concluded that only Maki-Childs had standing to sue the Coen defendants, and the court declined to reach the statute-of-repose argument because the standing issue was dispositive. The court explained that concluding that the attorney represented both the conservator and the estate would lead to a conflict of interest and that the caselaw cited by plaintiff was distinguishable. Therefore, the court granted summary disposition in favor of defendants.

II. STANDARD OF REVIEW

We review de novo a motion for summary disposition. *Kyocera Corp v Hemlock Semiconductor, LLC*, 313 Mich App 437, 445; 886 NW2d 445 (2015). A motion for summary disposition asserting a real-party-in-interest argument falls under either MCR 2.116(C)(8) or (10), depending on the pleadings and other circumstances of the case. *Cannon Twp v Rockford Pub Sch*, 311 Mich App 403, 411; 875 NW2d 242 (2015). This case presented the legal issue of whether an attorney hired by a conservator represents the conservator or the estate. Accordingly, summary disposition was properly considered under MCR 2.116(C)(8). " 'MCR 2.116(C)(8) tests the legal sufficiency of the claim on the pleadings alone to determine whether the plaintiff has stated a claim on which relief may be granted.' " *Kyocera Corp*, 313 Mich App at 445 (citation omitted). " 'A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.' " *Id*. (citation omitted). " 'All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant.' " *Id*. (citation omitted). However, it is insufficient to allege unsupported legal conclusions. *Id*. We also review de novo issues of statutory interpretation and the proper interpretation of a court rule. *Bank of America, NA v First American Title Ins Co*, 499 Mich 74, 85; 878 NW2d 816 (2016); *Magdich & Assoc, PC v Novi Dev Assoc, LLC*, 305 Mich App 272, 275; 851 NW2d 585 (2014). Finally, we review de novo the issue whether a person is the real party in interest. *In re Beatrice Rottenberg Living Trust*, 300 Mich App 339, 354; 833 NW2d 384 (2013).

III. REAL PARTY IN INTEREST

Plaintiff argues that the trial court erred by granting summary disposition in favor of defendants on the basis that plaintiff was not the real party in interest. Plaintiff contends that it was the real party in interest either because it was the client of the Coen defendants or because it was a third-party beneficiary of the contract between the Coen defendants and Maki-Childs. We disagree.

"An action must be prosecuted in the name of the real party in interest . . . ." MCR 2.201(B).[1] " 'A real party in interest is one who is vested with the right of action on a given claim, although the beneficial interest may be in another.' " *Beatrice Rottenberg Living Trust*, 300 Mich App at 356 (citation omitted). The rule "requir[es] that the claim be prosecuted by the party who by the substantive law in question owns the claim" that is asserted in the complaint. *Id*. (citation and quotation marks omitted; alteration in original). The crux of defendants' argument in the trial court was that plaintiff was not the real party in interest because the Coen defendants represented Maki-Childs rather than plaintiff. "Absent unique circumstances, an attorney is only liable in negligence to his client." *Mieras v DeBona*, 452 Mich 278, 297; 550 NW2d 202 (1996) (opinion by BOYLE, J.).

[1] We note that while the trial court and the parties referred to the issue as whether plaintiff had "standing" to file the lawsuit, the issue is more accurately characterized as whether plaintiff was the real party in interest. "[A]lthough the principle of statutory standing overlaps significantly with the real-party-in-interest rule, they are distinct concepts." *Beatrice Rottenberg Living Trust*, 300 Mich App at 355. Statutory standing is a jurisdictional principle, while "the real-party-in-interest rule is essentially a prudential limitation on a litigant's ability to raise the legal rights of another." *Id*.

Resolution of this issue requires interpretation of the relevant statute and court rule. The "goal in interpreting a statute is to give effect to the Legislature's intent, focusing first on the statute's plain language." *Bank of America, NA*, 499 Mich at 85. "When a statute's language is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written." *Id*. In addition, we " 'must give effect to every word, phrase, and clause in a statute and avoid an interpretation that renders nugatory or surplusage any part of a statute.' " *Jesperson v Auto Club Ins Ass'n*, 499 Mich 29, 34; 878 NW2d 799 (2016) (citation omitted). Finally, "[t]he interpretation and application of a court rule is governed by the principles of statutory construction, commencing with an examination of the plain language of the court rule." *Magdich & Assoc*, 305 Mich App at 275. We determine the intent of the court rule by examining the court rule and its place in the structure of the Michigan Court Rules as a whole. *Id*.

The language of the relevant statute and court rule establishes that an attorney hired to perform legal services for a conservator represents the conservator and does not have an attorney-client relationship with the estate. The Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq*., governs the powers of conservators. Under MCL 700.5423(2)(z), a conservator may

> [e]mploy an attorney to perform necessary legal services or to advise or assist the conservator in the performance of the conservator's administrative duties, even if the attorney is associated with the conservator, and act without independent investigation upon the attorney's recommendation. An attorney employed under this subdivision shall receive reasonable compensation for his or her employment.

The statute clarifies that the attorney performs legal services for the conservator and that the attorney advises or assists the conservator in the performance of his or her duties. This language focuses solely on the services and assistance provided to the *conservator*, which establishes that the attorney represents the conservator in the performance of his or her duties. The language in EPIC contrasts with the language of the former Revised Probate Code (RPC), MCL 700.1 *et seq*., which provided, "Without obtaining a court order, a fiduciary of an estate may employ counsel to perform necessary legal services *in behalf of the estate* and the counsel shall receive reasonable compensation for the legal services." MCL 700.543 (emphasis added).[2] The plain language of the RPC expressly established that the attorney rendered assistance on behalf of the estate. The Legislature removed this language in EPIC and replaced it with language indicating that the attorney provides legal services and assistance to the conservator. Therefore, we conclude that the plain language of the statute establishes that an attorney hired by a conservator represents the conservator, and the attorney does not have an attorney-client relationship with the estate.

The Michigan Court Rules provide further clarification on this issue. MCR 5.117(A) provides, "An attorney filing an appearance on behalf of a fiduciary shall represent the fiduciary." The plain language of this court rule is clear that an attorney appearing in the probate court on behalf of a conservator represents the conservator rather than the estate. Accordingly, we conclude that the plain language of the relevant stat-

[2] The Legislature repealed the RPC and replaced it with EPIC. See 1998 PA 386.

ute and court rule establishes that an attorney employed by the conservator represents the conservator and not the estate.

Plaintiff relies, in part, on this Court's decision in *Steinway v Bolden*, 185 Mich App 234, 237-238; 460 NW2d 306 (1990),[3] for the proposition that "although the personal representative retains the attorney, the attorney's client is the estate, rather than the personal representative." Although this Court concluded in that case that the attorney represented the estate, this Court relied primarily on the repealed provision of the RPC. *Id*. This Court explained that the RPC "authorizes a fiduciary of the estate, such as the personal representative, to 'employ counsel to perform necessary legal services *in behalf of the estate*.' " *Id*. at 237 (citation omitted; emphasis added). Thus, this Court concluded that the RPC allowed a fiduciary to hire an attorney to perform legal services *on behalf of the estate*, suggesting that the estate was the client. However, because EPIC did not retain the same language, we conclude that plaintiff's reliance on *Steinway* is misplaced.

Plaintiff also argues that, even if this Court concludes that plaintiff was not Coen's client, plaintiff was nevertheless able to bring a tort-based cause of action against the Coen defendants because it was a third-party beneficiary of the contract between Coen and Maki-Childs. Plaintiff's argument fails because it did not plead facts demonstrating its status as a named beneficiary of the contract between Coen and Maki-Childs. Plaintiff relies on our Supreme Court's decision in *Mieras* to argue that it was a third-party beneficiary of a contract between Coen and Maki-Childs. In

[3] Because *Steinway* was published before November 1, 1990, it is not binding. See MCR 7.215(J)(1).

Mieras, our Supreme Court outlined an exception to the general rule that an attorney is only liable in negligence to his or her client. *Mieras*, 452 Mich at 297 (opinion by BOYLE, J.).[4] The Court concluded that "beneficiaries named in a will may bring a tort-based cause of action against the attorney who drafted the will for negligent breach of the standard of care owed to the beneficiary by nature of the beneficiary's third-party beneficiary status." *Id*. at 308. The Court explained that "[t]he duty owed to named beneficiaries is narrowly circumscribed and only requires the attorney to draft a will that properly effectuates the distribution scheme set forth by the testator in the will." *Id*. at 302. The Court further explained that recognizing a cause of action in this narrow instance would not create a conflict of interest between the attorney and the beneficiaries for two reasons. First, beneficiaries have no rights under a will until the testator's death, and second, the only obligation owed to the beneficiaries is to exercise the standard of care in fulfilling the intent of the testator as described in the will. *Id*. at 301. This Court expanded the *Mieras* exception by concluding that it applied to beneficiaries named in estate planning documents aside from wills. *Bullis v Downes*, 240 Mich App 462, 467-468; 612 NW2d 435 (2000). However, plaintiff cites no caselaw extending this third-party beneficiary exception to anyone other than the named beneficiaries of a testamentary instrument that does not effectuate the intent of the testator.

Plaintiff also cites *Beaty v Hertzberg & Golden, PC*, 456 Mich 247; 571 NW2d 716 (1997), in support of its third-party beneficiary argument. In *Beaty*, the plaintiff

[4] Justice BOYLE's opinion was joined by the majority of justices of the Michigan Supreme Court. *Mieras*, 452 Mich at 308 (opinion by BOYLE, J.).

sued the defendant attorneys, who represented the bankruptcy trustee of her deceased husband's corporation, because of their failure to successfully litigate a life insurance claim. *Id*. at 249-250. One of the plaintiff's theories of malpractice was that she was a third-party beneficiary of the contract to prosecute the claim. *Id*. at 259. Citing *Mieras*, our Supreme Court explained that "[i]n a situation such as this, third-party beneficiary liability is premised on the concept that the initial attorney-client contract was so unquestionably for the benefit of the third party that that third party can maintain a suit for negligence by the attorney." *Id*. But the Court explained that the plaintiff's theory was "flawed" because any benefit to a third-party beneficiary must be direct, and the benefit to her was indirect because any funds recovered would pay off creditors of the bankruptcy estate. *Id*. at 259-260. The *Beaty* Court also held that the plaintiff's claim was "fatally defective" because she "failed to plead facts demonstrating her status as a named beneficiary of the contract" between the bankruptcy trustee and the law firm. *Id*. at 260.

The same conclusion applies to the instant case because plaintiff's second amended complaint never pleaded that Tyler or his estate was a named beneficiary of any contract between the Coen defendants and conservator Maki-Childs. Plaintiff asserts that Coen and the other defendant attorneys knew that their services were for plaintiff's benefit. But mere knowledge of a benefit to a third party is not enough. Therefore, plaintiff's failure to plead its status as a third-party beneficiary of a contract between Coen and Maki-Childs is fatal to its third-party-beneficiary theory of malpractice liability.

Because we conclude that the Coen defendants represented only Maki-Childs, plaintiff cannot assert mal-

practice against the Coen defendants in the instant suit because it is not the real party in interest. See MCR 2.201(B).[5] Additionally, plaintiff's claims against Burns and the Moore defendants fail. The Moore defendants and Burns could not have sued the Coen defendants because the estate was not the client of the Coen defendants. Therefore, Burns and the Moore defendants could not have committed malpractice by failing to discover and prosecute a cause of action against the Coen defendants earlier. Because we conclude that the trial court properly determined that plaintiff was not the real party in interest with regard to the legal malpractice claim, we need not reach the alternative issue of whether plaintiff's legal malpractice claim was barred by the statute of repose. For the same reason, we also decline to address plaintiff's argument that there existed a genuine issue of material fact regarding whether defendants held themselves out as representing the estate.

Affirmed.

TALBOT, C.J., and HOEKSTRA, J., concurred with JANSEN, J.

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[5] We acknowledge that the decision in this case raises policy concerns regarding the fact that a protected individual, the party on whose behalf the conservator performs his or her duties, cannot bring a malpractice action against the attorney representing the conservator. However, we cannot " 'substitute our own policy decisions for those already made by the Legislature.' " *Maier v Gen Tel Co of Mich*, 247 Mich App 655, 664; 637 NW2d 263 (2001) (citation omitted). This Court's duty is to interpret the plain language of the statute, which in this case establishes that an attorney hired by a conservator represents the conservator. Therefore, this policy question is properly directed toward the Legislature. See *id*.

LAMKIN v HAMBURG TOWNSHIP BOARD OF TRUSTEES

Docket No. 328836. Submitted November 2, 2016, at Lansing. Decided January 19, 2017, at 9:05 a.m. Leave to appeal denied 500 Mich 1018.

Mary A. Lamkin filed an action in the Livingston Circuit Court against the Hamburg Township Board of Trustees and the Hamburg Township zoning administrator, seeking to compel defendants to enforce a zoning ordinance that plaintiff's neighbors were allegedly violating. The court, Michael P. Hatty, J., sua sponte dismissed plaintiff's complaint under MCR 2.116(C)(5) and (I)(1), concluding that because plaintiff failed to establish that she had suffered special damages from her neighbor's conduct that was not common to other similarly situated property owners, she lacked standing to bring the action and was therefore not entitled to notice or an opportunity to be heard before the circuit court made the dismissal decision. Plaintiff appealed.

The Court of Appeals *held*:

1. MCR 2.116(I)(1)—which provides that a circuit court may render judgment without delay if the pleadings demonstrate that a party is entitled to judgment as a matter of law or if the affidavits or other proofs establish that there is no genuine issue of material fact—allows the court to grant summary disposition sua sponte. However, the circuit court must ensure that a party's basic due-process rights are protected when granting such a motion. Accordingly, the party must be given fair notice and an opportunity to be heard before the party's claim may be dismissed sua sponte. In this case, reversal was required because the circuit court failed to notify plaintiff that it was considering summary disposition of plaintiff's claim.

2. Under MCR 7.203(A)(1), the Court of Appeals has jurisdiction of an appeal of right filed by an aggrieved party from a final order of the circuit court, and the Court's jurisdiction does not hinge on the denial of a motion for reconsideration. Accordingly, in this case, plaintiff was not required to move for reconsideration to preserve her challenge to the circuit court order.

3. MCR 2.111(B)(1) provides that at the pleading stage a party must set forth a statement of the facts on which the pleader relies in stating the cause of action, with the specific allegations

necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend. MCR 2.112(A)(1)(a) provides that a party is not required to allege in his or her complaint the capacity to sue. Instead, the Michigan Court Rules recognize that standing to sue is a fact-based concept that is established with submitted proofs and challenged by a motion for summary disposition, rather than through the pleadings. In this case, the circuit court erred by granting summary disposition on the basis of plaintiff's failure to plead her capacity to sue. Plaintiff was not required to plead her capacity to sue, but the circuit court should have allowed plaintiff the opportunity to demonstrate that she had suffered special damages different from those of other similarly situated property owners before dismissing the claim.

Circuit court order vacated and case remanded for further proceedings.

O'CONNELL, J., concurring, wrote separately to emphasize that due process is necessary to a fundamentally fair court system and that meaningful appellate review is impossible when the lower court record is devoid of sufficient information on which to conduct such review.

RONAYNE KRAUSE, P.J., concurring in part and dissenting in part, agreed with the majority that plaintiff was not required to move for reconsideration in the circuit court before appealing the court's order that dismissed her complaint, but she disagreed with the majority that the trial court erred by dismissing plaintiff's complaint sua sponte without giving plaintiff notice and an opportunity to be heard. A party's right to mandamus or superintending control depends on a clear legal duty being ministerial and the plaintiff having no other remedy. Plaintiff failed to allege that she had a right to the enforcement of the zoning ordinance that was distinct from the general public, which is a predicate for prevailing in an action for mandamus or superintending control. Therefore, the circuit court did not err by concluding on these facts that plaintiff lacked standing to sue. In addition, contrary to the majority's opinion, the circuit court had authority under MCR 2.116(I)(1) to summarily dismiss plaintiff's complaint without providing advance notice that it was considering doing so because due process can be satisfied by affording a party an opportunity for a rehearing. Judge KRAUSE would have remanded the case to the circuit court for an evidentiary hearing to determine whether the court prevented plaintiff from filing a motion for reconsideration, as plaintiff claimed, and would have retained jurisdiction of the case.

1. SUMMARY DISPOSITION — SUMMARY DISPOSITION SUA SPONTE ON PLEADINGS BY COURT — PROCEDURAL DUE PROCESS REQUIRED.

Although MCR 2.116(I)(1) allows a circuit court to grant summary disposition sua sponte on the pleadings—if a party is entitled to judgment as a matter of law or if there is no genuine issue of material fact—the court must ensure that the party's basic due-process rights are protected through fair notice of the potential decision and an opportunity to be heard before that decision is made; an aggrieved party is not required to file a motion for reconsideration of the dismissal order in the circuit court but instead may challenge the order by filing an appeal of right in the Court of Appeals (MCR 7.203(A)(1)).

2. PLEADINGS — CAPACITY TO SUE — ALLEGATIONS OF CAPACITY TO SUE NOT REQUIRED IN PLEADINGS.

A circuit court may not sua sponte grant summary disposition on the pleadings for a party's failure to plead capacity to sue; MCR 2.112(A)(1)(a) does not require a party to allege capacity to sue, which is a fact-based concept that should be established with submitted proofs and challenged by a motion for summary disposition rather than through the pleadings alone.

Mary Ann Lamkin *in propria persona*.

Matecun, Thomas & Olson, PLC (by *Daniel W. Mabis*), for defendants.

Before: RONAYNE KRAUSE, P.J., and O'CONNELL and GLEICHER, JJ.

GLEICHER, J. Plaintiff, Mary Ann Lamkin, is a resident of Hamburg Township in Livingston County. Acting *in propria persona*, she filed a complaint in the circuit court, alleging that the Hamburg Township zoning administrator and the Hamburg Township Board of Trustees unlawfully failed to pursue a zoning violation action against one of her neighbors. Lamkin claims the neighbor unlawfully operates an industrial business involving sealcoating on property zoned as waterfront-residential. She seeks an order of manda-

mus or, alternatively, orders of superintending control or to show cause.

Six days after Lamkin filed her complaint and before it was served, the circuit court sua sponte dismissed it, invoking MCR 2.116(C)(5) ("[t]he party asserting the claim lacks the legal capacity to sue") and MCR 2.116(I)(1), which permits a court to render summary disposition on the pleadings. In a written opinion and order, the circuit court explained that Lamkin "lacks standing to assert the claims alleged in the Complaint" as she "failed to establish that [the neighbor's conduct] results in special damages not common to other property owners similarly situated." The court opined that "[b]ecause Plaintiff lacks standing to assert the claims in her Complaint, this Court is not required to afford Plaintiff notice or an opportunity to be heard, and summary dismissal is appropriate under MCR 2.116(I)(1) and MCR 2.116(C)(5)."

We agree that Lamkin's complaint lacks any allegations of special damages. We cannot agree that the circuit court was entitled to dismiss the complaint without affording Lamkin notice and an opportunity to be heard. Further, dismissal on the pleadings was inappropriate under MCR 2.112(A)(1)(a).

We begin with the process that Lamkin and every other litigant is due. MCR 2.116(I)(1) states:

> 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.

In *Al-Maliki v LaGrant*, 286 Mich App 483, 489; 781 NW2d 853 (2009), this Court recognized that under MCR 2.116(I)(1), "the trial court has the authority to grant summary disposition sua sponte . . . ." We emphasized, however, that "the trial court may not do so

in contravention of a party's due process rights." *Al-Maliki*, 286 Mich App at 489.

"[T]here 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." *Bonner v Brighton*, 495 Mich 209, 235; 848 NW2d 380 (2014). This basic and fundamental concept indisputably applies in the context of summary proceedings; this Court so held quite clearly in *Al-Maliki*. Sua sponte motions for summary disposition are permitted under the court rules, but no exception to basic due-process requirements exists in MCR 2.116(I)(1) or elsewhere. "It is a matter of simple justice in our system for a party to be given fair notice and an opportunity to be heard before the boom is lowered." *DKT Mem Fund Ltd v Agency for Int'l Dev*, 281 US App DC 47; 887 F2d 275, 301 n 3 (1989) (Ginsburg, J., concurring in part and dissenting in part).

Federal district courts, too, may grant summary judgment sua sponte. In so doing, however, a district court must "determine that the party against whom summary judgment is rendered has had a full and fair opportunity to meet the proposition that there is no genuine issue of material fact to be tried . . . ." *Schwan-Stabilo Cosmetics GmbH & Co v Pacificlink Int'l Corp*, 401 F3d 28, 33 (CA 2, 2005) (quotation marks and citation omitted). This rule comports with the United States Supreme Court's observation in *Celotex Corp v Catrett*, 477 US 317, 326; 106 S Ct 2548; 91 L Ed 2d 265 (1986), that "district courts are widely acknowledged to possess the power to enter summary judgment *sua sponte, so long as the losing party was on notice that* [*it*] *had to come forward with all of* [*its*] *evidence*." (Emphasis added.) Here, the circuit court's failure to notify

Lamkin that it was contemplating summary disposition of her claims constitutes a fatal procedural flaw necessitating reversal.[1]

The circuit court made a second error when it granted summary disposition based on Lamkin's failure to plead her standing to sue. The circuit court ruled that Lamkin did not "establish" that her neighbor's actions resulted in special damages and therefore that Lamkin lacked standing to challenge the zoning administrator's decisions. At the pleading stage, however, Lamkin was required only to set forth "[a] statement of the facts, without repetition, on which the pleader relies in stating the cause of action, with the specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend[.]" MCR 2.111(B)(1). And under MCR 2.112(A)(1)(a), Lamkin simply was not required to allege in her complaint her "capacity" to sue. This court rule recognizes that standing to sue, for example, is a fact-bound concept more amenable to proof rather than to pleading. The court rules invite the production of such proof by way of a motion for summary disposition supported with facts, followed by the requisite evidentiary response.[2]

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[1] Nothing in the Michigan Court Rules requires a party to file a motion for reconsideration to preserve his or her challenge to a circuit court ruling. That Lamkin did not move for reconsideration following the dismissal of her case has no bearing whatsoever on her ability to pursue a due-process claim or on this Court's ability to decide that issue. This Court has jurisdiction of an appeal of right filed by an aggrieved party from a final order of the circuit court. MCR 7.203(A)(1). This Court's appellate jurisdiction does not hinge on the denial of a motion for reconsideration.

[2] Even if such specificity were required under Michigan's court rules, we observe that MCR 2.118(A)(2) instructs that leave to amend "*shall* be freely given when justice so requires." (Emphasis added.) "Leave to amend should be denied only for particularized reasons, such as undue

The end result of the circuit court's race to eliminate this case is that we are left with nothing to substantively review. On remand, the circuit court must allow the parties to develop a reviewable record before reaching a judgment, summary or otherwise.

We vacate the order of summary disposition and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

O'CONNELL, J., concurred with GLEICHER, J.

O'CONNELL, J. (*concurring*). I concur in the result. I write separately to state that the trial court, in its effort to be efficient, may have set a new land speed record for disposing of a case. While efficiency is an excellent goal for trial courts to obtain, it may collide with a plaintiff's right to notice and an opportunity to be heard and prevent this Court from being able to engage in meaningful appellate review.

In this case, plaintiff, acting *in propria persona*, filed her lawsuit on July 29, 2015. Two days later on July 31, 2015, before defendants were even served and perhaps even before the ink was dry on the complaint, the trial court sua sponte dismissed the suit. The resulting scant lower court record does not reflect how plaintiff's issues were raised, argued, or presented to the lower court, and it is devoid of any answer by defendants. The trial court's order consists of six

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delay, bad faith, or dilatory motive on the movant's part, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, or where amendment would be futile." *Jenks v Brown*, 219 Mich App 415, 420; 557 NW2d 114 (1996). Absent any record evidence on the issue, it is impossible to determine at this juncture whether Lamkin can establish special damages. Furthermore, Lamkin is entitled to contest the legal premises underlying the court's summary disposition order.

conclusory paragraphs with a very limited recitation of the court's factual conclusions. The trial court's order does not provide sufficient information for this Court to evaluate the reasons for the dismissal or the merits of plaintiff's case.

Clearly, the trial court was frustrated by the numerous (and possibly frivolous) lawsuits that plaintiff has filed. While I appreciate efficiency, I conclude that plaintiff was completely denied her day in court and her opportunity to present her case in a reasonable manner. Though due process may take a little time and patience on the part of the trial court, it is necessary to a fundamentally fair court system. See *Al-Maliki v LaGrant*, 286 Mich App 483, 485-486; 781 NW2d 853 (2009).

I agree with Judge GLEICHER that we must vacate the lower court decision and direct that on remand the trial court give plaintiff an opportunity to present her case and create a reviewable lower court record.

RONAYNE KRAUSE, P.J. (*concurring in part and dissenting in part*). I wholeheartedly agree with Judge GLEICHER's observation that a party's right to seek redress in this Court does not depend on whether they moved for reconsideration in the trial court. However, while I understand my colleagues' reaction to the trial court's nearly immediate disposition of this case, I disagree that the trial court was not permitted to summarily dismiss plaintiff's case sua sponte without providing plaintiff advance notice that it was considering doing so. Furthermore, I find my colleagues' concerns about the sufficiency of the trial court's order baffling. Under the circumstances of this case, I nevertheless find the possibility that the trial court deprived plaintiff of her due-process rights by preventing

her from filing a motion for reconsideration sufficiently troubling that I would remand for an evidentiary hearing on that issue.

Plaintiff's complaint sought a writ of mandamus, an order of superintending control, and an order to show cause, because defendants purportedly failed to enforce a zoning ordinance that plaintiff's neighbors were allegedly violating. This Court looks to the substance of pleadings rather than the formal names or labels given by the parties. *Hartford v Holmes*, 3 Mich 460, 463 (1855); *Norris v Lincoln Park Police Officers*, 292 Mich App 574, 582; 808 NW2d 578 (2011). It is clear from the complaint that plaintiff's "show cause" count really is a request for a preliminary injunction, not a true cause of action. It is therefore entirely dependent on the validity of her other two counts.

The distinction between a claim for mandamus and a claim for superintending control is often confused. See *Choe v Flint Charter Twp*, 240 Mich App 662, 665-667; 615 NW2d 739 (2000). However, they both seek to accomplish essentially the same result and on essentially the same bases: superintending control is directed to a lower court or tribunal, and mandamus is directed to a public official. See *Jones v Dep't of Corrections*, 468 Mich 646, 658; 664 NW2d 717 (2003), and *In re Payne*, 444 Mich 679, 687-689; 514 NW2d 121 (1994). However, they are so closely related that they are sometimes treated as effectively synonymous. See, e.g., *Kelly v Bd of Law Examiners*, 447 Mich 1204 (1994); *Scullion v State Bd of Law Examiners*, 102 Mich App 711, 716 n 3; 302 NW2d 290 (1981); *Choe*, 240 Mich App at 667. Both serve as vehicles for compelling the performance of a clear legal duty. *Genesee Prosecutor v Genesee Circuit Judge*, 386 Mich 672, 680; 194 NW2d 693 (1972).

Significantly, however, a right to mandamus or superintending control depends on the clear legal duty being effectively ministerial and the plaintiff being without any other remedy. *Taylor v Ottawa Circuit Judge*, 343 Mich 440, 444; 72 NW2d 146 (1955); *Cadle Co v Kentwood*, 285 Mich App 240, 246; 776 NW2d 145 (2009). They may compel the *exercise* of discretion, but not the *outcome* of any such exercise. *Teasel v Dep't of Mental Health*, 419 Mich 390, 410; 355 NW2d 75 (1984). To prevail in an action for mandamus (or superintending control), any legal right held by the plaintiff must be distinct from the legal rights held by citizens generally. *Inglis v Pub Sch Employees Retirement Bd*, 374 Mich 10, 13; 131 NW2d 54 (1964). "A court does not abuse its discretion in refusing to grant a writ of superintending control where the party seeking the writ fails to establish grounds for granting a writ." *Cadle Co*, 285 Mich App at 246.

In this case, it is manifestly clear from plaintiff's complaint that the trial court's determination was correct, and precisely what record development my colleagues believe necessary escapes me. Plaintiff alleged nothing that even hinted that she held a right to the enforcement of defendants' zoning ordinance distinct from rights held by the public generally, and the most generous interpretation of the allegations set forth in the complaint indicates that there is no way she could. A private citizen may, in appropriate circumstances, bring an action to abate a public nuisance caused by the violation of a zoning ordinance, but only when the nuisance affects the private citizen in some way distinct from the general public. MCL 125.3407; *Towne v Harr*, 185 Mich App 230, 232-233; 460 NW2d 596 (1990). That is not the action plaintiff sought here. See *Unger v Forest Home Twp*, 65 Mich App 614, 618; 237 NW2d 582 (1975). Even beyond that failing, plain-

tiff's complaint contains extensive invective regarding various alleged illegalities but no specification of how she has in any way been harmed, let alone harmed in a way distinct from the general public.[1] The trial court correctly observed that a direct challenge to the actions of the zoning board regarding the issuance or enforcement of zoning *regarding the property of someone else* is unmaintainable because plaintiff lacks standing to do so. *Id*. I fail to understand how the trial court's opinion to that effect is deficient.

The trial court's nearly immediate sua sponte disposition of this case certainly might be perceived as startling. It is not, however, impermissible. My colleagues would read into MCR 2.116(I)(1) a requirement not written therein and already well established by caselaw as not existing. Trial courts are under enormous stresses to bring actions to conclusions within deadlines imposed not only by the needs of the parties before them, but also administratively dictated artificial deadlines. When it is readily apparent from the pleadings that a party's claims are not actionable or the matter is otherwise impossible to succeed on, MCR 2.116(I)(1) is one of a tiny number of tools given to the trial courts to help them allocate their finite resources to cases with at least possible merit. Although I do believe it would be the better practice, this Court has established that due process does *not* necessarily *require* notice and an opportunity to be heard before a trial court sua sponte dismisses an action under MCR 2.116(I)(1). *Al-Maliki v LaGrant*, 286 Mich App 483, 485-486; 781 NW2d 853 (2009). My colleagues have

[1] Additionally, although plaintiff's complaint is not a model of coherent articulation, it appears that she seeks to compel not a ministerial act or even the exercise of discretion per se, but rather a particular discretionary determination.

invented such a requirement out of thin air. "[D]ue process can be satisfied by affording a party an opportunity for rehearing." *Id*. at 486.

The concerning element in this appeal derives from plaintiff's contention that the trial court did not, in fact, afford her an opportunity to file a motion for reconsideration. More specifically, she contends that she attempted to file such a motion, but that she was told by the trial court's administrative staff that she was not permitted to file postjudgment motions. Although plaintiff provides no concrete evidence of this, I appreciate that it is not obvious how she could do so presently. If true, I would find it impossible to deem such a denial of due process harmless, no matter how overwhelmingly meritless the complaint might appear. Therefore, I would remand for the limited purpose of requiring the trial court to hold an evidentiary hearing to determine whether the court truly prevented plaintiff from filing a motion for reconsideration, and I would retain jurisdiction.

PEOPLE v SARDY (ON REMAND)

Docket No. 319227. Submitted November 28, 2016, at Lansing. Decided January 19, 2017, at 9:10 a.m. Leave to appeal denied 501 Mich 862.

Ghassan S. Sardy was convicted following a jury trial in the Oakland Circuit Court of child sexually abusive activity (CSAA), MCL 750.145c, using a computer to commit a crime, MCL 752.796, and two counts of second-degree criminal sexual conduct (CSC-II), MCL 750.520c. The court, Daniel Patrick O'Brien, J., sentenced defendant to concurrent terms of 71 months to 20 years of imprisonment for the CSAA and computer-crime convictions and 71 months to 15 years of imprisonment for the CSC-II convictions. Defendant's crimes involved his daughter, who was seven years old at the time of defendant's preliminary examination, and stemmed from videos of the child engaged in behavior characterized as masturbation as well as the victim's allegation that defendant had pressed his penis against her clothed genital area on two occasions. The victim testified at trial, but she could not recall the events in question. The court deemed her unavailable and, over objection, admitted the victim's preliminary-examination testimony. The trial court limited defendant's cross-examination of the victim to the subject matter of the victim's direct trial testimony, which consisted only of some foundational and peripheral matters. Therefore, defendant was unable to cross-examine the victim regarding the CSC-II accusations or her lack of memory. Defendant appealed, and the Court of Appeals, MURPHY, P.J., and GADOLA, J. (STEPHENS, J., concurring), affirmed defendant's convictions and, pursuant to *People v Lockridge*, 498 Mich 358 (2015), remanded the case to the trial court for a *Crosby*[1] proceeding regarding defendant's sentences. 313 Mich App 679 (2015). Defendant sought leave to appeal in the Supreme Court, and the Supreme Court, in lieu of granting leave to appeal, vacated Part II of the Court of Appeals' opinion and remanded the case to the Court of Appeals for reconsideration of whether the victim was unavailable at trial for Confrontation Clause purposes and whether defendant's Confrontation Clause rights were vio-

[1] *United States v Crosby*, 397 F3d 103 (CA 2, 2005).

lated when the trial court limited defendant's cross-examination of the victim. In all other respects, the Supreme Court denied defendant's application for leave to appeal. 500 Mich 887 (2016).

On remand, the Court of Appeals *held*:

The Confrontation Clause does not bar the admission of a declarant's prior testimonial statement as long as the declarant is present at trial to answer questions about the statement. When the declarant appears at trial, the declarant is available for purposes of the Confrontation Clause, even when the declarant claims to have no memory of the defendant's alleged misconduct and may be considered unavailable under the relevant hearsay rule, MRE 804(a)(3). Accordingly, when the declarant appears at trial and claims he or she cannot recall the events at issue in the case, the declarant may be cross-examined about the loss of memory and about his or her prior testimonial statement. While a trial court may impose reasonable limits on cross-examination, it may not entirely prohibit a defendant from cross-examining a witness about his or her loss of memory and allegations of the defendant's criminal conduct. In this case, although the victim was unavailable for purposes of the hearsay rule, she was available for purposes of the Confrontation Clause, and the trial court's limitation on defendant's cross-examination of the victim was not reasonable and violated defendant's right to confront the witnesses against him. Defendant's two CSC-II convictions rested wholly on the victim's testimony at the preliminary examination and had to be vacated, but defendant's CSAA and computer-crime convictions were established by the videos and the testimony of others, rendering any Confrontation Clause violation harmless beyond a reasonable doubt with regard to those convictions. Resentencing was required because of the possibility that vacating the CSC-II convictions would affect the scoring of the sentencing guidelines.

Defendant's CSAA and computer-crimes convictions affirmed, defendant's two CSC-II convictions vacated, and the case remanded for resentencing.

1. CONSTITUTIONAL LAW — CONFRONTATION CLAUSE — ADMISSION OF PRELIMINARY-EXAMINATION TESTIMONY — AVAILABILITY OF WITNESS.

A witness is available for purposes of the Confrontation Clause when the witness is present at trial and testifies, even if the witness can no longer remember his or her previous account of the subject matter and could be considered unavailable for purposes of the hearsay rule in MRE 804(a)(3) (US Const, Am VI; Const 1963, art 1, § 20).

2. CONSTITUTIONAL LAW — CONFRONTATION CLAUSE — CROSS-EXAMINATION OF STATE WITNESSES — MEMORY LOSS.

The Confrontation Clauses of the United States and Michigan Constitutions, US Const, Am VI; Const 1963, art 1, § 20, guarantee a criminal defendant the right to confront the witnesses against him or her; a defendant has the right to cross-examine a witness who testifies at trial but claims not to recall the events in question.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Jessica R. Cooper*, Prosecuting Attorney, *Thomas R. Grden*, Appellate Division Chief, and *Kathryn G. Barnes*, Assistant Prosecuting Attorney, for the people.

Robyn B. Frankel for defendant.

ON REMAND

Before: MURPHY, P.J., and STEPHENS and GADOLA, JJ.

MURPHY, P.J. Defendant was convicted following a jury trial of child sexually abusive activity (CSAA), MCL 750.145c, using a computer to commit a crime, MCL 752.796, and two counts of second-degree criminal sexual conduct (CSC-II), MCL 750.520c. Defendant's daughter was the victim of these crimes. Defendant was sentenced to concurrent prison terms of 71 months to 20 years for the CSAA and computer-crime convictions and 71 months to 15 years' imprisonment for the CSC-II convictions. When defendant's appeal was originally before us, we affirmed his convictions, but remanded the case for a *Crosby*[1] proceeding pursuant to *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015), to determine the propriety of defendant's sentences. *People v Sardy*, 313 Mich App 679, 688-689, 733; 884 NW2d 808 (2015). On defendant's application

[1] *United States v Crosby*, 397 F3d 103 (CA 2, 2005).

for leave to appeal in our Supreme Court, the Court, in lieu of granting leave, vacated Part II of our opinion with respect to the Confrontation Clause analysis, but denied leave in all other respects. *People v Sardy*, 500 Mich 887 (2016). The Supreme Court directed us to reconsider "(1) whether the complainant was unavailable for Confrontation Clause purposes,[2] see *Crawford v Washington*, 541 US 36, 59 n 9; 124 S Ct 1354; 158 L Ed 2d 177 (2004), and *United States v Owens*, 484 US 554, 559-560; 108 S Ct 838; 98 L Ed 2d 951 (1988); and (2) whether the defendant's confrontation rights were violated at trial by the trial court's limitation on cross-examination of the complainant, compare *Owens*, *supra*, with *Delaware v Van Arsdall*, 475 US 673, 679; 106 S Ct 1431; 89 L Ed 2d 674 (1986)." *Sardy*, 500 Mich at 888. On remand, we again affirm defendant's CSAA and computer-crime convictions; however, we vacate his two CSC-II convictions and remand for resentencing.

The CSAA and computer-crime offenses were effectively established by two videos introduced by a detective who was qualified as an expert in computer forensic examinations. The videos depicted the young victim "grinding" on a couch in a manner that was characterized as masturbation. Defendant had filmed the videos using his iPhone 4, and the videos had also been stored on defendant's Apple iMac and an external hard drive. With respect to the two CSC-II offenses, the prosecution relied on the victim's testimony "regarding a couple of instances in which, while both were clothed, defendant pressed his penis against the child's genital area[.]" *Sardy*, 313 Mich App at 690. This testimony was elicited from the victim at defendant's preliminary examination. The trial court admitted the victim's

[2] US Const, Am VI; Const 1963, art 1, § 20.

preliminary-examination testimony at the trial after ruling that the victim was unavailable due to lack of memory. The victim had taken the stand at trial and provided some testimony on foundational and peripheral matters but could not recall matters pertaining to the two acts of CSC-II. The trial court allowed defendant to cross-examine the victim at trial, but limited the cross-examination to the subject matter of the direct examination, essentially precluding defendant from exploring the CSC-II accusations made by the victim and her then-current lack of recall or memory.

In his original appeal in this Court, defendant argued that the trial court violated his constitutional right to confront the state's witnesses when it allowed the victim's preliminary-examination testimony to be admitted as substantive evidence at trial. Defendant maintained

> that the victim was not "unavailable" as required to admit the evidence, that the victim's testimony at the preliminary examination was unsworn and thus unusable, given that she had not been placed under oath before testifying, and that the preliminary examination did not provide defendant a full and fair opportunity for cross-examination. [*Sardy*, 313 Mich App at 691.]

In Part II of our opinion, now vacated in its entirety, we ruled that (1) the victim had been unavailable for purposes of the Confrontation Clause, (2) defendant had a full and fair opportunity for cross-examination at the preliminary examination, and (3) failure to place the victim under oath at the preliminary examination did not warrant reversal. *Id*. at 691-711. We note that defendant did not argue to us that his confrontation rights were infringed when the trial court limited his cross-examination of the victim at trial; therefore, we did not address that issue. Defendant also did not raise

that issue in his application for leave to appeal in our Supreme Court. Instead, the Supreme Court, acting sua sponte, has presented that issue to us for review.[3]

The Supreme Court, providing pinpoint citations of three United States Supreme Court opinions, has directed us to examine whether the victim was unavailable for purposes of the Confrontation Clause and whether the trial court violated defendant's confrontation rights by limiting the cross-examination of the victim at trial. We hold that the victim was "available" in relationship to the Confrontation Clause and that the trial court erred by not allowing defendant to cross-examine the victim regarding her memory loss and the alleged conduct giving rise to the two CSC-II charges.

In *Crawford*, 541 US at 59 n 9, the United States Supreme Court noted that when a declarant appears at trial for cross-examination, the Confrontation Clause does not place any constraints on the use of a prior testimonial statement, and that the Clause does not bar the admission of a prior testimonial statement "so long as the declarant is present at trial to defend or explain it." The language in this footnote has been construed "to mean that even a witness with no memory of the events in question is nevertheless present and available for cross-examination" for Confrontation Clause purposes. *State v Toohey*, 816 NW2d 120, 128; 2012 SD 51 (2012), citing *State v Biggs*, 333 SW3d 472, 477-478 (Mo, 2011); *State v Holliday*, 745 NW2d 556, 567-568 (Minn, 2008); *State v Legere*, 157 NH 746,

[3] The Supreme Court's order remanded the case to us for *reconsideration* of the two issues set forth in the order; however, as indicated, we did not *consider* the second issue concerning cross-examination of the victim at trial because the issue was never argued. We do note that defendant had preserved the issue at trial.

753-755; 958 A2d 969 (2008); *State v Pierre*, 277 Conn 42, 80-84; 890 A2d 474 (2006); *State v Gorman*, 854 A2d 1164, 1176-1178; 2004 ME 90 (2004). Here, the declarant, the victim, was present at trial and could have been cross-examined regarding the CSC-II offenses and her memory loss. In *Owens*, 484 US at 559-560, the United States Supreme Court ruled:

> The Confrontation Clause guarantees only an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish. . . . [T]hat opportunity is not denied when a witness testifies as to his current belief but is unable to recollect the reason for that belief. It is sufficient that the defendant has the opportunity to bring out such matters as the witness' bias, his lack of care and attentiveness, his poor eyesight, and even . . . the very fact that he has a bad memory. If the ability to inquire into these matters suffices to establish the constitutionally requisite opportunity for cross-examination when a witness testifies as to his current belief, the basis for which he cannot recall, we see no reason why it should not suffice when the witness' past belief is introduced and he is unable to recollect the reason for that past belief. In both cases the foundation for the belief (current or past) cannot effectively be elicited, but other means of impugning the belief are available. Indeed, if there is any difference in persuasive impact between the statement "I believe this to be the man who assaulted me, but can't remember why" and the statement "I don't know whether this is the man who assaulted me, but I told the police I believed so earlier," the former would seem, if anything, more damaging and hence give rise to a greater need for memory-testing, if that is to be considered essential to an opportunity for effective cross-examination. We conclude with respect to this latter example, as we did . . . with respect to the former, that it is not. The weapons available to impugn the witness' statement when memory loss is asserted will of course not always achieve success, but successful cross-examination is not the constitutional

> guarantee. They are, however, realistic weapons, as is demonstrated by defense counsel's summation in this very case, which emphasized [the victim's] memory loss and argued that his identification of respondent was the result of the suggestions of people who visited him in the hospital. [Citations, quotation marks, and brackets omitted.]

Owens indicates that a declarant who appears at trial but claims memory loss is "available" for purposes of the Confrontation Clause, even though our hearsay rules provide that a declarant is unavailable when the declarant "has a lack of memory of the subject matter of the declarant's statement," MRE 804(a)(3).[4] See *Toohey*, 816 NW2d at 128 n 2 (noting that under the South Dakota rule of evidence comparable to MRE 804(a), lack of memory renders a witness unavailable, yet under *Owens*, "memory loss may not render a witness 'unavailable' in the constitutional sense"). On the strength of *Crawford* and *Owens*, we hold that the victim was available for purposes of the Confrontation Clause.

With respect to the use of the victim's preliminary-examination testimony at trial, *Crawford*, as indicated earlier, observed that when a declarant appears at trial and testifies on cross-examination, the Confrontation Clause does not place constraints on or bar the use of prior testimonial statements. *Crawford*, 541 US at 59 n 9. Although defendant was able to cross-examine the

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[4] In our original opinion, we relied on MRE 804(a)(3) and *People v Garland*, 286 Mich App 1, 7; 777 NW2d 732 (2009). *Garland* indicates that the provisions concerning "unavailability" in MRE 804(a) may be employed to determine unavailability for purposes of the Confrontation Clause. *Sardy*, 313 Mich App at 694-695. We note that defendant simply argued that the victim was available because she had feigned lack of memory and was instead refusing to testify; defendant did not argue that a declarant who takes the stand and claims lack of memory is "available" for purposes of the Confrontation Clause. *Id*. at 694.

victim at the preliminary examination, defendant was not given the opportunity to cross-examine her *at trial* relative to the CSC-II charges, at which point the victim was claiming a lack of any memory of the sexual assaults. The jury was not presented with cross-examination testimony regarding the fact that the victim could no longer recall or remember the substance of the claims she had made at the time of the preliminary examination. The trial court's limitation of the victim's cross-examination at trial thus deprived defendant of the opportunity to potentially undermine entirely the charges of CSC-II. See *Owens*, 484 US at 559-560. We therefore hold, relative to the second question posed in the Supreme Court's remand order, that there was indeed a Confrontation Clause violation. And under these circumstances, we cannot conclude that the Confrontation Clause infringement was harmless beyond a reasonable doubt. See *People v Shepherd*, 472 Mich 343, 348; 697 NW2d 144 (2005). Accordingly, we must vacate the two CSC-II convictions.[5] However, with regard to the CSAA and computer-crime convictions, they are once again affirmed, given that defendant's inability to cross-examine the victim at trial did not have any pertinent bearing on those crimes, which were established by the videos and the testimony of others. And to the extent that cross-examination of the victim may have had any relevancy to the CSAA and computer-crime offenses, we deem any Confrontation Clause violation harmless beyond a reasonable doubt.

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[5] We note that the remand order also made reference to *Van Arsdall*, 475 US at 679, but the discussion on page 679 of that opinion simply acknowledged that a trial court has wide latitude to impose reasonable limits on cross-examination. Barring any and all cross-examination on the CSC-II charges, as the trial court did in this case, did not constitute a reasonable limit.

Finally, although we had originally remanded the case for a *Crosby* proceeding under *Lockridge*, we now remand for resentencing on the CSAA and computer-crime convictions under the advisory guidelines and the principles established in *Lockridge* because there exists a possibility that the vacation of the CSC-II convictions may affect the scoring of the sentencing guidelines variables and the exercise of the court's sentencing discretion.

Affirmed with respect to defendant's CSAA and computer-crime convictions, vacated with regard to defendant's two CSC-II convictions, and remanded for resentencing. We do not retain jurisdiction.

STEPHENS and GADOLA, JJ., concurred with MURPHY, P.J.

BOWLING v McCARRICK

Docket No. 331583. Submitted November 8, 2016, at Lansing. Decided December 13, 2016. Approved for publication January 26, 2017, at 9:00 a.m.

Bradly McCarrick and Jennifer Bowling shared legal custody of their children, MM and KM. Bowling had physical custody of MM, and McCarrick had physical custody of KM. Both parties had parenting time with the child in the other party's physical custody. McCarrick moved in the Ingham Circuit Court, Richard J. Garcia, J., to change MM's physical custody from Bowling to himself. The court referred the case to conciliation with the Friend of the Court, as it did with most domestic disputes. Bowling and McCarrick were unable to settle their differences, and the conciliator prepared a report and a recommendation on the matter according to the Ingham County Friend of the Court Handbook and Local Administrative Order 2006-2. The conciliator recommended that McCarrick be awarded primary physical custody of MM; Bowling filed an objection to the recommendation, but, following a hearing, the court entered an order changing MM's primary physical custody to McCarrick. Bowling appealed by delayed leave granted.

The Court of Appeals *held*:

When custody has been determined by a previous court order, a trial court must first find proper cause or a change of circumstances under MCL 722.27(1)(c) before modifying or amending that order. MCL 552.505(1)(g) authorizes the Friend of the Court to investigate all relevant facts and to make a written report and recommendation to the parties and to the court regarding child custody or parenting time, or both, if ordered to do so by the court. But that statute further states that if custody has been established by court order the court shall order an investigation only if the court first finds that proper cause has been shown or that there has been a change of circumstances. In this case, the trial court did not first make an independent finding of proper cause or a change of circumstances. Instead, the court erroneously relied on the conciliator's report to conclude that there existed proper

cause or a change of circumstances justifying an examination of the current custody arrangement.

Order changing custody vacated and case remanded.

Speaker Law Firm, PLLC (by *Liisa R. Speaker* and *Jennifer M. Alberts*), for Jennifer Bowling.

Bradly McCarrick *in propria persona*.

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

PER CURIAM. Plaintiff-mother, Jennifer Bowling, appeals by leave granted the trial court's order changing physical custody of the parties' son, MM, from herself to defendant-father, Bradly McCarrick.[1] We vacate the order and remand.

The parties have two children together, KM and MM, and their judgment of divorce provided for joint legal custody as to both children.[2] Pursuant to prior orders, Bowling had physical custody of MM, and McCarrick had physical custody of KM. The orders also provided that each party had parenting time with the child not in the party's physical custody. The instant matter concerns McCarrick's motion to change physical custody of MM.

MCL 722.27(1)(c) provides that the trial court may "modify or amend" a previous child custody judgment or order "for proper cause shown or because of change of circumstances" if doing so is in the best interests of the child. When a current order governs the custody of a minor child, the party requesting a change in custody

[1] *Bowling v McCarrick*, unpublished order of the Court of Appeals, entered June 3, 2016 (Docket No. 331583).

[2] McCarrick informed the trial court that he had another child and two stepsons who live with him and his wife. Bowling informed the trial court that she had four children total. No other information about these children is contained in the record.

bears the initial burden of proving "either proper cause or a change of circumstances sufficient to warrant reconsideration of the custody decision." *Gerstenschlager v Gerstenschlager*, 292 Mich App 654, 657; 808 NW2d 811 (2011). The moving party must meet this burden by "a preponderance of the evidence . . . *before* the trial court can consider whether an established custodial environment exists . . . and conduct a review of the best interest factors." *Vodvarka v Grasmeyer*, 259 Mich App 499, 509; 675 NW2d 847 (2003).

McCarrick's motion to change custody was immediately referred by the trial court to the Ingham County Friend of the Court for a "conciliation conference." Although the Michigan Court Rules do not refer to conciliation, conciliation is provided for in Ingham Circuit Court Local Administrative Order 2006-2, and it is described in the Ingham County Friend of the Court Handbook. It appears that the Ingham Circuit Court requires that all domestic cases involving issues of custody, parenting time, domicile, residence, and support be referred to a conciliation conference and that, at this conference, the parties meet with a conciliator from the Friend of the Court office, who employs mediation techniques in an attempt to help the parties resolve the dispute. Both Local Administrative Order 2006-2 and the Ingham County Friend of the Court Handbook state that if the parties are unable to reach agreement at the conciliation conference, the conciliator will make a recommendation to the circuit court that will become the court's order unless either party files an objection, in which case a hearing will be held.

The parties attended the conciliation conference but were unable to reach an agreement. No record of the conference has been provided to us, and neither Local

Administrative Order 2006-2 nor the Friend of the Court Handbook indicates that a record of conciliation conferences is to be maintained. The conciliator issued a report and recommendation on December 2, 2015, opining that there was proper cause or change of circumstances such that a change in physical custody could be considered. The report went on to recommend that primary physical custody of MM be changed from Bowling to McCarrick and set forth various reasons for that conclusion in the context of the statutory best-interest factors. Bowling timely filed an objection to the conciliator's recommendation, and a hearing was held before the trial court on January 13, 2016.[3]

Plaintiff's appeal centers on her assertion that the trial court may not consider a conciliator's report with regard to either the proper-cause threshold question or the best-interest factors. We agree that the law is clear that a conciliator's report may not be considered in regard to the threshold question. MCL 552.505(1)(g) authorizes the Friend of the Court, on order from the trial court, "[t]o investigate all relevant facts, and to make a written report and recommendation to the parties and to the court, regarding child custody or parenting time, or both, if ordered to do so by the court." But that statute also explicitly states that "[i]f custody has been established by court order, the court shall order an investigation *only if the court first finds* that proper cause has been shown or that there has been a change of circumstances." *Id*. (emphasis added). Here, the trial court referred the matter to the Friend of the Court before it had made this determination.

[3] According to the Ingham County Friend of the Court Handbook, "[i]f objections are filed within the 21 days, a referee hearing will be held." Although a referee hearing was not held, a hearing on the objections was heard by the trial court. The parties received a "Notice of Hearing" informing them of the hearing on Bowling's objections.

Indeed, in ultimately determining that there was proper cause, the court relied on the conciliator's report. Moreover, the court's ruling on the threshold question may have been influenced by the portion of the report addressing best interests, which would have put the best-interest cart before the threshold horse.[4] Given this error, we vacate the trial court's orders finding proper cause and changing custody and remand for further proceedings.[5]

We vacate the change-of-custody order and remand to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

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

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[4] We recognize that as to the proper-cause question, an evidentiary hearing is not always required. *Vodvarka*, 259 Mich App at 512. However, in order to forgo a hearing, the trial court must determine whether "there are contested factual issues that must be resolved in order for the court to make an informed decision on the motion [to change custody]." MCR 3.210(C)(8). A trial court's decision under MCL 722.27(1)(c) must be based on admissible evidence. *Mann v Mann*, 190 Mich App 526, 532; 476 NW2d 439 (1991).

[5] We have not addressed whether the conciliator's report may be relied on by the trial court in making a best-interest determination should the court find proper cause to consider a change in custody. Given that this record does not clearly set forth the training, job responsibilities, or authority of the conciliator in Ingham County, and given the lack of any statewide court rule governing conciliation, we cannot determine if the conciliator's report would fall within MCL 552.505(1)(g) and MRE 1101 (applicability of the rules of evidence). Accordingly, if the trial court finds proper cause to consider a change in custody, it would be prudent for the trial court to conduct a full evidentiary hearing on the best-interest factors rather than to rely on a conciliator's report.

BLACKWELL v FRANCHI

Docket No. 328929. Submitted December 13, 2016, at Detroit. Decided January 31, 2017, at 9:00 a.m. Leave to appeal sought.

Susan Blackwell filed a premises liability complaint in the Oakland Circuit Court against Dean and Debra Franchi after she was injured in a fall in defendants' home. Blackwell's injury occurred as she stepped into a dark mud room off of defendants' front hallway, unaware of the eight-inch step that descended into the mud room. Defendants moved for summary disposition under MCR 2.116(C)(10), claiming that there was no genuine issue of material fact because the drop-off into the mud room presented an open and obvious danger. The court, Colleen A. O'Brien, J., granted defendants' motion. Blackwell appealed.

The Court of Appeals *held*:

A premises owner has no duty to warn a licensee of an open and obvious danger when the risk of harm exists only if the licensee fails to discover the condition and realize its danger. Generally, an unremarkable step or drop-off does not, by itself, create a risk of harm because if a person sees the drop-off, he or she can readily navigate it without harm. When a person is harmed while encountering a drop-off, the question is whether he or she should have seen it and realized the danger. This is an objective question. That is, a licensee should discover a dangerous condition of the land when, on casual inspection, an average person of ordinary intelligence operating under the same conditions as the licensee would have seen the dangerous condition. A condition discoverable on casual inspection by an average person of ordinary intelligence is an open and obvious condition about which the premises owner generally has no duty to warn. In this case, Blackwell did not see the drop-off into the mud room because the room was dark and, according to her, the drop-off was not readily apparent. Blackwell introduced deposition testimony from other guests that evening in support of her assertion that no light was on in the mud room and the height differential between the hallway and the mud room was not open and obvious to an average person. On the basis of the testimony and photographs Blackwell submitted in defense of defendants' motion for sum-

mary disposition, there existed a genuine question of material fact about whether the drop-off to the mud room was a condition discoverable by an average person on casual inspection under the same conditions present when Blackwell encountered the drop-off. Defendants' argument that Blackwell could have discovered the drop-off if she had turned on the light to the mud room presented a question of comparative negligence; it did not affect the duty owed to Blackwell by defendants. A licensee is not required to take steps to improve visibility and the discoverability of the dangerous condition on the premises. The trial court improperly granted defendants' motion for summary disposition.

Reversed and remanded.

GLEICHER, J., concurring, wrote separately only to respond to the dissent. The dissent's identification of the darkness as the open and obvious danger was an inaccurate statement of the law. Premises liability actions concern dangerous conditions of the land. In this case, the dangerous condition of the land was an eight-inch drop-off that could not be seen on casual inspection—not the darkness itself.

K. F. KELLY, P.J., dissenting, agreed that Blackwell was a licensee and that defendants had a duty to warn her of hidden dangers. However, the question was not whether the drop-off was open and obvious. Rather, the question was whether the dark room was open and obvious. Blackwell's injuries arose because she purposely walked into a dark room, not because she encountered an otherwise unremarkable step into the room. The trial court properly granted summary disposition in favor of defendants because Blackwell should have recognized the danger posed by walking into a dark and unfamiliar room.

Oliver Law Firm (by *Kevin S. Oliver* and *Lindsay F. Sikora*) for Susan Blackwell.

Kopka Pinkus Dolin PLC (by *Mark L. Dolin* and *Steven M. Couch*) for Dean and Debra Franchi.

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

SHAPIRO, J. Plaintiff appeals as of right the order of the trial court granting defendants' motion for summary disposition under MCR 2.116(C)(10) (no genuine

issue of material fact) in this premises liability case. On the evening of December 14, 2013, plaintiff attended a dinner party at defendants' home. Defendants' home includes a hallway that leads from the front door to the living room and dining room area. There is a room on each side of the hallway, a bathroom and a mud room. There is an approximately eight-inch drop-off as one steps into the mud room from the hallway. Plaintiff went to put her purse in the mud room after arriving at defendants' home and fell upon entry as a result of the drop-off. Plaintiff was injured and filed suit. Defendants moved for summary disposition, arguing that the drop-off was open and obvious, and therefore they had no duty to warn plaintiff of its existence. The trial court granted defendants' motion. We reverse.[1]

The open and obvious danger doctrine provides that "if the particular activity or condition creates a risk of harm *only* because the invitee [or licensee] does not discover the condition or realize its danger" then liability is cut off "if the invitee [or licensee] should have discovered the condition and realized its danger." *Bertrand v Alan Ford, Inc*, 449 Mich 606, 611; 537 NW2d 185 (1995).[2] As a general rule, a drop-off, like a step,

[1] In addition to premises liability, plaintiff's complaint contained allegations sounding in ordinary negligence and nuisance. The trial court granted summary disposition to defendants on those claims as well. The parties do not present any substantial argument on appeal about ordinary negligence or nuisance, and we affirm the trial court's grant of summary disposition on those claims.

[2] Plaintiff argues that she should properly be considered an invitee because the dinner party at defendants' house was a work-related party. However, the evidence does not support this conclusion. Plaintiff did work at the University of Michigan with defendant Debra Franchi, but both testified at their depositions that only two other University of Michigan employees attended the party. Defendant Dean Franchi testified at his deposition that 50-60 people had been invited to the party

does not in and of itself create a risk of harm because if the drop-off is seen, a reasonable person can readily navigate it without incident.[3] In this case, however, plaintiff argues that the danger from the drop-off arose because she did not discover the drop-off or realize its danger. Therefore, the question is whether plaintiff *should have* discovered the drop-off and realized its danger.

Whether plaintiff should have discovered the drop-off turns on whether "an average user with ordinary intelligence acting under the same conditions would have been able to discover the danger and the risk presented by the condition upon casual inspection." *Grandberry-Lovette v Garascia*, 303 Mich App 566, 577; 844 NW2d 178 (2014) (quotation marks and citation omitted), abrogated on other grounds by *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 10 n 1 (2016). If so, the condition is open and obvious, and no duty to warn arises. A defendant is entitled to summary dis-

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and that about 20-25 people attended. Additionally, during plaintiff's deposition, she distinguished defendants' party from her employer's holiday party. This evidence shows that plaintiff was properly classified as a licensee at the time of her injury. A premises possessor does not owe a duty to a licensee to make the premises safe, but does owe a duty "to warn the licensee of any hidden dangers the owner knows or has reason to know of, if the licensee does not know or have reason to know of the dangers involved." *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000).

[3] The risk of harm presented by open and obvious steps is generally not unreasonable, but "where there is something unusual about the steps, because of their character, location, or surrounding conditions, . . . the duty of the possessor of land to exercise reasonable care remains." *Perkoviq v Delcor Homes—Lake Shore Pointe, Ltd*, 466 Mich 11, 17-18; 643 NW2d 212 (2002) (quotation marks and citation omitted). See also *Bertrand*, 449 Mich at 624-625 (concluding that though there was no duty to warn because the step was open and obvious, a question of fact existed about whether the step itself, given its location and the congested pedestrian traffic pattern, created an unreasonable risk of harm).

position on the basis of the open and obvious danger doctrine "[i]f the plaintiff alleges that the defendant failed to warn of the danger, yet no reasonable juror would find that the danger was not open and obvious . . . ." *Bertrand*, 449 Mich at 617. In order for a plaintiff's claim to survive a defendant's motion for summary disposition on the basis that the danger was open and obvious, the plaintiff must "come forth with sufficient evidence to create a genuine issue of material fact that an ordinary user upon casual inspection could not have discovered the existence of the [condition]." *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993). Therefore, we must determine whether, in light of the evidence presented, there is a genuine factual dispute regarding whether an average user of ordinary intelligence acting under the conditions as they existed at the time plaintiff encountered the drop-off would have been able to discover it on casual inspection. See *id*.

Plaintiff presented deposition testimony from several other party guests establishing that the drop-off into the mud room was not discoverable upon casual inspection at the time plaintiff encountered it. Guest Endia Simmons testified that she was walking with plaintiff when plaintiff fell. Simmons testified, "[W]e didn't realize that there was a step down because there [were] no lights in that particular room." Simmons further testified that "you could not see that there was a level down into [the] mud room" and that "[i]t looked like it just went straight across." Simmons also stated that if she had been walking ahead of plaintiff Simmons herself likely would have fallen. Guest Ebony Whisenant, while acknowledging that she did not specifically see plaintiff fall, corroborated Simmons's description of the mud room entrance. Whisenant testified at her deposition that the floor into the mud

room looked level and that the height differential could not be seen. Whisenant described the mud room as "pretty dark." Additionally, while the deposition testimony of the guests was not unanimous as to the lighting condition of the hallway adjacent to the mud room, everyone, including defendant Dean Franchi, agreed that the light inside the mud room was turned off at the time of plaintiff's fall. The photographs submitted by the parties also demonstrated that the drop-off was not easily seen, even with sufficient lighting. The testimony and photographs clearly demonstrated a question of fact about whether an average user acting under the conditions existing when plaintiff approached the mud room would have been able to discover the drop-off upon casual inspection.[4]

The instant case is distinguishable from *Novotney*, in which we determined that summary disposition was appropriate. In that case, the plaintiff did not assert that the handicap ramp could not be seen by an average person; she alleged only that she did not notice it even though it was daytime. In the case now before us, plaintiff asserts that given the absence of lighting, the drop-off could not be seen by an average person, and she has presented evidence through the testimony of third parties and photographs to support that assertion.

Defendants also argue that the drop-off, or height differential, was open and obvious because plaintiff could have turned on a light switch located at the entry to the mud room that would have illuminated the mud room. However, this argument goes to whether plaintiff was comparatively negligent; it does not affect duty.

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[4] Simmons and plaintiff testified that they were directed by Debra Franchi to put their purses in the mud room. Debra Franchi testified that they went in on their own initiative.

See *Lamp v Reynolds*, 249 Mich App 591, 598-600; 645 NW2d 311 (2002). The open and obvious danger doctrine focuses on the condition of the premises and the hazard as they existed at the time the plaintiff encountered them. See *Novotney*, 198 Mich App at 475. There is no additional requirement that the plaintiff take reasonable steps to improve the visibility of the alleged hazard. Defendants' argument that plaintiff should have discovered and turned on the light switch is not merely a statement that plaintiff should have looked where she was going but is also a statement that plaintiff should have altered the condition of the premises by turning on the lights.

The determination of whether defendants had a duty to warn plaintiff of the drop-off depends on how the conflicting testimony regarding whether the drop-off was open and obvious is resolved. Resolution of the conflicting testimony is a question for the jury, and therefore the trial court should not have granted summary disposition to defendants. See *Bertrand*, 449 Mich at 617.

Reversed and remanded. We do not retain jurisdiction.

GLEICHER, J., concurred with SHAPIRO, J.

GLEICHER, J. (*concurring*). I fully concur with the analysis advanced in the majority opinion and write separately only to respond to the dissent.

According to the dissent, "[t]he relevant inquiry is not whether the *step* was open and obvious, but whether the *dark room* was open and obvious." Respectfully, this is an inaccurate statement of the law. The danger on defendant's land was a step shrouded in darkness. The readily apparent darkness of the mud

room would have presented no danger had the step not been there.

In large part, Michigan's law of premises liability focuses on whether a particular property owner owes a duty of care to a third party. In cases involving licensees such as plaintiff Susan Blackwell, defendants have a duty to warn of any hidden dangers known to them. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000). The "dangers" that are the subjects of premises-liability law are conditions of the *land*. In the seminal case of *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001), our Supreme Court plainly enunciated that the duty of a premises possessor relates to risks of harm "caused by a dangerous condition on the land." The "dangerous condition on the land" involved here was an eight-inch drop-off that could not be seen on casual inspection by an ordinary user of the premises.

In *Abke v Vandenberg*, 239 Mich App 359, 363-364; 608 NW2d 73 (2000), this Court recognized that darkness may impair a plaintiff's visibility to the extent that an otherwise observable danger no longer qualifies as open and obvious. The plaintiff in *Abke* fell from a loading dock into a truck bay. *Id*. at 360. He claimed that the drop-off into the truck area was not discernable due to darkness. We held that the trial court properly denied the defendant's motion for summary disposition, as a factual dispute existed "concerning the visibility of the truck bay." *Id*. at 362. See also *Knight v Gulf & Western Props, Inc*, 196 Mich App 119, 127; 492 NW2d 761 (1992) ("The fact that defendant's vacant warehouse was not adequately lit was both obvious and known to plaintiff, but there was no evidence that he was aware or had reason to anticipate that there were interior loading docks that otherwise

were not marked or blocked off."). Those cases, like this one, involve elevation differentials hidden by poor lighting. In neither of the previous cases was darkness the danger—after all, darkness is not necessarily dangerous. The danger presented in the previous cases, and here, was an unseen and unseeable step—a condition of the land.

Record evidence supports that plaintiff was directed to place her coat in a completely dark room preceded by a step that was unexpected and invisible on casual inspection. The legal question presented by defendants' motion for summary disposition was whether a reasonable person in plaintiff's position would have foreseen the danger posed by the concealed step. *Laier v Kitchen*, 266 Mich App 482, 498; 702 NW2d 199 (2005). It bears emphasis that this test is objective. *Id*. It hinges on whether the dangerous condition on the land would have been visible to an ordinary person. We must examine whether a reasonable person in plaintiff's position would have foreseen a danger. *Hughes v PMG Building, Inc*, 227 Mich App 1, 11; 574 NW2d 691 (1997). As the majority opinion aptly describes, a question of fact exists regarding this question. Viewed in the light most favorable to plaintiff, a reasonable jury could conclude that defendants should have anticipated that a first-time guest in their home would not have been able to see the darkness-enveloped step, and that a warning was required.

The dissent commits a second legal error by placing on plaintiff the duty to discover any dangers hidden within the dark room before entering it. *Lugo* teaches that "[t]he level of care used by a particular plaintiff is irrelevant to whether the condition created or allowed to continue by a premises possessor is unreasonably dangerous." *Lugo*, 464 Mich at 522 n 5. "In a situation

where a plaintiff was injured as a result of a risk that was truly outside the open and obvious doctrine and that posed an unreasonable risk of harm, the fact that the plaintiff was also negligent would not bar a cause of action." *Id*. at 523. See also MCL 600.2958. Absent any warning, plaintiff had no reason to expect a step, and the record hints of no clues that would have raised a suspicion of a significant elevation differential before continuing ahead. Accordingly, I fully concur with the majority's conclusion that reversal of summary disposition is warranted.

K. F. KELLY, P.J. (*dissenting*). I respectfully dissent. The relevant inquiry is not whether the *step* was open and obvious, but whether the *dark room* was open and obvious.

I agree with the majority that plaintiff was a licensee and that defendants had an obligation to warn her of hidden dangers. At the heart of this matter is what constituted the "danger" to plaintiff—the unexceptional eight-inch step or the dark room? At oral argument, plaintiff's attorney conceded that there was absolutely nothing remarkable about the step. Counsel specifically acknowledged that it was a normal eight-inch step that, had the room been properly lit, would have been open and obvious. Plaintiff claims that the step was a danger because it was "unknown." However, it was unknown because plaintiff purposefully entered a dark room to confront unidentified dangers. The danger was not the step, but the dark room itself, which could have contained a variety of other unspecified and commonplace "dangers," such as laundry baskets or toys. The fact that the room was not lit was open and obvious. Plaintiff should have realized the danger posed by entering a dark and unknown room. I would affirm summary disposition in defendants' favor.

ALLARD v ALLARD (ON REMAND)

Docket No. 308194. Submitted June 16, 2016, at Lansing. Decided January 31, 2017, at 9:05 a.m.

Plaintiff, Earl H. Allard, Jr., and defendant, Christine A. Allard, were granted a divorce in the Wayne Circuit Court. Defendant appealed, contending that the court, Megan Maher Brennan, J., erred by enforcing the parties' antenuptial agreement; the agreement provided that any property acquired in either party's individual capacity or name during the marriage would remain the sole and separate property of the party named on the account or the party who acquired the property in his or her individual capacity or name. Most of the real estate acquired during the course of the marriage was acquired in the name of various limited liability companies (LLCs) formed by plaintiff and of which he was the sole member. The Court of Appeals, M. J. KELLY, P.J., and WILDER and FORT HOOD, JJ., affirmed the circuit court's determination that the antenuptial agreement was valid and enforceable, reversed the court's determination that all property and income acquired during the marriage by plaintiff and his LLCs were part of plaintiff's separate estate, and remanded the case for further proceedings. 308 Mich App 536 (2014). Plaintiff sought leave to appeal in the Supreme Court, which granted plaintiff's application. The Supreme Court vacated in part, affirmed in part, and reversed in part the Court of Appeals' decision. 499 Mich 932 (2016). Specifically, the Supreme Court reversed the Court of Appeals' determination that property acquired in the name of plaintiff and his LLCs during the marriage was not his separate property and affirmed the Court of Appeals' conclusion that the antenuptial agreement did not treat the income earned by the parties during the marriage as separate property. The Supreme Court also vacated the Court of Appeals' conclusion that MCL 552.23(1) and MCL 552.401 do not allow a party to invade the other spouse's separate estate contrary to the terms of a valid antenuptial agreement, reasoning that if the agreement did nothing more than divide the property between the marital estate and the parties' separate estates, the trial court could have exercised its discretion under those statutes to invade plaintiff's separate estate. The Supreme Court remanded

the case to the Court of Appeals to consider whether a provision in the antenuptial agreement waived defendant's ability to seek invasion of plaintiff's separate estate under MCL 552.23(1) and MCL 552.401. The Supreme Court, citing *Staple v Staple*, 241 Mich App 562 (2000), and *Omne Fin, Inc v Shacks, Inc*, 460 Mich 305 (1999), remanded the case to the Court of Appeals for consideration of whether parties may waive the trial court's discretion under MCL 552.23(1) and MCL 552.401 through an antenuptial agreement, and if so, whether the parties validly waived MCL 552.23(1) and MCL 552.401 in this case.

On remand, the Court of Appeals *held*:

1. A divorce case is equitable in nature, and a court of equity molds its relief according to the character of the case; once a court of equity acquires jurisdiction, the court will do what is necessary to accord complete equity and to conclude the controversy. However, because divorce is not a common-law right, a circuit court presiding over divorce matters does not have general equity powers but is limited to those powers specifically granted by statute. To that end, MCL 552.12, MCL 552.23(1), and MCL 552.401 grant circuit courts power in divorce actions. MCL 552.12 provides that the circuit court has the power to award issues, decree costs, and enforce its decrees. The division of property must be equitable in a divorce action. In that vein, MCL 552.401 provides that if it appears from the evidence in a case that a party contributed to the acquisition, improvement, or accumulation of property during a marriage, the circuit court may include in any decree of divorce or of separate maintenance entered in the court appropriate provisions awarding to a party all or a portion of the property, either real or personal, owned by his or her spouse as appears to be equitable under all the circumstances of the case. Similarly, MCL 552.23(1) provides that once a judgment of divorce or separate maintenance is entered, if the estate and effects awarded to either party are insufficient for the suitable support and maintenance of either party and any children of the marriage who are committed to the care and custody of either party, the court may also award to either party the part of the real and personal estate of either party and spousal support out of the real and personal estate, to be paid to either party in gross or otherwise as the court considers just and reasonable, after considering the ability of either party to pay and the character and situation of the parties and all other circumstances of the case.

2. Consistently with *Staples*—which held that parties to a divorce settlement may waive by contract their right under MCL 552.28 to petition for modification of an agreed-upon alimony provision—and *Omne*—which held that although MCL 600.1651

grants parties the right to waive any objection to venue after a cause of action arises, the parties may not by contract establish venue for potential causes of action that may arise after the contract is executed, contrary to that statute's clear language—MCL 552.12, MCL 552.23(1), and MCL 552.401 had to be interpreted to determine whether defendant could waive, through the antenuptial agreement, her right to an equitable division of property, spousal support, and child support. Reading the statutes together, the Legislature clearly intended circuit courts to have equitable discretion—when dividing property in a divorce matter—to invade the separate assets of the parties if doing so is necessary to achieve equity in the division; the statutes empower the circuit court in the property division determination; they do not grant any right to the parties in a divorce action to petition for the invasion of separate assets. Although parties have a fundamental right to contract as they see fit, they have no right to do so in contravention of Michigan's statutes and public policy. Accordingly, because parties to a divorce do not have any rights to waive under MCL 552.23(1) and MCL 552.401, they may not compel a court of equity, through an antenuptial agreement, to order a property settlement that is inequitable. In other words, parties cannot, by mutual agreement, strip a circuit court of its authority under MCL 552.23(1) to order relief that the court, in its sound discretion, deems necessary to equitably distribute property and adequately support and maintain the parties' minor children.

3. In this case, the parties' antenuptial agreement could not and therefore did not waive the circuit court's equitable discretion, under MCL 552.23(1) and MCL 552.401, to invade the separate assets of the parties if doing so was necessary to achieve equity in the division; defendant could not waive a right that belonged to the circuit court. Accordingly, the circuit court erred when it concluded that the parties' antenuptial agreement—which stated that the property settlement in the antenuptial agreement was to be in "in full satisfaction, settlement, and discharge of any and all rights or claims of alimony, support, property division, or other rights or claims of any kind, nature, or description incident to marriage and divorce . . . , under the present or future statutes and laws of common law of the state of Michigan or any other jurisdiction (all of which are hereby waived and released)"—precluded it from invading plaintiff's separate assets, as allowed under MCL 552.23(1) and MCL 552.401, to ensure equity in the division. Similarly, the circuit court erred by calculating child support under the mistaken belief that it lacked authority to award defendant spousal support (along with any portion of plaintiff's real or personal property) if such an award

was necessary to ensure the suitable support and maintenance of the parties' children.

4. MCL 557.28, which provides that a contract relating to property made between persons in contemplation of marriage shall remain in full force after marriage takes place, creates a statutory right in either party to seek modification of alimony. For purposes of MCL 557.28, the undefined technical term "property" means, collectively, the rights in a valued resource such as land, chattel, or an intangible and also includes any external thing over which the rights of possession, use, and enjoyment are exercised. Property can be real or personal, tangible or intangible, marital or separate. An antenuptial agreement regarding attorney fees or spousal support is a contract relating to property for purposes of MCL 557.28.

Circuit court orders related to property division, spousal support, child support, and divorce judgment vacated and the case remanded for further proceedings consistent with the opinion.

DIVORCE — ANTENUPTIAL AGREEMENTS — DISCRETION OF COURT — EQUITABLE DISTRIBUTION OF PROPERTY — WAIVER.

Reading MCL 552.12, MCL 552.23(1), and MCL 552.401 together, the Legislature clearly intended circuit courts to have equitable discretion—when dividing property in a divorce matter—to invade the separate assets of the parties if doing so is necessary to achieve equity in the division; the statutes empower the circuit court in the property division determination; they do not grant any right to the parties in a divorce action to petition for the invasion of separate assets; because parties to a divorce do not have any rights to waive under MCL 552.23(1) and MCL 552.401, parties cannot, by mutual agreement, strip a circuit court of its authority under MCL 552.23(1) to order relief that the court, in its sound discretion, deems necessary to equitably distribute property and adequately support and maintain the parties' minor children.

James N. McNally for plaintiff.

Gentry Nalley, PLLC (by *Kevin S. Gentry*), for defendant.

Amici Curiae:

Rebecca Shiemke, *Gail M. Towne*, *Liisa R. Speaker*, *Anne L. Argiroff*, and *Judith A. Curtis* for the Family Law Section of the State Bar of Michigan.

Donald A. DeLong, *James R. Cambridge*, *Daniel H. Minkus*, and *Carey Law Offices, PC* (by *James L. Carey*), for the Business Law Section of the State Bar of Michigan.

ON REMAND

Before: M. J. KELLY, P.J., and WILDER and FORT HOOD, JJ.

WILDER, J. This matter returns to us on remand from our Supreme Court. *Allard v Allard*, 499 Mich 932 (2016) (*Allard II*). We have been instructed to consider two issues on remand: "(1) whether parties may waive the trial court's discretion under MCL 552.23(1) and MCL 552.401 through an antenuptial agreement," and "(2) if so, whether the parties validly waived MCL 552.23(1) and MCL 552.401 in this case." *Id*. We conclude that parties cannot, by antenuptial agreement, deprive a trial court of its equitable discretion under MCL 552.23(1) and MCL 552.401. Accordingly, we vacate in part and remand for further proceedings consistent with this opinion.

I. FACTUAL BACKGROUND

The pertinent facts on remand remain nearly identical to those set forth in our prior opinion:

> The parties signed an antenuptial agreement on September 9, 1993, two days before their wedding on September 11, 1993. This case primarily deals with the validity and enforcement of that antenuptial agreement.
>
> * * *
>
> The pertinent sections of the signed antenuptial agreement provide as follows:

4. Each party shall during his or her lifetime keep and retain sole ownership, control, and enjoyment of all real, personal, intangible, or mixed property now owned, free and clear of any claim by the other party. However, provided that nothing herein contained shall be construed to prohibit the parties from at any time creating interests in real estate as tenants by the entireties or in personal property as joint tenants with rights of survivorship and to the extent that said interest is created, it shall, in the event of divorce, be divided equally between the parties. At the death of the first of the parties hereto, any property held by the parties as such tenants by the entireties or joint tenants with rights of survivorship shall pass to the surviving party.

5. In the event that the marriage . . . terminate[s] as a result of divorce, then, in full satisfaction, settlement, and discharge of any and all rights or claims of alimony, support, property division, or other rights or claims of any kind, nature, or description incident to marriage and divorce (including any right to payment of legal fees incident to a divorce), under the present or future statutes and laws of common law of the state of Michigan or any other jurisdiction (all of which are hereby waived and released), the parties agree that all property acquired after the marriage between the parties shall be divided between the parties with each party receiving 50 percent of the said property. However, notwithstanding the above, the following property acquired after the marriage will remain the sole and separate property of the party acquiring the property and/or named on the property:

a. As provided in paragraphs Two and Three of this antenuptial agreement, any increase in the value of any property, rents, profits, or dividends arising from property previously owned by either party shall remain the sole and separate property of that party.

b. Any property acquired in either party's individual capacity or name during the marriage, including any contributions to retirement plans (including but not limited to IRAs, 401(k) plans, SEP IRAs, IRA rollovers, and pension plans), shall remain the sole and separate property of the party named on the account or the party who acquired the property in his or her individual capacity or name.

* * *

8. Each party shall, without compensation, join as grantor in any and all conveyances of property made by the other party or by his or her heirs, devises, or personal representatives, thereby relinquishing all claim to the property so conveyed, including without limitation any dower or homestead rights, and each party shall further, upon the other's request, take any and all steps and execute, acknowledge, and deliver to the other party any and all further instruments necessary or expedient to effectuate the purpose and intent of this agreement.

* * *

10. Each party acknowledges that the other party has advised him or her of the other party's means, resources, income, and the nature and extent of the other party's properties and holdings (including, but not limited to, the financial information set forth in exhibit A attached hereto and incorporated herein by reference) and that there is a likelihood for substantial appreciation of those assets subsequent to the marriage of the parties.

* * *

The parties were married on September 11, 1993. During the course of the marriage, the parties held a joint checking account with Private Bank, which was closed in November 2010. There were no other jointly held ac-

counts. Defendant worked at two different advertising agencies during the first several years of the marriage. At the end of her employment, she earned approximately $30,000 per year. In 1999, after she became pregnant with the couple's second child, defendant stopped working and did not seek further employment.

Plaintiff received numerous cash gifts from his parents during the marriage, often totaling $20,000 per year. Plaintiff also testified to having received loans from his father during the course of the marriage, and claims that he used those funds to acquire some of the real estate he purchased during the marriage. Plaintiff also formed six limited liability companies (LLCs) during the marriage and served as the sole member of these companies . . . .

* * *

Testimony during trial established that plaintiff used at least some of the LLCs as a vehicle to purchase and convey numerous real estate holdings. In addition, the marital home, which plaintiff owned before the marriage, was conveyed to one of the LLCs. Plaintiff asserted in the trial court that defendant never incurred any liability as the result of the obligations arising from these multiple transactions, and that, as required by the antenuptial agreement, defendant signed warranty deeds when properties were sold to release any dower rights she might have acquired . . . .

* * *

After more than 16 years of marriage, plaintiff filed for divorce on July 28, 2010. On July 13, 2011, plaintiff filed a second motion for partial summary disposition regarding the antenuptial agreement. Plaintiff argued that the antenuptial agreement governed and was dispositive of all issues except for custody, parenting time, and child support. Plaintiff attached as evidentiary support for his motion: the September 9 antenuptial agreement, the deposition of John Carlisle, the deposition of Brian Carrier [Carrier worked in Carlisle's office and was the person

who notarized the antenuptial agreement], and the affidavit of Sherrie Doucette [Doucette worked in Carlisle's office and was one of the witnesses who signed the antenuptial agreement]. At the August 8, 2011 motion hearing, plaintiff also introduced the deposition testimony of defendant. Defendant responded to the motion by arguing that the agreement was void because the terms of the agreement were unconscionable, defendant did not have the benefit of independent counsel, and also because the agreement was signed under duress on the day of the wedding rehearsal. Defendant also contended that a change of circumstances supported the setting aside of the agreement, asserting that the facts would show she was abused by plaintiff during the marriage and that plaintiff never intended to create a marital partnership. In support of her response opposing the motion, defendant submitted her own affidavit and plaintiff's deposition.

The trial court granted plaintiff's motion. First, the trial court determined that defendant could not establish that the contract was signed under duress because there was no evidence of any illegal action. Next, the trial court determined that the agreement was not unconscionable because its terms did not shock the conscience of the court. Last, the trial court found that there was no change of circumstances that would make enforcement of the contract unfair and unreasonable. In particular, the trial court noted that the length of a marriage and the growth of assets are not unforeseeable and therefore cannot qualify as a change of circumstances. Further, the trial court questioned the validity of defendant's claim of abuse because, as far as the trial court was concerned, it was raised at the "eleventh hour," but regardless, noted that the allegation on its face would not "rise to the level of rendering th[e] contract unenforceable . . . ." Finally, the trial court found defendant's argument—that plaintiff's lack of intent to create a marital partnership was unforeseeable—unpersuasive, noting that the clear language of the agreement allowed for each spouse to maintain separate assets.

Subsequently at trial, defendant argued that aside from the plain language of the antenuptial agreement as interpreted by the trial court, she should be able to "invade" plaintiff's personal assets based on a partnership theory. The trial court ultimately rejected this argument. The trial court also concluded "that the equitable distribution factors contemplated by MCL 552.19 and set forth in *Sparks v Sparks*, 440 Mich 141, 159-162[; 485 NW2d 893] (1992) were not applicable" because of the presence of the unambiguous antenuptial agreement. Further, the trial court declined defendant's invitation to invade plaintiff's personal assets under MCL 552.23(1) or MCL 552.401. The court explained that if it allowed such an invasion to take place, then the right to freely contract would be jeopardized. As a result, the focus of the bench trial was to determine who owned what assets.

The record is clear that all the assets of worth were titled in either plaintiff's name, one of plaintiff's LLCs' names, or defendant's name. Given that evidence, the trial court concluded that there was little marital property to distribute. Consequently, pursuant to the antenuptial agreement, the trial court awarded plaintiff the six LLC entities, the stock he owned, and "all bank accounts presently titled in his name alone or titled in the name of his single-member LLCs." The trial court awarded defendant the stock she owned, an IRA account that was in her name, and all bank accounts that were in her name. The value of the assets awarded to plaintiff was in excess of $900,000, while the assets awarded to defendant were valued at approximately $95,000.

Because the antenuptial agreement prohibited the award of any spousal support, the trial court did not award any . . . .

* * *

With regard to child support, the trial court used the Michigan Child Support Formula to calculate the base child support to be $3,041 a month for both children. However, the trial court also determined that application

> of the formula would be both unjust and inappropriate and, therefore, not in the children's best interests. Consequently, the trial court increased the base monthly child support award by $1,000. [*Allard v Allard*, 308 Mich App 536, 539-547; 867 NW2d 866 (2014) (*Allard I*) (second and third alterations added, other alterations in original), aff'd in part, vacated in part, and rev'd in part 499 Mich 932 (2016).]

II. STANDARDS OF REVIEW AND PRINCIPLES OF STATUTORY CONSTRUCTION

Under MCR 2.613(C), we review for clear error the trial court's pertinent findings of fact. "[H]owever, the trial court's ultimate decision concerning whether those facts show a waiver is a question of law reviewed de novo." *Electrolines, Inc v Prudential Assurance Co, Ltd*, 260 Mich App 144, 163; 677 NW2d 874 (2003). We also review de novo issues of statutory interpretation. *Speicher v Columbia Twp Bd of Trustees*, 497 Mich 125, 133; 860 NW2d 51 (2014).

"The primary goal when interpreting a statute is to discern the intent of the Legislature by focusing on the most reliable evidence of that intent, the language of the statute itself." *Fairley v Dep't of Corrections*, 497 Mich 290, 296-297; 871 NW2d 129 (2015) (quotation marks and citation omitted). If the legislative intent can be gleaned from the statutory language, further construction is neither necessary nor permissible. *Id*. at 297.

III. ANALYSIS

Before turning to the substantive merits of the issue before us, we thank amici curiae, the Business Law and Family Law Sections of the State Bar of Michigan, for the briefs they have submitted in this matter. Given the ambit of the remand order in this case, the Business Law Section has decided to offer no argument

regarding the issues now before us. The Family Law Section, however, offers an argument we feel compelled to address.

The Family Law Section posits that by including the term "property" in MCL 557.28,[1] the Legislature intended to limit the scope of antenuptial agreements. Specifically, the Family Law Section suggests that antenuptial agreements regarding attorney fees and spousal support do not relate to "property"—at least as that term is used in MCL 557.28—and therefore any waiver provision in an antenuptial agreement regarding attorney fees or spousal support is necessarily invalid. We disagree.

The term in question, "property," is not statutorily defined. "Normally, this Court will accord an undefined statutory term its ordinary and commonly used meaning." *Grange Ins Co of Mich v Lawrence*, 494 Mich 475, 493; 835 NW2d 363 (2013). "However, where the Legislature uses a technical word that has acquired a particular meaning in the law, and absent any contrary legislative indication, [it is] construe[d] 'according to such peculiar and appropriate meaning.' " *Id*., quoting MCL 8.3a ("[T]echnical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning.").

There are few legal terms that carry a denotation more conceptually dense than that associated with the term "property." Property encompasses, "[c]ollectively, the rights in a valued resource such as land, chattel, or an intangible"—these collective rights are often analogized to a "bundle of sticks"—and the term also in-

[1] MCL 557.28 provides that "[a] contract relating to property made between persons in contemplation of marriage shall remain in full force after marriage takes place."

cludes "[a]ny external thing over which the rights of possession, use, and enjoyment are exercised[.]" *Black's Law Dictionary* (10th ed). Property can be real or personal, tangible or intangible, and—in the instant context—can be considered marital or separate. The so-called bundle of property rights can include many diverse forms of property interests. These interests are so varied, and their machinations so complex, that the subject is necessarily relegated to hornbooks and treatises. See, e.g., Edwards, Estates in Land and Future Interests (4th ed).

MCL 557.28 governs the validity of contracts "*relating to property* made between persons in contemplation of marriage," providing that such contracts "shall remain in full force after marriage takes place." (Emphasis added.) It is axiomatic that money is a type of personal property, and money is undeniably the form of property most often used to make payments of any kind, including those for attorney fees and spousal support.[2] Accordingly, under the plain language of MCL 557.28, an antenuptial agreement regarding attorney fees or spousal support is one "relating to" property.

We must, therefore, reject the interpretation of MCL 557.28 urged by the Family Law Section. We refuse to construe the undefined term "property" as having a meaning different from its technical legal sense. Thus, we conclude that antenuptial agreements related to attorney fees or spousal support are contracts "relating to property" under MCL 557.28.

We turn now to the true heart of the matter. The waiver question before us is one made difficult by a

[2] By nature, spousal support involves periodic payments "designed to ensure the maintenance of a spouse for a period after the divorce." *Krist v Krist*, 246 Mich App 59, 64; 631 NW2d 53 (2001).

seeming intersection of two bedrock principles of Michigan jurisprudence: first, that the fundamental right to contract must be protected by allowing parties to contract freely and by enforcing contractual agreements;[3] second, that courts sitting in equity must be free to afford whatever relief is necessary to see done that which, in good conscience, ought to be done.[4] It is well settled that

> [a] court possesses inherent authority to enforce its own directives. A divorce case is equitable in nature, and a court of equity molds its relief according to the character of the case; once a court of equity acquires jurisdiction, it will do what is necessary to accord complete equity and to conclude the controversy. [*Loutts v Loutts*, 298 Mich App 21, 35; 826 NW2d 152 (2012), quoting *Draggoo v Draggoo*, 223 Mich App 415, 428; 566 NW2d 642 (1997) (quotation marks omitted).]

However, "[t]he laws of divorce are statutory in nature and the equitable disposition of property is confined to the limits of the applicable statutes." *Charlton v Charlton*, 397 Mich 84, 92; 243 NW2d 261 (1976).

MCL 552.12 provides that divorce actions "shall be conducted in the same manner as other suits in courts of equity; and the court shall have the power to award issues, to decree costs, and to enforce its decrees, as in other cases." In that same equitable vein, MCL 552.401 provides:

> The circuit court of this state may include in any decree of divorce or of separate maintenance entered in the circuit court appropriate provisions awarding to a party all or a portion of the property, either real or

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[3] *Bloomfield Estates Improvement Ass'n, Inc v Birmingham*, 479 Mich 206, 212; 737 NW2d 670 (2007).

[4] See, e.g., *Haack v Burmeister*, 289 Mich 418, 425; 286 NW 666 (1939).

> personal, owned by his or her spouse, as appears to the court to be equitable under all the circumstances of the case, if it appears from the evidence in the case that the party contributed to the acquisition, improvement, or accumulation of the property. The decree, upon becoming final, shall have the same force and effect as a quitclaim deed of the real estate, if any, or a bill of sale of the personal property, if any, given by the party's spouse to the party.

In essence, the statutory language is a codification of the concept of the equitable trust, also known as the constructive trust. Such trusts recognize "the broad doctrine that equity regards and treats as done what in good conscience ought to be done." *Haack v Burmeister*, 289 Mich 418, 425; 286 NW 666 (1939) (quotation marks and citations omitted). In other words, if a "party contributed to the acquisition, improvement, or accumulation of . . . property," MCL 552.401, and therefore *should* have an interest in that property, equity will make it so.

Similarly, MCL 552.23(1) provides,

> Upon entry of a judgment of divorce or separate maintenance, if the estate and effects awarded to either party are insufficient for the suitable support and maintenance of either party and any children of the marriage who are committed to the care and custody of either party, the court may also award to either party the part of the real and personal estate of either party and spousal support out of the real and personal estate, to be paid to either party in gross or otherwise as the court considers just and reasonable, after considering the ability of either party to pay and the character and situation of the parties, and all the other circumstances of the case.

Through these statutes, it is evident that our Legislature has endeavored to codify the axiom that, in divorce actions, "a division of property must be equi-

table . . . in . . . light of the particular facts." *Mitchell v Mitchell*, 333 Mich 441, 446; 53 NW2d 325 (1952).

Notwithstanding these general principles, plaintiff contends that parties can, by way of an antenuptial agreement, divest a circuit court of its statutory authority to effectuate an equitable settlement by "invading" separate assets under MCL 552.23(1) and MCL 552.401. Plaintiff's argument hinges on MCL 557.28 ("A contract relating to property made between persons in contemplation of marriage shall remain in full force after marriage takes place."). It is true that, "[w]hen contracts are formed, the parties to the contract are the lawmakers in such realm and deference must be shown to their judgments and to their language as with regard to any other lawmaker." *Bloomfield Estates Improvement Ass'n, Inc v Birmingham*, 479 Mich 206, 213; 737 NW2d 670 (2007). However, "contracts founded on acts prohibited by a statute, or contracts in violation of public policy, are void." *Maids Int'l, Inc v Saunders, Inc*, 224 Mich App 508, 511; 569 NW2d 857 (1997).

In its remand order, our Supreme Court provided some guidance, directing our attention to two cases: *Staple v Staple*, 241 Mich App 562; 616 NW2d 219 (2000), and *Omne Fin, Inc v Shacks, Inc*, 460 Mich 305; 596 NW2d 591 (1999). With regard to the latter case, the Supreme Court's remand order did not specify whether we should consider Justice KELLY's lead opinion, Justice CORRIGAN's concurrence, or both opinions. In any event, we find all three opinions instructive here.[5] In particular, consideration of the relationship between the *Staple* and *Omne* opinions requires careful examination of two oft-repeated principles: first,

[5] We note, however, that because neither *Omne* opinion was joined by a majority of the justices—Justice TAYLOR did not participate—neither is

that "[w]aiver is the voluntary and intentional relinquishment of a known right," see *Varran v Granneman*, 312 Mich App 591, 623; 880 NW2d 242 (2015), and second, that "the freedom to contract does not permit contracting parties to impose obligations upon and waive the rights of third parties in the absence of legally cognizable authority to do so," *Woodman v Kera LLC*, 486 Mich 228, 243; 785 NW2d 1 (2010) (opinion by YOUNG, C.J.).

At issue in *Staple*, 241 Mich App at 564, was "the question of when an agreed-upon alimony provision in a divorce judgment entered pursuant to a settlement is subject to future modification, and when it is final and nonmodifiable." The *Staple* conflict panel summarized its holding as follows:

> [W]e adopt a[n] . . . approach that allows the parties to a divorce settlement to clearly express their intent to forgo *their* statutory right to petition for modification of an agreed-upon alimony provision, and to clearly express their intent that the alimony provision is final, binding, and thus nonmodifiable. Of course, MCL 552.28 creates a statutory right *in either party* to seek modification of alimony. However, like many other statutory and constitutional rights, parties may waive *their* rights under MCL 552.28. If the parties to a divorce agree to waive the right to petition for modification of alimony, and agree that the alimony provision is binding and nonmodifiable, and this agreement is contained in the judgment of divorce, their agreement will constitute a binding waiver of rights under MCL 552.28. [*Id*. at 568 (emphasis added).]

Thus, *Staple* dealt with the straightforward question of whether parties can, by contract, knowingly and willingly waive their own statutory rights.

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binding here under the doctrine of stare decisis. See *Spectrum Health Hosps v Farm Bureau Mut Ins Co of Mich*, 492 Mich 503, 535; 821 NW2d 117 (2012).

Contrastingly, in *Omne*, our Supreme Court grappled with "the question whether parties may contractually agree to venue" before any cause of action arises. *Omne*, 460 Mich at 311 (opinion by KELLY, J.). Noting that parties can duly waive any objection to venue so long as they do so after a cause of action arises, Justice KELLY "conclude[d] that contractual provisions establishing venue for *potential* causes of action that may arise *after* the contract is executed are unenforceable." *Id*. at 317 (first emphasis added). In pertinent part, Justice KELLY reasoned, "Had the Legislature intended to enforce contractual agreements regarding venue, it would have included such a provision . . . . [E]nforcement of contractual provisions establishing venue for causes of action that may arise after the contract is executed would contradict the manifest intent of the Legislature." *Id*. at 313. Justice CORRIGAN reached the same result for differing reasons. She reasoned that, "under the plain language of the [venue transfer] statute [MCL 600.1651], the trial court must transfer an action brought in an improper venue on the defendant's timely motion, regardless of whether the defendant had contractually agreed to the venue." *Omne*, 460 Mich 319 (opinion by CORRIGAN, J.). Hence, *Omne* involved not only the straightforward question involved in *Staple*—i.e., whether parties can agree to waive their own statutory rights—but also whether such an agreement can be enforced when it openly defies the Legislature's statutorily expressed intent.

In light of the contrast between *Staple* and *Omne*, the issue before us crystallizes into a rational paradigm; it changes from a seeming conflict between equity and the freedom to contract to a simple matter of statutory interpretation. In concert, MCL 552.12, MCL 552.23(1), and MCL 552.401 clearly demonstrate

that the Legislature intends circuit courts, when ordering a property division in a divorce matter, to have equitable discretion to invade separate assets if doing so is necessary to achieve equity. These statutes do not afford the parties to a divorce any statutory right to *petition* for invasion of separate assets—at least none that is distinct from the parties' right to petition for divorce in the first instance. Rather, the statutes simply empower the circuit court. For this reason, parties have no discernible rights to waive under MCL 552.23(1) and MCL 552.401. Moreover, to the extent that parties attempt, by contract, to bind the equitable authority granted to a circuit court under MCL 552.23(1) and MCL 552.401, any such agreement is necessarily void as against both statute and the public policy codified by our Legislature. Put differently, the parties to a divorce cannot, through antenuptial agreement, compel a court of equity to order a property settlement that is *in*equitable. Although parties have a fundamental right to contract as they see fit, they have no right to do so in direct contravention of this state's laws and public policy. See *Rory v Continental Ins Co*, 473 Mich 457, 470; 703 NW2d 23 (2005) ("[A]n unambiguous contractual provision . . . is to be enforced as written *unless* the provision would violate law or public policy.") (emphasis added).

Our conclusion in this regard is buttressed by the fact that MCL 552.23(1) grants a circuit court equitable authority over not just the parties before it but also over the interests of "any children of the marriage who are committed to the care and custody of either party . . . ." Time and again, our Courts have recognized that the parties to a divorce cannot, even by mutual agreement, relieve a circuit court of its duty to independently safeguard the interests of minor children who are involved. See, e.g., *Grange*, 494 Mich at

533 n 51 (opinion by ZAHRA, J.) ("[T]he family court alone is charged with making determinations in the child's best interests, and stipulation by the parties to an alternative custody arrangement cannot usurp that authority."); *Harvey v Harvey*, 470 Mich 186, 194; 680 NW2d 835 (2004) ("Permitting the parties, by stipulation, to limit the trial court's authority to review custody determinations would nullify the protections of the Child Custody Act and relieve the circuit court of its statutorily imposed responsibilities."); *Holmes v Holmes*, 281 Mich App 575, 590; 760 NW2d 300 (2008) ("Parents may not bargain away a child's welfare and rights, including the right to receive adequate child support payments. An agreement by the parties regarding support will not suspend the authority of the court to enter a support order.") (quotation marks and citation omitted); *Laffin v Laffin*, 280 Mich App 513, 518; 760 NW2d 738 (2008) ("It is a well-established principle in Michigan that parties cannot bargain away their children's right to support."). We rule in accordance with the great weight of this authority. Parties cannot, by mutual agreement, strip a circuit court of its authority under MCL 552.23(1) to order relief that the court, in its sound discretion, deems necessary to adequately support and maintain the parties' minor children.

In this case, the trial court deviated from the Michigan Child Support Formula (MCSF), finding that it was in the best interests of the minor children to award defendant an extra $1,000 a month in base child support. But the trial court did so only after concluding that the parties' antenuptial agreement precluded it from invading plaintiff's separate assets under MCL 552.23(1) and MCL 552.401. Therefore, contrary to the plain language of MCL 552.23(1), it appears that the trial court was under the erroneous impression that it

lacked authority to award defendant spousal support (along with any portion of plaintiff's real or personal property) if doing so was necessary to ensure the suitable support and maintenance of the children.[6] It is unclear whether the trial court would have ruled differently but for this error.

IV. CONCLUSION

In sum, we conclude that the parties could not, and therefore did not, waive the trial court's equitable discretion under MCL 552.23(1) and MCL 552.401. By holding otherwise, the trial court erred, but it is unclear from the record what effect—if any—the error had on the trial court's ultimate rulings regarding property division, spousal support, and child support. Accordingly, we vacate the trial court's pertinent orders (along with the relevant portion of the parties' divorce judgment) and remand for further proceedings consistent with (1) this opinion, (2) the affirmed portions of *Allard I*, and (3) our Supreme Court's decision in *Allard II*.[7] We do not retain jurisdiction. Because

[6] While on its face *spousal* support may not appear to relate to the suitable support and maintenance of children, the support and maintenance of children by *child* support alone may be insufficient in a particular case. The MCSF is a formula, and like any formula, it is formulaic and inflexible. A formulaic and inflexible approach to the resolution of a particular problem may, of course, find itself at loggerheads with the very concept of equity. Suffice it to say, there may be times when an award of alimony in gross or spousal support is necessary, under the circumstances, to address the suitable support and maintenance of children, and we do not second-guess the Legislature's policy judgment in that regard. Indeed, such policy choices involve "a decision-making process for which the judicial branch is the least well-equipped among the branches of government." See *Kyser v Kasson Twp*, 486 Mich 514, 537; 786 NW2d 543 (2010).

[7] Notwithstanding anything to the contrary in this opinion, and pending further order of the trial court, plaintiff is hereby ordered to

this matter involves questions of public policy, no costs may be taxed under MCR 7.219(A).

M. J. KELLY, P.J., and FORT HOOD, J., concurred with WILDER, J.

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continue paying child support in the same manner and amount as he was under the trial court's previous orders. See MCR 7.216(A)(7) ("The Court of Appeals may, at any time, in addition to its general powers, in its discretion, and on the terms it deems just . . . enter any judgment or order or grant further or different relief as the case may require[.]").

K & W WHOLESALE, LLC v DEPARTMENT OF TREASURY

Docket No. 327107. Submitted September 7, 2016, at Detroit. Decided February 7, 2017, at 9:00 a.m.

Plaintiffs, K & W Wholesale, LLC, and Visna Mati, filed a complaint in the Macomb Circuit Court against the Department of Treasury (the Department) and Kevin Clinton, seeking to appeal a Decision and Order of Determination (the order) finding that the Department properly seized 47 cases of tobacco from plaintiffs' facility because the cases failed to identify the first purchaser of the tobacco in violation of the Tobacco Products Tax Act (TPTA), MCL 205.421 *et seq*. The Department seized the tobacco cases on August 18, 2014, and conducted an informal conference on September 11, 2014, after which the referee determined that plaintiffs' possession of tobacco without proper identification of the first purchaser was sufficient in itself to violate the TPTA. On September 22, 2014, Clinton adopted the referee's recommendation on behalf of the Department. The order stated that if plaintiffs disagreed with the decision, then plaintiffs could file a written appeal in the circuit court of the county where the seizure occurred, and the appeal "must be commenced in circuit court within 20 days of this decision in accordance with section 9(4) of the Tobacco Products Act, MCL 205.429." On October 30, 2014, plaintiffs requested that the circuit court vacate the order, alleging that they were not able to file an appeal within 20 days of the order because their attorney had not been timely served with a copy of it. Defendants moved for summary disposition, alleging that the 20-day limitations period had run and that they had complied with the TPTA's requirement by notifying the person claiming an interest in the seized property. The court, Mark S. Switalski, J., denied defendants' motion, determining that defendants failed to provide substantively admissible evidence to demonstrate that plaintiffs had been properly served with a copy of the order. Defendants moved for reconsideration, alleging that they had provided a United States Postal Service (USPS) tracking document showing delivery at plaintiffs' address on September 24, 2014. Defendants also attached to their motion for reconsideration a certified mail receipt showing service at plaintiffs' address on September 24, 2014. On April 6, 2015, the

court, Kathryn A. Viviano, J., granted defendants' motions for reconsideration and summary disposition. Plaintiffs appealed.

The Court of Appeals *held*:

1. MCL 205.429(4) provides that a lawsuit challenging the Department's determination that tobacco had been lawfully seized and subject to forfeiture under the TPTA shall be commenced in the circuit court within 20 days after notice of the Department's determination is sent to the person or persons claiming an interest in the seized property. The plain language of MCL 205.429(4) provides that the 20-day period is triggered by sending notice to the person or persons claiming an interest in the seized property; MCL 205.429(4) does not contain any reference to sending notice to an attorney or representative of that person or those persons. In this case, all the evidence in the record, including the USPS tracking document, adequately proved service on the part of the Department, and plaintiffs failed to file suit in the circuit court within the limitations period. Therefore, the circuit court correctly granted defendants' motions for reconsideration and for summary disposition.

2. Plaintiffs' argument that the Michigan Administrative Code should supersede the pertinent language in MCL 205.429(4) failed. MCL 205.20 states that *unless otherwise provided by specific authority in a taxing statute administered by the Department*, all taxes shall be subject to the procedures of administration, audit, assessment, interest, penalty, and appeal provided in MCL 205.21 to MCL 205.30. The specific authority in the TPTA, MCL 205.429(4), requires that the 20-day period in question commence after the Department sends notice to the person or persons claiming interest in the seized property. Additionally, MCL 205.433(1) provides that the provisions of the TPTA control in case of conflict. Accordingly, even if a conflict could have been discerned, the TPTA provision regarding the triggering of the 20-day period controlled.

3. An agency's interpretation of a statute, while owed respectful consideration, cannot conflict with the Legislature's intent as expressed in the language of the statute. Even assuming that the Department had a custom of sending notice to attorneys representing individuals who had property seized pursuant to the TPTA, and assuming that this custom amounted to an interpretation of the TPTA, the plain language of MCL 205.429(4) demonstrates a legislative intent that the 20-day limitations period commences upon the sending of notice to the person or persons claiming an interest in the seized property.

4. The documentation, which included a seizure inventory form, a certified mail receipt, and two letters, made clear that Mati was closely involved with K & W Wholesale. Plaintiffs' argument that the Department should have sent separate notice to Mati did not create an issue of fact.

5. While plaintiffs were correct that the order misstated the plain wording of MCL 205.429(4) by providing that the appeal "must be commenced in circuit court within 20 days of this decision in accordance with section 9(4) of the Tobacco Products Act, MCL 205.429," plaintiffs did not attempt to explain how the outcome of the case would have changed had the Department used the correct wording.

Affirmed.

NOTICE — TOBACCO PRODUCTS TAX ACT — SEARCH AND SEIZURE — ADMINISTRATIVE DETERMINATIONS — SENDING NOTICE TO PERSONS CLAIMING AN INTEREST IN SEIZED PROPERTY.

MCL 205.429(4) provides that a lawsuit challenging the Department of Treasury's determination that tobacco had been lawfully seized and subject to forfeiture under the Tobacco Products Tax Act (TPTA), MCL 205.421 *et seq*., shall be commenced in the circuit court within 20 days after notice of the determination is sent to the person or persons claiming an interest in the seized property; the 20-day period is triggered by sending notice to the person or persons claiming an interest in the seized property; MCL 205.429(4) does not require sending notice to an attorney or representative of that person or those persons.

M. Michael Koroi for K & W Wholesale, LLC, and Visna Mati.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Carrie L. Kornoelje*, Assistant Attorney General, for the Department of Treasury and Kevin Clinton.

Before: GADOLA, P.J., and WILDER and METER, JJ.

METER, J. Plaintiffs, K & W Wholesale, LLC, and Visna Mati, appeal as of right an order granting defendants' motions for reconsideration and for sum-

mary disposition in this case involving the interpretation of the Tobacco Products Tax Act (TPTA), MCL 205.421 *et seq*. We affirm.

On August 18, 2014, the Michigan State Police, acting on behalf of defendant Department of Treasury (the Department), conducted an inspection of plaintiffs' facility in Sterling Heights. After observing various purported violations of the TPTA, the officers seized 47 cases of tobacco from plaintiffs. On September 11, 2014, a referee at the Department conducted an informal conference concerning whether the Department legally seized plaintiffs' tobacco and whether the tobacco should be forfeited to the state. The Department argued, in part, that plaintiffs violated MCL 205.426(6) by possessing tobacco shipping cases that failed to identify the first purchaser of the tobacco. The Department argued that the officers properly seized the tobacco and that it should be forfeited. Plaintiffs argued that they purchased the tobacco from a licensed wholesaler, that they had invoices to prove that the purchases were made legally, and that the product should be returned to them.

Following the hearing, the referee issued an informal conference recommendation. The referee concluded that the Department properly seized the tobacco. The referee reasoned that, on the date of the seizure, plaintiffs possessed cases of tobacco with labels that did not bear the name of the first purchaser of the tobacco. The referee noted that possession of tobacco without proper identification of the first purchaser was sufficient in itself to violate the TPTA and was grounds for seizure and forfeiture.

On September 22, 2014, defendant Kevin Clinton, on behalf of the Department, adopted the referee's recommendation in a Decision and Order of Determi-

nation (the Order). The Order stated that if plaintiffs disagreed with the decision, they could file a written appeal in the circuit court of the county where the seizure occurred. The Order stated that the appeal "must be commenced in circuit court within 20 days of this decision in accordance with . . . MCL 205.429." Defendants submitted evidence that a copy of the Order was received at the address of K & W Wholesale on September 24, 2014.

On October 30, 2014, plaintiffs filed a complaint in the circuit court, attempting to appeal the Order. In the complaint, plaintiffs argued that they were not able to file an appeal with the circuit court within 20 days of the Order because their attorney had not been timely served with a copy of it. Plaintiffs also argued that any deficiency in the labeling of the tobacco created only a presumption of a violation under the TPTA, which they adequately rebutted. Plaintiffs requested that the court vacate the Order.

On December 1, 2014, defendants moved for summary disposition under MCR 2.116(C)(4) (lack of subject-matter jurisdiction) and (7) (violation of the statute of limitations). Defendants argued that the court lacked subject-matter jurisdiction because the 20-day limitations period had run. In response to plaintiffs' argument that their attorney had not been served with a copy of the Order, defendants argued that they complied with the TPTA by notifying the person claiming an interest in the seized property. The circuit court initially denied defendants' motion for summary disposition in a ruling dated February 5, 2015, stating that defendants had "failed to provide the [c]ourt with substantively admissible evidence to demonstrate that [plaintiffs] were served with the decision that is the subject of this appeal." Defendants filed a

motion for reconsideration, arguing that the circuit court erred by finding no proper proof of service. Defendants argued that counsel for plaintiffs had admitted in his response to defendants' motion for summary disposition that plaintiffs received a copy of the Order on September 29, 2014. Defendants also pointed out that they had presented a United States Postal Service (USPS) tracking document showing delivery to plaintiffs' address on September 24, 2014. Finally, defendants attached to their motion for reconsideration an actual certified mail receipt showing service at plaintiffs' address on September 24, 2014.

On April 6, 2015, the circuit court, relying on the certified mail receipt, granted defendants' motions for reconsideration and for summary disposition. Plaintiffs now take issue with this decision.

"This Court reviews decisions on motions for summary disposition de novo." *Durcon Co v Detroit Edison Co*, 250 Mich App 553, 556; 655 NW2d 304 (2002). "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 150, 155; 756 NW2d 483 (2008) (citation and quotation marks omitted). "Summary disposition under MCR 2.116(C)(7) is appropriate when the undisputed facts establish that the plaintiff's claim is barred under the applicable statute of limitations." *Kincaid v Cardwell*, 300 Mich App 513, 522; 834 NW2d 122 (2013). "[A] party moving for summary disposition under MCR 2.116(C)(7) may support the motion with affidavits, depositions, admissions, or other admissible documentary evidence, which the reviewing court must consider." *Id*.

This Court reviews for an abuse of discretion a trial court's decision regarding a motion for reconsideration. *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000). In addition, "[i]ssues of statutory interpretation are reviewed de novo." *City of Riverview v Sibley Limestone*, 270 Mich App 627, 630; 716 NW2d 615 (2006).

The TPTA "is at its heart a revenue statute, designed to assure that tobacco taxes levied in support of Michigan schools are not evaded." *People v Beydoun*, 283 Mich App 314, 327; 770 NW2d 54 (2009) (citation and quotation marks omitted). If a person possesses tobacco in a manner that violates the TPTA, the tobacco "may be seized and confiscated" by the Department. MCL 205.429(1). After the tobacco has been seized, the person who conducted the seizure must serve an inventory statement of the seized property on the person from whom it was taken. MCL 205.429(3). Within 10 days of receiving the inventory statement, the person from whom the property was seized may demand a hearing before the state treasurer to determine "whether the property was lawfully subject to seizure and forfeiture." *Id*.

The Department is then required to hold a hearing within 15 days of the demand. *Id*. If, after the hearing, the Department determines that the property was lawfully seized and is subject to forfeiture, the person from whom the property was seized, or any person with an interest in the property, may file an appeal in the circuit court of the county in which the property was seized. MCL 205.429(3) and (4). The statute states that the suit "shall be commenced within 20 days after notice of the department's determination is sent to the person or persons claiming an interest in the seized property." MCL 205.429(4).

Plaintiffs contend that the 20-day period for filing an appeal in the circuit court had not run at the time of their lawsuit because the Department did not effectuate service on the attorney who represented them at the informal conference. "The primary goal of statutory interpretation is to ascertain the legislative intent that may reasonably be inferred from the statutory language." *Krohn v Home-Owners Ins Co*, 490 Mich 145, 156; 802 NW2d 281 (2011) (citation and quotation marks omitted). The first step is to review the language in the statute. *Id*. Unless otherwise 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." *Id*. (citations omitted). Unambiguous statutory language must be enforced as written. *Willett v Waterford Charter Twp*, 271 Mich App 38, 48; 718 NW2d 386 (2006).

MCL 205.429(4) states that an appeal in the circuit court must be made "within 20 days after notice of the department's determination is sent to the person or persons claiming an interest in the seized property." Applying the rules of statutory interpretation, we hold that the 20-day period is triggered by sending notice to the person or persons claiming an interest in the seized property. The statute simply does not contain any reference to sending notice to an attorney or representative of that person or those persons.

Plaintiffs argue that the Michigan Administrative Code should supersede the pertinent language in MCL 205.429(4). Plaintiffs argue that "MCL 205.20 . . . incorporates the informal conference provisions of MCL 205.21 into the TPTA forfeiture procedures and MCL 205.4 . . . incorporates the rules of the informal conference [procedure] . . . to the TPTA." Plaintiffs thus argue that administrative rules regarding notice to rep-

resentatives of taxpayers after an informal conference apply to the TPTA. However, MCL 205.20 states, "*Unless otherwise provided by specific authority in a taxing statute administered by the department*, all taxes shall be subject to the procedures of administration, audit, assessment, interest, penalty, and appeal provided in [MCL 205.21 to MCL 205.30]." (Emphasis added.) The specific authority in the TPTA requires that the 20-day period in question commence after the Department sends notice to "the person or persons claiming an interest in the seized property." MCL 205.429(4). In addition, the TPTA states:

> The tax imposed by this act shall be administered by the revenue commissioner pursuant to Act No. 122 of the Public Acts of 1941, being sections 205.1 to 205.31 of the Michigan Compiled Laws, and this act. In case of conflict between Act No. 122 of the Public Acts of 1941 and this act, the provisions of this act control. [MCL 205.433(1).]

Even if a conflict could be discerned, the TPTA provision regarding the triggering of the 20-day period controls.[1]

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[1] In addressing a claim involving the General Sales Tax Act (GSTA), MCL 205.51 *et seq*., the Supreme Court, in *Fradco, Inc v Dep't of Treasury*, 495 Mich 104, 108; 845 NW2d 81 (2014), ruled that "if a taxpayer has appointed a representative, the department must issue notice to both the taxpayer and the taxpayer's official representative to trigger the running of the appeal period." The Court noted that, "[i]n administering taxes generally, the department must adhere to MCL 205.21 to 205.30, '[u]nless otherwise provided by specific authority in a taxing statute.' " *Id*. at 113 n 15, quoting MCL 205.20 (second alteration in original). The *Fradco* Court noted that the GSTA is a taxing statute and expressly states that the Department is to follow the revenue collection act, MCL 205.1 to 205.31, in administering the sales tax. *Id*.; see also MCL 205.59(1). MCL 205.8 contains the express requirement that the taxpayer's "official representative" be served with notice of the Department's decision regarding a dispute with the taxpayer if the taxpayer has requested that such notice be sent. See *id*. at 113. Even assuming that plaintiffs could be deemed to have requested that notice

Plaintiffs also argue that because their attorney was sent copies of the Department's decisions in the past, this amounted to an interpretation by the Department that the Department was required to send this documentation to an attorney representing individuals before the Department. Even assuming that the Department had a custom of sending notice to attorneys representing individuals who had property seized pursuant to the TPTA, and assuming that this custom amounted to an interpretation of the TPTA, the Supreme Court has held that an "agency's interpretation [of a statute] is not binding on the courts . . . ." *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 103; 754 NW2d 259 (2008). The Supreme Court has stated that an agency's interpretation, while owed respectful consideration, "cannot conflict with the Legislature's intent as expressed in the language of the statute at issue." *Id*. As noted earlier, the plain language of the statute demonstrates a legislative intent that the 20-day limitations period commence upon the sending of notice to the person or persons claiming an interest in the seized property.

As a result of plaintiffs' failure to file suit in the circuit court within the limitations period, the circuit court correctly granted defendants' motions for reconsideration and for summary disposition.

Plaintiffs contend that there were questions of fact regarding whether the relevant interested parties were sent a copy of the Order because plaintiff Visna Mati, in an affidavit, denied having been served. However, plaintiffs themselves submitted several documents, including two letters, in support of their response to defendants' motion for summary disposition.

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of the opinion be sent to their attorney, the TPTA, unlike the GSTA, does not mandate that MCL 205.8 be followed.

Salem Samaan, the attorney who represented plaintiffs at the informal conference, stated in one letter that he had been retained by "Visna Mati/K & W Wholesale LLC relative to the above referenced matter." He later stated in another letter that he "attended the hearing with my client"[2] and that "[a] decision was issued and sent to my client, however, I never received a copy of the decision." He continued: "The decision was issued on September 22, 2014. My client received it September 29, 2014." He indicated that "[his] client, not aware of the 20 day deadline for filing an appeal, forwarded a copy of the decision to me today, October 14, 2014 . . . ." Another of plaintiffs' attorneys, M. Michael Koroi, argued, without elaboration, that "only one mailing ever went out" even though there were allegedly two interested parties. However, Koroi also admitted that Mati was "designated as the person whom the product was seized from and the owner under the Notice of Seizure and Inventory Statement of Property Seized and also identified as the person served with said forfeiture notice by the Michigan State Police." The seizure inventory form listed "Visna Mati" under the space for "name" and the space for "owner," and it listed "K & W Wholesale LLC" as the "legal place of business." Visna Mati signed this seizure inventory form. In addition, the certified mail receipt showed the addressee as "K & W Wholesale, LLC/Visna Mati"; the Order was mailed to the address of K & W Wholesale. The documentation makes clear that Mati was closely involved with K & W, and we will not abide plaintiffs' attempt to create an issue of fact by claiming that Mati should have been sent a separate notice, especially when Samaan sent a letter to the Department stating that he would be representing

[2] The clear implication of this statement is that "Visna Mati/K & W Wholesale" was his singular "client."

"Visna Mati/K & W Wholesale LLC" in the matter. See generally *Dykes v William Beaumont Hosp*, 246 Mich App 471, 481; 633 NW2d 440 (2001) (discussing attempts to create an issue of fact by way of affidavit). All the evidence in the record, including the USPS printout, adequately proved service on the part of the Department, and plaintiffs' appeal to the circuit court was time-barred. *Kincaid*, 300 Mich App at 522.[3]

Plaintiffs also note that the Order provided incorrect information regarding the allowable period for filing their appeal. The Order stated that if plaintiffs disagreed with the decision of the Department, an appeal "must be commenced in circuit court within 20 days of this decision in accordance with section 9(4) of the Tobacco Products Act, MCL 205.429." Plaintiffs are correct that the Order misstated the plain wording of the statute. As noted, MCL 205.429(4) states that an appeal to the circuit court must be made "within 20 days after notice of the department's determination is sent to the person or persons claiming an interest in the seized property."[4] However, plaintiffs do not even attempt to explain how the outcome of the present case would have changed if the Department had used the correct wording.

Affirmed.

GADOLA, P.J., and WILDER, J., concurred with METER, J.

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[3] We reject plaintiffs' argument that the circuit court prematurely granted summary disposition before the close of discovery. There was no fair likelihood that further discovery would yield support for plaintiffs' position. *Ensink v Mecosta Co Gen Hosp*, 262 Mich App 518, 540; 687 NW2d 143 (2004).

[4] Plaintiffs suggest that the statute and the manner in which the Department words its notices cause hardship to taxpayers, but we need not address this suggestion to resolve the present appeal.

TAYLOR SCHOOL DISTRICT v RHATIGAN

Docket No. 326128. Submitted June 9, 2016, at Lansing. Decided December 13, 2016. Approved for publication February 9, 2017, at 9:00 a.m. Leave to appeal denied 501 Mich 893.

Nancy Rhatigan and Rebecca Metz filed charges in the Michigan Employment Relations Commission (MERC) alleging that their employer, the Taylor School District, and their union, the Taylor Federation of Teachers, AFT, Local 1085, had engaged in unfair labor practices under the public employment relations act (PERA), MCL 423.201 *et seq*. The allegations involve two contracts: a collective bargaining agreement that contained the terms and conditions of employment for the charging parties' bargaining unit through October 1, 2017, and a "union security agreement" that required the payment of dues or service fees to the union through July 1, 2023. Both contracts were ratified after 2012 PA 349—which amended PERA—was enacted, but before it became effective. This amending act, commonly known as a "right to work" law, provided that an individual may not be required to pay any dues, fees, assessments, or other charges of any kind or amount to a labor organization or bargaining representative as a condition of obtaining or continuing public employment. An administrative law judge (ALJ) issued a decision and recommended order that found no unfair labor practice in connection with the two contracts and recommended dismissal of the charges. The charging parties filed exceptions to the ALJ's recommendation in MERC. After reviewing the record, MERC disagreed with the ALJ, ruling that the 10-year duration of the union security agreement was "excessive and unreasonable," that the union security agreement violated PERA as amended by 2012 PA 349, and that the union had violated its duty of fair representation by entering into the union security agreement. MERC ordered respondents not to enforce the union security agreement against the charging parties. Respondents appealed.

The Court of Appeals *held*:

1. The enactment of 2012 PA 349 did not constitute an unconstitutional impairment of contracts with respect to respondents. 2012 PA 349 was passed by both houses of the Michigan

Legislature and signed by the Governor, and thus enacted, no later than December 11, 2012. The union security agreement at issue in this case was not entered into by respondents until February 2013. In enacting 2012 PA 349, the Legislature therefore did not in any way act to impair the union security agreement because the union security agreement did not exist at the time of the statutory enactment. In actuality, it was not the Legislature that was seeking to impair an existing contract; to the contrary, it was respondents who were seeking to impair already enacted (although not yet effective) legislation.

2. 2012 PA 349, as applied in this case, is not limited to agreements entered into after the effective date of the statutory amendment. Statutes and statutory amendments generally apply prospectively, absent specific language of the Legislature to the contrary. In § 10(5) of 2012 PA 349, MCL 423.210(5), the Legislature explicitly adopted a limited prospectivity and thus at least implicitly indicated some retrospective applicability of 2012 PA 349. While it was unnecessary to determine how far that retrospective applicability extended, at a minimum, under the circumstances of this case, 2012 PA 349 properly applies to agreements entered into after the enactment of that statutory amendment but before its effective date.

3. MERC did not err by concluding that the school district had committed unfair labor practices in violation of MCL 423.210(1)(a) by coercing the charging parties to financially support the union. A claim under MCL 423.210(1)(a) requires proof that the employer's actions tended to interfere with the free exercise of employee rights. In this case, although the charging parties did not have a right under § 9 of PERA to be free of any obligation to financially support the union at the time the union security agreement was executed and ratified, § 9 now clearly provides that the charging parties have the right to refrain from financially supporting a labor organization, and the enforcement of the union security agreement against the charging parties violates that protected right. MERC found that the union security agreement's length of 10 years was excessive and unreasonable, and it also observed that the effect of enforcing the 10-year security agreement would compel bargaining unit members to remain in or financially support the union, in violation of the rights established under § 9 of PERA. Under these circumstances, the school district's efforts to enforce the union security agreement against the charging parties can fairly be characterized as interfering with, restraining, or coercing public employees

in the exercise of their right, guaranteed by § 9 of PERA, to choose not to support a labor organization.

4. MERC did not err by concluding that the school district had committed unfair labor practices in violation of MCL 423.210(1)(c) by seeking to enforce the union security agreement. Section 10(1)(c) prohibits a public employer from discriminating against employees in order to encourage or discourage membership in a labor organization. The elements of a prima facie case of unlawful discrimination under PERA are, in addition to the existence of an adverse employment action, (1) union or other protected activity, (2) employer knowledge of that activity, (3) anti-union animus or hostility toward the employee's protected rights, and (4) suspicious timing or other evidence that protected activity was a motivating cause of the alleged discriminatory action. Contrary to respondents' argument, the charging parties were engaging in a protected activity by refusing to pay union dues or fees under the union security agreement. Also, MERC did not clearly err by finding that evidence of discrimination or hostility to the charging parties' rights had been presented. The school district not only executed the union security agreement on the eve of the effective date of legislation that dramatically altered labor relations in Michigan and made such union security agreements unlawful, but it did so after that legislation had been passed by both houses of the Legislature and signed by the Governor. Under these circumstances, it is a reasonable inference that the school district acted with hostility toward the charging parties' right to refrain from financially supporting a labor organization and that this hostility was a motivating factor in its entry into a 10-year union security agreement that purported to eliminate the exercise of this right by the charging parties for a full decade following its statutory enactment. Further, at the time of its attempted enforcement of the union security agreement, the school district was aware that the charging parties then possessed the statutory right not to financially support the union. Moreover, MERC did not err by concluding that the charging parties incurred an adverse employment action arising from the school district's violation of MCL 423.210(1)(c). An adverse employment action is an employment decision that is materially and objectively adverse, and what constitutes an adverse employment action is determined on a case-by-case basis. MERC's finding that the charging parties suffered an adverse employment action in regard to their wages as a result of being forced to pay fees to the union, thus essentially decreasing their wages, is not based on a substantial or material error of law.

5. MERC did not err by ruling that the union security agreement was executed in an attempt to encourage the charging parties to maintain membership in a labor organization. The school district, by entering into the union security agreement, required, and essentially coerced, public employees to financially support a labor organization for a 10-year period in contravention of a state law protecting their rights to not do so. On this record, MERC reached a sound legal conclusion that, by doing so, the school district acted in a discriminatory manner that encouraged membership in the union.

6. MERC's conclusion that the union had breached its duty of fair representation by entering into the union security agreement after the enactment of 2012 PA 349 was supported by the record and was not based on a substantial and material error of law. A breach of the duty of fair representation occurs when the union's conduct toward one of its members of the collective bargaining unit is arbitrary, discriminatory, or in bad faith. This duty prohibits not only impulsive, irrational, or unreasoned conduct, but also inept conduct undertaken with little care or with indifference to the interests of those affected, which includes the failure to exercise discretion when that failure can reasonably be expected to have an adverse effect on any or all union members and extreme recklessness or gross negligence that can reasonably be expected to have an adverse effect on any or all union members. The union's execution and ratification of the 10-year union security agreement, which required its bargaining unit members to financially support it, occurred after the passage and signing of a significant state law that had a great impact on labor relations and that would shortly render such a requirement unlawful. This agreement was signed almost contemporaneously with a collective bargaining agreement that included a 10% reduction in wages, suspension of pay increases, and other conditions that negatively affected the wages and benefits of the teacher employees of the school district. Under these circumstances, it was reasonable for MERC to conclude that the union took deliberate action, in entering into the union security agreement to its own financial advantage, that would essentially subvert and undermine the plain language and intent of state law in a manner that was reckless and indifferent to the interests of persons to whom it owned a duty of fair representation.

Affirmed.

Judge OWENS, dissenting, would have reversed because PERA, as amended by 2012 PA 349, clearly and explicitly permits the enforcement of union security agreements entered into before the

amendment's effective date and because the parties clearly and unmistakably agreed to a union security agreement that lasted 10 years, a contract duration that MERC has upheld in other contexts under PERA.

Mackinac Center Legal Foundation (by *Derk A. Wilcox* and *Patrick J. Wright*) for the charging parties.

Mark H. Cousens for respondents.

Amici Curiae:

John Radabaugh for the National Right to Work Legal Defense Foundation, Inc.

White, Schneider, Young & Chiodini, PC (by *Catherine E. Tucker*), for the Michigan Education Association.

Before: MARKEY, P.J., and OWENS and BOONSTRA, JJ.

BOONSTRA, J. Respondents, Taylor School District (the school district) and Taylor Federation of Teachers, AFT, Local 1085 (the union), appeal by petition to review the order of the Michigan Employment Relations Commission (MERC) reversing the findings of the administrative law judge (ALJ)[1] and entering a cease and desist order against respondents. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

This appeal stems from a labor dispute that arose between Nancy Rhatigan and Rebecca Metz (the charging parties) and respondents after respondents executed a union security agreement. This case also presents the legal interplay between the union security

[1] The ALJ had recommended the dismissal of the charging parties' unfair labor practices claim against respondents.

agreement and 2012 PA 349,[2] which amended the public employment relations act (PERA), MCL 423.201 *et seq*., effective March 28, 2013, and which makes it unlawful to require a public employee to financially support a labor organization. The charging parties are employees of the Taylor Board of Education and members of the bargaining unit represented by the union. It is undisputed that the union and the school district entered into a collective bargaining agreement (CBA) in February 2013 and that this CBA governed the wages and the terms and conditions of employment for members of the bargaining unit. The union and the school district also executed the union security agreement in February 2013, and while the CBA expires October 1, 2017, the union security agreement expires July 1, 2023.

The union security agreement provides, in pertinent part:

> The Taylor School District and the Taylor Federation of Teachers agree that the Union's duties to persons employed in the bargaining unit require that each unit member share the costs associated with the negotiation of and administration of this collective bargaining agreement. Therefore, each person employed in the bargaining unit shall either become a member of the Taylor Federation of Teachers and pay dues required of members or agree to pay a service fee in an amount determined by the Union. A service fee will be deducted from the paychecks of persons who fail or refuse to do either. This section describes the process used to accomplish these goals. This agreement is made to reflect the parties' mutual goals of labor peace and bargaining unit continuity which both parties acknowledge to be valuable to each of them.

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[2] 2012 PA 349 is "colloquially called a 'right to work' law." *UAW v Green*, 302 Mich App 246, 249; 839 NW2d 1 (2013).

On August 6, 2013, the charging parties filed unfair labor practice charges against respondents under PERA. After a hearing, the ALJ recommended dismissal of the charges. The charging parties filed exceptions to the ALJ's recommendation with MERC. After reviewing the relevant facts and law, MERC agreed with the ALJ that the charging parties had standing to challenge the union security agreement and that MERC did not have the authority to inquire into the adequacy of consideration supporting the agreement. MERC also agreed with the ALJ that the union security agreement was not required to be of the same duration as the CBA. However, MERC held, contrary to the recommendation of the ALJ, that "the ten-year duration of the Union Security Agreement" was "excessive and unreasonable." MERC further held that the charging parties were correct in their assertion that the union security agreement "compels bargaining unit members to either remain in or to financially support a labor organization, a violation of § 9 of PERA[.]" MERC also disagreed with the ALJ's conclusion that the union had not violated its duty of fair representation to the charging parties when it entered into the union security agreement. MERC ordered respondents to cease and desist from enforcing the union security agreement against the charging parties. This appeal followed. This Court granted motions by the Michigan Education Association and the National Right to Work Legal Defense Foundation to file amicus briefs in this appeal.[3]

II. STANDARD OF REVIEW

In *Calhoun Intermediate Sch Dist v Calhoun Intermediate Ed Ass'n*, 314 Mich App 41, 46; 885 NW2d 310

[3] *Taylor Sch Dist v Rhatigan*, unpublished orders of the Court of Appeals, entered July 15, 2015 (Docket No. 326128).

(2016), this Court set forth the applicable standard of review from a decision of MERC.

> "We review MERC decisions pursuant to Const 1963, art 6, § 28, and MCL 423.216(e)." *Van Buren Co Ed Ass'n v Decatur Pub Sch*, 309 Mich App 630, 639; 872 NW2d 710 (2015) (quotation marks and citation omitted). MERC's factual findings are "conclusive if they are supported by competent, material, and substantial evidence on the record considered as a whole." *Police Officers Ass'n of Mich v Fraternal Order of Police, Montcalm Co Lodge No 149*, 235 Mich App 580, 586; 599 NW2d 504 (1999) (quotation marks and citation omitted). "MERC's legal determinations may not be disturbed unless they violate a constitutional or statutory provision or they are based on a substantial and material error of law." *Van Buren Co Ed Ass'n*, 309 Mich App at 639. We review de novo MERC's legal rulings. *St Clair Co Ed Ass'n v St Clair Intermediate Sch Dist*, 245 Mich App 498, 513; 630 NW2d 909 (2001).

MERC has been entrusted with the interpretation and enforcement of PERA, an area of the law that has been described as very specialized and "politically sensitive." *Van Buren Co Ed Ass'n*, 309 Mich App at 638, quoting *Kent Co Deputy Sheriffs' Ass'n v Kent Co Sheriff*, 238 Mich App 310, 313; 605 NW2d 363 (1999). To the extent that this Court's review of MERC's decision requires review of its application of PERA to the instant facts, "Michigan's judiciary traditionally accords deference to MERC's interpretation of PERA." *Bedford Pub Sch v Bedford Ed Ass'n, MEA/NEA*, 305 Mich App 558, 565; 853 NW2d 452 (2014). While this Court is certainly not bound by MERC's ultimate ruling on a question of law, this Court "will respectfully consider [MERC's] construction of a statute and provide cogent reasons for construing the statute differently." *Id*.

With regard to MERC's factual findings, this Court in *Mount Pleasant Pub Sch v Mich AFSCME Council 25, AFL-CIO*, 302 Mich App 600, 615; 840 NW2d 750 (2013), articulated the following governing principles:

> "Th[e] evidentiary standard [for factual findings] is equal to the amount of evidence that a reasonable mind would accept as sufficient to support a conclusion. While it consists of more than a scintilla of evidence, it may be substantially less than a preponderance." *City of Lansing v Carl Schlegel, Inc*, 257 Mich App 627, 630; 669 NW2d 315 (2003) (quotation marks and citations omitted). Further, "[r]eview of factual findings of the commission must be undertaken with sensitivity, and due deference must be accorded to administrative expertise. Reviewing courts should not invade the exclusive fact-finding province of administrative agencies by displacing an agency's choice between two reasonably differing views of the evidence." *Amalgamated Transit Union*, [*Local 1564 v Southeastern Mich Transp Auth*, 437 Mich 441, 450; 473 NW2d 249 (1991)].

This Court reviews de novo issues of statutory construction. *Simpson v Alex Pickens, Jr, & Assoc, MD, PC*, 311 Mich App 127, 131; 874 NW2d 359 (2015).

III. BACKGROUND OF PERA AND 2012 PA 349

PERA is a state statute that governs the vital professional relationship between a governmental agency and its employees. See *Van Buren Co Ed Ass'n*, 309 Mich App at 640. PERA also reflects the Legislature's intent to make sure that public employees are protected against unfair labor practices by public employers and unions. *Id*. Engaging in conduct prohibited by PERA is an unfair labor practice under MCL 423.216, and it is remedied by MERC in accordance with PERA. *Ranta v Eaton Rapids Pub Sch Bd of Ed*, 271 Mich App 261, 266; 721 NW2d 806 (2006). A

charging party bears the burden of proving an unfair labor practice. *Mount Pleasant Pub Sch*, 302 Mich App at 614.

Section 9 of PERA, MCL 423.209, provides certain rights for public employees with respect to labor organizations. Before the adoption of 2012 PA 349, § 9 provided, in pertinent part:

> It shall be lawful for public employees to organize together or to form, join or assist in labor organizations, to engage in lawful concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and protection, or to negotiate or bargain collectively with their public employers through representatives of their own free choice. [MCL 423.209, as enacted by 1965 PA 379.]

2012 PA 349 amended § 9 to provide, in pertinent part:

> (1) Public employees may do any of the following:
>
> (a) Organize together or form, join, or assist in labor organizations; engage in lawful concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and protection; or negotiate or bargain collectively with their public employers through representatives of their own free choice.
>
> (b) Refrain from any or all of the activities identified in subdivision (a).
>
> (2) No person shall by force, intimidation, or unlawful threats compel or attempt to compel any public employee to do any of the following:
>
> (a) Become or remain a member of a labor organization or bargaining representative or otherwise affiliate with or financially support a labor organization or bargaining representative.

Section 10 of PERA, MCL 423.210, prohibits certain conduct by public employers and labor organizations.

Before the adoption of 2012 PA 349, the relevant portions of § 10, relating to public employers, provided, in pertinent part:

> A public employer or an officer or agent of a public employer shall not do any of the following:
>
> (a) Interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed in section 9.
>
> * * *
>
> (c) Discriminate in regard to hire, terms, or other conditions of employment to discourage membership in a labor organization. However, this act or any other law of this state does not preclude a public employer from making an agreement with an exclusive bargaining representative as described in section 11 to require as a condition of employment that all employees in the bargaining unit pay to the exclusive bargaining representative a service fee equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative. [MCL 423.210(1), as amended by 2012 PA 53.]

2012 PA 349 amended Subsection (1)(c) to read simply, "Discriminate in regard to hire, terms, or other conditions of employment to encourage or discourage membership in a labor organization." MCL 423.210(1)(c), as amended by 2012 PA 349.

Both before and after the adoption of 2012 PA 349, PERA prohibited a labor organization or its officers or agents from acting to:

> (a) Restrain or coerce public employees in the exercise of the rights guaranteed in section 9. . . .
>
> * * *
>
> (c) Cause or attempt to cause a public employer to discriminate against a public employee in violation of

subsection (1)(c). [MCL 423.210(2)(a) and (c); MCL 423.210(3)(a) and (c) as amended by 2012 PA 53.]

IV. IMPAIRMENT OF CONTRACTS AND PROSPECTIVE/RETROSPECTIVE APPLICABILITY OF 2012 PA 349

Respondents notably do not ask this Court to hold that 2012 PA 349 constitutes an unconstitutional impairment of contractual obligations. US Const, art I, § 10 states, in part, "No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility." Similarly, Const 1963, art 1, § 10 states, "No bill of attainder, ex post facto law or law impairing the obligation of contract shall be enacted." These provisions have typically been interpreted as providing coextensive protections. See *AFT Mich v Michigan*, 497 Mich 197, 222-223; 866 NW2d 782 (2015).

Yet it is a fundamental and underlying premise of respondents' position on appeal that 2012 PA 349 indeed impermissibly impairs the union security agreement that respondents entered into shortly before the effective date of the statutory amendment. Respondents contend in their brief on appeal, for example, that "the Legislature knew that such legislation"—that is, 2012 PA 349, if it were to apply to union security agreements in effect before the effective date of the statutory amendment—"would contravene the Impairments Clauses of the Constitution of the United States and the State of Michigan." Therefore, according to respondents, citing § 10(5) of 2012 PA 349, MCL 423.210(5), the Legislature "expressly permitted parties to create, retain and enforce union security provisions which were in effect prior to the statute's effective date." Respondents thus contend that the Legislature made clear in the statute that its provi-

sions prospectively applied only to agreements that were entered into after the effective date of the statute.

On close inspection, however, it is apparent why respondents have limited their "impairment of contract" position to that of a presumption and have not advanced it as a constitutional argument: the premise is simply a fallacy.

First, it is noteworthy that the constitutional impairment of contract provisions, by their express terms, characterize their proscriptions as applying to the *passage* and the *enactment* of legislation impairing contracts. See US Const, art I, § 10 ("No State shall . . . *pass* any . . . Law impairing the Obligation of Contracts . . . ."") (emphasis added); Const 1963, art 1, § 10 ("No . . . law impairing the obligation of contract shall be *enacted*.") (emphasis added). To "enact" in the context of legislation refers to the power to "make [a legislative bill] into law by authoritative act, to pass," while a statute's "effective date" refers to the "date on which a statute . . . becomes enforceable or otherwise takes effect." *Black's Law Dictionary* (9th ed). See also *Frey v Dep't of Mgt & Budget*, 429 Mich 315, 340-341; 414 NW2d 873 (1987) (noting the difference between enactment by the Legislature and effective date).

2012 PA 349 was passed by both houses of the Michigan Legislature and signed by the Governor, and thus "enacted," no later than December 11, 2012.[4] The union security agreement at issue in this case was not entered into by respondents until February 2013. In enacting 2012 PA 349, the Legislature therefore did not

[4] See 2012 PA 349 (indicating approval by the Governor on December 11, 2012), available at <http://www.legislature.mi.gov/documents/2011-2012/publicact/htm/2012-PA-0349.htm> (accessed December 6, 2016) [https://perma.cc/749M-W6RA].

in any way act to impair the union security agreement, because the union security agreement simply did not exist at the time of the statutory enactment. In actuality, it was not the Legislature that was seeking to impair an existing contract; to the contrary, it was respondents who were seeking to impair already enacted (although not yet effective) legislation.[5]

Second, respondents' assertion regarding § 10(5) assumes too much. Section 10(5) of 2012 PA 349 states:

> An agreement, contract, understanding, or practice between or involving a public employer, labor organization, or bargaining representative that violates subsection (3) is unlawful and unenforceable. *This subsection applies only to an agreement, contract, understanding, or practice that takes effect or is extended or renewed after March 28, 2013*. [MCL 423.210(5) (emphasis added).]

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[5] Further, even if a contract is lawful when entered into, subsequent changes in law may render enforcement of that contract unlawful. See *Grand Rapids & I R Co v Cobbs & Mitchell*, 203 Mich 133, 142; 168 NW 961 (1918), quoting *Louisville & N R Co v Mottley*, 219 US 467; 31 S Ct 265; 55 L Ed 297 (1911) (" 'We forbear any further citation of authorities. They are numerous and are all one way. They support the view that, as the contract in question would have been illegal if made after the passage of the commerce act, it cannot now be enforced against the railroad company, even though valid when made. If that principle be not sound, the result would be that individuals and corporations could, by contracts between themselves, in anticipation of legislation render of no avail the exercise by congress, to the full extent authorized by the Constitution, of its power to regulate commerce.' "); see also *Gillette Commercial Operations North America & Subsidiaries v Dep't of Treasury*, 312 Mich App 394, 414; 878 NW2d 891 (2015), quoting *Exxon Corp v Eagerton*, 462 US 176, 190; 103 S Ct 2296; 76 L Ed 2d 497 (1983) (" '[A] statute does not violate the Contract Clause simply because it has the effect of restricting, or even barring altogether, the performance of duties created by contracts entered into prior to its enactment.' "). Rather, to impermissibly impair contracts, a law must act on the contract itself, rather than its subject matter, such as, for example, a statute prohibiting the enforcement of land contracts. See *Thompson v Auditor General*, 261 Mich 624, 635-636; 247 NW 360 (1933).

Therefore, as the italicized language reflects, there indeed exists a statutory basis for limiting certain of the proscriptions of 2012 PA 349 to agreements that take effect after the effective date of the statutory amendment. However, respondents fail to recognize (or acknowledge) that the limitation expressly applies only to "[t]his subsection." "This subsection" is MCL 423.210(5), which by its terms expressly applies only to agreements that violate Subsection (3) of § 10, MCL 423.210(3).[6]

However, MERC did not find a violation of MCL 423.210(3) in this case. The statutory limitation to agreements that take effect after the effective date of the statutory amendment is therefore not applicable here. Moreover, the fact that the Legislature expressly restricted the applicability of that statutory limitation to agreements that violate MCL 423.210(3) speaks volumes. A judicial extension of that limitation to *all* agreements made before the effective date of 2012 PA

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[6] MCL 423.210(3) provides:

> Except as provided in subsection (4), an individual shall not be required as a condition of obtaining or continuing public employment to do any of the following:
>
> (a) Refrain or resign from membership in, voluntary affiliation with, or voluntary financial support of a labor organization or bargaining representative.
>
> (b) Become or remain a member of a labor organization or bargaining representative.
>
> (c) Pay any dues, fees, assessments, or other charges or expenses of any kind or amount, or provide anything of value to a labor organization or bargaining representative.
>
> (d) Pay to any charitable organization or third party any amount that is in lieu of, equivalent to, or any portion of dues, fees, assessments, or other charges or expenses required of members of or public employees represented by a labor organization or bargaining representative.

349 that violate *any* provision of PERA would contravene the plain language of the statute. See *STC, Inc v Dep't of Treasury*, 257 Mich App 528, 536; 669 NW2d 594 (2003) (noting that a proviso limiting the scope of a statute's application must be interpreted according to its plain meaning). Therefore, contrary to respondents' contention, the proscriptions of 2012 PA 349 (other than those in § 10(3)) do not apply *only* to contracts entered into after the effective date of the statutory amendment.

From this analysis flow two conclusions that inform our analysis going forward. First, there simply is no impairment of contract issue here. Second, 2012 PA 349 (as applied here) is not limited to agreements entered into after the effective date of the statutory amendment.

Having said that, we recognize that statutes and statutory amendments generally apply prospectively, absent specific language of the Legislature to the contrary. *Brooks v Mammo*, 254 Mich App 486, 493; 657 NW2d 793 (2002). In this case, however, as discussed earlier, the Legislature explicitly adopted (in § 10(5) of 2012 PA 349, MCL 423.210(5)) a *limited* prospectivity, and thus at least implicitly indicated some retrospective applicability of 2012 PA 349 (outside the scope of that limitation). See *STC, Inc*, 257 Mich App at 536. We note, however, that retrospective applicability is a term that generally is used to denote applicability to "a pre-enactment cause of action." *In re Certified Questions (Karl v Bryant Air Conditioning Co)*, 416 Mich 558, 570; 331 NW2d 456 (1982). In this case, there was no "cause of action" before 2012 PA 349 was enacted, or even before its effective date. Moreover, "[a] statute is not regarded as operating retrospectively [solely] because it relates to an antecedent event." *Hughes v Judges' Re-*

tirement Bd, 407 Mich 75, 86; 282 NW2d 160 (1979). And 2012 PA 349 did not "take[] away or impair[] vested rights acquired under existing laws, or create[] a new obligation and impose[] a new duty, or attach[] a new disability with respect to transactions or considerations already past." *Id*. at 85; see also *Ballog v Knight Newspapers, Inc*, 381 Mich 527, 533-534; 164 NW2d 19 (1969). Therefore, we are persuaded that at least some retrospective applicability of 2012 PA 349 is appropriate in the instant case and called for by the plain language of the legislation itself.

We need not decide in this case just how far that retrospective applicability extends, but at a minimum we conclude, under the circumstances before us, that 2012 PA 349 properly applies to agreements entered into after the enactment of that statutory amendment but before its effective date. With that backdrop, and with the foregoing conclusions in mind, we will proceed to assess MERC's conclusions regarding the unfair labor practice charges against respondents, and we will consider the unfair labor practice charges in the context of respondents' actions—after the effective date of 2012 PA 349—to enforce the provisions of the union security agreement.

V. UNFAIR LABOR PRACTICE CHARGES—SCHOOL DISTRICT

On appeal, respondents contend that MERC erred by concluding that the school district committed unfair labor practices in violation of § 10 of PERA, specifically MCL 423.210(1)(a) and (c). We disagree.

A. VIOLATION OF § 10(1)(a) OF PERA

In *In re Mich State Univ (Police Department)*, MERC Decision & Order (Case No. C10 I-230), issued Novem-

ber 7, 2012, p 11, MERC recognized that a claim under § 10(1)(a) of PERA requires proof of "whether the employer's actions tend to interfere with the free exercise of employee rights." This is the threshold determination, and the employer's motives for the unlawful action and the employee's subjective reactions are not determinative. *Id*.

> This is the same test utilized in cases arising under Section 8(a)(1) of the National Labor Relations Act (NLRA), a provision which is essentially identical to Section 10(1)(a) of PERA. The [United States] Supreme Court has held that some conduct is "so inherently destructive of employee interests" that it may be deemed proscribed without need for proof of an underlying improper motive. *NLRB v Great Dane Trailers, Inc*, 388 US 26[, 34; 87 S Ct 1792; 18 L Ed 2d 1027] (1967). [*In re Mich State Univ*, p 11.]

However, if the "adverse effect of the discriminatory conduct on employee rights was comparatively slight," a charging party must prove a discriminatory motive behind the employer's conduct if the employer has offered "legitimate and substantial business justifications" for the conduct. *Great Dane Trailers*, 388 US at 34 (quotation marks and citation omitted).

In the instant case, MERC concluded that the school district violated § 10(1)(a) of PERA "by coercing Charging Parties to financially support the Union." Respondents challenge this legal conclusion, stating that because the union security agreement was executed and ratified before the March 28, 2013 effective date of 2012 PA 349, the charging parties did not have a right protected by § 9 of PERA to be free of any obligation to financially support the union. While respondents are correct that 2012 PA 349 was not in effect at the time the union security agreement was executed and ratified, we disagree with respondents' analysis of this

issue. It is undisputed that when the charging parties filed their unfair labor practice charges in August 2013, PERA protected their right to be free of any responsibility to financially support a labor organization. MCL 423.209(1)(b) and (2)(a). And the charging parties' unfair labor practice charges in the lower tribunal challenged the *enforcement* of the union security agreement, asserting that its enforcement (after the effective date of 2012 PA 349) violated their newly existing rights under PERA.

While respondents note that, under PERA, union security agreements such as the one in this case were lawful before March 28, 2013, the pivotal issue here is not so much the validity of the agreement itself, but rather whether its enforcement violated protected rights under PERA. Section 9 now clearly provides that the charging parties have the right to refrain from financially supporting a labor organization, and the enforcement of the union security agreement against the charging parties violates that protected right. We therefore conclude that MERC did not commit a substantial error of law by concluding that the school district had committed an unfair labor practice in violation of § 10(1)(a) of PERA, regardless of the school district's motive in seeking enforcement of the agreement. *Van Buren Co Ed Ass'n*, 309 Mich App at 639; *Great Dane Trailers*, 388 US at 34.

MERC found that the union security agreement's length of 10 years was "excessive and unreasonable," noting that the school district and the union were "attempting to nullify a state law for the next ten years." Notably, MERC also observed that the effect of enforcing the 10-year security agreement would compel bargaining unit members to remain in or financially support the union, in violation of the rights

established under § 9 of PERA. Under the circumstances of this case, we conclude that the school district's efforts to enforce the union security agreement against the charging parties can fairly be characterized as interfering with, restraining, or coercing public employees in the exercise of their right, guaranteed by § 9 of PERA, to choose not to support a labor organization. MCL 423.209(1)(b) and (2)(a). Accordingly, MERC's ruling that the charging parties had been coerced into financially supporting the union in violation of their existing rights pursuant to MCL 423.209(2)(a) was grounded in a fair and reasonable interpretation of PERA. *Calhoun Intermediate Sch Dist*, 314 Mich App at 46.

B. VIOLATION OF § 10(1)(c) OF PERA

MERC has articulated the following test to be used in determining whether a violation of § 10(1)(c) of PERA has occurred:

> Section 10(1)(c) of the Act prohibits a public employer from discriminating against employees in order to encourage or discourage membership in a labor organization. The elements of a prima facie case of unlawful discrimination under PERA are, in addition to the existence of an adverse employment action: (1) union or other protected activity; (2) employer knowledge of that activity; (3) anti-union animus or hostility toward the employee's protected rights; and (4) suspicious timing or other evidence that protected activity was a motivating cause of the alleged discriminatory action. [*In re Warren Consol Sch*, MERC Decision & Order (Case No. C09 A-001), issued February 20, 2015, p 17.]

This test is similar to the test used under federal law relative to claims under the National Labor Relations Act (NLRA). *Kentucky Gen, Inc v NLRB*, 177 F3d 430, 435 (CA 6, 1999). To establish a claim under both § 8(a)(1) and (3) of the NLRA, it must be established

that "(i) an individual was engaged in a protected activity, (ii) the employer was aware of the protected activity, and (iii) . . . the employee's protected activity motivated the adverse treatment." *Id*. at 435.

Respondents contend that the first element of this test is not met because the charging parties did not engage in protected activity under § 9 of PERA. As stated previously, however, the charging parties have an existing protected right to refrain from financially supporting a labor organization, MCL 423.209(2)(a), and MERC did not commit a substantial or material error of law in holding that enforcement of the union security agreement violates and infringes that right. Accordingly, the charging parties were engaging in a protected activity by refusing to pay union dues or fees under the union security agreement.

In a very cursory argument, respondents also contend that there is no evidence of discrimination or hostility to the charging parties' rights given that the union security agreement affected the entire bargaining unit as a whole or that such hostility was a motivating factor in the school district's decision to enter into the union security agreement. We disagree.

In *In re Warren Consol Sch*, p 20, MERC observed that "the charging party must present substantial evidence from which a reasonable inference of discrimination may be drawn." We conclude that MERC did not clearly err by finding that such evidence had been presented in this case. The school district not only executed the union security agreement on the eve of the effective date of legislation that dramatically altered labor relations in Michigan and made such union security agreements unlawful, but it did so after that legislation had been passed by both houses of the Michigan Legislature and signed by

Michigan's Governor. Under these circumstances, it is a reasonable inference that the school district acted with hostility toward the charging parties' right to refrain from financially supporting a labor organization, and that this hostility was a motivating factor in its entry into a 10-year union security agreement that purported to eliminate the exercise of this right by the charging parties for a full decade following its statutory enactment. Further, at the time of its attempted enforcement of the union security agreement, the school district was aware that the charging parties then possessed the statutory right not to financially support the union.

Moreover, MERC did not err by concluding that the charging parties incurred an adverse employment action arising from the school district's violation of MCL 423.210(1)(c). Specifically, MERC found that the charging parties "suffered an adverse employment action in regard to their wages because they will be forced to pay agency fees to the Union." This Court has defined an adverse employment action in the following manner:

> In *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 364; 597 NW2d 250 (1999), we defined an adverse employment action as an employment decision that is "materially adverse in that it is more than [a] 'mere inconvenience or an alteration of job responsibilities' " and that "there must be some objective basis for demonstrating that the change is adverse because 'a plaintiff's "subjective impressions as to the desirability of one position over another" [are] not controlling.' "
>
> Although there is no exhaustive list of adverse employment actions, typically it takes the form of an ultimate employment decision, such as "a termination in employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibili-

> ties, or other indices that might be unique to a particular situation." [*Peña v Ingham Co Rd Comm*, 255 Mich App 299, 311-312; 660 NW2d 351 (2003) (citations omitted; quotation marks altered; bracketed alterations in *Peña*).]

Further, what constitutes an adverse employment action will be determined on a case-by-case basis. *Chen v Wayne State Univ*, 284 Mich App 172, 201; 771 NW2d 820 (2009). An "exhaustive list" of what amounts to an adverse employment action does not exist, and this determination will vary according to the specific circumstances of each case. *Id*. We conclude that MERC's finding that the charging parties suffered an adverse employment action in regard to their wages as a result of being forced to pay fees to the union (thus essentially decreasing their wages) is not based on a substantial or material error of law. *Calhoun Intermediate Sch Dist*, 314 Mich App at 46.

Finally, respondents challenge MERC's holding that the union security agreement was executed in an attempt to encourage the charging parties to maintain membership in a labor organization. Respondents contend that this conclusion was erroneous, because union security agreements are intended to require financial contributions from public employees who did not wish to be members of a labor organization. While recognizing the nuances of this argument, it was indeed reasonable for MERC to reach the conclusion it did under the facts of this case. Specifically, the school district, by entering into the union security agreement, required, and essentially coerced, public employees to financially support a labor organization for a 10-year period in contravention of a state law protecting their rights to not do so. On this record, MERC reached a sound legal conclusion that, by doing so, the school district acted in

a discriminatory manner that encouraged membership in the union. *Id*.[7]

VI. DUTY OF FAIR REPRESENTATION—UNION

Respondents argue in part that MERC erred by concluding that the union breached its duty of fair representation by entering into the union security agreement shortly before 2012 PA 349 came into effect (but after it had been passed by the Legislature and signed into law by the Governor). We disagree.

A union's duty of fair representation provides protection for members of a bargaining unit who have surrendered their right to strike individual bargains with their employer. See *Humphrey v Moore*, 375 US 335, 342; 84 S Ct 363; 11 L Ed 2d 370 (1964). This duty was developed in the federal courts in a series of cases under the Railway Labor Act, and later extended to unions certified under the National Labor Relations Act (NLRA). *Goolsby v Detroit*, 419 Mich 651, 661; 358 NW2d 856 (1984), citing *Vaca v Sipes*, 386 US 171; 87 S Ct 903; 17 L Ed 2d 842 (1967). In *Goolsby*, 419 Mich at 660 n 5 (citation omitted), the Michigan Supreme Court recognized that "PERA impliedly imposes on labor organizations representing public sector employees a duty of fair representation which is similar to the duty imposed by the NLRA on labor organizations representing private sector employees." This duty has been described as being fiduciary in nature and involving a relationship marked by traits of " 'fidelity, of

[7] We note that even were we to conclude that MERC erred by finding that the school district violated PERA, we would nonetheless find the union security agreement unenforceable against the charging parties as a result of the union's breach of its duty of fair representation, as discussed later in this opinion.

faith, of trust, and of confidence.' " *Id*. at 662 (citation omitted). The *Goolsby* Court further specified:

> In *Vaca*, [386 US at 177], the Supreme Court of the United States made it clear that a union's duty of fair representation is comprised of three distinct responsibilities: (1) "to serve the interests of all members without hostility or discrimination toward any", (2) "to exercise its discretion with complete good faith and honesty", and (3) "to avoid arbitrary conduct". A union's failure to comply with any one of those three responsibilities constitutes a breach of its duty of fair representation. [*Id*. at 664.]

A breach of the duty of fair representation on the part of a union therefore occurs when the union's conduct toward one of its members of the collective bargaining unit " 'is arbitrary, discriminatory, or in bad faith.' " *Id*. at 661, quoting *Vaca*, 386 US at 190. The conclusion that a union acted arbitrarily does not require a finding of bad faith. *Goolsby*, 419 Mich at 679. Recognizing that courts in Michigan ought not to interpret a union's duty to refrain from engaging in arbitrary conduct narrowly, the *Goolsby* Court provided the following guidance concerning what amounts to arbitrary conduct:

> In addition to prohibiting impulsive, irrational, or unreasoned conduct, the duty of fair representation also proscribes inept conduct undertaken with little care or with indifference to the interests of those affected. We think the latter proscription includes, but is not limited to, the following circumstances: (1) the failure to exercise discretion when that failure can reasonably be expected to have an adverse effect on any or all union members, and (2) extreme recklessness or gross negligence which can reasonably be expected to have an adverse effect on any or all union members. [*Id*.]

A union's violation of its duty of fair representation related to a union security agreement can be remedied,

as MERC did here, by, *inter alia*, ordering that the union and employer cease and desist from attempting to terminate, or to cause the termination of, a charging party for failing to pay union dues or union fees as required by that agreement. See, e.g., *HC Macaulay Foundry Co v NLRB*, 553 F2d 1198 (CA 9, 1977). In this case, MERC concluded that the union acted unlawfully and unreasonably, ultimately determining that the union acted arbitrarily, that it discriminated against some of its bargaining unit members, and that it was indifferent to the interests of those members. MERC noted that the union was aware of the pending effective date of 2012 PA 349 when it negotiated for and ratified the union security agreement that it knew would compel unwilling members of the bargaining unit to support it financially for 10 years beyond the effective date of that legislation. MERC thus concluded that the union committed an unfair labor practice in violation of § 10(2)(a) and (c) of PERA, MCL 423.210(2)(a) and (c).

It is undisputed in this case that the union's execution and ratification of the 10-year union security agreement (requiring its bargaining unit members to financially support it) occurred after the passage and signing of a significant state law that had a great impact on labor relations and that would shortly render such a requirement unlawful. Additionally, this agreement was signed almost contemporaneously with a CBA that included a 10% reduction in wages, suspension of pay increases, and other conditions that negatively affected the wages and benefits of the teacher employees of the school district. Under these circumstances, we conclude that it was indeed reasonable for MERC to conclude that the union took deliberate action, by entering into the union security agreement to its own financial advantage, that would essentially subvert and undermine the plain language

and intent of state law in a manner that was reckless and indifferent to the interests of persons to whom it owned a duty of fair representation. *Goolsby*, 419 Mich at 679. While respondents counter that the union had broad discretion to represent the bargaining unit and that the union acted in a manner that protected the best interests of the bargaining unit as a whole in times of economic turmoil, *id*. at 665, MERC rejected this argument, impliedly concluding that the union acted to sustain and protect itself financially and that it had not acted in accordance with its fiduciary duty to demonstrate " 'fidelity, . . . faith, . . . trust, and . . . confidence' " to its members, *id*. at 662 (citation omitted). Under the circumstances of this case, and given the timeline of events leading up to the execution of the union security agreement under the wire of the effective date of 2012 PA 349 and the signing of a CBA that had a substantial negative impact on union members, *Goolsby*, 419 Mich at 679, MERC's conclusion that the union's conduct rose to the level of arbitrary, discriminatory, and indifferent conduct in violation of its duty of fair representation found support in the record and was not based on a substantial and material error of law. *Calhoun Intermediate Sch Dist*, 314 Mich App at 46.[8]

Having concluded that MERC's decision should be affirmed on the grounds specified in its opinion and order, we do not address the charging parties' alternate grounds for affirmance.

Affirmed.

MARKEY, P.J., concurred with BOONSTRA, J.

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[8] We find the dissent's reliance on *Ann Arbor Fire Fighters Local 1733*, 1990 MERC Lab Op 528, to be inapposite, inasmuch as our holding is not premised on a finding that the duration of the union security agreement alone constituted a per se violation of the union's duty of fair representation.

OWENS, J. (*dissenting*). I respectfully dissent from the majority's affirmance of the findings of the Michigan Employment Relations Commission (MERC) that the school district committed unfair labor practices in violation of § 10(1)(a) and (c)[1] of the public employment relations act (PERA)[2] and that the union committed an unfair labor practice in violation of § 10(2)(a) and (c),[3] thereby breaching its duty of fair representation.

At the time the union and the school district executed the February 2013 union security agreement, PERA authorized public employees to organize for the purpose of collective bargaining, former MCL 423.209, and precluded a public employer or an officer or an agent of a public employer from "interfer[ing] with, restrain[ing], or coerc[ing] public employees in the exercise of their rights guaranteed in § 9," MCL 423.210(1)(a), as amended by 2012 PA 53, and from "[d]iscriminat[ing] in regard to hire, terms, or other conditions of employment to encourage or discourage membership in a labor organization," MCL 423.210(1)(c), as amended by 2012 PA 53. PERA provided, however, that

> this act or any other law of this state does not preclude a public employer from making an agreement with an exclusive bargaining representative . . . to require as a condition of employment that all employees in the bargaining unit pay to the exclusive bargaining representative a service fee equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative. [MCL 423.210(1)(c), as amended by 2012 PA 53.]

Thus, PERA did not preclude the school district and the union from entering into the union security agree-

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[1] MCL 423.210(1)(a) and (c).

[2] MCL 423.201 *et seq*.

[3] MCL 423.210(2)(a) and (c).

ment and requiring all employees in the bargaining unit, including nonmembers of the bargaining unit, to pay a service fee equivalent to the amount of dues required of members of the bargaining unit.

There can be no dispute that if the school district and the union had entered into the union security agreement after the effective date of 2012 PA 349 the agreement would not be enforceable under PERA, as amended, because § 10(3)(c)[4] of the act gives public employees the right to not financially support a labor organization or bargaining representative. However, the union security agreement in this case was executed in February 2013 after a lengthy period of collective bargaining. Section 10(5)[5] of PERA, as amended, provides, in part, that any agreement between a public employer and labor organization that violates § 10(3) is unlawful and unenforceable, *unless such an agreement was already in effect when 2012 PA 349 took effect*—which was on March 28, 2013. I would conclude that PERA, as amended, clearly and explicitly permits the enforcement of union security agreements entered into before that date. Because the school district and the union entered into the union security agreement before March 28, 2013, I would hold that actions taken by either respondent to enforce the terms of the agreement would not violate PERA, as amended.

Nonetheless, the majority holds that the union security agreement is not enforceable on other grounds. The majority concludes that MERC properly found that the school district engaged in unfair labor practices under § 10(1)(a) "by coercing Charging Parties to financially support the union" and that the school district's enforcement of the union security agreement

[4] MCL 423.210(3)(c).

[5] MCL 423.210(5).

discriminated against the charging parties in violation of § 10(1)(c) by violating their protected right under PERA, as amended, to not financially support a labor organization. However, as previously noted, the charging parties did not have a protected right to be free of any obligation to financially support a labor organization or bargaining representative at the time of the contract negotiations and ratification of the union security agreement.[6] Therefore, I would conclude that MERC's rulings that the school district had coerced the charging parties into financially supporting the union in violation of their rights and that the school district acted with hostility toward the charging parties' rights to refrain from financially supporting a labor organization were not grounded in a fair and reasonable interpretation of PERA.

The majority also concludes that MERC properly found that the union's acting in a manner that would compel employees of the bargaining unit to support the union for 10 years beyond the effective date of 2012 PA 349 rose to the level of arbitrary conduct in violation of the union's duty of fair representation and, therefore, constituted an unfair labor practice in violation of § 10(2)(a) and (c). In *Ann Arbor Fire Fighters Local 1733*, 1990 MERC Lab Op 528, MERC refused to declare a 10-year pension moratorium agreement invalid for being "too long to be consistent with PERA's goal of promoting good faith bargaining." MERC stated:

> The Employer suggests that we should step in to invalidate any agreement between parties to a collective bargaining relationship which is unconscionably long. In

[6] On January 14, 2013, the union and the school district reached agreement on the terms of the CBA to replace a contract that had expired on August 16, 2011.

> support of this proposition it cites several cases finding employer proposals for 5-year contracts, together with other conduct, to be evidence of bad-faith bargaining under the National Labor Relations Act (NLRA), 29 USC 150. The reasoning in these cases is that the employer clearly knew that its proposals would be unacceptable to the union. Therefore, the proposals themselves were evidence of the employer's fixed intention not to reach any agreement with the union. The issue in these cases was the employer's good faith in negotiations. These cases do not stand for the proposition that a 5-year collective bargaining agreement is *per se* invalid under the NLRA.
>
> We are not authorized by PERA to police the content of agreements to redress imbalances of bargaining power between the parties. Nor are we willing to hold that parties may not enter into a bargaining waiver of 10 years duration without violating the Act. . . . [T]he parties clearly and unmistakably agreed to a 10-year-pension moratorium. While the scope of this agreement may be in dispute, the length of it is not. . . . Again, however, our task is to determine the parties' bargaining rights and obligations under PERA, not to reform their contract. [*Id.* at 537 (citations omitted).]

Similarly, in this case, the school district and the union clearly and unmistakably agreed to a 10-year union security agreement. The mere fact that the parties were aware of the pending effective date of 2012 PA 349 does not, in my view, demonstrate that the union acted arbitrarily by entering into an agreement that it determined to be in the best interests of the bargaining unit as a whole.

In sum, I would reverse MERC's decision that the school district committed unfair labor practices in violation of § 10(1)(a) and (c) and that the union committed an unfair labor practice in violation of § 10(2)(a) and (c) and as a result breached its duty of fair representation and, therefore, I would reverse the cease-and-desist order against respondents.

SHELTON v AUTO-OWNERS INSURANCE COMPANY

Docket No. 328473. Submitted December 13, 2016, at Detroit. Decided February 14, 2017, at 9:00 a.m. Leave to appeal denied 501 Mich 951.

Tyann Shelton brought an action in the Wayne Circuit Court against Auto-Owners Insurance Company, seeking personal protection insurance (PIP) benefits from defendant as a result of injuries she allegedly sustained in a single-car collision on January 22, 2013. The vehicle was owned by Timothy Williams, who was insured by defendant, and Shelton alleged that because she was a passenger in the vehicle and neither owned a vehicle nor resided with a relative who owned a vehicle, she was entitled to PIP benefits—including medical expenses and replacement services for household chores—from defendant under the no-fault act, MCL 500.3101 *et seq*. Defendant moved for summary disposition, asserting that Shelton made fraudulent statements concerning her need for replacement services and therefore was not entitled to PIP benefits under a fraud-exclusion clause in the insurance policy. The court, Annette J. Berry, J., granted summary disposition to defendant as to the replacement services but denied the motion as to payment for medical services. Defendant appealed by leave granted.

The Court of Appeals *held*:

1. MCL 500.3114(1) provides, in pertinent part, that a personal protection insurance policy applies to the person named in the policy, the person's spouse, and a relative of either domiciled in the same household. MCL 500.3114(4) provides that except as provided in Subsections (1) to (3), a person suffering accidental bodily injury arising from a motor vehicle accident while an occupant of a motor vehicle shall claim personal protection insurance benefits from insurers in the following order of priority: (a) the insurer of the owner or registrant of the vehicle occupied; (b) the insurer of the operator of the vehicle occupied. In this case, because Shelton was not a person named in the policy, the spouse of a person named in the policy, or a relative of either domiciled in the same household, defendant's policy did not apply to Shelton. Defendant was required to pay Shelton's benefits pursuant to the no-fault statute, not pursuant to a contractual agreement. Shelton received no-fault

benefits under MCL 500.3114(4), which does not state that the policy "applies" to the passenger's claim for benefits. The text of MCL 500.3114(4), unlike the text of MCL 500.3114(1), omits any mention of a personal protection insurance policy, instead providing that the injured person is to claim benefits from insurers. Because Shelton's no-fault benefits were governed solely by statute, the exclusionary provision in defendant's policy did not apply to Shelton and could not operate to bar her claim.

2. To void a policy because the insured has willfully misrepresented a material fact, an insurer must show (1) that the misrepresentation was material, (2) that it was false, (3) that the insured knew that it was false at the time it was made or that it was made recklessly, without any knowledge of its truth, and (4) that the insured made the material misrepresentation with the intention that the insurer would act upon it. A statement is material if it is reasonably relevant to the insurer's investigation of a claim. In this case, defendant relied on an investigator's reports and photographs to support its claim, and this evidence was insufficient to establish that Shelton committed fraud in light of the testimony, medical records, and affidavits that supported Shelton's claim of injury and need for medical care and assistance. Many of the investigator's photographs were so blurry and the subjects of the photographs so distant that it was impossible to discern the subjects' identities and actions. Additionally, the descriptions in defendant's brief were, at times, inconsistent with the investigator's reports. The fact that Shelton had been seen walking without a visible brace, bending over on two occasions, and wringing out a shirt did not establish beyond a question of fact that Shelton had defrauded defendant. While repeated activities may be sufficient to establish the elements of fraud beyond a question of fact, isolated examples of an injured person participating in simple physical actions such as bending, modest lifting, or other basic physical movements are not sufficient to establish the elements of fraud beyond a question of fact.

3. Reply briefs must be confined to rebuttal; a party may not raise new or additional arguments in its reply brief. Defendant's argument in its reply brief that Shelton's no-fault claim was barred by the wrongful-conduct rule was not raised in its original brief on appeal; therefore, the issue was not reached. However, had the issue been reached, defendant's argument would have been rejected because defendant failed to claim that Shelton's wrongful conduct was a proximate cause of her injuries.

Affirmed.

K. F. KELLY, P.J., concurred in the result only.

INSURANCE — NO-FAULT — MATERIAL MISREPRESENTATIONS — ESTABLISHING THE ELEMENTS OF FRAUD BEYOND A QUESTION OF FACT.

To void a policy because the insured has willfully misrepresented a material fact, an insurer must show (1) that the misrepresentation was material, (2) that it was false, (3) that the insured knew that it was false at the time it was made or that it was made recklessly, without any knowledge of its truth, and (4) that the insured made the material misrepresentation with the intention that the insurer would act upon it; when a claimant has alleged a need for replacement services, evidence of repeated activities that undermine the claim may be sufficient to establish the elements of fraud beyond a question of fact, but isolated examples of an injured person participating in simple physical actions such as bending, modest lifting, or other basic physical movements are not sufficient to establish the elements of fraud beyond a question of fact.

Luxon & Zang, PC (by *Timothy P. Luxon* and *Matthew M. Thomas*), and *Speaker Law Firm, PLLC* (by *Steven A. Hicks*), for Tyann Shelton.

Anselmi & Mierzejewski, PC (by *Christopher P. Endres*), for Auto-Owners Insurance Company.

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

SHAPIRO, J. In this no-fault personal protection insurance (PIP) case, defendant, Auto-Owners Insurance Company, sought summary disposition on the basis of a fraud-exclusion clause in its policy. Defendant asserted that plaintiff Tyann Shelton made fraudulent statements concerning her need for replacement services and therefore was excluded by the policy from all PIP benefits. The trial court granted summary disposition in favor of defendant as to replacement services, a ruling from which Shelton has not appealed.[1] The

[1] The record does not make clear the basis for the dismissal of the replacement-services claim. Defendant asserts that the trial court's decision implies that the court made a finding of fraud, and Shelton argues that the decision was based on a lack of proofs for the

trial court denied the motion as to payment for medical services, and defendant appeals that ruling by leave granted.[2] We affirm.

Shelton alleges that she was injured in a single-car collision on January 22, 2013. The vehicle was owned and operated by Timothy Williams; Shelton was a passenger.[3] She sought PIP benefits from defendant because she did not own a vehicle or reside with a relative who did. Therefore, defendant, as Williams's insurer, was to provide her with those PIP benefits to which she was entitled under the no-fault act. MCL 500.3114(4)(a). Shelton claimed PIP benefits beginning in January 2013 that included medical expenses and replacement services for household chores.[4] Defendant denied the claim, and Shelton brought suit.

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replacement-services claim. Defendant refers us to the trial court's remark during the hearing that the court "[doesn't] like people misrepresenting the truth." However, the court also stated that after a review of Shelton's deposition, the court could not conclude that Shelton lied. And in making its ruling, the trial court did not cite or discuss the elements of fraud, make findings regarding those elements, or even use the word "fraud." Neither party asked the court to clarify its ruling or to make a finding of fraud. Because the dismissal of the replacement-services claim has not been appealed, we need not address it further.

[2] *Shelton v Auto-Owners Ins Co*, unpublished order of the Court of Appeals, entered December 21, 2015 (Docket No. 328473).

[3] Plaintiff Dwayne Williams was also a passenger in the car. Dwayne Williams's claim is not at issue in this appeal.

[4] Before the trial court, defendant also argued that Shelton fraudulently misrepresented her preaccident history by failing to disclose that she had made a PIP claim following a 2005 accident. The trial court rejected the argument regarding the prior auto accident, noting that Shelton's statement about the 2005 accident simply could have been a mistake or a failure of memory and that "it really becomes an issue for the jury to decide whether or not she's credible." Defendant has not argued on appeal that the trial court erred in its ruling as to the 2005 claim. Moreover, the materials submitted by defendant with its brief on appeal relevant to the 2005 claim are not in the lower court record and were struck, with consent, at oral argument.

Defendant moved for summary disposition, asserting that Shelton was not entitled to PIP benefits under an exclusionary clause in the policy that provided:

> We will not cover any person seeking coverage under this policy who has made fraudulent statements or engaged in fraudulent conduct with respect to procurement of this policy or to any **occurrence** for which coverage is sought.

Defendant argues that this policy exclusion applies to Shelton despite the fact that she is not a policyholder, and defendant further argues that the evidence demonstrates beyond a question of fact that Shelton engaged in fraud as defined in the policy. Defendant relies largely on *Bahri v IDS Prop Cas Ins Co*, 308 Mich App 420, 423-426; 864 NW2d 609 (2014), in which we held that a fraud provision in an insurance contract could bar a claim for PIP benefits when the policyholder filed a claim for replacement services on a date that preceded the date on which the subject accident occurred. However, both the law and the facts of this case differ substantially from those that existed in *Bahri*.

The law governing application of the policy exclusion in *Bahri* is not applicable in this case. In *Bahri*, the provision applied to the plaintiff because the "defendant issued [the subject] no-fault automobile policy to [the] plaintiff." *Id*. at 421. In this case, however, Shelton was not a party to, nor an insured under, the policy; she was injured while a passenger, and because neither she nor her spouse or resident relative had a no-fault policy, defendant was required to pay her benefits pursuant to statute, not pursuant to a contractual agreement.

The Michigan Supreme Court stated in *Rohlman v Hawkeye-Security Ins Co*, 442 Mich 520, 524-525; 502 NW2d 310 (1993), that

> PIP benefits are mandated by statute under the no-fault act, MCL 500.3105; MSA 24.13105, and, therefore, the statute is the "rule book" for deciding the issues involved in questions regarding awarding those benefits. On the other hand, the insurance policy itself . . . is the contract between the insurer and the insured . . . .

The Supreme Court adhered to this principle in *Harris v Auto Club Ins Ass'n*, 494 Mich 462; 835 NW2d 356 (2013), a case involving a motorcycle-automobile collision. *Harris* cited MCL 500.3114(5)(a), which, using language paralleling the language used in MCL 500.3114(4)(a), provided that if the injured motorcyclist, his or her spouse, or a resident relative did not have a no-fault policy, then his or her no-fault benefits would be paid by the insurer of the owner or registrant of the automobile. *Id*. at 471-472. In *Harris*, the Court stated that the plaintiff could not take advantage of the uncoordinated medical benefit provision in the policy because his claim did not flow from the subject policy but instead arose "solely by statute." *Id*. at 472. The Court held that:

> [The plaintiff] is not claiming benefits under a no-fault insurance policy that he or anyone else procured. [He] is neither a third-party beneficiary nor a subrogee of the no-fault policy issued to the person that struck him and thus he [was] not eligible to receive benefits under that policy. Rather, [the plaintiff's] right to PIP benefits arises solely by statute. [*Id*. at 471-472 (citations omitted).]

Defendant's argument is directly contrary to the grounds for the holdings in both *Rohlman* and *Harris*. Here, as in those cases, Shelton's no-fault benefits are governed "solely by statute." Therefore, the exclusionary provision in defendant's no-fault policy does not apply to Shelton and cannot operate to bar Shelton's claim.

This conclusion is also consistent with the text of the relevant statutes. "The primary rule of statutory construction is that, where the statutory language is clear and unambiguous, the statute must be applied as written." *Cruz v State Farm Mut Auto Ins Co*, 466 Mich 588, 594; 648 NW2d 591 (2002). Additionally, the "primary task in construing a statute is to discern and give effect to the intent of the Legislature." *Farmers Ins Exch v Farm Bureau Gen Ins Co of Mich*, 272 Mich App 106, 111; 724 NW2d 485 (2006) (citation, quotation marks, and brackets omitted). "[A] court must give effect to every word, phrase, and clause and avoid a construction that would render any part of the statute surplusage or nugatory." *Id*.

Under Subsection 1 of the no-fault priority statute, "a personal protection insurance policy . . . *applies* to . . . the person named in the policy, the person's spouse, and a relative of either domiciled in the same household . . . ." MCL 500.3114(1) (emphasis added). Shelton is not an individual named in defendant's policy, a spouse of the person named in the policy, or a relative of either the person named in defendant's policy or his spouse. Therefore, pursuant to the statute, defendant's policy does not "apply" to Shelton. Rather, Shelton received no-fault benefits pursuant to Subsection 4, which reads:

> Except as provided in subsections (1) to (3), a person suffering accidental bodily injury arising from a motor vehicle accident while an occupant of a motor vehicle shall claim personal protection insurance benefits from insurers in the following order of priority:
>
> (a) The insurer of the owner or registrant of the vehicle occupied.
>
> (b) The insurer of the operator of the vehicle occupied. [MCL 500.3114(4).]

Subsection (4) does not state that the owner or operator's insurance policy "applies" to the passenger's claim for benefits, and its text, unlike that of Subsection (1), omits any mention of a personal protection insurance *policy*, instead providing that the injured person is to "claim personal protection insurance benefits from insurers," beginning with "[t]he insurer of the owner or registrant of the vehicle occupied." MCL 500.3114(4)(a).

Defendant argues that we should depart from the statute as a matter of public policy because if we do not, no-fault insurers will lose the ability to deny fraudulent no-fault claims. This argument is meritless. As always, if an insurer concludes that a claim is fraudulent, it may deny the claim.[5] Should the claimant then file suit, the burden is on the claimant to prove that he or she is entitled to his or her claimed benefits, a burden that is highly unlikely to be met if the fact-finder concludes that the claim is fraudulent.[6] And insurers can obtain attorney fees for having to litigate any claims that are determined to be fraudulent. MCL 500.3148.

This case also presents very different facts than did *Bahri*.[7] In *Bahri*, the insurer presented unrebutted

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[5] This Court has long held that insurers should be afforded an opportunity to review claims for lack of coverage, excessiveness, and fraud. *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 257 Mich App 365, 378; 670 NW2d 569 (2003).

[6] MCL 500.3107(1), Subsections (a), (b), and (c), respectively require a plaintiff to prove that the medical expenses were "reasonable charges incurred for reasonably necessary [medical care]," that the plaintiff has lost "income from work [he or she] would have performed during the first 3 years after the date of the accident if he or she had not been injured," and that the costs for replacement services were "reasonably incurred in obtaining ordinary and necessary services."

[7] We note that the policy language in the instant case differs significantly from that in *Bahri*. In *Bahri*, the exclusion read, "We do not

evidence (1) that the plaintiff claimed replacement-services benefits for services that had been performed 19 days *before the auto accident had even occurred* and (2) that over a period of approximately seven weeks, the plaintiff repeatedly engaged in a wide range of chores during the days on which she claimed that someone else did them for her. *Bahri*, 308 Mich App at 425-426. In this case, it is clear that questions of fact exist as to whether Shelton made material misrepresentations, and if so, whether they were made with the intent to defraud defendant.

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provide coverage for any insured who has made fraudulent statements or engaged in fraudulent conduct in connection with any accident or loss for which coverage is sought under this policy." *Bahri*, 308 Mich App at 423-424 (quotation marks omitted). The exclusion in this case states:

> We will not cover any person seeking coverage under this policy who has made fraudulent statements or engaged in fraudulent conduct *with respect to procurement of this policy or to any* **occurrence** for which coverage is sought. [Emphasis added.]

Defendant has not provided us with the policy definition of "occurrence," but in all cases dealing with the term, it has been defined as the accident or event during which the injury occurs. See, e.g., *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 112-113; 595 NW2d 832 (1999) (stating that the applicable insurance policy defined the term "occurrence" as "an accident, . . . which results, during the policy period, in . . . bodily injury; or . . . property damage"), *Group Ins Co of Mich v Czopek*, 440 Mich 590, 596; 489 NW2d 444 (1992) (stating that the term "occurrence" was defined in the policy as "an accident, . . . which results, during the policy term, in bodily injury or property damage"), and *Mich Basic Prop Ins Ass'n v Wasarovich*, 214 Mich App 319, 327-328; 542 NW2d 367 (1995) (stating that the definition of "occurrence" in the policy included an accident that resulted in personal injury during the policy period). Defendant has neither alleged any fraud "with respect to [the] procurement of [the] policy" nor with respect to the "occurrence." The claimed fraud was in the reporting of services later provided, an event not referenced in the provision. However, because the issue was not considered in the trial court, we decline to rule on this basis. *Mich Ed Ass'n v Secretary of State*, 280 Mich App 477, 488; 761 NW2d 234 (2008), aff'd 489 Mich 194 (2011); *People v Byrne*, 199 Mich App 674, 677; 502 NW2d 386 (1993).

Reliance on an exclusionary clause in an insurance policy is an affirmative defense; therefore, defendant has the burden of proof. An "insurance company has the burden to prove that one of the policy's exclusions applies." *Auto-Owners Ins Co v Seils*, 310 Mich App 132, 146; 871 NW2d 530 (2015). Thus, to obtain summary disposition, the insurer must show that there is no question of material fact as to any of the elements of its affirmative defense. MCR 2.116(C)(10). The elements, as set forth in *Bahri*, are as follows:

> "To void a policy because the insured has wilfully misrepresented a material fact, an insurer must show that (1) the misrepresentation was material, (2) that it was false, (3) that the insured knew that it was false at the time it was made or that it was made recklessly, without any knowledge of its truth, and (4) that the insured made the material misrepresentation with the intention that the insurer would act upon it. A statement is material if it is reasonably relevant to the insurer's investigation of a claim." [*Bahri*, 308 Mich App at 424-425 (citation and quotation marks omitted).]

We review de novo motions for summary disposition under MCR 2.116(C)(10). *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). In doing so, we are required to view the affidavits, pleadings, depositions, admissions, and other documentary evidence in the light most favorable to the nonmovant. *Liparoto Constr, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 29; 772 NW2d 801 (2009). Similarly, all reasonable inferences must be drawn in favor of the nonmovant. *Dextrom v Wexford Co*, 287 Mich App 406, 415; 789 NW2d 211 (2010). Summary disposition is only appropriate under MCR 2.116(C)(10) when there is no genuine issue with respect to any material fact and the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d

817 (1999). "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).

In support of its motion, defendant relied on an investigator's reports and some photographs that counsel alleges were taken by the investigator on June 1, 2013.[8] Defendant argues that the photographs and investigator's reports are sufficient to establish beyond a question of fact that Shelton committed fraud despite the testimony, medical reports, and affidavits that support Shelton's claim of injury and need for medical care and assistance. We disagree. First, many of the photographs are so blurred and the subjects of the photographs so distant that it is impossible to determine who is being photographed and what they are doing. Second, the descriptions in defendant's brief are, at times, inconsistent with the investigator's reports. For example, defendant's brief states that on June 1, 2013, Shelton "is observed outstretching both of her arms above her head to lift and pass a child to an unknown female."[9] However, the investigator's report

[8] While not raised in the briefing, based on the record before us, it appears that many of the documents on which defendant relies, including the three surveillance reports and the photographs, do not meet the evidentiary requirements of MCR 2.116(G)(6) and should not have been considered. MCR 2.116(G)(6) provides that "[a]ffidavits, depositions, admissions, and documentary evidence offered in support of or in opposition to a motion based on subrule (C)(1)-(7) or (10) *shall only be considered to the extent that the content or substance would be admissible as evidence* . . . ." (Emphasis added.) The reports on which defendant relies appear to be hearsay. Their ostensible author did not testify and has not provided an affidavit that the statements in his reports are true and that he will so testify at trial. The same is true of the photographs on which defendant relies.

[9] Formatting altered.

dated June 1, 2013, states that the "claimant" being observed is "Timothy Williams," not Shelton, and all of the report's references to "the claimant" use the pronoun "he." The only person that the report identifies as being "observed lifting the toddler" is Williams.[10] The only women referred to in that report are two "female subject[s]," neither of whom is identified in the report as Shelton despite the fact that Shelton had been watched by this investigator on two prior occasions. Moreover, the only photographs submitted by defendant are dated June 1, 2013, and the report does not identify Shelton as being present on that date.

Defendant also argues that Shelton fraudulently claimed assistance with doing laundry on July 6, 2013, because the investigator's report states that on that date he saw Shelton wringing out a shirt while on the front lawn of her home.[11] A single instance of a single shirt being wrung out does not demonstrate beyond question that Shelton can operate a washer or dryer, carry loads of laundry, or perform similar tasks. Nor does it conclusively demonstrate an intent to defraud. Similarly, the fact that Shelton was seen walking without a visible brace[12] and was observed to bend over on two occasions does not establish beyond a question of fact that she has defrauded defendant.[13] By contrast,

[10] The report states, "The claimant is also observed lifting the toddler and shaking him as he is playing with the toddler."

[11] In fact, the report is equivocal as to this fact, stating that Shelton "*appears* to be wringing it out." (Emphasis added.) And there is no reference to any photographs or videotape to confirm even this self-serving statement.

[12] Shelton testified that she is able to walk. She also testified that she always wore a back brace but stated that sometimes she wore it under her clothing.

[13] In support of its position, defendant refers us to a passage in Shelton's deposition that is not in the record. Shelton stated in her

as noted earlier, the insurer in *Bahri* presented uncontested evidence (1) that the plaintiff claimed replacement-services benefits for services that had been performed 19 days before the auto accident had even occurred and (2) that over a period of approximately seven weeks, the plaintiff repeatedly engaged in a wide range of chores during the days on which she claimed that someone else did them for her. *Bahri*, 308 Mich App at 425-426. While such repeated activities are sufficient to establish the elements of fraud beyond a question of fact, a single episode of wringing out a shirt does not, nor do isolated examples of an injured person participating in simple physical actions such as bending, modest lifting, or other basic physical movements that the person asserts are painful or difficult. These types of inconsistencies in a claimant's statements are not sufficient to establish any of the elements of fraud beyond a question of fact.

Defendant raises an alternative argument in its reply brief, claiming that Shelton's no-fault claim is barred by the wrongful-conduct rule. However, "[r]eply briefs must be confined to rebuttal, and a party may not raise new or additional arguments in its reply brief." *Kinder Morgan Mich, LLC v City of Jackson*, 277 Mich App 159, 174; 744 NW2d 184 (2007), citing MCR 7.212(G). Accordingly, we need not reach the issue. However, were we to do so, we would reject the argument. The wrongful-conduct rule applies to activities or behavior that occur prior to, and are causative

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deposition that she "normally" wears a back brace and that, if wearing a loose-fitting shirt, she wears the brace under her shirt. Defendant also refers us to one of the June 1, 2013 photos in which a woman is seen carrying what appears to be a small plastic bag (contents unknown) and argues that this was inconsistent with her deposition testimony. However, Shelton testified that she could walk to nearby stores and that she could lift a bag containing five regular-size cans of vegetables.

of, the injury.[14] See *Cervantes v Farm Bureau Gen Ins Co of Mich*, 272 Mich App 410, 417; 726 NW2d 73 (2006) (stating that "the wrongful conduct rule only applies if a plaintiff's wrongful conduct is a proximate cause of his injuries"); *Orzel v Scott Drug Co*, 449 Mich 550, 565; 537 NW2d 208 (1995) ("[The plaintiff's] injury must have been suffered while and as a proximate result of committing an illegal act.") (quotation marks and citation omitted; alteration in original). Defendant makes no such claim here.

Affirmed. We do not retain jurisdiction.

GLEICHER, J., concurred with SHAPIRO, J.

K. F. KELLY, P.J. (*concurring*).

I concur in the result only.

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[14] Defendant's brief fails to cite any cases applying the wrongful-conduct rule as it seeks to do. And when asked at oral argument for supporting caselaw, defendant could provide none.

PEOPLE v BARRITT

Docket No. 333206. Submitted December 14, 2016, at Detroit. Decided February 14, 2017, at 9:05 a.m. Vacated in part and remanded to the Genesee Circuit Court 501 Mich 872.

John E. Barritt was charged in the Genesee Circuit Court with one count each of felony murder, MCL 750.316(1)(1), carjacking, MCL 750.529a, second-degree arson, MCL 750.73(1), fourth-degree arson, MCL 750.75(1), and tampering with evidence, MCL 750.483a(6)(b), in connection with the death of his girlfriend, Amy Wienski. In response to a report that Wienski was missing, the Mt. Morris Township Police Department executed a search warrant at the house where she lived with defendant. During the search, defendant arrived at the house in a car driven by another individual. After initially questioning defendant at the house about Wienski, Calhoun County Sheriff's Department Deputy Bryan Gandy requested defendant to go to the Homer Police Department for further questions, rather than continuing the discussions "in the grass" by the house. Deputy Kevin Mahan drove defendant in his marked police car to the department's office. Defendant's hands were unrestrained, but he sat in the back of the police car; the deputies did not tell him that he could drive to the department's office with the individual who drove him to his and Wienski's home, even though the individual also drove to the department's office for questioning at the deputies' request. Gandy and Deputy Steve Hinkley interviewed defendant for 90 minutes, and at the end of the interview, defendant was handcuffed and transported to the Mt. Morris Police Department. Defendant moved to suppress his statement on the basis that he was in custody at the time the statement was taken, and the statement was taken without the provision of the warnings required by *Miranda v Arizona*, 384 US 436 (1966). The court, Geoffrey L. Neithercut, J., granted defendant's motion and suppressed the statement, concluding that because defendant's interrogation occurred at a police station, which constitutes a "place of detention" under MCL 763.7(f), he was in custody for purposes of *Miranda*. The Court of Appeals granted the prosecution's application for leave to appeal.

The Court of Appeals *held*:

1. Because a defendant has a right against self-incrimination, the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless procedural safeguards are present to secure that right; specifically, *Miranda* warnings must be given before the interrogation. Custodial interrogation is questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his or her freedom of action in any significant way. To determine whether a person was in custody for purposes of *Miranda* analysis, a court must consider the totality of the circumstances, including the circumstances surrounding the interrogation and, given those circumstances, whether a reasonable person would have felt he or she was not at liberty to terminate the interrogation and leave. *Miranda* warnings need not be given simply because the questioning takes place in a police station; instead, the fact that a police station is a "place of detention," as defined by MCL 763.7(f), is only one fact to consider in the totality-of-the-circumstances inquiry.

2. MCL 763.7(f) defines the term "place of detention" as a police station, correctional facility, or prisoner holding facility or another governmental facility where an individual may be held in connection with a criminal charge that has been or may be filed against the individual. That definition applies to the term as it is used in MCL 763.8 through MCL 763.10, which require that any police interview conducted in a place of detention be videotaped.

3. In this case, the trial court correctly suppressed defendant's statement, but it did so for the wrong reason. The trial court erred by making its in-custody determination on the basis that the location of defendant's interview occurred in a "place of detention," as defined by MCL 763.7(f). The MCL 763.7(f) definition does not transform all interviews that occur in a "place of detention" into custodial interrogation for purposes of *Miranda*. Rather, the totality of the circumstances in this case demonstrated that defendant was subject to custodial interrogation when his statement was taken in light of the following facts: (1) defendant was asked to go to the police station for further questioning, (2) defendant was driven to the station in the backseat of a marked police car without being given the option of driving there with the person who originally drove defendant to his home, (3) defendant was not informed he was not under arrest until after most of the 90-minute interview was completed, (4) defendant was surrounded by officers in a police-dominated atmosphere, (5) defendant was never told he was free to leave, (6) the interview was lengthy and confrontational at times, and (7) defendant was

handcuffed and transported to another police department when the interview concluded. Defendant's statement was correctly suppressed because it was taken while he was in custody but without the provision of the *Miranda* warnings.

Affirmed.

GLEICHER, J., concurring, joined the majority opinion, agreeing with the majority that defendant was in custody at the time he was questioned by the deputies, and wrote separately to discuss an additional approach to the totality-of-the-circumstances test for determining whether a defendant was in custody during police questioning. Applying to this case the five relevant factors for in-custody determinations set forth in *Howes v Fields*, 565 US 499, 509 (2012)—(1) the location of the questioning, (2) the duration of the questioning, (3) statements made during the interview, (4) the presence or absence of physical restraints, and (5) the release of the interviewee at the end of the questioning—defendant was clearly in custody when the police questioned him about Wienski's disappearance.

K. F. KELLY, P.J., dissenting, disagreed with the majority's analysis of the custodial interrogation as applied to this case. Defendant was not in custody, and *Miranda* warnings were therefore not required, at the time he was questioned by the police. A reasonable person would have believed he or she was free to leave the questioning in that defendant voluntarily agreed to go to the station to answer questions and to ride there in the back of a police car, the room in which he was interviewed was not locked or secured, he was offered a beverage, he was not handcuffed, the atmosphere was casual, he was told twice that he could end the interview at any time, and he was told that he was not under arrest. Judge KELLY would have reversed the trial court's order that suppressed defendant's statement.

CRIMINAL LAW — WORDS AND PHRASES — PLACE OF DETENTION — CUSTODIAL INTERROGATION.

MCL 763.7(f) defines the term "place of detention" as a police station, correctional facility, or prisoner holding facility or another governmental facility where an individual may be held in connection with a criminal charge that has been or may be filed against the individual; that definition applies to the term as it is used in MCL 763.8 through MCL 763.10; it does not control when determining whether a defendant was subject to custodial interrogation for purposes of *Miranda v Arizona*, 384 US 436 (1966); the fact that a police station is a "place of detention," as defined by

MCL 763.7(f), is only one fact to consider in the totality-of-the-circumstances inquiry into whether a defendant was in custody when questioned by the police.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *David S. Leyton*, Prosecuting Attorney, and *Michael A. Tesner*, Assistant Prosecuting Attorney, for the people.

Neil C. Szabo for defendant.

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

SHAPIRO, J. The prosecution brings this interlocutory appeal[1] from the trial court's decision to suppress statements made by defendant, John Edward Barritt, during a police interview conducted without the provision of *Miranda*[2] warnings. Because defendant was subject to custodial interrogation, we affirm.

FACTS AND PROCEDURE

On May 4, 2015, the Mt. Morris Township Police Department contacted the Calhoun County Sheriff's Department, asking for their assistance in locating Amy Wienski, who had been reported as missing. Wienski was not at home when the deputies arrived, and, suspecting foul play, the deputies obtained and executed a search warrant. While the deputies were at the home, defendant, who was Wienski's boyfriend, arrived in a vehicle driven by another civilian. The police asked defendant to accompany them to a Cal-

[1] We granted the prosecution's application for leave to appeal. *People v Barritt*, unpublished order of the Court of Appeals, entered July 1, 2016 (Docket No. 333206).

[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

houn County Sheriff's Department office for an interview, and he was transported there in the back seat of a police car. At the station, defendant was questioned for approximately 90 minutes by Detectives Bryan Gandy and Steve Hinkley but was not given *Miranda* warnings at any time. At the conclusion of the interrogation, he was handcuffed and transported to the custody of the Mt. Morris Police Department. He was later charged with multiple crimes related to the death of Wienski.[3]

Defendant moved to suppress the statements he had made during the deputies' questioning on the ground that he made those statements during custodial interrogation without the deputies first providing *Miranda* warnings. The trial court conducted an evidentiary hearing at which it heard testimony from Deputy Kevin Mahan, who transported defendant to the station, and from Gandy. The court also reviewed the transcript of the deputies' questioning of defendant. The court granted defendant's motion, in part relying on MCL 763.7, and we granted the prosecution's interlocutory application for leave to appeal.

During the motion hearing, Mahan and Gandy each testified that, while they were at Wienski's home, defendant arrived in a vehicle driven by another civilian. Mahan testified that defendant was approached by police officers upon his arrival. Gandy testified that he was one of the officers who approached defendant and that he told defendant he wished to speak to him about Wienski. Gandy further testified that he "ask[ed] [de-

[3] Defendant was charged with one count of felony murder, MCL 750.316(1)(b), one count of carjacking, MCL 750.529a, one count of second-degree arson, MCL 750.73(1), one count of fourth-degree arson, MCL 750.75(1), and one count of tampering with evidence, MCL 750.483a(6)(b).

fendant] if he would go to the Homer Police Department with us so we could sit down and talk to him in a better area rather than standing out in the grass there at the home." Gandy stated that defendant rode with Mahan to the sheriff's office. Mahan testified, "I had a marked car there and I had [defendant] have a seat in the back of my car." Gandy also explained that his vehicle was one of "a whole line" of law enforcement vehicles leaving Wienski's house. Gandy testified that the police had also asked the person who had driven defendant to Wienski's house to follow them to the sheriff's office, and he acknowledged that defendant was not given the opportunity to ride to the sheriff's office with that person.

Mahan testified that defendant was not handcuffed during the drive. Mahan was not asked whether the back doors of his patrol car could be opened from the inside, but testified that he "let [defendant] out of the car" when they arrived at the sheriff's office. Defendant was then escorted into the building by Gandy and Hinkley, both of whom were armed. The building was a former township police department building that had been converted for use as a general township building with a section reserved for use by the sheriff's department. Gandy testified that the doors to the office are locked on the outside so that not just anyone can enter but that the doors do not lock from the inside and so do not prevent anyone from leaving. Gandy testified that defendant was seated closer to the exit doors than himself and Hinkley, but the record did not reveal whether it was objectively apparent that the doors were not locked from the inside.

Gandy testified that the interview was not confrontational, but the transcript of the interview contains multiple exchanges that were clearly heated, specifi-

cally when the detectives repeatedly accused defendant of not being truthful in his statements. For example, when defendant denied knowledge of what had happened to Wienski, Hinkley replied: "I don't like bullshit. I'm not going to bullshit you and you don't bullshit me. Listen to me, dude, I'm square business. No bullshit. Okay?"

The questioning lasted about 90 minutes. Gandy acknowledged that neither he nor Hinkley ever told defendant that he was free to leave, and the interview transcript reveals that defendant was not told that he was not under arrest until page 79 of the 90-page interview transcript and then only in response to defendant's statement "I think I need a lawyer now." When defendant responded by asking that the interview end, Hinkley twice said "we can finish at any time," but rather than ending the questioning, Hinkley continued the interrogation, saying to defendant:

> You're lying about the car. Lying, lying, lying. Okay. That's just it, period. Okay? I mean I know enough, I'm so positive about that, I will call you a liar to your face, and I don't do that to people. Okay? You lied, lied, lied. Okay? So, that means to me either you did something on purpose to her or something accidentally happened to her. Okay? Now, this is a real simple choice for you. Okay? All right? This is an accident or it's on purpose. Okay? You – you got to man up sometime in your life. You've got to man up and you've got to come to some type of reasonable situation from this. Something happened. You know it happened. I know it happened. I know you're lying about the car, dude. I know you're lying about the car. I – you're lying about the car dude. I mean, I'd frickin' put my paycheck – I know you're lying about the car. Okay? So that makes me – that troubles me about her. I don't think you did it on purpose. I think it was an accident. All right, dude? I'm – I'm telling you, I'm pretty sure it was an accident. All right. You know it was an accident. I know it was an accident. What happened to her?

When defendant answered "I don't know," Hinkley responded, "you do know." Defendant again said "I don't know," and Hinkley responded, "you definitely know" and then left the room.

While Hinkley was out of the room, defendant, speaking to Gandy, asked for an attorney a second time, and Gandy responded, "We're going to wait for Detective Hinkley to come back." Shortly thereafter, Hinkley returned to the interview room with a K-9 officer and dog. The K-9 officer, Sergeant Brad, told defendant that the dog was "a good boy" and "friendly." Defendant responded to these comments about the dog by stating "I bet he has his moments where he isn't," to which Sergeant Brad responded, "Oh, he'll blow you right off your feet if I send him." While the dog remained in the room, Sergeant Brad said to defendant:

> I'm not in charge of nothing. I just stand around, do things, sit here with you while they – while they, you know discuss other information and things that might've come in . . . . But I'll tell you what, the truth always comes out.
>
> * * *
>
> You know what I mean? So, I guess it's one of those things if you – the sooner the truth comes out, the easier it is to – to deal with, you know what I mean?
>
> * * *
>
> You want to make sure that you're as truthful as possible because – because you know, it's going to be rough otherwise. You see what I mean?

After Gandy explained that they were going to take defendant to the Mt. Morris Police Department, Brad stated: "Listen, John, before you go, is there anything else that you want to tell 'em? We talked for a second.

I know you got something else there. I can see it written all over your face." Defendant answered, "No," and Brad said, "You can't stick with it forever, bud . . . . Just got to say – say the truth. Say what happened." Defendant again stated that he did not know what happened and was then handcuffed for transport to Mt. Morris. At that point defendant asked, "[A]m I being arrested?" Two officers responded to the question by offering obfuscating responses.[4]

At the conclusion of the evidentiary hearing, the trial court determined that defendant had been in custody during the questioning, and so granted defendant's motion. In setting forth its reasoning, the trial court substantially relied on the statutory definition of "place of detention" in MCL 763.7(f): "a police station, correctional facility, or prisoner holding facility or another governmental facility where an individual may be held in connection with a criminal charge that has been or may be filed against the individual."[5] The trial court reasoned that because the interrogation of defendant occurred in a police station, which, by statute, constitutes a "place of detention," he was in custody for purposes of *Miranda*.

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[4] The following exchange occurred after defendant asked if he was under arrest:

> *Detective Gandy*: We're transporting you to another department and that's going to be up to them. But, we can't transport you without being restrained, for safety reasons.
>
> [*Defendant*]: He said yeah, so I am being arrested?
>
> *Unidentified Speaker*: I didn't say yeah.
>
> [*Defendant*]: I thought you said yeah.
>
> *Unidentified Speaker*: I didn't say nothin'.

[5] MCL 763.7 is located in Chapter III, "Rights of Persons Accused," of "The Code of Criminal Procedure," MCL 760.1 *et seq*.

ANALYSIS

Although we reject the trial court's reliance on MCL 763.7, we agree that defendant was in custody at the time of his interrogation and therefore affirm the trial court's suppression order.[6]

Consistent with the right against self-incrimination:

> [T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. [*Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966).]

In order to determine whether someone was "in custody or otherwise deprived of his freedom of action," *id*., a court must consider "the totality of the circumstances, with the key question being whether the defendant reasonably believed that he was not free to leave," *People v Mendez*, 225 Mich App 381, 382-383; 571 NW2d 528 (1997).[7]

The trial court, while reaching the correct result, short-circuited the totality-of-the-circumstances analy-

[6] "We review a trial court's factual findings in a ruling on a motion to suppress for clear error." *People v Attebury*, 463 Mich 662, 668; 624 NW2d 912 (2001). We review de novo a trial court's "interpretation of the law or the application of a constitutional standard to uncontested facts . . . ." *Id*.

[7] "The ultimate question whether a person was 'in custody' for purposes of *Miranda* warnings is a mixed question of fact and law, which must be answered independently by the reviewing court after review de novo of the record." *Mendez*, 225 Mich App at 382, citing *Thompson v Keohane*, 516 US 99; 116 S Ct 457; 133 L Ed 2d 383 (1995).

sis by concluding that MCL 763.7(f) was dispositive regarding whether or not defendant was in custody at the time he was questioned by the police. As noted earlier, the statute defines "place of detention" as "a police station, correctional facility, or prisoner holding facility or another governmental facility where an individual may be held in connection with a criminal charge that has been or may be filed against the individual." MCL 763.7(f). The trial court concluded that because defendant was in a location defined by the statute as a "place of detention," he was in custody for purposes of *Miranda*. The trial court erred by reading the statute so broadly. MCL 763.7 provides definitions for terms used in MCL 763.8 through MCL 763.10. Those statutes require that any police interview conducted in a "place of detention" be videotaped so that there will be a clear record of the nature of the interrogation, the actions of the police, and the statements made by the defendant in places of detention as defined by MCL 763.7. These statutes do not, however, transform all interviews that occur in places defined as a "place of detention" in MCL 763.7 into "custodial interrogation" for purposes of *Miranda*.

This is demonstrated in the text of MCL 763.7 itself. Subdivision (a) of that statute paraphrases the constitutional jurisprudence in its definition of "custodial detention," stating, " 'Custodial detention' means an individual's being in a place of detention because a law enforcement official has told the individual that he or she is under arrest or because the individual, under the totality of the circumstances, reasonably could believe that he or she is under a law enforcement official's control and is not free to leave." MCL 763.7(a). It is clear that the test of whether the person is in custody is determined by consideration of "the totality of the circumstances" as *Miranda* jurisprudence has

always required. *Id*. The fact that a police station is a "place of detention" is a fact that should be considered among the totality of the circumstances, but the statute also makes clear that a person can be questioned in a police station without necessarily being in custody. Indeed, the United States Supreme Court has made clear that *Miranda* warnings need not be given "simply because the questioning takes place in the station house . . . ." *Oregon v Mathiason*, 429 US 492, 495; 97 S Ct 711; 50 L Ed 2d 714 (1977).

Although the trial court erred by concluding that MCL 763.7(f) was dispositive, we nevertheless affirm its ruling because the totality of the circumstances demonstrates that defendant was subject to custodial interrogation without the required *Miranda* warnings.[8]

The totality-of-the-circumstances inquiry requires us to examine all the facts surrounding the interview to determine how a reasonable person in defendant's position would have gauged the breadth of his or her freedom of action. *Yarborough v Alvarado*, 541 US 652, 663; 124 S Ct 2140; 158 L Ed 2d 938 (2004) (quotation marks and citation omitted). "Two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave." *Thompson v Keohane*, 516 US 99, 112; 116 S Ct 457; 133 L Ed 2d 383 (1995).

The prosecution argues that this case is comparable to *Mathiason*, 429 US at 493, 496, in which the

[8] "Where a trial court reaches the correct result for the wrong reason, its decision need not be reversed on appeal." *In re People v Jory*, 443 Mich 403, 425; 505 NW2d 228 (1993).

Supreme Court held that the defendant had not been in custody when questioned at a police station. We reject this comparison as the facts described in the *Mathiason* opinion are in sharp contrast to those in this case.

First, in *Mathiason*, *id*. at 493, the officers informed the defendant that they could meet where it would be convenient for him. In contrast, in this case, the officers specifically asked defendant to go to the police station, and told him it would be a "better area" for the interview. Second, in *Mathiason*, *id*., the defendant drove himself to the police station, and the police officer met him there, while in this case, an officer drove defendant to the police station in the back seat of a fully marked patrol car that was one of several in a long line of police vehicles. While the officers testified that they did not force defendant to ride in the patrol car, they both acknowledged that defendant was not given the option to ride with the civilian who had driven him to Wienski's home, even though that civilian drove to the police station at the same time at the request of the police.[9] Third, in *Mathiason*, upon arrival at the police station, the defendant was "immediately informed that he was not under arrest," and the pre-*Miranda* questioning lasted no more than "five minutes after defendant had come to the office." *Id*. at 493, 495 (quotation marks and citation omitted). In the instant case, the majority of the questioning occurred before the police told defendant that he was not under arrest.[10] Fourth, in this case, the pre-*Miranda* inter-

[9] Not only would this person have been able to give defendant a ride to the interview, but a reasonable person would observe that another individual whom the police wished to question was driving himself to the interview, while defendant was riding in the back seat of a patrol car.

[10] The officer's statement to defendant that he was not under arrest also appears inconsistent with the actual circumstances of the situation,

view was far longer and was marked by confrontational questioning, unlike the questioning in *Mathiason*. Fifth, the *Mathiason* Court noted that at the conclusion of the interview, the defendant "did in fact leave the police station without hindrance," while in the instant case, defendant was handcuffed and transported to another police department. *Id*. at 495.

In support of its position that defendant was not in custody during the police interview, the prosecution calls attention to the fact that the door to the interview room was not locked. However, even assuming that a reasonable person would have been aware of that fact, it is clearly outweighed by other circumstances: defendant was never told that he was free to leave, the officers were armed and in uniform,[11] and the questioning was at times aggressive and included repeated accusations of lying and demands that defendant change his statement.[12] An officer eventually told defendant that he was not under arrest, but this was very

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particularly given that very shortly thereafter defendant was handcuffed and transported to another police department.

[11] The dissent's reliance on *Illinois v Perkins*, 496 US 292; 110 S Ct 2394; 110 L Ed 2d 243 (1990), is inapposite. In that case, the suspect was placed in a jail cell with a government agent who appeared in all respects to be another inmate. *Id*. at 294-295. The suspect, believing this agent to be another inmate, boasted to him that he had committed a murder; the defendant later claimed that his statements were inadmissible because he made the statements when he was in custody in the cell and had not been given *Miranda* warnings. *Id*. at 295-296. The *Perkins* Court concluded that while the suspect was in custody, there was no interrogation because "[c]onversations between suspects and undercover agents do not implicate the concerns underlying *Miranda*. The essential ingredients of a 'police-dominated atmosphere' and compulsion are not present when an incarcerated person speaks freely to someone whom he believes to be a fellow inmate." *Id*. at 296.

[12] "[S]uch an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner." *Miranda*, 384 US at 457.

late in the interview.[13] Further, when told he was not under arrest, defendant responded, "then why am I here?" This reaction is consistent with our objective reading of the officers' prior actions as custodial. When defendant indicated that he did not want to continue the interview, the officer continued to question him and again repeatedly accused him of lying. When defendant said for a second time that he wanted a lawyer and did not want to continue the interview, a different officer, accompanied by a police dog, entered the room and continued the questioning, stating at one point that the dog would "blow you right off your feet if I send him." Ultimately, as soon as the police decided to end the interview, defendant was handcuffed and transported to another police department.

In sum, this case, unlike *Mathiason*, bears multiple hallmarks of custodial interrogation. Nor is this case comparable to the other caselaw cited and relied on by the prosecution. In *Mendez*, 225 Mich App at 382-383, we held that a defendant's pretrial statement to the police should not be suppressed given that the defendant "picked the time of the interview in response to a police letter requesting an interview, drove himself to the police station, was left alone and unrestrained in an interview room, and, after giving written answers to some questions . . . was allowed to leave." Further, "[t]he investigators testified that they informed defendant at the outset of the interview that he was not under arrest . . . ." *Id*. This case is also distinguishable from *People v Zahn*, 234 Mich App 438; 594 NW2d 120 (2007), and *People v Coomer*, 245 Mich App 206; 627

[13] Notably, the statement that defendant was not under arrest came in direct response to defendant's request for an attorney. A person could reasonably have understood it as a rebuff of his request for counsel rather than as an assurance that he had full freedom of movement.

NW2d 612 (2001). In the former, the questioning took place in a private location of the defendant's choosing, and the defendant was told that he was not in custody or under arrest. *Zahn*, 234 Mich App at 443-444. In the latter, the questioning occurred in the defendant's own apartment, and the police told her that she was not under arrest and that they would leave if she wanted them to do so. *Coomer*, 245 Mich App at 212-213, 217.[14]

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[14] We respectfully note that the dissent does not address the totality of the circumstances, referring only to those facts that favor a finding of noncustody. The fact that the door to the police station was not locked and the fact that defendant was not handcuffed do weigh in favor of such a conclusion, but they are by no means dispositive and are outweighed by facts supporting the opposite conclusion. Nor can we agree that defendant was not subjected to custodial interrogation simply because the interrogation occurred in a "casual atmosphere" in that defendant was provided with a beverage and the officers ordered a pizza for themselves. Provision of a beverage does not vitiate custodial pressures, nor does it replace the *Miranda* warnings as a constitutional guarantee. The dissent also refers to the fact that defendant "was told twice that he could 'end this at any time' and that he was not under arrest." However, as already noted, *all* these statements occurred on page 79 of the 90-page transcript, immediately after defendant had requested an attorney and had indicated he did not want to continue the questioning. And immediately after defendant made these statements, the same officer undertook the most aggressive questioning of the entire interrogation, brought in the police dog, and placed defendant in handcuffs. From an objective standpoint, being told that he "could end this" and "that he was not under arrest" had little if any meaning given what occurred immediately thereafter.

Finally, we cannot agree with the dissent's characterization of a suspect being advised that he is not under arrest or permitting a defendant to leave the interview without being arrested as merely "a courtesy." In *Mathiason*, 429 US at 495-496, the existence of these "courtesies" constituted two of the three reasons the Court relied on to find that the defendant was not in custody. The Court emphasized that the suspect "came voluntarily to the police station[,] . . . was immediately informed that he was not under arrest[, and] [a]t the close of a ½-hour interview . . . did in fact leave the police station without hindrance." *Id*. at 495. The dissent's suggestion that defendant could not have been in custody because he "was never told he was under arrest"

Defendant was subjected to custodial interrogation without having been provided *Miranda* warnings. Although the trial court's legal analysis was in part erroneous, it reached the correct result, and we affirm.

GLEICHER, J., concurred with SHAPIRO, J.

GLEICHER, J. (*concurring*). I concur with the majority that defendant, John Barritt, was in custody during the time he was questioned by the Calhoun County deputies. This case illustrates, however, that determining whether a person is in custody can be challenging. Both the majority and the dissent raise arguments consistent with the record. Both opinions cite valid caselaw. I write separately to flesh out an additional analytical approach.

Miranda instructs that "in all settings in which [a person's] freedom of action is curtailed in any significant way," the police must warn the suspect of his right to remain silent and assure him that an exercise of that right will be honored. *Miranda v Arizona*, 384 US 436, 467; 86 S Ct 1602; 16 L Ed 2d 694 (1966). This is so because "the coercion inherent in custodial interrogation blurs the line between voluntary and involuntary statements . . . ." *Dickerson v United States*, 530 US 428, 435; 120 S Ct 2326; 147 L Ed 2d 405 (2000). Thus, the familiar warnings are "an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere." *Miranda*, 384 US at 468.

Whether an interrogation atmosphere exists depends on whether the person being questioned is

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turns *Mathiason* and *Miranda* on their heads by suggesting that officers may act as if a suspect is in custody but avoid the need to provide *Miranda* warnings simply by not stating that the suspect is under arrest.

actually in police custody. " '[C]ustody' is a term of art that specifies circumstances that are thought generally to present a serious danger of coercion." *Howes v Fields*, 565 US 499, 508-509; 132 S Ct 1181; 182 L Ed 2d 17 (2012). We determine whether a person is in custody by objectively evaluating "all of the circumstances surrounding the interrogation . . . ." *Stansbury v California*, 511 US 318, 322; 114 S Ct 1526; 128 L Ed 2d 293 (1994). Our goal is to determine "how a reasonable person in the position of the individual being questioned would gauge the breadth of his or her 'freedom of action.' " *Id*. at 325 (quotation marks and citation omitted). In other words, we ask: would a reasonable person in the suspect's position have understood that he or she was free to walk away from the police during the questioning?

Caselaw from other jurisdictions offers organizational structures that assist in determining the presence or absence of custody for *Miranda* purposes. My application of those approaches convinces me that Barritt was in police custody during the questioning.

In *Howes*, 565 US at 509, the United States Supreme Court identified a handful of "[r]elevant factors" that should guide a court's custody inquiry: "the location of the questioning, its duration, statements made during the interview, the presence or absence of physical restraints, . . . and the release of the interviewee at the end of the questioning." (Citations omitted.) The Supreme Court assigned no particular weight to any of the factors; the factual considerations are guides rather than rigid or immutable requirements. When applied to the facts of this case, these factors compel the conclusion that Barritt was in custody while being questioned about Amy Wienski's disappearance.

As to location, an interview that takes place in public, or in a suspect's home, weighs against a finding of custody. See *Berkemer v McCarty*, 468 US 420, 438; 104 S Ct 3138; 82 L Ed 2d 317 (1984); *Beckwith v United States*, 425 US 341, 342, 347-348; 96 S Ct 1612; 48 L Ed 2d 1 (1976). On the other hand, a police station environment represents the quintessential "police-dominated atmosphere" referenced in *Miranda*, 384 US at 445. The *Howes* Court put it this way: "A person who is 'cut off from his normal life and companions' and abruptly transported from the street into a 'police-dominated atmosphere' may feel coerced into answering questions." *Howes*, 565 US at 511 (citations omitted). Here, the station house location of the questioning weighs in favor of a finding of custody. In my view, this is true whether the door to the office in which Barritt was questioned was locked or unlocked. The central thrust of this consideration is the general location of the questioning, not its distinct features.

The caselaw provides no bright-line rules regarding how long an interrogation must proceed before its duration is more consistent with custody than not. Ninety minutes, the time that elapsed before Barritt's arrest, likely falls on the shorter end of the spectrum. But see *Yarborough v Alvarado*, 541 US 652, 665; 124 S Ct 2140; 158 L Ed 2d 938 (2004) (a two-hour interview pointed toward a finding of custody); *United States v FNU LNU*, 653 F3d 144, 155 (CA 2, 2011) (noting that the interview "lasted for 90 minutes, substantially longer than most interviews that we have deemed non-custodial in other contexts"). Here, the 90 minutes of questioning began at approximately 7:40 p.m. Objectively, two hours of nighttime questioning is more consistent with a perception of custody than with a belief that one could simply get up and walk out of the room.

Statements made during an interview are also relevant to a custody determination. In *Yarborough*, 541 US at 665, the Supreme Court observed that the failure of an interrogating officer to tell a suspect that he could leave militated toward a finding of custody. The New Hampshire Supreme Court weights that fact heavily in its custody analysis:

> Here, the question is whether the restraint on the defendant's movement was akin to a formal arrest. Consequently, whether the defendant was told that he was at liberty to terminate the interrogation provides strong evidence as to whether a reasonable person in the defendant's position would feel free to leave. Thus, notwithstanding the fact that the defendant was told that he was not under arrest, the lack of evidence that he was told he was free to terminate the interrogation supports a finding of custody at some point during the interrogation. [*State v McKenna*, 166 NH 671, 680; 103 A3d 756 (2013).]

See also *People v Elmarr*, 181 P3d 1157, 1163 (Colo, 2008) (finding it "[i]mportant[]" that the defendant "was never told he was not under arrest, or that he was free to leave"); *State v Ortiz*, 766 NW2d 244, 252 (Iowa, 2009) (finding that the defendant was in custody based in part on the fact that "[e]ven though [the officer] never told Ortiz he was under arrest at the station, [the officer] also never told Ortiz he was free to leave the station"); and *Howes*, 565 US at 515 (concluding that the fact that police told the incarcerated suspect that he was free to return to his cell and end the interview was the "[m]ost important" consideration in making the custody determination).

Barritt was never told that he could return home. And although an objective standard governs our review, the testimony of detective Bryan Gandy supports that Barritt would not have been permitted to leave the station had he asked to do so. Gandy admitted that

when applying for a search warrant of Wienski's home, he averred that "the description of the subject who burned Amy Winski's [sic] rental car matches that of John Barritt." Barritt was the prime suspect in a criminal investigation. It stretches credulity that the deputies would have permitted him to walk out of the station. Objectively, the officers' failure to advise Barritt of his right to do so (since he was not under arrest at the time) weighs in favor of a custody finding.

Furthermore, as the majority opinion elucidates, the *nature* of Barritt's interrogation also objectively demonstrates that Barritt was in the officers' custody. The New Hampshire Supreme Court observed in *McKenna*, "The accusatory nature of questioning is widely recognized as a factor weighing in favor of a finding of police custody." *McKenna*, 166 NH at 681. While the officers' personal opinions about the guilt of their subject are irrelevant to a custody analysis, those beliefs "may bear upon the custody issue if they are conveyed, by word or deed, to the individual being questioned." *Stansbury*, 511 US at 325. In this case, the officers adopted an aggressive tone during the interrogation. They repeatedly challenged Barritt's claims that he did not know where Wienski was and had not driven her car. The tenor of the questioning was consistent with confession-extraction and therefore with custody.

The use of physical restraints is a fact that pushes the scale toward a custody finding. Although handcuffing a suspect is not dispositive of custody, it goes a long way toward establishing that an individual reasonably felt that he or she was not at liberty to terminate an interrogation. *White v United States*, 68 A3d 271, 279-280 (DC, 2013). But "effective restrictions on a defendant's movement can be a product of verbal,

psychological, or situational restraint." *McKenna*, 166 NH at 678. Here, Barritt was not handcuffed. Nevertheless, he was driven to the police station in the back seat of a marked police vehicle and left there in the company of two deputies, questioned in a room with the door closed in a locked building during nonworking hours. In my view, these very real physical restraints on Barritt's freedom tend to demonstrate a custodial situation.[1]

The final factor referenced in *Howes*, 565 US at 509—"the release of the interviewee at the end of the questioning"—weighs in favor of a finding of custody. I readily concede that the Supreme Court's designation of this fact as relevant to a custody analysis seems somewhat anomalous, as it does not touch on the events of the interrogation itself. For an in-depth discussion of this factor, see Pettinato, *The Custody Catch-22: Post-Interrogation Release as a Factor in*

[1] The dissent points out that Barritt "agreed to ride in a marked police car." While this is true, it ignores the surrounding circumstances. When Barritt pulled up at his home, he found a number of deputies performing a search of the property. His pets had been taken into custody. He was immediately approached by an armed deputy who (in the deputy's words) "had Mr. Barritt have a seat in the back of my car." According to that same deputy, Barritt "was escorted in[to]" the police department. These circumstances are far more consistent with a restriction of freedom than with a voluntary cooperation.

In *McKenna*, 166 NH at 684, the New Hampshire Supreme Court discussed an additional custody factor relevant to the character of the interrogation: "the fact that the police initiated the contact with the defendant." When law enforcement authorities instigate a "confrontation between the suspect and the criminal justice system . . . custody is more likely to exist." *Id*. (quotation marks and citation omitted). Here, a number of officers arrived at the home Barritt shared with Wienski and executed a search warrant. As in *McKenna*, this fact weighs in favor of a custody finding. See also *Ross v State*, 45 So 3d 403, 415 (Fla, 2010) (citation omitted) (relying on "the manner in which police summon the suspect for questioning" as a factor of importance in ascertaining custody).

Determining Miranda Custody, 65 Ark L Rev 799, 818 (2012) ("One oddity that has resulted from the general lack of clarity in Miranda custody jurisprudence is the consideration of post-interrogation arrest or release in the totality-of-the-circumstances test.").

Applied in this case, the *Howes* custody factors weigh heavily in favor of a finding of custody. Barritt was taken to the police station in the back seat of a marked car, was accusatorily questioned in a police station by two armed deputies, was never told that he could leave or terminate the questioning, and was arrested when the interview concluded despite not having confessed to playing any part in Wienski's disappearance.

The factor approach suggested in *Howes* forces a court to maintain a wide-angle focus in determining whether a reasonable person in the suspect's position would have felt free to terminate police questioning. The majority opinion hews closely to this totality-of-the-circumstances mandate. The facts surrounding Barritt's interrogation, viewed through the *Howes* factors' lens, strongly support a finding of custody. I join the majority in full.

K. F. KELLY, P.J. (*dissenting*). I respectfully dissent. Because defendant was not in custody at the time of his statement, he was not entitled to *Miranda*[1] warnings. I would reverse.

In order to determine whether someone was "in custody," this Court must consider "the totality of the circumstances, with the key question being whether the defendant reasonably believed that he was not free to leave." *People v Mendez*, 225 Mich App 381, 382-383;

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

571 NW2d 528 (1997). See also *People v Steele*, 292 Mich App 308, 316-317; 806 NW2d 753 (2011). When considering the totality of the circumstances, this Court must consider "the objective circumstances of the interrogation, not . . . the subjective views harbored by either the interrogating officers or the person being questioned." *Stansbury v California*, 511 US 318, 323; 114 S Ct 1526; 128 L Ed 2d 293 (1994). Specifically, the Court has held that *Miranda* warnings need not be imposed "simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect." *Oregon v Mathiason*, 429 US 492, 495; 97 S Ct 711; 50 L Ed 2d 714 (1977). Rather, the Court in *Miranda* revealed that it was concerned with an atmosphere that would "generate 'inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely.' " *Illinois v Perkins*, 496 US 292, 296; 110 S Ct 2394; 110 L Ed 2d 243 (1990), quoting *Miranda*, 384 US at 467. As mentioned, these circumstances have been limited to when the objective facts of the interrogation reveal that a defendant would not feel free to end the interrogation of his own free will and leave. See *Steele*, 292 Mich App at 316-317.

Given the factual circumstances surrounding the present case, defendant's interview was not a "custodial interrogation" requiring *Miranda* warnings for admissibility. Of specific importance is that defendant agreed to voluntarily come to the police station to answer questions. Furthermore, defendant agreed to ride in a marked police car. During the interview with the police, defendant was placed in a room that was not locked or secured, and in which the various officers in the building felt free to come and go at their own leisure. Defendant was offered a beverage, officers

came in the room to ask the other officers about pizza orders, and defendant repeatedly indicated that he wanted to help the investigation as much as possible. Defendant was not restrained in any manner during the interview and was never told he was under arrest or that he was not free to leave. In fact, as conceded by defense counsel at oral argument, he was told twice that he could "end this at any time" and that he was not under arrest. A reasonable person presented with those circumstances would "reasonably believe[] that he was . . . free to leave." *Mendez*, 225 Mich App at 382-383.

Similarly, in *Mathiason*, 429 US at 493-494, the defendant came to the police station willingly, was told that he was not under arrest, was taken to an office where the door was closed but not locked, and was questioned while sitting at a desk with a police officer. Under these circumstances, the Court held that "there is no indication that the questioning took place in a context where [the defendant's] freedom to depart was restricted in any way." *Id*. at 495. Defendant in the present case was also at the police station willingly, was taken to a room with the door closed but not locked, and was questioned at a desk across from a police officer. Although the defendant in *Mathiason* was specifically told that he was not under arrest at the start of the interrogation and was allowed to leave after the interrogation, while defendant here was not provided the same courtesies, I do not find those factual differences to be determinative. Specifically, while defendant may not have been told he was not under arrest or allowed to leave the interview without being placed under arrest, he was subject to a casual environment that portrayed defendant's lack of arrest—he was not restrained and watched as the

police officers interviewing him engaged in casual conversation with the other officers in the building.

In light of these circumstances, defendant's interview would not "generate 'inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely.' " *Perkins*, 496 US at 296, quoting *Miranda*, 384 US at 467. In other words, defendant had not "been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda*, 384 US at 444. As such, defendant was not in custody, and *Miranda* warnings were not required for the interview. The trial court should have denied defendant's motion to suppress his statement.

PEOPLE v RICE

Docket No. 329502. Submitted February 8, 2017, at Lansing. Decided February 14, 2017, at 9:10 a.m.

Anthony M. Rice pleaded guilty in the Eaton Circuit Court to operating or maintaining a methamphetamine laboratory, MCL 333.7401c(2)(f), and operating or maintaining a methamphetamine laboratory near a specified location, MCL 333.7401c(2)(d). Pursuant to a *Cobbs*[1] agreement, the court, Jeffrey Sauter, J., sentenced Rice as a fourth-offense habitual offender to concurrent terms of 4 to 35 years of imprisonment. The sentence imposed by the court was lower than the minimum sentence recommended by the sentencing guidelines and was also lower than the sentence the court had indicated at the *Cobbs* hearing that it would likely impose on Rice. The prosecution appealed by leave granted.

The Court of Appeals *held*:

The trial court properly ruled that, under *People v Lockridge*, 498 Mich 358 (2015), the legislative sentencing guidelines are advisory in every case. The prosecution contended that *Lockridge* required the trial court to impose a minimum sentence within the guidelines range because the guidelines in this case were not calculated using judicially found facts. The prosecution argued that, under *Lockridge*, the guidelines are advisory only when judicially found facts are used to calculate the guidelines minimum sentence range but remain mandatory when the guidelines range is not calculated using facts not admitted to by the defendant or found by a jury beyond a reasonable doubt. However, the *Lockridge* Court did not limit its holding to those situations in which a defendant's guidelines are calculated using judge-found facts. Instead, the *Lockridge* Court expressly held that Michigan's sentencing guidelines were constitutionally deficient and rendered them advisory only. Therefore, the trial court did not err by imposing a minimum sentence below the guidelines minimum

[1] *People v Cobbs*, 443 Mich 276 (1993).

sentence range, and no substantial and compelling reasons were required to justify the court's departure from the guidelines.

Affirmed.

CRIMINAL LAW — SENTENCING GUIDELINES — DEPARTURE FROM RECOMMENDED GUIDELINES RANGE.

People v Lockridge, 498 Mich 358 (2015), rendered Michigan's legislative sentencing guidelines merely advisory even when a defendant's guidelines minimum sentence range has been calculated without using judicial fact-finding (MCL 769.34).

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Douglas R. Lloyd*, Prosecuting Attorney, and *Brent E. Morton*, Senior Assistant Prosecuting Attorney, for the people.

Tracie R. Gittleman for defendant.

Amicus Curiae:

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Linus Banghart-Linn*, Assistant Attorney General, for the people.

Before: RONAYNE KRAUSE, P.J., and O'CONNELL and METER, JJ.

PER CURIAM. Defendant, Anthony Mark Rice, pleaded guilty as a fourth-offense habitual offender, MCL 769.12, to operating or maintaining a methamphetamine laboratory, MCL 333.7401c(2)(f), and operating or maintaining a methamphetamine laboratory near a specified location, MCL 333.7401c(2)(d). The trial court sentenced Rice below the guidelines minimum sentence range to concurrent terms of 48 months' to 35 years' imprisonment. The prosecution appeals Rice's sentence by leave granted.[1] We affirm.

[1] *People v Rice*, unpublished order of the Court of Appeals, entered March 11, 2016 (Docket No. 329502).

I. FACTUAL BACKGROUND

Pursuant to a *Cobbs*[2] agreement, Rice admitted that he bought chemicals to manufacture methamphetamine in an apartment building. The trial court indicated that it would sentence Rice to the bottom of his recommended sentencing guidelines range. Between Rice's plea and the sentencing hearing, the Michigan Supreme Court issued its decision in *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015).

The sentencing guidelines recommended that the trial court impose a minimum sentence of 72 to 240 months' imprisonment. The calculation did not involve any judicial fact-finding. At his sentencing hearing, Rice presented evidence that he had been a model prisoner who worked in prison, had participated in drug and alcohol rehabilitation, and had not received any misconduct tickets. The trial court decided to depart downward from the sentencing guidelines. The court acknowledged Rice's prior record and the nature of the crimes for which he was being sentenced, but it found that Rice's convictions primarily involved "poisoning" himself and that giving Rice the "benefit of the doubt" would help him make a positive change in his life.

The prosecution argued that the trial court was mandated to apply the sentencing guidelines. According to the prosecution, *Lockridge* did not apply because Rice's case did not involve constitutionally impermissible judicial fact-finding. The trial court determined that the *Lockridge* Court used broad language that rendered the sentencing guidelines advisory under all

[2] *People v Cobbs*, 443 Mich 276, 283; 505 NW2d 208 (1993) (describing an agreement in which a defendant may plead guilty or no contest in reliance on a trial court's preliminary evaluation of a sentence, but withdraw the plea if the court later exceeds the preliminary evaluation).

circumstances and that it could treat the guidelines as advisory in Rice's case. The prosecution now appeals.

II. STANDARD OF REVIEW

This Court reviews de novo issues of statutory interpretation. *People v Williams*, 475 Mich 245, 250; 716 NW2d 208 (2006). We also review de novo questions of constitutional law. *Lockridge*, 498 Mich at 373.

III. ANALYSIS

The prosecution argues that the Michigan Supreme Court's decision in *Lockridge* only renders the legislative sentencing guidelines advisory in cases in which the defendant's sentence involves judicial fact-finding. Because the *Lockridge* Court did not limit its language in that fashion, we disagree. We conclude that the *Lockridge* Court rewrote MCL 769.34(2) and (3) without exception, rendering the guidelines advisory in all cases.

The *Lockridge* Court framed the issue as "whether the Michigan sentencing guidelines violate a defendant's Sixth Amendment fundamental right to a jury trial." *Lockridge*, 498 Mich at 364. In answering this question affirmatively, the Court concluded that "the rule from *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000), as extended by *Alleyne v United States*, 570 US ___; 133 S Ct 2151; 186 L Ed 2d 314 (2013), applies to Michigan's sentencing guidelines and renders them constitutionally deficient." *Lockridge*, 498 Mich at 364.

To remedy this constitutional violation, the Court "sever[ed] MCL 769.34(2) to the extent that it makes the sentencing guidelines range as scored on the basis of facts beyond those admitted by the defendant or

found by the jury beyond a reasonable doubt mandatory." *Id*. The Court explicitly struck down the requirement in MCL 769.34(3) "that a sentencing court that departs from the applicable guidelines range must articulate a substantial and compelling reason for that departure." *Id*. at 364-365. The Court further struck down "any part of MCL 769.34 or another statute [that] refers to use of the sentencing guidelines as mandatory or refers to departures from the guidelines." *Id*. at 365 n 1.

Addressing the entire scheme and system of MCL 769.34, the *Lockridge* Court held that the guidelines are advisory and struck down the MCL 769.34(3) requirement that a trial court articulate substantial and compelling reasons for departing from the guidelines. It is clear from this language that the Court drew no distinction between cases that applied judge-found facts and cases that did not. The Court's language was precise and explicit, and the Court in no way limited its holding to cases in which judicial fact-finding actually occurred.

For these reasons, we conclude that the trial court properly held that the legislative sentencing guidelines are advisory in every case, regardless of whether the case involves judicial fact-finding. If the Michigan Supreme Court did not intend that result, it is up to that Court to clarify its previous opinion. See *People v Strickland*, 293 Mich App 393, 402; 810 NW2d 660 (2011) ("This Court is bound to follow decisions of our Supreme Court.").[3]

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[3] The Michigan Supreme Court may very well clarify its *Lockridge* opinion in the near future, given that the issue "whether MCL 769.34(2) and (3) remain in full force and effect where the defendant's guidelines range is not dependent on judicial fact-finding" is presently pending before the Court. *People v Steanhouse*, 499 Mich 934 (2016).

We affirm.

RONAYNE KRAUSE, P.J., and O'CONNELL and METER, JJ., concurred.

Special Orders

SPECIAL ORDERS

In this section are orders of the Court of general interest to the bench and bar of the state.

Order Entered January 17, 2017:

STENZEL v BEST BUY CO, INC., Docket No. 328804. The Court orders that a special panel shall be convened pursuant to MCR 7.215(J) to resolve the conflict between this case and *Williams v Arbor Home, Inc*, 254 Mich App 439; 656 NW2d 873 (2002), vacated in part on other grounds 469 Mich 898 (2003).

The Court further orders that Part II(C) of the opinion in this case, released on December 22, 2016, is vacated in its entirety. MCR 7.215(J)(5).

Appellant may file a supplemental brief within 21 days of the Clerk's certification of this order. Appellees may file a supplemental brief within 21 days of the service of appellant's brief.