MICHIGAN APPEALS REPORTS

CASES DECIDED

IN THE

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COURT OF APPEALS

FROM

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[1] To April 30, 2017.

[2] From May 10, 2017.

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PEOPLE v SMITH

Docket No. 330075. Submitted February 15, 2017, at Detroit. Decided February 21, 2017, at 9:00 a.m.

Brandon A. Smith pleaded guilty in the Wayne Circuit Court to armed robbery, MCL 750.529. He had agreed to plead guilty after reaching a *Cobbs* agreement[1] with the prosecution. In exchange for Smith's plea, the prosecution agreed to dismiss a third-offense habitual offender enhancement and that Smith would be given a minimum sentence at the bottom of the guidelines range. The parties agreed that the minimum sentence guidelines range was 126 to 210 months of imprisonment. The court ultimately sentenced Smith to 126 to 240 months of imprisonment. Six months after sentencing, Smith moved for resentencing because the recommended minimum sentence guidelines range as calculated in the Sentencing Information Report (SIR) was 81 to 135 months of imprisonment. The court, Craig S. Strong, J., denied Smith's motion without explaining how it calculated the guidelines range to be 126 to 210 months of imprisonment. The trial court further stated that even if the guidelines range were 81 to 135 months of imprisonment, Smith's minimum sentence of 126 months of imprisonment was within that range. Smith appealed by delayed leave granted.

The Court of Appeals *held*:

The Due Process Clause of the Fourteenth Amendment requires that a plea be voluntary and made with sufficient awareness of the relevant circumstances and likely consequences. In this case, the court anticipated sentencing Smith at the low end of a guidelines range of 126 to 210 months of imprisonment. The court communicated this to Smith by means of a *Cobbs* agreement, and Smith pleaded guilty in reliance on the agreement. Implicit in the sentencing agreement was that Smith's sentence would be imposed in accordance with the correctly calculated guidelines range. Even though the parties initially agreed to an incorrect and higher minimum sentence guidelines range, and the court sentenced Smith at the bottom of that range, the correct range was lower, and the Due Process

[1] *People v Cobbs*, 443 Mich 276 (1993).

Clause required that Smith be sentenced at the low end of the correct range in conformity with the parties' implicit agreement. Accordingly, Smith was entitled to be resentenced or, if the trial court were to determine that it could not sentence him at the low end of the correct guidelines range, to withdraw his plea.

Remanded for resentencing.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Jason W. Williams*, Chief of Research, Training, and Appeals, and *Julie A. Powell*, Assistant Prosecuting Attorney, for the people.

Law Offices of Suzanna Kostovski (by *Suzanna Kostovski*) for defendant.

Before: JANSEN, P.J., and BECKERING and GADOLA, JJ.

PER CURIAM. Defendant appeals by delayed leave granted[1] his conviction of armed robbery, MCL 750.529. Defendant was sentenced to 126 to 240 months' imprisonment. We remand for resentencing in accordance with this opinion.

This case arises from defendant's decision to plead guilty to armed robbery pursuant to a *Cobbs*[2] agreement. Defendant was charged with armed robbery. On December 8, 2014, defendant appeared in the trial court and informed the court that he wished to plead guilty to the charged offense. The prosecutor indicated that the parties agreed that the sentencing guidelines range was 126 to 220[3] months' imprisonment and that the prosecution would agree to a minimum sentence

[1] See *People v Smith*, unpublished order of the Court of Appeals, entered December 11, 2015 (Docket No. 330075).

[2] *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993).

[3] We note that the record establishes that the parties agreed to a guidelines range of 126 to 210 months' imprisonment, rather than a range of 126 to 220 months' imprisonment. We conclude that the

within that range and would dismiss the third-offense habitual offender sentence enhancement. Defense counsel indicated that the parties agreed to a guidelines range of 126 to 210 months' imprisonment and indicated that the prosecution did not object to a sentence at the "bottom" of the guidelines range. Defendant was sworn to tell the truth and was questioned concerning his understanding of the plea and sentence agreement. The following colloquy then occurred:

> *The Court*: Um, now there's a sentence agreement that the prosecutor will move to withdraw the habitual third. In which the penalty is twice the maximum sentence.
>
> And your sentence will be within the guidelines of 126 to 210 months and she does not have any objection towards you on being sentenced at the low end of the guidelines; is that your understanding[?]
>
> [*Defendant*]: Yes.
>
> *The Court*: And you are doing this freely and voluntarily?
>
> [*Defendant*]: Yes.

Defendant was advised of his rights and described the factual basis supporting his plea.

On December 23, 2014, defendant appeared for sentencing. The following conversation occurred:

> [*Defense Counsel*]: We'd indicate for the record, your Honor, that there was a plea agreement in this matter. That we did reach an agreement whereby the Prosecution allowed my client to plead guilty under the guidelines. And the guidelines are 126 to 201.[4]

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reference to 220 months was either a misstatement or a typographical error in the plea hearing transcript.

[4] We note that the record establishes that the parties agreed to a guidelines range of 126 to 210 months' imprisonment, rather than a range of 126 to 201 months' imprisonment. Defense counsel's reference to 201 months in the sentencing transcript was likely either a misstatement or a typographical error.

> We don't object to those guidelines. We do have an agreement that the Court would sentence the defendant at the low end of the guidelines. We're asking the Court to give him the minimum, the 126, as oppose[d] to anything in between.
>
> * * *
>
> [*The Prosecutor*]: Your Honor, I'm not aware of any stipulation to the low end of the guidelines. I just have that it is a guideline sentence agreement.
>
> * * *
>
> [*Defense Counsel*]: Your Honor, we would indicate; as an officer of the Court, I do realize the prosecutor [who handled the plea] is not here. But as an officer of the court, there was an agreement that it would be the low end of the guidelines.
>
> *The Court*: All right. The Court believed at the time, that the low end of the guidelines would be reasonable. The Court did consider the defendant did admit his guilt.
>
> And at this stage in life, considering that he's already been convicted of armed robbery in the past it seem[s] like the bottom of the guidelines would be enough time to rehabilitate this young man. But maybe it's not. Maybe it's not.

The court then sentenced defendant to 126 to 240 months' imprisonment.

On June 17, 2015, after obtaining appellate counsel, defendant moved for resentencing in the trial court. Defendant argued that, although neither party raised the issue at sentencing, the trial court relied on incorrect guidelines information. Defendant contended that the guidelines range was 81 to 135 months' imprisonment. Further, defendant argued that before sentencing him the trial court failed to ask him whether he was given an opportunity to review the contents of the

presentence investigation report (PSIR). Importantly, defendant's sentencing information report (SIR) reflected that the guidelines range was 81 to 135 months' imprisonment. On October 16, 2015, the trial court issued an opinion and order denying the motion. The court indicated that it "calculate[d] defendant's guidelines to be between 126-210 months for his minimum sentence," but the court did not explain how it determined the guidelines range. The court further explained, "Even if defendant's assertion is correct, and his guidelines range should have been 81 months to 135 months, his argument is still not valid for re-sentencing, as his actual sentence of 126 months falls within [the] guidelines range [and] is presumed to be a valid sentence."

Defendant argues that the trial court erred when it sentenced him to a minimum sentence based on an improperly calculated guidelines range. We agree.

The issue whether the trial court followed the proper procedures for entry of a plea agreement constitutes a question of law that we review de novo. See *People v Barrera*, 451 Mich 261, 269 n 7; 547 NW2d 280 (1996). We also review de novo the issue whether a defendant was denied his right to due process. *People v Henry (After Remand)*, 305 Mich App 127, 156; 854 NW2d 114 (2014). The question in this case is whether a defendant who pleads guilty under a *Cobbs* agreement and agrees to a sentence at the low end of the guidelines range is entitled to a sentence at the low end of the *properly scored* guidelines range. We conclude that, although the prosecution and defense counsel agreed to an incorrect, higher guidelines range, defendant is nevertheless entitled to resentencing at the low end of the properly calculated sentencing guidelines range.

A guilty plea is a waiver of several constitutional rights, including the right to a trial by jury, the right to confront one's accusers, and the right against compulsory self-incrimination. *People v Cole*, 491 Mich 325, 332; 817 NW2d 497 (2012). "For a plea to constitute an effective waiver of these rights, the Due Process Clause of the Fourteenth Amendment requires that the plea be voluntary and knowing." *Id*. at 332-333. In other words, " '[w]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.' " *Id*. at 333 (citation omitted; alteration in original).

We find several decisions of our Supreme Court relevant to determining the issue presented in this case. In *People v Cobbs*, 443 Mich 276, 285; 505 NW2d 208 (1993), the Michigan Supreme Court explained that when a defendant pleads guilty with knowledge of the sentence that will be imposed, the defendant's plea demonstrates that he or she agrees that the sentence is proportionate to the offense and the offender. In *People v Wiley*, 472 Mich 153, 154; 693 NW2d 800 (2005), our Supreme Court expanded on this rule and indicated that a defendant may enter into a valid plea agreement for a sentence exceeding the sentencing guidelines range. The Court explained, "[A] defendant waives appellate review of a sentence that exceeds the guidelines by understandingly and voluntarily entering into a plea agreement to accept that specific sentence." *Id*. Nevertheless, the court explained that a trial court must complete the SIR and determine the appropriate sentencing guidelines range "so that it is clear that the agreed-upon sentence constitutes a departure." *Id*. at 154 n 1.

In *People v Price*, 477 Mich 1, 3-4; 723 NW2d 201 (2006), the defendant pleaded guilty to a charge of bank robbery, MCL 750.531, pursuant to a *Cobbs* agreement that provided for a minimum sentence within the appropriate sentencing guidelines range. The trial court then sentenced the defendant to a minimum sentence of 5 years' imprisonment, which was within the sentencing guidelines range as calculated by the court. *Id*. The defendant subsequently moved for resentencing, claiming that the guidelines were incorrectly calculated and that the correct sentencing guidelines range was 5 to 21 months' imprisonment. *Id*. at 4. Our Supreme Court concluded that the trial court incorrectly scored Prior Record Variable (PRV) 1 and Offense Variable (OV) 13, and that the guidelines range should have been 5 to 21 months' imprisonment. *Id*. at 4-5. Therefore, the defendant's sentence was not within the appropriate guidelines range. *Id*. at 5. Accordingly, the Court remanded the case to the trial court for resentencing. *Id*. The Court differentiated *Price* from *Wiley* and determined that the defendant did not waive his objection to the scoring of the guidelines because "the court and defendant did not reach an agreement for a specific sentence." *Id*. at 3 n 1. Instead, the Court explained, the "defendant generally agreed to a sentence within the guidelines range however the trial court ultimately calculated it." *Id*.

We conclude that the situation in this case is more in line with the situation in *Price* than the situation in *Wiley*. In *Wiley*, the defendant agreed to a specific sentence. *Wiley*, 472 Mich at 154. In this case, defendant did not agree to a specific sentence. Instead, he agreed to a minimum sentence at the low end of the guidelines range. Therefore, we conclude that *Wiley* is distinguishable from the instant case. In contrast, in

Price the *Cobbs* agreement was for a sentence "within the appropriate statutory sentencing guidelines range." *Price*, 477 Mich at 3. Similarly, in this case, defendant agreed to a minimum sentence at the low end of the guidelines range. Indeed, the parties referred to the agreement as a guidelines sentencing agreement throughout the proceedings. Implicit in the plea agreement was the understanding that defendant would be sentenced at the low end of an accurate guidelines range. Accordingly, we conclude that the *Cobbs* agreement was for a sentence within the proper guidelines range.

Similar to the situation in *Price*, the guidelines range under which the court sentenced defendant was significantly higher than the appropriate sentencing guidelines range. We acknowledge that the prosecutor and defense counsel agreed to a guidelines range of 126 to 210 months' imprisonment, and the court imposed a sentence at the bottom of that range. However, the guidelines range as reflected in the SIR was 81 to 135 months' imprisonment, which was far below the range calculated by the parties. When presented with the fact that the range initially used by the court and the parties was miscalculated, the trial court upheld its sentence, indicating, without explanation, that the proper range was 126 to 210 months' imprisonment and reasoning that, in any event, the minimum sentence was still within the sentencing guidelines range advocated by defendant. The court did not explain the discrepancy between the guidelines range as calculated in the SIR and the guidelines range as calculated by the court. Nor did the court otherwise explain why the range of 126 to 210 months' imprisonment was the correct range. The minimum sentence of 126 months was not "at the low end" of the sentencing range indicated in the SIR. Consequently, the court did not

adhere to the bargain to sentence defendant to a minimum sentence at the low end of the guidelines range. We conclude that due process requires that the trial court sentence defendant to a minimum sentence at the low end of the appropriate guidelines range. The record establishes that defendant entered his plea with the understanding that he would receive a sentence at the low end of the correct guidelines range. Sentencing defendant within the higher guidelines range denied defendant his right to due process because a defendant must enter a guilty plea "with sufficient awareness of the relevant circumstances and likely consequences." See *Cole*, 491 Mich at 333 (quotation marks and citation omitted).

We remand this case to the trial court for resentencing. The trial court shall resentence defendant to a minimum sentence at the low end of the correctly calculated sentencing guidelines range. If the court determines that it cannot sentence defendant to the low end of the properly scored guidelines range, it must provide defendant the opportunity to withdraw his guilty plea. See *Cobbs*, 443 Mich at 283.

Remanded for resentencing. We do not retain jurisdiction.

JANSEN, P.J., and BECKERING and GADOLA, JJ., concurred.

BERGMANN v COTANCHE

Docket No. 330438. Submitted February 15, 2017, at Lansing. Decided February 23, 2017, at 9:00 a.m.

Donald and Sherry Bergmann brought an action in the Charlevoix Circuit Court against Bryce R. Cotanche and Boyne USA, Inc. (Boyne USA), seeking compensation for injuries Donald sustained in a collision between a front-end loader driven by Contanche—who was operating the front-end loader to plow snow during the course of his employment with Boyne USA—and Donald's vehicle on a public highway. Plaintiffs alleged that the front-end loader was required to be registered and insured and that the failure to do so entitled plaintiffs to compensation under MCL 500.3116 of the no-fault act, MCL 500.3101 *et seq*. Defendants moved for summary disposition, alleging that the front-end loader was exempt from registration and the requirement to maintain no-fault insurance because the vehicle qualified under the "special mobile equipment" exception of MCL 257.216(d). The court, Roy C. Hayes III, J., concluded that the special-mobile-equipment exception did not apply because while the front-end loader was not designed or used primarily for the transportation of persons or property, its travel on the public highway to reach plow sites was more than incidental. The court also concluded that MCL 257.216(d) required the front-end loader to be registered and insured. Plaintiffs appealed.

The Court of Appeals *held*:

1. MCL 500.3101(1) provides that the owner or registrant of a motor vehicle required to be registered in this state shall maintain security for payment of benefits under personal protection insurance, property protection insurance, and residual liability insurance. However, under MCL 257.216(d), "special mobile equipment" is exempt from registration. MCL 257.62 defines special mobile equipment, in relevant part, as every vehicle not designed or used primarily for the transportation of persons or property and incidentally operated or moved over the highways. To fall under the definition of special mobile equipment, the vehicle must be (1) incidentally operated or moved over the highway, and (2) not designed primarily for transportation of

persons or property or (3) not used primarily for transportation of persons or property. The presence of Factor (1) along with the presence of either Factor (2) or Factor (3) will qualify a vehicle for exemption. The Michigan Vehicle Code, MCL 257.1 *et seq*., does not define "incidental." Michigan caselaw supported use of the definition of "incidental" in *Black's Law Dictionary* (10th ed), which defines "incidental" as subordinate to something of greater importance; having a minor role. Accordingly, a court must evaluate the totality of the circumstances when making a determination of whether operation or movement over a public highway is incidental, including the frequency and amount of a vehicle's operation or movement over a public highway and the task or purpose of the vehicle. If the movement or operation of the vehicle over the highway is subordinate to the vehicle's main task or purpose, then the movement or operation is incidental. In this case, the front-end loader qualified as special mobile equipment under MCL 257.62 because the parties did not dispute that the front-end loader was not designed or used primarily to transport people or equipment and because the front-end loader's travel over the public highway was incidental to its objectives. When the front-end loader finished plowing snow at the first site, it had to travel about a quarter of a mile along a public road to reach the second site; therefore, the front-end loader's travel over the public road was incidental to its main purpose, which was to plow snow. The relatively short distance and time that would have been spent on the public road was indicative of how the main purpose of the vehicle was to plow snow and of how travel over the roads was subordinate to the plowing purpose. The trial court erred by concluding that the front-end loader's travel on the public highway to reach the plow sites was more than incidental.

2. MCL 257.216(d) provides, in relevant part, that the Secretary of State *may* issue a special registration, and MCL 257.872 specifically indicates that the word "may" means that an action is permissive. Furthermore, because the requirement in MCL 500.3101(1) to maintain no-fault insurance is limited to the owner or registrant of a motor vehicle *required to be registered in this state*, as long as special mobile equipment does not require registration, it does not have to be covered by no-fault insurance. Because the front-end loader in this case was not required to be registered, it was also not required to be covered by no-fault insurance. The trial court erred by concluding that the front-end loader was required to be registered and insured.

Reversed and remanded.

1. AUTOMOBILES — SPECIAL MOBILE EQUIPMENT — WORDS AND PHRASES — "INCIDENTAL."

MCL 257.62 defines special mobile equipment as every vehicle not designed or used primarily for the transportation of persons or property and incidentally operated or moved over the highways; "incidental" means subordinate to something of greater importance or having a minor role; a court must evaluate the totality of the circumstances when making a determination of whether operation or movement of a vehicle over a public highway is incidental, including the frequency and amount of the vehicle's operation or movement over a public highway and the task or purpose of the vehicle; if the movement or operation of the vehicle over the highway is subordinate to the vehicle's main task or purpose, then the movement or operation is incidental.

2. AUTOMOBILES — SPECIAL MOBILE EQUIPMENT — EXEMPTION FROM MOTOR VEHICLE REGISTRATION — NO-FAULT INSURANCE COVERAGE NOT REQUIRED.

MCL 500.3101(1) provides that the owner or registrant of a motor vehicle required to be registered in this state shall maintain security for payment of benefits under personal protection insurance, property protection insurance, and residual liability insurance; MCL 257.216(d) specifically exempts special mobile equipment from registration; because the requirement in MCL 500.3101(1) to maintain no-fault insurance is limited to the owner or registrant of a motor vehicle required to be registered in this state, as long as special mobile equipment does not require registration, it does not have to be covered by no-fault insurance.

Atkinson Petruska Kozma & Hart PC (by *Gary A. Kozma*) for Donald and Sherry Bergmann.

Plunkett Cooney (by *Hilary A. Ballentine* and *John P. Deegan*) for Bryce R. Cotanche and Boyne USA, Inc.

Before: HOEKSTRA, P.J., and SAAD and RIORDAN, JJ.

SAAD, J. In this negligence action premised on owner liability under the no-fault act, MCL 500.3101 *et seq*., defendants appeal[1] the trial court's order that denied

[1] We granted defendant's application for leave to appeal. *Bergman v Cotanche*, unpublished order of the Court of Appeals, entered March 8,

their motion for summary disposition. The trial court, in denying the motion, found that the front-end loader vehicle at issue in this case was not exempt from registration and therefore was required to be insured under the no-fault act. But because the front-end loader meets the statutory requirements of "special mobile equipment," it was not required to be registered, and the trial court erred when it held otherwise. Accordingly, we reverse and remand.

I. BASIC FACTS

On December 12, 2012, defendant Bryce R. Cotanche was operating a front-end loader to plow snow in the course of his employment with defendant Boyne USA, Inc. (Boyne USA). The front-end loader was not registered with the state of Michigan nor insured under a no-fault insurance policy. To reach his next plow site, Cotanche made a left turn from a private drive onto Deer Lake Road, a public highway. He intended to drive on Deer Lake Road for approximately a quarter of a mile to reach his next site. Plaintiff Donald Bergmann[2] was driving northbound on Deer Lake Road, and the two vehicles collided.[3]

Plaintiff filed suit against defendants and sought compensation for his injuries. Plaintiff alleged that defendant Boyne USA was liable for defendant Cotanche's negligence because it owned the front-end loader and Cotanche drove it in the course of his

2016 (Docket No. 330438). While the order lists plaintiffs' surname as "Bergman," the proper spelling of plaintiffs' surname is "Bergmann."

[2] Because plaintiff Sherry Bergmann's claims are derivative of plaintiff Donald's, for simplicity's sake, we will use the term "plaintiff" in this opinion to refer to Donald.

[3] While not pertinent for our issue on appeal, we note that the responding sheriff concluded that plaintiff was at fault for "driving too fast for the conditions."

employment. Plaintiff contended that the front-end loader was required to be registered and insured and that the failure to do so entitled plaintiff to a recovery equal to all personal protection benefits paid or payable to permit reimbursement of his insurer under MCL 500.3116 in addition to damages otherwise allowed by law.

Defendants moved for partial summary disposition under MCR 2.116(C)(8) (failure to state a claim) and (C)(10) (no genuine issue of fact) and asserted that the front-end loader was exempt from registration and the resulting requirement to maintain no-fault insurance because the vehicle qualified under the "special mobile equipment" exception of MCL 257.216(d). Plaintiff countered that the front-end loader was a motor vehicle required to be registered and insured. Plaintiff argued that the front-end loader was not exempt under the "special mobile equipment" exception because, although not designed for use on the highway, it was not "incidentally operated or moved over the highway[]" as required by the exception. MCL 257.62.

The trial court ultimately concluded that the front-end loader met the first aspect of the test to qualify as special mobile equipment because it was not designed or used primarily for the transportation of persons or property. However, the court determined that the second prong was not satisfied because the travel on the public highway to reach plow sites was more than incidental. The court therefore concluded that the "special mobile equipment" exception did not apply and that the law required the front-end loader to be registered and insured. The court also concluded that MCL 257.216(d) provided that special mobile equipment driven on the highway needed special registration and that the front-end loader should have been registered and insured regardless.

II. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a summary disposition motion to determine if the moving party was entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). While the trial court did not state which court rule it was relying on when it denied defendants' motion for partial summary disposition, we will review the motion under MCR 2.116(C)(10) because it relied on documentation outside the pleadings. See *Innovation Ventures v Liquid Mfg*, 499 Mich 491, 506-507; 885 NW2d 861 (2016). A "motion under MCR 2.116(C)(10) tests the factual support for a claim and should be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *MEEMIC Ins Co v DTE Energy Co*, 292 Mich App 278, 280; 807 NW2d 407 (2011). When reviewing a motion for summary disposition under MCR 2.116(C)(10), we consider "affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion." *Greene v A P Prods, Ltd*, 475 Mich 502, 507; 717 NW2d 855 (2006) (quotation marks and citation omitted). The motion "is properly granted if the proffered evidence fails to establish a genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Klein v HP Pelzer Auto Sys, Inc*, 306 Mich App 67, 75; 854 NW2d 521 (2014).

"The interpretation and application of a statute in particular circumstances is a question of law this Court reviews de novo." *Detroit Pub Sch v Conn*, 308 Mich App 234, 246; 863 NW2d 373 (2014).

III. ANALYSIS

Under Michigan's no-fault act, "[t]he owner or registrant of a motor vehicle *required to be registered* in this state shall maintain security for payment of benefits under personal protection insurance, property protection insurance, and residual liability insurance." MCL 500.3101(1) (emphasis added). "Security is only required to be in effect during the period the motor vehicle is driven or moved on a highway." *Id*. The Michigan Vehicle Code, MCL 257.1 *et seq*., however, exempts certain motor vehicles from registration with the state. One of those exceptions is for "special mobile equipment." MCL 257.216(d).[4] MCL 257.62, in turn, defines "special mobile equipment" as the following:

> [*E*]*very vehicle not designed or used primarily for the transportation of persons or property and incidentally operated or moved over the highways*, including farm tractors, road construction or maintenance machinery, mobile office trailers, mobile tool shed trailers, mobile trailer units used for housing stationary construction equipment, ditch-digging apparatus, and well-boring and well-servicing apparatus. The foregoing enumeration shall be considered partial and shall not operate to exclude other vehicles which are within the general terms of this definition. [Emphasis added.]

At issue in this appeal is whether Boyne USA's front-end loader qualifies as special mobile equipment that is exempt from registration and the resulting requirement to carry no-fault insurance. Defendants maintain that the front-end loader is special mobile

[4] Notwithstanding this exemption, "[t]he secretary of state may issue a special registration to an individual, partnership, corporation, or association not licensed as a dealer that pays the required fee, to identify special mobile equipment that is driven or moved on a street or highway." MCL 257.216(d).

equipment because MCL 257.62 specifies that tractor-like equipment, such as "farm tractors" and "road construction or maintenance machinery," is included in the definition and that the front-end loader in question clearly is in that family of vehicles. However, our Supreme Court has held "that the specifications of that general definition must be found to exist with respect to the enumerated items of equipment if they are to qualify as 'special mobile equipment' entitled to exemption." *Davidson v Secretary of State*, 351 Mich 4, 9; 87 NW2d 131 (1957).[5] In other words, it is not sufficient for a vehicle to merely be one of the enumerated types of vehicles in MCL 257.62. Instead, the vehicle must *also* satisfy the general definition of special mobile equipment—i.e., it must be a "vehicle not designed or used primarily for the transportation of persons or property and [be] incidentally operated or moved over the highways"—to be entitled to an exemption from the registration requirement. MCL 257.62. Therefore, defendants' argument that a front-end loader is *automatically* special mobile equipment by definition is unavailing.

This Court has previously interpreted MCL 257.62 and held that in order for a vehicle to fall under the definition of special mobile equipment,

> the vehicle must be (1) incidentally operated or moved over the highway *and* (2) not designed primarily for transportation of persons or property, *or* (3) not used primarily for transportation of persons or property; the presence of factor (1) along with the presence of either factor (2) or factor (3) will qualify a vehicle for the exemption. [*Auto-Owners Ins Co v Stenberg Bros, Inc*, 227 Mich App 45, 51; 575 NW2d 79 (1997).]

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[5] Although MCL 257.62 has been modified since the Court made its decision in *Davidson*, the salient portion of the definition remains the same. Compare MCL 257.62 with *Davidson*, 351 Mich at 6-7.

Here, the parties do not dispute, and we agree, that the front-end loader was not designed or used primarily to transport people or equipment, thereby satisfying Factor (2). Therefore, the remaining issue is whether Factor (1) is satisfied—whether the front-end loader was "incidentally operated or moved over the highway."

The Michigan Vehicle Code does not define the word "incidentally." The Court's "objective when interpreting a statute is to discern and give effect to the intent of the Legislature." *Book-Gilbert v Greenleaf*, 302 Mich App 538, 541; 840 NW2d 743 (2013). "Undefined statutory terms must be given their plain and ordinary meanings, and it is proper to consult a dictionary for definitions." *Halloran v Bhan*, 470 Mich 572, 578; 683 NW2d 129 (2004). According to *Black's Law Dictionary* (10th ed), "incidental" is defined as "[s]ubordinate to something of greater importance; having a minor role[.]" This definition matches our understanding of the term and is consistent with established caselaw.

In *Davidson*, the plaintiff used "batching trucks" to deliver concrete from a mixing plant to a nearby highway paving project. *Davidson*, 351 Mich at 7. Indeed, "[t]hese trucks [were] *used only for transporting* concrete mix from a mixing plant to a highway location being paved therewith." *Id*. (emphasis added). The number of trips the trucks took over public roads "extended at least into the hundreds." *Id*. The Court held that the batching trucks were not special mobile equipment because (1) they were designed and used primarily to transport property and (2) their operation over the public roadways was "more than incidental." *Id*. at 9. While the *Davidson* Court did not go into any detail regarding how it concluded that the travel was "more than incidental," we note that because the

trucks' sole purpose was to *transport*, it follows that the trucks' main or primary purpose was to indeed travel on or across public roads. Thus, it cannot be said that the trucks' travel on the roads was subordinate to the trucks' purpose or task. Indeed, the travel over the roads—getting from the mixing plant to the construction site—was the trucks' main purpose. As a result, it is quite understandable why the *Davidson* Court concluded that the batching trucks' travel over the roads was "more than incidental." While the Court noted that the trucks took "hundreds" of trips over the public roads, this fact by itself is not dispositive in our view.

In *Stenberg Bros*, the vehicle at issue was a tanker-trailer that was initially designed and built in 1955 to transport liquids in bulk. *Stenberg Bros*, 227 Mich App at 46. But since 1987, the tanker-trailer was used "solely as a [stationary] storage tank." *Id*. When the defendant leased the tanker-trailer to another corporation, the tanker-trailer was pulled over public highways for 15 miles to its destination. *Id*. And when the lease expired, the tanker-trailer was to be returned to the defendant in the same manner. *Id*. at 46-47. The Court held that the tanker-trailer was special mobile equipment that was exempt from registration because the tanker-trailer was not used primarily for transportation and was "only incidentally moved over the highway." *Id*. at 51. Although the *Stenberg Bros* Court did not thoroughly analyze the question of incidental movement over the highways or articulate criteria to consider when performing that analysis,[6] it is clear

[6] *Stenberg Bros* primarily addressed an apparent inconsistency between the plain language of MCL 257.62 and the *Davidson* Court's interpretation of that statute. The statute includes the phrase "not designed *or* used primarily for the transportation of persons or property." MCL 257.62 (emphasis added). Thus, the statute creates a *disjunctive* relationship between design and use. But a certain passage

that *Stenberg Bros*'s holding is consistent with our understanding of the term "incidental." At the relevant time, the tanker-trailer's main purpose was to remain as a stationary storage tank, which meant that any movement across and along public roads was minor or subordinate to that larger purpose. Thus, the tanker-trailer was "incidentally operated or moved over the highways."

In *People v Metamora Water Serv, Inc*, 276 Mich App 376, 378; 741 NW2d 61 (2007), this Court addressed whether the defendants' "water trucks" were special mobile equipment and exempt from motor vehicle registration. The defendant was ticketed for failing to register the water trucks that it used in the course of its well-drilling business. *Id*. at 377-378. The Court held that the trucks were not special mobile equipment because (1) the trucks were designed and used for transportation and (2) the fact that the trucks were used on "a daily or almost daily basis" on the public highways "does not satisfy the incidental-usage requirement of the exemption." *Id*. at 386. Thus, *Metamora Water* suggests that frequency of operation over public highways can be a relevant inquiry when determining incidental operation on public highways. See also *Davidson*, 351 Mich at 7 (referring to the fact that the trucks made "hundreds" of trips over public roads). But in addition to the frequency of a vehicle's trips over the highway, we note that because the main purpose of the water trucks was to transport property over the highway, it cannot be said that traveling over the highway was incidental to that purpose.

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in *Davidson* supports a *conjunctive* relationship between design and use. *Stenberg Bros*, 227 Mich App at 49-50, citing *Davidson*, 351 Mich at 9. The *Stenberg Bros* Court resolved this issue by concluding that the passage in *Davidson* was dictum. *Stenberg Bros*, 227 Mich App at 52.

Therefore, *Davidson*, *Stenberg Bros*, and *Metamora Water* all support our definition of "incidental" as being "[s]ubordinate to something of greater importance; having a minor role[.]" *Black's Law Dictionary* (10th ed). To make this determination, a court must evaluate the totality of the circumstances. We agree with *Davidson* and *Metamora Water* that the frequency and amount of a vehicle's operation or movement over the highways is something to consider when deciding whether the travel was incidental. But this is merely one factor to consider. Key to any analysis will be the purpose of the vehicle. Otherwise, it will be impossible to truly ascertain whether the travel on the public roads was truly incidental to the vehicle's task or purpose.

Here, we hold that Boyne USA's front-end loader meets the MCL 257.62 definition of special mobile equipment. As already discussed, there is no question that the vehicle was neither designed for nor used for the transportation of people or property. Further, viewing the evidence in a light most favorable to plaintiff, we conclude that the front-end loader's travel over the public roads was incidental to its objectives. There was evidence that, during the winter, the front-end loader was used to plow snow at Boyne USA's facilities. When the plowing was complete at the first site, the front-end loader had to travel about a quarter of a mile along a public road in order to reach the second plowing site. We view this travel as incidental to the vehicle's main purpose, which was to plow snow. Although not dispositive, we also believe that the relatively short distance and time that would have been spent on the public road is indicative of how the main purpose of the vehicle was to plow and how the travel over the roads was indeed minor or subordinate to the plowing purpose. The fact

that the plowing occurred somewhat regularly in the winter when snow accumulated does not alter our analysis. The fact remains that, regardless of how frequent, the travel along the public roads was clearly incidental to the more significant plowing tasks that were taking place. Consequently, the trial court erred when it ruled otherwise.

Defendants also argue that the trial court erred when it determined that the front-end loader needed to be registered and insured even if it qualified as special mobile equipment. We agree. As special mobile equipment, the front-end loader was not required to be registered. MCL 257.216(d) specifically exempts special mobile equipment from registration but also provides that "[t]he secretary of state *may* issue a special registration to an individual, partnership, corporation, or association not licensed as a dealer that pays the required fee, to identify special mobile equipment that is driven or moved on a street or highway." MCL 257.216(d) (emphasis added). The Michigan Vehicle Code specifically indicates that the word "may" means that an action is permissive. MCL 257.82. Thus, there is no indication from MCL 257.216(d) that a vehicle qualifying as special mobile equipment is required to be registered; the statute merely allows the Secretary of State to permissively register special mobile equipment that is driven or moved on the highway. Further, the requirement to maintain no-fault insurance is limited to the "owner or registrant of a motor vehicle *required to be registered* in this state." MCL 500.3101(1) (emphasis added). Thus, as long as special mobile equipment does not require registration, as is the case here, it does not have to be covered by no-fault insurance. Accordingly, the trial court erred when it ruled to the contrary.

We reverse and remand for proceedings consistent with this opinion. We do not retain jurisdiction. Defendants, as the prevailing parties, may tax costs pursuant to MCR 7.219.

HOEKSTRA, P.J., and RIORDAN, J., concurred with SAAD, J.

YACHCIK v YACHCIK

Docket No. 333834. Submitted February 15, 2017, at Lansing. Decided February 28, 2017, at 9:00 a.m.

Plaintiff, Stephani L. Yachcik, was divorced from defendant, Kristopher J. Yachcik; plaintiff moved in the Alpena Circuit Court to change the legal residence of the parties' minor child from Michigan to Pennsylvania. The parties had agreed to joint legal and physical custody of the minor child at the time of their divorce, and they modified their parenting-time arrangement in 2012 so that each parent had parenting time on an alternating weekly basis. Plaintiff's new husband, Benjamin Wallen, worked and lived near the border of New York and Pennsylvania, and he visited plaintiff and the minor child when his work schedule allowed. Plaintiff sought to move the child's legal residence to Pennsylvania because of an employment opportunity for her and also to reduce her and Wallen's living expenses by downsizing to one home. If she were allowed to move the minor child, plaintiff intended to send him to a private school. Plaintiff proposed a parenting-time schedule in which the minor child would live with her and Wallen during the school year, and the child would visit defendant in Michigan for Thanksgiving break, one week of winter break, spring break, and 10 weeks of summer break. The court, Michael G. Mack, J., applied the change-of-residence factors set forth in MCL 722.31(4) and denied plaintiff's motion, reasoning that plaintiff had failed to prove by a preponderance of the evidence that the residence change had the capacity to improve the minor child's quality of life. The court also ordered that if plaintiff moved to Pennsylvania the parties would inversely follow the parenting-time schedule proposed by plaintiff but that if plaintiff did not leave Michigan, the parties' existing parenting-time schedule would remain in effect. Plaintiff appealed.

The Court of Appeals *held*:

1. MCL 722.31(1) of the Child Custody Act (CCA), MCL 722.21 *et seq*., provides that a parent of a child whose custody is governed by court order may not change a legal residence of the child to a location that is more than 100 miles from the child's

legal residence at the time of the commencement of the action in which the order is issued except in accordance with MCL 722.31. MCL 722.31(4) provides that before a court may permit a change of legal residence, it must consider—with the child as the primary focus in the court's deliberations—whether the legal residence change has the capacity to improve the quality of life of both the child and the relocating parent, MCL 722.31(4)(a); the degree to which each parent has complied with and utilized his or her parenting time under a court order and whether the parent's plan to change the child's legal residence is inspired by the parent's desire to defeat or frustrate the parenting-time schedule, MCL 722.31(4)(b); if it grants the change in legal residence, whether the parenting-time schedule could be arranged to provide an adequate basis for preserving and fostering the parental relationship between the child and each parent, and whether each parent is likely to comply with the modification, MCL 722.31(4)(c); the extent to which the parent opposing the legal residence change is motivated by a desire to secure a financial advantage with respect to a support obligation, MCL 722.31(4)(d); and whether domestic violence is involved, regardless of whether the violence was directed against or witnessed by the child, MCL 722.31(4)(e).

2. A trial court must follow a four-step approach when deciding a motion for change of legal residence. MCL 722.31(4) provides that the trial court must determine whether the moving party established by a preponderance of the evidence the MCL 722.31(4) factors; if a change in legal residence is supported by the evidence, then the trial court must determine whether a custodial environment exists; if an established custodial environment exists, the court must determine whether the change in legal residence would be in the child's best interests by considering whether the MCL 722.23 best-interest factors have been established by clear and convincing evidence. Consideration of each of the MCL 722.31(4) factors is mandatory when the trial court is determining whether to allow a change of the child's legal residence. Although MCL 722.31(4) requires a trial court to consider each of the factors, the court does not have to specifically delineate its findings and conclusions with regard to each listed factor when making a change-of-legal-residence determination. Comparing MCL 722.31(4) to other CCA statutory sections, the word "consider" in MCL 722.31(4) requires a trial court to carefully think about, take into account, or assess each factor; the statute's language does not require the court to take additional action, such as making explicit findings on the record regarding each factor. However, a trial court's factual findings concerning the MCL 722.31(4) factors must comply with MCR 3.210(D)(1) in

that the findings must be sufficient to allow an appellate court to review whether those findings were against the great weight of the evidence.

3. In this case, the trial court applied the correct legal framework and did not commit clear legal error when it failed to expressly address all the MCL 722.31(4) factors when it considered plaintiff's motions to change the minor child's legal residence. Even though it narrowed the focus of its analysis to MCL 722.31(4)(a) and (c) and found MCL 722.31(4)(a) dispositive, it correctly recognized that all the MCL 722.31(4) factors controlled its determination regarding plaintiff's requested change of the child's legal residence. Given the trial court's conclusion that it was not clear whether the child's quality of life would be improved by the move and the court's statutorily required primary focus being on the child, MCL 722.31(4), the court did not abuse its discretion by concluding that plaintiff failed to demonstrate by a preponderance of the evidence that a change of residence was supported by the MCL 722.31(4) factors.

4. The trial court's determination that the proposed move to Pennsylvania did not have the capacity to increase the minor child's quality of life overall was not against the great weight of the evidence. Plaintiff's increased financial resources and the opportunity to enroll in a private high school were only two of the considerations relevant to the trial court's determination; the court did not err by putting emphasis on the child's current proximity to immediate and extended family members and strong ties to the Alpena area.

5. An established custodial environment exists if over an appreciable time a child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. MCL 722.27(1)(c) provides that a trial court may modify or amend its previous judgment or order for proper cause shown or because of a change of circumstances if there is clear and convincing evidence that the modification or amendment is in the child's best interests; the best-interest factors must be addressed when a parenting-time modification results in a change of custody. A trial court must consider the MCL 722.23 best-interest factors and state its findings and conclusions of law with respect to each factor when making the best-interest determination; the court must analyze the best-interest factors before entering a custody order that alters an established custodial environment, even when a parenting-time modification results in a custody change because a parent moves away from the area of the child's legal residence after the parent's motion to change

legal residence of the child is denied. In this case, there was no dispute that an established custodial environment existed with both parents. Because the amended parenting-time schedule would have resulted in a change of the established custodial environment, the trial court erred by ordering the custody modification without first conducting a hearing and considering the statutory best-interest factors set forth in MCL 722.23 and then stating its findings and conclusions of law with regard to each factor.

Trial court order denying plaintiff's motion to change legal residence of the minor child affirmed, order changing parenting-time schedule vacated, and the case remanded for further proceedings.

PARENT AND CHILD — CHILD CUSTODY — CHANGES OF LEGAL RESIDENCE — CONSIDERATION OF FACTORS — FINDINGS OF FACT.

MCL 722.31(1) of the Child Custody Act, MCL 722.21 *et seq*., provides that a parent of a child whose custody is governed by court order may not change the legal residence of the child to a location that is more than 100 miles from the child's legal residence at the time of the commencement of the action in which the order is issued except in accordance with MCL 722.31; under MCL 722.31, a court may permit the change after considering the five factors set forth in MCL 722.31(4); although each MCL 722.31(4) factor must be considered, the court does not have to make explicit findings and conclusions with regard to each listed factor when making a change-of-legal-residence determination; the court's findings must comply with MCR 3.210(D)(1) in that they must be sufficient to allow an appellate court to review whether those findings were against the great weight of the evidence.

Speaker Law Firm, PLLC (by *Liisa R. Speaker* and *Sandra J. Lake*), for plaintiff.

Laurie S. Longo for defendant.

Before: HOEKSTRA, P.J., and SAAD and RIORDAN, JJ.

PER CURIAM. Plaintiff, Stephanie L. Yachcik, appeals as of right the trial court order (1) denying her motion to change the minor child's legal residence from Michigan to Pennsylvania and (2) providing that, if plaintiff

moves to Pennsylvania,[1] she will be awarded the same parenting time that she had proposed for defendant, Kristopher J. Yachcik, in conjunction with her motion. We affirm in part, vacate in part, and remand for further proceedings consistent with this opinion.

I. FACTUAL BACKGROUND

Plaintiff and defendant married in June 2003. Their son, GY, was born during the first year of their marriage. The parties divorced in August 2005 and agreed to joint legal and physical custody of GY. After the divorce, both parties remained in the Alpena, Michigan area.

A short time later, defendant began dating Christina LeTourneau. The couple began living together when GY was approximately two years old. Plaintiff also had her own relationships.

In July 2012, plaintiff and defendant agreed to modify their parenting-time arrangement so that each party would have parenting time on an alternating weekly basis. In August 2012, plaintiff married her current husband, Benjamin Wallen, who lives and works near the New York/Pennsylvania border. He searched for employment in Michigan, but he was unable to find a job with health insurance benefits comparable to those through his out-of-state job, which cover ongoing treatment for a rare form of cancer with which he is afflicted. Wallen's work schedule provides four days off every other weekend, which gives him an opportunity to visit plaintiff and GY in Michigan once every month or month-and-a-half. Occasionally, plaintiff and GY have visited Wallen in Pennsylvania as well.

[1] It is undisputed that plaintiff moved to Pennsylvania after entry of the order at issue in this appeal.

In January 2016, plaintiff moved to change GY's legal residence to Pennsylvania. She explained that she had found a job there,[2] and that she and her husband would save thousands of dollars in living expenses each year if they were able to consolidate their households and no longer pay for separate residences. She also proposed a parenting-time schedule under which GY would stay with plaintiff and Wallen during the school year and visit defendant in Michigan "for Thanksgiving break, one week of Christmas break, spring break, and 10 weeks of summer break."

Defendant opposed the motion, contending that the move would not be beneficial to GY. He also requested that the trial court award him primary physical custody if plaintiff moved to Pennsylvania and ensure that the parenting-time schedule was consistent with GY's best interests if plaintiff moved away from the Alpena area.

The trial court held a hearing on plaintiff's motion in May 2016, taking testimony from plaintiff; Wallen; defendant; LeTourneau; the owner of the business that offered plaintiff a job in Pennsylvania; the director of admissions from Notre Dame High School, a private Catholic school where plaintiff planned to send GY upon moving to Pennsylvania; and a Pennsylvania realtor who was working with plaintiff and Wallen to locate a house. During her testimony, plaintiff proposed that if the trial court granted her motion, defendant should receive parenting time during Thanksgiving break, half of Christmas break, all of spring break, and the entire summer break except for the first and last weeks. Plaintiff clearly indicated during the hearing that she intended to move to Pennsylvania regard-

[2] Plaintiff had previously been self-employed "running the farm at [their] house," but the farm did not produce any significant profits.

less of the outcome of her motion to change GY's legal residence. At the end of the hearing, the court took the matter under advisement, promising to issue a written opinion.

The trial court's opinion and order summarized the factual and procedural background of the case and stated the following as its decision and reasoning:

> MCL 722.31(4) controls the question of a legal residence change. That statutory provision requires this Court to determine whether the change in residence has the capacity to improve the quality of life for both the child and the relocating parent, but, placing primary focus on the child. It is clear from the testimony that [plaintiff's] life would improve greatly in both a financial sense and an emotional sense since her move to Pennsylvania would be uniting herself with her husband and gaining employment. But the proof involved with the improvement in the quality of life for [GY] is less clear. The Court is of the opinion that removing the child from this community where he has a large extended family into a community where he has no extended family is very much against his best interest. Additionally, the child has been going to the Alpena Public Schools since he became school[-aged] [and going] into a community where he knows not one [soul] other than [plaintiff and Wallen] is also against his best interest. The proof concerning the superiority of the proposed school is not strong and fails to establish by a preponderance of evidence that the residence change has the capacity to improve the quality of life for the minor child.
>
> For all of the foregoing reasons, this Court **DENIES** Plaintiff's Motion for Change of Residence for the minor child. In the event that the Plaintiff moves from the area to the state of Pennsylvania she is to enjoy the same parenting time schedule for herself that she proposed for [defendant] at the hearing in this cause. If she does not leave this area, the Order of week on week off will control

> custody and parenting time. This Court **FINDS** that there has been an established custodial environment in both homes for the minor child.

Subsequently, plaintiff filed a motion for reconsideration, which the trial court denied.

II. STANDARD OF REVIEW

Pursuant to MCL 722.28, in child custody disputes, "all orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." Accordingly, this Court reviews for an abuse of discretion a trial court's decision on whether to grant a motion for change of legal residence and its decision on whether to change custody. *Fletcher v Fletcher*, 447 Mich 871, 879-880; 526 NW2d 889 (1994); *Sulaica v Rometty*, 308 Mich App 568, 577; 866 NW2d 838 (2014). "In this context, an abuse of discretion exists when the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias." *Sulaica*, 308 Mich App at 577. See also *Fletcher*, 447 Mich at 879-880.

"In the child custody context, questions of law are reviewed for clear legal error. A trial court commits legal error when it incorrectly chooses, interprets, or applies the law." *Sulaica*, 308 Mich App at 577. See also *Fletcher*, 447 Mich at 876-877. The trial court's findings of fact are reviewed under the great weight of the evidence standard. *Fletcher*, 447 Mich at 878-879; see also *Rains v Rains*, 301 Mich App 313, 324; 836 NW2d 709 (2013). "This Court may not substitute [its] judgment on questions of fact unless the facts clearly preponderate in the opposite direction. However,

where a trial court's findings of fact may have been influenced by an incorrect view of the law, our review is not limited to clear error." *Rains*, 301 Mich App at 324-325 (quotation marks and citations omitted; alteration in original).

"This Court reviews de novo the proper interpretation and application of statutes and court rules." *Brecht v Hendry*, 297 Mich App 732, 736; 825 NW2d 110 (2012).

> A court's primary goal when interpreting a statute is to discern legislative intent first by examining the plain language of the statute. Courts construe the words in a statute in light of their ordinary meaning and their context within the statute as a whole. A court must give effect to every word, phrase, and clause, and avoid an interpretation that renders any part of a statute nugatory or surplusage. Statutory provisions must also be read in the context of the entire act. It is presumed that the Legislature was aware of judicial interpretations of the existing law when passing legislation. When statutory language is clear and unambiguous, courts enforce the language as written. [*Lee v Smith*, 310 Mich App 507, 509; 871 NW2d 873 (2015) (citations omitted).]

Additionally, it is important to keep in mind the following principles in this case:

> Statutory language should be construed reasonably, keeping in mind the purpose of the act. The purpose of judicial statutory construction is to ascertain and give effect to the intent of the Legislature. In determining the Legislature's intent, we must first look to the language of the statute itself. Moreover, when considering the correct interpretation, the statute must be read as a whole. A statute must be read in conjunction with other relevant statutes to ensure that the legislative intent is correctly ascertained. The statute must be interpreted in a manner that ensures that it works in harmony with the entire statutory scheme. The Legislature is presumed to be familiar with

> the rules of statutory construction and, when promulgating new laws, to be aware of the consequences of its use or omission of statutory language, and to have considered the effect of new laws on all existing laws. [*In re MKK*, 286 Mich App 546, 556-557; 781 NW2d 132 (2009) (quotation marks and citations omitted).]

III. CONSIDERATION OF THE FACTORS UNDER MCL 722.31(4)

Plaintiff first argues that the trial court erred by failing to consider four out of the five factors listed under MCL 722.31(4) when it decided plaintiff's motion to change GY's legal residence. We disagree.[3]

MCL 722.31(1) of the Child Custody Act (CCA), MCL 722.21 *et seq*., provides:

> A child whose parental custody is governed by court order has, for the purposes of this section, a legal residence with each parent. Except as otherwise provided in this section, a parent of a child whose custody is governed by court order shall not change a legal residence of the child to a location that is more than 100 miles from the child's legal residence at the time of the commencement of the action in which the order is issued.

However, a court may permit a change of legal residence as provided in MCL 722.31(4), which states:

> Before permitting a legal residence change otherwise restricted by subsection (1), the court shall consider each of the following factors, with the child as the primary focus in the court's deliberations:

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[3] Defendant contends that plaintiff waived this issue. We reject defendant's characterization of the record. It is clear that plaintiff did not "affirmatively express[] satisfaction" with the court's proposed analysis under MCL 722.31(4). *Moore v Detroit Entertainment, LLC*, 279 Mich App 195, 224; 755 NW2d 686 (2008). Additionally, plaintiff was not required to object to the trial court's findings in its written opinion and order to preserve this issue for appeal. See MCR 2.517(A)(7).

(a) Whether the legal residence change has the capacity to improve the quality of life for both the child and the relocating parent.

(b) The degree to which each parent has complied with, and utilized his or her time under, a court order governing parenting time with the child, and whether the parent's plan to change the child's legal residence is inspired by that parent's desire to defeat or frustrate the parenting time schedule.

(c) The degree to which the court is satisfied that, if the court permits the legal residence change, it is possible to order a modification of the parenting time schedule and other arrangements governing the child's schedule in a manner that can provide an adequate basis for preserving and fostering the parental relationship between the child and each parent; and whether each parent is likely to comply with the modification.

(d) The extent to which the parent opposing the legal residence change is motivated by a desire to secure a financial advantage with respect to a support obligation.

(e) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

In *Rains*, 301 Mich App at 325, we "reiterate[d] the correct process that a trial court must use when deciding a motion for change of domicile":

A motion for a change of domicile essentially requires a four-step approach. First, a trial court must determine whether the moving party has established by a preponderance of the evidence that the factors enumerated in MCL 722.31(4), the so-called *D'Onofrio*[3] factors, support a motion for a change of domicile. Second, if the factors support a change in domicile, then the trial court must then determine whether an established custodial environment exists. Third, if an established custodial environment exists, the trial court must then determine whether the change of domicile would modify or alter that established custodial environment. Finally, if, and only if, the trial court finds that a change of domicile would modify or

> alter the child's established custodial environment must the trial court determine whether the change in domicile would be in the child's best interests by considering whether the best-interest factors in MCL 722.23 have been established by clear and convincing evidence.

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[3] *D'Onofrio v D'Onofrio*, 144 NJ Super 200, 206-207; 365 A2d 27 (1976).

See also *McKimmy v Melling*, 291 Mich App 577, 582; 805 NW2d 615 (2011) ("The party requesting the change of domicile has the burden of establishing by a preponderance of the evidence that the change is warranted.").

As plaintiff emphasizes, the trial court did not specifically identify any subdivisions of MCL 722.31(4) in its reasons for denying plaintiff's motion. It stated that "MCL 722.31(4) controls the question of a legal residence change" and quoted portions of the language in MCL 722.31(4)(a) without referring to the language of any other subdivision, either by direct quotation or paraphrase, and without providing any other reasoning that could be construed as an analysis of the other factors. However, at the end of the hearing on plaintiff's motion, the trial court stated that the only two factors that it needed to analyze in this case were MCL 722.31(4)(a) and (c). By recognizing that MCL 722.31(4) governs this case and having indicated its focus on particular factors, it is clear that the court considered the relevancy of all the factors before narrowing the focus of its analysis. Therefore, the trial court should not be understood as having indicated that it ignored some of the factors under MCL 722.31(4).

Moreover, considering the trial court's reasoning as a whole, and its statements on the record at the end of the motion hearing, it is apparent that the court found

MCL 722.31(4)(a) dispositive in this case. As a result, we conclude that the trial court completed the first step under *Rains*, 301 Mich App at 325, by (1) determining that plaintiff failed to demonstrate by a preponderance of the evidence that "the legal residence change has the capacity to improve the quality of life for both the child and the relocating parent," MCL 722.31(4)(a), and (2) then concluding that this factor was outcome-determinative, such that further explanation of its findings under the other factors was unnecessary. Cf. *Brown v Loveman*, 260 Mich App 576, 601; 680 NW2d 432 (2004) (indicating that the moving party carries a burden of satisfying each factor under MCL 722.31(4)). Stated differently, it was logical for the trial court to conclude, given its finding that it was not clear whether the child's quality of life would be improved by the move, that plaintiff had failed to demonstrate by a preponderance of the evidence that the MCL 722.31(4) factors supported a change of legal residence, especially when the court's primary focus under the statute had to be the child. See MCL 722.31(4); *Rains*, 301 Mich App at 325.

We disagree with plaintiff's contention that the trial court was, at a minimum, required to *state* its findings with regard to each of the factors under MCL 722.31(4). MCL 722.31(4) provides that before a court permits a legal residence change restricted by MCL 722.31(1), "the court *shall consider* each of the following factors . . . ." (Emphasis added.) "The word 'shall' is unambiguous and is used to denote mandatory, rather than discretionary, action." *Salter v Patton*, 261 Mich App 559, 563; 682 NW2d 537 (2004) (quotation marks and citation omitted). Accordingly, when a statute provides that a court "shall consider" specific factors or criteria in rendering its decision, consideration of each

of those factors is mandatory. See, e.g., *Gilmore v Parole Bd*, 247 Mich App 205, 233; 635 NW2d 345 (2001).

We conclude, however, that the statutory language requiring a court to "consider" the factors under MCL 722.31(4) does not require the court to specifically delineate its findings with regard to each factor, especially when MCL 722.31(4) is read in the context of the entire CCA. See *In re MKK*, 286 Mich App at 556-557; *Lee*, 310 Mich App at 509. The act does not define the word "consider." Accordingly, we may turn to the dictionary to determine its plain and ordinary meaning. *Hays v Lutheran Social Servs of Mich*, 300 Mich App 54, 59; 832 NW2d 433 (2013). In *Merriam-Webster's Collegiate Dictionary* (11th ed), the word "consider" is defined as "to think about carefully," "to think of esp. with regard to taking some action," "to take into account," "to regard or treat in an attentive or kindly way," and "to come to judge or classify." Given this definition, it is apparent that MCL 722.31(4) requires a trial court to carefully think about, take into account, or assess each factor, but there is no indication that a trial court is required to take further action, such as making explicit findings on the record.

This conclusion is supported by the use of the word "consider" elsewhere in the CCA, where it is paired with other verbs that clearly require a trial court to specifically make findings and state conclusions with regard to each of the applicable factors or criteria. Again, MCL 722.31(4) provides, "Before permitting a legal residence change otherwise restricted by subsection (1), the court *shall consider each of the following factors* . . . ." (Emphasis added.) MCL 722.23, on the other hand, states, "As used in this act, 'best interests of the child' means the sum total of the following

factors *to be considered, evaluated, and determined by the court* . . . ." (Emphasis added.) "Evaluate" and "determine" are not defined by the CCA. The dictionary definition of "evaluate" is "to determine or fix the value of" and "to determine the significance, worth, or condition of usu. by careful appraisal and study." *Merriam-Webster's Collegiate Dictionary* (11th ed). The word "determine" is defined, in relevant part, as "to settle or decide by choice of alternatives or possibilities," "to find out or come to a decision about by investigation, reasoning, or calculation," or "to come to a decision." In considering the differences in language between the statutory sections, it is apparent that MCL 722.23 requires more than MCL 722.31(4).

Accordingly, we reject plaintiff's reliance on unpublished authority citing *Bowers v Bowers*, 198 Mich App 320, 328; 497 NW2d 602 (1993), to conclude that a trial court is required to explicitly state its findings and conclusions with regard to each factor under MCL 722.31(4). In *Bowers*, 198 Mich App at 328, this Court restated the rule that a "trial court must consider each of [the] factors [under MCL 722.*23*] and explicitly state its findings and conclusions regarding each." Given the significant differences between the statutory language in MCL 722.31(4) and MCL 722.23, we conclude that MCL 722.31(4) does not encompass the stringent requirement stated in *Bowers* that a court must state its findings and conclusions with regard to each factor.

Furthermore, MCL 722.31 was added to the CCA in 2000, 2000 PA 422, after MCL 722.23 was enacted in 1970, 1970 PA 91, and after *Bowers*, 198 Mich App at 328, and other cases restating the same rule were decided. See, e.g., *Daniels v Daniels*, 165 Mich App 726, 730-731; 418 NW2d 924 (1988). We must read statutes in context with other relevant statutes, *In re MKK*, 286

Mich App at 556, and we must presume that "the Legislature was aware of judicial interpretations of the existing law when passing legislation," *Lee*, 310 Mich App at 509. We also must presume that the Legislature was "familiar with the rules of statutory construction and, when promulgating new laws, . . . aware of the consequences of its use or omission of statutory language, and to have considered the effect of new laws on all existing laws." *In re MKK*, 286 Mich App at 556-557 (citations omitted). Therefore, without any indication to the contrary, we must conclude that the Legislature intentionally chose to exclude "evaluate" and "determine" from the language in MCL 722.31, thereby mandating a different procedure than that required by MCL 722.23. In other words, we conclude that the Legislature's intent was *not* to require that the same procedures be used by trial courts in considering the factors under MCL 722.31(4) and MCL 722.23.

However, it is necessary to note that MCR 3.210(D) describes the trial court's responsibility to make findings of fact with regard to contested postjudgment motions in domestic relations actions, such as the motion at issue in this case. MCR 3.210(D) states, in relevant part:

> The court must make findings of fact as provided in MCR 2.517, except that
>
> (1) *findings of fact and conclusions of law are required on contested postjudgment motions to modify a final judgment or order* . . . . [Emphasis added.]

Although we conclude that MCL 722.31(4) does not require a trial court to specifically state its factual findings and conclusions with regard to each listed factor, the trial court must state its factual findings and conclusions of law in a manner that fulfills MCR 3.210(D)(1) and facilitates appellate review; an appel-

late court must be able to review the trial court's findings concerning the MCL 722.31(4) factors to determine whether those findings were against the great weight of the evidence. *Rains*, 301 Mich App at 324.

Because MCL 722.31(4) only requires a court to "consider" each listed factor, the trial court in this case did not commit clear legal error when it failed to expressly address in its opinion all the factors under MCL 722.31(4) when it considered plaintiff's motion to change GY's legal residence. See MCL 722.28; *Fletcher*, 447 Mich at 876-877; *Sulaica*, 308 Mich App at 577. The record establishes that the trial court recognized that all of the factors under MCL 722.31(4) are applicable to a motion for a change in legal residence. However, the court concluded—presumably on the basis of the evidence presented at the motion hearing—that only two factors (MCL 722.31(4)(a) and (c)) were relevant or contested in this case, and that MCL 722.31(4)(a) was dispositive.[4] Given the trial court's findings under the facts of this case, the trial court applied the proper legal framework and did not commit clear legal error. See *Rains*, 301 Mich App at 325-326, 329-330.

IV. GREAT WEIGHT OF THE EVIDENCE

Next, plaintiff contends that the trial court's finding under MCL 722.31(4)(a)—specifically, that changing the child's legal residence to Pennsylvania did not have the capacity to improve the child's quality of life—was against the great weight of the evidence. We disagree.

In the trial court, it was undisputed that the move had the capacity of improving *plaintiff's* quality of life

[4] Notably, plaintiff concedes on appeal that MCL 722.31(4)(d) and (e) were irrelevant in this case.

emotionally. Likewise, the trial court expressly recognized that the move would greatly benefit plaintiff financially, and the record supports that conclusion. It is apparent that the move would significantly increase plaintiff's income and allow plaintiff and her husband to consolidate their living expenses instead of paying for separate households. However, plaintiff contends that the trial court "failed to acknowledge" that the "increase in [plaintiff's] earning potential" resulting from the move "would also serve to improve [GY's] life as well." We have recognized that an increase in a parent's income may improve a child's quality of life. *Rittershaus v Rittershaus*, 273 Mich App 462, 466; 730 NW2d 262 (2007); *Brown*, 260 Mich App at 601. Plaintiff testified that the additional money earned and saved as a result of the move would make it possible to afford the tuition for Notre Dame High School and to take more trips as a family.[5]

Extensive testimony was provided regarding the potential ways in which GY may benefit by attending Notre Dame High School. This Court has recognized that the benefits of the school or school district where the moving party plans to relocate is a relevant consideration under MCL 722.31(4). See, e.g., *Rittershaus*, 273 Mich App at 467; *Dick v Dick*, 147 Mich App 513, 520; 383 NW2d 240 (1985). Accordingly, plaintiff argues that the trial court's "determination that there was no 'strong' evidence that the proposed new school was superior to [GY's] current school is also against the great weight of evidence." In her appellate brief, plaintiff reiterates, in detail, the testimony provided at the hearing regarding Notre Dame's "impressive creden-

[5] Plaintiff testified that she and Wallen have not been able to accumulate savings because their limited surplus income is routinely consumed by unexpected expenses.

tials." However, plaintiff fails to recognize that she did not proffer any evidence regarding the credentials of GY's current school, which would have provided a basis for the trial court to determine whether the change in schools had the capacity to actually *improve* the child's "quality of life." MCL 722.31(4). Although plaintiff and defendant testified regarding GY's struggles in his current school, there is nothing in the record developed at the motion hearing, including the trial court's receipt of report cards after the hearing, that would facilitate an adequate comparison or demonstrate that Notre Dame High School actually offered substantial "additional programs," services, or extracurricular activities that are unavailable in GY's current school system. See *Rittershaus*, 273 Mich App at 467. Demonstrating the capacity for an *improvement* in the child's quality of life was plaintiff's burden. See *Rains*, 301 Mich App at 326-327.

We recognize that plaintiff stated relevant statistics for Alpena Public Schools, without citation or supporting documentation, in her motion for reconsideration, but a motion for reconsideration is a vehicle to identify "a palpable error" in the *prior ruling*. See MCR 2.119(F)(3). Accordingly, a court has full discretion to decline to consider evidence presented with a motion for reconsideration "that could have been presented the first time the issue was argued." *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000); see also *Yoost v Caspari*, 295 Mich App 209, 220; 813 NW2d 783 (2012) ("Ordinarily, a trial court has discretion on a motion for reconsideration to decline to consider new legal theories or evidence that could have been presented when the motion was initially decided."). Alpena Public Schools' academic reputation may be well known to those who reside in that area, but without admitted evidence on the matter, we

cannot conclude that the trial court's finding was against the great weight of the evidence. See *Rains*, 301 Mich App at 324-325.

Plaintiff also identified Notre Dame's successful soccer and robotics teams in support of her position that Notre Dame offers additional extracurricular activities that are not available in Alpena. However, she expressly acknowledged during her testimony at the motion hearing that the child plays soccer in the Alpena area, albeit through an association separate from his school, and that the area has a robotics club. Plaintiff also indicated that the child was interested in a course in Mandarin Chinese at Notre Dame, which would not be available to him in Alpena, and that Notre Dame's "small class sizes" were a benefit that was not available in the child's current school. However, the availability of a course in Mandarin, smaller class sizes, and a *school* soccer team does not demonstrate that the trial court's finding that "[t]he proof concerning the superiority of the proposed school is not strong" clearly preponderates against the great weight of the evidence. See *id*. Our conclusion in that regard is further supported by the fact that plaintiff acknowledged that she and Wallen had not resolved—or even fully considered—how the child would be transported to and from school each day and participate in the school's extracurricular activities given that the drive would be a minimum of 30 to 35 minutes each way, that plaintiff and Wallen both planned to work full-time jobs, and that there is no school bus transportation to and from the area where they intended to move.

Moreover, increased financial resources and the related opportunity to enroll in a private school are two of several considerations relevant to a trial court's determination under MCL 722.31(4)(a) of whether a

change in legal residence has the capacity to improve a child's *overall* quality of life. As discussed earlier in this opinion, the basis of the trial court's decision under MCL 722.31(4) was as follows: (1) "removing the child from this community where he has a large extended family into a community where he has no extended family is very much against his best interest," (2) moving the child from a school system that he has attended for his entire life into a community where he knows no one except plaintiff and her husband is against the child's best interests, and (3) "[t]he proof concerning the superiority of the proposed school is not strong and fails to establish by a preponderance of evidence that the residence change has the capacity to improve the quality of life for the minor child." It is clear from the trial court's reasoning that it believed that these circumstances—which demonstrated that a long-distance move would be disruptive to the child's strong ties to the Alpena area—outweighed the extent to which the child may benefit from a moderate increase in the family's disposable income or from enrollment in the private school selected by plaintiff.

Furthermore, we have recognized that living in close proximity to immediate and extended family members and remaining in a stable environment are relevant considerations with regard to MCL 722.31(4)(a). See, e.g., *Rittershaus*, 273 Mich App at 466-467 (recognizing the importance of having relatives in close proximity in a case in which childcare was needed); *Dick*, 147 Mich App at 520-521 (recognizing the importance of having a day-to-day relationship with a parent). Contrary to plaintiff's claims on appeal, the testimony at the motion hearing clearly shows that the child had a significant network of extended family members, including both his biological relatives and the relatives of the parties' significant others, who knew him well and

frequently spent time with him. Although plaintiff argues that the trial court failed to consider the fact that moving to Pennsylvania will allow GY to spend more time with Wallen, moving out of state also would, on the same token, prevent GY from spending as much time with LeTourneau, who has played a substantial, parent-like role in his life for many years as defendant's live-in girlfriend and fiancée.[6]

Plaintiff also contends that the trial court failed to consider testimony regarding defendant's limited knowledge of the child's activities and lack of diligence in caring for the child's emotional and medical needs, which, according to plaintiff, weighs in favor of a finding that the move had the capacity to improve the child's quality of life. We have reviewed each of these claims and conclude that most of the inferences drawn by plaintiff are not supported by the cited testimony. Further, these specific pieces of testimony do not establish that the trial court's findings under MCL 722.31(4)(a) were against the great weight of the evidence.

Plaintiff argues that the trial court should have considered testimony from plaintiff and Notre Dame's admissions director that GY seemed excited about attending Notre Dame. We cannot conclude that reversal is required on this basis. Although the Legislature directs courts to address "[t]he reasonable preference of the child, if the court considers the child to be of sufficient age to express preference," when determining the best interests of the child, MCL 722.23(i), the

[6] We have stated that "the role of the extended family cannot be the determining factor in denying a change of domicile." *Phillips v Jordan*, 241 Mich App 17, 31; 614 NW2d 183 (2000). However, in this case, it is clear that the trial court also relied on other considerations and did not solely rely on the proximity of extended family as the determining factor.

child's preference is not a specific consideration for determining whether the moving party has supported the proposed change of legal residence by a preponderance of the evidence under MCL 722.31(4). See *Rains*, 301 Mich App at 325. There is no indication in MCL 722.31 that the factors listed in Subsection (4) are exclusive, meaning that the court could have expressly considered the child's stated interest in Notre Dame High School, but we decline to reverse the trial court's judgment on the basis of a factor that the court was not required to consider.

Our task on appeal is to consider plaintiff's claims while bearing in mind that "a reviewing court should not substitute its judgment on questions of fact unless they clearly preponderate in the opposite direction." *Fletcher*, 447 Mich at 878 (quotation marks and citation omitted). While the record shows that moving to Pennsylvania had the capacity to increase plaintiff's quality of life both financially and emotionally and had the potential of benefitting the child by providing additional funds for private school tuition and family trips, the trial court's ultimate determination that the move did not have the capacity to increase the child's quality of life overall was not against the great weight of the evidence. See *Rains*, 301 Mich App at 324-325.

V. ESTABLISHED CUSTODIAL ENVIRONMENT

Plaintiff next contends that the trial court erred by preemptively ordering a new parenting-time arrangement for when plaintiff moved to Pennsylvania without first considering whether plaintiff's move to Pennsylvania would alter an established custodial environment and, if so, whether the parenting-time arrangement was in GY's best interests. It is undisputed that plaintiff now lives in Pennsylvania, such

that the new parenting-time arrangement is in effect under the order. We agree with plaintiff and conclude that this case must be remanded for the trial court to consider the statutory best-interest factors under MCL 722.23 with respect to the parenting-time schedule now in place.

MCL 722.27(1)(c) allows a trial court to "modify or amend its previous judgments or orders for proper cause shown or because of change of circumstances," as long as the modification would be in the child's best interests. "The statutory requirement for a threshold finding of proper cause or a change of circumstances does not necessarily control a case involving modification of parenting time 'absent a conclusion that a change in parenting time will result in a change in an established custodial environment.' " *Kubicki v Sharpe*, 306 Mich App 525, 540 n 8; 858 NW2d 57 (2014), quoting *Shade v Wright*, 291 Mich App 17, 25-27; 805 NW2d 1 (2010). An established custodial environment exists "if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort." MCL 722.27(1)(c).

In this case, the trial court found that an established custodial environment existed with both parents, which neither party disputes on appeal. Following the hearing on plaintiff's motion to change the child's legal residence, the trial court held that the inverse of plaintiff's proposed parenting-time schedule would be in effect in the event that plaintiff moved to Pennsylvania. This schedule significantly reduced plaintiff's parenting time from caring for the child on an alternating weekly basis to caring for the child only during his summer vacation and other extended breaks from school. It is apparent that this amended parenting-

time schedule would result in a change in the established custodial environment. See *Brown*, 260 Mich App at 592 (concluding, in a case in which the parents previously exercised equal parenting time, that a parenting-time modification similar to that ordered by the court in the instant case "effectively amounted to a change in the established custodial environment").

Pursuant to MCL 722.27(1)(c), "[t]he court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child." The mandate under MCL 722.27(1)(c) "requires the court to consider the factors listed in MCL 722.23 and to state its findings and conclusions with respect to each one." *Spires v Bergman*, 276 Mich App 432, 444 n 4; 741 NW2d 523 (2007).

We agree with plaintiff that this case is similar to *Grew v Knox*, 265 Mich App 333; 694 NW2d 772 (2005). In that case, the plaintiff moved to change her domicile and to change the child's legal residence from Monroe County, Michigan, to Traverse City, Michigan. *Id*. at 334-335. In response, the defendant moved for temporary custody of the parties' child. *Id*. at 335. Before holding evidentiary hearings on the parties' motions, the trial court concluded that a hearing on the defendant's motion for a change in custody would not be necessary if the court determined that the plaintiff had failed to meet her burden of proof under MCL 722.31 to change the child's legal residence. *Id*. at 335. Later, the trial court denied the plaintiff's motion to change the child's residence, finding that the plaintiff had failed to meet her burden under MCL 722.31. *Id*. at 336. As a result, "the trial court did not hold a hearing on defendant's motion for a change of custody. However,

despite the lack of a custody hearing, the trial court granted temporary physical custody to defendant for as long as plaintiff continued to live in" Traverse City. *Id*. at 336. We concluded "that the trial court erred in awarding temporary physical custody of the child to defendant without conducting an evidentiary hearing or making findings of fact pursuant to MCL 722.23 and 722.27," *id*., reasoning as follows:

> In the present case, the trial court altered the parties' custody arrangements after conducting an evidentiary hearing on plaintiff's motion for a change of legal residence. Although a hearing under MCL 722.31 does take into consideration *the child's interests*, see MCL 722.31(4), *the child's best interests* as delineated by MCL 722.23 are not the primary focus of the hearing. Likewise, had the court held a hearing regarding defendant's motion for a change of custody, the burden would have been on defendant to prove by clear and convincing evidence that the change was in the child's best interests, MCL 722.27(1)(c), rather than on plaintiff, as was the case in the hearing under plaintiff's motion for a change of legal residence. Yet once the trial court determined that plaintiff had not met her burden under MCL 722.31, the trial court ended the hearing and awarded temporary custody to defendant without hearing testimony regarding whether a change in custody was in the child's best interests or making findings regarding the child's best interests. . . . Whether a court is establishing custody in an original matter, or altering a prior custody order, the requirement is the same: "specific findings of fact regarding each of twelve factors that are to be taken into account in determining the best interests of the child" must be made. [*Id*. at 337 (emphasis added).]

Importantly, the *Grew* Court stated that the trial court's "determination that a change of the child's legal residence was not warranted, coupled with plaintiff's intention to remain in Traverse City, necessitated a review of the current custody situation," meaning that

"the trial court should have analyzed the best interest factors under MCL 722.23 and 722.27 before making any changes to custody." *Id*. at 337-338. Accordingly, the Court "remand[ed] the case to the trial court for an evidentiary hearing on the change of custody." *Id*. at 342.

Although *Grew* is distinguishable to a certain extent because defendant did not separately move for temporary custody in this case, we believe that the analysis in *Grew* can be understood as generally holding that a trial court is required to analyze the best-interest factors before entering a custody order that alters an established custodial environment, even in cases when that change in custody is prompted by a situation in which a parent, whose motion for a change in legal residence was denied, still decides to move, or remain, a significant distance away. Further, even if we assume, arguendo, that *Grew* is not generally applicable in these situations, defendant's actions in this case were similar to the defendant's actions in *Grew*. Defendant did not file a separate motion requesting a change in custody in this case, but he asked for the change in his response to plaintiff's motion by requesting modification of the parenting-time schedule and the current custody arrangement so that he would be awarded "primary physical custody" if plaintiff moved to Pennsylvania. Correspondingly, the trial court implicitly recognized that its alteration of the parenting-time arrangement, upon plaintiff's move to Pennsylvania, constituted a change in custody, as it stated:

> In the event that the Plaintiff moves from the area to the state of Pennsylvania she is to enjoy the same parenting time schedule for herself that she proposed for [defendant] at the hearing in this cause. If she does not leave this area, the Order of week on week off *will control custody* and parenting time. [Emphasis added.]

A trial court is required to address the best-interest factors under MCL 722.23 whenever a parenting-time modification results in a change of custody. *Shade*, 291 Mich App at 32; *Powery v Wells*, 278 Mich App 526, 528; 752 NW2d 47 (2008). Thus, the circumstances of the instant case did not excuse the trial court from addressing whether the particular modification of the parenting-time schedule was in the child's best interests by expressly considering and making findings regarding each factor set forth in MCL 722.23. MCL 722.27(1)(c); *Shade*, 291 Mich App at 32; *Spires*, 276 Mich App at 444 n 4.

We note that the parties dispute whether the trial court was required to consider the child's best interests in this case in light of the parties' specific statements and arguments in the court below. We reject defendant's focus on the parties' failure to prompt the trial court to consider the best-interest factors before changing the parenting-time arrangement in this case given the clear statutory mandate under the CCA:

> The Child Custody Act is a comprehensive statutory scheme for resolving custody disputes. With it, the Legislature sought to "promote the best interests and welfare of children." The act applies to all custody disputes and vests the circuit court with continuing jurisdiction.
>
> The act makes clear that the best interests of the child control the resolution of a custody dispute between parents, as gauged by the factors set forth at MCL 722.23. MCL 722.25(1). It places an affirmative obligation on the circuit court to "declare the child's inherent rights and establish the rights and duties as to the child's custody, support, and parenting time in accordance with this act" whenever the court is required to adjudicate an action "involving dispute of a minor child's custody." MCL 722.24(1); *Van* [*v Zahorik*, 460 Mich 320, 328; 597 NW2d 15 (1999).] Taken together, these statutory provisions impose on the trial court the duty to ensure that the

> resolution of any custody dispute is in the best interests of the child. [*Harvey v Harvey*, 470 Mich 186, 191-192; 680 NW2d 835 (2004) (citations omitted).]

An affirmative duty imposed by the Legislature on a trial court cannot be sidestepped merely because a party does not remind the court of its responsibility. See *Powery*, 278 Mich App at 528-529; *Grew*, 265 Mich App at 336-338, 342.

"Where a trial court fails to consider custody issues in accordance with the mandates set forth in MCL 722.23 and make reviewable findings of fact, the proper remedy is to remand for a new child custody hearing." *Foskett v Foskett*, 247 Mich App 1, 12; 634 NW2d 363 (2001) (quotation marks and citation omitted). Accordingly, remand is required so that the trial court may consider the statutory best-interest factors and determine whether the new parenting-time arrangement is in the best interests of the child.[7]

VI. CONCLUSION

Plaintiff failed to establish that the trial court erred by denying her motion to change the child's legal residence from Michigan to Pennsylvania. However,

[7] Because there is no indication that the trial court considered the statutory best-interest factors when ordering the new parenting-time schedule, we do not believe that a best-interest "finding can easily and clearly be drawn" from the court's opinion. See *Powery*, 278 Mich App at 530-531. Notably, the trial court expressly held that it would not hear any testimony relevant to the best-interest factors under MCL 722.23 at the hearing on plaintiff's motion to change GY's legal residence. Additionally, although we recognize that the number of viable parenting-time arrangements is rather limited in this case given the child's school schedule and the location of plaintiff's and defendant's residences, there are not only two feasible alternatives for parenting time in this case. The trial court should have considered the child's best interests when crafting a new schedule.

we agree that the trial court erred by adopting a parenting-time arrangement that changed the established custodial environment without first considering whether that particular arrangement was in the best interests of the child.

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

HOEKSTRA, P.J., and SAAD and RIORDAN, JJ., concurred.

BARTLETT INVESTMENTS INC v CERTAIN UNDERWRITERS AT LLOYD'S LONDON

Docket No. 328922. Submitted February 8, 2017, at Detroit. Decided March 2, 2017, at 9:00 a.m.

Plaintiff, Bartlett Investments Inc., brought an action in the Wayne Circuit Court against defendant, Certain Underwriters at Lloyd's London, alleging that defendant wrongfully denied plaintiff's property insurance claim following the discovery of extensive vandalism to plaintiff's vacant building. The insurance policy provided that any loss or damage caused by vandalism had to be reported to defendant within 10 days after plaintiff first learned of the loss or damage. The policy further provided that, as a condition of coverage, plaintiff had to ensure that the building was fully secured against unauthorized entry at all times and that the property was "inspected regularly" during the policy period. Plaintiff discovered the property damage and submitted a claim. Defendant rejected the claim, stating that the claim had been denied because there was long-term water damage and because the claimed damages were a combination of an overlap with a prior claim, wear and tear, maintenance, and theft, all of which were not covered losses. Plaintiff brought suit, and defendant moved for summary disposition, relying on two grounds for denial that had not been listed in its denial letter: plaintiff's failure to comply with the 10-day notice provision and plaintiff's failure to comply with the requirements to make regular inspections and to keep the building secured. The court, Brian R. Sullivan, J., granted defendant's motion, holding that there was no question of fact that plaintiff had failed to comply with those two provisions. Plaintiff appealed.

The Court of Appeals *held*:

1. When a loss under an insurance policy has occurred and payment has been refused for reasons stated in good faith, the insurance company must fully apprise the insured of all the defenses on which it intends to rely; the insurance company's failure to do so is, in legal effect, a waiver and estops the insurance company from maintaining any defenses to an action on the policy other than those of which it has thus given notice.

However, this doctrine has an exception for waivers that would protect the insured against risks that were not included in the policy. In this case, the exception to the doctrine did not apply to the 10-day notice requirement because plaintiff's failure to meet this after-loss requirement did not expand by type or by extent the risks undertaken by defendant in the policy; accordingly, because defendant did not specifically refer to the 10-day notice requirement in its initial denial letter, defendant waived that defense. However, even though defendant did not raise the defense that plaintiff failed to secure and inspect the building in its initial denial letter, defendant did not waive that defense because the requirement to secure and inspect the building was one that required plaintiff to take pre-loss actions specifically intended to prevent or limit the type of loss for which plaintiff claimed coverage.

2. Defendant's denial letter contained general reservation-of-rights language providing that it reserved "[a]ll rights, defenses and privileges" and that it did not "waive any . . . rights or defenses that [it] now [has] or may discover in the future." This language was not sufficient to apprise plaintiff of defendant's intent to rely on the 10-day notice provision as a reason for declining coverage because it was overly broad.

3. Plaintiff's owner testified that, with the exception of the front door to the building, all other doors were bolted shut. Plaintiff's owner also testified that certain holes in the roof had been covered by bricks and steel sheets. This testimony was sufficient for a reasonable trier of fact to conclude that plaintiff fulfilled its obligation to secure the premises. Accordingly, the trial court did not err by holding that there was sufficient evidence to create a genuine question of fact as to whether plaintiff complied with the requirement to secure the building.

4. The policy's requirement that the property be "regularly inspected" meant that the insured or the insured's agent had to assess the subject property with the purpose of discovering any significant change in condition at generally consistent, albeit not precise, and reasonable intervals. Showing the building to prospective buyers did not constitute evidence of a critical appraisal at reasonable intervals. Similarly, walking by the front door of the property and casually viewing a portion of the outside of the property while working at a store adjacent to the subject property was not evidence of a careful assessment of its condition. Accordingly, the trial court did not err by granting defendant's motion for summary disposition because plaintiff failed to present evi-

dence to create a genuine issue of material fact as to whether it complied with the requirement to regularly inspect the property.

Affirmed.

INSURANCE — ACTIONS — DEFENSES — WAIVER.

When a loss under an insurance policy has occurred and payment has been refused for reasons stated in good faith, the insurance company must fully apprise the insured of all the defenses on which it intends to rely; the insurance company's failure to do so is, in legal effect, a waiver and estops the insurance company from maintaining any defenses to an action on the policy other than those of which it has thus given notice; this doctrine has an exception for waivers that would protect the insured against risks that were not included in the policy.

Melamed, Dailey, Levitt & Milanowski, PC (by *Joseph L. Milanowski* and *Amy L. Diviney*), for Bartlett Investments Inc.

Garan Lucow Miller, PC (by *Timothy J. Jordan* and *Megan K. Cavanagh*), and *Walker Wilcox Matousek LLP* (by *David E. Walker* and *Bridget DiBattista*) for Certain Underwriters at Lloyd's London.

Before: STEPHENS, P.J., and SERVITTO and SHAPIRO, JJ.

PER CURIAM. Plaintiff is the owner of a vacant building in the city of Highland Park for which it purchased a commercial property insurance policy. Because vacant buildings carry a significantly greater risk for vandalism and damage than do occupied buildings, plaintiff had to obtain a policy that carried special certificates of coverage regarding vacant buildings. The certificates contained two provisions relevant to this appeal. First, the policy provided that "any loss or damage caused by Vandalism must be reported to [Lloyd's] within ten (10) days after the Insured first learns of the loss or damage." Second, it provided that, as a condition of coverage, the insured must ensure

that the building "be fully secured against unauthorized entry at all times" and that "[t]he insured property shall be inspected regularly by the Insured or the Insured's agent during the policy period."

On or about February 1, 2013, plaintiff's owner, Anwar Matty, discovered extensive vandalism damage to the building. He submitted a claim for the losses, and defendant rejected the claim. The reasons set forth in defendant's denial letter were as follows:

> [T]he claimed damages are a combination of overlap with the loss of January 6, 2013,[1] wear and tear, maintenance and theft. There was also an indication of long-term water damage . . . . As none of these are Covered Causes of Loss, Underwriters regret[s] they are unable to provide payment for your claim.

Following the denial, plaintiff filed suit. In the trial court, defendant relied on two grounds for denial that had not been listed in the denial letter: failure to comply with the 10-day notice provision and failure to comply with the requirement to make "regular inspections" and to keep the building secured. Defendant brought a motion for summary disposition under MCR 2.116(C)(10), asserting that there was no question of fact that plaintiff had failed to comply with these provisions and, therefore, was not entitled to coverage. The trial court agreed and granted defendant's motion, dismissing the case. Although we disagree with portions of the trial court's analysis, we affirm.

I. WAIVER OF DEFENSES NOT RAISED IN THE DENIAL LETTER

Plaintiff argues that the trial court's decision was erroneous because Michigan law precludes defendant

[1] Defendant provided coverage for the January loss, and that loss is not at issue in this case.

from obtaining relief on any defenses not explicitly stated in its first denial letter. Plaintiff relies heavily on *Smith v Grange Mut Fire Ins Co of Mich*, 234 Mich 119, 122-123; 208 NW 145 (1926), in which our Supreme Court stated:

> [I]t must be accepted as the settled law of this State, that, when a loss under an insurance policy has occurred and payment refused for reasons stated good faith requires that the company shall fully apprise the insured of all of the defenses it intends to rely upon, and its failure to do so is, in legal effect, a waiver, and estops it from maintaining any defenses to an action on the policy other than those of which it has thus given notice.

While *Smith* contains perhaps the clearest articulation of this rule, the doctrine appears to have been a part of Michigan jurisprudence long before *Smith*. See *Johnson v Yorkshire Ins Co*, 224 Mich 493, 496-497; 195 NW 45 (1923) (holding that when an insurer denied payment alleging that no valid contract for insurance existed, the insurer waived the defense that the insured had failed to adequately submit a proof of loss); *Popa v Northern Ins Co of New York*, 192 Mich 237, 241; 158 NW 945 (1916) (stating that "when an insurance company has been notified of a loss under a policy issued by it, and it sends an adjusting agent to inquire into the loss, and such agent . . . refuses payment, and denies all liability," the insurer has waived the defense of failure to receive a proof of loss); *Castner v Farmers' Mut Fire Ins Co of Van Buren Co*, 50 Mich 273, 275; 15 NW 452 (1883) (stating that when the insurance company asserted two grounds for denying coverage at the time the suit was initiated, the insurance company was "not at liberty thereafter to vary [its] grounds and offer new or additional objections").

Defendant argues that in order to rely on the rule articulated in *Smith*, plaintiff is required to show that defendant's failure to specifically state these two provisions as grounds for denying coverage in its first denial letter prejudiced plaintiff. However, in our review of the caselaw, including more recent cases, we find no indication that an insured is required to show that it was prejudiced. See *Mich Twp Participating Plan v Fed Ins Co*, 233 Mich App 422, 436; 592 NW2d 760 (1999) (stating that "once an insurance company has denied coverage to its insured and stated its defenses, the insurer has waived or is estopped from raising new defenses"); *Smit v State Farm Mut Auto Ins Co*, 207 Mich App 674, 679-680; 525 NW2d 528 (1994) (stating that the "general rule is that once an insurance company has denied coverage to an insured and stated its defenses, the company has waived or is estopped from raising new defenses" but that the rule cannot be applied to "broaden[] the coverage of a policy"); *Durham v Auto Club Group Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued December 13, 2016 (Docket No. 329667), pp 1, 3-4 (holding that when an insured was denied coverage after a full investigation that provided the insurance company with "knowledge of all necessary facts to assert" a "residency defense," yet the insurance company failed to assert such a defense in its first letter denying coverage, the defense was waived).

Similarly, in *Jones v Jackson Nat'l Life Ins Co*, unpublished opinion of the United States Court of Appeals for the Sixth Circuit, issued June 20, 1994 (Docket Nos. 93-1503 and 93-1528), pp 4-5; 27 F3d 566 (Table), the United States Court of Appeals for the Sixth Circuit conducted its own review of Michigan law and held that there was no prejudice requirement for an insured to claim that an insurer waived any defense

not explicitly mentioned in its first letter denying coverage.[2] In that case, the insurer's first denial letter had informed its insured's spouse that it was denying payment under the insured's life insurance policy because the insured's cancer diagnoses had predated delivery of the policy. *Id*. at 1-2. The Sixth Circuit concluded that because this was the only ground stated for denying coverage in the first denial letter, the insurer had waived any other defenses and the insured was not required to show that it was prejudiced in order to assert that the insurer waived additional defenses. *Id*. at 4-5. In reaching this conclusion, the Sixth Circuit noted a distinction in the caselaw between when the rule articulated in *Smith* had been applied in the context of estoppel and when it had been applied in the context of waiver. See *id*. The Sixth Circuit noted that while an insured is required to show that it was prejudiced in order to invoke the doctrine of estoppel, it is not required to show prejudice to assert the doctrine of waiver. *Id*.[3] The Sixth Circuit pointed to

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[2] While we recognize that unpublished decisions from the United States Court of Appeals are not binding, we can turn to them as persuasive authority. See *Jodway v Kennametal, Inc*, 207 Mich App 622, 630-631; 525 NW2d 883 (1994) (adopting the rationale of an unpublished opinion from the United States District Court for the Eastern District of Michigan).

[3] In *Dahlmann v Geico Gen Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued March 22, 2016 (Docket Nos. 324698 and 325225), pp 3, 9-10, we determined that when an insured did not show that it was prejudiced by an insurer's assertion of a basis for denying benefits that was different from the grounds stated in its initial denial letter, the insured could not assert the doctrine of estoppel to preclude the insurer from obtaining relief on the alternate grounds. However, although the Court noted that the insured had asserted *estoppel* as the basis for relief, the Court did not explicitly address whether the same requirements would apply in the context of *waiver*. See also *Potesta v US Fidelity & Guaranty Co*, 202 W Va 308, 314-318; 504 SE2d 135 (1998) (discussing the common-law application of the principles of waiver and

our Supreme Court's opinion in *Taylor v Supreme Lodge of Columbian League*, 135 Mich 231, 232; 97 NW 680 (1903). In that case, our Supreme Court held that when an insurer had expressly informed a plaintiff's attorney by letter that it was declining coverage because of the insured's alleged lack of payment, the insurer waived any other defenses. *Id*.

Defendant argues in the alternative that it cannot be found to have waived any defenses not specifically stated in its initial denial letter because that letter contained the following general reservation-of-rights language:

> By stating the above, Minuteman Adjusters, Inc. and Underwriters do not waive any of their rights or defenses that they now have or may discover in the future. All rights, defenses and privileges afforded by the above-referenced policy or by law are expressly reserved.

We reject defendant's argument that this general language was sufficient to apprise plaintiff of its intent to rely on the 10-day notice provision as a reason for declining coverage. In *Meirthew v Last*, 376 Mich 33, 37-38; 135 NW2d 353 (1965), our Supreme Court determined that similar general reservation-of-rights language was not sufficient to comply with an insurer's notice obligations, finding that such general language "smacks of bad faith for want of specific reference to that clause of the policy" on which the insurer intended to rely. If general reservation-of-rights language like that relied on by defendant were sufficient to comply with an insurer's obligations, then insurers would be able to issue overly broad and vague denial letters

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estoppel in this context and holding that while prejudice on the part of the insured is a requirement in order to assert estoppel, it is not a requirement for an insured to assert waiver).

without giving their insureds any indication of which provisions in the policy they ultimately intend to rely on in denying coverage.

However, the doctrine has an exception for waivers that would "protect the insured against risks that were not included in the policy . . . ." *Kirschner v Process Design Assoc, Inc*, 459 Mich 587, 594; 592 NW2d 707 (1999). This exception does not apply to the 10-day notice requirement because a failure to meet this after-loss requirement did not expand by type or by extent the risks undertaken by defendant in the policy. Had plaintiff given notice within 10 days, it would not have affected the type or extent of the loss suffered. On the other hand, we conclude that requiring defendant to provide coverage for repeated vandalism to a vacant building that, contrary to the explicit requirements of the policy, was not secured or regularly inspected would substantially expand the degree of risk undertaken by the insurer. Unlike the 10-day notice requirement, these actions were to take place *before* the loss and were specifically directed at reducing the likelihood and possible extent of the type of loss actually suffered.[4]

In sum, because defendant failed to specifically refer to the 10-day notice requirement in the initial denial

[4] To fall within this exception to the waiver rule, an insurer must show not only that application of the waiver rule would expand the scope of coverage in theory, but also that the specific loss suffered was one that would not have been within the policy's original scope of coverage. See *Kirschner*, 459 Mich at 594-595 (stating that the doctrine of waiver and estoppel cannot be applied so as to "make a contract of insurance cover a loss it never covered by its terms, to create a liability not created by the contract and never assumed by the defendant under the terms of the policy") (citation and quotation marks omitted). Thus, if plaintiff's loss was unrelated to a failure to secure and regularly inspect the building, defendant's failure to raise that failure in its initial denial letter would still constitute a waiver of the defense.

letter, defendant has waived that defense. However, despite defendant's failure to raise the defense that plaintiff, contrary to a condition of the policy, failed to secure and inspect the building, the doctrine of waiver does not apply. This is because the requirement to secure and inspect the building was one that required plaintiff to take pre-loss actions specifically intended to prevent or limit the type of loss for which it now claims coverage.

II. WAS THERE A QUESTION OF FACT AS TO REGULAR INSPECTION?

Because defendant is entitled to rely on the claimed failure to secure and inspect, we must determine whether the trial court erred by finding no question of fact as to whether plaintiff complied with these provisions. We agree with the trial court that plaintiff did establish a question of fact as to the building being secured but not as to it having been regularly inspected. The Vacancy Permit states:

> In consideration of the premium charged, it is understood and agreed that Condition 6 (Vacancy) of the Loss Conditions of Policy Form CP 00 10 04 02 is deleted and replaced by the following:
>
> (1) Permission is granted for the insured building(s) on the property set forth in the Declarations to be vacant or unoccupied during the period of this insurance, subject to the following warranties by the Insured:
>
> • All doors, windows and other means of ingress into the insured building(s) shall be fully secured against unauthorized entry at all times during the policy period.
>
> * * *
>
> • The insured property shall be inspected regularly by the Insured or the Insured's agent during the policy period.

The Vacancy Permit clearly requires plaintiff to both secure the building and regularly inspect the building. The evidence regarding each requirement will be addressed in turn.

While the trial court found that plaintiff complied with the requirement to secure the building, defendant argues on appeal that there was no genuine issue of material fact regarding plaintiff's lack of compliance with this requirement.[5] "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). We agree with the trial court that there was sufficient evidence to create a genuine question of fact on this issue.

The Vacancy Permit required that plaintiff keep "[a]ll doors, windows and other means of ingress into the insured building(s) . . . fully secured against unauthorized entry at all times . . . ." Matty testified that, other than the front door of the building, every other door was bolted shut. Matty also testified that when he discovered the three-by-three hole and the roof hole, they were covered by bricks and steel sheets, respectively. Based on this testimony, there appears to be evidence that plaintiff complied with its obligations to secure the building under the Vacancy Permit. While the evidence also shows that vandals were ultimately able to gain access to the building, the mere fact that Matty's efforts to secure the building were unsuccess-

[5] In its reply brief, plaintiff argues that this Court should not consider this issue because defendant did not file a cross-appeal. Plaintiff is incorrect; a prevailing party does not need to file a cross-appeal to urge an alternative ground for a lower court's ruling. *Middlebrooks v Wayne Co*, 446 Mich 151, 166 n 41; 521 NW2d 774 (1994).

ful does not in and of itself mean that he failed to comply with the policy's requirements. If the mere act of vandalism were sufficient evidence to show a failure to secure the building, then plaintiff would never be able to recover for a vandalism loss, and the policy explicitly states that vandalism loss is covered. Matty's testimony was sufficient for a reasonable trier of fact to conclude that plaintiff fulfilled its obligation to secure the premises under the Vacancy Permit. The trial court did not err in rejecting this argument.

The trial court did conclude, however, that there was no genuine issue of material fact and that plaintiff failed to meet its obligation to ensure that the property was "inspected regularly." At his deposition, Matty testified as follows concerning whether he made regular inspections of the property:

> *Q*. Did you conduct regular inspections of the property?
>
> *A*. No, I just, like I said, I would just go in there myself when I was showing the building to people and most of the time it was like once or twice every couple months, so --

Matty did not remember how many times he went into the building in December 2012, but he did claim to walk by the front door every day. Matty was also the owner of a meat store adjacent to the vacant building, so he would casually view the property on his way to work every day. Matty further testified that the mayor of Highland Park also used to bring people in to see the building, but Matty acknowledged that he did not go along the alley behind the building because "[t]he alley is not the nicest place to walk . . . ."

Whether Matty's actions in showing the building to prospective purchasers once or twice every couple of months constitute regularly inspecting the building, despite Matty's direct answer of "no" when specifi-

cally asked about regular inspections, turns on the interpretation of the policy's requirement that the property be "regularly inspected." The policy itself does not define this term, and we decline to adopt the extraordinarily flexible meaning suggested by plaintiff. Instead, we conclude that "regularly inspect" means that the insured or the insured's agent is to assess the subject property with the purpose of discovering any significant change in condition and that this inspection is to occur at generally consistent, albeit not precise, and reasonable intervals.[6] Matty's deposition testimony that he and the mayor of Highland Park would go inside the building in order to show the property to prospective buyers is not evidence of a critical appraisal at reasonable intervals. Similarly, walking by the front door of the property and casually viewing a portion of the outside of the property while working at a store adjacent to the subject property is not evidence of a careful assessment of its condition. Because plaintiff failed to present evidence to create a genuine issue of material fact regarding whether it complied with the requirement in the Vacancy Permit to regularly inspect the subject property, the trial court did not err by granting defendant's motion for summary disposition.

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[6] This Court may consult a dictionary to interpret undefined terms in an insurance policy. *Vushaj v Farm Bureau Gen Ins Co of Mich*, 284 Mich App 513, 515; 773 NW2d 758 (2009). *Merriam-Webster's Collegiate Dictionary* (11th ed) defines "inspect" as "to view closely in critical appraisal" and defines "regular" as "recurring, attending, or functioning at fixed, uniform, or normal intervals." *New Oxford American Dictionary* (3d ed) defines the respective terms as "look at . . . closely, typically to assess . . . condition or to discover any shortcomings" and "doing the same thing or going to the same place frequently or at uniform intervals." *Webster's New Twentieth Century Dictionary of the English Language* (2d ed) defines them respectively as "to look at carefully; to examine critically" and "consistent or habitual in action."

Affirmed. As the prevailing party, defendant may tax costs.

STEPHENS, P.J., and SERVITTO and SHAPIRO, JJ., concurred.

LIEBERMAN v ORR

Docket No. 333816. Submitted December 7, 2016, at Lansing. Decided March 7, 2017, at 9:00 a.m.

In this custody matter involving parents John A. Lieberman and Kimberly A. Orr, Lieberman filed a motion in the Clinton Circuit Court seeking to modify the parties' parenting time and to change the school attended by their two children from DeWitt, where Orr resided, to Midland, where Lieberman resided. Lieberman's motion indicated that the change in schools could be accomplished by a simple swap of the parties' then-existing parenting-time schedules. In the consent judgment of divorce following dissolution of the parties' marriage, the trial court awarded sole physical custody of the children to Orr, with parenting time to Lieberman, and joint legal custody to both parties. At the time of the instant action, Orr had 225 overnights with the children, and Lieberman had the remaining 140 overnights. In response to Lieberman's motion to change the children's schools and swap the parenting-time schedules, Orr argued that the motion was effectively a motion to change custody and that Lieberman had failed to show proper cause or a change of circumstances sufficient to revisit the existing custody arrangement. The court, Lisa Sullivan, J., concluded that the case was primarily about the change in schools and that the parenting-time issue was secondary. The court further determined that the children enjoyed an established custodial environment with both Orr and Lieberman and that the change in schools would not affect those established custodial environments. The court considered the relevant best-interest factors under MCL 722.23, and it concluded that a preponderance of the evidence showed that the change in schools would be in the children's best interests. The court reversed the existing parenting-time order and reduced Orr's overnights each year from 225 to 140. Orr appealed.

The Court of Appeals *held*:

1. Under MCL 722.27(1)(c), a party seeking to change a parenting-time or custody order must first show that proper cause or a change of circumstances exists to justify revisiting the parenting-time or custody order currently in place. If the requested modification would change custody, the standards for showing

proper cause or a change of circumstances are outlined in *Vodvarka v Grasmeyer*, 259 Mich App 499 (2003). To establish a change of circumstances sufficient to revisit a custody order, *Vodvarka* requires that the moving party prove by a preponderance of the evidence that the conditions surrounding custody of the child have materially changed since entry of the last custody order and that the changes have or could have a significant effect on the child's well-being. The changes must be more than normal life changes. To show proper cause, *Vodvarka* requires a moving party to show that an appropriate ground exists to support legal action by the court. If the moving party establishes proper cause or a change of circumstances sufficient to revisit custody, *Vodvarka* indicates that the party must prove by clear and convincing evidence that the change in custody is in the child's best interests. In contrast, if the requested modification is limited to a change in parenting time, *Shade v Wright*, 291 Mich App 17 (2010), sets forth the proper standards for establishing proper cause or a change of circumstances. Normal life changes may justify revisiting an existing parenting-time order. *Shade* explains that a change in parenting time requires the moving party to prove by a preponderance of the evidence that the change is in the child's best interests. However, when the requested modification—a change in custody *or* a change in parenting time—would change a child's established custodial environment, the framework for deciding on the requested modification is the more demanding framework described in *Vodvarka*. That is, clear and convincing evidence must show that any modification that affects the child's established custodial environment is in the child's best interests. In this case, although Lieberman's motion was labeled a motion to change parenting time and schools, it amounted to a change in physical custody of the children and clearly affected the children's established custodial environments with each parent. Orr had been awarded sole physical custody in the parties' consent judgment of divorce. A swap of parenting time would have also swapped primary physical custody of the children, and that kind of change must be evaluated according to the standards in *Vodvarka*. Therefore, the trial court clearly erred by failing to evaluate the proposed change under the *Vodvarka* framework. The case had to be remanded for the trial court to apply the proper standards under *Vodvarka*.

2. Even if Lieberman's motion was properly labeled and simply sought to change parenting time and schools, the modification would have resulted in a change to the children's established custodial environments and should have been evaluated under the more restrictive *Vodvarka* framework. While a minor parenting-time modification does not change a child's established

custodial environment, a significant parenting-time modification does change the established custodial environment. Lieberman should have been required to prove by clear and convincing evidence that the proposed changes were in the children's best interests. The trial court's conclusion that the change in parenting time requested by Lieberman would not alter the children's established custodial environments was against the great weight of the evidence. A reduction in Orr's parenting time from 62% of the calendar year to approximately 38% of the year not only altered the children's established custodial environment with Orr, the reduction shifted primary physical custody of the children from Orr to Lieberman.

Vacated and remanded.

O'CONNELL, J., dissenting, agreed with the trial court's disposition of the case and would have affirmed its decision. The trial court properly determined that the standards in *Shade* governed the facts of the case and that Lieberman only needed to show by a preponderance of the evidence that the change in schools and parenting time was in the children's best interests. Lieberman successfully showed proper cause or a change of circumstances for his requested change in schools and parenting time by presenting evidence that the younger child's academic performance was suffering and that Lieberman was best suited to manage the child's academic progress. Contrary to the conclusion reached in the majority opinion, the change in parenting time would not have changed the children's established custodial environment with either parent. All that Lieberman requested was a change in schools and a swap of the parenting time then awarded to each parent. If Lieberman had an established custodial environment with 140 overnights a year, the children could similarly maintain an established custodial environment with Orr if her parenting time was reduced to 140 overnights a year.

Scott Bassett for John Lieberman.

Speaker Law Firm, PLLC (by *Liisa R. Speaker* and *Jennifer M. Alberts*), for Kimberly Orr.

Before: M. J. KELLY, P.J., and O'CONNELL and BECKERING, JJ.

BECKERING, J. In this child custody matter, defendant, Kimberly Orr, appeals as of right the trial court's

order granting plaintiff, John Lieberman's motion to change parenting time and the children's schools.[1] Defendant contends on appeal that granting plaintiff's motion affected the established custodial environment the children had with her, and that it effectively changed primary physical custody of the children from her to plaintiff without review under the correct legal framework. We agree, and therefore, we vacate the trial court's order and remand for further proceedings.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

After the parties' marriage dissolved, the trial court entered a consent judgment of divorce in March 2008

[1] Plaintiff contends that the postjudgment order appealed from in this case does not change the established custodial environment and, therefore, is not a final order appealable by right under MCR 7.202(6)(a)(i). In a one-page brief accompanying supplemental authority, plaintiff further argues that the order is not appealable under MCR 7.202(6)(a)(iii) pursuant to this Court's recent decisions in *Ozimek v Rodgers*, 317 Mich App 69; 893 NW2d 125 (2016), and *Madson v Jaso*, 317 Mich App 52; 893 NW2d 132 (2016). Plaintiff contends that these cases stand for the proposition that postjudgment orders effecting a change in schools (*Ozimek*) or modifying a party's parenting time (*Madson*) are not appealable by right. *Madson* involved an interim order providing for makeup parenting time while the parties prepared for a new custody determination. *Madson*, 317 Mich App at 63. It is, therefore, sufficiently distinguishable from this case and is inapplicable. Although *Ozimek* is more to the point, plaintiff has overlooked one important exception to the general proposition he derives from *Ozimek*: an order that changes where a child attends school that also changes "the amount of time either parent spends with the child" such that it affects custody is appealable by right. *Ozimek*, 317 Mich App at 77. Contrary to the dissent's implication, this Court dismissed *Ozimek* for lack of jurisdiction not simply because it involved a question of legal custody, but because the disputed order denying a motion to change schools did not affect custody. That is not the case here. Although the trial court characterized its ruling as merely a change of schools and a modification of parenting time that did not affect the established custodial environments, for the reasons set forth in this opinion, the trial court's order did affect the custody of the minor children. Therefore, it is appealable as of right pursuant to MCR 7.202(6)(a)(iii).

that awarded defendant sole physical custody and the parties joint legal custody of the two minor children. The consent judgment gave plaintiff parenting time of one midweek overnight a week, every other weekend, four weeks during summer vacation, and alternating holidays. Minor modifications to plaintiff's parenting-time schedule were made in 2008 and 2009.

In July 2010, defendant filed a motion to change the children's residence from East Tawas to DeWitt, where defendant had obtained a full-time job. Plaintiff opposed the motion, and countered it with a motion to change custody. Plaintiff asked the court, among other things, to order psychological examinations for the parties and the children and an *in camera* interview with the children to determine their preferences. Stressing his present involvement and anticipated future involvement with the children's academic development, plaintiff asked the court to "[o]rder a Change in Custody that awards Plaintiff parenting time during the school year and Defendant parenting time based upon the testimony elicited at hearing [sic] in this matter." Plaintiff appears to have withdrawn his motion subsequent to the parties' February 23, 2011 stipulated modification of parenting time. Pursuant to the terms of the modification, the children continued to live with defendant during the school year, and plaintiff received parenting time three weekends a month during the school year and all but the first and last weeks of the children's summer vacation. The trial court entered a corresponding modified uniform child support order showing that plaintiff had 140 overnights a year with the children, and defendant had 225.

In April 2013, pursuant to a motion filed by the Iosco County Friend of the Court, the trial court entered an

order transferring the parties' case to Clinton County.[2] In December 2013, defendant filed a motion requesting parenting time on alternating weekends throughout the year. She alleged that plaintiff violated the parenting-time agreement by not ensuring her telephonic access to the children during the children's summer vacation, and she indicated that her employer no longer required her to work weekends. Plaintiff opposed the motion, arguing that the proposed reduction in his parenting time from 140 to 88 days—a reduction of 52 days—would alter his established custodial environment with the children.

The referee who heard defendant's motion noted that the parents shared joint legal custody, defendant had primary physical custody, and plaintiff had parenting time as provided by the parties' February 23, 2011 stipulated agreement. The referee also found that there was an established custodial environment with each parent and that the proposed 52-day reduction in plaintiff's parenting-time schedule would change the established custodial environment that the children had with plaintiff. Therefore, according to *Shade v Wright*, 291 Mich App 17, 25-28; 805 NW2d 1 (2010), resolution of defendant's motion was governed by the legal framework set forth in *Vodvarka v Grasmeyer*, 259 Mich App 499; 675 NW2d 847 (2003). Employing this framework, the referee found that defendant had failed to establish the proper cause or change of circumstances necessary to proceed to a hearing to determine whether a change in parenting time was in the best interests of the children. The trial court denied

[2] The court indicated to the parties in 2011 that, after resolution of a property matter unrelated to the instant dispute, a change of venue and transfer of the matter would be initiated because neither party resided in Iosco or an adjacent county. MCR 3.212.

defendant's objection to the referee's recommendation, but told defendant that she could submit for the court's consideration an amended motion proposing a parenting-time modification that did not alter the children's established custodial environment with plaintiff. The court rejected defendant's amended motion because it reduced plaintiff's parenting time by 20 days, from 140 to 120 days. The court stated that defendant could file a motion that reallocated plaintiff's parenting time, but not one that reduced it.

In May 2016, plaintiff filed a motion to "modify parenting time and change schools," requesting "essentially that the parties swap the current parenting time schedule." Plaintiff based his motion on concerns about the children's academic opportunities and one child's academic performance. Plaintiff contended that the youngest child ended his fourth-grade year in the 50th percentile in reading and the 63d percentile in math, and that the goal was the 80th percentile. Plaintiff further observed that he had taken the child to Sylvan Learning Center to arrange for the tutoring the child needed to improve academically and that he would be better than defendant at helping the child achieve his academic potential.[3] In addition, plaintiff noted that the older child had "reached adolescence" and wanted to spend more time with plaintiff, with whom he could

[3] Testimony at the evidentiary hearing on plaintiff's motion came from Catherine Ringey, Center Director for Sylvan Learning Center. No one from the child's school testified at the hearing regarding his academic progress or standing. Ringey admitted on cross-examination that the child was reading at his grade level, or close to it. Defendant's attorney pressed Ringey and noted that to be at his grade level equivalent, the child should have scored a 4.8 but his assessment showed a score of 4.7. According to Ringey, this was still the equivalent of reading in the 50th percentile. Two exhibits were shown regarding math tests the child took in March and May of 2016. On the test in March, he scored an 83. On the test in May, he scored a 92.

explore his interests in history and science. Plaintiff also cited concerns with the children's hygiene, specifically regular nail trimming and dental checkups. Plaintiff asserted that the February 23, 2011 stipulated modification of parenting time provided for "both joint legal and physical custody" of the children. He further asserted, "If this Court was to grant Plaintiff Father's swap of parenting time schedules, because there is no material change in the amount of time the children spend in each household, and both parents would continue to share in providing love, support, and guidance of the minor children, the joint custodial environment would not be changed." Accordingly, plaintiff asserted that the relevant legal framework governing his motion was set forth in *Shade*, 291 Mich App at 25-28, under which normal life occurrences can constitute a change of circumstances sufficient to proceed to an evidentiary hearing regarding whether the proposed modification of parenting time is in the children's best interests. Plaintiff stated, "If this Court grants Plaintiff Father's modification of parenting time, the minor children will attend The Midland Academy of Advanced and Creative Studies . . . beginning in the academic year 2016-2017."

In her response to plaintiff's motion, defendant disputed that the parties shared joint physical custody and that plaintiff's proposed change would not significantly change the amount of time the children spent in each household. Defendant further contended that plaintiff's proposed changes would alter the established custodial environments that the children had with each parent. Defendant also moved to dismiss plaintiff's motion on the ground that, notwithstanding its label, it was actually a motion to change custody,

and plaintiff had not made the threshold showing of a proper cause or change of circumstances as set forth in *Vodvarka*.

In its ruling from the bench, the trial court characterized this case as primarily a legal custody issue "about changing schools" and viewed the parenting-time issue as subordinate to the school issue. In the words of the court, "The parenting time request is really if [the school] change is made how can parenting time . . . with each parent be accommodated." The trial court found that an established custodial environment existed with both parents and that changing the children's schools would not affect the established custodial environments. Accordingly, the court determined that, in order to succeed in his motion, plaintiff had to prove by a preponderance of the evidence that changing schools was in the best interests of the children. After addressing all of the statutory best-interest factors, MCL 722.23, and making findings on those relevant to the issue of changing schools, the trial court concluded that a preponderance of the evidence showed that changing schools was in the children's best interests. To accommodate this decision, the court granted plaintiff's motion to modify parenting time, reversing the existing parenting-time order so that plaintiff had 225 overnights a year and defendant had 140. In doing so, the trial court reduced the children's overnights with defendant by 85 days, or nearly three months.

II. ANALYSIS

A. STANDARD OF REVIEW

"All custody orders must be affirmed on appeal unless the circuit court's findings were against the

great weight of the evidence, the circuit court committed a palpable abuse of discretion, or the circuit court made a clear legal error on a major issue."[4] MCL 722.28; *Pierron v Pierron*, 282 Mich App 222, 242; 765 NW2d 345 (2009), aff'd 486 Mich 81 (2010).

> The great weight of the evidence standard applies to all findings of fact. A trial court's findings regarding the existence of an established custodial environment and regarding each custody factor should be affirmed unless the evidence clearly preponderates in the opposite direction. An abuse of discretion standard applies to the trial court's discretionary rulings such as custody decisions. Questions of law are reviewed for clear legal error. A trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law. [*Corporan v Henton*, 282 Mich App 599, 605; 766 NW2d 903 (2009) (quotation marks and citations omitted).]

"The applicable burden of proof presents a question of law that is reviewed de novo on appeal." *Pierron*, 282 Mich App at 243 (quotation marks and citation omitted).

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[4] A court is not bound by what litigants choose to label their motions "because this would exalt form over substance." *Johnston v Livonia*, 177 Mich App 200, 208; 441 NW2d 41 (1989). Rather, courts must consider the gravamen of the complaint or motion based on a reading of the document as a whole. See *Stephens v Worden Ins Agency, LLC*, 307 Mich App 220, 229; 859 NW2d 723 (2014). As indicated, the trial court characterized plaintiff's motion as primarily a legal custody issue "about changing schools"; plaintiff adopts this characterization on appeal. However, plaintiff moved to modify parenting time, primarily in response to the oldest child's preferences and stage of development and the youngest child's need for private tutoring. That the children would attend Midland Academy of Advanced and Creative Studies was presented as a consequence that would follow from the trial court's grant of plaintiff's proposed modification of parenting time. Regardless of how plaintiff wishes to characterize this matter, it entails a request that affects custody.

B. RELEVANT LEGAL STANDARDS

The purposes of the Child Custody Act, MCL 722.21 *et seq*., "are to promote the best interests of the child and to provide a stable environment for children that is free of unwarranted custody changes." *Id*. at 243. Constant changes in a child's physical custody can wreak havoc on the child's stability, as can other orders that may significantly affect the child's best interests. The Child Custody Act authorizes a trial court to award custody and parenting time arising out of a child custody dispute and imposes a gatekeeping function on the trial court to ensure the child's stability, as set forth in pertinent part in MCL 722.27:

> (1) If a child custody dispute has been submitted to the circuit court as an original action under this act or has arisen incidentally from another action in the circuit court or an order or judgment of the circuit court, for the best interests of the child the court may do 1 or more of the following:
>
> (a) Award the custody of the child to 1 or more of the parties involved or to others and provide for payment of support for the child, until the child reaches 18 years of age. . . .
>
> (b) Provide for reasonable parenting time of the child by the parties involved, by the maternal or paternal grandparents, or by others, by general or specific terms and conditions. Parenting time of the child by the parents is governed by section 7a.
>
> (c) Subject to subsection (3),[5] modify or amend its previous judgments or orders for *proper cause shown or because of change of circumstances* until the child reaches 18 years of age and, subject to section 5b of the support and parenting time enforcement act, 1982 PA 295, MCL 552.605b, until the child reaches 19 years and 6 months of age. *The court shall not modify or amend its previous*

[5] Subsection (3) is not relevant to the instant case.

> *judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child*. The custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered. . . . [Emphasis added.]

1. PHYSICAL CUSTODY

Relevant to the case at bar, in a child custody dispute, MCL 722.27(1) allows a court to award custody to one or more of the parties and reasonable parenting time to the parties involved, both in accordance with the best interests of the child. Physical custody refers to a child's living arrangements. The Child Custody Act does not define "physical custody" or the often-used phrases "sole physical custody" and "primary physical custody." However, "physical custody" is defined under the Uniform Child-Custody Jurisdiction and Enforcement Act, MCL 722.1101 *et seq*., as "the physical care and supervision of a child." MCL 722.1102(n). Caselaw frequently uses "sole custody" or "primary physical custody" to distinguish between an award of custody to one parent and an award of joint physical custody.

In contrast to awarding sole or primary physical custody to one parent, a trial court has the option of awarding the parties joint custody, i.e., joint legal and joint physical custody, and the court must consider an award of joint custody at the request of either parent. MCL 722.26a(1). The term "joint physical custody" stems from MCL 722.26a(7)(a), which addresses a situation in which "the child . . . reside[s] alternately

for specific periods with each of the parents." The term "joint legal custody" stems from MCL 722.26a(7)(b), which addresses a situation in which "the parents . . . share decision-making authority as to the important decisions affecting the welfare of the child."

The parties in the instant case agree, and the trial court record makes clear, that the consent judgment of divorce gave defendant physical custody of the children and plaintiff liberal parenting time. At the time the motion at issue was made, the children were spending 140 overnights a year with plaintiff. The parties shared joint legal custody; that is, they shared decision-making authority concerning the important decisions affecting the welfare of their children.

2. PARENTING TIME

Parenting time is the time a child spends with each parent. "Whereas the primary concern in child custody determinations is the stability of the child's environment and avoidance of unwarranted and disruptive custody changes, the focus of parenting time is to foster a strong relationship between the child and the child's parents." *Shade*, 291 Mich App at 28-29. A court bases a parenting-time order on its determination of the best interests of the child, and it grants parenting time "in a frequency, duration, and type reasonably calculated to promote a strong relationship between the child and the parent granted parenting time." MCL 722.27a(1). A child has a right to parenting time unless the court determines on the record by clear and convincing evidence that parenting time would endanger the child's physical, mental, or emotional health. MCL 722.27a(3). The trial court may consider the factors set forth in MCL 722.27a(7),[6] along with the best-interest

[6] Formerly MCL 722.27a(6).

factors provided in MCL 722.23, when granting parenting time. *Shade*, 291 Mich App at 31.

3. MODIFICATION OF PREVIOUS JUDGMENTS OR ORDERS OR ISSUANCE OF NEW ORDERS THAT AFFECT THE ESTABLISHED CUSTODIAL ENVIRONMENT

As set forth in MCL 722.27(1)(c), when seeking to modify a custody or a parenting-time order, the moving party must first establish proper cause or a change of circumstances before the court may proceed to an analysis of whether the requested modification is in the child's best interests. *Vodvarka* addresses the requisite standards for showing proper cause or a change of circumstances relative to requests to modify child custody. *Vodvarka*, 259 Mich App at 509-514. *Shade* addresses the requisite standards for showing proper cause or a change in circumstances relative to requests to modify parenting time. *Shade*, 291 Mich App at 28-30. Notably, when a proposed change of circumstances will affect a child's established custodial environment, the applicable legal framework for analyzing the matter is that set forth in *Vodvarka*. *Id*. at 27. An established custodial environment exists "if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. The age of the child, the physical environment, and the inclination of the custodian and the child as to the permanency of the relationship shall also be considered." MCL 722.27(1)(c).

a. THE PROPER CAUSE OR CHANGE OF CIRCUMSTANCES THRESHOLD

To establish a change of circumstances sufficient for a court to consider modifying a custody order, the movant must prove by a preponderance of the evidence

that "since the entry of the last custody order, the conditions surrounding custody of the child, which have or could have a *significant* effect on the child's well-being, have materially changed." *Vodvarka*, 259 Mich App at 512, 513. "[T]he evidence must demonstrate something more than the normal life changes (both good and bad) that occur during the life of a child, and there must be at least some evidence that the material changes have had or will almost certainly have an effect on the child." *Id*. at 513-514. "[T]o establish 'proper cause' necessary to revisit a custody order, a movant must prove by a preponderance of the evidence the existence of an appropriate ground for legal action to be taken by the trial court." *Id*. at 512. As is the case with a change of circumstances, "[t]he appropriate ground(s) should be relevant to at least one of the twelve statutory best interest factors, and must be of such magnitude to have a significant effect on the child's well-being." *Id*. If the movant does not establish proper cause or a change of circumstances, the trial court is prohibited from holding a child custody hearing:

> The plain and ordinary language used in MCL 722.27(1)(c); MSA 25.312(7)(1)(c) evinces the Legislature's intent to condition a trial court's reconsideration of the statutory best interest factors on a determination by the court that the party seeking the change has demonstrated either a proper cause shown or a change of circumstances. *It therefore follows as a corollary that where the party seeking to change custody has not carried the initial burden of establishing either proper cause or a change of circumstances, the trial court is not authorized by statute to revisit an otherwise valid prior custody decision and engage in a reconsideration of the statutory best interest factors*. [*Id*. at 508-509 (quotation marks and citations omitted).]

The purpose of this threshold showing "is to minimize unwarranted and disruptive changes of custody orders, except under the most compelling circumstances." *Corporan*, 282 Mich App at 603.

As noted earlier, "[w]hereas the primary concern in child custody determinations is the stability of the child's environment and avoidance of unwarranted and disruptive custody changes, the focus of parenting time is to foster a strong relationship between the child and the child's parents." *Shade*, 291 Mich App at 28-29; MCL 722.27a. Therefore, although normal life changes typically are insufficient to establish the proper cause or change of circumstances required to proceed to consideration of a child custody order, such changes may be sufficient for a court to consider modification of a parenting-time order unless the requested change would alter the established custodial environment. See *Shade*, 291 Mich App at 29, 30-31. However, "[i]f a change in parenting time results in a change in the established custodial environment, then the *Vodvarka* framework is appropriate." *Shade*, 291 Mich App at 27. In other words, if a change in parenting time would alter the established custodial environment, the normal changes that occur in a child's life "[would] not warrant a change in the child's custodial environment." *Id*. at 29.

b. BEST-INTEREST ANALYSIS AND APPLICABLE BURDEN OF PROOF

If the movant seeking to change custody or parenting time successfully establishes proper cause or a change of circumstances under the applicable legal framework, the trial court must then evaluate whether the proposed change is in the best interests of the child by analyzing the appropriate best-interest factors. In matters affecting custody, when the child has an established custodial environment with each parent, the

movant must prove by clear and convincing evidence that the proposed change is in the best interests of the child. *Foskett v Foskett*, 247 Mich App 1, 6; 634 NW2d 363 (2001). In a parenting-time matter, when the proposed change would not affect the established custodial environment, the movant must prove by a preponderance of the evidence that the change is in the best interests of the child. *Shade*, 291 Mich App at 23. However, as indicated earlier, when the proposed parenting-time change alters the established custodial environment, the proposal is essentially a change in custody, and *Vodvarka* governs. See *Shade*, 291 Mich App at 27; *Pierron*, 486 Mich at 92-93 ("[A] case in which the proposed change would modify the custodial environment is essentially a change-of-custody case."). Thus, after identifying the proper burden of proof, a court then proceeds to consideration of the best-interest factors. As this Court explained in *Shade*:

> Both the statutory best interest factors in the Child Custody Act, MCL 722.23, and the factors listed in the parenting time statute, MCL 722.27a([7]), are relevant to parenting time decisions. *Custody decisions require findings under all of the best interest factors, but parenting time decisions may be made with findings on only the contested issues*. [*Shade*, 291 Mich App at 31-32 (emphasis added).]

If the movant cannot meet the applicable burden of proof, the court shall not grant the proposed change. See MCL 722.27(1)(c).

C. APPLICATION

In light of the foregoing legal standards, we conclude that the trial court committed clear legal error in its choice and application of the legal framework under which to analyze plaintiff's motion. Notwithstanding the label plaintiff gave his motion or his inaccurate

assertion that the proposed "swap" in parenting time would produce "no material change in the amount of time the children spend in each household," plaintiff's proposed modifications to parenting time effectively changed physical custody of the children from defendant to plaintiff.

The parties' judgment of divorce awarded legal custody to both parents, but physical custody of the children to defendant; the judgment did not award the parties joint physical custody.[7] As noted, an award of physical custody primarily or solely to one party typically entails a situation in which the children receive physical care and supervision primarily from the parent awarded that status. That is the case here. In accordance with the parties' agreement that defendant would be the children's primary physical custodian, the children in the case at bar have resided with and been cared for and supervised primarily by defendant since entry of the judgment of divorce. Thus, it defies the plain meaning of the word "primary," as well as rudimentary mathematics, to say that reducing the primary custodian's overnights with the children from 225, or nearly

[7] Notwithstanding plaintiff's assertion to the contrary, the February 23, 2011 order (stipulated order regarding parenting time) does not expressly provide for joint physical custody; rather, it changes parenting time as indicated elsewhere in this decision, and it provides that "[a]ll other prior orders shall remain in full force and effect." Further, the Clinton County Friend of the Court referee who heard defendant's December 2013 motion for a change in parenting time noted that the effective order gave the parties joint legal custody and defendant primary physical custody of the children. In addition, after defendant argued that plaintiff's motion to change parenting time would actually change custody, the trial court appears to have acknowledged as much, noting that the outcome of plaintiff's motion would "change the label that's in the prior order." The only order that provided any "label" regarding custody was the judgment of divorce. Presumably, therefore, the trial court meant that the successful outcome of plaintiff's motion would render him primary physical custodian of the children.

62% of the calendar year, to 140, or approximately 38% of the calendar year, does not change primary physical custody. By proposing a reduction in the number of overnights the children spend with defendant to a distinct minority of the year, plaintiff was proposing a change in custody, regardless of the label he gave his motion. Accordingly, the proper legal standard under which to review his motion was the more burdensome and restrictive standard set forth in *Vodvarka*, not the less restrictive legal framework set forth in *Shade*, and the first issue the trial court had to consider was whether plaintiff had established proper cause or a change of circumstances that met the standards set forth in *Vodvarka*.[8]

Even if we were to accept plaintiff's characterization of his motion as one simply to modify parenting time and change schools,[9] we nevertheless would hold that

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[8] Plaintiff admits that normal life changes are not sufficient to meet the *Vodvarka* threshold when it comes to a change in physical custody. Defendant accurately questions whether plaintiff's evidence regarding the younger child's academic performance and the older child's shared interests with plaintiff meets the *Vodvarka* standard for proper cause or a change in circumstances.

Contrary to our dissenting colleague's representation in Part VI of his opinion, the younger child was not performing at the 29th and 27th percentile in reading and mathematics, respectively, when the issue of proper cause or a change of circumstances was before the trial court. Rather, those figures were calculated by Sylvan Learning Center when first assessing the child in the second half of third grade. Both parents thereafter undertook various efforts to improve the child's academic performance. The child's performance levels at the time of the evidentiary hearing after fourth grade placed him at the 50th percentile in reading and the 64th percentile in math, according to Sylvan Learning Center. Plaintiff suggested that he could provide even more tutoring if the child lived with him, and the goal would be for the child to become college-ready upon graduation.

[9] It bears repeating that a party's label is not dispositive of the substance of that party's motion. Otherwise, parties could simply label

the trial court committed error requiring reversal by finding, against the great weight of the evidence, that plaintiff's proposed change would not affect the established custodial environment the children share with defendant and by not analyzing the motion under the applicable legal framework set forth in *Vodvarka*. *Shade*, 291 Mich App at 27 ("If a change in parenting time results in a change in the established custodial environment, then the *Vodvarka* framework is appropriate.").

This Court addressed a similar issue in *Pierron*, 282 Mich App 222. The trial court found *Pierron* to be "very close on point"; unlike the trial court, however, we find that *Pierron* supports defendant's position, not plaintiff's. In *Pierron*, the defendant-mother had sole physical custody of the minor children, and the parties shared joint legal custody. *Id*. at 225-226. At the time of the judgment of divorce, both parents lived in Grosse Pointe Woods, and the children attended Grosse Pointe Public Schools. *Id*. at 226. When the defendant later purchased a house in Howell and sought to enroll the children in Howell Public Schools, the plaintiff-father moved to prevent the change in school districts on the ground that it would significantly modify the children's established custodial environment. *Id*. at 227-229.

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change-of-custody matters as change-in-parenting-time matters in order to benefit from the lower threshold set forth in *Shade*. In no world can a change from 225 overnights to 140 overnights be considered simply a change of parenting time and not a change in physical custody when the parties do not share joint physical custody. And if they do share joint physical custody, a reduction from 225 overnights to 140 overnights (85 days) would likely affect the established custodial environment, much like plaintiff argued when opposing defendant's December 2013 motion, which would have reduced plaintiff's parenting time by 52 days.

After a six-day hearing, the circuit court in *Pierron* found that the children had established custodial environments with both parents and that the defendant's removal of the children to Howell Public Schools would change the established custodial environments of the children. *Id*. at 230-232. The circuit court determined that because the change in schools would alter the children's established custodial environments, the defendant had to prove by clear and convincing evidence that the change was in the children's best interests. *Id*. at 232. After conducting a best-interest analysis, the trial court found that the defendant had not met her burden of proof and therefore granted the plaintiff's request that the children remain enrolled in Grosse Pointe Public Schools. *Id*. at 242. The defendant appealed this ruling.

On appeal, this Court agreed with the trial court that the children had an established custodial environment with both parents but concluded that the court erred "when it found that the proposed change of school districts would alter the children's established custodial environment." *Id*. at 248. The Court mentioned at the outset that primary physical custody would not change in order to accommodate the change of schools:

> We first note that the proposed change of school districts *would not have changed the actual custody arrangements* in this case. *Defendant has at all times had primary physical custody* of the children since the parties' divorce, and plaintiff has seen and interacted with the children only during his parenting time. Enrollment of the children in the Howell Public Schools *would not alter this arrangement in any way—defendant would still maintain primary physical custody*, and plaintiff would still be free to exercise liberal and reasonable parenting time just as he had done before the change of school districts. [*Id*. at 248-249 (emphasis added).]

Although the *Pierron* Court acknowledged that the change "might require minor modifications to [the] plaintiff's parenting time schedule," the Court concluded that it did not rise to the level of affecting the children's established custodial environment with the plaintiff. *Id*. at 249. The Court explained why as follows:

> Since the divorce, defendant has always been the primary physical custodian of the minor children. In contrast, plaintiff has seen the children and exercised parenting time only when his personal and work schedules have accommodated it. Enrolling the children in the Howell Public Schools quite simply would not alter this arrangement. Plaintiff would still be free to exercise parenting time with the children after school and on weekends and holidays. Such a schedule would not be materially different than plaintiff's current parenting time schedule. [*Id*. at 250.]

Because only a change to the parenting-time schedule was at issue, the defendant was required only to prove by a preponderance of the evidence that the change was in the best interests of the children. *Id*. And even then, the court needed only to evaluate the best-interest factors relevant to a school change. *Id*. at 250-253. The Michigan Supreme Court granted the plaintiff's application for leave to appeal and affirmed this Court's analysis and conclusion regarding whether the proposed change in schools would affect the children's established custodial environment with plaintiff. *Pierron*, 486 Mich at 86-87.

Pierron supports the conclusion in this case that a substantial modification of parenting time would alter the established custodial environment that the children have with defendant. Whereas minor modifications that leave a party's parenting time essentially intact do not change a child's established custodial

environment, see *id*. at 87, significant changes do. See also *Rains v Rains*, 301 Mich App 313, 323-324; 836 NW2d 709 (2013) (indicating that even when parents have joint physical custody and have established a "joint custodial environment," changes that "substantially reduce the time a parent spends with a child [could] potentially cause a change in the established custodial environment"); *Shade*, 291 Mich App at 25-28 (stating that a change in parenting time did not affect the established custodial environment because it left the parties with approximately the same number of parenting-time days); *Powery v Wells*, 278 Mich App 526, 528; 752 NW2d 47 (2008) (holding that a modification of parenting time that would relegate a parent who had been equally active in the child's life to the role of a "weekend parent" would amount to a change in the child's established custodial environment with that parent); *Brown v Loveman*, 260 Mich App 576, 596; 680 NW2d 432 (2004) (indicating that the modification of parenting time from each parent having nearly equal parenting time to one parent having parenting time during the school year and the other having parenting time during the summer "necessarily would amount to a change in the established custodial environment").

In the instant matter, the plaintiff's proposal would reduce the children's overnights with defendant from 225 a year to 140 a year; the 85-day reduction is a nearly 40% decrease in the time the children would spend with defendant. Time spent with the children would be primarily on the weekends and in the summer. "If a change in parenting time results in a change in the established custodial environment, then the *Vodvarka* framework is appropriate." *Shade*, 291 Mich App at 27. Accordingly, even if one could construe plaintiff's motion as simply one seeking the modifica-

tion of parenting time, the *Vodvarka* framework would still apply because the proposed changes would alter the children's established custodial environment with defendant.

Plaintiff attempts to rebut defendant's argument about being relegated to a weekend/summer parent by contending that, as shown in *Pierron*, the distance between defendant's and plaintiff's homes and the school need not affect the equation, and noting that the parties have lived a significant distance from one another for years. Plaintiff points out that the distance change in *Pierron* was "far more substantial, yet it was allowed." However, the change in *Pierron* was allowed because, notwithstanding the distance from Grosse Pointe Woods to Howell, custody did not change and the change in schools necessitated only minor modifications in the plaintiff's exercise of parenting time, not the nearly 40% reduction in defendant's parenting time called for in this case.

Plaintiff also argues that the 10 weeks of parenting time during summer vacation that his proposal allows defendant "has the effect [of] preserving and promoting the custodial environment that the children have with [defendant]." However, plaintiff's emphasis on the long stretch of summer parenting time defendant would have with the children does not offset the fact that defendant loses more than 12 weeks of parenting time under plaintiff's proposal. Further, central to the children's established custodial environment with defendant was the support and guidance defendant gave and the material needs she met relative to the children's school attendance. Plaintiff's proposed modification of parenting time would not only substantially reduce the time defendant would spend with the children, it would also change the character of her interaction with

the children. Therefore, the proposal significantly alters the children's established custodial environment with defendant. Finally, plaintiff argues that the determinative factor is not the reduction in defendant's day-to-day contact with the children, but "the record showing that the children's best interests would be served by having plaintiff take over the day-to-day management of the children's education that determined the result in this case." This argument misses the point—before a court may even consider whether a proposed custodial change is in the best interests of the children, it must first determine whether the movant has made the required showing of proper cause or a change of circumstances. In this case, under either a custody analysis or a parenting-time analysis, the applicable legal framework for determining whether the threshold showing has been made is that found in *Vodvarka*, and the trial court erred when it incorrectly applied the law in this instance. See *Shade*, 291 Mich App at 27.

III. RESPONSE TO THE DISSENT

We agree with the dissent on a number of issues. We agree with the dissent's explication of the law governing child custody and parenting-time decisions, and we agree that the Legislature's intent is to provide for the best interests of the children, which includes preventing unwarranted changes in custody and parenting time. We also agree that a grant of physical custody is irrelevant to the factual question of whether, and with whom, a child has an established custodial environment. Additionally, we agree that the trial court properly decided that the children at issue have an established custodial environment with each parent. However, we disagree on two key issues.

First, without imputing any improper intention, we see in plaintiff's motion an attempt to change primary physical custody under the guise of a change in parenting time. This attempt may arise from plaintiff's interpretation of the February 23, 2011 stipulated modification of parenting time as a stipulation to joint legal and joint physical custody. However, as we pointed out, defendant disputes this interpretation, and the referee who heard defendant's December 2013 parenting-time motion understood that the judgment of divorce continued to govern the custodial arrangements. Nevertheless, because the proposed change is essentially a change in physical custody, the first question is whether plaintiff has met *Vodvarka*'s more stringent threshold required to proceed to a best-interest hearing.

Second, even if we did view the proposed change as merely a change in parenting time (that also entailed a move from DeWitt to Midland), the caselaw cited in our decision compels us to conclude that a change of the magnitude suggested in this case affects the children's established custodial environment with both parents, again making *Vodvarka* the proper legal framework for resolving the dispute. Sometimes, judges must agree to disagree; this case presents just such an occasion.

IV. CONCLUSION

The trial court committed clear legal error in its selection and application of the governing law. Because the effect of granting plaintiff's motion was a change in physical custody, the trial court should have applied the legal standards set forth in *Vodvarka* to determine whether plaintiff established proper cause or a change of circumstances sufficient to revisit the custody issue. Even if the trial court had been correct in treating

plaintiff's motion as one to modify parenting time, *Vodvarka* remained the proper standard to apply in evaluating whether the proposed modification was in the best interests of the children because the proposed modification would have modified the children's established custodial environment. *Shade*, 291 Mich App at 27. In light of these errors, we vacate the trial court's order and remand for further proceedings in compliance with the statutory requirements of the Child Custody Act and relevant caselaw regarding a change of custody. Assuming on remand that the trial court finds by a preponderance of the evidence that plaintiff has met the *Vodvarka* standard, plaintiff must still prove by clear and convincing evidence that plaintiff's proposed change is in the best interests of each of his children.[10] See *Foskett*, 247 Mich App at 6 (noting that "[t]his higher standard . . . applies when there is an established custodial environment with both parents"). In doing so, the court must evaluate all the best-interest factors set forth in MCL 722.23, not just those related to the contested issues. See *Shade*, 291 Mich App 31-32.

Vacated and remanded. We do not retain jurisdiction. Defendant, as the prevailing party, may tax costs. MCR 7.219.

M. J. KELLY, P.J., concurred with BECKERING, J.

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[10] This Court further stresses that the best interests of each child must be considered before the child's established custodial environment may be changed. Although the trial court may certainly take into account the siblings' desire to be with one another, it may not change one child's established custodial environment based solely on the best interests of the other child. See MCL 722.27(1)(c) ("The court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child.").

O'CONNELL, J. (*dissenting*). The majority's visceral response to a major change in the parties' parenting time is understandable, but on a close scrutiny, I conclude the trial court's analysis of the facts, the law, the process, and its application of the law in this case was faultless. The majority opinion frames this case as involving a change of custody, but this is not a change of custody case; this is a factually complex parenting-time case in which the trial court ultimately held the children's educational needs paramount to the parents' dispute over which of them should have more time with the children.

In other words, the trial court in this case did exactly what it should do when faced with a complex family law issue—it followed the procedures this Court has outlined to resolve such disputes and, in the end, placed the children's best interests first. I respectfully dissent from the majority's conclusion that the trial court committed a clear legal error in the framework it applied to this case.

I. FACTUAL AND PROCEDURAL BACKGROUND

Defendant-mother, Kimberly Ann Orr, and plaintiff-father, John Allen Lieberman, divorced in 2008. Their consent judgment granted Orr sole physical custody of their two children, granted joint legal custody to the parties, and granted Lieberman a liberal amount of parenting time. In 2010, the trial court allowed Orr's motion to change the children's residence from their previous home in East Tawas, Michigan. Orr moved to DeWitt, Michigan, and Lieberman moved shortly thereafter to Midland, Michigan.

Parenting time changed after the parties moved. In February 2011, the parties stipulated to Lieberman having parenting time three weekends a month and

during the majority of the children's summer vacation. As a result, Lieberman received 140 overnights a year and Orr received 225 overnights a year. In December 2013, Orr filed a motion for a change in parenting time. Her motion requested a modification of parenting time to expand her summer and weekend time with the minor children.[1]

A referee heard the motion on January 28, 2014. The referee found that the children had an established custodial environment with both parents. Following Orr's objections, the trial court held a hearing on March 20, 2014. After considering the parties' admissions and the stipulated parenting-time order from 2011, the trial court found that the children looked to both parents for guidance, discipline, the necessities of life, and parental comfort. Accordingly, it agreed with the referee's finding that the children had an established custodial environment with both parents.[2]

In May 2016, Lieberman moved to change the children's school to Midland Academy. He alleged that the youngest child began struggling in school in 2014 and that his fluency scores in reading and math had approached the cut-off point for risk. While the child improved with tutoring over the summer of 2015, he again began falling behind during the 2015-2016 school year. Lieberman sought to facilitate the change by "swap[ping] the current parenting time schedule" so

[1] It could be considered a harbinger of things to come that Orr complained of the burdensome responsibility of day-to-day parenting, including assuring that the children's school assignments and homework were completed, and sought more fun and recreational time with the children.

[2] At oral argument and in the briefs filed with this Court, the parents conceded that the children have an established custodial environment with both of them. As I will discuss in Part V of this opinion, this is an important development that the majority overlooks.

that the children would reside primarily with Lieberman during the school year and with Orr during most weekends and the majority of summer vacation.

Orr moved to dismiss the petition, alleging that Lieberman had not stated proper cause or a change of circumstances sufficient to justify modifying the children's parenting time. The trial court ruled that the younger child's issues with school performance and both children's issues with hygiene might constitute a proper cause or change of circumstances sufficient to warrant revisiting the parenting-time order. The trial court allowed the case to proceed to a hearing, stating that it would make its ruling regarding change of circumstances after the parties presented proofs.

The parties presented evidence that both are extensively involved in the children's lives. Lieberman testified that he and the children enjoyed visiting museums, fishing, mountain biking, and kayaking together. Orr testified that she and the children enjoyed fishing, boating, camping, and horseback riding together. Both parties testified about their involvement in the children's schooling, both parties presented evidence that the children discussed daily concerns and life events with them, and both parties presented evidence of supportive and nurturing home environments.

Both parties also testified that after the youngest child began to struggle with reading, they assisted. Lieberman testified that after the younger child's test scores began falling, he engaged Sylvan Learning Center for educational assistance. Catherine Ringey, the Director for Sylvan Learning Center in Midland, testified that some children do better with more individualized instruction. According to Ringey, Sylvan assessed the younger child when he was in third grade and the child initially scored in the 29th percentile for

reading and the 27th percentile for math. Sylvan recommended tutoring the child as much as possible.

By the end of the summer of 2015, the child was in the 54th percentile for reading and "his confidence soared." Ringey characterized the child's improvement as impressive, but she wanted the child to advance to around the 80th percentile to be competitive "through school and in college and jobs . . . ." According to Lieberman, he reached out to Orr about enrolling the child in Sylvan during the school year, but Orr did not do so.

Orr testified that she did not trust Sylvan's for-profit nature and did not enroll the child in tutoring during the school year because he was close to reaching his benchmark proficiencies. Instead of paid tutoring, Orr practiced reading and math with the child at home and asked the child's teacher to enroll him in a special class. Ringey testified that as a result of not receiving tutoring during his fourth grade year, the child's reading score dropped to the 50th percentile because he was not progressing at the same rate as his peers. The child was also eventually enrolled in math tutoring, and his math percentile score improved from the 27th to the 63d percentile.

Lieberman testified that he sought to modify parenting time so that he could enroll the children in Midland Academy because it had small class sizes, a focus on arts, sciences, and extracurricular activities, and created a curriculum for each individual child. Orr testified that uprooting the children from their current school environment was unreasonable and that she was concerned that Midland Academy did not offer extracurricular programs that the older child enjoyed.

Following the hearing, the trial court ruled that the case was a parenting-time case that was primarily about changing schools. It found that the children

shared their concerns with both parents and that both parents provided the children with material needs and supported them in their activities. The court further found that "the children in this case have two great parents, and I'm very impressed with the extended families and step families, it seems like these kids have a lot of people that love them, a lot of people they feel comfortable around." Accordingly, the trial court found that the children had an established custodial environment with both parents. It also found that the proposed modification to parenting time would not affect the children's relationships with their parents.

On that basis, the trial court applied the preponderance-of-the-evidence standard to its findings regarding the children's best interests. Considering the best-interest factors, it found that the parties were equal on most factors. However, the trial court found that the capacity to give the children guidance, and the home, school, and community record of the children favored Lieberman because he was more proactive in remedying the younger child's academic difficulties. The trial court found that Orr's more relaxed parenting style may have contributed to the children's educational and hygiene issues. Finally, the trial court found that the parties' willingness to facilitate a close relationship with the other parent slightly favored Lieberman.

Ultimately, the trial court found that (1) a proper cause or change of circumstances existed, (2) a preponderance of the evidence supported changing the children's school to Midland Academy, and (3) changing the parenting-time schedule to accommodate the change in school was in the children's best interests. The trial court switched Lieberman and Orr's parenting-time schedule so that Orr received 140 over-

nights a year, primarily during weekends and the summer, and Lieberman received 225 overnights a year, primarily during the school year.

II. JURISDICTION

As an initial matter, this Court lacks jurisdiction to hear this case as an appeal of right. Orr has appealed an order modifying parenting time and addressing school enrollment. This Court has concluded that neither school-enrollment orders, *Ozimek v Rodgers*, 317 Mich App 69, 75; 893 NW2d 125 (2016), nor parenting-time orders, *Madson v Jaso*, 317 Mich App 52, 66; 893 NW2d 132 (2016), are "final orders" appealable by right.[3] The order in the present case is only appealable by leave, and because this Court has not granted leave to appeal, we do not have jurisdiction to hear this case.

This case is a prime example of why parenting-time orders are and should be appealable by leave only. Public policy favors prompt and final adjudication of custody disputes. See MCL 722.28. Sagas about parenting time are best resolved by judges in the family division of the circuit court, where the same judge consistently rules on matters concerning a single family, allowing the judge to become intimately familiar with the facts and situations of each family, the best interests of the children, and the effect of the changes and the parties' disputes on the stability of the children's environment. In this case, the saga has taken

[3] The Michigan Supreme Court has recently ordered argument on whether to grant leave to appeal in *Ozimek*, *Ozimek v Rodgers*, 500 Mich 940 (2017), and ordered that an application for leave to appeal in *Madson* be held in abeyance pending the decision on *Ozimek* and another related case, *Madson v Jaso*, 889 NW2d 509 (Mich, 2017).

place over 9 years and has involved a fluid, changing parenting-time situation. The trial court is in the best position to end the struggle for control between the parents by ruling on what is in the best interests of the children from its outside, yet intimately familiar, seat.

III. STANDARDS OF REVIEW

This Court must affirm custody orders "unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." MCL 722.28. "A trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law." *Corporan v Henton*, 282 Mich App 599, 605; 766 NW2d 903 (2009) (quotation marks and citation omitted). We review for clear legal error the trial court's determinations on questions of law. *Id*.

We review the trial court's decision regarding whether a party has demonstrated proper cause or a change of circumstances to determine whether it is against the great weight of the evidence. *Id*. We also review the trial court's finding regarding the existence of an established custodial environment under the same standard. *Pierron v Pierron*, 486 Mich 81, 85; 782 NW2d 480 (2010). A finding is against the great weight of the evidence if the evidence clearly preponderates in the opposite direction. *Corporan*, 282 Mich App at 605.

IV. LEGAL STANDARDS

Before making any decision on a proposed change that would affect the welfare of a child, the trial court must determine whether the proposed change would modify the child's established custodial environment.

Pierron, 486 Mich at 85. Not every parenting-time adjustment will modify a child's established custodial environment:

> While an important decision affecting the welfare of the child may well require adjustments in the parenting time schedules, this does not necessarily mean that the established custodial environment will have been modified. If the required parenting time adjustments will not change whom the child naturally looks to for guidance, discipline, the necessities of life, and parental comfort, then the established custodial environment will not have changed. [*Pierron*, 486 Mich at 86 (citation omitted).]

A child has an established custodial environment with both parents when the child "looks to both the mother and the father for guidance, discipline, the necessities of life, and parental comfort." *Berger v Berger*, 277 Mich App 700, 707; 747 NW2d 336 (2008).

When determining whether and with whom a child has an established custodial environment, the focus is on the child's circumstances, not on the order or orders that created those circumstances. *Hayes v Hayes*, 209 Mich App 385, 388; 532 NW2d 190 (1995). Thus, "[t]he trial court's custody order is irrelevant to this analysis." *Id*.

A trial court may only amend a previous judgment or order concerning child custody if the moving party shows proper cause or a change of circumstances. *Corporan*, 282 Mich App at 603. Accordingly, the trial court must determine whether proper cause or a change of circumstances exists before revisiting a custody order. *Id*. The trial court may—but need not—hold an evidentiary hearing to determine whether the circumstances rise to the level of proper cause or a change of circumstances. See *id*. at 605. The purpose of this framework is to "erect a barrier against removal of a

child from an established custodial environment and to minimize unwarranted and disruptive changes of custody orders." *Vodvarka v Grasmeyer*, 259 Mich App 499, 509; 675 NW2d 847 (2003) (quotation marks and citation omitted).

Proper cause exists if there are "one or more appropriate grounds that have or could have a significant effect on the child's life to the extent that a reevaluation of the child's custodial situation should be undertaken." *Id*. at 511. A change of circumstances exists if, "since the entry of the last custody order, the conditions surrounding custody of the child, which have or could have a *significant* effect on the child's well-being, have materially changed." *Id*. at 513. Normal life changes, whether positive or negative, do not constitute a change of circumstances sufficient to warrant changing a child's established custodial environment. *Id*. However, when a proposed parenting-time change does *not* modify the child's custodial environment, normal life changes may constitute a sufficient change of circumstances to warrant the parenting-time change. *Shade v Wright*, 291 Mich App 17, 30-31; 805 NW2d 1 (2010).

If a proposed modification would change a child's established custodial environment, the moving party must show by clear and convincing evidence that the change is in the child's best interests. *Pierron*, 486 Mich at 92. However, if the proposed modification does not change the child's custodial environment, the moving party must show by a preponderance of the evidence that the change is in the child's best interests. *Id*. at 93.

V. THE MAJORITY'S FLAWED ANALYSIS

It is a legal adage that hard cases make bad law. The root of this adage is particularly applicable to this case:

> Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend. [*Northern Securities Co v United States*, 193 US 197, 400-401; 24 S Ct 436; 48 L Ed 679 (1904) (Holmes, J., dissenting).]

In this case, the majority's instinct that switching parenting time from favoring Orr to favoring Lieberman must be wrong has led it to shortcut the proper legal framework with the pressure of a hydraulic saw.

First, the majority's method for reaching the result it seeks is to conflate a grant of physical custody with a child's custodial environment. In doing so, the majority ignores that the 2008 custody order has no bearing on whether and with whom the children have an established custodial environment. The trial court's custody order is *irrelevant* to determining the children's established custodial environment. *Hayes*, 209 Mich App at 388. The focus is on the children's actual environment, and "it makes no difference whether that environment was created by a court order, without a court order, in violation of a court order, or by a court order that was subsequently reversed." *Id*.

In reviewing the legal framework laid out in Part IV of this opinion, one will notice that whether and to whom the trial court initially granted sole or primary physical custody is found nowhere within it. Indeed, one can read Judge MURRAY's excellent decision in *Vodvarka* until the cows come home, and one will not find the phrase "physical custody" in that opinion. That is because, as this Court stated in *Hayes* and has

stated again many times since, the *custody order* is irrelevant: the controlling consideration is the child's *custodial environment* at the time of the hearing.

In order to reach its desired result, the majority changes the paradigm that all courts use to resolve parenting-time disputes. It casts out the courts' primary goal of minimizing disruptive changes to the children's custodial environments. The majority then disregards the numerous court proceedings that have occurred since that divorce judgment. Traditionally, sole custody would result in one parent having significantly more overnights, and joint custody would result in an approximately equal measure, but as these matters go, those labels lose meaning over time. Each situation is different, and because of modifications to parenting time, each situation is fluid. To whom the children look for love, guidance, and support is not determined by an initial custody label.

For this reason, the majority's conclusion that the trial court committed a clear legal error in evaluating the initial change of circumstances under *Shade* rather than under *Vodvarka* is fatally flawed. *Shade* provides that normal life changes may constitute a sufficient change of circumstances to warrant modifying parenting time but not the children's custodial environment. *Shade*, 291 Mich App at 30-31. *Vodvarka* provides that the children's conditions must have materially changed to warrant a parenting-time modification that will affect the children's custodial environment. *Vodvarka*, 259 Mich App at 513-514. In either case, it is not the children's *physical custody* that is of concern, it is the children's *custodial environment*.

The parties do not dispute that the children have an established custodial environment with both parents and have had that environment for some time.

And contrary to the majority's conclusion, for reasons that shall be discussed, the resulting change to parenting time in this case will not alter the children's established custodial environments. *Vodvarka* does not apply, and the trial court did not err by failing to apply it.[4]

Second, the majority's conclusion that an 85-day change in the number of parenting-time overnights must necessarily change the children's custodial environments is unsupported. The majority neatly sidesteps this issue by treating it as a legal issue when it is a factual issue. See *Pierron*, 486 Mich at 85 (indicating that we review the trial court's decisions regarding established custodial environments as issues of fact). As the attorneys illustrated through their vehement opposition at oral argument to setting a specific number of days as a threshold, no arbitrary number of days will determine to whom children look for love, guidance, and necessities.[5]

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[4] Even if *Vodvarka* did apply, the trial court properly progressed to an evidentiary hearing. The trial court may hold an evidentiary hearing on the threshold question of whether proper cause or a change of circumstances exists to warrant revisiting a custody order. See *Corporan*, 282 Mich App at 605. The trial court's decision to hold a hearing was appropriate in this case, in which it was unclear whether one of the children's educational struggles rose to the level of a normal life change or a major life change, and where it was unclear whether the parenting-time change would alter the children's custodial environments.

[5] The majority's conclusion leads me to question what number of days automatically transforms a parenting-time change into a change of custodial environment—10 days, 20 days, 50 days, 85 days? While developing a cutoff might be helpful to some family law practitioners, such a mathematical approach would take into account only one factor of the multifaceted, factually complex issues of custodial environments. Such an approach would be extremely unwise. Unfortunately, by determining that an 85-day change necessarily alters an established custodial environment, the majority opinion has begun to construct the very mathematical cutoff that the litigants' attorneys advised against.

The children had established custodial environments with both parents when the 140- and 225-day split favored Orr. The trial court found that the children would continue having established custodial environments with both parents when the 140- and 225-day split favored Lieberman. The trial court found that both parents were active parents, devoted to their children, and communicated with them regularly without regard to whose house the children were staying in overnight. While major changes in parenting time *may* result in a change to children's established custodial environments, the majority treats this possibility as conclusive solely on the basis that the change in this case involves 85 overnights. In doing so, the majority ignores the trial court's specific factual findings when those findings were not against the great weight of the evidence.

VI. MY ANALYSIS

In analyzing these issues under the legal framework I have laid out in Part IV of this opinion, I conclude that the trial court's decision was legally sound and that its factual findings were not against the great weight of the evidence.

A. PROPER CAUSE OR CHANGE OF CIRCUMSTANCES

Orr first contends that the trial court erred by finding that the youngest child's difficulties in school constituted proper cause or a change of circumstances sufficient to revisit the children's custody order. I disagree.

In *Corporan*, this Court considered whether a child's declining grades constituted a change of circumstances that would warrant revisiting a custody

order. *Corporan*, 282 Mich App at 608. In that case, the child had changed schools and received lower grades in certain subjects at the new school but was not in danger of failing any subject. *Id*. at 608-609. We concluded that the trial court's determination that a minor decline in the child's grades was not a material change of circumstances was not against the great weight of the evidence. *Id*. at 609.

Corporan does not stand for the proposition that a child's difficulties in school can never constitute proper cause or a change of circumstances. To the contrary, whether a child's academic struggles constitute proper cause or a change of circumstances sufficient to change a child's parenting time or custodial environment depends on the magnitude of the child's difficulties and the effect those difficulties will have on the child's future. The trial court is uniquely equipped to resolve such factually intricate questions.

In this case, Lieberman alleged that the younger child was becoming deficient in foundational skills—reading and mathematics—that Ringey testified could pose a threat not only to the child's future educational success, but to the child's successes into adulthood.[6] The child was nearing the cutoff point for academic risk and was at the 29th and 27th percentiles, respectively, among students his age. Unlike the child in *Corporan*, the child in this case was at serious educational risk from deficiencies that posed a threat to the child's long-term success. In my opinion, the child's academic difficulties were serious enough that the trial court would have been warranted in finding that they

[6] While hygiene difficulties were also a factor in this case and played a part in determining the children's best interests, the parties and trial court clearly focused on the younger child's educational difficulties in relation to a change in parenting time.

rose to the level of significantly affecting the child's well-being under *Vodvarka*.[7] I conclude that under the facts of this case, the trial court's decision to revisit the parenting-time order was not against the great weight of the evidence.

B. ESTABLISHED CUSTODIAL ENVIRONMENT VERSUS PHYSICAL CUSTODY

Orr next contends that the trial court erred when it found that the children had an established custodial environment with both parents because the parties' divorce order granted her sole physical custody. According to Orr, this fact alone results in a change of custody. I could not more vehemently disagree. As I discussed in Part IV of this opinion, a parenting-time modification does not necessarily change a child's established custodial environment.

In this case, both parents provided the children with loving and supportive home environments. Both parents engaged the children in activities that suited the children's interests. Both parents discussed how the children came to them with difficulties to seek comfort and advice. The children completed school assignments at both homes, and both parents were significantly involved in the children's education. I conclude that the trial court's finding that the children had an established custodial environment with both parents was not against the great weight of the evidence.

Second, Orr contends that the trial court erred when it found that modifying the children's parenting time would not alter their established custodial environments. Again, I disagree.

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[7] My conclusion would render moot the question of whether the trial court properly applied *Vodvarka* or *Shade*. Under either standard, the trial court properly revisited the children's parenting time.

While a change in parenting time from 225 overnights to 140 overnights is certainly at the outer edge of a parenting-time change (and to some practitioners and at least two appellate judges, beyond a cutoff), I cannot say that the trial court's conclusion that it would not change the children's established custodial environment was against the great weight of the evidence. Orr provided no evidence to support her assertions that this change would alter how the children look to her for guidance, necessities, and support. To the contrary, Lieberman was able to maintain an established custodial environment with the children while having exactly the same parenting-time schedule to which Orr objects. And the record indicates that both parents have striven to maintain close bonds with their children, provide them with physical comforts, engage them in their interests, and counsel them when they have difficulties, and both parents intend to continue to do so in the future. There is no evidence to support that the altered parenting-time schedule would change to whom the children look for guidance, support, and necessities. Accordingly, I conclude that the trial court's finding was not against the great weight of the evidence.

C. THE CHILDREN'S BEST INTERESTS

Orr contends that the trial court clearly erred by applying the preponderance-of-the-evidence standard to the children's best interests instead of the clear-and-convincing-evidence standard. I disagree.

Orr bases her argument on her previous assertion that the trial court incorrectly concluded that a parenting-time modification would not change the children's established custodial environment. However, because I have rejected that argument, the

preponderance-of-the-evidence standard was the appropriate standard. The trial court considered all the relevant best-interest factors in reaching its conclusion. I conclude that the trial court applied the proper standard when determining the children's best interests.

VII. CONCLUSION

Under the unique set of facts in this case, the trial court concluded that both Lieberman and Orr were excellent parents and that a change in schools was necessary to accommodate the struggling child's educational needs. To effect the change in schools, the trial court flipped the parenting-time schedule in favor of Lieberman. The flip appears to be at the outer edge mathematically speaking, but standing alone, it provides no basis to overturn the trial court's finding that this change would not alter the children's custodial environments. I cannot conclude that the trial court committed clear legal error in its consideration of the evidence within the applicable framework. Neither can I find that its decision was against the great weight of the evidence or that it abused its discretion in making its parenting-time decision. The trial court made a difficult, but correct, decision.

I would affirm the trial court's supported and well-reasoned decision.

ELAHHAM v AL-JABBAN

Docket Nos. 326775 and 331438. Submitted March 7, 2017, at Detroit. Decided March 9, 2017, at 9:00 a.m.

Lamis H. Elahham brought a divorce action against Mohamad B. Al-Jabban in the Genesee Circuit Court, Family Division, after 24 years of marriage. The parties had four adult sons and one son who was a minor when plaintiff left the marital home in 2012 and moved into the parties' apartment in Egypt. Plaintiff took the minor child with her to Egypt and filed her divorce complaint in January 2013. Following a bench trial, the court, Duncan M. Beagle, J., entered a contested judgment of divorce that addressed child custody, spousal support, and property division, and it awarded plaintiff attorney fees; the judgment was later amended. Defendant subsequently moved to modify the award of spousal support to plaintiff, alleging that plaintiff had remarried in Egypt. The trial court denied defendant's motion, concluding that there was insufficient evidence that plaintiff had remarried to support a reduction in the support award. In Docket No. 326775, defendant appealed the trial court's decisions regarding the award of attorney fees to plaintiff and the property division. Plaintiff cross-appealed, challenging the trial court's decisions regarding child custody, spousal support, the property division, and discovery sanctions. In Docket No. 331438, defendant appealed by delayed leave granted the trial court order denying his motion to modify the award of spousal support. The Court of Appeals ordered the cases consolidated.

The Court of Appeals *held*:

1. A waiver constitutes the intentional relinquishment of a known right. In this case, defendant waived the issue whether the trial court abused its discretion by awarding attorney fees to plaintiff because defendant agreed to pay plaintiff's attorney fees at the outset of the divorce action.

2. Equity is the overall goal when a trial court distributes property in a divorce action. Depending on the circumstances of a case, when determining the appropriate distribution of property, a court must consider the following factors when relevant: (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. In this case, defendant's argument that he suffered great financial hardship because the trial court required him to sell one of the commercial buildings out of which he conducted his medical practice—which forced him to relocate a portion of his medical practice—is without merit because defendant received sufficient assets in the property distribution to purchase or rent replacement office space. The trial court properly considered the relevant property-distribution factors when dividing the marital estate. Although the apartment in Cairo that was awarded to plaintiff was valued at only $143,000, plaintiff was also awarded a 1/7 interest in the Lake Fenton property, one unit of a commercial property on Saginaw Street, half the proceeds from the sale of another commercial property, jewelry worth at least $25,000, a Lexus car, and 55% of defendant's IRA, which was valued at $750,000 to $800,000. Accordingly, the property division of the parties' major assets was equitable. Plaintiff failed to establish that defendant's repayment of a $60,000 shareholder loan, a $128,080 distribution payment, and $20,503 in automobile expenses constituted dissipation of marital assets, rather than payments for defendant's ordinary business expenses and income. The trial court correctly awarded to plaintiff, and plaintiff received, one-half the down payment received for the sale of one unit in the Saginaw Street building and one-half of all past and future monthly payments related to the sale of that property.

3. MCL 722.27a(10) provides that a parenting-time order must contain a provision prohibiting the parties from exercising parenting time in a country that is not a party to the Hague Convention on the Civil Aspects of International Child Abduction (Hague Convention) unless both parents provide the court with written consent to allow a parent to exercise parenting time in a country that is not a party to the Hague Convention. The MCL 722.27a(10) language clearly prevents a trial court from awarding physical custody of a child to a parent who lives in a country that is not a party to the Hague Convention; the statutory prohibition applies to both the custodial and noncustodial parent. In this case, defendant did not agree in writing to allow the parties' minor child to live in Egypt. Accordingly, the trial court correctly concluded that it could not award physical custody of the minor child to plaintiff while she lived in Egypt.

4. A trial court awards spousal support to balance the needs and incomes of the parties to ensure that neither party is impoverished. MCL 552.28 allows a trial court to modify a spousal support award if the moving party demonstrates that there has been a change of circumstances since the judgment of divorce. MCL 552.13(2) provides that an award of alimony may be terminated by the court as of the date the party receiving alimony remarries unless a contrary agreement is specifically stated in the judgment of divorce; a trial court has continuing jurisdiction to modify a spousal-support order, even if the judgment of divorce does not contain language granting that authority. In this case, the trial court did not abuse its discretion by modifying the spousal-support award to provide that defendant's support obligations to plaintiff would terminate on defendant's death, December 31, 2018, or one year after plaintiff remarried, whichever came first; the monthly spousal support was to be cut in half if plaintiff remarried. In the judgment of divorce, the trial court specifically reserved the right to modify the spousal support and in any event had continuing jurisdiction to modify the order. The trial court did not abuse its discretion when it determined the initial amount of spousal support or when it modified the original award. The trial court weighed and addressed all the relevant factors when it granted plaintiff spousal support, and the award was equitable under the circumstances of the case. The modification of the award was also equitable in that plaintiff's financial needs would be reduced were she to marry and the additional year of reduced support would allow her more time to complete her schooling.

5. MCR 2.302(E)(2) permits a trial court to sanction a party for failing to supplement his or her discovery responses as required by MCR 2.302(E)(1). MCR 2.313(A)(5) and (B)(2) provide that a trial court may order monetary sanctions or any other sanction that is just if a party fails to comply with a discovery order or discovery request. The trial court did not abuse its discretion by sanctioning defendant in a single monetary amount for his repeated failures to comply with court orders and discovery requests, rather than sanctioning him independently for each alleged failure to comply. Although the trial court did not order sanctions with regard to every allegation that defendant had failed to comply with a court order or discovery request, the court adequately addressed the issue by holding multiple hearings to determine defendant's compliance, entered several show-cause orders, entered several orders requiring defendant to comply with discovery or a court order, and granted attorney fees with regard to defendant's noncompliance.

6. Michigan courts recognize marriages solemnized in foreign nations as a matter of comity. A Michigan court will recognize a marriage celebrated in a foreign county if the marriage is valid in the nation of celebration and the marriage is not contrary to public policy in Michigan. The rule in Michigan is that the validity of a foreign marriage must be determined by reference to the domestic relations law of the country of celebration. The trial court correctly concluded that it lacked sufficient evidence that plaintiff was remarried as of the hearing to modify the spousal-support order. The trial court did not abuse its discretion when it found plaintiff's expert, who was licensed to practice law in both Egypt and Michigan, more credible than defendant's expert, who was an imam, had a Ph.D. in Sharia law, and was born in Syria but was unfamiliar with the traditions in Egypt. Plaintiff's expert testified that a marriage in Egypt is legally valid when the marriage contract—the Katb el-Kitab—is certified by filing a lawsuit asking for a declaration opinion that the marriage is valid and recording the declaration opinion as a judgment. While there was evidence that plaintiff filed a lawsuit seeking a declaration opinion that the marriage was valid, there was no evidence that the Katb el-Kitab was registered with any Egyptian city or certified by the government. Accordingly, the trial court did not err by denying defendant's motion to reduce spousal support on the basis of plaintiff's alleged remarriage.

In Docket No. 326775, the trial court's orders regarding attorney fees, property division, child custody, spousal support, and discovery sanctions affirmed.

In Docket No. 331438, the trial court's order denying defendant's motion to modify the spousal support award affirmed.

PARENT AND CHILD — CHILD CUSTODY — PHYSICAL CUSTODY — PARENTS WHO LIVE IN A COUNTRY NOT A PARTY TO THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION.

MCL 722.27a(10) provides that a parenting-time order must contain a provision prohibiting the parties from exercising parenting time in a country that is not a party to the Hague Convention on the Civil Aspects of International Child Abduction (Hague Convention) unless both parents provide the court with written consent to allow a parent to exercise parenting time in such a country; MCL 722.27a(10) clearly prohibits a trial court from awarding physical custody of a child to a parent who lives in a country that is not a party to the Hague Convention; the statutory prohibition applies to both the custodial and noncustodial parents.

Scott Bassett, PLLC (by *Scott Bassett*), for plaintiff.

Speaker Law Firm, LLC (by *Liisa R. Speaker*), for defendant.

Before: HOEKSTRA, P.J., and JANSEN and SAAD, JJ.

PER CURIAM. In Docket No. 326775, defendant, Mohamad B. Al-Jabban, appeals as of right the first amendments of the contested judgment of divorce. Specifically, defendant challenges the trial court's decisions regarding attorney fees and property division. Plaintiff, Lamis H. Elahham, cross-appeals, challenging the trial court's decisions on child custody, spousal support, property division, and discovery sanctions. In Docket No. 331438, defendant appeals by delayed leave granted[1] the order finding insufficient information that plaintiff remarried and denying defendant's motion to modify the spousal support award. We affirm in both appeals.

This case arises from a divorce complaint filed in 2013. The parties were married in Syria in 1989. Defendant is a physician with his own medical practice. Plaintiff obtained her pharmacy degree in Syria, but was not licensed as a pharmacist in Michigan at any relevant time. Plaintiff was a stay-at-home mother for most of the parties' marriage, but she worked part-time as a teacher and a pharmacy intern at various times during the marriage. The parties had four adult sons and one minor child at the time of trial.

In late 2012, plaintiff left the marital home in Grand Blanc, Michigan, and moved into the parties' apartment in Egypt. Plaintiff took the parties' minor child

[1] See *Elahham v Al-Jabban*, unpublished order of the Court of Appeals, entered July 21, 2016 (Docket No. 331438).

with her to Egypt and filed for divorce in January 2013. The trial court held a bench trial and signed a contested judgment of divorce on December 1, 2014. The court addressed several issues in the judgment of divorce, including child custody, child support, spousal support, and property division. The court also awarded attorney fees to plaintiff. The court entered an amended judgment of divorce on March 20, 2015. Several months after the entry of the judgment of divorce, defendant moved to modify spousal support on the basis that plaintiff had remarried. The trial court held a hearing on the motion on July 2, 2015, and, after hearing testimony from experts for both parties, determined that there was insufficient evidence that plaintiff had remarried.

I. ATTORNEY FEES

In Docket No. 326775, defendant first argues that the trial court abused its discretion by awarding attorney fees to plaintiff. We conclude that defendant waived the issue by agreeing to pay plaintiff's attorney fees at the outset of the case.

A waiver constitutes the "intentional relinquishment of a known right." *Reed Estate v Reed*, 293 Mich App 168, 176; 810 NW2d 284 (2011) (citation and quotation marks omitted). A waiver is shown through express declarations or declarations manifesting a party's purpose and intent. *Id*. During a March 4, 2013 pretrial hearing, defense counsel told the court: "There isn't anybody to pay [plaintiff's] legal fees except my client. *So, she is going to be taken care of on legal fees*." (Emphasis added.) Defense counsel objected to "any huge legal fees ordered now," but also stated that plaintiff's attorney would "be well compensated for if not on a voluntarily [sic] basis, certainly the Court

would order my client to provide her with legal fees." On appeal, defendant does not challenge the reasonableness of the attorney fee award. Instead, defendant contends that the trial court abused its discretion by requiring him to pay attorney fees without finding that he had the ability to pay or that he had violated a court order. We conclude that defendant waived the issue by agreeing at the outset of the case to pay plaintiff's attorney fees. Therefore, we decline to address whether the trial court abused its discretion by granting attorney fees to plaintiff.

II. PROPERTY DISTRIBUTION

Defendant argues that the trial court inequitably divided the marital property by ordering the sale of one of the commercial properties owned by the parties. We disagree. On cross-appeal, plaintiff argues that the trial court's property division was inequitable because plaintiff received significantly fewer assets than defendant. Again, we disagree.

The parties presented ample testimony at trial regarding the marital assets. In addition to the marital home located in Grand Blanc, Michigan, the parties owned an apartment in Cairo, Egypt. Both parties owned a 1/7 interest in a lake house in Fenton, Michigan. Defendant also owned property in Syria. Defendant owned his medical practice, and he was the sole member of an LLC that owned an office building referred to as the Saginaw Street property. Plaintiff and defendant were the only two members of an LLC that owned another office building referred to as the Richfield Road property. Defendant operated his medical practice out of suites in both the Saginaw Street and Richfield Road properties.

The court awarded defendant the Grand Blanc home and his 1/7 interest in the Fenton lake house. In addition, defendant was awarded his medical practice and the property in Syria. Plaintiff was awarded the apartment in Egypt and her 1/7 interest in the Fenton property. With regard to the office buildings, the court ordered the sale of the Richfield Road property and ordered that the proceeds from the sale be divided between plaintiff and defendant. With regard to the Saginaw Street property, the court ordered that defendant receive the suite out of which he operated his medical practice and that plaintiff receive another suite in the building. The Saginaw Street property contained a final unit called Unit C, which defendant sold during the pendency of the divorce case. The court ordered the parties to divide the down payment and monthly payments from the proceeds of the sale of the Saginaw Street unit.

In general, an issue is preserved if it was raised in, and addressed and decided by, the trial court. *Mouzon v Achievable Visions*, 308 Mich App 415, 419; 864 NW2d 606 (2014). Defendant raised the issue of the division of the Richfield Road and Saginaw Street properties in his proposed findings of fact and conclusions of law, in which he proposed that plaintiff receive two of the Richfield Road units, while he receive the Richfield Road suite out of which he conducted his medical practice and the two remaining units of the Saginaw Street property. Plaintiff raised the issue of defendant's dissipation of marital assets in her proposed findings of fact and conclusions of law, in which she outlined the alleged dissipation of assets and recommended that the court assign the amount of the dissipation to defendant.

The trial court addressed and decided the issue raised by defendant in its judgment of divorce and

corresponding opinion when it ordered the sale of the Richfield Road property and divided units A and B of the Saginaw Street property between plaintiff and defendant. Therefore, the issue is preserved. The court also addressed and decided the broader issue of the division of the marital estate, as well as the issue of how to divide the proceeds from the sale of the Saginaw Street unit, in the judgment of divorce. However, the trial court did not directly address and decide the dissipation issue raised by plaintiff. Therefore, this issue is unpreserved.

> Although this Court need not address an unpreserved issue, it may overlook preservation requirements when the failure to consider an issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented. [*Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 387; 803 NW2d 698 (2010).]

Although the trial court did not directly address or decide the issue of defendant's dissipation of marital assets in the context of the property division, we will overlook the preservation requirements because our failure to consider the issue could result in a manifest injustice to plaintiff if she were correct that the trial court failed to consider defendant's purposeful dissipation of marital assets. In addition, we believe that consideration of the issue is necessary for a proper determination of the broader property division issue. Therefore, we will address plaintiff's argument regarding whether the trial court failed to consider defendant's dissipation of marital assets.

We review for clear error the trial court's findings of fact. *Richards v Richards*, 310 Mich App 683, 693; 874 NW2d 704 (2015). " 'A finding is clearly erroneous if we

are left with a definite and firm conviction that a mistake has been made.' " *Id*. at 690 (citation omitted). " 'If the findings of fact are upheld, [we] must decide whether the dispositive ruling was fair and equitable in light of those facts.' " *Id*. at 693 (citation omitted; alteration in original). We will uphold the trial court's ruling "unless this Court is 'left with the firm conviction that the division was inequitable.' " *Id*. at 694 (citation omitted). With regard to the dissipation issue, because the issue was not preserved for appellate review, our review is limited to plain error. See *Duray Dev, LLC v Perrin*, 288 Mich App 143, 150; 792 NW2d 749 (2010). "Plain error occurs at the trial court level if (1) an error occurred (2) that was clear or obvious and (3) prejudiced the party, meaning it affected the outcome of the lower court proceedings." *Id*.

The overarching goal of a trial court's property distribution in a divorce action is equity. *Richards*, 310 Mich App at 694. "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*.

> [T]he 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*. (citation and quotation marks omitted).]

The court must consider all relevant factors, but may not " 'assign disproportionate weight to any one circumstance.' " *Id*. (citation omitted).

Defendant acknowledges that the monetary value of the commercial property that each party received was equal. However, defendant contends that the trial court's decision to sell one of the buildings out of which he conducted his medical practice caused him to suffer an extreme financial hardship because he was forced to relocate his medical practice. Defendant's argument that he suffered extreme financial hardship is specious because the record indicates that defendant had sufficient assets to relocate his medical practice.

Defendant received one unit of the Saginaw Street property, half the proceeds from the sale of Saginaw Street Unit C, and half the proceeds from the sale of the Richfield Road property. In addition, the trial court awarded defendant the following assets: the marital home valued at $830,000 with an equity value of $240,000, a 1/7 interest in a $285,000 Fenton lake house, the unvalued property in Syria, defendant's medical practice valued at $177,604, and 45% of defendant's retirement account, which had a value between $753,009 and $800,000. Experts Robert Looby and John Haag valued defendant's reasonable physician compensation at $283,318. Defendant's income tax returns reflect that he made between approximately $385,000 and $500,000 in the five years preceding the divorce action. Therefore, defendant had the means to rent or purchase a replacement office based on the property received in the judgment of divorce and defendant's income. Furthermore, the trial court stated in its opinion and order, "The receiver shall have the discretion to determine any rents to be paid by the HUSBAND to operate his medical office, beginning January 1, 2015,"

which indicates that defendant could have remained in the Richfield Road location by paying rent. Therefore, defendant's argument that the trial court inequitably divided the commercial properties is without merit.

On cross-appeal, plaintiff contends that the trial court inequitably divided the marital estate and improperly ignored defendant's dissipation of marital assets. Plaintiff contends that the trial court failed to consider and weigh the relevant property division factors when it divided the marital property. However, we conclude that plaintiff's argument is without merit because the trial court *did* consider the relevant factors in its opinion and order corresponding with the judgment of divorce. Before ordering the division of marital assets, the court acknowledged that it weighed the relevant factors. The court explained that defendant was paying the tuition and costs for his older sons to attend college, was paying spousal support to plaintiff, and was responsible for the financial support of the minor child. On the other hand, the court recognized that plaintiff received an equitable property award, which included 55% of defendant's IRA account, plaintiff had an apartment in Egypt and a place to stay in Michigan, plaintiff had the necessary skills to secure employment, and defendant would pay plaintiff's attorney fees. In its order signed on March 19, 2015, the court clarified that it analyzed several factors in its previous decision and that the most relevant factors included the present situation of the parties, the needs of the parties, general principles of equity, the earning ability of the parties, and the duration of the marriage. Therefore, the trial court properly considered relevant factors in dividing the marital estate.

Plaintiff further contends that she was awarded major assets worth $143,000, while defendant was

inequitably awarded major assets worth $359,274. Plaintiff refers to the trial court's decision to award her the apartment in Cairo, Egypt, which had a value of $143,000. However, plaintiff overlooks several additional awards in the judgment of divorce. In addition to the Cairo apartment, plaintiff was awarded a 1/7 interest in the $285,000 Fenton lake house, one unit of the Saginaw Street property, half the proceeds from the sale of the Richfield Road property, half the proceeds from the sale of the Saginaw Street Unit C, jewelry worth at least $25,000, a Lexus vehicle with an equity value of $13,000, and 55% of defendant's IRA, with a value between $753,009 and $800,000. Therefore, plaintiff's argument that she received assets worth only $143,000 is without merit.

Plaintiff further contends that the trial court failed to consider defendant's dissipation of marital assets from his medical practice, which she argues included his repayment of a $60,000 shareholder loan, $128,080 in distributions, and $20,503 in automobile expenses. Plaintiff fails to establish that these amounts stemmed from defendant's dissipation of marital assets, rather than from defendant's ordinary business expenses and income. With regard to the distributions from the medical practice, the evidence in the record indicates that this amount was considered part of defendant's income for the purpose of determining the marital property division. With regard to the automobile expenses, plaintiff fails to show that these expenses fell outside the range of normal business expenses for defendant's medical practice. Furthermore, with regard to the loan repayment, plaintiff fails to show that the repayment constituted dissipation of marital assets. The result of a loan repayment would be an increase in the equity of the medical practice, which would be factored into defendant's property award.

Finally, plaintiff contends that the trial court improperly handled defendant's sale of one of the units of the Saginaw Street property during the pendency of the case. Before trial, the court entered an order prohibiting the dissipation of marital assets during the divorce action. Defendant sold one unit of the Saginaw Street property during the divorce action in violation of the court order. Plaintiff challenges the trial court's decision with regard to the distribution of the profits from the sale. She contends that the trial court ordered half the down payment and all the monthly payments be placed in defense counsel's client trust account, but then failed to order that plaintiff receive half of these amounts. The record indicates that the court evenly divided the proceeds from the sale in the judgment of divorce. The court stated in its opinion and order, "As to the unit which was sold (Condo C) the parties shall evenly divide the down payment and any past and future monthly payments." Therefore, the court properly awarded half the down payment and half the monthly payments to plaintiff.

III. CHILD CUSTODY

Plaintiff argues on cross-appeal that the trial court erred when it concluded that it could not grant physical custody of the minor child to plaintiff while plaintiff lived in Egypt. We disagree.

"A custody order 'shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue.' " *Butler v Simmons-Butler*, 308 Mich App 195, 200; 863 NW2d 677 (2014), quoting MCL 722.28. We will affirm the trial court's factual determinations under the "great weight" standard "unless the evidence clearly prepon-

derates in the other direction." *Id*. We defer to the trial court's determinations regarding credibility when reviewing the trial court's findings. *Id*. In addition, we review for an abuse of discretion the trial court's discretionary ruling regarding which party is granted custody. *Id*. "An abuse of discretion, for purposes of a child custody determination, exists when the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias." *Id*. at 201. "Questions of law are reviewed for clear legal error. A trial court commits legal error when it incorrectly chooses, interprets or applies the law." *Id*. We review de novo questions of statutory interpretation. *Rogers v Wcisel*, 312 Mich App 79, 86; 877 NW2d 169 (2015). Finally, we review de novo a trial court's decision to grant or deny a motion for a directed verdict and view the evidence in the light most favorable to the nonmovant. *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 491; 668 NW2d 402 (2003).

During the bench trial, defendant moved for a directed verdict on the issue of whether the court could grant physical custody of the minor child to plaintiff while plaintiff lived in Egypt. Defendant contended that the trial court could not grant physical custody of the minor child to plaintiff in Egypt because Egypt is not a party to the Hague Convention on the Civil Aspects of International Child Abduction (the Hague Convention). Defendant further explained that if plaintiff decided not to return the minor child to the United States in order to have parenting time with defendant, the trial court could not enforce the parenting time order. The trial court agreed with defendant's analysis and granted sole physical custody to defendant.

The issue raised on appeal requires us to interpret the phrase "parenting time" in MCL 722.27a(10) of the Child Custody Act, MCL 722.21 *et seq*. "The goal of statutory interpretation is to give effect to the Legislature's intent." *Rogers*, 312 Mich App at 86. "If a statute's language is clear, this Court assumes that the Legislature intended its plain meaning and enforces it accordingly." *Id*. In general, words and phrases in a statute should be given their primary and generally understood meaning. *Id*. at 87. " '[E]very word should be given meaning, and we should avoid a construction that would render any part of the statute surplusage or nugatory.' " *Id*. at 86-87 (citation omitted). "Statutory language should be construed reasonably, keeping in mind the purpose of the act, and to avoid absurd results." *Id*. at 87.

The statute at issue, MCL 722.27a(10),[2] provides:

> Except as provided in this subsection, a parenting time order shall contain a prohibition on exercising parenting time in a country that is not a party to the Hague Convention on the Civil Aspects of International Child Abduction. This subsection does not apply if both parents provide the court with written consent to allow a parent to exercise parenting time in a country that is not a party to the Hague Convention on the Civil Aspects of International Child Abduction.

The plain language of the statute establishes that a court may not grant physical custody to a parent when that parent lives in a country that is not a party to the Hague Convention. The parties do not dispute that plaintiff intended to live in Egypt and that defendant

[2] At the time of the trial court's decision, MCL 722.27a(10) was codified as MCL 722.27a(9). See MCL 722.27a(9), as amended by 2015 PA 50. The language in former MCL 722.27a(9) and the current version of MCL 722.27a(10) is identical.

did not agree to the exercise of parenting time in Egypt. Accordingly, the sole issue is whether the trial court correctly determined that it could not grant plaintiff physical custody of the minor child in Egypt because plaintiff was precluded from exercising parenting time in a country that is not a party to the Hague Convention. The trial court correctly concluded that MCL 722.27a(10) precludes the award of physical custody to a parent living in a country that is not a party to the Hague Convention. As noted by the trial court, each parent exercises parenting time with the child when the parent spends time with the child, regardless of which party has physical custody of the child. The statute does not state that the prohibition only applies to the noncustodial parent. Therefore, the trial court correctly concluded that it could not award physical custody of the minor child to plaintiff because the statute precludes the court from granting parenting time in a country that is not a party to the Hague Convention, unless the other parent agrees in writing.

We also note that our interpretation of the statute avoids an absurd result. Plaintiff's interpretation of the statute would permit a parent with physical custody of a child to take the child to a country that is not a party to the Hague Convention. The concern for international child abduction applies equally to the custodial parent and the noncustodial parent. As noted by the trial court in its opinion accompanying the judgment of divorce, "If this court granted 'custody' to the WIFE and she did not provide the HUSBAND to have court ordered parenting time in Michigan, where would he go for relief?" Therefore, plaintiff's interpretation would lead to the absurd result that the custodial parent could take the child to a nonparty country despite any risk of parental kidnapping. We read the statute to avoid this absurd result. Accordingly, the

trial court properly determined that it could not grant physical custody of the minor child to plaintiff while plaintiff resided in Egypt.

IV. SPOUSAL SUPPORT

Plaintiff next argues on cross-appeal that the trial court abused its discretion by modifying its initial spousal support award. We disagree.

"Whether to award spousal support is in the trial court's discretion, and the 'trial court's decision regarding spousal support must be affirmed unless we are firmly convinced that it was inequitable.' " *Richards*, 310 Mich App at 690 (citation omitted). We review for clear error the trial court's underlying factual findings. *Id*.

A trial court awards spousal support to balance the needs and incomes of the parties so that neither party is impoverished, and the trial court awards spousal support on the basis of what is just and reasonable under the circumstances of the case. *Richards*, 310 Mich App at 691. MCL 552.13(1) provides, in part:

> In every action brought, either for a divorce or for a separation, the court may require either party to pay alimony for the suitable maintenance of the adverse party, to pay such sums as shall be deemed proper and necessary to conserve any real or personal property owned by the parties or either of them, and to pay any sums necessary to enable the adverse party to carry on or defend the action, during its pendency.

The trial court should weigh the following factors when deciding whether to award spousal support:

> (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. [*Richards*, 310 Mich App at 691 (citation and quotation marks omitted).]

"To modify a spousal support award, the moving party must show that there has been a change of circumstances since the judgment of divorce." *Loutts v Loutts (After Remand)*, 309 Mich App 203, 213; 871 NW2d 298 (2015). In addition, MCL 552.28 addresses the amendment of spousal support and provides:

> On petition of either party, after a judgment for alimony or other allowance for either party or a child, or after a judgment for the appointment of trustees to receive and hold property for the use of either party or a child, and subject to [MCL 552.17], the court may revise and alter the judgment, respecting the amount or payment of the alimony or allowance, and also respecting the appropriation and payment of the principal and income of the property held in trust, and may make any judgment respecting any of the matters that the court might have made in the original action.

MCL 552.13(2) specifically addresses remarriage and provides, in relevant part, "An award of alimony may be terminated by the court as of the date the party receiving alimony remarries unless a contrary agreement is specifically stated in the judgment of divorce." In addition, this Court has noted that "[o]nce a trial court provides for spousal support, it has continuing jurisdiction to modify such an order, even without 'triggering language' in the judgment of divorce." *Richards*, 310 Mich App at 693.

In the judgment of divorce, the court ordered that defendant pay $4,583.33 in monthly spousal support for 55 months, starting on June 1, 2014, and terminating on December 1, 2018. The court stated that after December 1, 2018, "the issue is preserved." The court also ordered that spousal support "shall terminate only on the death of either party or further order of the court." However, the court also stated, "The court reserves the right to amend or modify the ruling on spousal support based on a pending motion by HUSBAND that the WIFE has remarried and may be gainfully employed[.]"

On September 23, 2014, defendant moved to terminate or modify his spousal support obligation. Defendant contended that plaintiff had remarried and that plaintiff had stated that she is a pharmacist in Cairo. In the March 20, 2015 amended judgment of divorce, the trial court ordered, "Defendant's spousal support obligation to the Plaintiff shall terminate upon the death of the payee, December 31, 2018 or one (1) year after the remarriage of the Plaintiff, whichever occurs first." The court further stated, "Upon the remarriage of the Plaintiff her monthly spousal support shall be reduced 50% or one-half the present monthly amount."

The trial court did not abuse its discretion when it modified the spousal support award. The trial court retained the right to amend or modify the spousal support award in the judgment of divorce by stating that it reserved the right to modify or amend the support award on a pending motion that plaintiff has remarried and may be gainfully employed. Defendant filed such a motion on September 23, 2014, and the issue of plaintiff's remarriage was not resolved until after the July 2, 2015 hearing. Accordingly, based on the language in the judgment of divorce, the trial court

reserved the right to modify the spousal support award under the circumstances. In addition, this Court recently clarified that the trial court has continuing jurisdiction to modify a spousal support order, even without "triggering language" in the judgment of divorce. *Richards*, 310 Mich App at 693. Therefore, the trial court had the discretion to modify its initial spousal support award.

Furthermore, the amount of the initial and revised spousal support awards was equitable under the circumstances of the case. In the trial court's opinion and order accompanying the judgment of divorce, the trial court detailed its findings regarding its initial spousal support award. The court addressed the relevant factors. The court first addressed the past relations and conduct of the parties, noting that plaintiff was romantically involved with another man in Egypt, while defendant was living with another woman and may have remarried. The court also concluded that defendant was "financially controlling" over plaintiff.

With regard to the length of the marriage, the court found that the parties were married for 25 years and that plaintiff had decided to initiate the divorce and relocate to Egypt. Regarding the parties' ability to work, the court concluded that defendant was an established medical doctor and the primary financial provider for the family. The court explained that plaintiff's ability to work was a complex issue. The court stated that plaintiff had worked as a teacher and pharmacy intern and that she had a professional pharmacy degree. The court further explained that plaintiff was available for work, but that she was not currently seeking employment notwithstanding having had two years to update her educational skills.

With regard to the source and amount of property, the trial court noted that each party received approximately $900,000 in marital assets in the judgment of divorce. The court also noted the present ages of the parties, with defendant being 53 and plaintiff being 47 when the judgment entered, and explained that defendant had the ability to pay spousal support. However, the court explained, "The court also must consider the support [defendant] is providing for the minor child and the tuition needs of the other four children, who rely upon him for financial support." With regard to the present situation of the parties, the court explained that defendant was solely responsible for supporting the parties' children, while plaintiff had moved to Egypt, engaged in a relationship with another man, and was not working. With regard to the needs of the parties, the court noted that plaintiff was living in a fully paid and fully furnished apartment in Egypt and that she had received a substantial property award. The court explained that although the standard of living in Egypt was unclear, plaintiff would likely need to find employment.

With regard to the health of the parties, the court explained that both parties appeared in good health. The court noted that the prior standard of living for the parties was an upper-class lifestyle. The court described the parties' homes and cars and explained that plaintiff had previously received $3,000 a month for her living expenses. The court further noted that defendant was responsible for nearly all the support of the children, while plaintiff was only responsible for herself. Finally, the court addressed the general principles of equity, noting that plaintiff was a stay-at-home mom during most of the parties' marriage and should not be required to dissipate her portion of the marital estate. The court also recognized that defen-

dant was a good provider for the four children in college and gave generously to charity.

The trial court did not abuse its discretion with regard to its initial discussion of the relevant factors and the initial spousal support award. The court thoroughly discussed and weighed each relevant factor. Plaintiff contends that the trial court improperly considered defendant's support of the parties' four adult children. However, we conclude that the trial court properly considered defendant's support of the parties' adult children. Indeed, one of the relevant factors is whether one of the parties is responsible for the support of other individuals. See *Richards*, 310 Mich App at 691. Therefore, considering all these factors, the trial court's initial award of $4,583.33 per month was equitable and did not constitute an abuse of discretion.

Plaintiff further contends that the trial court inequitably modified the spousal support award. In its March 19, 2015 opinion and order, the court explained that while it could terminate plaintiff's spousal support altogether upon her remarriage, the court decided to terminate spousal support one year after plaintiff's remarriage and reduce the spousal support by 50 percent upon plaintiff's remarriage. The court explained, "This will allow Plaintiff additional time to complete licensing requirements to become a pharmacist. In addition[,] this will give Plaintiff additional monies to address her argument [that] she did not receive an equitable division of the property." The modified award is equitable considering that plaintiff's remarriage would reduce her financial need for support payments, and the modified award would provide her with additional time to complete the requirements to become a pharmacist. Therefore, the trial court did

not abuse its discretion by modifying the spousal support award on the basis of plaintiff's remarriage.

V. DISCOVERY SANCTIONS

Plaintiff next argues on cross-appeal that the trial court abused its discretion by failing to timely impose discovery sanctions on defendant and by awarding insufficient sanctions. We disagree.

We review for an abuse of discretion the trial court's decision regarding whether to impose discovery sanctions. *Traxler v Ford Motor Co*, 227 Mich App 276, 286; 576 NW2d 398 (1998). The record indicates that the trial court sanctioned defendant for his failure to comply with court orders and discovery requests. Plaintiff relies on MCR 2.302 and MCR 2.313 to support her argument. MCR 2.302(E)(1) provides, in relevant part:

> A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information acquired later, except as follows:
>
> * * *
>
> (b) A party is under a duty seasonably to amend a prior response if the party obtains information on the basis of which the party knows that
>
> (i) the response was incorrect when made; or
>
> (ii) the response, though correct when made, is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

MCR 2.302(E)(2) permits a trial court to sanction a party pursuant to the sanctions outlined in MCR 2.313(B) for failing to supplement his or her discovery

responses as required by MCR 2.302(E)(1). MCR 2.313(A)(5) governs the award of expenses in connection with a motion for an order compelling discovery and provides, in relevant part:

> If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct, or both, to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust. [MCR 2.313(A)(5)(a).]

MCR 2.313(B)(2) provides, in relevant part:

> If a party . . . fails to obey an order to provide or permit discovery, including an order entered under subrule (A) of this rule or under MCR 2.311, the court in which the action is pending may order such sanctions as are just, including, but not limited to the following:
>
> * * *
>
> In lieu of or in addition to the foregoing orders, the court shall require the party failing to obey the order or the attorney advising the party, or both, to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The record is replete with motions to compel discovery. Plaintiff filed numerous motions in the trial court regarding defendant's failure to comply with discovery requests, and the court entered numerous orders compelling discovery and requiring compliance with court orders. The court also addressed defendant's failure to comply with discovery requests in its opinion and order accompanying the judgment of divorce. The court

noted that defendant did not cooperate with discovery requests, was not candid about the sale of the Saginaw Street unit, failed to update his answers to interrogatories, and was often late with support payments. The court ordered that defendant pay an additional attorney fee award of $3,000. Therefore, although the trial court did not order sanctions with regard to every allegation that defendant had failed to comply with a court order or a discovery request, the court adequately addressed the issue by holding multiple hearings to determine defendant's compliance, entering several show cause orders, entering several orders requiring defendant to comply with discovery or a court order, and granting attorney fees with regard to defendant's noncompliance.

On appeal, plaintiff takes particular issue with the trial court's failure to order discovery sanctions relative to the sale of unit C of the Saginaw Street property. However, the trial court adequately addressed the issue of defendant's sale of the Saginaw Street unit. During an April 14, 2014 hearing, the court required that half of the down payment from the sale of the Saginaw Street unit be placed in defense counsel's trust account. The court also ordered the placement of the monthly payments of approximately $3,770 into defense counsel's trust account.

During a September 8, 2014 hearing, plaintiff's attorney raised the issue of defendant's failure to comply with the court's order. Defense counsel admitted that defendant was behind on the payments but explained that defendant was not receiving monthly payments from the purchaser of the property. Defense counsel indicated that defendant made arrangements with the purchaser of the property and that the issue should be resolved by the next week. Following the

hearing, the court entered an order requiring that defendant pay the arrearage on the payments. The court stated that September 29, 2014, was the control date on which all obligations were required to be paid. Therefore, the trial court addressed the issue by requiring that defendant place the funds in the trust account by a certain date. Contrary to plaintiff's assertion on appeal, the record does not indicate a consistent failure to comply with the trial court's order following the September 8, 2014 hearing. Therefore, the trial court did not abuse its discretion by failing to impose additional sanctions.

VI. PLAINTIFF'S REMARRIAGE

In Docket No. 331438, defendant first argues that the trial court erred by determining that there was insufficient evidence to establish that plaintiff had remarried in Egypt. We disagree.

The issue regarding plaintiff's remarriage constitutes a mixed question of fact and law. The trial court's findings of fact are reviewed for clear error. See *Richards*, 310 Mich App at 690. The issue whether plaintiff remarried in Egypt presents a question of law, which we review de novo. See *Diez v Davey*, 307 Mich App 366, 376; 861 NW2d 323 (2014). As discussed, "[t]o modify a spousal support award, the moving party must show that there has been a change of circumstances since the judgment of divorce." *Loutts*, 309 Mich App at 213. In this case, the change of circumstances was plaintiff's alleged remarriage. "Michigan courts recognize marriages solemnized in foreign nations as a matter of comity." *Stankevich v Milliron (On Remand)*, 313 Mich App 233, 240 n 3; 882 NW2d 194 (2015). A Michigan court will recognize a marriage celebrated in a foreign country if the marriage is valid

in the nation of celebration and the marriage is not contrary to public policy in Michigan. *Id*. "The rule in Michigan is that the validity of a foreign marriage must be determined by reference to the domestic relations law of the country of celebration." *Id*.

Plaintiff entered into a Katb el-Kitab (Kitab) with a man named Sharif Khashaba on June 11, 2014. According to defendant, the Kitab document constituted a marriage contract between plaintiff and Khashaba. The translation of the document indicates that it was "[a] claim for notarizing [a] marriage contract upon the requester's request and under her responsibility." The document indicates that a hearing was held on June 10, 2015. The purpose of the hearing was to notarize the marriage contract. The translation then goes on to state that the contract was authenticated, and the document is sealed with the seal of the "Abdeen Court."

On December 26, 2014, plaintiff was deposed and answered questions regarding her relationship with Khashaba. When asked if she was married, plaintiff explained, "I'm not married, I'm going to go back and marry. I have a Katb-Kitab." When asked about the Kitab, plaintiff testified, "It's like engagement, but it's not marriage. But it is engagement, but more – and you can search that in Islamic way." Plaintiff further expanded by stating, "It is not consider[ed] as marriage unless you have the legal part of it. But I can take my hijab off, he can come in and go, I can go with him." Plaintiff planned to get married in January 2015. She explained that after she was married in January 2015, she would receive a document and take the document to be registered in the Egyptian courts.

On July 2, 2015, the trial court held a hearing on the issue whether plaintiff had remarried. A copy of the Kitab was admitted into evidence at the hearing.

Mohamed Elsharnoby, plaintiff's witness, testified that he is licensed as an attorney in both Michigan and Egypt. Elsharnoby was licensed in Michigan in 2006, and he was licensed in Egypt in 1992. He also lived in Egypt from 1970 to 2001. Elsharnoby testified that he maintained offices in both Egypt and Michigan at the time of the hearing.

Elsharnoby detailed the process of legalizing a marriage in Egypt. Elsharnoby explained that an individual has a marriage contract certified by filing a lawsuit asking for a declaration opinion that the marriage is valid, which may take a couple of years to obtain. He explained that the parties must take the declaration opinion and record it as a judgment with the city to prove a valid marriage. He explained that simply having the marriage contract is akin to a "boyfriend and girlfriend relationship" and that "Kitab is like engagement." He testified that the Kitab is "just a paper between two parties that would consent – that would consider themselves husband and wife, but it has nothing to do with the law." Elsharnoby explained that if the parties do not record the marriage, the wife will have no rights except the right to receive child support. However, once the parties formalize the marriage contract, the wife may receive spousal support, child support, and rights to the marital home before the children turn 18 years old.

Defendant's witness, Mohamad Algalaieni, testified that he is an imam and has a Ph.D. in Sharia law. Algalaieni was born in Syria and admitted that he was unfamiliar with the traditions in Egypt. Algalaieni testified that the parties took the first step of entering into the marriage on June 11, 2014, and were religiously married on that day. However, he explained that the "real marriage" is delayed until after the

marriage ceremony. He testified that an Egyptian judge recognized plaintiff's marriage on June 10, 2015. He explained that, in Syria, not everyone chooses to register a marriage contract with the court, but it is recommended that they do so.

Following the hearing, the court entered an order, in which it explained that although there was a strong argument that plaintiff was married under Sharia law, the court was not bound by the religious law in Egypt. The court explained that defendant did not produce evidence or testimony that the religious law of marriage was also the secular law of marriage in Egypt. The court credited the testimony of Elsharnoby and noted that there was no evidence plaintiff had recorded the marriage with the Egyptian government. The court, therefore, declined to find that plaintiff had remarried.

The trial court properly found that it lacked sufficient evidence that plaintiff was remarried at the time of the hearing. The trial court properly credited the testimony of Elsharnoby, who is licensed to practice law in both Michigan and Egypt. Algalaieni, on the other hand, is a religious official and does not have a license to practice law in either Michigan or Egypt. In addition, Algalaieni is Syrian and admitted that he is not familiar with the traditions in Egypt. Therefore, the trial court properly concluded that Elsharnoby's testimony was more credible than Algalaieni's testimony with regard to the secular law in Egypt.

According to Elsharnoby, the steps to obtain a legally valid marriage in Egypt include (1) having the marriage contract certified by filing a lawsuit asking for a declaration opinion that the marriage is valid and (2) recording the declaration opinion as a judgment. The trial court properly concluded that there was

insufficient evidence that this process had occurred before the July 2, 2015 hearing. The Kitab reflects that plaintiff took the first step of filing a lawsuit seeking a declaration opinion that the marriage is valid. However, the Kitab does not indicate that the document was registered with any Egyptian city or certified by the government. Therefore, although it appears from the translation that an Egyptian court authenticated the marriage contract, the trial court properly determined that the document does not indicate that plaintiff took the final step of registering the document with the Egyptian government.

In addition, contrary to defendant's argument, the trial court did not apply the Michigan statutory requirements for a valid marriage to the facts of this case. Defendant points to the court's statement that it was not presented with legal authority regarding whether the Kitab was recognized as a valid and legal marriage "under Michigan law," as well as the court's statement that "this court is not bound by religious law, but by the laws of the State of Michigan." However, the trial court did not base its decision regarding the validity of the marriage on the domestic relations law of Michigan. Instead, the court concluded that it could not recognize the marriage pursuant to Michigan law regarding the recognition of foreign marriages because the court lacked evidence that the marriage was valid in Egypt. The trial court did not question the experts regarding the requirements for valid marriage in Michigan, and the court did not discuss the requirements for a valid marriage in Michigan in its order. Accordingly, the court applied the correct legal framework when it determined that there was insufficient evidence that plaintiff was remarried at the time of the hearing.

Lastly, defendant argues that the trial court abused its discretion by continuing the spousal support award in spite of plaintiff's career and the support of her new partner. As discussed, an issue is preserved if it was raised in, and addressed and decided by, the trial court. See *Mouzon*, 308 Mich App at 419. Defense counsel noted at the beginning of the July 2, 2015 hearing that the subject of the hearing was plaintiff's remarriage. He did not raise the issue whether spousal support should be modified because plaintiff was receiving adequate support from Khashaba or because plaintiff had the ability to work. The trial court did not address or decide the issue during the hearing or in its corresponding order, which was limited in scope to the issue whether plaintiff had remarried. Therefore, the issue is not preserved for appellate review. Because the issue involves questions of fact that have not been raised in or decided by the trial court, we decline to address the issue. See *Gen Motors Corp*, 290 Mich App at 387.

Affirmed.

HOEKSTRA, P.J., and JANSEN and SAAD, JJ., concurred.

NOWACKI v DEPARTMENT OF CORRECTIONS

Docket No. 330255. Submitted February 8, 2017, at Lansing. Decided March 14, 2017, at 9:00 a.m.

Tom Nowacki filed a class action under the Civil Rights Act, MCL 37.2101 *et seq*., in the Washtenaw Circuit Court on behalf of all current and former male corrections officers working or having worked at the Women's Huron Valley Correctional Facility. The lawsuit claimed that the Michigan Department of Corrections (MDOC) discriminated against the male officers because of their sex by enacting policies that prevented them from working in certain positions in the facility and from obtaining overtime. The court certified the class action. MDOC appealed, and the Court of Appeals affirmed in an unpublished opinion per curiam, issued August 19, 2014 (Docket No. 315969). On remand, MDOC transferred the class's equitable claims to the Court of Claims under MCL 600.6404(3); the class's claims for monetary damages were left pending and stayed in the circuit court, MCL 600.6421(2). Nowacki then sought a voluntary dismissal of the equitable claims in the Court of Claims so that the class's monetary claims could proceed in the circuit court. The Court of Claims, MARK T. BOONSTRA, J., issued a conditional order dismissing the equitable claims but requiring that notice be given to the class of the dismissal of its equitable claims and of the class members' right, if they opted out of the class action, to individually pursue equitable relief in the Court of Claims. The order was binding on all members of the class who did not opt out and constituted a dismissal with prejudice of the class's claims for equitable relief. MDOC appealed the order granting Nowacki a voluntary dismissal of his equitable claims for injunctive and declaratory relief.

The Court of Appeals *held*:

1. MCR 3.501(C)(5) requires that putative members of a class be given notice of the nature of the action in which they may be members and of the rights corresponding to their membership in the class. Under MCR 3.501(C)(3), the court with jurisdiction over the action must, as soon as practicable, decide how, when, by whom, and to whom notice must be given.

According to MCR 3.501(E), a class action may not be dismissed or otherwise compromised without the court's approval and without giving notice to the class of the compromise or dismissal. In this case, the putative class members had not yet received notice of the class action as required by MCR 3.501(C), and MDOC argued that dismissal of the claims for equitable relief was improper without the class first having received notice of the action and of their rights attendant to the action. In the interest of judicial economy, the Court of Claims determined that a notice informing the putative class members of the nature of the action and the dismissal of the equitable claims could be given at the same time. In light of MDOC's unnecessary bifurcation of the action, the Court of Claims did not abuse its discretion by ordering that the information concerning the action and the dismissal be provided to the class in one notice.

2. The instruction in MCR 3.501(E) that class members be notified of a proposed dismissal of the action suggests that the class must have already received notice of the action. But courts must be permitted to exercise their inherent powers to manage the cases before them. The court rules did not foresee the procedural path of this case in which MDOC bifurcated the action, and when faced with this situation, Nowacki chose to pursue monetary relief instead of equitable relief. Although the notice required by MCR 3.501(C) would afford a class member the opportunity to object to the dismissal of a class's claim, and the absence of such notice could potentially prejudice a class member who wished to remain in the class and pursue equitable relief, the dismissal of the equitable claims did not affect a class member's ability to pursue equitable relief for himself or herself. The flexibility and latitude that must be inherent in a court's management of the cases before it authorized the Court of Claims' disposition of Nowacki's motion for voluntary dismissal. In addition, Nowacki asserted that monetary relief was the primary objective of the class action, and he provided evidence that the putative class members were likely aware of the class action and of the pending dismissal. Under the facts of this case, the Court of Claims did not abuse its discretion in conditionally granting Nowacki's motion for voluntary dismissal of the class's equitable claims.

3. The Court of Claims' conditional dismissal of the class's equitable claims and its order that class members be informed of their individual right to seek equitable relief does not unduly prejudice MDOC by exposing it to multiple claims in multiple forums. That possibility always exists in class actions

because the only members bound by the class action are those who have opted to join the class. Class members who choose to exclude themselves from the class retain the right to individual relief. Additionally, MDOC could have stipulated to join all claims—equitable and monetary—in the Court of Claims under MCL 600.6421(3), but it did not do so. Any prejudice suffered by MDOC resulted in part from its own insistence on needlessly bifurcating the lawsuit.

Affirmed.

Fett & Fields, PC (by *James K. Fett*), and *Law Office of Glen N. Lenhoff* (by *Glen N. Lenhoff*) for plaintiff.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Jeanmarie Miller*, Assistant Attorney General, for defendant.

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

RONAYNE KRAUSE, P.J. In this class action lawsuit, defendant appeals by right the Court of Claims' order granting plaintiff a voluntary dismissal of his claims for injunctive and declaratory relief. This action was originally filed in the circuit court and was previously appealed. After remand, defendant transferred the equitable and declaratory claims to the Court of Claims pursuant to MCL 600.6404(3), leaving the claims for monetary damages pending and stayed in the circuit court pursuant to MCL 600.6421(2). Plaintiff sought to dismiss the equitable claims in order to continue the proceedings in the circuit court, and the Court of Claims, in a thoughtful and thorough opinion, crafted a *conditional* dismissal along with, among other things, certain requirements for providing notice to the class. We affirm.

The previous appeal in this Court concerned the circuit court's grant of class certification. We previously provided the following background to this case:

> In this employment discrimination class action, plaintiff alleges that certain policies enacted by defendant at the Women's Huron Valley Correctional Facility (WHV), defendant's only facility that houses women prisoners, discriminate against male correction officers in violation of the Civil Rights Act (CRA), MCL 37.2101 *et seq*. . . .
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> * * *
>
> Before 2009, several lawsuits were brought against defendant alleging that some of its staff were sexually abusing female prisoners. Settlement agreements were reached in these cases. In response, defendant sought, and the Michigan Civil Service Commission approved, the use of bona fide occupational qualifications (BFOQs),[1] which ensured that only women could be employed for certain positions at WHV. Plaintiff's lawsuit in the underlying action alleges that defendant applied these BFOQs over broadly, improperly denying him and other men opportunities for various job assignments and overtime work. [*Nowacki v Dep't of Corrections*, unpublished opinion per curiam of the Court of Appeals, issued August 19, 2014 (Docket No. 315969) (*Nowacki I*), p 1.]

In *Nowacki I*, we affirmed the circuit court's grant of class certification. Our Supreme Court denied defen-

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[1] The Elliott-Larsen Civil Rights Act, MCL 37.2101 *et seq*., which prohibits an employer from "discriminat[ing] against a person on the basis of sex with respect to a term, condition, or privilege of employment," MCL 37.2202(1)(c), provides that "[a] person subject to this article may apply to the commission for an exemption on the basis that . . . sex is a bona fide occupational qualification reasonably necessary to the normal operation of the business or enterprise." MCL 37.2208. "An employer may have a bona fide occupational qualification on the basis of . . . sex . . . without obtaining prior exemption from the commission" but bears "the burden of establishing that the qualification is reasonably necessary to the normal operation of the business." *Id*.

dant's application for leave to appeal. *Nowacki v Dep't of Corrections*, 498 Mich 859 (2015).

After defendant transferred the equitable and declaratory claims to the Court of Claims, plaintiff moved to dismiss those claims in order to expedite resolution of the monetary claims, which plaintiff asserted were "the primary objective of the class." Over defendant's objection,[2] the Court of Claims conditionally granted the dismissal, requiring that the class notice in the circuit court must inform the putative class members of the dismissal of the class's claim for equitable and declaratory relief and of their right to seek that relief in the Court of Claims if they were to elect their right to be excluded from the class action. Except as to members who opted out of the class, the order was binding on the class and constituted a dismissal with prejudice of the class's claims for injunctive and declaratory relief.

We review for an abuse of discretion a grant of voluntary dismissal. *Mleczko v Stan's Trucking, Inc*, 193 Mich App 154, 155; 484 NW2d 5 (1992). Under MCR 3.501(E), "[a]n action certified as a class action may not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to the class in such manner as the court directs." That language confers broad discretion on the court ordering notice, so we will also review for an abuse of discretion the manner of notice chosen by the Court of Claims. "An abuse of discretion occurs when the trial court chooses an outcome falling outside the range of principled outcomes." *Edry v Adelman*, 486 Mich 634, 639; 786 NW2d 567 (2010). We review de novo the construction and application of a

[2] The irony of a defendant objecting to the dismissal of claims against it is not lost on us.

court rule. *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 456; 733 NW2d 766 (2006).

Defendant first argues that it was improper for the Court of Claims to approve dismissal of the class's claim for injunctive and declaratory relief when the putative class members had not yet been provided with notice of the underlying action and their corresponding rights as required by MCR 3.501(C).[3] The language used by MCR 3.501(E) does appear to presume that notice of the initial action has already been provided to the class. However, nothing in MCR 3.501 expressly precludes a dismissal under MCR 3.501(E) when notice as required by MCR 3.501(C) has not yet been provided. The Court of Claims determined that it would "serve the interests of judicial economy and efficiency" to incorporate notice of the dismissal *into* the general notice of the action that would eventually be provided to the class members through the circuit court proceedings. We find no abuse of discretion in making the two notices contemporaneous. Indeed, as we will discuss further and in light of defendant's insistence on unnecessarily bifurcating this action, we find that the trial court arrived at the only solution defendant made possible.

Defendant next argues that "post-dismissal notification" to the class members is inadequate to comply with MCR 3.501(E). The requirement in MCR 3.501(E) that the class be notified of a *proposed* order strongly suggests that prior notice was intended. Precedent

[3] MCR 3.501(C)(5) requires the court to see that notice is given to the class members informing them of the nature of the action and their rights as class members. MCR 3.501(C)(3) provides in part that "[a]s soon as practicable, the court shall determine how, when, by whom, and to whom the notice shall be given; the content of the notice; and to whom the response to the notice is to be sent." "Reasonable notice of the action shall be given to the class in such manner as the court directs." MCR 3.501(C)(4)(a).

from the federal courts suggests that part of the purpose of MCR 3.501(E) is to afford class members an opportunity to object to a proposed dismissal or settlement.[4] See *Shelton v Pargo, Inc*, 582 F2d 1298, 1303 (CA 4, 1978) (interpreting the then-similar FR Civ P 23(e)).[5] Although the Court of Claims ordered that a member who elects to be excluded from the class action may file a claim for injunctive or declaratory relief, it clearly dismissed the class's claims for that relief *before* providing notice to the class members of that proposed action. Therefore, at least in theory, a hypothetical class member who wished to remain in the class and desired equitable relief arguably would be prejudiced by the lack of predismissal notice.

However, under the particular circumstances of this case, the decision to afford notice to the class members after dismissal was not an abuse of discretion. First, the court rules do not practically contemplate the procedural scenario in this case of a bifurcated class action. Courts simply must be permitted the flexibility and latitude to manage the cases before them by exercising their "inherent powers" as consistently with the spirit of the court rules as practicable and appropriate to the situation. See *Brenner v Kolk*, 226 Mich App 149, 159; 573 NW2d 65 (1997). Because defendant had effectively backed the Court of Claims and plaintiff into a corner, the Court of Claims reasonably

[4] When interpreting the Michigan Court Rules, a court may consider for its persuasive value federal precedent interpreting a similar federal rule. See *State ex rel Gurganus v CVS Caremark Corp*, 496 Mich 45, 70 n 3; 852 NW2d 103 (2014) (CAVANAGH, J., concurring).

[5] Prior to 2003, Federal Rule of Civil Procedure 23(e) was substantially similar to MCR 3.501(E), providing that "[a] class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." *All Plaintiffs v All Defendants*, 645 F3d 329, 332 (CA 5, 2011), quoting FR Civ P 23(e) (1999).

determined that judicial resources would be best preserved and the proceedings expedited by issuing one notice to the class instead of two.

Furthermore, plaintiff maintained that monetary relief was the class's "primary objective," the pursuit of which would be best advanced by dismissing the claims pending in the Court of Claims in order to resume the proceedings in the circuit court. Plaintiff also maintained that the putative class members were all actually aware of the proposed action because plaintiff had attached to its motion for dismissal a posting on a website created for the class action that set forth the aforementioned reasoning behind the proposed action. Both parties likely—even if not formally—knew the identities of the putative class members (former and current male corrections officers at WHV). Therefore, we find it reasonable for the Court of Claims to have determined that the members were indeed aware of the pending voluntary dismissal. Because of the prolonged history of this case, even more unnecessarily prolonged by the bifurcation, it is equally reasonable to conclude that the putative class members likely supported the voluntary dismissal.

In any event, it is pure conjecture to predict whether the class members would have objected to the proposed dismissal. The Court of Claims went to great lengths in its order to ensure that any class member who elected to be excluded from the class could bring an action in the Court of Claims for injunctive and declaratory relief, thereby minimizing any prejudice to a class member who sought that relief. Giving deference to the broad discretion afforded to the Court of Claims to determine the manner of notice under MCR 3.501(E), we cannot say that it arrived at an unprincipled outcome. *Edry*, 486 Mich at 639.

Finally, defendant argues that it will be unduly prejudiced by the dismissal because it would then face the possibility of having to defend multiple actions in different forums. Defendant's assertion is at best a mirage. That possibility is inherent in class actions: only class members "who have not submitted an election to be excluded" are bound by a class action judgment, and class members have the right to elect to be excluded. MCR 3.501(D)(5). Under the circumstances, we perceive no reason why the probability of multiple individual actions has materially increased. Consequently, we fail to perceive how defendant was prejudiced by the voluntary dismissal, with prejudice, of certain class claims. We further note that defendant *could* have stipulated to joinder of all claims in the Court of Claims, pursuant to MCL 600.6421(3), as plaintiff apparently requested.[6] Defendant's accusation that *plaintiff* engaged in dilatory, obstructive, or prejudicial tactics is presumptuous. *If* defendant has sustained any prejudice, which as noted we do not find, it brought a great deal of that prejudice down on itself with its insistence on a totally unnecessary bifurcation. We are not inclined to ignore the practical ramifications of undertaking a particular procedural strategy, even if that strategy is entirely within the party's legal rights. The Court of Claims resolved the situation presented to it as elegantly, fully, and fairly as the tools it was provided would allow.

Affirmed.

O'CONNELL and METER, JJ., concurred with RONAYNE KRAUSE, P.J.

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[6] At oral argument, we directly asked counsel for defendant whether, as plaintiff asserted in his brief on appeal, plaintiff did in fact ask defendant to stipulate to joinder. Defendant did not provide us with an answer, even an implicit one, to the question we asked, but did admit that the bifurcation was entirely defendant's doing.

PEOPLE v SHARPE

Docket Nos. 332879 and 333872. Submitted March 8, 2017, at Detroit. Decided March 16, 2017, at 9:00 a.m. Affirmed on other grounds 502 Mich 313.

Lovell C. Sharpe was charged in the Wayne Circuit Court with first-degree criminal sexual conduct, MCL 750.520b; third-degree criminal sexual conduct, MCL 750.520d(1)(a); and fourth-degree criminal sexual conduct, MCL 750.520e, as the result of several incidents of sexual contact that occurred between defendant and the complainant, who was 13 or 14 years old at the time. Testimony at the preliminary examination indicated that the complainant had become pregnant and had an abortion that was paid for in part by defendant. After defendant was bound over for trial, the prosecution filed a request to admit evidence that defendant was the only person with whom the complainant had had sexual intercourse between the alleged criminal incidents and her abortion. In response, defendant asked the court to preclude the admission of evidence relating to the complainant's previous virginity, pregnancy, and abortion. The court, Shannon N. Walker, J., ruled that the prosecution would be permitted at trial to ask the complainant whether she had become pregnant during the time of the charged incidents but would not allow evidence regarding complainant's abortion or her lack of previous sexual activity under MRE 404(a)(3). In Docket No. 332879, the prosecution sought leave to appeal the trial court's order to the extent that the prosecution's motion had been denied. In Docket No. 333872, defendant filed a delayed application for leave to appeal, seeking to challenge the order to the extent that the prosecution's motion had been granted. The Court of Appeals granted both applications and consolidated the appeals.

The Court of Appeals *held*:

1. The trial court did not abuse its discretion by ruling that the prosecution could elicit testimony from the complainant that she had become pregnant as the result of a sexual assault perpetrated by defendant. In general, under MRE 404(a), evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity with that character on a particular occasion. Under MRE 404(a)(3), in

a prosecution for criminal sexual conduct, evidence of the victim's past sexual conduct with the defendant and evidence of specific instances of sexual activity are admissible to show the source of semen, pregnancy, or disease. Because the prosecution did not seek to introduce evidence of the victim's pregnancy to prove that the complainant had a particular character trait in accordance with which she acted during the alleged instances of sexual conduct, the complainant's pregnancy was not character evidence and therefore was not precluded by MRE 404(a). Evidence of the complainant's pregnancy was also not prohibited under MCL 750.520j. That provision, known as the rape-shield statute, bars admission of evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct, unless a judge finds that evidence of the victim's past sexual conduct with the actor or evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value. In this case, evidence of the complainant's pregnancy was relevant to corroborate her account of vaginal penetration and to explain her delay in reporting the alleged sexual assault.

2. The trial court abused its discretion by ruling that the prosecution could not elicit testimony from the complainant that her only sexual contact was with defendant. The prosecution did not seek to introduce evidence of the complainant's lack of sexual activity with men other than defendant to prove that the victim acted in conformity with that character in violation of MRE 404(a)(3), but rather to substantiate her claim, and prove by the process of elimination, that she had been sexually penetrated and impregnated by defendant. Accordingly, the evidence concerning the complainant's virginity was outside the scope of prohibited evidence under MRE 404(a)(3) given its purpose for admission, and the trial court erred by relying on MRE 404(a)(3) as a basis for excluding the evidence. This evidence was also not prohibited by MCL 750.520j(1), which does not bar evidence concerning a victim's lack of specific instances of sexual conduct. Further, given the evidence of the complainant's pregnancy, her insistence that she had never had sexual relations with anyone except defendant was highly relevant to her claim that defendant had vaginally penetrated and impregnated her and, accordingly, committed the charged offenses. Because MCL 750.520j(1)(b) permits evidence of specific instances of sexual activity to show the origin of a complainant's pregnancy, the complainant was permitted to

testify that defendant's criminal sexual conduct was the only possible origin or source of her pregnancy.

3. The trial court abused its discretion by ruling that the prosecution was barred from introducing evidence concerning the complainant's abortion by MRE 404(a)(3). The circumstances surrounding the victim's abortion were not character evidence and were not being offered to prove action in conformity with DM's character. While evidence of the abortion would constitute evidence of specific instances of the victim's sexual conduct prohibited under MCL 750.520j(1), it fell within the exception for evidence of the victim's past sexual conduct with the actor under MCL 750.520j(1)(a) by providing further objective evidence that the complainant had in fact been impregnated as a result of defendant's alleged vaginal penetration of the complainant. Evidence regarding the complainant's abortion was highly relevant to the charges against defendant because it was directly probative of a material fact at issue, specifically, whether defendant had sexually penetrated the complainant. The evidence was also significant given the testimony of the complainant's mother that defendant had paid for half of the abortion with no expectation of repayment. A jury could reasonably infer, from defendant's financial contribution, a consciousness of guilt or a desire to dispose of the "evidence" because the child's birth could lead to the conclusion that he committed the sexual assault that caused the pregnancy. The mere fact that an abortion took place was not so inflammatory as to render it inadmissible, nor was there a basis for concluding that the fact that an abortion took place would appeal to a jury's sympathies.

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

1. EVIDENCE — CRIMINAL SEXUAL CONDUCT — PREGNANCY OF COMPLAINANT.

Evidence that a complainant became pregnant after a sexual assault alleged to have been perpetrated by the defendant may be admissible at a trial for criminal sexual conduct if it is material to a fact at issue in the case, its inflammatory or prejudicial nature does not outweigh its probative value, and its admission is not for the purpose of establishing the complainant's character (MRE 404(a)(3); MCL 750.520j).

2. EVIDENCE — CRIMINAL SEXUAL CONDUCT — LACK OF PREVIOUS SEXUAL INTERCOURSE BY COMPLAINANT.

Evidence that a complainant had not engaged in sexual intercourse before an alleged incident of criminal sexual conduct may be

admitted at the trial for that crime to substantiate the complainant's claim that any sexual penetration or pregnancy the complainant experienced was the result of the defendant's criminal sexual conduct; this evidence is not barred by MRE 404(a)(3) if its admission is not for the purpose of establishing the complainant's character or by MCL 750.520j(1), which does not bar evidence concerning a victim's lack of specific instances of sexual conduct.

3. EVIDENCE — CRIMINAL SEXUAL CONDUCT — ABORTION BY COMPLAINANT.

Evidence that the complainant in a prosecution for criminal sexual conduct had an abortion may be admissible at the trial for that crime if the evidence is relevant and the circumstances surrounding the abortion were not being offered to prove action in conformity with the complainant's character under MRE 404(a)(3) but to provide evidence of the victim's past sexual conduct with the actor under MCL 750.520j(1)(a); the mere fact that an abortion took place is not so inflammatory as to render it inadmissible, nor does it necessarily appeal to a jury's sympathies.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Jason W. Williams*, Chief of Research, Training, and Appeals, and *Madonna Georges Blanchard*, Assistant Prosecuting Attorney, for the people.

Jonathan B. D. Simon for defendant.

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

RIORDAN, P.J. In these consolidated appeals, the trial court issued an order[1] granting in part and denying in part the prosecution's motion to admit evidence concerning a criminal sexual conduct victim's pregnancy, abortion, and lack of other sexual partners. In its ruling, the court held that references to the complain-

[1] The parties agree that although the trial court entered two orders with regard to the prosecution's motion, the court intended for the parties to rely on the more detailed order, which consists of the court's entire ruling.

ant's abortion and lack of other sexual partners were inadmissible, but references to the complainant's pregnancy were admissible.

In Docket No. 332879, the prosecution filed an application for leave to appeal, seeking to challenge the trial court's order to the extent that the prosecution's motion was denied. In Docket No. 333872, defendant filed a delayed application for leave to appeal, seeking to challenge the order to the extent that the prosecution's motion was granted. We granted both applications and consolidated the appeals.[2] We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This case arises from several incidents of criminal sexual conduct (CSC) that defendant allegedly committed against the complainant, DM, when she was 13 or 14 years old. Defendant has been charged with first-degree CSC, MCL 750.520b; third-degree CSC, MCL 750.520d(1)(a); and fourth-degree CSC, MCL 750.520e.

At the preliminary examination, the complainant described two incidents of abuse by defendant that allegedly occurred in late 2013 or 2014. Defendant was previously in a relationship with DM's mother, and he fathered two of DM's half-siblings. The first incident occurred when defendant stayed with DM and her siblings while DM's mother was hospitalized. DM alleged that defendant made sexual contact with her, consisting of vaginal penetration as well as other touching. A second incident of abuse allegedly occurred

[2] *People v Sharpe*, unpublished order of the Court of Appeals, entered September 2, 2016 (Docket Nos. 332879 and 333872).

at defendant's home, which again included vaginal penetration, among other things.

In October 2014, DM went to Henry Ford Hospital after her mother received a letter indicating that DM had an abnormal test result and needed to see the doctor again. At that time, DM underwent a pregnancy test, which came back positive. DM had not been showing any signs of pregnancy, and she and her mother were unaware that she was pregnant before they received the test results. Before she went to the hospital, DM was unaware of how a woman became pregnant, and Henry Ford staff had to explain the process to her.

DM's mother told defendant about the pregnancy, and they agreed that DM needed to get an abortion. Defendant gave DM's mother money to pay for half the cost of the abortion, with no expectation of repayment. DM then underwent an abortion in November 2014.

For several months, DM refused to tell her mother how she became pregnant. In April 2015, after ending her relationship with defendant, DM's mother again asked DM how she had become pregnant. DM then disclosed defendant's alleged sexual abuse.

At the preliminary examination, DM testified that she did not have any boyfriends during the year that she was 14 and that no one else had penetrated her. DM's mother provided similar testimony, stating that she had no reason to believe that DM was sexually active with anyone other than defendant.

After defendant was bound over for trial, the prosecution filed a request to pierce the rape shield at trial. The prosecution first requested that the trial court admit evidence that defendant was the only person with whom DM had sexual contact between the incidents giving rise to defendant's charges and DM's

abortion. The prosecution argued that this would corroborate DM's account of the sexual assault and help the jury to decide whether defendant penetrated and impregnated her. The prosecution asserted that the evidence would be admissible under the exceptions in MCL 750.520j and MRE 404(a)(3) as evidence regarding the source or origin of semen, pregnancy, or disease. The defense argued that evidence concerning DM's virginity was inadmissible under *People v Bone*, 230 Mich App 699; 584 NW2d 760 (1998), and that the evidence of her pregnancy and abortion was not relevant. Rather, it contended, the evidence regarding DM's virginity, pregnancy, and abortion was extremely prejudicial. Accordingly, defendant asked the court to preclude any mention of DM's virginity, pregnancy, and abortion at trial.

The court initially ruled:

> Well I know from my experience that the issue in this particular case is gonna be the credibility of the witness. In this particular case, we're dealing with a 14-year-old teenager.
>
> It would be helpful to have the DNA from the aborted fetus. Because if we had that DNA, what if that DNA didn't come back to the defendant? Then that would mean that possibly she was having consensual sex maybe with someone her own age. We don't know. And we won't know because the fetus was not preserved for DNA purposes.
>
> So I have to agree with the defense that the prejudicial nature of the proposed evidence outweighs the probative value in this case, and I'm not gonna allow it.

Later in the hearing, the court provided clarification of its ruling:

> For clarity, for the record, I will allow the prosecutor to ask the complainant whether or not she got pregnant during the time that she was allegedly sexually active with the

> defendant. However, I will not allow evidence in regards to the abortion or her sexual intercourse with no other partners.
>
> * * *
>
> The Court's gonna preclude evidence and argument in regard to the abortion and other sexual partners or lack of prior sexual activity by the complainant, and that's pursuant to MRE 404(a)3.

Consistent with its ruling on the record, the trial court entered an order granting the prosecution's motion in part by allowing evidence of DM's pregnancy and denying the motion in part by excluding evidence of DM's abortion and lack of other sexual partners.

II. STANDARD OF REVIEW

We review a trial court's decision to admit evidence for an abuse of discretion. *People v Mardlin*, 487 Mich 609, 614; 790 NW2d 607 (2010); *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). An abuse of discretion occurs if the trial court's decision "is outside the range of reasonable and principled outcomes." *People v Orr*, 275 Mich App 587, 589; 739 NW2d 385 (2007). In general, there is no abuse of discretion when the trial court's decision involves a close evidentiary question. *People v Sabin (After Remand)*, 463 Mich 43, 67; 614 NW2d 888 (2000). "When the decision involves a preliminary question of law, . . . such as whether a rule of evidence precludes admission, we review the question de novo." *Mardlin*, 478 Mich at 614.

The rules of statutory construction also apply to the construction of rules promulgated by the Michigan Supreme Court, including the Michigan Rules of Evidence. *People v Duncan*, 494 Mich 713, 723; 835 NW2d 399 (2009).

> When construing a statute, our primary goal is to ascertain and give effect to the intent of the Legislature. To do so, we begin by examining the language of the statute. If the statute's language is clear and unambiguous, we assume that the Legislature intended its plain meaning and the statute is enforced as written. Stated differently, a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself. Only where the statutory language is ambiguous may a court properly go beyond the words of the statute to ascertain legislative intent. [*People v Phillips*, 469 Mich 390, 395; 666 NW2d 657 (2003) (quotation marks and citations omitted).]

III. LEGAL BACKGROUND

These consolidated appeals implicate the same statute and rule of evidence. MRE 404 provides:

> (a) *Character evidence generally*. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
>
> * * *
>
> (3) *Character of alleged victim of sexual conduct crime*. In a prosecution for criminal sexual conduct, evidence of the alleged victim's past sexual conduct with the defendant and evidence of specific instances of sexual activity, showing the source or origin of semen, pregnancy, or disease[.]

Similarly, MCL 750.520j, known as the rape-shield statute, states:

> (1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520b to 520g unless and only to the extent that the judge finds that the

> following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:
>
> (a) Evidence of the victim's past sexual conduct with the actor.
>
> (b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.
>
> (2) If the defendant proposes to offer evidence described in subsection (1)(a) or (b), the defendant within 10 days after the arraignment on the information shall file a written motion and offer of proof. The court may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1). If new information is discovered during the course of the trial that may make the evidence described in subsection (1)(a) or (b) admissible, the judge may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1).

The evidentiary rule differs from the statute in that the rule of evidence generally addresses the admission of *character* evidence while the statute deals with the admission of evidence dealing with instances of a victim's sexual *conduct*. Compare MRE 404(a)(3) with MCL 750.520j. However, MCL 750.520j and MRE 404(a)(3) permit the same types of evidence: (1) evidence of the victim's past sexual conduct with the "actor" under MCL 750.520j or "the defendant" under MRE 404(a)(3), and (2) evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease. The second exception is not limited to sexual activity with the defendant. Instead, it encompasses evidence of sexual activity, even if unrelated to the defendant, if that sexual activity shows the source or origin of semen, pregnancy, or disease.

"The rape-shield law, with certain specific exceptions, was designed to exclude evidence of the victim's sexual conduct with persons *other than defendant*." *People v Arenda*, 416 Mich 1, 10; 330 NW2d 814 (1982) (emphasis added). As we explained in *People v Duenaz*, 306 Mich App 85, 92; 854 NW2d 531 (2014):

> The [rape-shield] statute was enacted to prohibit inquiry into a victim's prior sexual encounters, which were historically used by defendants charged with CSC involving an adult in an effort to prove the defense of consent. The statute reflects a legislative policy determination that sexual conduct or reputation regarding sexual conduct as evidence of character and for impeachment, while perhaps logically relevant, is not legally relevant. Although consent is not a relevant defense to a CSC charge involving an underage minor, Michigan courts have applied the rape-shield statute in cases involving child victims. [Citation omitted.]

However, the statute does not bar "testimony regarding sexual subjects involving the complainant" if "such testimony falls outside the scope of the statute." *People v Ivers*, 459 Mich 320, 328; 587 NW2d 10 (1998).

IV. DOCKET NO. 333872

Defendant contends that the trial court abused its discretion by ruling that the prosecution could elicit testimony from DM that she had become pregnant as a result of a sexual assault perpetrated by defendant. We disagree.

Under MRE 402, "[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of Michigan, [the Rules of Evidence], or other rules adopted by the Supreme Court." Defendant contends that "[e]vidence regarding complainant's pregnancy is barred by MRE 404(a)(3) as evidence of the victim's

'past sexual conduct' " under *Bone*, 230 Mich App 699. Defendant also argues that if evidence of the victim's pregnancy is admitted without DNA or forensic evidence that he caused the pregnancy, he "will suffer from the unfair appeal to the jurors' sense that complainant should be believed and that she is deserving of additional sympathy." The prosecution, however, contends that evidence that the victim became pregnant while she was sexually active with defendant is admissible under MRE 404(a)(3), which allows the admission of evidence concerning specific instances of sexual activity showing the source of pregnancy.

The trial court correctly determined that evidence regarding the complainant's pregnancy was admissible. In analyzing this issue, the parties focus on MRE 404(a)(3). MRE 404(a) pertains to "[e]vidence of a person's character or a trait of character" to prove "action in conformity therewith on a particular occasion . . . ." In general, under MRE 404(a), evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity with that character on a particular occasion. *Bone*, 230 Mich App at 701. In a prosecution for criminal sexual conduct, evidence of the victim's past sexual conduct with the defendant and evidence of specific instances of sexual activity are admissible to show the source of semen, pregnancy, or disease. MRE 404(a)(3); *Bone*, 230 Mich App at 702. Here, however, the prosecution did not seek to introduce evidence of the victim's pregnancy to prove that she acted in conformity with that character when the incidents allegedly occurred. See MRE 404(a)(3). Stated differently, the prosecution did not seek the admission of the evidence related to the pregnancy to show that DM had a particular character trait, in accordance with which she acted during the alleged instances of sexual conduct. Therefore, because the

complainant's pregnancy is not character evidence and is not being offered to prove that the complainant "acted in conformity therewith," it is not precluded by MRE 404(a).

The trial court properly concluded that the prosecution could present evidence of the complainant's pregnancy because such evidence is not prohibited under MCL 750.520j(1). Again, unless otherwise precluded, "[a]ll relevant evidence is admissible . . . ." MRE 402. Relatedly, "the touchstone of the rape-shield statute is relevance. In providing two narrow exceptions to the exclusionary rule, the Legislature premised both exceptions on the threshold determination that the proposed evidence is 'material to a fact at issue.' " *People v Adair*, 452 Mich 473, 482; 550 NW2d 505 (1996), quoting MCL 750.520j(1). The record clearly shows that the pregnancy is relevant to corroborate DM's account of vaginal penetration. See MRE 401 (defining relevance); *People v Borowski*, 330 Mich 120, 125-126; 47 NW2d 42 (1951) (stating that evidence that the complainant became pregnant and gave birth was admissible as evidence of intercourse). The evidence also is relevant under the facts of this case to explain DM's delay in reporting defendant's alleged sexual assault. She did not disclose the sexual assault until after she was found to be pregnant and later questioned by her mother regarding the source of the pregnancy. While evidence of the pregnancy falls within the categories of excluded evidence under the statute as evidence of a specific instance of the victim's sexual conduct, it is clearly admissible under the statutory exception for "[e]vidence of the victim's past sexual conduct with the actor."[3] MCL 750.520j(1)(a).

[3] For the reasons discussed later in this opinion, we conclude that the victim's testimony that her only sexual contact was with defendant is admissible. Therefore, evidence of her pregnancy constitutes "[e]vidence of the victim's past sexual conduct with the actor." MCL 750.520j(1)(a).

We reject defendant's claim that the pregnancy-related evidence is inadmissible because it is impermissibly prejudicial under MCL 750.520j in light of the fact that there is no alternative DNA or other forensic evidence available to show parentage. A trial court must exclude evidence that is material to a fact in issue and that otherwise fulfills the requirements under the rape-shield statute if the "inflammatory or prejudicial nature" of the evidence "outweigh[s] its probative value[.]" MCL 750.520j(1).[4] Defendant mischaracterizes the probative and prejudicial value of the evidence at issue. A positive pregnancy test is highly probative because it provides objective proof that corroborates the complainant's claims that she was vaginally penetrated by defendant. With the evidence of the pregnancy, the proof of defendant's guilt rests on more than a one-on-one credibility contest. We fail to see how this evidence is unduly prejudicial for the reasons that defendant states. Further, as discussed later in this opinion, DM's testimony that defendant was the only person with whom she had sexual contact is admissible and has the same type of probative indicia as would DNA or forensic evidence from the aborted child.

For these reasons, the trial court properly admitted evidence of DM's pregnancy, regardless of the lack of DNA or other forensic evidence that defendant was the father of the child.

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[4] The standard for excluding evidence on the basis of prejudice is more stringent under MCL 750.520j than under MRE 403, which provides, "Although relevant, evidence may be excluded if its probative value is *substantially* outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." (Emphasis added.) See *Adair*, 452 Mich at 481 (comparing the prejudice-related inquiry under MRE 403 and MCL 750.520j(1) and recognizing that the rape-shield statute reflects the same "evidentiary postulate, but with a significant modification").

V. DOCKET NO. 332879

The prosecution argues that the trial court abused its discretion when it ruled that the prosecution could not elicit testimony from DM that her only sexual contact was with defendant and could not introduce evidence concerning her abortion. We agree.

A. OTHER SEXUAL PARTNERS

The trial court relied on MRE 404(a) in excluding evidence of DM's lack of other sexual partners. Again, under MRE 404(a), evidence of a person's character or trait of character is generally inadmissible for the purpose of proving action in conformity with that character on a particular occasion. However, in a prosecution for criminal sexual conduct, evidence of the victim's past sexual conduct with the defendant and evidence of specific instances of sexual activity are admissible to show the source of semen, pregnancy, or disease. MRE 404(a)(3); *Bone*, 230 Mich App at 701-702. In *Bone*, 230 Mich App at 702-704, this Court held that the defendant's right to a fair trial was violated by the prosecutor's repeated references to the complainant's virginity as circumstantial proof that the victim did not consent to the sexual conduct at issue. Specifically, the *Bone* Court held, "We interpret MRE 404(a)(3) to preclude the use of evidence of a victim's virginity as circumstantial proof of the victim's current unwillingness to consent to a particular sexual act." *Bone*, 230 Mich App at 702. However, it is significant that the Court noted, immediately after stating its interpretation of MRE 404(a)(3), that "evidence introduced for some other relevant purpose does not become inadmissible merely because it tends to show that the victim was a virgin." *Bone*, 230 Mich App at 702 n 3. It is axiomatic that evidence that is inadmissible for one

purpose may nonetheless be admissible for another purpose. *Sabin*, 463 Mich at 56.

Here, the prosecution did not seek to introduce evidence of the complainant's lack of sexual activity with men other than defendant to prove that the victim acted in conformity with that character when the incidents of defendant's abuse allegedly occurred. See MRE 404(a)(3). For example, the prosecution did not request admission of the evidence to show that the complainant's previous virginity supported an alleged lack of consent,[5] or that she regularly got pregnant and then had abortions. Instead, the prosecution sought admission of evidence concerning the victim's lack of other sexual partners to substantiate her claim, and prove by the process of elimination, that she was, in fact, sexually penetrated and impregnated by defendant. Accordingly, the evidence concerning the complainant's virginity was outside the scope of prohibited evidence under MRE 404(a)(3) given its purpose for admission, and the trial court erred by relying on MRE 404(a)(3) as a basis for excluding the evidence.[6]

Further, this evidence is not prohibited under MCL 750.520j(1). The plain statutory language does not bar evidence concerning a victim's *lack* of specific instances of sexual conduct.[7] See *Phillips*, 469 Mich at 395.

[5] Consent is not an issue in this case given the victim's age. See MCL 750.520b(1)(b); MCL 750.520d(1)(a); MCL 750.520e(1)(a).

[6] Even if the proposed testimony had been within the scope of MRE 404(a)(3), the evidence was offered for a proper purpose for admission under both MRE 404(a)(3) and MCL 750.520j(1) as "evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease[.]" Accordingly, the subsequent analysis concerning MCL 750.520j would be equally applicable if the evidence fell within the scope of MRE 404(a)(3).

[7] Notably, *Bone*, 230 Mich App at 701-704, was decided under MRE 404(a)(3), not MCL 750.520j.

Nevertheless, even if evidence of DM's virginity arguably refers to "specific instances of the victim's sexual conduct" by essentially constituting the inverse of sexual activity, the statute permits "[e]vidence of specific instances of sexual activity showing the source or origin of . . . pregnancy." MCL 750.520j(1)(b). "Again, the touchstone of the rape-shield statute is relevance. In providing two narrow exceptions to the exclusionary rule, the Legislature premised both exceptions on the threshold determination that the proposed evidence is 'material to a fact at issue.' " *Adair*, 452 Mich at 482, quoting MCL 750.520j(1). As previously discussed, the trial court properly ruled that evidence of DM's pregnancy is admissible at trial.

Given the evidence of DM's pregnancy, her insistence that she never had sexual relations with anyone except defendant is highly relevant to her claim that defendant vaginally penetrated and impregnated her and, accordingly, committed the charged offenses. Because MCL 750.520j(1)(b) permits evidence of specific instances of sexual activity to show the origin of a complainant's pregnancy, it is only reasonable to conclude that DM should be permitted to testify, consistent with her claim that defendant was the person whose sexual activity was the "origin" of her pregnancy, that there was no other possible source or origin given the fact that no one but defendant had sexually penetrated her.

Additionally, this evidence is not inadmissible on the basis of its potentially inflammatory or prejudicial effect. See MRE 403; MCL 750.520j(1). The objective evidence of DM's pregnancy and evidence of DM's lack of sexual partners is highly probative of whether defendant did, in fact, vaginally penetrate the victim. See *People v Mills*, 450 Mich 61, 67; 537 NW2d 909

(1995) (discussing the probative value of evidence), mod 450 Mich 1212 (1995). Moreover, given that the testimony at issue is DM's *lack* of sexual partners, there is, at most, minimal prejudice associated with the admission of this testimony, especially given the purpose of the rape-shield statute, see *Adair*, 452 Mich at 480; *Arenda*, 416 Mich at 10, and the purpose of the evidence in this case, cf. *Bone*, 230 Mich App at 703-704. Under the circumstances of the instant case, the evidence only is prejudicial to the extent that it makes more likely the fact that defendant actually committed the offenses, and "[r]elevant evidence is inherently prejudicial . . . ." *Mills*, 450 Mich at 75 (quotation marks and citation omitted). We find no basis for concluding that the evidence would have an inflammatory or prejudicial effect that would outweigh its probative value. See MRE 403; MCL 750.520j.

Therefore, the trial court's refusal to allow the prosecutor to question the complainant regarding whether she had sexual relations with anyone other than defendant was outside the range of reasonable and principled outcomes. See *Orr*, 275 Mich App at 588-589; cf. *Bone*, 230 Mich App at 702-704, 702 n 3.[8]

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[8] We find persuasive the reasoning in *State v Stanton*, 319 NC 180, 187; 353 SE2d 385 (1987), which considered evidence strikingly similar to that at issue in this case:

> Defendant contends that the admission of this evidence [indicating that the victim was not dating or having sexual intercourse with anyone else on a regular basis at the time of the rape] somehow violates Rule 412. With certain exceptions not pertinent here, Rule 412 is the embodiment of its predecessor, N.C.G.S. § 8–58.6 (repealed by 1983 N.C.Sess.Laws (Regular Sess.1984) ch. 1037, § 2 (effective 1 July 1984)), a part of what was commonly referred to as the Rape Shield Law. Defendant's failure to object at trial aside, we find no error in the admission of this evidence. Defendant cites no authority contrary to either Rule 412 or its predecessor statute, N.C.G.S. § 8–58.6, to pro-

B. ABORTION EVIDENCE

We also agree with the prosecution that the trial court erred when it concluded that the prosecution could not present at trial any evidence of the complainant's abortion.

Again, all relevant evidence is admissible unless it is otherwise prohibited by the Rules of Evidence or other law. MRE 402. The trial court erroneously concluded that evidence of the abortion was barred by MRE 404(a)(3). The circumstances surrounding the victim's abortion were not character evidence and were not being offered to prove action in conformity with DM's character. While evidence of the abortion would constitute "[e]vidence of specific instances of the victim's sexual conduct" prohibited under MCL 750.520j(1),[9] it falls within the exception for evidence of the victim's past sexual conduct with the actor under MCL 750.520j(1)(a) by providing further objective evidence that DM was, in fact, pregnant, which necessarily resulted from defendant's alleged vaginal penetration of her.

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hibit a victim from willingly testifying as to the lack of sexual involvement for purposes of corroboration, and we decline to so construe it. It would strain credulity for this Court to hold that, while a victim may testify to the details of her rape and corroborate that testimony with further testimony concerning her pregnancy and subsequent abortion, she may not testify as to the lack of sexual involvement with anyone except the defendant and thereby fail to fix responsibility for the pregnancy on the defendant.

[9] Cf. *Commonwealth v Weber*, 549 Pa 430, 437; 701 A2d 531 (1997) ("The Rape Shield Law applies to evidence concerning a victim's abortion because it necessarily implicates past sexual conduct."); *Razo v State*, 431 NE2d 550, 554 (Ind App, 1982) (stating, with regard to a now-repealed rape-shield statute, that "[a] pregnancy which has been aborted can only be the result of 'past sexual conduct' ").

Contrary to defendant's claims, the record shows that evidence regarding DM's abortion is highly relevant to the charges against him, especially in the context of this case. See MRE 401; MRE 402. Evidence of DM's pregnancy and the subsequent abortion are directly probative of a material fact at issue, i.e., whether defendant engaged in an act of sexual penetration with the complainant. See MCL 750.520b(1)(b); MCL 750.520d(1)(a). We are persuaded by the court's reasoning in *State v Stanton*, 319 NC 180, 186; 353 SE2d 385 (1987), in holding that the trial court did not abuse its discretion in admitting evidence of the complainant's pregnancy and abortion: "[The victim's] simple statement that she had an abortion served the purpose of corroborating both the fact of penetration and the fact of her pregnancy." Evidence of DM's abortion is also significant in this case given her mother's testimony that defendant paid for half of the abortion and that he had no expectation of repayment.[10] A jury could reasonably infer, from defendant's financial contribution, a consciousness of guilt or a desire to dispose of the "evidence" because the child's birth could lead to the conclusion that he had committed the sexual assault that caused the pregnancy. Cf. *People v Unger*, 278 Mich App 210, 226; 749 NW2d 272 (2008) ("A rational jury could have also inferred defendant's consciousness of guilt from evidence that defendant wished to have the victim's body immediately cremated. Defendant's desire to have the body cre-

[10] Although defendant's statements themselves were not admitted through the testimony of DM's mother at the preliminary examination, defendant's statements regarding the abortion would be admissible through her testimony as the statement of a party opponent. MRE 801(d)(2) (stating that a party's own statement, if offered against the party, is not hearsay).

mated could be viewed as an effort to destroy evidence of the crime of murder, thereby showing a consciousness of guilt.").[11]

Because of its significant probative value, we disagree that evidence concerning the victim's abortion is inadmissible because it would be impermissibly prejudicial or it would improperly appeal to the jury's sympathy. See MCL 750.520j(1) (stating that evidence permitted under the statute may only be admitted if "its inflammatory or prejudicial nature does not outweigh its probative value"). Given the prevalence of abortion in today's society, we again are persuaded by the court's reasoning in *Stanton*, 319 NC at 186: "The mere fact that an abortion took place is not so inflammatory as to render it inadmissible." Likewise, there is no basis for concluding that the fact that an abortion took place would appeal to a jury's sympathies.

Therefore, given the high probative value of the evidence, the trial court's exclusion of evidence related to DM's abortion was outside the range of principled outcomes. See *Orr*, 275 Mich App at 588-589.

VI. CONCLUSION

All of the evidence proffered by the prosecution is admissible. The trial court erred by holding otherwise and shall permit the admission of this evidence at defendant's trial.

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[11] We also agree with the prosecution that evidence concerning DM's abortion could be somewhat relevant, given the admission of evidence of DM's pregnancy, to address the lack of conclusive DNA or forensic evidence showing that defendant was the father of the child or fetus related to DM's pregnancy. Although we recognize that a stipulation or jury instruction could easily address this purpose for admission without mentioning the abortion, we believe that the evidence of the abortion is highly relevant for the reasons previously discussed.

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

METER and FORT HOOD, JJ., concurred with RIORDAN, P.J.

In re ANTRIM SHALE FORMATION *re* OPERATION OF WELLS UNDER VACUUM

Docket Nos. 327723 and 330161. Submitted March 14, 2017, at Lansing. Decided March 21, 2017, at 9:00 a.m.

Linn Midwest Energy LLC, Linn Operating, Inc., Terra Energy Company LLC, and others are operators of natural gas wells in the Antrim Shale Formation (the ASF) that applied to the Michigan Public Service Commission (the MPSC) for approval to operate wells under vacuum in the ASF. Muskegon Development Company intervened, seeking a declaratory ruling that no gas wells under vacuum would be permitted in the ASF or, alternatively, seeking approval to operate its own gas wells under vacuum. After 24 evidentiary hearings that included 250 exhibits, an administrative law judge issued a proposal for decision recommending that the MPSC dismiss the applications until the applicants had obtained approval from the Michigan Department of Environmental Quality. The MPSC rejected the proposal for decision and instead granted all the applications to operate gas wells under vacuum in the ASF. Riverside Energy Michigan LLC, Jordan Development Company, LLC, HRF Exploration & Production LLC, and Trendwell Energy Corporation opposed the operation of gas wells under vacuum in the ASF and appealed the MPSC's ruling in Docket No. 327723. In Docket No. 330161, appellants challenged the order implementing the MPSC's decision. The Court of Appeals consolidated the appeals.

The Court of Appeals *held*:

1. The MPSC's authority comes from the statutory provisions that created the MPSC, MCL 460.1 *et seq*. Specific to this case, the MPSC has the authority to enact rules and regulations to facilitate the equitable purchasing, taking, and collecting of all gas, MCL 483.105; to prevent waste; to conserve the natural gas resources of Michigan; and to preserve the public's peace, safety, and convenience as related to natural gas production, MCL 483.114. In this case, appellants contended that the MPSC exceeded the scope of its authority by issuing a blanket order allowing all well operators to operate their gas wells under vacuum. According to appellants, the order issued by the MPSC

should have been limited in its application to the parties involved in the instant case because, under MCL 24.203(3), a decision in a contested case generally applies only to those parties named in the case, with the exception of orders in contested cases that are issued after public notice and a public hearing, MCL 24.232(6). In this case, the MPSC's order of general applicability was within its authority because it was issued after public notice and a public hearing.

2. When it is unregulated, natural gas is subject to the "rule of capture," which means that the first to obtain the gas has the right to it, even though it may have come from under a neighbor's land. Michigan's gas rights are governed by the principle of "ownership in place," which limits the rule of capture. The ownership-in-place principle provides that a surface owner is entitled only to his or her equitable share of the recoverable gas in a common pool. In this case, testimony established that there was no evidence of a common pool because there is no way to determine where the gas captured by a well originates. Therefore, the MPSC properly concluded that the ownership-in-place rule did not apply.

3. Any final order of the MPSC must be authorized by law and be supported by competent, material, and substantial evidence on the whole record, and one expert's testimony qualifies as substantial evidence in MPSC cases. Evidence is substantial when a reasoning mind would judge it sufficient to support a conclusion. In this case, appellants claimed that the MPSC's order was unreasonable because competent, material, and substantial evidence did not support the MPSC's assertions concerning the safety, lack of waste, and effect on the correlative rights of adjacent well operators. However, the MPSC properly relied on an independent engineering expert's testimony that monitoring, equipment safety features, and the prompt repair of any leaks would prevent the oxygen levels in the gas mixture from causing the mixture to become flammable. Further, the MPSC properly relied on the testimony of two engineers regarding waste. According to the engineers, wells under vacuum recovered a greater quantity of the gas available, leaving less gas in the fractures when a well is abandoned. Finally, the MPSC properly relied on two engineers' testimony that the correlative rights of adjacent lease owners were sufficiently protected by guidelines already in place that required wells to be drilled at least 330 feet from adjoining projects. According to the engineers, the greater the distance between wells, the less likely it was that two or more neighboring wells would communicate and drain gas from the

other wells. Therefore, the evidence on which the MPSC relied was competent, material, and substantial, and the MPSC's ruling was not unreasonable.

Affirmed.

Varnum, Riddering, Schmidt & Howlett LLP (by *Jack D. Sage* and *Toni L. Newell*) for Riverside Energy Michigan LLC, Jordan Development Company, LLC, HRF Exploration & Production, LLC, and Trendwell Energy Corporation.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, *B. Eric Restuccia*, Deputy Solicitor General, and *Spencer A. Sattler* and *Steven D. Hughey*, Assistant Attorneys General, for the Michigan Public Service Commission.

Ranieri Hanley & Hodek, PLC (by *L. Eric Ranieri*), for Linn Midwest Energy LLC, Linn Operating, Inc., Terra Energy Company LLC, Breitburn Operating LP, Breitburn Management Company LLC, EnerVest Management Partners LP, Belden & Blake Corporation, EnerVest Institutional Fund IX LP, and Merit Energy Company LLC.

Before: BECKERING, P.J., and O'CONNELL and BORRELLO, JJ.

PER CURIAM. Appellants, oil companies operating within the Antrim Shale Formation, appeal as of right the order of the Michigan Public Service Commission (the Commission) granting natural gas producers approval to operate wells under vacuum in the Antrim Shale Formation. The Commission considered the entire shale formation, and its decision permitted all operators who were drilling in the formation to operate their wells under vacuum. We affirm.

I. BACKGROUND

Natural gas production has occurred in the Antrim Shale Formation since the 1940s. Natural gases, primarily methane and carbon dioxide, have absorbed into the shale. The fractures in which this gas resides may be short or long. Water in the system effectively traps the gas in the reservoir, but as water is pumped out of the fracture system, it lowers the reservoir pressure and releases the gas from the organic matter in the shale. By August 2010, more than 10,000 wells owned by 32 companies operated in the formation.

Appellees are natural gas producers that applied to the Commission in August 2009 for permission to operate their natural gas wells under vacuum in the Antrim Shale Formation. The Michigan Administrative Code provides that the Commission must approve the placement of any gas wells under vacuum:

> No gas well, pool or field shall be placed under vacuum by the use of compressors, pumps or other devices except with the approval of the commission. If and when the placing of a vacuum in any well, pool or field is planned, application for approval shall be made to the commission, and the adjoining lease owners and operators of a pool or field who may be affected shall be given notice. The commission may call a hearing on the subject, or may take such action as it deems advisable. [Mich Admin Code, R 460.867.]

Several parties intervened in the application process. Nine companies favored operating wells under vacuum and six companies opposed it. Those in favor argued that operating under vacuum would increase the amount of gas recovered and reduce waste, while those opposed argued that operating wells under vacuum would effectively drain gas from adjacent areas, impinging on the correlative rights of adjacent well operators.

In April 2010, the Commission decided that it would open a docket to consider an appropriate response to the question of "proposals by all interested persons regarding the issue of whether the Commission should permit gas wells to be operated under vacuum from the Antrim Shale Formation" rather than resolving issues on a case-by-case basis. Applicants and intervenors in previous cases were consolidated into the new case.

The Commission took evidence at 24 evidentiary hearings and received 250 exhibits before an administrative law judge issued a proposal for decision. The proposal for decision noted that the Commission and the Michigan Department of Environmental Quality (DEQ) shared authority to regulate gas wells and that there was no understanding regarding which agency would exercise that authority. The proposal recommended that the Commission dismiss the applications until the applicants had obtained DEQ approval to operate their wells under vacuum.

On May 14, 2015, the Commission rejected the proposal for decision and instead granted all applications to operate gas wells under vacuum in the Antrim Shale Formation, subject to certain enumerated conditions. Concerning correlative rights, the Commission determined that existing guidelines, which provided that wells must be drilled at least 330 feet from adjoining projects, sufficiently protected the interests of adjacent leaseholders because data showed that few wells in the Antrim Shale Formation communicated and the lack of communication lessened the risk that a well operating under vacuum would drain gas from a neighboring well. Finally, the Commission determined that allowing wells to operate under vacuum would not alter the status quo because all well operators would be allowed to operate under vacuum if they so chose.

Regarding other considerations, the Commission found that vacuum-well operations were safe and reduced waste because total production would increase and producers would gain more gas than they expended in recovering gas from the wells. Ultimately, the Commission ordered that "all other current and future natural gas wells produced from the Antrim Shale formation may also operate under a vacuum" subject to requirements the Commission outlined in the May 14, 2015 decision.

Appellants, those parties opposed to operating wells under vacuum, now appeal.

II. STANDARD OF REVIEW

The standard of review for orders of the Commission "is narrow and well defined." *In re Application of Mich Electric Transmission Co*, 309 Mich App 1, 9; 867 NW2d 911 (2015). When appealing a decision of the Commission, the appellant has the burden "to show by clear and satisfactory evidence that the order of the commission complained of is unlawful or unreasonable." MCL 462.26(8).

An order is unlawful if the Commission failed to follow a statutory mandate or abused its discretion. *In re MCI Telecom Complaint*, 460 Mich 396, 427; 596 NW2d 164 (1999). "[A]gency interpretations are entitled to respectful consideration, but they are not binding on courts and cannot conflict with the plain meaning of the statute." *In re Rovas Complaint*, 482 Mich 90, 117-118; 754 NW2d 259 (2008). We review de novo whether the Commission exceeded the scope of its authority. *In re Pelland Complaint*, 254 Mich App 675, 682; 658 NW2d 849 (2003). We also review de novo issues of statutory construction. *Mich Electric Transmission Co*, 309 Mich App at 10.

An order is unreasonable if the evidence does not support it. See *id*. The Commission's final order must "be supported by competent, material, and substantial evidence on the whole record." *Id*. Substantial evidence is "evidence that a reasoning mind would accept as sufficient to support a conclusion." *Dignan v Mich Pub Sch Employees Retirement Bd*, 253 Mich App 571, 576; 659 NW2d 629 (2002). The Commission is entitled to weigh conflicting evidence and opinion testimony in order to determine in which direction the evidence preponderates. See *Mich Electric Transmission Co*, 309 Mich App at 12. "The testimony of one expert constitutes substantial evidence in cases before the Commission." *Id*.

III. SCOPE OF THE COMMISSION'S AUTHORITY

Appellants argue that the Commission's order exceeded the scope of its statutory authority and that the Commission may not issue a blanket order covering production in the Antrim Shale Formation because a decision in a contested case like this one can only apply to those parties involved in the case. We disagree.

The Commission derives its authority from the statutes underlying its creation and possesses no common-law authority. MCL 460.1 *et seq*.; *In re Pub Serv Comm Guidelines For Transactions Between Affiliates*, 252 Mich App 254, 263; 652 NW2d 1 (2002). The Commission is authorized to enact regulations "for the equitable purchasing, taking and collecting of all . . . gas . . . , which regulations shall apply to all persons affected thereby in like manner . . . ." MCL 483.105. In addition, the Commission is authorized to

> prevent the waste of natural gas in producing operations . . . and to make rules and regulations for that purpose. It is hereby authorized and empowered to do all

> things necessary for the conservation of natural gas in connection with the production . . . and to establish such other rules and regulations as will be necessary to carry into effect this act, to conserve the natural gas resources of the state and to preserve the public peace, safety, and convenience in relation thereto. [MCL 483.114.]

The Commission may set standards "either pursuant to the rule-making provisions of the [Administrative Procedures Act, MCL 24.201 *et seq*.,] or case by case through adjudication." *Northern Mich Exploration Co v Pub Serv Comm*, 153 Mich App 635, 649; 396 NW2d 487 (1986). The Administrative Procedures Act provides that a rule is "an agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency, or that prescribes the organization, procedure, or practice of the agency, including the amendment, suspension, or rescission of the law enforced or administered by the agency." MCL 24.207.

Generally, a contested case is a proceeding that determines the legal rights, duties, or privileges of the named parties. MCL 24.203(3). The determination "is required by law to be made by an agency after an opportunity for an evidentiary hearing." *Id*. Typically, an agency may not make a generally applicable statement in an order in contested cases. See *In re Pub Serv Comm Guidelines*, 252 Mich App at 264-265. "Where a statute provides that an agency may proceed by rule-making or by order and an agency proceeds by order in lieu of rule-making, the order shall not be given general applicability to persons who were not parties to the proceeding or contested case before the issuance of the order, *unless the order was issued after public notice and a public hearing*." MCL 24.232(6) (emphasis added).

In this case, while the controversy over vacuum-well operation in the Antrim Shale Formation began as contested cases, the Commission later stated its intent to consider "proposals by all interested persons regarding the issue of whether the Commission should permit gas wells to be operated under vacuum from the Antrim Shale Formation" rather than resolving the issues. The Commission then took extensive public testimony, not only from those involved in the prior contested cases but from others, and acted only after those public hearings. We conclude that the Commission's generally applicable orders were not outside its authority because they were issued after public notice and a public hearing under MCL 24.232(6).

IV. LAWFULNESS OF THE COMMISSION'S ORDER

Appellants next argue that the Commission's order was unlawful because it failed to protect the correlative rights of other owners of wells in the Antrim Shale Formation by apportioning the natural gas from the common pool. We disagree because there was no evidence that a common pool existed.

Generally, surface owners of oil and gas rights are only entitled to proportionate shares of the common oil and gas reserves underlying the land:

> Absent regulation, natural gas and oil are subject to the rule of capture under which, essentially, the first person to take them is entitled to them even though the well drains natural resources from under the land of another. In most American jurisdictions, the rule has been modified by the "fair share" or "ownership-in-place" rule. Michigan is an ownership-in-place state. Under the rule, "each owner of the surface is entitled only to his equitable and ratable share of the recoverable oil and gas energy in the common pool in the proportion which the recoverable reserves

> underlying his land bears to the recoverable reserves in the pool." [*Northern Mich Exploration*, 153 Mich App at 638-639 (citations omitted).]

The ownership-in-place rule only limits the application of the rule of capture; it does not eliminate it. See *Wronski v Sun Oil Co*, 89 Mich App 11, 22; 279 NW2d 564 (1979).

In this case, Steven Kohler testified that because of the nature of the fracturing in the Antrim Shale Formation, there is no way to determine "where any of the gas that enters any of the wellbores really comes from . . . ." There was no contrary testimony to establish that a common pool of gas existed. Accordingly, we conclude that the Commission properly determined that the ownership-in-place rule did not apply in this case because there was no common pool from which to apportion equitable shares.

V. REASONABLENESS OF THE COMMISSION'S ORDER

Appellants argue that the Commission's order was unreasonable because competent, material, and substantial evidence did not support its findings regarding the safety, lack of waste, and effect on correlative rights associated with operating natural gas wells under vacuum. We disagree. As previously stated, the testimony of one expert constitutes substantial evidence, and the Commission is entitled to accept it even if contrary evidence exists. *Mich Electric Transmission Co*, 309 Mich App at 12.

Regarding the safety of vacuum-well operation, the Commission specifically noted the testimony of Daniel Cooper, an independent engineering expert. According to Cooper, operating the wells under vacuum could pull oxygen into the system, but because the gases in the Antrim Shale Formation were composed of 70% meth-

ane and 30% carbon dioxide, the oxygen level would have to rise to 17% in order for the mixture to become flammable. Equipment monitoring and prompt repair of leaks would prevent combustible mixtures from forming. Additionally, safeguards could be built into the equipment to shut down parts of the system if the oxygen content rose to dangerous levels. We conclude that competent, material, and substantial evidence existed because reasonable minds could rely on Cooper's testimony to conclude that wells could be operated safely under vacuum.

Regarding waste, the Commission relied on the testimony of two engineers, Todd Tetrick and Steven Kohler. Tetrick testified that using vacuums increased net gas recovery by leaving less gas in the fractures at the point that the wellheads were abandoned. According to Kohler, who used data from 18 wells that included wells operated under vacuum, if 50% of the wells in the Antrim Shale Formation were operated under vacuum, the total recoverable gas from the formation would increase by 3.7% to 8.9%. Kohler testified that using vacuums would prevent waste because it would result in more gas recovery. The Commission found Kohler's testimony more credible than the contradictory testimony of Vello Kuuskraa because Kohler used actual data to reach his conclusions while Kuuskraa used simulations. Again, competent evidence supported the Commission's findings because reasonable minds could rely on the evidence to conclude that vacuum wells would increase gas production and thus reduce waste.

Finally, regarding correlative rights, the Commission relied on the testimony of Kohler and engineer Chet Ozgen. Kohler testified that the greater the distance between wells, the less likely it would be that

the wells would communicate and drain gas from each other. According to Ozgen, wells must have a strong connection through the fracture system in order for drainage to occur. The Commission noted that DEQ rules require at least 330 feet of space between wellheads and that, in a system of complex fractures like that found in the Antrim Shale Formation, it could take years for communication between wells to develop. Additionally, the Commission observed that gas producers typically drilled offset wells along leasehold boundary lines to reduce the chance of drainage. In sum, the evidence was sufficient to support a conclusion that existing measures sufficiently protected correlative rights, and the Commission was entitled to accept this evidence even though contrary evidence existed.

We affirm.

BECKERING, P.J., and O'CONNELL and BORRELLO, JJ., concurred.

PEOPLE v MEADOWS

Docket No. 334927. Submitted March 14, 2017, at Detroit. Decided March 28, 2017, at 9:00 a.m.

Zerious Meadows was convicted of first-degree murder, MCL 750.316, in the Recorder's Court of Detroit, Karl F. Zick, J., after he committed an act of arson in 1970 that resulted in the death of two children. Defendant was 16 years old when he committed the crime. In 1973, the Court of Appeals reversed defendant's conviction and remanded the case for a new trial. 46 Mich App 741 (1973). After a second jury trial in 1975, defendant was again convicted of first-degree murder and sentenced to life in prison without the possibility of parole. In 2012, the United States Supreme Court held that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on cruel and unusual punishments, *Miller v Alabama*, 567 US 460 (2012), and subsequently held that *Miller* applies retroactively, *Montgomery v Louisiana*, 577 US ___; 136 S Ct 718 (2016). In response to *Miller*, the Michigan Legislature enacted MCL 769.25 and MCL 769.25a, which address life-without-parole offenses committed by minors and the option of imprisonment for a term of years. Because defendant committed the crime when he was 16 years old and had been sentenced to life in prison without the possibility of parole, defendant was eligible for resentencing under *Miller* and *Montgomery*. On July 22, 2016, the prosecution filed a notice requesting that the circuit court impose a sentence for a term of years consistent with MCL 769.25a(4)(c), including a maximum sentence of 60 years' imprisonment. The Wayne Circuit Court, Bruce U. Morrow, J., imposed a sentence of 25 to 45 years' imprisonment and then ordered defendant's release after giving him credit for more than 46 years served. The prosecution appealed, alleging that the maximum sentence had to be set at 60 years under MCL 769.25a(4)(c). In two separate unpublished orders, entered September 23, 2016, and October 19, 2016 (Docket No. 334927), the Court of Appeals granted the prosecution's application for leave to appeal, stayed further proceedings, and prohibited defendant's release from custody.

The Court of Appeals *held*:

MCL 769.25a(4)(c) provides that if the prosecuting attorney does not file a motion requesting that the court impose a sentence of imprisonment for life without the possibility of parole under MCL 769.25a(4)(b), then the court shall sentence the individual to a term of imprisonment for which the maximum term shall be 60 years and the minimum term shall be not less than 25 years or more than 40 years. The plain and unambiguous language of the statute provides that the maximum term "shall be 60 years"; it did not state that the maximum term of imprisonment shall be "not more" than 60 years. Therefore, under MCL 769.25a(4)(c), defendant's maximum term had to be set at 60 years, and the circuit court erred by imposing a maximum sentence of 45 years.

Vacated and remanded for resentencing.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Jason W. Williams*, Chief of Research, Training, and Appeals, and *Jon P. Wojtala*, Assistant Prosecuting Attorney, for the people.

Melvin Houston for defendant.

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

MURPHY, J. This case arises out of defendant's conviction of first-degree murder, MCL 750.316, more than 40 years ago, which crime was committed in 1970 when defendant was 16 years old, and out of the opinions issued by the United States Supreme Court in *Miller v Alabama*, 567 US 460; 132 S Ct 2455; 183 L Ed 2d 407 (2012), and *Montgomery v Louisiana*, 577 US ___; 136 S Ct 718; 193 L Ed 2d 599 (2016). On resentencing, the circuit court imposed a prison term of 25 to 45 years and then ordered defendant's release after giving him credit for more than 46 years served. In two separate orders, this Court ultimately granted the prosecution's application for leave to appeal,

stayed further proceedings, and prohibited defendant's release from custody. *People v Meadows*, unpublished order of the Court of Appeals, entered October 19, 2016 (Docket No. 334927); *People v Meadows*, unpublished order of the Court of Appeals, entered September 23, 2016 (Docket No. 334927). We vacate defendant's sentence and remand for resentencing.

Defendant, as a 16-year-old, committed an act of arson in 1970 that resulted in the death of two children. In 1971, defendant was convicted of first-degree murder, but this Court reversed defendant's conviction and remanded the case for a new trial. *People v Meadows*, 46 Mich App 741; 208 NW2d 593 (1973). In 1975, defendant was once again convicted of first-degree murder. He was sentenced to life in prison without the possibility of parole. In 2012, the United States Supreme Court decided *Miller*, which held "that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.' " *Miller*, 567 US at 465. In response to *Miller*, our Legislature enacted MCL 769.25 and MCL 769.25a, which address life-without-parole offenses committed by minors and the option of imprisonment for a term of years. 2014 PA 22. MCL 769.25 applied to future convictions and certain past convictions with matters still pending or pending when *Miller* was issued. On the other hand, MCL 769.25a applied to closed cases for which appeals had been exhausted or were no longer available, but only if the Michigan or United States Supreme Court were to hold in the future that *Miller* was retroactively applicable. MCL 769.25a was eventually triggered when the United States Supreme Court issued its decision in *Montgomery*, concluding that the holding in *Miller* constituted a substantive rule of constitutional law that must be

afforded retroactive applicability. *Montgomery*, 577 US at ___; 136 S Ct at 736. The parties here agree that MCL 769.25a governs in this case.

For purposes of resentencing, the prosecution did *not* file a motion seeking a "sentence of imprisonment for life without the possibility of parole." MCL 769.25a(4)(b). Instead, the prosecution filed a notice requesting that the circuit court impose a sentence for a term of years consistent with MCL 769.25a(4)(c), including a maximum sentence of 60 years' imprisonment. And MCL 769.25a(4)(c) provides that "[i]f the prosecuting attorney does not file a motion under subdivision (b) [asking for life without parole], the court shall sentence the individual to a term of imprisonment *for which the maximum term shall be 60 years* and the minimum term shall be not less than 25 years or more than 40 years." (Emphasis added.) The parties agree that this provision, MCL 769.25a(4)(c), controls, with defendant contending that it merely provides that the maximum term can be no more than 60 years. In a sentencing memorandum and at the resentencing hearing, defendant requested a sentence of 25 to 45 years' imprisonment. At the hearing, the prosecution, while reminding the circuit court about the horrific nature of the crime, never really spoke to the question regarding the specific length of the prison term that should be imposed. However, as mentioned earlier, in its notice, the prosecution had requested the imposition of a sentence that was consistent with MCL 769.25a(4)(c), including a mandatory 60-year maximum sentence. Given that the prosecution's stance was and is that the maximum sentence had to be set at 60 years under MCL 769.25a(4)(c), and considering that defendant had already served more than 46 years, essentially making the minimum sentence irrelevant at this point, we can understand to a degree why the

prosecution was not more vocal at resentencing, although it should have squarely disputed defendant's request for a 45-year maximum term. The circuit court imposed a sentence of 25 to 45 years' imprisonment.

We need not spend much time resolving this appeal; the circuit court's sentence was not permitted under the plain and unambiguous language of MCL 769.25a(4)(c). Upon review de novo relative to statutory construction, and appreciating that we must discern the intent of the Legislature by examining the plain language of the words used in the statute, *Driver v Naini*, 490 Mich 239, 246-247; 802 NW2d 311 (2011), MCL 769.25a(4)(c) cannot be any more clear—"the maximum term shall be 60 years . . . ." The statute does not state that the maximum term of imprisonment shall be "not more" than 60 years, which is how defendant improperly interprets MCL 769.25a(4)(c).[1] In sum, the circuit court erred by imposing a maximum sentence of 45 years.

Vacated and remanded for resentencing. We do not retain jurisdiction.

M. J. KELLY, P.J., and RONAYNE KRAUSE, J., concurred with MURPHY, J.

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[1] MCL 769.25(9), which does not apply, provides that "[i]f the court decides not to sentence the individual to imprisonment for life without parole eligibility, the court shall sentence the individual to a term of imprisonment for which the maximum term shall be not less than 60 years and the minimum term shall be not less than 25 years or more than 40 years." This provision reflects that the Legislature is more than capable of clearly indicating whether a maximum term of imprisonment provides some room for the exercise of discretion, which is not the case with MCL 769.25a(4)(c).

LANDSTAR EXPRESS AMERICA, INC v NEXTEER AUTOMOTIVE CORPORATION

Docket No. 328334. Submitted November 1, 2016, at Detroit. Decided March 30, 2017, at 9:00 a.m.

Landstar Express America, Inc., brought an action in the Oakland Circuit Court against Nexteer Automotive Corporation and Steeringmex S. De R. L. De C. V., alleging that defendants breached an implied contract when plaintiff did not receive payment for the expedited deliveries it made on behalf of nonparty Contech Castings, LLC, to defendants or that in the alternative defendants were unjustly enriched by those delivery services for which plaintiff did not receive payment. Defendants entered into a contract with Contech for Contech to supply defendants with casting parts for the automobile steering assemblies defendants manufacture for certain automobile companies. The contract provided that Contech was responsible for paying the costs of expedited shipping to defendants if Contech was unable to deliver the casting parts in time for defendants to meet their own delivery deadlines. When Contech was unable to deliver the parts on time from April 2011 through November 2011, Contech contracted with plaintiff for express shipping of those parts to defendants. Plaintiff brought an action in the United States District Court for the Eastern District of Michigan against Contech, seeking to recover, under the terms of the contract, payment for the shipping costs plaintiff incurred when it delivered the casting parts to defendants for Contech. Plaintiff obtained a judgment against Contech in the federal action, but plaintiff only collected a portion of the judgment amount from Contech. Plaintiff then filed the instant action to recover the portion of the shipping costs it was unable to collect from Contech in the federal action, arguing that an implied contract was formed under a theory of common-law assignee liability when defendants accepted the goods delivered by plaintiff for Contech. The court, James M. Alexander, J., granted defendants' motion for summary disposition and denied plaintiff's competing motion, concluding that defendants were not liable to plaintiff for the shipping costs because Contech had contractually agreed to pay plaintiff for its delivery services. The trial court also concluded that defendants

were not unjustly enriched because Contech, not defendants, had received the primary benefit of plaintiff's shipment services in that the services allowed Contech to satisfy its contractual duty to timely deliver parts to defendants. Plaintiff appealed.

The Court of Appeals *held*:

1. Liability for shipping costs is generally a matter of contract because it lies against the person who required the carrier to perform the service. While consignors of goods are normally responsible for shipping costs, the parties may alter responsibility for those costs by contract. In general, a contract will be implied only if there is no express contract between the same parties on the same subject matter. However, absent a clear law that unquestionably preempts Michigan contract law, parties involved in shipping goods are free to contract among themselves as to the liability for shipping costs; the law will not imply a contract for payment of shipping costs by a consignee when the consignor and carrier contractually agree that the consignor is liable for those costs. In this case, the trial court correctly granted summary disposition in favor of defendants on plaintiff's claim of breach of implied contract. Contech directly contracted with plaintiff to ship parts to defendants, who were not parties to the contract, and the contract between Contech and plaintiff clearly stated that Contech was responsible for those shipping charges. A contract was not implied because, even though there was no direct contract between plaintiff and defendants, the contract between Contech and defendants and between Contech and plaintiff both provided that Contech was responsible for the shipping costs.

2. The law will imply a contract to prevent unjust enrichment but only if the defendant was unjustly or inequitably enriched at the plaintiff's expense; enrichment is unjust when a party unjustly received and retains an independent benefit. In this case, the trial court correctly dismissed plaintiff's unjust-enrichment claim. A contract between plaintiff and defendants could not be implied because there were express contracts between plaintiff and Contech and defendants and Contech that placed liability for shipping costs on Contech. In any event, plaintiff was unable to demonstrate that defendants received an unjust benefit; defendants received the benefit for which they contracted—the timely delivery of steering assembly parts—and all parties contemplated that Contech would be responsible for expedited shipping charges.

Affirmed.

CONTRACTS — CARRIERS — LIABILITY FOR SHIPPING COSTS.

Although consignors of goods are normally responsible for shipping costs, absent a clear law that unquestionably preempts Michigan contract law, parties involved in shipping goods are free to contract among themselves as to the liability for shipping costs; the law will not imply a contract for payment of shipping costs by a consignee when the consignor and carrier contractually agree that the consignor is liable for those costs.

Holland & Knight LLP (by *Lawrence J. Hamilton II* and *Joshua H. Roberts*) and *Clark Hill PLC* (by *Cynthia M. Filipovich*) for plaintiff.

Foley & Lardner LLP (by *John R. Trentacosta*, *Vanessa L. Miller*, and *Nicholas J. Ellis*) for defendants.

Before: STEPHENS, P.J., and SAAD and METER, JJ.

SAAD, J. Plaintiff, Landstar Express America, Inc., appeals the trial court's order that granted summary disposition in favor of defendants, Nexteer Automotive Corporation and Steeringmex S. De R.L. De C.V. We affirm.

I. NATURE OF THE CASE

Plaintiff sued defendants for $5 million for plaintiff's delivery of automotive parts to defendants notwithstanding that plaintiff had delivered the parts at the request of and by way of contract with nonparty Contech Castings, LLC. Indeed, in the contract between Contech and plaintiff, Contech agreed to pay plaintiff for these shipments, which was consistent with Contech's express contractual obligation to defendants to make on-time delivery of the parts and to pay for premium shipments if it could not comply with its on-time delivery commitments to defendants. At no

time did defendants contract with plaintiff or promise to pay plaintiff for the shipments. In fact, prior to this suit, plaintiff never claimed that it looked to defendants for payment of the shipping fees.

To underscore this last point, when Contech failed to pay plaintiff for the parts plaintiff had delivered to defendants, plaintiff rightfully sued Contech for breach of contract in federal court, not defendants, for Contech's failure to pay the shipping costs. In federal district court, plaintiff opposed Contech's effort to bring defendants into the suit and instead asserted that it was Contech, and not defendants, that was responsible in contract to pay plaintiff. Yet, when plaintiff could not recover $5 million of its $6 million judgment against Contech, plaintiff changed targets and sued defendants in state court on an implied-contract theory—that by accepting delivery of the automobile parts, defendants agreed to pay plaintiff.

In other words, plaintiff asks this Court to imply and impose a contractual obligation on defendants to pay $5 million to plaintiff, notwithstanding that (1) Contech had an express contract with plaintiff to pay for these shipments, (2) Contech was contractually obligated to defendants to pay for these shipments, (3) plaintiff admitted in federal court that Contech, not defendants, was responsible for these shipments, and (4) defendants never agreed or promised to pay plaintiff for these shipments.

We agree with the trial court that Michigan contract law governs this case and that Contech, not defendants, contracted to pay for the shipments. Furthermore, we will not imply a contractual obligation on defendants that contradicts the stated position of plaintiff in federal court and also contradicts the express contractual arrangements between Contech and

defendants and between Contech and plaintiff, both of which govern these shipments.

Plaintiff also claims that defendants should be obligated to pay plaintiff because defendants were unjustly enriched by plaintiff's delivery of the automobile parts. We reject this theory for the simple reason that defendants were not unjustly or unfairly enriched. To the contrary, by virtue of their contract with Contech, defendants were entitled to on-time delivery of parts and to Contech's payment of the expedited shipments. In other words, defendants received simply what they contracted for, no more, no less.

For these reasons, and pursuant to the law explained below, we affirm the trial court's dismissal of plaintiff's suit against defendants.

II. BASIC FACTS AND PROCEDURAL HISTORY

Plaintiff is a transportation and logistics company that arranges various services for its customers, including expedited air transportation. Defendants manufacture automobile steering assemblies and supply them to Ford Motor Company and General Motors Company. Defendants have multiple plants, including plants in Michigan. At all times relevant to this appeal, nonparty Contech supplied certain casting parts to defendants for these steering systems. The parts were manufactured in Contech's facility in Clarksville, Tennessee, and delivered to defendants' plants.

Defendants' contract with Contech provided that if Contech failed to have goods ready in time to meet defendants' delivery deadlines, it was Contech's responsibility to pay for premium shipments to defendants. In June 2011, Contech began having difficulty keeping up with defendants' demand for parts and started to fall behind schedule. In order to deliver the

parts on time, Contech arranged for plaintiff to expedite the shipments to defendants and agreed to pay plaintiff for its services. The expedited air shipments at issue occurred between April 14, 2011, and November 15, 2011, which resulted in Contech owing more than $5 million to plaintiff.

Contech did not pay plaintiff, and in January 2013, plaintiff obtained a judgment in federal district court for $5,995,510.44 against Contech, based on the breach of express contracts. Notably, in the federal district court action, Contech attempted to bring defendants into the suit, but plaintiff opposed the effort.[1] Plaintiff was able to collect only $1.1 million of the judgment from Contech.

To recover the remaining $5 million, plaintiff filed the instant lawsuit against defendants and brought claims of breach of contract and unjust enrichment. Plaintiff alleged that an implied contract for payment was formed—under a theory of common-law consignee liability—when defendants accepted the goods from the carrier. Alternatively, plaintiff alleged that it would be inequitable for defendants to demand and orchestrate the expedited shipping and to receive the benefit of the transportation services without compensating plaintiff.

Plaintiff and defendants filed competing motions for

[1] Specifically, at the federal district court, plaintiff stated in its brief opposing Contech's motion for leave to file a third-party complaint against Nexteer:

> Landstar did not intend for Nexteer to remit payment for services ordered by Contech. Indeed, Landstar continuously billed Contech for its services and discussed costs of those services with Contech, not Nexteer. Contech cannot show that Landstar ever consented to any agreement to be paid by Nexteer when its contract for services, implied or otherwise, was with Contech. [Citation omitted.]

summary disposition under MCR 2.116(C)(10). The trial court ruled that there were no material questions of fact in dispute and that defendants were entitled to summary disposition as a matter of law. The trial court dismissed plaintiff's breach-of-contract claim, concluding that a consignee's acceptance of an air shipment alone no longer creates an express or implied obligation to pay the shipment costs. Instead, the court noted that the question of liability for air freight costs is a matter of contract. The trial court concluded that the evidence established that Contech "secured and contractually agreed" to pay plaintiff's shipping costs. The trial court also dismissed plaintiff's unjust-enrichment claim. It found that Contech, not defendants, had received the "primary benefit" of plaintiff's shipment services because the services allowed Contech to satisfy its contractual duties to timely deliver parts to defendants. It further found that defendants had not received benefits from plaintiff's shipping services other than those already considered in the agreement with its supplier. The trial court concluded that, although Contech's performance of its contractual duties benefited defendants, this could not form the basis of a benefit conferred by plaintiff to satisfy the definition of an unjust-enrichment claim.

Accordingly, the trial court granted defendants' motion for summary disposition and denied plaintiff's motion for summary disposition. This appeal followed.

III. STANDARD OF REVIEW

On appeal, we review a trial court's decision on a motion for summary disposition brought under MCR 2.116(C)(10) de novo. *Johnson v Recca*, 492 Mich 169, 173; 821 NW2d 520 (2012). When deciding a motion for summary disposition, a court must consider the plead-

ings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party, *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012), and all reasonable inferences are to be drawn in favor of the nonmoving party, *Dextrom v Wexford Co*, 287 Mich App 406, 415; 789 NW2d 211 (2010). Summary disposition is proper if the evidence fails to establish a genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id*. In addition, issues of contractual interpretation are questions of law that this Court reviews de novo. *Burkhardt v Bailey*, 260 Mich App 636, 646; 680 NW2d 453 (2004).

IV. BREACH-OF-CONTRACT CLAIM

Plaintiff contends that the trial court erroneously dismissed its action because there remains a material dispute regarding whether defendants, the consignees, were liable for unpaid air freight costs by operation of law because they accepted delivery of the shipments. We disagree.

The Michigan Supreme Court has indicated that liability in such shipping matters ordinarily is a matter of contract because it lies against "the person who required [the carrier] to perform the service." *Penn R Co v Marcelletti*, 256 Mich 411, 414; 240 NW 4 (1932) (quotation marks and citation omitted). The *Marcelletti* Court noted that, while the consignor normally is responsible for such costs, if the parties intend, they can "[u]ndoubtedly" alter this arrangement so the consignor has no liability for shipment costs. *Id*.; see also *Louisville & N R Co v Central Iron & Coal Co*, 265 US 59, 66; 44 S Ct 441; 68 L Ed 900 (1924) (stating that parties "were left free to contract" on matters not addressed by rule or law). The Michigan Supreme

Court case *New York Central R Co v Brown*, 281 Mich 74; 274 NW 715 (1937), is also instructive. In *Brown*, the Court noted that by accepting the shipment and exercising dominion over it, the consignee had "entered into the contract expressed in the bill of lading." *Id*. at 80. And because the contract indicated that the defendant was the "consignee" and that the freight was to be charged to the consignee, the defendant could not escape liability. *Id*. at 76, 80. Thus, the terms of the contract were key in the *Brown* Court's analysis.

Here, for each of the expedited air shipments at issue, Contech contracted with plaintiff; neither defendant was a party to those particular contracts. Under the express terms of the contracts, Contech, not defendants, requested the shipments and was obligated to pay the freight charges. Further, nearly all the bills of lading were marked "pre-paid," and the invoices identified Contech as the "Bill to" party. These facts again show that defendants were not liable for any shipping costs. Indeed, plaintiff conceded in federal district court that (1) its contracts with Contech reflect that Contech is responsible for the shipping charges and (2) plaintiff always intended for Contech to pay the shipping charges. Further, in the contract between Contech and defendants, Contech agreed that it would be responsible for the freight charges associated with its supplying parts to defendants. As a result, it is unmistakable that, under contract law, defendants cannot be held liable for the freight charges at issue, and the trial court properly granted defendants' motion for summary disposition.[2]

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[2] On the basis of this conclusion, the facts that plaintiff relies on to show that defendants arguably had a greater role than merely being recipients of the shipments do not alter the analysis regarding the parties' intent.

Nevertheless, while plaintiff acknowledges that there was no express contract between it and defendants, plaintiff claims that defendants are liable under an implied-contract theory. Specifically, plaintiff relies on the application of the doctrine of "consignee liability."[3] We reject this attempt to impose an implied contract when the subject matter clearly is governed by express contracts.

Our Court has held that "a contract will be implied only if there is no express contract covering the same

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[3] Regarding this doctrine, plaintiff primarily relies on the three early United States Supreme Court cases: *Pittsburgh, C, C & St L R Co v Fink*, 250 US 577, 581; 40 S Ct 27; 63 L Ed 1151 (1919); *New York Central & H R R Co v York & Whitney Co*, 256 US 406, 408; 41 S Ct 509; 65 L Ed 1016 (1921); and *Central Iron*, 265 US 59. In *Fink*, 250 US at 581, the Court stated that "the consignee is *prima facie* liable for the payment of the freight charges when he accepts the goods from the carrier." However, we agree with the North Dakota Supreme Court, which stated that "*Fink* and *York & Whitney* do not hold that the common law presumptions, as distinguished from the statutory filed rate doctrine, cannot be altered by contract." *E W Wylie Corp v Menard, Inc*, 523 NW2d 395, 398 (ND, 1994). Instead,

> *Fink* and *York & Whitney* better illustrate the "filed rate doctrine" than any common law rule. Simply put, the filed rate doctrine, deeply lodged in the complex history and turgid language of the Interstate Commerce Act, dictates that the rate a common carrier duly files with the Interstate Commerce Commission (ICC) is the only lawful rate it can charge for its services, and that deviation from the filed rate is not permitted under any pretext. [*Id*.]

Further, plaintiff's reliance on *Central Iron* also is misplaced. In *Central Iron*, 265 US at 66, the Supreme Court noted that parties "were left free to contract" on matters not addressed by the tariff filed with the ICC. Hence, because "[t]he tariff did not provide when or by whom the payment should be made," the Court looked to the contractual terms in the bills of lading to determine whether the consignee was responsible for the uncollected portion of the legally mandated tariff. *Id*. at 66-67. Thus, "*Central Iron* clarifies that contract law ordinarily determines who is liable for payment of freight charges under the common law." *Wylie*, 523 NW2d at 399.

subject matter." *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 478; 666 NW2d 271 (2003). Plaintiff contends that this principle of law does not apply in this instance because there is no express contract between it and defendants. It is true that "[g]enerally, an implied contract may not be found if there is an express contract *between the same parties* on the same subject matter." *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 194; 729 NW2d 898 (2006) (quotation marks and citation omitted). However, the *Morris Pumps* Court qualified that "generally" the same parties need to have an express contract on the same subject matter—it is not an absolute requirement.

In *Morris Pumps*, the city of Detroit contracted with a general contractor to construct a wastewater treatment facility. *Id*. at 190. The general contractor then subcontracted with Centerline Piping to complete the mechanical portion of the contract. *Id*. Centerline, in turn, contracted with several materials suppliers for equipment and supplies. *Id*. The suppliers provided the various contracted-for goods to the site, but Centerline abandoned the project, went out of business, and did not pay the suppliers. *Id*. The general contractor retained a new subcontractor to finish the project. *Id*. at 190-191. The new subcontractor used the materials provided by the suppliers but did not pay the suppliers for the goods. *Id*. at 191. The suppliers sought recovery from the general contractor on an implied contract/unjust enrichment theory. *Id*.

The defendant general contractor in *Morris Pumps* argued that no contract could be implied because of the existence of express contracts between the plaintiffs and Centerline. The Court rejected this argument and stated:

> [W]e recognize that there existed express contracts between plaintiffs and Centerline, all of which concerned the subject matter at issue here. Thus, we agree with defendant that *there were express contracts covering the same subject matter*. However, *defendant was not a party to any of these express contracts*. Therefore, the contracts did not exist between the same parties. Because there were no express contracts between the same parties on the same subject matter, defendant's argument with respect to this issue must fail. The mere existence of the express contracts between plaintiffs and Centerline does not bar recovery from defendant . . . . [*Id*. at 194-195 (emphasis altered; citation omitted).]

While plaintiff directs our attention to the *Morris Pumps* Court's reliance on the fact that there was no contract between the plaintiff and the defendant, we think that this aspect alone is not controlling. Indeed, the *Morris Pumps* Court also noted how there were "express contracts covering the same subject matter" but that the defendant "was not a party to *any* of these express contracts." *Id*. (emphasis added). Unlike in *Morris Pumps*, defendants here were parties to express contracts related to the subject matter, i.e., the expedited shipping. In addition to the contracts between Contech and plaintiff, in which Contech and plaintiff agreed that Contech was responsible for the shipping costs, the contract between defendants and Contech also provided that Contech—not defendants—was responsible for the expedited shipping costs for the automotive parts. In sum, while there was no direct contract between plaintiff and defendants, the fact that defendant contracted with Contech and Contech, in turn, contracted with plaintiff—with all contracts specifically and consistently providing that Contech is the party responsible for shipping costs—is sufficient to preclude the imposition of any implied contract to the contrary.

Accordingly, we reject plaintiff's attempt to impose liability on defendants through an amorphous "consignee liability" theory when, under Michigan contract law, the obligation for the shipping costs falls squarely to Contech. Absent any clear law that unquestionably preempts Michigan law, Michigan contract law applies and governs our decision. Therefore, we agree with the "prevailing view" that "the parties involved in the transportation arrangement are free to contract among themselves as to the liability for the freight charges and this includes a carrier agreeing not to look to the consignee for payment—at least absent a federal statute or regulation to the contrary." *Western Home Transp, Inc v Hexco, LLC*, 28 F Supp 3d 959, 969-970 (D ND, 2014). Only absent the clear intent of the parties would any common-law presumptions or defaults of liability apply. See *Wylie*, 523 NW2d at 399.

V. UNJUST-ENRICHMENT CLAIM

Plaintiff asserts that the trial court erroneously dismissed its claim of unjust enrichment because there remains a material dispute regarding whether defendants were unjustly enriched by plaintiff's expedited air shipments. We disagree.

An equitable claim of unjust enrichment is grounded on the theory that the law will imply a contract to prevent the unjust enrichment of another party. *Belle Isle Grill Corp*, 256 Mich App at 478. However, as we have already determined, plaintiff cannot imply a contract with defendants because an express contract exists between plaintiff and Contech covering the subject matter. *Id*. Therefore, defendants were also entitled to summary disposition on this claim of unjust enrichment.

Regardless, a review of the underlying merits of plaintiff's claim of unjust enrichment also requires dismissal of that claim. A claim alleging unjust enrichment requires that a plaintiff establish "(1) the receipt of a benefit by the defendant from the plaintiff and (2) an inequity resulting to the plaintiff because of the retention of the benefit by the defendant." *Morris Pumps*, 273 Mich App at 195. "[T]he law will imply a contract to prevent unjust enrichment only if the defendant has been unjustly or inequitably enriched at the plaintiff's expense." *Id*. However, not all enrichment is necessarily unjust. *Karaus v Bank of NY Mellon*, 300 Mich App 9, 23; 831 NW2d 897 (2013). "[T]he key to determining whether enrichment is unjust is determining whether a party unjustly received and retained an independent benefit." *Id*. Further,

> "the mere fact that a third person benefits from a contract between two other persons does not make such third person liable in quasi-contract, unjust enrichment, or restitution. Moreover, where a third person benefits from a contract entered into between two other persons, in the absence of some misleading act by the third person, the mere failure of performance by one of the contracting parties does not give rise to a right of restitution against the third person." [*Morris Pumps*, 273 Mich App at 196, quoting 66 Am Jur 2d, Restitution and Implied Contracts, § 32, p 628.]

We hold that plaintiff cannot demonstrate how any benefit received by defendants was unjust. As already discussed, the evidence clearly shows that Contech contracted with plaintiff for the shipments at issue. In those contracts, Contech was responsible for the payment of those requested services. Likewise, the contract between defendants and Contech shows that Contech was responsible for expedited-freight charges. Accordingly, the benefit defendants received—the

timely delivery of steering assembly parts—was nothing more than what all the parties contemplated. Further, all the parties contemplated that Contech—not defendants—would be responsible for the shipping charges. As a result, we agree with the trial court that it cannot be said that defendant's failure to pay for the shipping costs was unjust.

While plaintiff certainly was deprived of the money it was due for fulfilling its obligation to ship the parts, that duty to pay fell to Contech, not defendants. To rule that defendants now should pay for Contech's debts would work an injustice against defendants, who had a contractual right to have Contech pay for these costs. Of course, Contech is the party who is primarily responsible for plaintiff's difficult position. Contech retained the benefit provided by plaintiff because Contech was able to meet its contractual duty to defendants while not meeting its contractual obligation to pay plaintiff for the shipping services. But we would be remiss if we did not note that plaintiff was in the best position to protect itself from being saddled with a high amount of unpaid bills because it could have refused to provide further shipping services for Contech long before Contech's debt reached $5 million. Indeed, the record reflects that plaintiff initially extended Contech a credit limit of $5,000 and was advised by its own credit department to extend no further credit but, for reasons that are not fully clear, disregarded that limit.

Affirmed. Defendants, as the prevailing parties, may tax costs pursuant to MCR 7.219.

STEPHENS, P.J., and METER, J., concurred with SAAD, J.

PEOPLE v BRYANT

Docket No. 328512. Submitted November 2, 2016, at Detroit. Decided February 2, 2017. Approved for publication March 30, 2017, at 9:05 a.m. Leave to appeal denied 501 Mich 881.

Bud Bryant was convicted after pleading guilty in the Wayne Circuit Court to possession of a firearm during the commission of a felony (felony-firearm), second offense, MCL 750.227b(1). Lawrence S. Talon, J., sentenced Bryant to five years of imprisonment to be served concurrently with the sentence imposed on Bryant in another case and consecutively to Bryant's existing parole. Bryant was also ordered to pay $1,000 in restitution, MCL 780.766(2) and MCL 769.1a(2), and $498 in costs and fees. Bryant's conviction arose after he broke into a home and a security camera showed him walking away from the home with a long gun and a change jar. In exchange for Bryant's guilty plea, the prosecution dismissed a charge of second-degree home invasion and agreed to disregard his fourth-offense habitual-offender status. The parties agreed that Bryant would receive a five-year sentence, and the court sentenced him consistently with the plea agreement. Bryant applied in the Court of Appeals for leave to appeal the restitution order. He also contended that his trial counsel was ineffective for failing to object to the restitution order. The Court denied Bryant's application. *People v Bryant*, unpublished order of the Court of Appeals, entered August 31, 2015 (Docket No. 328512). Bryant then applied for leave to appeal in the Supreme Court, which remanded the case to the Court of Appeals for consideration as on leave granted. 499 Mich 896 (2016). The Supreme Court ordered the Court of Appeals to consider the restitution awarded to the victim of Bryant's offense in light of *People v McKinley*, 496 Mich 410 (2014).

The Court of Appeals *held*:

1. Under MCL 780.766(2), full restitution must be ordered for a victim's losses caused by a defendant's course of conduct giving rise to a conviction, and there must be a direct, causal connection between the conduct giving rise to the defendant's conviction and the amount of restitution ordered. Restitution may not be ordered for a victim's losses that occur during a course of conduct that

does not result in a conviction. In this case, Bryant's felony-firearm conviction was necessarily connected to the predicate offense of second-degree home invasion. Even though the home-invasion charge had been dismissed, Bryant's course of conduct relating to the felony-firearm charge included the conduct from which the home-invasion charge arose. In addition, Bryant was not required to refer during the plea proceedings to every item taken during the home invasion in order for the court to calculate the amount of restitution owed for the stolen goods. Rather, once Bryant was convicted, the prosecution was allowed to prove the amount of restitution related to his course of conduct by a preponderance of the evidence and by reference to the presentence investigation report. Therefore, the trial court did not abuse its discretion when it ordered Bryant to pay $1,000 in restitution.

2. Bryant's claim that his trial counsel was ineffective for failing to object to the restitution order was without merit. Counsel is not required to raise a futile objection.

Affirmed.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Jason Williams*, Chief of Research, Training, and Appeals, and *Margaret Gillis Ayalp*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Anne Yantus*) for defendant.

Before: STEPHENS, P.J., and SAAD and METER, JJ.

PER CURIAM. Defendant pleaded guilty to possession of a firearm during the commission of a felony (felony-firearm), second offense, MCL 750.227b(1), pursuant to a plea and sentencing agreement. The trial court sentenced defendant to serve five years in prison, concurrently with the sentence imposed in another case and consecutively to his existing parole. Defendant was also ordered to pay $498 in costs and fees and $1,000 in restitution. Defendant applied in this Court for leave to appeal, challenging the restitution order

and arguing that his trial counsel was ineffective for failing to object to the restitution order at sentencing. This Court denied his application.[1] Defendant then applied for leave to appeal in the Michigan Supreme Court. The Supreme Court remanded the case to us "for consideration as on leave granted of the defendant's issue regarding the propriety of the Wayne Circuit Court's restitution award in light of *People v McKinley*, 496 Mich 410[; 852 NW2d 770] (2014)." *People v Bryant*, 499 Mich 896 (2016). "In all other respects," the Court ruled, "leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court." *Id*. We affirm.

Defendant broke into Deborah Raupp's home and stole rifles, a change jar, and a jewelry box. A security camera outside Raupp's home captured defendant walking out of the home with a long gun and change jar in his hand. The parties reached a plea and sentencing agreement: defendant would plead guilty to felony-firearm (second offense), and in exchange the prosecution would dismiss a second-degree home invasion count and fourth-offense habitual-offender notice. The parties agreed that defendant would be sentenced to five years in prison. The trial court sentenced defendant to prison terms consistent with the plea agreement.

At sentencing, the prosecution requested that defendant pay $1,000 in restitution. Raupp requested $1,000 in restitution for her insurance deductible. The trial court ordered defendant to pay this amount. Defendant filed a motion to correct an invalid sentence, challenging the restitution, costs, and fees ordered.

[1] *People v Bryant*, unpublished order of the Court of Appeals, entered August 31, 2015 (Docket No. 328512).

Regarding restitution, defendant argued that it should be reduced because the amount ordered was improper under *McKinley*, 496 Mich at 419-421, MCL 780.766(2), and MCL 769.1a(2). Defendant argued that the trial court should have ordered restitution only for the loss resulting from the theft of a single gun because he only admitted to stealing one gun and was only charged with possessing one gun. Therefore, he contended, any loss associated with the theft of additional items was related to the dismissed charge of second-degree home invasion and could not be recovered. The prosecution argued that *McKinley* did not apply because, among other reasons, defendant had been charged with second-degree home invasion. The trial court concluded that *McKinley* was inapplicable because "there's no requirement that the factual basis establish the level of restitution . . . ." Instead, the court reasoned, the factual basis underlying the plea must "simply [establish] the elements of the crime . . . ." The trial court called this a "home invasion" case in which "[b]oth guns were [taken as] a matter of [defendant's] course of conduct." The trial court noted that the presentence investigation report (PSIR) provided a "preponderance of the evidence that there were . . . two guns stolen . . . ." The trial court upheld the $1,000 restitution order.

This Court reviews de novo "[t]he proper application of . . . statutes authorizing the assessment of restitution at sentencing . . . ." *McKinley*, 496 Mich at 414-415. We review a trial court's factual findings for clear error and a trial court's calculation of restitution for an abuse of discretion. *People v Corbin*, 312 Mich App 352, 361; 880 NW2d 2 (2015).

MCL 780.766(2) governs restitution and states that a defendant must "make full restitution to any victim

of the defendant's course of conduct that gives rise to the conviction . . . ."[2] The *McKinley* Court, considering a "restitution award . . . based solely on uncharged conduct," concluded that the phrase "gives rise to the conviction" means " 'to produce or cause' " the conviction. *McKinley*, 496 Mich at 413, 419, quoting *Random House Webster's College Dictionary* (2000). Therefore, the *McKinley* Court concluded that "the [restitution] statute ties 'the defendant's course of conduct' to the convicted offenses and requires a causal link between them." *McKinley*, 469 Mich at 419. Stated differently, "MCL 780.766(2) requires a direct, causal relationship between the conduct underlying the convicted offense and the amount of restitution to be awarded," *id*. at 421, and "any course of conduct that does not give rise to a conviction may not be relied on . . . [to] assess[] restitution," *id*. at 419.

In light of *McKinley*, the *Corbin* Court reasoned that restitution may be "award[ed] only for losses factually and proximately caused by the defendant's offense . . . ." *Corbin*, 312 Mich App at 369 (considering whether the trial court could order restitution for one victim's uncertain future losses and for another victim's losses relating to a charge that the prosecution dismissed). "In determining whether a defendant's conduct is a factual cause of the result," the *Corbin* Court explained, "one must ask, but for the defendant's conduct, would the result have occurred?" *Id*. at 369 (quotation marks and citations omitted). The Court further stated that "[f]or a defendant's conduct to be regarded as a proximate cause, the victim's injury

[2] MCL 769.1a(2) also requires the trial court to order a defendant to "make full restitution to any victim of the defendant's course of conduct that gives rise to the conviction . . . ."

must be a direct and natural result of the defendant's actions." *Id*. (quotation marks and citation omitted).

Once the need for restitution is established, if there is a dispute regarding the proper amount of restitution to be ordered, the prosecuting attorney must prove by a preponderance of the evidence the amount required to make the victim whole. MCL 780.767(4); *People v Fawaz*, 299 Mich App 55, 65; 829 NW2d 259 (2012). The PSIR may be used in making this showing. MCL 780.767(2); *Fawaz*, 299 Mich App at 59-60.

The crime of felony-firearm (second offense) has three elements: (1) the defendant attempted to commit a felony or committed a felony (2) while he or she had a firearm in his or her possession, and (3) the defendant had a separate felony-firearm conviction. MCL 750.227b(1). The defendant need not be convicted of the predicate felony to sustain a felony-firearm conviction, but the predicate felony "must have been committed." *People v Burgess*, 419 Mich 305, 311; 353 NW2d 444 (1984). In this case, a reading of the information as a whole showed that the prosecution listed as the predicate offense the second-degree home-invasion charge[3] based on the larceny at Raupp's home. See MCL 750.110a(3). MCL 750.110a(3) provides:

> A person who breaks and enters a dwelling with intent to commit a felony, larceny, or assault in the dwelling, a person who enters a dwelling without permission with intent to commit a felony, larceny, or assault in the dwelling, or a person who breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a felony, larceny, or assault is guilty of home invasion in the second degree.

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[3] The listing of "first-degree" home invasion in Count 2 (the felony-firearm count) was an obvious typographical error, given that Count 1 charged defendant with second-degree home invasion.

Defendant contends that he cannot be held liable for restitution relating to the home invasion as a whole because "the legal basis of [defendant's] felony[-]firearm conviction was the theft and possession of a single gun." Nevertheless, defendant's felony-firearm conviction was necessarily based on the predicate felony of second-degree home invasion, and as aptly stated by the prosecution on appeal, "[w]hile the home invasion charge was dismissed, its *commission* was part and parcel of the felony-firearm conviction," and "the course of conduct for the home invasion included stealing the victim's belongings." Defendant appears to be arguing that because, as part of the factual basis for his plea, he admitted only to stealing one gun, he cannot be ordered to pay restitution for anything other than that single gun. This, however, is a misreading of the law. Once defendant was properly convicted (as he assuredly was), the prosecution was then allowed to prove the amount of restitution related to defendant's course of conduct by a preponderance of the evidence and by reference to the PSIR. MCL 780.767(2); *Fawaz*, 299 Mich App at 59-60, 65. The course of conduct necessarily included the circumstances related to the required predicate offense of second-degree home invasion. The law simply does not require a defendant convicted by plea to specifically refer to each stolen item in order for the prosecution to obtain a restitution order for the stolen goods.[4] We find no basis for reversal, and we also reject defendant's claim of ineffective

[4] Imagine that this case had gone to trial and defendant was convicted after a jury trial of felony-firearm (second offense) and second-degree home invasion. Restitution of $1,000 would be appropriate even though one would not know for certain which items the jury had focused on in rendering the home-invasion verdict. We further note that, unlike in *People v Raisbeck*, 312 Mich App 759, 771, 773; 882 NW2d 161 (2015), wherein the Court denied restitution with regard to persons who were

assistance of counsel regarding the failure to raise the issue at an earlier point in the proceedings. See *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010) (holding that counsel is not ineffective for failing to raise a meritless argument).

Affirmed.

STEPHENS, P.J., and SAAD and METER, JJ., concurred.

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not listed on the information but who were claimed to be victims by the prosecution, there was only one victim here; *Raisbeck* is not controlling in the present case.

PEOPLE v CAMERON

Docket No. 330876. Submitted March 15, 2017, at Lansing. Decided April 4, 2017, at 9:00 a.m. Leave to appeal sought.

Shawn L. Cameron, Jr., was convicted following a jury trial in the Washtenaw Circuit Court of assault with intent to do great bodily harm less than murder, MCL 750.84. He was sentenced as a fourth-offense habitual offender, MCL 769.12, to 13 months to 20 years of imprisonment. Cameron was also ordered to pay $1,611 in court costs under MCL 769.1k(1)(b)(*iii*). He appealed as of right, arguing that the trial court was without statutory authority to impose court costs and that the Legislature's retroactive grant of such authority in 2014 PA 352 was unconstitutional. The Court of Appeals disagreed, but it remanded the case to the trial court for that court to determine whether the court costs imposed were reasonably related to the actual costs of conducting Cameron's trial. *People v Cameron*, unpublished opinion per curiam of the Court of Appeals, issued July 28, 2015 (Docket No. 321387). On remand, the trial court, Darlene A. O'Brien, J., explained the basis of the court costs imposed by describing how the costs had been calculated. The trial court held that the amount of costs Cameron was ordered to pay was reasonably related to the actual costs incurred by the trial court. Cameron again appealed, arguing that the court-cost assessment constitutes an unconstitutional tax, as opposed to a fee, and that MCL 769.1k(1)(b)(*iii*) violates our Constitution's separation-of-powers provision.

The Court of Appeals *held*:

1. A tax is an involuntary contribution of money authorized by law and enforceable by the courts, while a fee is an amount of money generally given in exchange for a service rendered or a benefit conferred. When determining whether a charge constitutes a fee or a tax, a court must consider (1) whether the charge serves a regulatory purpose rather than operates as a means of raising revenue, (2) whether the charge is proportionate to the costs of the service to which it is related, and (3) whether the payor can refuse or limit his or her use of the service to which the charge is related. The plain language of the statute indicated that the court costs imposed on Cameron served a revenue-generating

purpose. Further, although the court costs imposed had a factual basis and related to the costs incurred by the trial court, the costs were not proportionate to the service rendered by the trial court because the service rendered benefitted the public rather than Cameron. Finally, Cameron had no ability to decline prosecution and so could not refuse or limit his use of the service related to the costs. Consequently, when considering the three factors in their totality, the court costs authorized by MCL 769.1k(1)(b)(*iii*) were a tax and had to comply with the Michigan Constitution's Distinct Statement Clause, Const 1963, art 4, § 32.

2. The Distinct Statement Clause requires all laws that impose, continue, or revive a tax to distinctly state the tax. A statute violates the Distinct Statement Clause if it imposes an obscure or deceitful tax or disguises a tax as a regulatory fee. Although MCL 769.1k(1)(b)(*iii*) does not require that a court separately calculate its actual costs in each case and does not specify or limit the total amount of costs a court may impose, it does require that the costs imposed be reasonably related to the costs actually incurred by the court. It also implicitly obligates a court to establish a factual basis for the costs imposed and contains provisions ensuring accountability and transparency in connection with the costs imposed. This legislative guidance prevents the statute from being obscure or deceitful.

3. Article 3, § 2 of Michigan's 1963 Constitution states that the powers of government are divided into three branches—legislative, executive, and judicial—and that a person exercising the powers of one branch shall not exercise powers belonging to another branch, except as provided by the Constitution. Under Const 1963, art 9, §§ 1 and 2, the power to tax rests solely with the Legislature, but the Legislature may delegate its taxing authority as long as the delegation includes standards by which the body to which the power is delegated is to exercise the power of taxation. Standards that accompany the delegation of the Legislature's taxing power must be as reasonably precise and as sufficiently broad as the case requires or permits. MCL 769.1k(1)(b)(*iii*) properly delegates to the trial court the Legislature's authority to impose taxes because the statute contains standards by which the authority must be exercised. Specifically, the statute gives trial courts the broad authority to impose court costs that are reasonably related to the actual costs incurred by the court in its prosecution of a criminal defendant.

Affirmed.

1. CRIMINAL LAW — SENTENCING — IMPOSITION OF COSTS — DETERMINATION OF TAX OR FEE.

A tax is an involuntary contribution of money authorized by law and enforceable by the courts, while a fee is an amount of money generally given in exchange for a service rendered or a benefit conferred; when determining whether a charge constitutes a fee or a tax, a court must consider three questions: (1) whether the charge serves a regulatory purpose rather than operates as a means of raising revenue, (2) whether the charge is proportionate to the necessary costs of the service to which it is related, and (3) whether the payor has the ability to refuse or limit its use of the service to which the charge is related; when considering these three factors, the costs imposed under MCL 769.1k(1)(b)(*iii*) are a tax.

2. CRIMINAL LAW — SENTENCING — COSTS — CONSTITUTIONALITY — DISTINCT STATEMENT CLAUSE.

The Distinct Statement Clause of Michigan's 1963 Constitution requires that all laws that impose a tax distinctly state the tax; a statute violates the clause if it imposes an obscure or deceitful tax or disguises a tax as a regulatory fee; costs imposed under MCL 769.1k(1)(b)(*iii*) are not obscure or deceitful or disguised as a regulatory fee and therefore do not violate the Distinct Statement Clause (Const 1963, art 4, § 32).

3. CRIMINAL LAW — SENTENCING — COSTS — CONSTITUTIONALITY — SEPARATION OF POWERS.

Article 3, § 2 of Michigan's 1963 Constitution states that the powers of government are divided into three branches and that a person exercising the powers of one branch may not exercise the powers of another branch except as otherwise provided by the Constitution; a trial court's authority to impose costs under MCL 769.1k(1)(b)(*iii*) represents a delegation of the Legislature's sole authority to impose taxes under Const 1963, art 9, §§ 1 and 2, but the Legislature may delegate its taxing authority as long as the delegation includes standards by which the body to which the power is delegated is to exercise the power of taxation; MCL 769.1k(1)(b)(*iii*) provides trial courts with standards by which to impose costs and does not violate the separation-of-powers doctrine.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Brian L. Mackie*, Prosecuting Attorney, and *Mark Kneisel*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Marilena David-Martin*) for defendant.

Before: BECKERING, P.J., and O'CONNELL and BORRELLO, JJ.

PER CURIAM. In this criminal proceeding, defendant Shawn Cameron, Jr., comes before this Court in an appeal of right for a second time. At issue in the instant appeal is whether the imposition of court costs under MCL 769.1k(1)(b)(*iii*) constitutes an unconstitutional tax. Defendant is not the first person to challenge the constitutionality of MCL 769.1k(1)(b)(*iii*) on this basis; however, there are no published opinions on the issue. We conclude that although it imposes a tax, MCL 769.1k(1)(b)(*iii*) is not unconstitutional, and we affirm the trial court's assessment of court costs.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Defendant was convicted after a jury trial of assault with intent to do great bodily harm less than murder, MCL 750.84, for his role in an attack on a woman over a dispute regarding the payment of babysitting fees. The trial court sentenced him as a fourth-offense habitual offender, MCL 769.12, to 13 months to 20 years' imprisonment. The court also ordered defendant to pay certain costs and fees, including $1,611 in court costs.

Defendant appealed by right, arguing that the trial court lacked the statutory authority to impose court costs and that the Legislature's retroactive grant of such authority was unconstitutional. See 2014 PA 352, enacting § 1. Relying on binding precedent, a panel of this Court disagreed. *People v Cameron*, unpublished opinion per curiam of the Court of Ap-

peals, issued July 28, 2015 (Docket No. 321387). However, the panel remanded the case to the trial court for a determination of whether the court costs imposed were " 'reasonably related to the actual costs incurred by the trial court[.]' " *Id*. at 2, quoting MCL 769.1k(1)(b)(*iii*).

On remand, the trial court explained the basis for the imposition of $1,611 in court costs:

> The Washtenaw County Trial Court previously established a factual basis for the court costs it has imposed on each felony case at the time of sentencing. The costs were computed based on the ten year average annual total court budget of $16,949,292 multiplied by the average annual percentage of all filings which are felonies, i.e., 22%, which revealed the average annual budget for the Washtenaw Trial Court's handling of all of its criminal felony cases. This amount was then divided by the average annual number of felony filings over [the] last 6 years (2,217) which resulted in the average court costs of handling each felony case as $1,681. The state costs were subtracted ($68) as well as an additional $2, resulting in the sum of $1,611 being assessed per felony case.

On this basis, the trial court concluded that the amount of court costs imposed on defendant was reasonably related to the actual costs incurred by the trial court.

II. ANALYSIS

Defendant argues that the court-cost-assessment provision set forth in MCL 769.1k constitutes a tax, as opposed to a fee, because it raises revenue and criminal defendants do not pay court costs voluntarily. Defendant maintains that the costs cannot be considered a proportionate fee for services because criminal defendants are not being provided a service when they are subjected to prosecution in a court of law. As a tax, defendant contends that MCL 769.1k(1)(b)(*iii*) is un-

constitutional because it violates Const 1963, art 4, § 32, which provides that "[e]very law which imposes, continues or revives a tax shall distinctly state the tax." Moreover, defendant claims that there is no limit on the amount of costs that might be imposed under the statute. Defendant also argues that MCL 769.1k violates the separation-of-powers provision of Const 1963, art 3, § 2.

A. STANDARDS OF REVIEW

"Whether a charge is a permissible fee or an illegal tax is a question of law." *Dawson v Secretary of State*, 274 Mich App 723, 740; 739 NW2d 339 (2007) (opinion by WILDER, P.J.) (quotation marks and citation omitted). This Court reviews constitutional questions de novo.[1] *People v Conat*, 238 Mich App 134, 144; 605 NW2d 49 (1999). "Statutes are presumed to be constitutional and must be construed as such unless it is clearly apparent that the statute is unconstitutional." *In re RFF*, 242 Mich App 188, 205; 617 NW2d 745 (2000). "[T]he burden of proving that a statute is unconstitutional rests with the party challenging it." *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich 1, 11; 740 NW2d 444 (2007).

B. APPLICABLE LAW

The assessment of court costs against a convicted defendant is governed by MCL 769.1k(1), which provides:

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[1] Defendant concedes that when he was before the trial court he did not challenge as an unconstitutional tax the imposition of court costs under MCL 769.1k. Therefore, the issue is unpreserved. However, this Court may overlook preservation requirements if "an important constitutional question is involved . . . ." *People v Gezelman (On Rehearing)*, 202 Mich App 172, 174; 507 NW2d 744 (1993).

> (b) The court may impose any or all of the following:
>
> * * *
>
> (*iii*) Until 36 months after the date the amendatory act that added subsection (7) is enacted into law, any cost reasonably related to the actual costs incurred by the trial court without separately calculating those costs involved in the particular case, including, but not limited to, the following:
>
> (A) Salaries and benefits for relevant court personnel.
>
> (B) Goods and services necessary for the operation of the court.
>
> (C) Necessary expenses for the operation and maintenance of court buildings and facilities.

As defendant points out in his brief, separate panels of this Court have come to different conclusions in unpublished opinions with respect to whether court costs imposed under MCL 769.1k(1)(b)(*iii*) constitute a fee or a tax. Upon review of the issue, we agree with the analysis and conclusions set forth in *People v Bailey*, unpublished opinion per curiam of the Court of Appeals, issued December 15, 2015 (Docket No. 323190).[2]

C. TAX OR FEE

As this Court in *Bailey* pointed out, "The first step in examining the constitutional muster of MCL 769.1k(1)(b)(*iii*) is to determine whether it assesses a 'governmental "fee" ' or a tax." *Bailey*, unpub op at 3, quoting *Dawson*, 274 Mich App at 740.[3]

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[2] Unpublished opinions are not binding, but they may be consulted as persuasive authority. MCR 7.215(C)(1); *Paris Meadows, LLC v Kentwood*, 287 Mich App 136, 145 n 3; 783 NW2d 133 (2010).

[3] The parties to the case at bar agree that "fee" and "tax" are the categories at issue for characterizing the court costs that may be imposed pursuant to MCL 769.1k(1)(b)(*iii*).

A tax is an "exaction[] or involuntary contribution[] of money the collection of which is sanctioned by law and enforceable by the courts." *Dukesherer Farms, Inc v Dir of the Dep't of Agriculture (After Remand)*, 405 Mich 1, 15; 273 NW2d 877 (1979) (quotation marks omitted). "Taxes have a primary purpose of raising revenue, while fees are usually in exchange for a service rendered or a benefit conferred." *Westlake Transp, Inc v Pub Serv Comm*, 255 Mich App 589, 612; 662 NW2d 784 (2003), aff'd sub nom *American Trucking Ass'ns, Inc v Mich Pub Serv Comm*, 545 US 429; 125 S Ct 2419; 162 L Ed 2d 407 (2005), and *Mid-Con Freight Sys, Inc v Mich Pub Serv Comm*, 545 US 440; 125 S Ct 2427; 162 L Ed 2d 418 (2005). "Taxes are designed to raise revenue for the general public, while a fee confers benefits only upon the particular people who pay the fee, not the general public or even a portion of the public who do not pay the fee." *Westlake Transp*, 255 Mich App at 613 (quotation marks and citation omitted).

When determining whether a charge constitutes a fee or a tax, a court must consider three questions: "(1) whether the charge serves a regulatory purpose rather than operates as a means of raising revenue, (2) whether the charge is proportionate to the necessary costs of the service to which it is related, and (3) whether the payor has the ability to refuse or limit its use of the service to which the charge is related." *Id*. at 612. We will consider each of these questions in turn.

1. REGULATORY PURPOSE OR MEANS OF RAISING REVENUE

This factor looks at the purpose of the charge. We agree with defendant that the purpose of MCL 769.1k(1)(b)(*iii*) is to raise revenue. The plain language of the statute does not reveal a regulatory concern with

the public health, safety, and welfare because court costs "are not a form of punishment." *People v Konopka (On Remand)*, 309 Mich App 345, 370; 869 NW2d 651 (2015). Rather, MCL 769.1k(1)(b)(*iii*) expressly allows a trial court to impose costs for "the actual costs incurred by the trial court," including the compensation of court personnel and the recovery of necessary operational expenses. MCL 769.1k(1)(b)(*iii*)(A) to (C). Thus, MCL 769.1k(1)(b)(*iii*) focuses on the trial court's revenue, i.e., "the income of a government from taxation and other sources, appropriated for public expenses." *Random House Webster's College Dictionary* (1996).

Recent caselaw supports the conclusion that MCL 769.1k(1)(b)(*iii*) functions to raise revenue for the courts. In *Konopka*, this Court assumed without elaboration that MCL 769.1k served a revenue-generating purpose and rejected the argument that the amended version of MCL 769.1k violated the Due Process and Equal Protection Clauses of the United States and Michigan Constitutions. The *Konopka* Court's decision was based, in part, on the ground that "[t]he statute is rationally related to the legitimate purpose of compensating courts for the expenses incurred in trying criminal cases because it provides for the collection of costs from criminal defendants." *Konopka*, 309 Mich App at 368, citing MCL 769.1k(1)(b)(*iii*). The Court further reasoned that

> [b]ecause "the state, including its local subdivisions, is responsible for costs associated with arresting, processing, and adjudicating individuals" who commit criminal offenses, the classification scheme imposing costs on criminal defendants but not civil litigants is "rationally related to the legitimate governmental purpose of generating revenue from individuals who impose costs on the govern-

> ment and society." [*Konopka*, 309 Mich App at 369, quoting *Dawson*, 274 Mich App at 738.]

Therefore, in light of the plain language of the statute and this Court's interpretation of the statute in *Konopka*, we conclude that MCL 769.1k(1)(b)(*iii*) is a revenue-generating statute.

2. PROPORTIONATE TO THE COSTS OF THE SERVICE

This factor looks at whether a court imposed costs that were proportionate to the services it rendered a particular defendant. Defendant argues that the costs imposed were not proportionate to the costs the court incurred because MCL 769.1k(1)(b)(*iii*) allows the court to impose costs on a party without separately calculating the actual costs incurred by that party. We disagree. Defendant's argument is unavailing because he misconstrues proportionality as exactitude and because the court costs at issue had a factual basis and related to the actual costs the trial court incurred in felony criminal proceedings.

The test for proportionality is not whether a fee or tax is precisely equal to the actual costs incurred. See *Westlake Transp*, 255 Mich App at 615. In *Westlake Transp*, this Court considered whether Michigan's $100 application fee and $100 annual renewal fee for intrastate truckers amounted to a governmental fee or a tax. *Id*. at 593. The plaintiffs argued that the fees were not proportional because they exceeded the expense of the related services. *Id*. at 614. This Court noted that "[a] fee must be proportionate to the cost of the regulation, but its amount is presumed reasonable unless its unreasonableness is established. Where revenue generated by a regulatory 'fee' exceeds the cost of regulation, the 'fee' is actually a tax in disguise." *Id*. (quotation marks, citations, and brackets omitted).

The Court considered a senate fiscal report provided by the plaintiffs showing that the agency collecting the fees had a "surplus" in "nearly every year" that the report examined. *Id*. at 614-615. Nevertheless, the Court concluded that the "aggregate excess" during the years covered by the report "was only 11.7 percent, a relatively small percentage," and "that the Court of Claims did not clearly err in finding that the fees were not 'wholly disproportionate.' " *Id*. at 615.

That a court imposes costs that may be more or less than the precise costs incurred in a particular criminal defendant's prosecution does not mean that the costs are disproportionate or that ways of ensuring proportionality are lacking. MCL 769.1k(1)(b)(*iii*) requires a relationship between the costs imposed and the services they support by authorizing only costs "reasonably related to the actual costs incurred by the trial court . . . ." Additionally, this Court held in *Konopka* that a trial court must "establish a factual basis" for the costs imposed pursuant to MCL 769.1k(1)(b)(*iii*). *Konopka*, 309 Mich App at 359. As an aid to determining court costs, the State Court Administrative Office has recommended that circuit courts calculate costs for purposes of MCL 769.1k(1)(b)(*iii*) "by taking the average of actual costs times the percent of [the] workload for [the] criminal [division] divided by the average number of criminal cases disposed."[4] The trial court in the case at bar imposed costs calculated using a substantially similar formula to determine its average

[4] After the enactment of 2014 PA 352, the State Court Administrative Office (SCAO) provided the circuit courts with a memorandum setting forth options for calculating court costs. See SCAO, *Memorandum Re 2014 PA 352* (November 6, 2014), available at http://courts.mi.gov/Administration/SCAO/OfficesPrograms/Documents/collections/MCL769.1k-ImpositionCriminalFinesCostsAssessments.pdf> (accessed March 9, 2017) [https://perma.cc/K4GV-ANH8].

cost per felony case. Thus, the court costs at issue have a factual basis and are grounded in the average of actual costs incurred by the trial court in felony prosecutions. Although the court costs imposed on an individual defendant may vary from the actual expenses incurred in a specific defendant's prosecution, such variance should not, given the trial court's method of calculation in the instant case, result in an "aggregate excess" that would render the assessment disproportional. See *Westlake Transp*, 255 Mich App at 615.[5]

Defendant further argues that the costs are "not proportionate to the 'service,' because the courts confer benefit[s] to the public (justice, fairness, order) not the particular person on whom the costs are imposed." This argument has merit.

At least one state court has recognized that the penal system benefits the public rather than the person convicted of a crime.[6] *State v Medeiros*, 89 Hawaii 361, 370; 973 P2d 736 (1999). In *Medeiros*, the Su-

[5] In *Bailey*, this Court observed, as does plaintiff, that pursuant to MCL 769.1k,

> the state court administrative office (SCAO) is tasked with compiling data, which information could be used to determine the proportionality of the costs assessed under the statute. However, trial courts only began collecting and submitting data in January 2015, and the SCAO has until July 1, 2016 to compile its first report. See MCL 769.1k(7), (9). Accordingly, the evidence defendant could present to establish the unreasonableness of costs assessed under the statute simply does not yet exist. [*Bailey*, unpub op at 5.]

Even assuming the correctness of that analysis and that the report to which it refers currently exists, defendant does not attempt to make any use of it for purposes of this appeal.

[6] Caselaw from sister state courts may be considered for its persuasive value. *Travelers Prop Cas Co of America v Peaker Servs, Inc*, 306 Mich

preme Court of Hawaii held that a local ordinance requiring a convicted person to pay "a service fee of $250.00 for services performed by the city in connection with the arrest, processing, investigation, and prosecution of the convicted person" was an unauthorized tax as opposed to a fee. *Id*. at 362 n 1. In reaching that conclusion, the court reasoned that "the 'service' of being investigated and prosecuted clearly does not 'benefit' the payors of the charge, *i.e*., the persons convicted as a result of the work of the police and the prosecutors; rather, it benefits society at large." *Medeiros*, 89 Hawaii at 368. The court was skeptical of the argument that a criminal defendant received a rehabilitative benefit, but it concluded that "[e]ven assuming, *arguendo*, that a convicted person receives some benefit from his experience with the guiding hand of the law, . . . the principal purpose of the penal system is to benefit society, not those who break the law." *Id*. at 370.

We find the reasoning in *Medeiros* persuasive and conclude that, although the court costs at issue comport with the requirements of MCL 769.1k(1)(b)(*iii*) and *Konopka*, they nevertheless are not proportionate to the service provided because any service rendered by the trial court's role in the prosecution of defendant benefits primarily the public, not defendant.

3. PAYOR'S ABILITY TO REFUSE OR LIMIT USE OF THE SERVICE

The last factor requires consideration of "whether the payor has the ability to refuse or limit its use of the service to which the charge is related." *Westlake Transp*, 255 Mich App at 612. Both plaintiff and defendant agree that, generally speaking, court costs

App 178, 188; 855 NW2d 523 (2014), citing *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 221 n 6; 761 NW2d 293 (2008).

are not voluntarily incurred. As plaintiff conceded: "It is clear that a criminal defendant has no power to 'pass' on his or her prosecution and avoid the underlying costs. Even if a defendant chooses to plead and forego [sic] a trial, costs are incurred and assessed."

In sum, MCL 769.1k(1)(b)(*iii*) clearly raises revenue rather than regulates behavior. Although the statute was written to ensure that costs imposed on criminal defendants are proportional to the costs incurred by the trial court, the costs lack important hallmarks of a fee. Mainly, the benefactor of a successful felony prosecution is the general public, not the defendant who is paying for that service. Accordingly, court costs do not "confer[] benefits only upon the particular people who pay the fee[.]" *Westlake Transp*, 255 Mich App at 613 (quotation marks and citation omitted). Rather, court costs confer benefits on "the general public or even a portion of the public who do not pay the fee." *Id*. (quotation marks and citation omitted). And once charged with a felony, a defendant lacks "the ability to refuse or limit its use of the service to which the charge is related." *Id*. at 612. Considering the factors "in their totality," the costs at issue should be considered a tax, not a fee.[7] *Id*. In fact, while this Court is not bound by

[7] Defendant engages in what amounts to a drive-by citing of the Headlee Amendment, Const 1963, art 9, § 31, and *Bolt v City of Lansing*, 459 Mich 152, 158-159, 168; 587 NW2d 264 (1998), in support of his contention that the levying of a tax is prohibited without first seeking the approval of the electorate. Defendant's cited authorities, however, pertain to the activities of local units of government and to controlling the total amount of taxes that may be imposed on state taxpayers in any fiscal year. See, e.g., *Airlines Parking, Inc v Wayne Co*, 452 Mich 527; 550 NW2d 490 (1996). "It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *Yee v Shiawassee Co Bd of Comm'rs*, 251

a party's statement regarding what the law is, we note that the prosecution concedes that MCL 769.1k(1)(b)(*iii*) "is, in fact, a tax, rather than a governmental fee." Accordingly, MCL 769.1k(1)(b)(*iii*) must comply with the Distinct Statement Clause. Const 1963, art 4, § 32; *Gillette Commercial Operations North America & Subsidiaries v Dep't of Treasury*, 312 Mich App 394, 447; 878 NW2d 891 (2015).

D. DISTINCT STATEMENT CLAUSE

The Distinct Statement Clause provides that "[e]very law which imposes, continues or revives a tax shall distinctly state the tax." Const 1963, art 4, § 32. As this Court explained in *Gillette*:

> The purpose of [the distinct-statement] provision is to prevent the Legislature from being deceived in regard to any measure for levying taxes, and from furnishing money that might by some indirection be used for objects not approved by the Legislature. The Distinct-Statement Clause is violated if a statute imposes an obscure or deceitful tax, such as when a tax is disguised as a regulatory fee. [*Gillette*, 312 Mich App at 447 (quotation marks and citations omitted).]

Defendant contends that MCL 769.1k(1)(b)(*iii*) violates the Distinct Statement Clause because it does not reveal that it is creating a tax, does not establish a "rate of calculation," does not specify or limit the amount a court may charge, and does not clarify what proportion of the court's operating and maintenance costs criminal defendants will bear. Defendant asserts that these flaws in the statute render the costs it

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Mich App 379, 406; 651 NW2d 756 (2002) (quotation marks and citation omitted). Defendant has not established that either of his cited authorities supports his argument, and thus, he has effectively abandoned this issue.

sanctions obscure and deceitful and, therefore, unconstitutional. We disagree.

MCL 769.1k(1)(b)(*iii*) does not require that a court separately calculate the actual costs in each case, and it does not set or specifically limit the amount of costs a court may impose. However, this is not to say that the statute fails to provide any guidance or limitations. MCL 769.1k(1)(b)(*iii*) limits the costs to those "reasonably related" to the costs the court incurs, and it provides a nonexclusive list of the types of expenses the court may include in its determination of costs. Implicit in the statute, and made explicit by this Court's analysis in *Konopka*, 309 Mich App at 359-360, is the court's obligation to "establish a factual basis" for the costs imposed.

In addition, the amendments occasioned by 2014 PA 352, which ushered in MCL 769.1k(1)(b)(*iii*), did not produce an effect that was "obscure or deceitful," *Gillette*, 312 Mich App at 447, because the public act stated its purpose clearly as follows:

> This amendatory act is a curative measure that addresses the authority of courts to impose costs under section 1k of chapter IX of the code of criminal procedure, 1927 PA 175, MCL 769.1k, before the issuance of the supreme court opinion in People v Cunningham, 496 Mich 145 (2014). [2014 PA 352, enacting § 2.]

Further, MCL 769.1k(1)(b)(*iii*) contains provisions ensuring transparency and accountability in connection with the costs imposed, which weigh against a result that is obscure or deceitful. For example, MCL 769.1k(7) requires that "[b]eginning January 1, 2015, the court shall make available to a defendant information about any fine, cost, or assessment imposed under subsection (1), including information about any cost imposed under subsection (1)(b)(*iii*)." MCL 769.1k also requires that "each year the clerk of the court shall transmit a report

to the state court administrative office" revealing the "[t]he total amount of costs that were imposed [and collected] by that court under subsection (1)(b)(*iii*)." MCL 769.1k(8)(c) and (d). The State Court Administrative Office, in turn, must compile the data and submit an annual report to the governor. MCL 769.1k(9). In addition, MCL 769.1k(1)(b)(*iii*) contains a sunset clause, authorizing the assessment of costs in the manner set forth in the statute "[u]ntil 36 months after the date the amendatory act that added subsection (7) is enacted into law . . . ."

In sum, MCL 769.1k(1)(b)(*iii*) was an effort by the Legislature to allow trial courts to impose costs on a convicted defendant in amounts reflecting the court's actual operational costs in connection with criminal cases. While a trial court retains some discretion in calculating the costs, the statutory guidance encourages the court to use a formula to determine the average cost of a criminal case. In any event, the trial court must establish on the record its factual basis for those costs. *Konopka*, 309 Mich App at 359-360. It is true that MCL 769.1k(1)(b)(*iii*) does not contain the word "tax." Nevertheless, defendant has presented no evidence indicating that the Legislature did not intend MCL 769.1k(1)(b)(*iii*) to raise revenue for the courts or that the court costs collected are directed to a use unintended by the Legislature. *Gillette*, 312 Mich App at 447. Accordingly, defendant has not carried his burden of proving that the statute violates the Distinct Statement Clause. See *In re Request for Advisory Opinion*, 479 Mich at 11.

E. SEPARATION OF POWERS

Defendant next argues that MCL 769.1k(1)(b)(*iii*) violates our Constitution's separation-of-powers provi-

sion on the ground that "[t]he amended cost statute delegates to the trial court the authority to determine the amount of the tax" when "the power to tax rests solely with the Legislature." However, other than identifying the pertinent constitutional provisions, defendant cites no authority in support of his argument that MCL 769.1k(1)(b)(*iii*) violates the separation-of-powers doctrine. Consequently, we could consider defendant's argument abandoned on the ground that a party may not leave it to this Court to " 'unravel and elaborate for him his arguments . . . .' " *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). Nonetheless, because this issue has been raised by several other defendants and is not yet the subject of a published opinion, we will address it.

Const 1963, art 3, § 2 states that "[t]he powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution." As our Supreme Court has explained, however, the separation-of-powers doctrine does not require an absolute separation of the branches of government:

> While the Constitution provides for three separate branches of government, the boundaries between these branches need not be airtight. In fact, in designing the structure of our Government and dividing and allocating the sovereign power among three co-equal branches, the Framers of the Constitution sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence. The true meaning [of the separation-of-powers doctrine] is that the whole power of one of these departments should not be exercised by the same hands which possess the whole

> power of either of the other departments; and that such exercise of the whole would subvert the principles of a free Constitution. [*Makowski v Governor*, 495 Mich 465, 482; 852 NW2d 61 (2014) (quotation marks and citations omitted; alteration in original).]

"If the grant of authority to one branch is limited and specific and does not create encroachment or aggrandizement of one branch at the expense of the other, a sharing of power may be constitutionally permissible." *Hopkins v Parole Bd*, 237 Mich App 629, 636; 604 NW2d 686 (1999).

Regarding the imposition of taxes, the Michigan Constitution provides that "[t]he legislature shall impose taxes sufficient with other resources to pay the expenses of state government," Const 1963, art 9, § 1, and that "[t]he power of taxation shall never be surrendered, suspended or contracted away," Const 1963, art 9, § 2. Therefore, the power to tax and appropriate generally rests exclusively with the Legislature. *UAW v Green*, 498 Mich 282, 290; 870 NW2d 867 (2015).

Nevertheless, a legislature may delegate its powers. *Hoffman v Otto*, 277 Mich 437, 440; 269 NW 225 (1936) (noting that, "to the extent of public need," the power of taxation may be delegated to municipal power). To delegate its powers without violating the separation-of-powers doctrine, a legislature must provide guidelines and standards to the body to which power is delegated. *McNeil v Charlevoix Co*, 484 Mich 69, 102; 772 NW2d 18 (2009) (MARKMAN, J., concurring in part and dissenting in part) (noting, for example, that the Legislature may "delegate a task to an executive branch agency if it provides 'sufficient standards' "). The Legislature's delegation of authority is proper if the standards it provides are "as reasonably precise as the subject matter requires or permits." *Westervelt v*

Natural Resources Comm, 402 Mich 412, 438; 263 NW2d 564 (1978) (quotation marks and citation omitted); *City of Ann Arbor v Nat'l Ctr for Mfg Sciences, Inc*, 204 Mich App 303, 308; 514 NW2d 224 (1994) ("[T]he standards must be sufficiently broad to permit efficient administration so that the policy of the Legislature may be complied with, but not so broad as to give uncontrolled and arbitrary power to the administrators.").

In accordance with the foregoing principles, the *Bailey* Court determined that MCL 769.1k(1)(b)(*iii*) did not violate the constitutional provision mandating the separation of governmental powers. *Bailey*, unpub op at 5. The panel, assuming that MCL 769.1k(1)(b)(*iii*) "imposes a tax," regarded the situation as "akin to the legislative delegation of sentencing discretion to trial courts," *id*., and elaborated:

> It is well established that the ultimate authority to provide for penalties for criminal offenses is constitutionally vested in the Legislature, and the role of the judiciary is to impose and administer the sentencing statutes as enacted. . . . [M]any sentencing statutes delegate discretion to the trial courts in determining a defendant's appropriate sentence. However, the Supreme Court has proclaimed that the separation of powers clause . . . is not offended by the Legislature delegating sentencing discretion in part and retaining sentencing discretion in part. [*Id*. at 5-6 (quotation marks and citations omitted).]

In *Bailey*, the panel acknowledged that costs assessed under MCL 769.1k(1)(b)(*iii*) were not imposed as punishment and therefore that authorities addressing sentencing discretion were not directly on point. *Id*. at 6. However, the panel held that "this delegation, like the delegation of sentencing discretion, was not taken without providing guidance and parameters." *Id*. The panel further observed that "the bestowing of such

discretion does not become an unconstitutional delegation of a legislative function where its exercise is controlled and guided by adequate standards in the statute authorizing it." *Id*. (quotation marks and citation omitted). The panel outlined the guidance provided by the Legislature in MCL 769.1k(1)(b)(*iii*) before concluding that there was "no unconstitutional delegation of legislative authority." *Id*. We find the analysis in *Bailey* to be persuasive.

In sum, even if our Legislature delegated some of its taxing authority to the circuit courts, the Michigan Constitution does not require an absolute separation of powers. *Makowski*, 495 Mich at 482. In addition, MCL 769.1k(1)(b)(*iii*) provides adequate guidance to the circuit courts by instructing them to impose "any cost reasonably related to the actual costs incurred by the trial court without separately calculating those costs involved in the particular case . . . ." Further, it was necessary for the Legislature to provide "sufficiently broad" guidance in order to accommodate the varying costs incurred by the circuit courts. *Nat'l Ctr for Mfg Sciences, Inc*, 204 Mich App at 308. Although defendant bemoans the lack of a specified methodology for calculating court costs, the plain language of MCL 769.1k(1)(b)(*iii*) suggests that a court should impose costs in accordance with the costs involved in an average case. This Court's interpretation of MCL 769.1k(1)(b)(*iii*) as requiring a factual basis for the assessed costs further ensures that the circuit courts do not exercise unfettered discretion under MCL 769.1k(1)(b)(*iii*). See *Konopka*, 309 Mich App at 359. Especially because he has cited no authority in support of his position, defendant failed to carry his burden of proving that MCL 769.1k(1)(b)(*iii*) operates as an unconstitutional delegation of power. See *In re Request for Advisory Opinion*, 479 Mich at 11.

III. CONCLUSION

MCL 769.1k(1)(b)(*iii*) is a revenue-generating measure, and the courts forcibly impose the assessment against unwilling individuals. Therefore, it is a tax rather than a governmental fee. Although the statute does not expressly state that it imposes a tax, the statute is neither obscure nor deceitful, and therefore, it does not run afoul of the Distinct Statement Clause of Michigan's Constitution. Finally, because a trial court must establish a factual basis for its assessment of costs to ensure that the costs imposed are reasonably related to those incurred by the court in cases of the same nature, the legislative delegation to the trial court to impose and collect the tax contains sufficient guidance and parameters so that it does not run afoul of the separation-of-powers provision of Const 1963, art 3, § 2. We affirm the trial court's imposition of court costs against defendant.

Affirmed.

BECKERING, P.J., and O'CONNELL and BORRELLO, JJ., concurred.

PEOPLE v PARLOVECCHIO

Docket No. 333590. Submitted March 15, 2017, at Detroit. Decided April 4, 2017, at 9:05 a.m. Leave to appeal denied 500 Mich 1062.

Anthony Parlovecchio was indicted by a grand jury and charged in the 36th District Court of, among other things, willful neglect of duty as a public employee or person holding public trust, MCL 750.478, in connection with a failed Wayne County jail construction project. Defendant, acting as the president of Parlovecchio Building Company, Inc., entered into an agreement with the Wayne County Building Authority (WCBA) to act as the project manager or owner's representative for the Wayne County jail project; the project was never completed. Defendant was charged with willfully neglecting to fully inform WCBA of certain financial and other information regarding the project, a duty purportedly enjoined by state law or the Wayne County charter or ordinances. Defendant moved to quash the charge, and the court, Kevin F. Robbins, J., granted the motion, concluding that defendant was an independent contractor, not a person holding public trust or public employment for purposes of liability under MCL 750.475. The prosecution appealed, and the Wayne Circuit Court, Qiana D. Lillard, J., reversed the dismissal order and reinstated the indictment, reasoning that MCL 750.478 applied to defendant because independent contractors can hold a position of public trust. The Court of Appeals granted defendant's delayed application for leave to appeal.

The Court of Appeals *held*:

MCL 750.478 prohibits a public officer or a person holding public trust or employment from willfully neglecting to perform any duty that is or will be enjoined by law. To establish a violation of MCL 750.478, the prosecution must establish: (1) that the defendant was a public officer or any person holding any public trust or employment, (2) that the defendant had a duty that is enjoined by law, and (3) that the defendant willfully neglected to perform that duty. It was undisputed that defendant was not a public officer, and the district court correctly applied the "economic reality" test to determine that defendant was an independent contractor under his contract with WCBA rather than a

public employee. In addition, under MCL 750.478, the term "law" in the phrase "duty enjoined by law" does not include obligations imposed by contract. A contract is not the law; rather, a contract is enforceable under the law. Accordingly, a person may not be held criminally liable under MCL 750.478 on the basis of breach of contract. Therefore, in this case, even if defendant were a person holding "public trust"—a term not defined by MCL 750.478—he would not be criminally liable under the statute because the duty to report certain information was imposed by the terms of the contract, not by any statute; accordingly, defendant did not have a duty "enjoined by law" that he willfully neglected.

Reversed and charge dismissed.

CRIMINAL LAW — WILLFUL NEGLECT OF DUTY — WORDS AND PHRASES — DUTY ENJOINED BY LAW.

MCL 750.478 prohibits a public officer or a person holding public trust or employment from willfully neglecting to perform any duty that is or will be enjoined by law; for purposes of MCL 750.478, the term "law" in the phrase "duty enjoined by law" does not include obligations imposed by contract; accordingly, a person may not be held criminally liable under MCL 750.478 on the basis of a breach of contract.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Jason W. Williams*, Chief of Research, Training, and Appeals, and *David A. McCreedy*, Assistant Prosecuting Attorney, for the people.

Law Offices of Ben M. Gonek, PLLC (by *Ben M. Gonek*), for defendant.

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

PER CURIAM. Defendant, Anthony Parlovecchio, appeals by leave granted the circuit court's reversal of the district court decision granting defendant's motion to dismiss a grand jury indictment. We reverse.

Defendant, acting as the president of Parlovecchio Building Company, Inc., entered into an agreement with the Wayne County Building Authority (WCBA) to act as project manager or owner's representative for the Wayne County jail project (Project). The Project was never completed, and a number of individuals, including defendant, were indicted for the various roles they played in the failure of the Project. Defendant was indicted under MCL 750.478 for willful neglect of duty as a public employee or person holding public trust. The indictment stated in part that defendant "did willfully neglect to perform the duty to fully and honestly inform a legislative body, to wit: the Wayne County Building Authority, a duty enjoined upon him by State law and/or the Wayne County Charter and/or Wayne County Ordinances . . . ." That charge of the indictment contained no other specifics.

In his motion to quash Count 4 of the indictment, defendant argued in the district court that he was neither a public officer nor an employee, but rather an independent contractor, and he therefore was not subject to MCL 750.478; he also argued that the indictment insufficiently specified those criminal actions he "actually did," and he requested a bill of particulars. The district court agreed with defendant's first proposition and dismissed the indictment. On appeal, the circuit court reversed the district court's dismissal order and reinstated the indictment, holding that the statute applies to independent contractors because independent contractors can hold a position of public trust. We granted defendant's delayed application for leave to appeal the circuit court order.[1] We review for an abuse of discretion the circuit court's determination

[1] *People v Parlovecchio*, unpublished order of the Court of Appeals, entered August 3, 2016 (Docket No. 333590).

on a motion to dismiss, *People v Bylsma*, 493 Mich 17, 26; 825 NW2d 543 (2012), but we review de novo the circuit court's ruling on the underlying question regarding the applicability of MCL 750.478 to defendant because it presents a matter of statutory interpretation, *People v Buehler*, 477 Mich 18, 23; 727 NW2d 127 (2007). We also review de novo the constitutionality of statutes. *People v Douglas*, 295 Mich App 129, 134; 813 NW2d 337 (2011).

In *People v Waterstone*, 296 Mich App 121, 131-132; 818 NW2d 432 (2012), this Court recited the governing standards of review and the controlling principles of statutory construction:

> This Court reviews for an abuse of discretion both a district court's decision to bind a defendant over for trial and a trial court's decision on a motion to quash an information. A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. A trial court necessarily abuses its discretion when it makes an error of law. This Court reviews de novo questions of statutory construction.
>
> * * *
>
> . . . [T]he Michigan Supreme Court [has] recited the well-established principles that govern our interpretation of a statute[, stating as follows]:
>
> > The overriding goal of statutory interpretation is to ascertain and give effect to the Legislature's intent. The touchstone of legislative intent is the statute's language. The words of a statute provide the most reliable indicator of the Legislature's intent and should be interpreted on the basis of their ordinary meaning and the overall context in which they are used. An undefined statutory word or phrase must be accorded its plain and ordinary meaning, unless the undefined word or phrase is a

> "term of art" with a unique legal meaning. [Citations and quotation marks omitted.]

The parties dispute the construction of various terms employed in MCL 750.478, which provides:

> When any duty is or shall be *enjoined by law* upon any public officer, or upon any person holding any public trust or employment, every willful neglect to perform such duty, where no special provision shall have been made for the punishment of such delinquency, constitutes a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than $1,000.00. [Emphasis added.]

For a conviction under this statute, the prosecution must establish (1) that the defendant was a public officer or "any person holding any public trust or employment," (2) that the defendant had a duty that is "enjoined by law," and (3) that the defendant willfully neglected to perform that duty. MCL 750.478; *People v Medlyn*, 215 Mich App 338, 340-341; 544 NW2d 759 (1996).

It is undisputed that defendant is not a "public officer," and we agree with the district court that defendant is an independent contractor rather than a public employee. Plaintiff offers at most a vague argument to the contrary, and we reject that argument as advocating the complete dissolution of any distinction whatsoever between an employee and a contractor.[2] The district court correctly applied the "economic reality" test, see *Buckley v Prof Plaza Clinic Corp*, 281 Mich App 224, 233-236; 761 NW2d 284 (2008), and determined, on the basis of several provisions in defendant's contract with WCBA, that defendant was not a

[2] Plaintiff would draw a distinction between "holding employment" and "being an employee" that we think to be untrue under the circumstances.

"person holding any public . . . employment" under the plain language of MCL 750.478.

The term "public trust" is not defined in the statute or elsewhere in the Michigan Penal Code, and it is simply not necessary for us to address whether defendant was a person holding a public trust.

We instead focus on the question concerning whether defendant had a duty "enjoined by law" to communicate the pertinent financial information and situation to the county. In the context of this case, interpretation of MCL 750.478 and the phrase "enjoined by law" requires examination of how broadly or narrowly to construe the word "law." The prosecution's argument that defendant had a duty "enjoined by law" is ultimately premised solely on the underlying contract. Essentially, the prosecution contends that defendant's duty, for purposes of MCL 750.478, arose under the law of contracts. We conclude that the prosecution's construction is much too broad, improperly exposing private contractors on governmental projects to criminal liability solely on the basis of breach of contract.

We believe that an analogy can be made to the law of mandamus. A writ of mandamus can only be issued if a governmental employee or entity "had a clear legal duty to perform the [requested] act." *Casco Twp v Secretary of State*, 472 Mich 566, 577; 701 NW2d 102 (2005). And the legal duty cannot rest solely on a contractual obligation. *Garner v Mich State Univ*, 185 Mich App 750, 763; 462 NW2d 832 (1990) ("Where the right or duty sought to be enforced rests *wholly* on contract, mandamus cannot issue to enforce it . . . .") (emphasis in original); *Warber v Moore*, 126 Mich App 770, 776; 337 NW2d 918 (1983) (stating that "mandamus should not be available to compel public officers to perform a duty assumed by contract"); *Bd of Co Rd*

Comm'rs of the Co of Oakland v State Hwy Comm, 79 Mich App 505, 512; 261 NW2d 329 (1977) ("We note first that mandamus will not be granted to compel public officers to perform a duty assumed by contract, unless mandated by statute."). Indeed, in *Waterman-Waterbury Co v Sch Dist No 4 of Cato Twp*, 183 Mich 168, 174; 150 NW 104 (1914), our Supreme Court observed:

> The primary purpose of the writ of mandamus is to enforce *duties created by law*. It is stated by text-writers, as a general principle, that the writ is not designed as a remedy for the collection of debts, and will not lie to enforce the private contracts of municipalities. [Emphasis added.]

If a public officer, which is how the prosecution seeks to treat defendant, cannot be compelled in a mandamus action to perform a duty arising solely out of a contract, because it does not constitute a legal duty or a duty created by law, we fail to see how that same officer can be held criminally liable under MCL 750.478 for failing to perform a contractual duty. We must distinguish the phrase "enjoined by law" from "enjoined by contract." A contract is not the "law." Rather, a contract is enforceable *under the law*. It is unnecessary to define the full reach or parameters of the word "law" as used in the phrase "enjoined by law" under MCL 750.478. Rather, we need only to examine, given the limits of the prosecution's argument relying solely on contract, whether the word "law" as used in the statute encompasses a contractual obligation; we conclude that it does not.

The grand jury indictment in this case sets forth only a contractual duty. At oral argument, the prosecutor repeatedly asserted that the only duty defendant allegedly violated is his contractual one. As a conse-

quence, defendant has indisputably not been accused of violating a duty that could give rise to criminal liability under MCL 750.478. The district court correctly dismissed the indictment, and the circuit court erred by reversing that order.

It is therefore unnecessary for us to address whether the statute is unconstitutional or whether the grand jury indictment was insufficiently specific.

In sum, defendant is entitled to dismissal of the charge under MCL 750.478, and by way of this opinion, we dismiss the charge against defendant in this case.

M. J. KELLY, P.J., and MURPHY and RONAYNE KRAUSE, JJ., concurred.

SERVEN v HEALTH QUEST CHIROPRACTIC, PC

Docket No. 330983. Submitted April 4, 2017, at Detroit. Decided April 6, 2017, at 9:00 a.m.

Bruce D. Serven filed an action in the Genesee Circuit Court against Health Quest Chiropractic, PC, Solomon Cogan, Thomas Klapp, Ronald Wilcox, and others, alleging claims of malicious prosecution, tortious interference with advantageous business relationships, abuse of process, and violations of Serven's due-process and equal-protection rights. Beginning in 2006, Health Quest of Burton (Health Quest) provided chiropractic services to AE for injuries that AE had allegedly received in a 2004 automobile accident. Cogan was a part-owner of Health Quest. Serven performed an independent chiropractic examination (ICE) of AE at the request of AE's automobile insurance provider, State Farm Insurance Company. Serven concluded that AE's condition was normal, that AE did not need further chiropractic services, and that the treatments Health Quest had provided to AE were not medically necessary for the injuries AE had sustained in the accident. As a result, State Farm denied payment for additional services. In a separate action, Health Quest filed an action against State Farm, seeking reimbursement from State Farm for the services Health Quest had provided to AE. Serven and Cogan testified against each other in that action; Health Quest failed to recover reimbursement costs in that case for the services provided. Cogan's Health Quest business partner, Cozzetto, then filed a complaint against Serven with the Michigan Bureau of Health Professions-Board of Chiropractic (the board), asserting that Serven improperly rendered an opinion regarding AE without first reviewing Health Quest's records and that Serven had acted outside the scope of his chiropractic license by considering records from other medical care providers in his decision. Cogan was chair of the board, and Klapp and Wilcox served as members of the board's disciplinary subcommittee. Cozzetto made similar allegations related to an ICE Serven had performed on Cozzetto following a car accident in 2000 that had similarly resulted in the termination of Cozzetto's insurance benefits. During the board's investigation of Serven, Serven stated that Heath Quest "had a track record of performing unnecessary treatment." After the

investigation was completed, the Attorney General subsequently filed an administrative complaint against Serven, alleging claims of negligence, incompetence, and a lack of good moral character. The administrative law judge (ALJ) assigned to the case issued a proposal for decision, concluding that the allegations were not supported by the facts. The board's disciplinary subcommittee did not adopt the ALJ's proposal and instead concluded that Serven was negligent because he had issued his opinion regarding AE without first reviewing Health Quest's chiropractic records. The disciplinary subcommittee additionally concluded that Serven's comment regarding Health Quest's track record established the charge that Serven lacked good moral character. Cogan was present during the meeting when the disciplinary subcommittee made its decision regarding the complaint against Serven. The Court of Appeals reversed the decision of the disciplinary subcommittee. *Bureau of Health Professions v Serven*, 303 Mich App 305 (2013). Serven subsequently brought this action. Cogan, Klapp, and Wilcox moved for summary disposition of Serven's claims. The court, Joseph J. Farah, J., granted the motion with regard to the constitutional and malicious-prosecution claims but denied the motion with regard to Serven's claims for abuse of process and tortious interference. Cogan, Klapp, and Wilcox appealed.

The Court of Appeals *held*:

1. Judges are absolutely immune from liability for acts performed in the exercise of their judicial functions even when the acts are in excess of their jurisdiction and are alleged to have been done maliciously. Absolute immunity protects the finality of judgments and preserves judicial independence by insulating judges from vexatious actions prosecuted by disgruntled litigants. Quasi-judicial immunity, on the other hand, extends absolute judicial immunity to nonjudicial officers, and it is available to those serving in a quasi-judicial adjudicative capacity as well as those persons other than judges without whom the judicial process could not function; a quasi-judicial body is a board or commission with statutorily conferred power to ascertain facts, issue orders, and exercise discretion of a judicial nature. The doctrine has developed in two distinct forms: one that focuses on the nature of the job-related duties, roles, or functions of the person claiming immunity, and one that focuses on statements in an underlying judicial proceeding that were made by the person claiming immunity. Quasi-judicial immunity is necessary (1) to save judicial time in defending suits, (2) to allow for finality in the resolution of disputes, (3) to prevent deterring competent persons

from taking office, and (4) to prevent the threat of lawsuit from discouraging independent action.

2. The board has authority to take disciplinary action against chiropractor licensees who have adversely affected the public's health, safety, and welfare. The complaint intake section of the board reviews any complaint filed against a chiropractor to determine whether an investigation is necessary. If one is determined necessary and the investigator believes after the investigation that the challenged conduct was below the minimum standards for the profession, the board submits the matter to an appropriate expert reviewer. The board requests the Attorney General to file a formal administrative complaint if the expert substantiates the staff investigator's assessment. A contested case—a proceeding in which a determination of the legal rights, duties, or privileges of a named party is required by law to be made by an agency after an opportunity for an evidentiary hearing—is then held before an ALJ. MCL 24.203(3) provides that the ALJ must act in an impartial manner and can be disqualified for personal bias. Under Mich Admin Code, R 338.1630(5), the disciplinary subcommittee has authority to adopt, modify, or reject, in whole or in part, the ALJ's opinion or proposal for decision. MCL 24.285 requires the disciplinary subcommittee to make the decision within a reasonable period of time, and the decision must be supported by competent, material, and substantial evidence. Similar to domestic relations matters when a Friend of the Court referee conducts an evidentiary hearing and recommends a resolution that must be considered and either entered or rejected by a circuit court judge, a member of the disciplinary subcommittee acts as a judge because the subcommittee considers the evidence gathered, findings made, and conclusions rendered by an ALJ and reviews exceptions filed by the parties to the proposal for decision before rendering a final disciplinary decision. Accordingly, the ALJ acts like a magistrate or hearing referee, and a member of the disciplinary subcommittee acts as the judge who renders a final decision.

3. Because the disciplinary subcommittee members act in a quasi-judicial adjudicative capacity during disciplinary proceedings, the members are entitled to quasi-judicial immunity for the decisions they make in that role. Public policy is served by cloaking the disciplinary subcommittee with absolute quasi-judicial immunity because it precludes civil suits against the members, thereby saving judicial time in repetitive appellate-type challenges against disciplinary decisions, and enforces finality in the subcommittee's decisions; subcommittee members are

also more willing to serve because they do not have to fear repercussions for disciplinary decisions. Absolute immunity is also merited because the entire complaint process has adequate procedural safeguards; the aggrieved party has the right to seek direct judicial review by the courts after all administrative remedies available within the board have been exhausted, making a separate civil action unnecessary to secure relief. Moreover, as an additional procedural safeguard, Serven could have filed a complaint against the individual defendants with the State Board of Ethics.

4. The trial court should have dismissed Serven's claims against Cogan, Klapp, and Wilcox because the individual defendants had quasi-judicial immunity from liability for all acts performed as members of the disciplinary subcommittee; the absolute immunity remained even though the safeguards against biased individuals deciding a disciplinary matter did not work in this matter.

Reversed and remanded.

IMMUNITY — QUASI-JUDICIAL IMMUNITY — MICHIGAN BUREAU OF HEALTH PROFESSIONS-BOARD OF CHIROPRACTIC DISCIPLINARY SUBCOMMITTEE.

Quasi-judicial immunity extends absolute judicial immunity—which grants judges absolute immunity from liability for acts performed in the exercise of their judicial function even when the acts are in excess of their jurisdiction and are alleged to have been done maliciously—to nonjudicial officers; quasi-judicial immunity is available to those serving in a quasi-judicial adjudicative capacity as well as those persons other than judges without whom the judicial process could not function; members of the Michigan Bureau of Health Professions-Board of Chiropractic Disciplinary Subcommittee act in a quasi-judicial adjudicative capacity during disciplinary proceedings and have quasi-judicial immunity from liability for acts performed in the exercise of their duties for the subcommittee.

Gasiorek, Morgan, Greco, McCauley & Kotzian, PC (by *Donald J. Gasiorek* and *Ahmad A. Chehab*), for Bruce D. Serven.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Erik A. Grill* and *Mark E. Donnelly*,

Assistant Attorneys General, for Solomon Cogan, Thomas Klapp, and Ronald Wilcox.

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

PER CURIAM. Bruce D. Serven is a chiropractor who was disciplined by the Disciplinary Subcommittee of the Michigan Bureau of Health Professions-Board of Chiropractic. This Court reversed the subcommittee, holding that its order lacked legal and factual merit. Serven then filed suit, alleging that the disciplinary subcommittee members acted with self-interest and improperly penalized him. As to part of Serven's claims, the circuit court denied the disciplinary subcommittee members' motion for summary disposition based on quasi-judicial immunity and qualified immunity as well as failure to state a claim upon which relief could be granted. Because the disciplinary subcommittee members were entitled to absolute immunity as quasi-judicial actors, we reverse and remand for further proceedings consistent with this opinion.

I. BACKGROUND

This case arises out of State Farm Insurance Company's retention of Serven, a licensed chiropractor, to perform an independent chiropractic examination (ICE) on AE. AE had been involved in a motor vehicle accident in May 2004 and two years later sought chiropractic treatment from Health Quest of Burton. Health Quest treated AE approximately three times weekly. At the time, Health Quest was owned, in part, by Solomon Cogan and Silvio Cozzetto. Cogan was also the chairman of the Michigan Bureau of Health Professions-Board of Chiropractic. Defendants Thomas

Klapp and Ronald Wilcox were members of the board's disciplinary subcommittee.

Serven conducted a physical examination of AE and elicited his medical history. Serven concluded that AE was "not currently suffering from any type of musculoskeletal condition of spinal origin of causal relationship to the [subject] auto accident." In fact, Serven opined that AE's condition was "normal," negating the need for any further chiropractic services. Serven further advised State Farm that Health Quest's services provided to date were not "medically necessary for the injuries sustained in this accident." Based in part on this advice, State Farm denied payment for additional treatment to AE. Health Quest filed suit against State Farm, seeking reimbursement for the services Health Quest had provided to AE; Serven and Cogan testified against each other during the trial. State Farm prevailed. Serven alleges that Cogan threatened him, "Obviously I need to see you on a higher level."

Shortly thereafter, Cogan's business partner, Cozzetto, filed a complaint against Serven with the board. Cozzetto noted that he was sent by his own insurer to Serven for an ICE following a 2000 car accident. Cozzetto alleged that Serven conducted chiropractic and orthopedic tests improperly, leading to an inaccurate report and termination of his insurance benefits. In relation to the current matter, Cozzetto indicated that his associate, Dennis Borja, had examined and treated AE. Cozzetto accused Serven of improperly rendering an opinion without reviewing Health Quest's records and acting outside the scope of his chiropractic license by considering records from medical care providers. The Attorney General subsequently filed an administrative complaint against Ser-

ven, alleging that his behavior constituted negligence, incompetence, and lack of good moral character under MCL 333.16221 of the Public Health Code, MCL 333.1101 *et seq*. The lack-of-good-moral-character allegation was based on Serven's alleged comment during the board's investigation that Health Quest "had a track record of performing unnecessary treatment." The case was referred to an administrative law judge (ALJ) who determined that Serven was not negligent, incompetent, or lacking in good moral character, and the ALJ issued a proposal for a decision to this effect.

The disciplinary subcommittee of the board did not adopt the ALJ's proposal. At a March 15, 2012 meeting at which Cogan was present, the subcommittee instead found that Serven was negligent because he had not reviewed Health Quest's chiropractic records before issuing his opinion regarding the ICE. In addition, the subcommittee determined that it was "quite likely" that Serven made the comment that Health Quest "had a track record of performing unnecessary treatment," representing a lack of good moral character. The board placed Serven on probation for one year. Serven appealed the disciplinary subcommittee's decision in this Court.

This Court held that the disciplinary subcommittee erred, reversed the decision, and remanded to the disciplinary subcommittee with instructions to expunge Serven's record. *Bureau of Health Professions v Serven*, 303 Mich App 305, 311; 842 NW2d 561 (2013). We found the subcommittee's conclusion that Serven was negligent legally unsound. Specifically, as an independent chiropractic examiner, Serven owed a duty to State Farm to gather information and to provide advice, a duty that Serven fulfilled. Serven's only duty to AE was not to cause physical harm, and there was no

allegation Serven had breached that duty. And Serven owed no duty to Health Quest. *Id*. at 309-310. This Court also rejected the subcommittee's conclusion that Serven's conduct amounted to a lack of good moral character. Serven's alleged comment regarding Health Quest during the board's investigation was an "attempt[] to be candid" and was not publicized further than necessary. *Id*. at 310-311.

Thereafter, Serven filed this lawsuit against Cogan, Klapp, and Wilcox in their individual capacities, alleging claims of malicious prosecution, tortious interference with Serven's advantageous business relationships, abuse of process, and violations of Serven's due-process and equal-protection rights.[1] Defendants moved for summary disposition pursuant to MCR 2.116(C)(6), (C)(7) and (C)(8). The circuit court granted defendants' motion with regard to the constitutional and malicious prosecution claims but denied their motion with regard to Serven's claims for abuse of process and tortious interference. Defendants appealed, contending that the circuit court should have dismissed these claims as well.

II. QUASI-JUDICIAL IMMUNITY

Defendants argue that they are entitled to quasi-judicial immunity because they are part of the Michigan Bureau of Health Professions-Board of Chiropractic Disciplinary Subcommittee. Summary disposition is appropriate under MCR 2.116(C)(7) when "[e]ntry of judgment, dismissal of the action, or other relief is appropriate because of . . . immunity granted by law . . . ." We review de novo a lower court's summary

[1] Serven raised unrelated claims against various other named defendants that are not at issue in this appeal. Our use of the term "defendants" hereafter refers to Cogan, Klapp, and Wilcox.

disposition ruling. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). "A party may support a motion under MCR 2.116(C)(7) by affidavits, depositions, admissions, or other documentary evidence," which is otherwise admissible. *Id*. We must review this evidence "in the light most favorable to the nonmoving party . . . ." *Denhof v Challa*, 311 Mich App 499, 510; 876 NW2d 266 (2015). "The contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant." *Maiden*, 461 Mich at 119.

We begin our analysis with the doctrinal sire of quasi-judicial immunity—absolute judicial immunity. "It is well settled that judges are accorded absolute immunity from liability for acts performed in the exercise of their judicial functions." *Diehl v Danuloff*, 242 Mich App 120, 128; 618 NW2d 83 (2000). The purpose of absolute immunity is to "protect[] the finality of judgments and preserv[e] the judicial independence by 'insulating judges from vexatious actions prosecuted by disgruntled litigants.' " *Id*., quoting *Forrester v White*, 484 US 219, 225; 108 S Ct 538; 98 L Ed 2d 555 (1988). "[T]he broad scope of the immunity . . . is 'for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences.' " *Diehl*, 242 Mich App at 129, quoting *Pierson v Ray*, 386 US 547, 554; 87 S Ct 1213; 18 L Ed 2d 288 (1967) (quotation marks and citations omitted). Accordingly, judges "are not liable to civil actions for their judicial acts even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly." *Bradley v Fisher*, 80 US (13 Wall) 335, 351; 20 L Ed 646 (1871). Absolute immunity is necessary because "controversies sufficiently intense to erupt in litigation are not easily capped by a judicial

decree" and could cascade into a never-ending river of actions in other forums. *Butz v Economou*, 438 US 478, 512; 98 S Ct 2894; 57 L Ed 2d 895 (1978). And "safeguards built into the judicial process tend to reduce the need for private damages actions as a means of controlling unconstitutional conduct." *Id*. For example,

> [t]he insulation of the judge from political influence, the importance of precedent in resolving controversies, the adversary nature of the process, and the correctability of error on appeal are just a few of the many checks on malicious action by judges. Advocates are restrained not only by their professional obligations, but by the knowledge that their assertions will be contested by their adversaries in open court. Jurors are carefully screened to remove all possibility of bias. Witnesses are, of course, subject to the rigors of cross-examination and the penalty of perjury. Because these features of the judicial process tend to enhance the reliability of information and the impartiality of the decisionmaking process, there is a less pressing need for individual suits to correct constitutional error. [*Id*.]

Quasi-judicial immunity is an "extension of absolute judicial immunity to non-judicial officers . . . ." Comment, *The Officer Has No Robes: A Formalist Solution to the Expansion of Quasi-Judicial Immunity*, 66 Emory LJ 123, 134 (2016). Quasi-judicial immunity "is available to those serving in a quasi-judicial adjudicative capacity as well as those persons other than judges without whom the judicial process could not function." *Maiden*, 461 Mich at 134 (quotation marks and citation omitted). In this vein, this Court has noted:

> The doctrine of quasi-judicial immunity as developed by the common law has at least two somewhat distinct branches: one branch focuses on the nature of the job-related duties, roles, or functions of the person claiming immunity, and one branch focuses on the fact that the

> person claiming immunity made statements or submissions in an underlying judicial proceeding. [*Denhof*, 311 Mich App at 511.]

In relation to the first branch, a quasi-judicial body subject to quasi-judicial immunity is defined as a board or commission with statutorily conferred power "to ascertain facts and make orders founded thereon" and "to exercise discretion of a judicial nature." *Midland Cogeneration Venture, LP v Naftaly*, 489 Mich 83, 91-92; 803 NW2d 674 (2011) (quotation marks and citations omitted).

In addition to the reasons posited for extending absolute immunity to judicial officers, quasi-judicial immunity is supported by:

> "(1) the need to save judicial time in defending suits; (2) the need for finality in the resolution of disputes; (3) to prevent deterring competent persons from taking office; (4) to prevent the threat of lawsuit from discouraging independent action; and (5) the existence of adequate procedural safeguards such as change of venue and appellate review." [*Diehl*, 242 Mich App at 131-132, quoting *Duff v Lewis*, 114 Nev 564, 569; 958 P2d 82 (1998) (quotation marks and citations omitted).]

Defendants contend that they are entitled to quasi-judicial immunity because in their disciplinary subcommittee positions, they acted as quasi-judicial adjudicators. The board is comprised of nine members, five chiropractors and four public members, tasked with "ascertaining minimal entry level competency of health practitioners and verifying continuing education during licensure." In addition, the board must "take disciplinary action against licensees who have adversely affected the public's health, safety, and welfare." State of Michigan, *Michigan Board of Chiropractic*, available at <http://www.michigan.gov/snyder/0,4668,7-277-57738_

57679_57726-250191—,00.html> (accessed March 23, 2017) [https://perma.cc/9WWU-VBZG].

Once a complaint is filed against a chiropractor, like the complaint filed by Cozzetto against Serven, the "Complaint Intake Section" of the board reviews the allegations and determines if investigation is necessary. If an investigation is deemed necessary, a "trained investigation staff" member interviews the appropriate witnesses and collects evidence. If the investigator believes the challenged conduct "was below the minimal standards for the profession," the board submits the matter to "an appropriate expert reviewer." If the expert substantiates the staff investigator's assessment, the board requests the Attorney General to file a formal administrative complaint. Dep't of Licensing and Regulatory Affairs, *What Happens After a Complaint is Filed?*, available at <http://www.michigan.gov/lara/0,4601,7-154-72600_73836-365424—,00.html> (accessed March 23, 2017) [https://perma.cc/T4QQ-Y3KA]. In this way, the board acts as police and prosecutor.

Formal administrative complaints are placed before an ALJ for a hearing. *Id*. Matters such as this are considered "contested cases." A contested case is "a proceeding . . . in which a determination of the legal rights, duties, or privileges of a named party is required by law to be made by an agency after an opportunity for an evidentiary hearing." MCL 24.203(3). The evidentiary hearings in contested cases may be heard by an ALJ, as was done in this case. An ALJ must act "in an impartial manner" and can be disqualified for "personal bias." MCL 24.279. But the ALJ is not the final arbiter. At the end of the hearing, the ALJ issues a proposed decision to which the parties may file exceptions. MCL 24.281(1). The disciplinary

subcommittee issues the final order. It "may adopt, modify, or reject, in whole or in part, the opinion or proposal for decision of the [ALJ]." Mich Admin Code, R 338.1630(5). This final decision must be made "within a reasonable period" and must be supported by "competent, material and substantial evidence." MCL 24.285. In this regard, the ALJ acts like a magistrate or hearing referee and the Board's disciplinary subcommittee as the judge who renders a final decision.

That the disciplinary subcommittee acts as a judge is supported by "the job-related duties, roles, or functions" of the subcommittee's members. *Denhof*, 311 Mich App at 511. The subcommittee considers the evidence gathered, findings made, and conclusions rendered by an ALJ and reviews exceptions filed by the parties before rendering a final disciplinary decision. The system is akin to that in domestic relations matters, in which a Friend of the Court referee conducts the evidentiary hearing and recommends a resolution that must be considered and either entered or rejected by a circuit court judge. See MCL 552.507. Accordingly, the subcommittee "serv[es] in a quasi-judicial adjudicative capacity," *Maiden*, 461 Mich at 134, with duties similar to the circuit court in domestic relations matters.

Moreover, quasi-judicial immunity is frequently extended to a medical licensing board charged with hearing license suspension and revocation matters. *Watts v Burkhart*, 978 F2d 269, 271 (CA 6, 1992). See also *Buckwalter v Nevada Bd of Med Examiners*, 678 F3d 737, 740 (CA 9, 2012); *Ostrzenski v Seigel*, 177 F3d 245, 249 (CA 4, 1999) ("Every court of appeals that has addressed the issue has concluded that members of a state medical disciplinary board are entitled to absolute quasi-judicial immunity for performing judi-

cial or prosecutorial functions."). As a general proposition, the United States Supreme Court has held "that adjudication within a federal administrative agency shares enough of the characteristics of the judicial process" to warrant immunity. *Butz*, 438 US at 512-513.

Cloaking the disciplinary subcommittee with absolute quasi-judicial immunity also serves public policy. Precluding civil suits against the members saves judicial time in repetitive appellate-type challenges against disciplinary decisions and enforces finality. Competent persons need not fear vexatious and harassing litigation arising from their official actions and are therefore more likely to agree to serve on disciplinary boards. Disciplinary subcommittee members can act independently and without fear of repercussion for taking disciplinary action against an individual in the regulated field. See *Diehl*, 242 Mich App at 131-132. Ultimately, insulating disciplinary subcommittee members protects the members and the judicial system from private lawsuits by chiropractors disgruntled by disciplinary action. See *Butz*, 430 US at 512. See also *Watts*, 978 F2d at 278, quoting *Bettencourt v Bd of Registration in Med*, 904 F2d 772, 783 (CA 1, 1990) (noting that " 'the act of revoking a physician's license . . . is likely to stimulate a litigious reaction from the disappointed physician, making the need for absolute immunity apparent' "); *Vosburg v Dep't of Social Servs*, 884 F2d 133, 137 (CA 4, 1989) (extending quasi-judicial immunity to social workers who file petitions in child protective cases, in part, because "the chances are high that suits against social workers would occur with some degree of regularity" as "[p]arents, resentful of and humiliated by an attempt to usurp their rights, would likely channel their frustration" at "the State's advocate").

The entire process also bears "adequate procedural safeguards" to merit absolute immunity. *Diehl*, 242 Mich App at 132. First and foremost, when "all administrative remedies available within an agency" have been exhausted, the aggrieved party is entitled to direct judicial review by the courts. MCL 24.301. See also Const 1963, art 6, § 28 (requiring the opportunity for direct judicial review of administrative officers' judicial or quasi-judicial final decisions). Accordingly, the aggrieved party need not file a separate civil action to secure relief. Indeed, Serven was vindicated by judicial review in this case. See *Serven*, 303 Mich App at 311.

Sufficient safeguards ensure that chiropractors against whom a complaint has been filed will be reviewed by unbiased arbiters. See *Butz*, 438 US at 512. Mich Admin Code, R 338.1604 has at all relevant times directed, "Any member of . . . a board . . . who takes an active part in the investigatory or allegation process shall not participate in deciding the contested case . . . ." Mich Admin Code, R 338.1605(3) grants the board's chair, Cogan, power to appoint a replacement disciplinary subcommittee member if a previously named individual "is unable to participate." This would include replacement of a member removed pursuant to Mich Admin Code, R 338.1604. Two years after Serven's disciplinary matter, MCL 333.16216a was enacted to clarify that anyone with a conflict of interest, such as "a personal or financial interest in the outcome," is subject to disclosure requirements. However, active efforts to protect against conflicts of interest were already in place and were sufficient to protect a respondent's rights.

Clearly, the safeguards against biased individuals deciding a disciplinary matter did not work in this

case. Cogan was not a member of the disciplinary subcommittee, but he appeared at the subject meeting and participated in off-the-record discussions. This violated the spirit of former MCL 333.16216(1), which provided that "[t]he chair of a board . . . shall not serve as a member of a disciplinary subcommittee . . . ."[2] Cogan was an equity partner in Health Quest and bore a financial interest in the outcome of Serven's disciplinary matter and therefore should have played absolutely no role in the decision. The failure of the protective measures does not warrant a private lawsuit against the disciplinary subcommittee members, however. Absolute immunity does not fall away even when the judicial or quasi-judicial official acts "maliciously or corruptly." *Bradley*, 80 US (13 Wall) at 351-352.

The circuit court erroneously relied on *North Carolina State Bd of Dental Examiners v Fed Trade Comm*, 574 US ___; 135 S Ct 1101; 191 L Ed 2d 35 (2015), in denying immunity to defendants on conflict-of-interest grounds. *North Carolina* was based on a completely different, and much more narrowly drawn, immunity principle than that at play here.

In *North Carolina*, the state's Board of Dental Examiners investigated several dentist complaints to determine if nondentists could legally provide teeth whitening services. The complaints filed by the various dentists challenged the lower prices offered by nondentists for these services, but did not allege that any recipient of nondentist teeth-whitening services had been harmed. The board was made up of seven dentists, one dental hygienist, and one public member. It determined that teeth whitening fell within the practice of dentistry and therefore entered cease-and-desist

[2] MCL 333.16216(1), as amended by 2013 PA 268. This provision was subsequently relocated to MCL 333.16216(4) by 2014 PA 413.

letters against any and all nondentists providing such services or manufacturing teeth-whitening products. *Id*. at ___; 135 S Ct at 1108. The Federal Trade Commission filed a complaint against the state board and conducted an investigation, believing the board's conduct violated federal antitrust law by illegally interfering with free enterprise. *Id*. at ___; 135 S Ct at 1108-1109.

Specific to antitrust litigation, the United States Supreme Court interpreted federal legislation "to confer immunity on anticompetitive conduct by the States when acting in their sovereign capacity." *Id*. at ___; 135 S Ct at 1110, citing *Parker v Brown*, 317 US 341, 350-351; 63 S Ct 307; 87 L Ed 315 (1943). *Parker* state-action immunity is most often applied to "[s]tate legislation and decision[s] of a state supreme court, acting legislatively rather than judicially" as these "are an undoubted exercise of state sovereign authority." *North Carolina*, 574 US at ___; 135 S Ct at 1110 (quotation marks and citation omitted). *Parker* state-action immunity is strictly limited, however, when the state delegates authority to a board controlled by "active market participants" because those members will always have a financial interest in anticompetition decisions and actions. *Id*. at ___; 135 S Ct at 1111.

This case does not involve federal antitrust law. Therefore, the limited state-action immunity conferred by federal antitrust legislation is inapplicable and irrelevant. The board is controlled by chiropractors with a ratio of five licensed chiropractors to four public members. When the disciplinary subcommittee revokes or suspends one chiropractor's license, that chiropractor's clients will likely move on and find another, competing chiropractor for services. Even so, the disciplinary action does not violate federal antitrust leg-

islation; it conforms to state law to protect the public from unscrupulous or incompetent providers.

Moreover, defendants are not completely immune from any admonishment as there are internal governmental mechanisms for handling their alleged misconduct, adding another procedural safeguard. If defendants were elected state judges, Serven could have filed a grievance with the Judicial Tenure Commission, MCR 9.207(A), which may have led to disciplinary action. Here, Serven could have filed a complaint with the State Board of Ethics. Defendants are "public officers" as defined in MCL 15.341(c), as they were "appointed by the governor or another executive department official." In that role, defendants were required to use board personnel and resources for legitimate official purposes "and not for personal gain or benefit." MCL 15.342(3).[3] "Any person or entity . . . may file a complaint charging a public officer . . . with unethical conduct." *State Board of Ethics Rules of Practice & Procedure*, R 15.5(1), available at <http://www.michigan.gov/documents/mdcs/Ethics_Rules-web_485576_7.pdf> (accessed March 27, 2017) [https://perma.cc/HJ7F-CS9W]. Accordingly, Serven was not without the means to bring public attention to defendants' alleged wrongdoing.

Ultimately, as the board's disciplinary subcommittee was cloaked with absolute quasi-judicial immunity, the circuit court should have dismissed Serven's claims against these defendants. Given this resolution, we need not consider the remainder of defendants' appellate challenges.

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[3] The state ethics act, MCL 15.341 *et seq*., does permit an aggrieved party to file a civil suit for damages. The action must be filed within 90 days of the alleged violation of the act. MCL 15.342c. Serven waited more than two years to file this suit, well beyond the statutory limitations period.

We reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

O'CONNELL, P.J., and GLEICHER and BOONSTRA, JJ., concurred.

PEOPLE v WAHMHOFF

Docket No. 330211. Submitted February 15, 2017, at Lansing. Decided February 28, 2017. Approved for publication April 11, 2017, at 9:00 a.m.

Christopher G. Wahmhoff was convicted following a bench trial in the Calhoun Circuit Court of resisting and obstructing a police officer, MCL 750.81d(1), and trespassing, MCL 750.552. Defendant had crawled inside a pipeline on Enbridge, Inc., property sometime before employees arrived at 7:00 a.m. on June 24, 2013. He intended to disrupt an entire workday for Enbridge in an act of protest. Firefighters and police personnel were immediately called to the scene because an overpowering chemical odor emanated from the pipe, but defendant refused to exit the pipe until 5:00 p.m. Emergency personnel remained on site for approximately 8 to 10 hours and were prepared to respond if defendant lost consciousness. Defendant was taken into custody when he exited the pipe at approximately 5:00 p.m. The court, Conrad J. Sindt, J., sentenced defendant to 12 months' probation and 60 days in jail, ordered defendant to pay a fine, and ordered defendant to pay a total of $4,301.28 in restitution: $520.28 to the Calhoun County Sheriff's Department based solely on overtime compensation; $3,000 to the Fredonia Township Fire Department based on the use of two fire engines and the presence of personnel at the site, but adjusted according to the trial court's estimation; and $781 to the Marshall Fire Department based on the use of one fire engine and the presence of personnel at the site, but adjusted according to the trial court's estimation. Defendant appealed, solely challenging the restitution order.

The Court of Appeals *held*:

1. The Sixth Amendment of the United States Constitution reserves to juries the determination of any fact, other than the fact of a prior conviction, that increases a criminal defendant's maximum potential sentence. While this rule applies to sentences consisting of a criminal fine, criminal fines and restitution are not synonymous; therefore, judicial fact-finding to determine the appropriate amount of restitution does not implicate a defen-

dant's Sixth Amendment right to a jury trial. Accordingly, defendant was not entitled to have the amount of restitution determined by a jury.

2. A court's calculation of a restitution amount is reviewed for an abuse of discretion. Under MCL 780.766(2) of the Crime Victim's Rights Act (CVRA), MCL 780.751 *et seq*., when sentencing a defendant convicted of a crime, a court shall order that the defendant make full restitution to any victim of the defendant's course of conduct that gives rise to the conviction. Under MCL 780.766(1), a "victim" includes a governmental entity that suffers direct physical or financial harm as a result of a crime. The CVRA permits restitution only for losses factually and proximately caused by the defendant's offense; it does not permit restitution for speculative or conjectural losses, nor does it permit restitution for the general costs of criminal investigations and prosecutions, which include regular or overtime compensation paid to employees for performing their ordinary job functions. The evidence must provide a reasonably certain factual foundation for a restitution amount to meet the statutory standard. In this case, a distinction could be drawn between the general costs of investigation, which would not be recoverable as restitution, and the expenditure of resources far beyond routine costs for investigation, prosecution, or emergency response invested by the firefighters and police personnel solely as the result of defendant's conscious decision to illegally remain inside the pipe. Therefore, the record provided support for a finding that at least some of the expenses incurred by the responding governmental entities qualified as direct financial harm as the result of a crime. However, the record did not reveal the point at which the losses shifted from ordinary costs of investigation to financial losses directly resulting from defendant's criminal activity, and the prosecution failed to establish a reasonably certain factual foundation for these expenses in the trial court. The trial court improperly adjusted the restitution calculation without any basis in the record; the exhibits proffered by the prosecution were insufficient because they merely identified a standard "rate" for each category of personnel multiplied by the number of hours spent on the scene without taking into consideration the fact that some of the costs were ineligible for restitution. Accordingly, the trial court abused its discretion to the extent that it awarded restitution based on routine overtime compensation or regular compensation.

3. On remand, should the prosecution seek restitution based on direct physical or financial loss, harm, or damage related to the equipment used by firefighters and police personnel, the prosecu-

tion must establish, with reasonable certainty, the amount of any loss that (1) did not constitute an ordinary, general cost of investigation or operation and (2) was directly caused by defendant's criminal offense.

Restitution award vacated; case remanded for furthering proceedings.

RESTITUTION — GOVERNMENTAL ENTITIES — ESTABLISHING DIRECT PHYSICAL OR FINANCIAL HARM AS A RESULT OF A CRIME.

Under MCL 780.766(2) of the Crime Victim's Rights Act (CVRA), MCL 780.751 *et seq*., when sentencing a defendant convicted of a crime, a court shall order that the defendant make full restitution to any victim of the defendant's course of conduct that gives rise to the conviction; under MCL 780.766(1), a "victim" includes a governmental entity that suffers direct physical or financial harm as a result of a crime; the CVRA does not permit a sentencing court to order restitution for the general costs of criminal investigations and prosecutions, which include regular or overtime compensation paid to employees for performing their ordinary job functions; a governmental entity seeking restitution based on direct physical or financial harm as a result of a crime must establish with reasonable certainty that the amount of any loss (1) did not constitute an ordinary, general cost of investigation or operation and (2) was directly caused by the defendant's criminal offense.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *David E. Gilbert*, Prosecuting Attorney, and *Jennifer K. Clark*, Assistant Prosecuting Attorney, for the people.

John F. Royal for defendant.

Before: HOEKSTRA, P.J., and SAAD and RIORDAN, JJ.

PER CURIAM. Defendant, Christopher George Wahmhoff, was convicted after a bench trial of resisting and obstructing a police officer, MCL 750.81d(1), and trespassing, MCL 750.552. The trial court sentenced him to 12 months' probation and 60 days in jail, to be suspended, for his resisting and obstructing conviction and ordered defendant to pay a fine for his trespassing conviction. After a hearing, defendant was ordered to

pay a total of $4,301.28 in restitution. Defendant now appeals as of right, solely challenging the restitution order. We vacate the restitution order and remand for further proceedings consistent with this opinion.

I. FACTUAL BACKGROUND

On June 24, 2013, at some time before employees arrived at 7:00 a.m., defendant crawled inside a pipeline on Enbridge, Inc., property in Fredonia Township, Michigan. When deputies arrived, defendant stated that he would not leave the pipe until 5:00 p.m. because he intended to disrupt an entire workday for Enbridge in an act of protest. Fire personnel were called to the scene because defendant was in a confined space and an overpowering chemical odor could be smelled inside the pipe. Accordingly, at least one ventilation fan was placed at the end of the pipe to ensure that defendant received fresh air while he remained inside, and firefighters and police personnel remained on site, prepared to respond if defendant lost consciousness. As promised, defendant exited the pipe at approximately 5:00 p.m. and was taken into custody.

II. JUDICIAL FACT-FINDING AND RESTITUTION

Defendant contends that the restitution award should be vacated because he was entitled to have the amount of restitution determined by a jury under the Sixth and Fourteenth Amendments of the United States Constitution. We disagree.

A. STANDARD OF REVIEW

"A Sixth Amendment challenge presents a question of constitutional law that this Court reviews de novo." *People v Lockridge*, 498 Mich 358, 373; 870 NW2d 502 (2015).

B. ANALYSIS

We previously rejected this argument in *People v Corbin*, 312 Mich App 352, 371-373; 880 NW2d 2 (2015). In that case, we held that judicial fact-finding to determine the appropriate amount of restitution does not implicate a defendant's Sixth Amendment right to a jury trial. *Id*. at 372-373. Likewise, we expressly stated that the Michigan Supreme Court's recent decision in *Lockridge*, 498 Mich 358, does not apply to "restitution orders entered in conjunction with sentencing." *Corbin*, 312 Mich App at 373 n 5. We are bound by that decision. MCR 7.215(J)(1).

Additionally, like the defendant in *Corbin*, defendant's reliance on *Southern Union Co v United States*, 567 US 343; 132 S Ct 2344; 183 L Ed 2d 318 (2012), is misplaced. In that case, the United States Supreme Court held that "the determination of any fact, other than the fact of a prior conviction, that increases a criminal defendant's maximum potential sentence," including a sentence consisting of a criminal fine, must be determined by a jury. *Id*. at 346, 360. As we observed in *Corbin*, "[a] criminal fine and restitution are not synonymous . . . ." *Corbin*, 312 Mich App at 372.

Accordingly, defendant's argument fails.

III. CALCULATION OF RESTITUTION

Defendant also argues that the trial court's award of restitution was an abuse of discretion because it was speculative, arbitrary, and based on costs or losses that are not eligible for reimbursement as restitution. Although we disagree with defendant's claim that the responding government entities necessarily are entitled to no restitution in this case, we agree with defendant that the trial court's restitution award was improper.

A. STANDARD OF REVIEW

We generally "review a court's calculation of a restitution amount for an abuse of discretion and its factual findings for clear error." *Corbin*, 312 Mich App at 361 (citations omitted). "A trial court may abuse its discretion by blurring the distinction between a civil remedy for damages and the criminal penalty of restitution." *Id*. However, "when the question of restitution involves a matter of statutory interpretation, the issue is reviewed de novo as a question of law." *People v Dimoski*, 286 Mich App 474, 476; 780 NW2d 896 (2009); see also *Corbin*, 312 Mich App at 361.

B. ANALYSIS

Crime victims have a right to restitution under both the Michigan Constitution and Michigan statutory law. *People v Bell*, 276 Mich App 342, 346; 741 NW2d 57 (2007); see also Const 1963, art 1, § 24; MCL 769.1a; MCL 780.766. "The purpose of restitution is to allow crime victims to recoup losses suffered as a result of criminal conduct." *People v Newton*, 257 Mich App 61, 68; 665 NW2d 504 (2003) (quotation marks and citation omitted).

"The Crime Victim's Rights Act [(CVRA)], MCL 780.751 *et seq*., determines whether a sentencing court's restitution order is appropriate." *Newton*, 257 Mich App at 68. Pursuant to MCL 780.766(2), "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 . . . ." A "victim" includes, among other things, a "governmental entity or any other legal entity

that suffers direct physical or financial harm as a result of a crime." MCL 780.766(1) (punctuation omitted); see also *Newton*, 257 Mich App at 68-69.[1]

As we explained in *Corbin*, 312 Mich App at 360:

> The CVRA provides that the prosecution has the burden of proving by a preponderance of the evidence the amount of the victim's loss. MCL 780.767(4). "MCL 780.766(2) requires a direct, causal relationship between the conduct underlying the convicted offense and the amount of restitution to be awarded." *People v McKinley*, 496 Mich 410, 421; 852 NW2d 770 (2014). This Court has held that court-ordered restitution is not a substitute for civil damages. *People v Tyler*, 188 Mich App 83, 89; 468 NW2d 537 (1991).

Thus, "[t]he CVRA . . . permits an award only for losses factually and proximately caused by the defendant's offense[.]" *Corbin*, 312 Mich App at 369; see also *id*. (describing factual and proximate causation). It does not permit restitution for "speculative or conjectural losses." *Id*. at 365. But "[w]here the evidence provides a reasonably certain factual foundation for a restitution amount, the statutory standard is met." *Id*.; see also *People v Grant*, 455 Mich 221, 233-234; 565 NW2d 389 (1997) (considering a former version of the CVRA and indicating the information on which a trial court may rely in calculating restitution); *People v Guajardo*, 213 Mich App 198, 200; 539 NW2d 570 (1995) (also interpreting a former version of the CVRA and concluding that the amount of restitution "should be based upon the evidence").

We agree with defendant that the CVRA does not permit a sentencing court to order restitution for the

[1] Michigan's general restitution statute, MCL 769.1a, is substantively identical in all relevant respects to the provisions of the CVRA discussed in this opinion. See MCL 769.1a(1)(b) and (2).

general costs of criminal investigations and prosecutions. In *People v Crigler*, 244 Mich App 420, 422, 427; 625 NW2d 424 (2001), we held that a law enforcement agency can "obtain restitution of buy money lost to a defendant as a result of the defendant's criminal act of selling controlled substances," which was never recovered by the police. Recognizing that an entity must incur " 'physical, financial, or emotional harm' " as a result of the crime in order to be entitled to restitution under MCL 780.766(1), we noted that "harm" is defined in the dictionary "using the words 'injury,' 'damage,' and 'hurt.' " *Id*. at 426 (citation omitted). Accordingly, we concluded that "the permanent loss" of the buy money was a financial harm to the law enforcement agency, reasoning that law enforcement's ability to conduct narcotics purchases in future investigations is impaired when the agency is unable to recover buy money from narcotics purchases that result in convictions. *Id*. We also drew the following distinction between the loss of the buy money and the law enforcement agency's other expenses:

> [T]here is nothing in the statutory language that suggests that when the financial loss takes place during the course of a criminal investigation, no "harm" occurs. The loss of buy money is qualitatively unlike the expenditure of other money related to a criminal investigation, because it results directly from the crime itself; that is, the money is lost when it is exchanged for the controlled substance. The payment of salaries and overtime pay to the investigators, the purchase of surveillance equipment, the purchase and maintenance of vehicles, and other similar expenditures are "costs of investigation" unrelated to a particular defendant's criminal transaction. These expenditures would occur whether or not a particular defendant was found to be engaged in the sale of controlled substances. However, the loss of the buy money used to purchase specific controlled substances from the subject of a criminal inves-

> tigation directly results from the commission of a crime, and it causes financial harm to the governmental entity involved—the narcotics enforcement team. [*Id*. at 426-427.]

Later, in *Newton*, we addressed "whether a law-enforcement agency that expends money investigating a defendant suffers direct 'financial harm as a result of a crime.' " *Newton*, 257 Mich App at 69 (referring to MCL 780.766(1)). In that case, the trial court ordered the defendant to pay restitution for the overtime expenses incurred by the sheriff's department that investigated the defendant's crime. *Id*. at 62. We considered the distinction previously drawn, in dicta, by this Court in *Crigler*, 244 Mich App at 426-427, and concluded that the award of restitution was improper because "the *general cost* of investigating and prosecuting criminal activity is not direct 'financial harm as a result of a crime.' " *Newton*, 257 Mich App at 69-70 (emphasis added). Rather, "the cost of the investigation [in *Newton*] would have been incurred without regard to whether [the] defendant was found to have engaged in criminal activity." *Id*. at 69. Similarly, in *People v Gaines*, 306 Mich App 289, 323-324; 856 NW2d 222 (2014), we concluded that the trial court erred by ordering "restitution for officer investigation (24 hours for $864), a forensic analyst (102 hours for $3,672), and discs ($6.64)" because those costs were "comparable to costs of the investigation in *Newton* and distinguishable from the direct cost of the buy money paid in *Crigler*."

In this case, defendant was ordered to pay $520.28 in restitution to the Calhoun County Sheriff's Department based solely on the overtime compensation paid to four employees; $3,000 in restitution to the Fredonia Township Fire Department, which apparently was based on the use of two fire engines and the presence of

personnel from the department that responded to the scene, but adjusted according to the trial court's estimation; and $781 to the Marshall Fire Department based on the amount of compensation paid to two lieutenants of the Marshall Fire Department and the use of one fire engine, but reduced according to the trial court's estimation.

To the extent that the trial court awarded restitution based on routine overtime compensation or regular compensation, such an award was improper. A law enforcement agency is not entitled to restitution for regular or overtime compensation paid to its employees for performing their ordinary job functions. See *Newton*, 257 Mich App at 69-70; *Gaines*, 306 Mich App at 323-324. However, based on the exhibits and testimony admitted at the restitution hearing, we agree with the trial court that the responding authorities may be entitled to some restitution given the extraordinary amount of time invested by the fire and sheriff personnel solely due to defendant's calculated refusal to exit the pipe. We find it appropriate to draw such a distinction in this case because, for much of the day, no further investigation or emergency response would have been necessary but for defendant's deliberate decision to remain inside the pipe. The record shows that the emergency personnel arrived at the scene, determined that defendant was inside the pipe illegally, believed that defendant's safety was at risk given the strong odor inside the pipe, and instructed him to come out, but defendant refused, stating that he was going to stay inside the pipe until 5:00 p.m. It is clear that defendant's measured, illegal act prompted the expenditure of resources far beyond routine costs for investigation, prosecution, or emergency response that would ordinarily be expended to investigate or evacuate an individual in a pipe.

Likewise, the record provides support for a finding that at least some of the expenses incurred by responding governmental entities specifically resulted from defendant's conscious decision to remain inside the pipe for several hours; therefore, these expenses qualify as " '*direct* . . . financial harm as a result of a crime.' " *Gaines*, 306 Mich App at 322, quoting MCL 780.766(1). It would be illogical to conclude that the time and resources invested by the emergency responders for the duration of the incident were wholly "ordinary" or "routine." The incident was assessed and the investigation was completed early in the day, it was readily apparent that defendant's conduct was illegal, see MCL 750.81d(1); MCL 750.552, and it was defendant's choice to persist in his conduct at a substantial cost to responding authorities. The governmental entities were required to remain on site for 8 to 10 hours simply because defendant refused to exit the hazardous pipe, and the agencies did not want to unnecessarily endanger the safety of emergency personnel by performing an avoidable "confined space rescue." Accordingly, we conclude that this extended investment of resources was distinct from "the general cost of investigation and prosecuting criminal activity" or " 'costs of investigation' unrelated to a particular defendant's criminal transaction," which would not be recoverable as restitution. See *Gaines*, 306 Mich App at 323; *Newton*, 257 Mich App at 69-70; *Crigler*, 244 Mich App at 427. Rather, the costs incurred in this case appear more analogous to a loss of buy money, or a financial loss that "results directly from the crime itself[.]" *Crigler*, 244 Mich App at 427; see also *Gaines*, 306 Mich App at 323; *Newton*, 257 Mich App at 69-70.

However, even if the governmental entities may be entitled to some restitution in this case, the record does not reveal the point at which their losses shifted from

ordinary costs of investigation to financial losses directly resulting from this particular defendant's criminal activity. Further, even if this distinction were clear, the prosecution did not establish a reasonably certain factual foundation for these expenses in the trial court. *Corbin*, 312 Mich App at 365. The proffered exhibits and testimony do not provide any basis for understanding how the rates used for the calculations were developed or whether the stated "costs" actually constitute financial harm—meaning "injury," "damage," or "hurt," see *Crigler*, 244 Mich App at 426—to the entities for purposes of MCL 780.766(1). The evidence also does not distinguish between routine costs and additional expenses that were caused by defendant's extraordinary conduct in this case. Further, the trial court adjusted the restitution calculations without any basis in the record, instead altering the restitution amounts on the basis of what it believed to be "the best common sense solution . . . based on [its] experience . . . ." Consequently, similar to *Corbin*, 312 Mich App at 368, the trial court in this case essentially selected an arbitrary amount of restitution by attempting to make an "informed guess" about the appropriate amount of restitution. This approach is not consistent with the statutory standard, which requires a "reasonably certain factual foundation for a restitution amount . . . ." *Id*. at 365.

In sum, the prosecution failed to demonstrate, with reasonable certainty, the resources expended by the governmental entities in connection with defendant's criminal activity beyond the ordinary costs of investigation or operation. See *Newton*, 257 Mich App at 69-70; *Corbin*, 312 Mich App at 360, 365. Accordingly, the trial court abused its discretion by ordering defendant to pay restitution based on the requests and

information proffered by the prosecution. See *Corbin*, 312 Mich App at 361.

On remand, however, the prosecution may seek leave in the trial court to conduct a second restitution hearing. See *id*. at 371, 373. If the prosecution chooses to pursue restitution on behalf of these governmental entities, it must establish, with reasonable certainty, the amount of any loss that (1) did not constitute an ordinary, general cost of investigation or operation and (2) was directly caused by defendant's criminal offense. See *Corbin*, 312 Mich App at 365; *Newton*, 257 Mich App at 69-70; *Crigler*, 244 Mich App at 427.

Again, the governmental entities may not recover salary or overtime compensation that is equivalent to that paid as a " 'cost[] of investigation' unrelated to a particular defendant's criminal transaction." *Newton*, 257 Mich App at 69; *Crigler*, 244 Mich App at 427. The exhibits proffered in connection with the restitution hearing were insufficient to establish this distinction because they merely identified a "rate" for each category of personnel and calculated a restitution value by multiplying that rate by 10, the number of hours spent on the scene. Also, again, routine purchase or maintenance costs associated with the fire engines and other equipment are not eligible for restitution. *Newton*, 257 Mich App at 69-70; *Crigler*, 244 Mich App at 427. Accordingly, if the prosecution seeks restitution on remand based on direct physical or financial *loss*, *harm*, or *damage* related to the equipment used by the departments, see *Newton*, 257 Mich App at 68; *Crigler*, 244 Mich App at 426, the prosecution must establish that loss with a "reasonably certain factual foundation," *Corbin*, 312 Mich App at 365. The exhibits also were insufficient in that regard; it is apparent that the amounts provided do not identify property or financial

assets that were lost, damaged, or harmed, if any, because the amounts provided are calculations based on designated standard "rates" multiplied by the number of hours on site. See *Crigler*, 244 Mich App at 426-427. Information concerning the value of the loss, damage, or harm is crucial for restitution to be justified in this case given the clear "qualitative" distinction drawn by the *Crigler* Court between the loss of buy money, i.e., a loss directly resulting from the crime itself, and commonplace monetary expenses like the purchase and maintenance of vehicles or other equipment, i.e., ordinary costs that are "unrelated to a particular defendant's criminal transaction." *Id*. at 427.

IV. CONCLUSION

The restitution award in this case constituted an abuse of discretion. Accordingly, we vacate the restitution order and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

HOEKSTRA, P.J., and SAAD and RIORDAN, JJ., concurred.

KENDZIERSKI v MACOMB COUNTY

Docket No. 329576. Submitted April 11, 2017, at Detroit. Decided April 18, 2017, at 9:00 a.m.

Rita Kendzierski and nine other Macomb County retirees brought a class action against Macomb County in the Macomb Circuit Court, alleging that the retirees had a vested right to lifetime healthcare benefits under several collective bargaining agreements (CBAs) with defendant and that defendant was not permitted to make unilateral changes to the healthcare benefits. Plaintiffs requested a permanent injunction with regard to defendant's unilateral modification of the benefits. Both parties moved for summary disposition. The court, Diane M. Druzinski, J., granted summary disposition in favor of defendant, concluding that while plaintiffs had a vested right to lifetime healthcare benefits, defendant could reasonably modify the scope and level of the benefits. Plaintiffs appealed, asserting that the court erred by concluding that defendant could unilaterally modify the benefits. Defendant cross-appealed, asserting that the court erred by concluding that plaintiffs' healthcare retirement benefits were vested or comprised an entitlement to lifetime benefits.

The Court of Appeals *held*:

1. To determine whether the right to the healthcare benefits has vested, a plaintiff must establish that he or she had a contractual right to the claimed benefit that was to continue after the agreement's expiration and that the right was included in his or her respective contract at the time of retirement. When a contract is silent regarding the duration of retiree benefits, a court may not infer that the parties intended those benefits to vest for life; however, the court may conclude that the parties intended for the benefits to vest for life as long as ordinary contract principles are used to reach that conclusion. When a contract contains a latent ambiguity, extrinsic evidence may be admitted to establish the meaning of the contract. A latent ambiguity exists when the language in the contract appears to be clear and intelligible and suggests a single meaning, but other facts create the necessity for interpretation or a choice among two or more possible meanings. In this case, the CBAs were silent on

the issue whether the healthcare benefits vested; while the CBAs stated that defendant would provide fully paid medical benefits, the CBAs did not expressly state whether the benefits were promised indefinitely or only for the duration of the CBAs. Other language in the CBAs—including a "survivor" option permitting continuation of a surviving spouse's healthcare coverage following the death of the retiree, a provision that the agreement could be terminated if the retiree failed to enroll in Medicare at the age of 65, and a provision stating that coverage would be suspended while the retiree maintained coverage through another employer but recommenced when the coverage through the other employer ended—indicated that the parties contemplated the retirees' reception of healthcare benefits far beyond the three-year term of the CBAs. Accordingly, the CBAs contained a latent ambiguity with regard to whether the parties intended for the retiree benefits to vest, and the trial court properly examined extrinsic evidence to determine the meaning of the CBAs.

2. Plaintiffs presented unrefuted extrinsic evidence to establish the parties' intent that the retirees receive lifetime healthcare benefits. Defendant's 2014 bond proposal and the proposal's accompanying letter from the Macomb County Executive stated that defendant "provides retiree health benefits to eligible County retirees (and their eligible beneficiaries) for their lifetimes," that the practice of funding the benefits began 20 years earlier, and that defendant has historically provided retiree healthcare to "vested employees" as part of defendant's benefit package. Accordingly, plaintiffs had a vested right to lifetime healthcare benefits under the CBAs.

3. Under established contract principles, vested retirement rights may not be altered without the retiree's consent. In this case, the CBAs stated that defendant may provide the "substantial equivalence" of the healthcare plan provided to pre-Medicare eligible retirees, but this caveat only appeared with regard to pre-Medicare eligible retiree healthcare coverage; the CBAs did not contain similar language with regard to other coverage. Regardless, defendant failed to provide any evidence indicating that plaintiffs consented to the alteration in the healthcare benefits. The trial court erred by determining that defendant could reasonably modify the scope and level of the healthcare benefits without plaintiffs' consent.

Affirmed in part; reversed in part; case remanded for entry of an order granting summary disposition in favor of plaintiffs and granting plaintiffs' motion for a permanent injunction.

1. CONTRACTS — VESTED RETIREMENT RIGHTS — CONTRACTUAL SILENCE REGARDING DURATION OF RETIREE BENEFITS — USE OF ORDINARY CONTRACT PRINCIPLES TO DETERMINE PARTIES' INTENT.

Under established contract principles, vested retirement rights may not be altered without the retiree's consent; to determine whether the right to the healthcare benefits has vested, a plaintiff must establish that he or she had a contractual right to the claimed benefit that was to continue after the agreement's expiration and that the right was included in his or her respective contract at the time of retirement; when a contract is silent regarding the duration of retiree benefits, a court may not infer that the parties intended those benefits to vest for life; however, the court may conclude that the parties intended for the benefits to vest for life as long as ordinary contract principles are used to reach that conclusion.

2. CONTRACTS — LATENT AMBIGUITY — ADMISSION OF EXTRINSIC EVIDENCE.

When a contract contains a latent ambiguity, extrinsic evidence may be admitted to establish the meaning of the contract; a latent ambiguity exists when the language in the contract appears to be clear and intelligible and suggests a single meaning, but other facts create the necessity for interpretation or a choice among two or more possible meanings.

Legghio & Israel, PC (by *Christopher P. Legghio*), for plaintiffs.

Kitch Drutchas Wagner Valitutti & Sherbrook (by *Susan Healy Zitterman* and *Karen B. Berkery*) for defendant.

Before: FORT HOOD, P.J., and JANSEN and HOEKSTRA, JJ.

JANSEN, J. In this class action, plaintiffs, acting as class representatives, appeal as of right the trial court's opinion and order denying their motion for summary disposition and request for a permanent injunction with regard to defendant's unilateral modification of retiree healthcare benefits. On cross-appeal, defendant challenges the same order, asserting that

the trial court's conclusion that plaintiffs' healthcare retirement benefits were vested or comprised an entitlement to lifetime benefits constituted error. We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

This case presents the issue whether defendant was permitted to make unilateral changes to retiree healthcare benefits outlined in several collective bargaining agreements (CBAs). Plaintiffs represent a class of retirees covered under various CBAs with defendant. The parties dispute (1) whether plaintiffs have a vested right to lifetime healthcare benefits, and (2) if so, whether defendant was permitted to make unilateral changes to the healthcare benefits. The trial court concluded that plaintiffs have a vested right to lifetime healthcare benefits. However, the court then concluded that defendant could reasonably modify the scope and level of the benefits. The court, therefore, granted summary disposition in favor of defendant.

I. STANDARD OF REVIEW

Plaintiffs moved for summary disposition pursuant to MCR 2.116(C)(10). Defendant moved for summary disposition under MCR 2.116(C)(7), (8), and (10). We review de novo a trial court's ruling on a motion for summary disposition. *Stephens v Worden Ins Agency, LLC*, 307 Mich App 220, 227; 859 NW2d 723 (2014). Because the trial court clearly relied on documents outside of the pleadings, including the CBAs, deposition testimony, and other documentation submitted by the parties, we conclude that summary disposition was granted to defendant under MCR 2.116(C)(10). See *Cuddington v United Health Servs, Inc*, 298 Mich App 264, 270; 826 NW2d 519 (2012) ("The trial court did not indicate whether it granted defendant's motion pursu-

ant to MCR 2.116(C)(8) or (10); however, because the trial court considered documentary evidence beyond the pleadings, we construe the motion as having been granted pursuant to MCR 2.116(C)(10).").

> A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In reviewing a grant of summary disposition under MCR 2.116(C)(10), this Court considers the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party. Summary disposition is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. [*Williams v Enjoi Transp Solutions*, 307 Mich App 182, 185; 858 NW2d 530 (2014) (citations omitted).]

In addition, "[a] written contract's interpretation is also reviewed de novo." *Reicher v SET Enterprises, Inc*, 283 Mich App 657, 664; 770 NW2d 902 (2009).

> We enforce contracts according to their terms, as a corollary to the parties['] liberty to enter into a contract. We examine contractual language and give the words their plain and ordinary meanings. An unambiguous contractual provision reflects the parties['] intent as a matter of law, and [i]f the language of the contract is unambiguous, we construe and enforce the contract as written. Courts may not create ambiguity when contract language is clear. Rather, this Court must honor the parties' contract, and not rewrite it. [*Id*. at 664-665 (citations and quotation marks omitted; third alteration in original).]

II. VESTED BENEFITS

Defendant argues that the trial court improperly concluded that plaintiffs are entitled to lifetime healthcare benefits. We disagree.

To determine whether plaintiffs' right to healthcare benefits had vested, we first examine the CBA lan-

guage at issue in the context of accepted principles of contract interpretation. "Under established contract principles, vested retirement rights may not be altered without the [retiree]'s consent." *Harper Woods Retirees Ass'n v Harper Woods*, 312 Mich App 500, 511; 879 NW2d 897 (2015) (citation and quotation marks omitted; alteration in original). Our Supreme Court in *Arbuckle v Gen Motors LLC*, 499 Mich 521, 539; 885 NW2d 232 (2016), recently observed that "a union may represent and bargain for already-retired employees, but only with respect to *non*vested benefits. By contrast, when an employer explicitly obligates itself to provide vested benefits, that promise is rendered forever unalterable without the retiree's consent." (Citation omitted.)

To determine whether the right to the healthcare benefits has vested, a plaintiff must establish that "(1) he or she had a contractual right to the claimed benefit that was to continue after the agreement's expiration, and (2) the right was included in his or her respective contract at the time of retirement." *Harper Woods*, 312 Mich App at 511. Before the United States Supreme Court issued its opinion in *M & G Polymers USA, LLC v Tackett*, 574 US ___; 135 S Ct 926; 190 L Ed 2d 809 (2015), a presumption existed in the United States Court of Appeals for the Sixth Circuit that retiree benefits outlined in a CBA are vested lifetime benefits. *Harper Woods Retirees Ass'n*, 312 Mich App at 511-512. In *Tackett*, the United States Supreme Court concluded that this presumption was inconsistent with the traditional rules of contract law. *Tackett*, 574 US at ___; 135 S Ct at 937; 190 L Ed 2d at 821. The Court indicated that ordinarily, a contractual obligation ceases when the CBA terminates. *Id*. at ___; 135 S Ct at 937; 190 L Ed 2d at 820. "[W]hen a contract is silent as to the duration of retiree benefits, a court may not

infer that the parties intended those benefits to vest for life." *Id*. at ___; 135 S Ct at 937; 190 L Ed 2d at 820. However, the Court clarified that its holding did not preclude a conclusion that the parties intended for the lifetime benefits to vest, so long as ordinary contract principles were used to reach that conclusion. *Id*. at ___; 135 S Ct at 937; 190 L Ed 2d at 820.

Our Supreme Court expanded upon this idea in *Arbuckle*:

> Indeed, basic principles of contract interpretation instruct that courts should not construe ambiguous writings to create lifetime promises and, absent a contrary intent, that contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement. For when a contract is silent as to the duration of retiree benefits, a court may not infer that the parties intended those benefits to vest for life. [*Arbuckle*, 499 Mich at 540 (citations and quotation marks omitted).]

Accordingly, we examine the traditional rules of contract interpretation to determine whether plaintiffs had the right to lifetime healthcare benefits. As explained in *Arbuckle*:

> Interpretation of a collective-bargaining agreement, like interpretation of any other contract, is . . . a question of law also subject to review de novo. A reviewing court interprets a collective-bargaining agreement according to ordinary principles of contract law, at least when those principles are not inconsistent with federal labor policy. [*Id*. at 531-532 (citations and quotation marks omitted).]

This Court has recently recognized:

> This Court's main goal in the interpretation of contracts is to honor the intent of the parties. The words used in the contract are the best evidence [of] the parties' intent. When contract language is clear, unambiguous, and has a definite meaning, courts do not have the ability

> to write a different contract for the parties, or to consider extrinsic testimony to determine the parties' intent. [*Kyocera Corp v Hemlock Semiconductor, LLC*, 313 Mich App 437, 446; 886 NW2d 445 (2015) (citations and quotation marks omitted).]

However, when a contract contains a latent ambiguity, then extrinsic evidence may be admitted to establish the meaning of the contract. *Shay v Aldrich*, 487 Mich 648, 667; 790 NW2d 629 (2010). Our Supreme Court has described a latent ambiguity as follows:

> A latent ambiguity . . . is one that does not readily appear in the language of a document, but instead arises from a collateral matter when the document's terms are applied or executed. Because the detection of a latent ambiguity requires a consideration of factors outside the instrument itself, extrinsic evidence is obviously admissible to prove the existence of the ambiguity, as well as to resolve any ambiguity proven to exist. [*Id*. at 668 (citation and quotation marks omitted).]

Our Supreme Court has further explained that

> [a] latent ambiguity exists when the language in a contract appears to be clear and intelligible and suggests a single meaning, but other facts create the necessity for interpretation or a choice among two or more possible meanings. To verify the existence of a latent ambiguity, a court must examine the extrinsic evidence presented and determine if in fact that evidence supports an argument that the contract language at issue, under the circumstances of its formation, is susceptible to more than one interpretation. Then, if a latent ambiguity is found to exist, a court must examine the extrinsic evidence again to ascertain the meaning of the contract language at issue. [*Id*. (citations and quotation marks omitted).]

We disagree with the trial court's conclusion that the CBAs are unambiguous. Due to the plethora of CBAs existing at various times with different unions, follow-

ing the method used by the trial court, we have selected exemplars to reflect the language at issue for the periods encompassing: (a) 2000 to 2004, (b) 2005 to 2007, and (c) 2008 to 2010. These CBAs are silent on the issue of whether the healthcare benefits vested. Each exemplar CBA states that defendant will provide fully paid medical benefits. However, the CBAs do not expressly state whether the benefits were promised indefinitely or only for the duration of the CBA.

As noted by plaintiffs in their brief on appeal, other contract language creates a latent ambiguity regarding whether the healthcare benefits are vested. For example, the CBAs contain a "survivor" option permitting continuation of a surviving spouse's healthcare coverage following the death of the retiree. The fact that this provision contemplates that coverage will continue until, and even after, the death of the retiree indicates that the parties intended that the healthcare coverage would last beyond the three-year term of the individual CBAs. In addition, the CBAs provide that the agreement may be terminated if the retiree fails to enroll in Medicare at age 65. This provision again contemplates that the coverage outlasts the three-year period of the CBA given that a retiree may retire years before turning 65. Furthermore, the CBAs provide that healthcare coverage is suspended while the retiree has coverage through another employer but then states that coverage through the CBA recommences once the coverage through the other employer ends. Once again, this contract provision indicates that the parties contemplated that the retirees will receive healthcare benefits far beyond the three-year term of the CBAs. Accordingly, we conclude that the CBAs contain a latent ambiguity with regard to whether the parties intended for the retiree benefits to vest, and the trial

court properly examined extrinsic evidence to determine the meaning of the CBAs.

In determining that the healthcare benefits were lifetime benefits, the trial court examined a 2014 bond funding proposal, accompanied by a letter from the Macomb County Executive. We agree with the trial court that this unrefuted evidence established the intent of the parties to provide lifetime healthcare benefits to retirees. The trial court relied on a sentence in the 2014 bond proposal, which read, "The County provides retiree health benefits to eligible County retirees (and their eligible beneficiaries) *for their lifetimes*." (Emphasis added.) The proposal acknowledged that the practice of funding retiree healthcare benefits began 20 years earlier. Additionally, the proposal provided, "*Historically*, Macomb County has offered retiree healthcare to *vested* employees as part of their benefit package." (Emphasis added.)

We conclude that these statements by defendant establish that the healthcare benefits are vested. The first statement expressly provides that the healthcare benefits last for the life of the retiree and the retiree's eligible beneficiaries. The second statement provides that healthcare benefits are granted to employees with vested rights and states that this has been an historical practice of the county. Importantly, the bond proposal outlines defendant's 20-year history of funding the healthcare benefits, suggesting that defendant took this position during the period in which plaintiffs retired and continued to take the same position during the pendency of this case.[1] Accordingly, plaintiffs pre-

[1] In addition to this dispositive evidence, plaintiffs presented evidence that a human resources representative for defendant informed retirees that the healthcare benefits are lifetime benefits.

sented unrefuted evidence establishing that the retiree healthcare benefits are vested.

III. MODIFICATION OF THE BENEFITS

The next issue is whether the trial court correctly concluded that defendant maintained the ability to modify the healthcare coverage in spite of the fact that the healthcare benefits are vested. We disagree with the trial court's conclusion that defendant could modify the healthcare benefits without plaintiffs' consent.

In *Harper Woods*, this Court clarified that a party to a contract may not unilaterally alter the contract and that when an alteration of a CBA affects a party's vested rights, the change may give rise to a breach of contract action. See *Harper Woods*, 312 Mich App at 508. This Court rejected the trial court's use of a reasonableness standard to determine whether the defendant properly altered the retirees' healthcare benefits without the consent of the retirees. *Id*. at 508-509. This Court stated, "In Michigan, '[a] mere judicial assessment of "reasonableness" is an invalid basis on which to refuse to enforce contractual provisions.' " *Id*. at 509 (citation omitted; alteration in original). With regard to the trial court's reliance on the "reasonableness" standard outlined in *Reese v CNH America LLC*, 694 F3d 681 (CA 6, 2012), this Court explained that "the trial court was not bound to follow *Reese*." *Id*. This Court further explained:

> *Reese* does not stand for the proposition that an employer may always unilaterally alter its retirees' healthcare benefits under a CBA, regardless of the CBA's specific language, as long as the alterations are reasonable. Rather, the *Reese* court indicated that a retiree's right to health insurance benefits under a CBA could be unilaterally altered if evidence indicated the parties intended to

> permit such alterations, not because vested health insurance benefits under a CBA are unilaterally alterable as a matter of law. [*Id*. at 510.]

Importantly, this Court then added, "Under established contract principles, vested retirement rights may not be altered without the [retiree]'s consent." *Id*. at 511 (citation and quotation marks omitted; alteration in original).

The exemplar CBAs outline the healthcare benefits provided to retirees. The CBAs describe the healthcare plan provided to the pre-Medicare eligible retirees but also state that defendant may provide the "substantial equivalence" of the plan. The CBAs explain, "Determination of substantial equivalency, as expressed herein, will be subject to review and agreement by the Parties to this Agreement, prior to implementation of same." The substantial equivalence caveat only appears with regard to the pre-Medicare eligible retiree healthcare coverage, and the CBAs do not contain similar language with regard to prescription coverage, the "over 65 supplemental" coverage for Medicare-eligible retirees, or the alternative Health Maintenance Organization plans. Regardless, defendant failed to provide *any* evidence indicating that plaintiffs consented to the alteration in the healthcare benefits. Therefore, we conclude that the trial court erred by determining that defendant may reasonably modify the scope and level of the healthcare benefits without plaintiffs' consent. The trial court erred by granting summary disposition in favor of defendant, and summary disposition in favor of plaintiffs was appropriate. Accordingly, we remand this case to the trial court for entry of an order granting summary disposition in favor of plaintiffs and granting plaintiffs' motion for a permanent injunction in conformance with this opinion.

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

FORT HOOD, P.J., and HOEKSTRA, J., concurred with JANSEN, J.

PEOPLE v MANUEL

Docket No. 331408. Submitted April 12, 2017, at Detroit. Decided April 18, 2017, at 9:05 a.m.

Iskandar Manuel was charged in the Ingham Circuit Court with delivering or manufacturing 20 or more but fewer than 200 marijuana plants, MCL 333.7401(2)(d)(*ii*); possessing marijuana with intent to deliver, MCL 333.7401(2)(d)(*iii*); maintaining a drug house, MCL 333.7405(1)(d) and MCL 333.7406; and possessing a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was registered as a qualifying patient and a primary caregiver for five qualifying patients under the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*., which entitled him to cultivate up to 72 marijuana plants and possess approximately 425.24 grams of usable marijuana. A search of defendant's home discovered 12 marijuana plants sitting on a freezer in an open garage and, in the basement, a grow operation of 59 marijuana plants and several tins containing more than 1,000 grams of marijuana that, according to defendant, was unusable because it was not yet dried. The trial court, Rosemarie E. Aquilina, J., dismissed the charges, ruling that defendant was entitled to immunity under § 4 of the MMMA, MCL 333.26424, because he had complied with the volume limitations; had stored the marijuana in an enclosed, locked facility; and was engaged in the medical use of marijuana. The prosecution appealed.

The Court of Appeals *held*:

1. The trial court did not clearly err by finding that defendant had complied with the volume limitations set forth in § 4 of the MMMA. As a qualifying patient and primary caregiver for five patients, defendant was allowed to cultivate up to 72 marijuana plants, and the evidence indicated that he had only 71. Defendant was also allowed to possess 425.24 grams of usable marijuana, which the MMMA defines as the dried leaves, flowers, plant resin, or extract of the marijuana plant. Although defendant possessed more than that amount of marijuana, it was not usable marijuana under the statutory definition because the evidence suggested that it was drying rather than dried.

2. The trial court did not clearly err by finding that defendant had kept his marijuana plants in an enclosed, locked facility as required by § 4 of the MMMA. The MMMA defines "enclosed, locked facility" to mean a closet, room, or other comparable, stationary, and fully enclosed area equipped with secure locks or other functioning security devices that permit access only by a registered primary caregiver or registered qualifying patient. Testimony indicated that defendant's grow room was protected by two different doors with locks, the first of which also had two padlocks. Although the padlocks were not locked and there were keys in the door locks at the time of the search, the MMMA requires only that marijuana be kept in an enclosed area equipped with secured locks. Further, although the search revealed 12 marijuana plants sitting on a freezer in defendant's garage, testimony indicated that defendant had received the plants just minutes before the search and that he was in the active process of relocating the plants to his grow room. Given that the MMMA defines the medical use of marijuana to include the delivery, transfer, or transportation of marijuana, the electorate clearly intended the MMMA to allow the movement of marijuana from one place to another, which means that a window of time must exist in which a primary caregiver or qualifying patient could legally unlock an enclosed area in which marijuana is being stored and move it to another enclosed, locked facility.

3. The trial court did not clearly err by concluding that defendant was engaged in the medical use of marijuana. Under former MCL 333.26424(d), now MCL 333.26424(e), defendant was presumed to be engaged in the medical use of marijuana because he showed by a preponderance of the evidence that, at the time of the charged offense, he possessed a valid registry identification card and complied with the volume limitations of MCL 333.26424(a) and (b). The prosecution did not rebut that presumption by showing that defendant had acquired 12 of the marijuana plants he possessed from a person with whom he was not connected for purposes of the MMMA. The MMMA does not require a primary caregiver to acquire the marijuana to be used for assisting a qualifying patient from the qualifying patient or another caregiver, and there was no evidence that defendant did not intend to use the marijuana to treat or alleviate a registered qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition.

Affirmed.

1. CONTROLLED SUBSTANCES — MICHIGAN MEDICAL MARIHUANA ACT — SECTION 4 IMMUNITY — VOLUME LIMITATIONS — DEFINITIONS — USABLE MARIJUANA.

To be entitled to immunity under § 4 of the Michigan Medical Marihuana Act, MCL 333.26424, a qualifying patient must comply with the volume limitations for usable marijuana set forth in the act; the act defines usable marijuana as the dried leaves, flowers, plant resin, or extract of the marijuana plant; marijuana that is drying rather than dried is not usable marijuana under this definition (MCL 333.26423(n)).

2. CONTROLLED SUBSTANCES — MICHIGAN MEDICAL MARIHUANA ACT — SECTION 4 IMMUNITY — ENCLOSED, LOCKED FACILITY REQUIREMENT.

To be entitled to immunity under § 4 of the Michigan Medical Marihuana Act, MCL 333.26424, a qualifying patient must store any marijuana plants in an enclosed, locked facility; the act defines enclosed, locked facility to mean a closet, room, or other comparable, stationary, and fully enclosed area equipped with secure locks or other functioning security devices that permit access only by a registered primary caregiver or registered qualifying patient; a window of time exists in which a primary caregiver or qualifying patient may legally unlock an enclosed area in which marijuana is being stored and move the marijuana to another enclosed, locked facility (MCL 333.26423(d)).

3. CONTROLLED SUBSTANCES — MICHIGAN MEDICAL MARIHUANA ACT — SECTION 4 IMMUNITY — MEDICAL USE OF MARIJUANA.

To be entitled to immunity under § 4 of the Michigan Medical Marihuana Act, MCL 333.26424, a qualifying patient must prove that he or she was engaged in the medical use of marijuana; a defendant is presumed to be engaged in the medical use of marijuana if he or she shows by a preponderance of the evidence that, at the time of the charged offense, he or she possessed a valid registry identification card and complied with the volume limitations of MCL 333.26424(a) and (b); the act defines the medical use of marijuana to include the acquisition of marijuana; the act does not require a primary caregiver to acquire the marijuana to be used for assisting a qualifying patient from the qualifying patient or another caregiver; acquiring marijuana plants that do not exceed the statutory limits cannot rebut the presumption that a defendant was engaged in the medical use of marijuana (MCL 333.26423(h); MCL 333.26424(d), as amended by 2012 PA 512; MCL 333.26424(e), as amended by 2016 PA 283).

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief

Legal Counsel, *Stuart J. Dunnings III*, Prosecuting Attorney, and *Andrew M. Stevens*, Assistant Prosecuting Attorney, for the people.

White Law PLLC (by *James White* and *John W. Fraser*) for defendant.

Before: RONAYNE KRAUSE, P.J., and K. F. KELLY and GADOLA, JJ.

GADOLA, J. In this case involving the Michigan Medical Marihuana[1] Act (MMMA), MCL 333.26421 *et seq*., defendant was charged with delivering or manufacturing 20 or more but fewer than 200 marijuana plants, MCL 333.7401(2)(d)(*ii*); possessing marijuana with intent to deliver, MCL 333.7401(2)(d)(*iii*); maintaining a drug house, MCL 333.7405(1)(d) and MCL 333.7406; and possessing a firearm during the commission of a felony, MCL 750.227b. The trial court dismissed the charges after ruling that defendant was entitled to immunity under MCL 333.26424, which is § 4 of the MMMA.[2] The prosecution appeals that ruling as of right. We affirm.

I. BACKGROUND FACTS

On May 14, 2014, Michigan State Police Detective Sergeant Charles Rozum executed a search warrant at

[1] We use the more common spelling "marijuana" unless directly quoting the MMMA.

[2] Discussed in more detail in this opinion, § 4 allows a defendant to "claim entitlement to immunity for any or all charged offenses" if the defendant sufficiently proves that he or she "(1) was issued and possessed a valid registry identification card, (2) complied with the requisite volume limitations of § 4(a) and § 4(b), (3) stored any marijuana plants in an enclosed, locked facility, and (4) was engaged in the medical use of marijuana." *People v Hartwick*, 498 Mich 192, 217-218; 870 NW2d 37 (2015), citing MCL 333.26424(a) and (b).

defendant's home. Defendant was registered as a primary caregiver under the MMMA and had five associated qualifying patients. On the day of the search, Rozum arrived at defendant's home at 7:15 p.m. and encountered defendant and another man, Michael Lauria, in the driveway close to the garage, which was attached to defendant's home. Rozum testified that he recovered 12 marijuana plants sitting on a freezer in the open garage. Defendant explained that Lauria had just delivered "12 clones" for which defendant paid $120. According to defendant, at the precise moment he "want[ed] to go to the basement, the police raid[ed] [the] house." Rozum testified that "[t]here wasn't a grow operation in the garage" but that there was a grow operation in defendant's basement.

Rozum explained that the grow operation in defendant's basement was located behind a locked door, but there was a key on a keyring with several other keys already inserted into the locking mechanism, which allowed him to access the room. Defendant testified that the keyring held his house and car keys. Rozum testified that he found two unlocked padlocks, and defendant explained that he secured the door with the two padlocks "[j]ust to make sure nobody can go inside . . . ." Rozum said that inside the grow room he encountered another locked door that also had a key in its lock. Defendant testified that the padlocks were not in place and the keys were in the door locks because he was planning to put the plants he purchased from Lauria into the grow room. Defendant testified that before Lauria's arrival he was "in the basement preparing 12 pot[s]" so he could transfer the plants. Rozum stated that he found 59 marijuana plants inside the grow room and also found "tins containing suspected marijuana buds."

Defendant moved to dismiss the charges under § 4. At an evidentiary hearing on the motion, Rozum testified that he weighed the suspected marijuana using a digital scale at his office after the search. Rozum noted that he did not include the packaging when he weighed the suspected marijuana, but did use something to contain the material on the scale. He agreed that he zeroed off the scale before weighing the suspected marijuana. Rozum testified that the tins held 1,195 grams of what was later determined to be marijuana. The marijuana was then delivered to the Michigan State Police Crime Laboratory in Lansing, Michigan.

Sandra Jean Schafer, a forensic scientist with the Michigan State Police Crime Laboratory, weighed the marijuana without any packaging on July 2, 2014. She reported that it weighed 1,068 grams, a difference of 127 grams. She testified that the crime laboratory scales were "calibrated on a monthly basis" and that she specifically checked the calibration before using the scale in this instance. Schafer said the marijuana she weighed "was not compressed. It was not moldy. It was not wet, and it was not charred." She described it as being "consistently dry."

Michigan State Police Detective Sergeant Charles Barker testified that he did not know whether the scales at the office were calibrated on a routine basis. "In general," he asserted, "most of the weights that are taken at the office are greater than that that is found by the lab." Barker attributed most of these differences to weighing an item in its packaging at the office, but without packaging at the crime laboratory. However, Barker characterized a 127-gram difference as "way excessive."

Frank Telewski, a professor of plant biology at Michigan State University, testified that the difference

of 127 grams was a "rather large discrepancy." Telewski opined that the discrepancy was not likely the result of inaccuracies in the scales, but rather could be easily explained by a loss of moisture. Specifically, Telewski explained, "[T]he material on the earlier date weighed more because it had a higher moisture content than the material that was subsequently weighed several weeks later." Telewski admitted that he did not examine the scales that were used, but noted that he had no reason to question the accuracy of the scales.

Rozum described the marijuana he encountered in the tins on the day of the search as "[d]ried marijuana." Explaining how he knew it was not moist, he stated, "When you touch the marijuana your hands didn't get wet, there was no moisture content. When you felt it[,] it felt stiff, rough, dry." He explained that the marijuana was "crunchy" and testified that, based on his training and 10 years of experience as a narcotics officer, he believed the marijuana was ready to be used. Rozum said that if wet marijuana is stored in a container, "it will mold. If it's dry, it won't mold." Rozum testified that he was unable to say "if [the marijuana] was [dried] a hundred percent or anything less than that, but . . . none of the buds molded in our property room . . . which led me to believe it was dry." Rozum agreed that the marijuana was stored in a paper bag in the property room.

Telewski testified that plant material can "take anywhere from a few days to 14 days" to dry. He explained that one could "look at the outside of a marijuana bud, it could look like it's dry, but . . . you may not have removed the moisture from inside of it and . . . it may not be dry." Telewski opined that "[w]eighing the plant material is the best way to determine how well it's dried." Telewski said that when

he viewed the marijuana on December 22, 2015, it "appeared to be in a dried state[.]" He acknowledged, however, that he did not perform any scientific tests to determine the moisture content of the marijuana. Telewski weighed the marijuana on December 22, 2015, and it weighed 2 pounds 9.25 ounces,[3] but he explained that he did not remove the marijuana from the plastic bag it was stored in and did not calibrate the scale immediately before taking the weight.

Defendant testified that he began drying the marijuana "two or three days" before the police executed the search warrant and that he planned to keep the marijuana drying in the tins "[a]bout six, seven days more." Defendant further explained that he did not put all of the marijuana in the tins on the same day or at the same time.

The prosecution conceded at the hearing that defendant possessed a valid registry identification card at all times relevant to the charged offenses. After taking testimony, the court concluded that defendant complied with the volume limitations of § 4. It found that defendant possessed only 71 marijuana plants and that the marijuana he had in the tins was unusable because it was in "various stages of drying." The court found that defendant stored the marijuana in an enclosed, locked facility because "he simply had [his] keys in the room for a very short time anticipating the delivery . . . ." Finally, the trial court found that defendant was engaged in the medical use of marijuana, despite the prosecution's contention that he illegally purchased marijuana from Lauria. Accordingly, the trial court ruled that defendant was entitled to § 4 immunity and dismissed the charges against him.

[3] Approximately 1,169 grams.

II. STANDARDS OF REVIEW

Whether a defendant is entitled to immunity under § 4 is a question of law that a trial court must determine before trial. *People v Hartwick*, 498 Mich 192, 212-213; 870 NW2d 37 (2015). To determine whether a defendant is entitled to § 4 immunity, a trial court "must make factual determinations, including whether the defendant has a valid registry identification card and whether he or she complied with the volume, storage, and medical use limitations." *Id*. at 213-214. We review a trial court's factual findings for clear error. *Id*. "Questions of law are reviewed de novo by appellate courts." *Id*. A trial court's decision to dismiss criminal charges is reviewed for an abuse of discretion. *People v Bylsma*, 493 Mich 17, 26; 825 NW2d 543 (2012). "A trial court necessarily abuses its discretion when it makes an error of law." *People v Waterstone*, 296 Mich App 121, 132; 818 NW2d 432 (2012).

This appeal also raises issues of statutory interpretation, which we review de novo. *People v Kolanek*, 491 Mich 382, 393; 817 NW2d 528 (2012). "[B]ecause the MMMA was the result of a voter initiative, our goal is to ascertain and give effect to the intent of the electorate, rather than the Legislature, as reflected in the language of the law itself." *Id*. at 397. When construing the MMMA, we must assign the words of the statute their plain and ordinary meaning, as the electorate would have understood them. *Id*.

III. SECTION 4 IMMUNITY

A defendant may claim immunity under § 4 of the MMMA if the defendant proves by a preponderance of the evidence that, at the time of the charged offense, the defendant

> (1) was issued and possessed a valid registry identification card,
>
> (2) complied with the requisite volume limitations of § 4(a) and § 4(b),
>
> (3) stored any marijuana plants in an enclosed, locked facility, and
>
> (4) was engaged in the medical use of marijuana. [*Hartwick*, 498 Mich at 217-218, citing MCL 333.26424(a) and (b).]

The prosecution concedes that defendant was issued and possessed a valid registry identification card at all times relevant to the charged offenses.

The volume limitations of § 4(a) and § 4(b) require a primary caregiver or qualifying patient to possess no more than a specified number of marijuana plants and a specified amount of usable marijuana. "When a primary caregiver is connected with one or more qualifying patients, the amount of usable marijuana and the number of plants is calculated in the aggregate—2.5 ounces of usable marijuana and 12 marijuana plants for each qualifying patient, including the caregiver if he or she is also a registered qualifying patient acting as his or her own caregiver." *Hartwick*, 498 Mich at 218-219. A qualifying patient or primary caregiver who possesses more marijuana than allowed under § 4(a) and § 4(b) cannot establish the second element of immunity.

In this case, defendant is both a qualifying patient and a primary caregiver for five patients, so he was allowed to cultivate up to 72 marijuana plants and to possess up to 15 ounces, or approximately 425.24 grams, of usable marijuana under the MMMA. It is clear that defendant stayed within the cultivation limitation because he only possessed 71 marijuana plants. However, he also possessed marijuana in tins

that weighed in at 1,195 grams, 1,068 grams, and 1,169 grams, or nearly 2½ times the legally permitted amount of "usable" marijuana. The question, however, is whether this marijuana was "usable" for purposes of the MMMA.

The MMMA defines "usable marihuana" as "the *dried* leaves, flowers, plant resin, or extract of the marihuana plant, but does not include the seeds, stalks, and roots of the plant." MCL 333.26423(n) (emphasis added). In *People v Randall*, unpublished opinion per curiam of the Court of Appeals, issued January 13, 2015 (Docket No. 318740), a panel of this Court examined the meaning of the word "dried" as used in the former definition of "usable marihuana" under the MMMA. See MCL 333.26423(k), as amended by 2012 PA 512 (defining "usable marihuana" as "the dried leaves and flowers of the marihuana plant, and any mixture or preparation thereof, but does not include the seeds, stalks, and roots of the plant").[4] We find instructive and persuasive the following definition provided in *Randall*, and therefore adopt it as our own:

> "Dried" is the past participle or past tense of the verb "dry." *Random House Webster's College Dictionary* (1997). A past participle is a "nonfinite verb form ending usu. in *–ed*" which "may also function adjectivally." Garner, *Garner's Modern American Usage* (3rd ed) (New York: Oxford University Press, 2009), p 909. As a past participle, it has a perfective aspect, which is a "verb aspect that expresses action as complete." *Id*. at 883, 909. Likewise, the past tense signals "an action or even a state that occurred at some previous time." *Id*. at 920. Additionally, the past-perfect tense denotes "an act, state, or condition [that] was

[4] Although this Court's unpublished opinions are not binding, they may be instructive or persuasive. *Adam v Bell*, 311 Mich App 528, 533 n 1; 879 NW2d 879 (2015); MCR 7.215(C)(1).

> completed before another specified past time or past action." *Id*. Therefore, the term "dried" clearly indicates a *completed* condition.
>
> This is in contrast to present participles, which are verb forms "ending in *–ing* and used in verb phrases to signal the progressive aspect." *Id*. at 909. Present participles may also be adjectival. *Id*. The progressive aspect shows "that an action or state—past, present, or future—was, is, or will be unfinished at the time referred to." *Id*. at 883. [*Randall*, unpub op at 3-4 (alteration in original).]

At the evidentiary hearing, Telewski testified that the weight difference in the marijuana from the time Rozum weighed it immediately after the search (1,195 grams) to the time Schafer weighed it in the laboratory on July 2, 2014 (1,068 grams) was best explained by a "loss of moisture, so the material on the earlier date weighed more because it had a higher moisture content than the material that was subsequently weighed several weeks later." Although Telewski recorded the weight of the marijuana as 1,169 grams on December 22, 2015, unlike Rozum and Schafer, he weighed the marijuana in its packaging and acknowledged that he did not calibrate the scale before taking the weight. Telewski opined that marijuana could take anywhere "from a few days to 14 days" to dry. Defendant testified that he had started drying the marijuana "two or three days" before Rozum executed the search warrant, and he planned to keep the material drying "about six, seven days more." This evidence suggests that the marijuana defendant possessed was "drying" rather than "dried."

We note that Rozum provided some testimony to the contrary. Specifically, Rozum described the marijuana he found in the tins on the day of the search as "dried marijuana," explaining that it "felt stiff, rough, dry," and that it was "crunchy." Rozum also testified that the

marijuana did not mold after it was placed in a paper bag in the property room, which he said led him "to believe it was dry."

The trial court was charged with resolving all factual disputes, which we review for clear error. *Hartwick*, 498 Mich at 201. "The clear error standard asks whether the appellate court is left with a definite and firm conviction that a mistake has been made." *People v Rhodes*, 495 Mich 938, 938 (2014). Given Telewski's expert testimony that the weight differential of 127 grams was most likely due to a loss of moisture, and defendant's testimony that the harvested marijuana was in various stages of drying because not all of it had been placed in the tins at the same time and had only been in the tins two to three days, we are not definitely and firmly convinced that the trial court made a mistake when it found that the marijuana was in "various stages of drying" and therefore was not usable under the MMMA. Put simply, the marijuana was "drying," not "dried," and therefore was not usable under the statutory definition.

Regarding the third element of immunity, § 4 provides that marijuana plants must be "kept in an enclosed, locked facility." The MMMA defines an "enclosed, locked facility" to mean "a closet, room, or other comparable, stationary, and fully enclosed area equipped with secured locks or other functioning security devices that permit access only by a registered primary caregiver or registered qualifying patient." MCL 333.26423(d). The definition of "enclosed, locked facility" also includes a motor vehicle if certain additional conditions are met. See MCL 333.26423(d)(1) and (2).

Rozum found 59 marijuana plants in defendant's grow room in his basement. Testimony at the hearing

revealed that defendant's grow room was protected by two different doors with locks, the first of which also had two padlocks. Although the padlocks were not locked and there were keys in the door locks at the time of the search, the statute requires only that marijuana be kept in an "enclosed area *equipped with secured locks* . . . ." MCL 333.26423(d) (emphasis added). Further, although Rozum found 12 marijuana plants sitting on a freezer in defendant's garage, testimony showed that defendant had received the plants just minutes before the search and that he was in the active process of relocating the plants to his grow room. Specifically, defendant testified that Lauria arrived at his home "like two minutes, three minutes" before the police arrived, and Lauria testified that the police showed up less than five minutes after he arrived. Defendant also testified that he had prepared pots in his basement for the 12 marijuana plants, and he said that the doors to his grow room were unlocked for the sole purpose of moving the plants into the room. Defendant's explanation was supported by testimony that his house and car keys were also on the keyring along with the key that was in the first door lock.

The MMMA defines the medical use of marijuana to include the "acquisition, possession, . . . use, . . . delivery, *transfer*, *or transportation* of marihuana . . . ." MCL 333.26423(h) (emphasis added). As evidenced by the definition of the medical use of marijuana and by the fact that the MMMA includes criteria that allow a motor vehicle to fall within the definition of an "enclosed, locked facility," the electorate clearly intended the MMMA to allow the movement of marijuana from one place to another. Necessarily, then, a window of time must exist in which a primary caregiver or qualifying patient could legally unlock an enclosed area in which marijuana is being stored and move the

marijuana to another enclosed, locked facility. The law only requires that an enclosed room be secured by one locked door to constitute an "enclosed, locked facility" for purposes of the MMMA. See MCL 333.26423(d). Yet defendant's grow room was secured by not one, but two locked doors, the first of which was also secured by two padlocks. Defendant explained that he installed the extra padlocks "[j]ust to make sure nobody can go inside, make it hard." Far from flouting the law, these facts demonstrate that defendant went to extensive measures to comply with the statutory requirements of § 4. Under the circumstances, we are not definitely and firmly convinced that the trial court made a mistake by finding that defendant kept his 71 marijuana plants in an enclosed, locked facility.

Finally, to establish the fourth element of § 4 immunity, a defendant must prove that he or she was engaged in the medical use of marijuana. *Hartwick*, 498 Mich at 219. We presume that a defendant was engaged in the medical use of marijuana under § 4(d)[5] if the defendant shows by a preponderance of the evidence that, at the time of the charged offense, he or she (1) possessed a valid registry identification card and (2) complied with the volume limitations of § 4(a) and § 4(b). *Id*. at 220-221; MCL 333.26424(d), as amended by 2012 PA 512. The prosecution may rebut this presumption "by presenting evidence that the defendant's conduct was not for the purpose of alleviating the registered qualifying patient's debilitating medical condition[.]" *Id*. at 202. Additionally, "non-MMMA-compliant conduct may rebut the . . . presumption of medical use for otherwise MMMA-compliant conduct if a nexus exists between the non-

[5] This presumption is now codified at § 4(e), MCL 333.26424(e). See 2016 PA 283, effective December 20, 2016.

MMMA-compliant conduct and otherwise MMMA-compliant conduct[.]" *Id*. "[I]f the prosecution rebuts the . . . presumption of the medical use of marijuana, the defendant may still establish, on a charge-by-charge basis, that the conduct underlying a particular charge was for the medical use of marijuana[.]" *Id*. at 203.

Because the trial court properly found that defendant possessed a valid registry identification card and stayed within the volume limitations of § 4(a) and § 4(b), he was entitled to a presumption that he was engaged in the medical use of marijuana. *Id*. at 202. To rebut that presumption, the prosecution needed to present evidence that defendant's conduct "was not for the purpose of alleviating the registered qualifying patient's debilitating medical condition[.]" *Id*. The prosecution argues that defendant purchased 12 marijuana plants from Lauria, with whom he was not connected for purposes of the MMMA, which was enough to show that he was not engaged in the medical use of marijuana. We disagree.

The MMMA is silent as to how a qualifying patient or primary caregiver is to obtain marijuana plants for cultivation. The MMMA does, however, define the medical use of marijuana to include "the *acquisition* . . . of marihuana . . . ." MCL 333.26423(h) (emphasis added). Therefore, acquiring marijuana plants that do not exceed the statutory limits cannot rebut the presumption that defendant was engaged in the medical use of marijuana. Section 4 does not require a primary caregiver to obtain the marijuana to be used "for assisting a qualifying patient" from the qualifying patient or another caregiver. MCL 333.26424(b). It does, however, provide that "[a] primary caregiver shall not *transfer a marihuana-infused product to* any

individual who is not a qualifying patient to whom he or she is connected through the department's registration process." MCL 333.26424(o) (emphasis added). Defendant was not *transferring to* Lauria, from whom he was purchasing the marijuana, nor was the item involved a *marihuana-infused product*.

Evidence at the hearing showed that defendant acquired 12 marijuana plants from Lauria, which kept defendant within the legal limit. Defendant testified that he was readying the grow room so that he could transfer the plants into pots in the room. Thus, the record shows he was in the process of cultivating marijuana. There is no evidence that defendant did not intend to use the marijuana he acquired from Lauria "to treat or alleviate a registered qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition." MCL 333.26423(h). Therefore, the trial court properly found that defendant was engaged in the medical use of marijuana.

In sum, the trial court properly concluded that defendant was entitled to § 4 immunity, and therefore it did not abuse its discretion by dismissing the charges against him.

Affirmed.

RONAYNE KRAUSE, P.J., and K. F. KELLY, J., concurred with GADOLA, J.

PLANET BINGO, LLC v VKGS, LLC

Docket No. 328896. Submitted April 5, 2017, at Lansing. Decided April 18, 2017, at 9:10 a.m.

Planet Bingo, LLC, and Melange Computer Services, Inc. (collectively, plaintiffs) brought an action against VKGS, LLC, doing business as Video King, in the Ingham Circuit Court, alleging breach of contract, common-law unfair competition, and unjust enrichment. On January 28, 2005, VKGS, LLC, acquired Video King and began to operate as Video King (hereinafter, defendant), a manufacturer and distributor of electronic bingo equipment with its principal place of business in Omaha, Nebraska. Melange, a Michigan corporation, had developed a software program called EPIC. On September 1, 2005, defendant and Melange entered into an agreement (the 2005 agreement) regarding the use of EPIC on defendant's equipment. The 2005 agreement contained a substantial confidentiality clause. In 2006, Melange was acquired by Planet Bingo and became a wholly owned subsidiary of Planet Bingo. Defendant then began developing a competing software program called OMNI. Concerned that defendant wrongfully developed OMNI using confidential information gleaned from EPIC, Planet Bingo brought an action against defendant in the United States District Court for the Western District of Michigan in May 2011 for breach of contract, unfair competition, and unjust enrichment, but the case was dismissed for lack of diversity jurisdiction. However, before the case had been dismissed in federal court, defendant filed an action on December 13, 2011, for a declaratory judgment against plaintiffs in Nebraska's Douglas County District Court. On December 20, 2011, plaintiffs brought the instant action in the Ingham Circuit Court. Defendant moved for summary disposition under MCR 2.116(C)(6), arguing that the pending action in Nebraska involved the same claims as those asserted in plaintiffs' complaint in the instant action. The Ingham Circuit Court, Clinton Canady III, J., denied defendant's motion, reasoning that the claims involved in the instant action and the Nebraska action were not the same for purposes of MCR 2.116(C)(6). Meanwhile, plaintiffs moved to dismiss the Nebraska action for lack of personal jurisdiction. Plaintiffs also moved for a preliminary injunction in the Ingham

Circuit Court to enjoin defendant from violating the provisions of the 2005 agreement, and the court issued a reciprocal preliminary injunction against the parties until an evidentiary hearing could take place. Two days later, the Nebraska district court entered an order dismissing the Nebraska action for lack of personal jurisdiction over plaintiffs. Defendant appealed in Nebraska's appellate courts. Discovery in the instant case was very contentious, and the Ingham Circuit Court initially held that discovery would be limited to the period from September 1, 2005, until the present, but the court later held that discovery would be limited to the period from January 28, 2005, until the present. Defendant asserted two counterclaims against plaintiffs for breach of contract and tortious business interference/injurious falsehood. On March 29, 2013, the Nebraska Supreme Court held that the Nebraska district court erred by determining that it lacked personal jurisdiction over plaintiffs and remanded the matter to the district court for further proceedings. The Nebraska action remained pending when the instant action was appealed. On July 8, 2015, the Ingham Circuit Court dismissed all the parties' claims under MCR 2.116(C)(6) with the exception of defendant's wrongful-injunction claim. The next day, defendant moved for a declaration that it was wrongfully enjoined, plus damages, costs, and attorney fees. Plaintiffs argued that defendant had failed to state an actionable claim. The court dismissed defendant's wrongful-injunction claim pursuant to MCR 2.116(C)(8) and (C)(10). Both parties appealed.

The Court of Appeals *held*:

1. Under MCL 445.1908 of the Michigan Uniform Trade Secrets Act (MUTSA), MCL 445.1901 *et seq*., MUTSA generally displaces conflicting tort, restitutionary, and other law of this state providing civil remedies for misappropriation of a trade secret, but it does not displace other civil remedies that are not based on misappropriation of a trade secret. Unfair competition encompasses more than just misappropriation; therefore, MUTSA does not preempt all common-law unfair-competition claims, only those that are based on misappropriation of trade secrets as defined by MUTSA. In this case, plaintiffs premised their claim for common-law unfair competition on three distinct factual allegations: (1) that defendant had used plaintiffs' confidential information in the creation of OMNI, (2) that defendant had sold OMNI on the basis of its similarity to EPIC, and (3) that defendant had falsely represented to a potential customer that a bingo hall was already using OMNI when that hall was actually using EPIC. The first of these three grounds was preempted by

MUTSA given the breadth of the definition of "confidential information" under the 2005 agreement; defendant's alleged use of plaintiffs' confidential information constituted misappropriation of a trade secret under MUTSA. However, the second and third grounds were unrelated to misappropriation of trade secrets and therefore were not displaced by MUTSA. The circuit court erred by granting defendant summary disposition of plaintiffs' common-law unfair-competition claim because the claim was not entirely preempted by MUTSA.

2. Under the unambiguous language of MCR 2.116(C)(6), summary disposition is appropriate whenever there is another action between the same parties involving the same claims currently initiated and pending at the time of the decision regarding the motion for summary disposition. In this case, plaintiffs did not demonstrate that the circuit court's reliance on MCR 2.116(C)(6) was erroneous. The circuit court's ruling did not contravene the purpose of MCR 2.116(C)(6); rather, it was an effort to achieve that purpose. However, because the circuit court made its ruling after it had already summarily disposed of all of plaintiffs' claims and had struck plaintiffs' amended complaint, the circuit court's finding that this action involved the same claims as those involved in the Nebraska action might not have taken plaintiffs' previously dismissed claims into consideration at all. The timing of the circuit court's ruling combined with the record's lack of specificity on appeal made it impossible for an appropriate review de novo to determine whether MCR 2.116(C)(6) would have been a valid ground for summary disposition of plaintiffs' claims. Therefore, the case had to be remanded with instructions that, before any other proceedings take place, the circuit court shall order the parties to make a record of what claims are then pending in the Nebraska action (or on appeal in Nebraska) and to subsequently address—on an individual basis—the issue whether summary disposition of each claim involved in this action would be appropriate under MCR 2.116(C)(6). In the event that any uncertainty remained regarding whether the Nebraska action would ultimately resolve all the claims involved in this action on their merits, the circuit court was directed to stay the proceedings pending the outcome of the Nebraska action and any appellate proceedings arising out of it.

3. While Michigan is strongly committed to open and far-reaching discovery, a trial court must also protect the interests of the party opposing discovery so as not to subject that party to excessive, abusive, or irrelevant discovery requests. In this case, the parties' competing breach-of-contract claims were largely

premised on the 2005 agreement between Melange and defendant. The preamble to the 2005 agreement referred to events that occurred before that agreement was executed, and the language in the confidentiality provision indicated that confidential information under the 2005 agreement included information conveyed between the parties both before and after the agreement's effective date. Therefore, discovery of information related to the period before January 28, 2005, might well have been relevant to the subject matter involved in the pending action. It was difficult to ascertain the relevance of the documents that might have been discovered had the circuit court not limited discovery so early in the proceedings. Discovery pertaining to the events that occurred before the execution of the agreement was directly relevant to the contractual claims and defenses at issue in this case, and any undue burden or expense attendant to defendant's production of documents from before January 28, 2005, could have been resolved by proper protective orders. The circuit court abused its discretion by setting a hard limit precluding the discovery of all documents created before January 28, 2005, regardless of the potential relevance of the documents. On remand, if the circuit court were to determine that a stay of the proceedings or summary disposition of all claims under MCR 2.116(C)(6) would be unwarranted, the circuit court was directed to allow the parties to conduct reasonable pre-January 28, 2005 discovery to the extent that such discovery would be relevant to the breach-of-contract claims then remaining and would be reasonably calculated to lead to the discovery of admissible evidence.

Circuit court's contested discovery ruling reversed; circuit court's order granting summary disposition under MCR 2.116(C)(6) vacated; case remanded for further proceedings.

TRADE REGULATION — MICHIGAN UNIFORM TRADE SECRETS ACT — MISAPPROPRIATION OF TRADE SECRETS — DISPLACEMENT OF CIVIL REMEDIES — UNFAIR COMPETITION.

Under MCL 445.1908 of the Michigan Uniform Trade Secrets Act (MUTSA), MCL 445.1901 *et seq*., MUTSA generally displaces conflicting tort, restitutionary, and other law of this state providing civil remedies for misappropriation of a trade secret, but it does not displace other civil remedies that are not based on misappropriation of a trade secret; unfair competition encompasses more than just misappropriation; therefore, MUTSA does not preempt all common-law unfair-competition claims, only those that are based on misappropriation of trade secrets as defined by MUTSA.

Cohen, Lerner & Rabinovitz, PC (by *Steven Z. Cohen* and *Aaron E. Silvenis*), for plaintiffs.

Miller Johnson (by *Craig H. Lubben*) for defendant.

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

PER CURIAM. In this business dispute, plaintiffs-counterdefendants, Planet Bingo, LLC (Planet Bingo) and Melange Computer Services, Inc. (Melange) (collectively, plaintiffs), appeal as of right the circuit court's final order dismissing the last pending claim in this case. Defendant-counterplaintiff, VKGS, LLC, doing business as Video King (Video King), claims its cross-appeal from that same order. We reverse in part, vacate in part, and remand for further proceedings consistent with this opinion.

I. FACTUAL BACKGROUND

This case arises out of Video King's use of a software program (EPIC) that was developed by Planet Bingo's subsidiary Melange, Video King's subsequent development of a competing software program (OMNI), and plaintiffs' allegation that Video King wrongfully developed OMNI using confidential information gleaned from EPIC. The relevant procedural history is complex. The parties have previously litigated claims related to this matter in other actions in foreign jurisdictions. See *VKGS, LLC v Planet Bingo, LLC*, 285 Neb 599; 828 NW2d 168 (2013) (*VKGS*); *Planet Bingo, LLC v VKGS, LLC*, 961 F Supp 2d 840 (WD Mich, 2013). Certain background facts pertinent to the instant appeal were set forth by the Nebraska Supreme Court in *VKGS*, 285 Neb at 601-602:

Video King was founded in 1992 by . . . a gaming conglomerate to develop, manufacture, and distribute electronic bingo equipment. In 2005, Video King was conveyed to VKGS, LLC, in a spinoff transaction, but continued to do business under the name "Video King." Video King's principal place of business is located in Omaha, Nebraska.

Since 2000, Video King and Melange have had a business relationship. Melange is a Michigan corporation formed in 1989 and has a principal place of business in Lansing, Michigan. Melange was the developer of a software program known as EPIC. On September 1, 2005, Video King and Melange entered into an agreement [(the 2005 agreement)] regarding the use of EPIC on Video King's electronic bingo equipment. Subsequent amendments to this agreement were entered into in 2007, 2008, 2009, 2011, and 2012. Per this continuing agreement, Video King and Melange conducted day-to-day business together, including communication via telephone, e-mail, reports, face-to-face meetings, and conferences.

In 2006, Melange was acquired by Planet Bingo and became a wholly owned subsidiary of Planet Bingo (hereinafter, Melange and Planet Bingo will be collectively referred to as "Planet Bingo").

At a time not specified by the record, Video King began developing its own software for electronic bingo equipment, called OMNI. Concerned that Video King improperly used Melange's confidential information to design bingo software, Planet Bingo filed suit against Video King in the U.S. District Court for the Western District of Michigan in May 2011. Planet Bingo alleged breach of contract, unfair competition, and unjust enrichment.

On October 5, 2011, a hearing was held on a motion filed by Planet Bingo for expedited discovery. At that hearing, the magistrate judge questioned whether there was federal diversity jurisdiction and ordered the parties to show cause why the case should or should not be dismissed for lack of diversity jurisdiction. On December 21, the case was dismissed on those grounds.

> However, on December 13, 2011, prior to dismissal in federal court, Video King filed an action for declaratory judgment against Planet Bingo in [Nebraska's] Douglas County District Court. That action sought a declaration of the rights, status, and other legal obligations of the parties with respect to confidentiality agreements between the parties. Additionally, on December 20, Planet Bingo refiled its action in the Michigan state court system. [Punctuation omitted.]

The preamble to plaintiffs' December 20, 2011 complaint in the Ingham Circuit Court acknowledged that both the federal action and the Nebraska action remained pending at that time. Plaintiffs alleged three counts against Video King: (1) breach of contract, (2) common-law unfair competition, and (3) unjust enrichment. An underlying basis of all three claims was plaintiffs' allegation that, contrary to the confidentiality provisions of the 2005 agreement between the parties, Video King had used confidential information about EPIC to develop Video King's competing OMNI software.

The 2005 agreement had a substantial confidentiality clause:

> 17. Confidentiality. The PARTIES agree that all information, including without limitation the Software including any updates, enhancements and new releases thereof, the Documentation, including formulas, methods, know-how, processes, designs, new products, developmental work, marketing requirements, marketing plans, customer names, prospective customer names, the terms and pricing of agreements, and in general, any other information related to this Agreement, transmitted to the other, (the "Confidential Information"), shall be handled as confidential information regardless of the means through which it is disclosed, in accordance with the provisions of this clause. Confidential Information shall be used exclusively for the purposes set forth in this Agreement and its

> Exhibits, therefore, at no time whatsoever, neither party may be entitled to provide, transfer, publish, reproduce or disclose such Confidential Information to third parties whether directly or indirectly through third parties; or in any manner whatsoever. . . . Each party acknowledges and accepts that the Confidential Information that it has received through any means or form and at any time, as well as that it may receive in the future under this Agreement and its Exhibits, is and shall continue to be the exclusive property of the party issuing such Confidential Information. . . . The obligation contained in this clause with regard to nondisclosure of Confidential Information shall survive for a period of five (5) years from the termination, rescission, or expiration date of this Agreement. . . . Each party acknowledges that Confidential Information may be unique and valuable to its owner, and that disclosure in breach of this Agreement will result in irreparable injury to the owner of such Confidential Information, for which monetary damages alone would not be an adequate remedy. Therefore, each party agrees that in the event of a breach or threatened breach of the provisions set forth in this clause, the disclosing party shall be entitled to seek specific performance and injunctive or other equitable relief as a remedy for any such breach or anticipated breach without the necessity of posting any surety or bond. Any such relief shall be in addition to and not in lieu of any appropriate relief in the way of monetary damages and any other remedies that disclosing party may have at law or in equity.

Before answering plaintiffs' complaint, Video King filed its first of several motions for summary disposition. Video King's first such motion was filed pursuant to MCR 2.116(C)(6) ("Another action has been initiated between the same parties involving the same claim."). Citing in support *Valeo Switches & Detection Sys, Inc v EMCom, Inc*, 272 Mich App 309; 725 NW2d 364 (2006) (*Valeo*), Video King argued that the pending action in Nebraska involved the same claims as those asserted in plaintiffs' complaint here. Therefore, Video King

argued, summary disposition was appropriate under MCR 2.116(C)(6) either with or without prejudice at the circuit court's discretion. The circuit court ultimately denied Video King's motion under MCR 2.116(C)(6) without prejudice, reasoning that the claims involved in this action and the Nebraska action were not the "same" for purposes of MCR 2.116(C)(6). In the meantime, plaintiffs moved to dismiss the Nebraska action for lack of personal jurisdiction. *VKGS*, 285 Neb at 603.

Before responding to Video King's motion for summary disposition in the Ingham Circuit Court, plaintiffs filed a motion seeking a preliminary injunction enjoining Video King from "violating the provisions of the 2005 agreement; continuing to use confidential information relating to EPIC; and further offering for placement, placing, distributing, marketing, and advertising the OMNI system so long as it contains confidential information relating to EPIC." After considering the matter, the circuit court issued a reciprocal preliminary injunction against the parties until such time as an evidentiary hearing could take place.

Two days after the circuit court denied Video King's motion for summary disposition under MCR 2.116(C)(6) and issued its reciprocal preliminary injunction against the parties, the Nebraska district court entered an order dismissing the Nebraska action for lack of personal jurisdiction over plaintiffs. Video King pursued an appeal of the district court's ruling in Nebraska's appellate courts. *Id*. at 601.

The action in the Ingham Circuit Court proceeded to discovery, which was extremely contentious. Among myriad discovery matters, the circuit court considered Video King's objection that plaintiffs were "trying to . . . use this lawsuit as a basis to try to learn about

[Video King's] business" by requesting the production of documents spanning back to Video King's formation "back in the 1990s." Contending that the 2005 agreement's confidentiality clause only covered the period from the execution of that agreement (i.e., September 1, 2005) through December 24, 2008 (i.e., the date the parties executed an agreement that had no confidentiality provision), Video King argued that discovery should be limited to that period: September 1, 2005, through December 24, 2008. Plaintiffs responded that, even assuming that the 2005 agreement was terminated by the execution of the December 24, 2008 agreement, the terms of the confidentiality provision extended the "life" of the provision for five years after termination of the agreement. Therefore, plaintiffs argued, the confidentiality provision remained in effect until at least December 2013—well after Video King developed OMNI. With regard to the need for discovery to extend *before* the effective date of the 2005 agreement, plaintiffs argued that such discovery was necessary to refute Video King's argument that OMNI was based on information in Video King's possession before it had access to EPIC, not on confidential information it later received. The circuit court initially held that discovery would be limited to the period from September 1, 2005, until the present, but the court later revisited the issue and held that discovery would be limited to the period from January 28, 2005 (i.e., the date that VKGS acquired Video King and began to operate as Video King), until the present.

In September 2012, Video King sought and was granted leave to file an amended answer and counterclaims. Video King asserted two counterclaims against plaintiffs: (1) breach of contract and (2) tortious business interference and injurious falsehood.

On March 29, 2013, the Nebraska Supreme Court issued its decision concerning the district court's jurisdictional dismissal of the Nebraska action. *Id*. at 599. The Nebraska Supreme Court reversed, holding that the district court erred by determining that it lacked personal jurisdiction over Planet Bingo and Melange. *Id*. at 612. Thus, the Nebraska Supreme Court remanded the matter to the Nebraska district court for further proceedings. *Id*. According to the parties' briefs filed in the instant appeal, the remanded action in the Nebraska district court remains pending.

After entertaining numerous motions for partial summary disposition, the circuit court summarily disposed of all of plaintiffs' claims on various grounds. The circuit court also granted Video King partial summary disposition on the issue of liability regarding its counterclaim for breach of contract.

Upon reviewing a June 2015 letter that Video King's counsel had sent to the Nebraska district court, the circuit court concluded that the Nebraska action "involved the exact same claims and parties involved in this present case" and that Video King was using the Nebraska action "to essentially circumvent any limitations [the circuit court] placed on discovery . . . ." After receiving an unfavorable discovery ruling in the circuit court, Video King "would then go to the Nebraska court and seek the exact same discovery . . . ." Therefore, during a telephonic pretrial conference with the parties, the circuit court "indicated to the parties that its intent was to dismiss the case sua sponte pursuant to MCR 2.116(I)(1) and [MCR] 2.116(C)(6)." (Emphasis omitted.) The circuit court did so on July 8, 2015, dismissing all of the parties' claims with the exception of Video King's "wrongful injunction claim and any related damages." The circuit court reasoned that

dismissal of all other claims under MCR 2.116(C)(6) was "appropriate for purposes of fairness, judicial economy, and to protect . . . the parties from having to attempt to comply with inconsistent rulings from two different state courts."

The next day, Video King filed a motion seeking a declaration that it was wrongfully enjoined, plus damages, costs, and attorney fees. Video King argued that, aside from wrongfully seeking an injunction against it, plaintiffs had filed frivolous pleadings and maintained a frivolous action. Video King requested an evidentiary hearing to allow it to substantiate its position. In response, plaintiffs argued that Video King had failed to state an actionable claim that it was wrongfully enjoined or to demonstrate a genuine issue of material fact regarding its wrongful-injunction claim. Consequently, plaintiffs argued, summary disposition of that claim was appropriate under MCR 2.116(C)(8) and (C)(10). Ultimately, the circuit court held in plaintiffs' favor, dismissing Video King's wrongful-injunction claim pursuant to MCR 2.116(C)(8) and (C)(10). The circuit court reasoned that the injunction it had issued was reciprocal, lasted "a short period of time," was merely intended to maintain the status quo, and did not harm the parties; thus, it was not "wrongful."

These appeals ensued.

II. STANDARDS OF REVIEW

We review de novo a trial court's decision regarding a motion for summary disposition, *Heaton v Benton Constr Co*, 286 Mich App 528, 531; 780 NW2d 618 (2009), reviewing the record as it existed at the time of the trial court's ruling, *Quinto v Cross & Peters Co*, 451 Mich 358, 366 n 5; 547 NW2d 314 (1996); *Peña v Ingham Co Rd Comm*, 255 Mich App 299, 313 n 4; 660 NW2d

351 (2003). "Whether the Legislature has abrogated, amended, or preempted the common law is a question of legislative intent." *Velez v Tuma*, 492 Mich 1, 11; 821 NW2d 432 (2012). That question, like statutory interpretation, is a question of law reviewed de novo. *Id*. On the other hand, we generally "review the grant or denial of a discovery motion for an abuse of discretion," reviewing questions regarding the interpretation of the related court rules de novo. *D'Alessandro Contracting Group, LLC v Wright*, 308 Mich App 71, 76; 862 NW2d 466 (2014). "A trial court abuses its discretion when it chooses an outcome falling outside the range of reasonable and principled outcomes, or when it makes an error of law." *Thomas M Cooley Law Sch v Doe 1*, 300 Mich App 245, 263; 833 NW2d 331 (2013) (citations omitted).

III. ANALYSIS

A. PREEMPTION

We turn now to the claims of error raised by plaintiffs. They contend that the circuit court erred by holding that plaintiffs' common-law unfair-competition claim was preempted by the Michigan Uniform Trade Secrets Act (MUTSA), MCL 445.1901 *et seq*. We agree.

"The common law, which has been adopted as part of our jurisprudence, remains in force until amended or repealed." *Wold Architects & Engineers v Strat*, 474 Mich 223, 233; 713 NW2d 750 (2006). The Legislature may abrogate the common law, but to do so it must "speak in no uncertain terms." *Hoerstman Gen Contracting, Inc v Hahn*, 474 Mich 66, 74; 711 NW2d 340 (2006).

> In general, where comprehensive legislation prescribes in detail a course of conduct to pursue and the parties and

> things affected, and designates specific limitations and exceptions, the Legislature will be found to have intended that the statute supersede and replace the common law dealing with the subject matter. [*Id*. (citation omitted).]

"We will not lightly presume that the Legislature has abrogated the common law." *Velez*, 492 Mich at 11.

MUTSA addresses the question of preemption at MCL 445.1908, which states that MUTSA generally "displaces conflicting tort, restitutionary, and other law of this state providing civil remedies for misappropriation of a trade secret," but it does not displace "[o]ther civil remedies that are not based upon misappropriation of a trade secret." Under MUTSA, "misappropriation" of a "trade secret"[1] means

> either of the following:
>
> (*i*) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means.
>
> (*ii*) Disclosure or use of a trade secret of another without express or implied consent by a person who did 1 or more of the following:
>
> (A) Used improper means to acquire knowledge of the trade secret.
>
> (B) At the time of disclosure or use, knew or had reason to know that his or her knowledge of the trade secret was

---

[1] The phrase "trade secret" is statutorily defined by MUTSA as

> information, including a formula, pattern, compilation, program, device, method, technique, or process, that is both of the following:
>
> (*i*) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.
>
> (*ii*) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. [MCL 445.1902(d).]

> derived from or through a person who had utilized improper means to acquire it, acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use, or derived from or through a person who owed a duty to the person to maintain its secrecy or limit its use.
>
> (C) Before a material change of his or her position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake. [MCL 445.1902(b).]

It has been recognized from common law, on the other hand, that unfair competition encompasses more than just misappropriation. See *In re MCI Telecom Corp Complaint*, 240 Mich App 292, 312 n 8; 612 NW2d 826 (2000) ("[T]he common-law doctrine of unfair competition was ordinarily limited to acts of fraud, bad-faith misrepresentation, misappropriation, or product confusion."). Accordingly, MUTSA does not preempt *all* common-law unfair-competition claims, only those that are based on misappropriation of "trade secrets" as defined by MUTSA. The pertinent question, then, is whether plaintiffs' unfair-competition claim was based on misappropriation alone or also on fraud, bad-faith misrepresentation, or product confusion.

In their original complaint, plaintiffs premised their claim for common-law unfair competition on three distinct factual allegations: (1) that Video King had "utilized Plaintiffs' confidential information in the creation of" OMNI, (2) that Video King had "sold O[MNI] based on its similarity to" EPIC, and (3) that "in at least one instance," Video King had "falsely represented to a potential customer that a" bingo hall was "already using" OMNI "when, in fact, that hall was using EPIC." Given the breadth of the definition of "confidential information" under the 2005 agreement, the first of these three grounds for plaintiffs' unfair-competition claim was preempted by MUTSA. Video

King's alleged use of plaintiffs' confidential information constituted misappropriation of a trade secret under MUTSA. The second and third grounds, however, are unrelated to misappropriation of trade secrets and hence are not displaced by MUTSA. See MCL 445.1908. By deciding otherwise and holding that plaintiffs' common-law unfair-competition claim was entirely preempted by MUTSA, the circuit court erred. Its error in that regard led it to erroneously grant Video King summary disposition of plaintiffs' common-law unfair-competition claim.

B. SUMMARY DISPOSITION UNDER MCR 2.116(C)(6)

Plaintiffs contend that the circuit court erred by sua sponte dismissing the remainder of this action—aside from Video King's wrongful-injunction claim—under MCR 2.116(C)(6). We vacate the circuit court's ruling in this regard and remand.

> [S]ummary disposition cannot be granted under MCR 2.116(C)(6) unless there is another action between the same parties involving the same claims currently initiated and pending at the time of the decision regarding the motion for summary disposition. And, if there is another action pending and the party opposing the motion under MCR 2.116(C)(6) raises a question regarding whether that suit can and will continue, a stay of the second action pending resolution of the issue in the first action, should be granted. [*Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999).]

For purposes of the instant inquiry, a pending appeal is equivalent to a pending action. See *Darin v Haven*, 175 Mich App 144, 151; 437 NW2d 349 (1989), citing *Maclean v Wayne Circuit Judge*, 52 Mich 257, 259; 18 NW 396 (1884) ("It is a familiar principle that when a court of competent jurisdiction has become possessed

of a case its authority continues, subject only to the appellate authority, until the matter is finally and completely disposed of; and no court of co-ordinate authority is at liberty to interfere with its action.") (emphasis omitted). Moreover, for purposes of MCR 2.116(C)(6), the "other action" need not be one pending in this state's courts or a federal court situated in this state; rather, an action pending between the parties in a foreign jurisdiction can warrant summary dismissal of a subsequent action filed here. *Valeo*, 272 Mich App at 319. However, "when dismissing a case under MCR 2.116(C)(6)" because of a pending foreign action, "it might be appropriate . . . to do so without prejudice in the event that the foreign court's jurisdiction is disputed, an issue such as forum non conveniens arises, or the case is dismissed on grounds other than its merits." *Id*.

Plaintiffs do not take issue with the circuit court's finding that the Nebraska action "involved the exact same claims and parties involved in this present case"; rather, plaintiffs contend that enforcement of MCR 2.116(C)(6) under the facts of this case was inconvenient for the parties and contrary to the "spirit" of MCR 2.116(C)(6) and MCR 1.105 ("These rules are to be construed to secure the just, speedy, and economical determination of every action and to avoid the consequences of error that does not affect the substantial rights of the parties."). Plaintiffs' argument in that regard is directly contrary to the fundamental principles by which this Court construes our court rules. The first step in construing a court rule is not an examination of the underlying policy considerations. On the contrary, "[t]his court uses the principles of statutory construction when interpreting a Michigan court rule," beginning "by considering the plain language of the court rule in order to ascertain its mean-

ing." *Henry v Dow Chem Co*, 484 Mich 483, 495; 772 NW2d 301 (2009). "[W]hen the language of the rule is unambiguous, it must be enforced as written." *Acorn Investment Co v Mich Basic Prop Ins Ass'n*, 495 Mich 338, 350; 852 NW2d 22 (2014).

Under the unambiguous language of MCR 2.116(C)(6), summary disposition is appropriate whenever "there is another action between the same parties involving the same claims currently initiated and pending at the time of the decision regarding the motion for summary disposition." *Fast Air*, 235 Mich App at 549. Plaintiffs do not dispute the circuit court's finding that the same parties and claims were involved in the pending Nebraska action. Hence, plaintiffs have not demonstrated that the circuit court's reliance on MCR 2.116(C)(6) was erroneous.

Furthermore, the circuit court's construction and application of MCR 2.116(C)(6) is not at loggerheads with its underlying purpose. MCR 2.116(C)(6) "is a codification of the former plea of abatement by prior action, the purpose of which was to protect parties from the harassment of new suits." *Valeo*, 272 Mich App at 313. The plain language of the rule is "in keeping" with that purpose, i.e., the prevention of "litigious harassment involving the same question and claims as those presented in pending litigation." *Id*. at 319-320 (quotation marks and citation omitted). Viewed in that context, the circuit court's ruling did not contravene the purpose of MCR 2.116(C)(6); rather, it was an effort to achieve that purpose.

Having concluded that the circuit court's ruling under MCR 2.116(C)(6) is proper on its face, we nevertheless are compelled to remand to the circuit court for additional fact-finding. A circuit court's ruling under MCR 2.116(C)(6) is reviewed de novo on the basis of the

record as it existed at the time the ruling was made. *Quinto*, 451 Mich at 366 n 5. We are constrained to observe that the circuit court made its ruling *after* it had already summarily disposed of all of plaintiffs' claims and had stricken plaintiffs' amended complaint. Given the timing of its ruling, the circuit court's finding that this action involved the same claims as those involved in the Nebraska action might not have taken plaintiffs' previously dismissed claims into consideration at all. The record on appeal lacks specificity, not only of the specific claims being dismissed under MCR 2.116(C)(6), but also of the claims pending in the Nebraska action at any given time. Therefore, this Court is unable to conduct the appropriate de novo review of the record in order to determine whether MCR 2.116(C)(6) would have been a valid ground for summary disposition of plaintiffs' claims. See *Meridian Mut Ins Co v Mason-Dixon Lines, Inc (On Remand)*, 242 Mich App 645, 651 n 4; 620 NW2d 310 (2000) ("[W]e note that *where the record permits review under the correct subpart*, the trial court's ruling on a motion for summary disposition under a different subpart does not preclude appellate review according to the correct subpart.") (emphasis added). Therefore, we remand with instructions that, before any other proceedings take place, the circuit court shall order the parties to make a record of what claims are then pending in the Nebraska action (or on appeal in Nebraska) and to subsequently address—on an individual basis—the issue whether summary disposition of each claim involved in this action is appropriate under MCR 2.116(C)(6). In the event that there remains any uncertainty whether the Nebraska action will ultimately resolve all the claims involved in this action on their merits, the circuit court should stay the proceed-

ings pending the outcome of the Nebraska action and any appellate proceedings arising out of it. See *Fast Air*, 235 Mich App at 549 ("[I]f there is another action pending and the party opposing the motion under MCR 2.116(C)(6) raises a question regarding whether that suit can and will continue, a stay of the second action pending resolution of the issue in the first action, should be granted."); see also *Valeo*, 272 Mich App at 319 ("[W]e note that it might be appropriate, when dismissing a case under MCR 2.116(C)(6), to do so without prejudice in the event that the foreign court's jurisdiction is disputed, an issue such as forum non conveniens arises, or the case is dismissed on grounds other than its merits.").[2]

C. TEMPORAL SCOPE OF DISCOVERY

Because the circuit court, on remand, may determine that summary disposition under MCR 2.116(C)(6) was not appropriate as to all claims in this action, we will also address plaintiffs' argument that the circuit court erred by unduly restricting the temporal scope of discovery. We agree in part.

"While Michigan is strongly committed to open and far-reaching discovery, a trial court must also protect the interests of the party opposing discovery so as not to subject that party to excessive, abusive, or irrelevant discovery requests." *In re Hammond Estate*, 215 Mich App 379, 386; 547 NW2d 36 (1996) (citations omitted). In pertinent part, MCR 2.302 provides:

(A) Availability of Discovery.

[2] Alternatively, should the Nebraska action have already been fully decided on the merits, the circuit court should consider the potential applicability of issue preclusion (i.e., collateral estoppel) and claim preclusion (i.e., res judicata).

(1) After commencement of an action, parties may obtain discovery by any means provided in subchapter 2.300 of these rules.

* * *

(B) Scope of Discovery.

(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of another party, including the existence, description, nature, custody, condition, and location of books, documents, or other tangible things, or electronically stored information and the identity and location of persons having knowledge of a discoverable matter. It is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

* * *

(C) Protective Orders. On motion by a party or by the person from whom discovery is sought, and on reasonable notice and for good cause shown, the court in which the action is pending may issue any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . . .

In this case, the parties' competing breach-of-contract claims were largely premised on the 2005 agreement between Melange and Video King. Notably, the preamble to the 2005 agreement refers to events that occurred *before* that agreement was executed, including the fact that Melange had previously provided Video King with information, including software. Moreover, the language the parties used in the "Confidentiality" provision of the 2005 agreement indicates that "Confidential Information" under that agreement

includes information conveyed between the parties both before and after the agreement's effective date:

> Each party acknowledges and accepts that the Confidential Information that it *has received* through any means or form and *at any time*, as well as that it *may receive in the future* under this Agreement and its Exhibits, is and shall continue to be the exclusive property of the party issuing such Confidential Information. [Emphasis added.]

Given such contractual language and the claims asserted by the parties, pre-January 28, 2005 discovery might well have been relevant to the subject matter involved in the pending action—on this record, with the circuit court limiting discovery so early in the proceedings, it is difficult to ascertain the relevance of the documents that *might* have been discovered had the circuit court ruled differently. Because confidential information under the 2005 agreement includes information received "at any time," and because the agreement acknowledges that the parties provided one another with information before the agreement was executed, discovery regarding what information was provided, and when, was directly relevant to the contractual claims and defenses at issue in this case. Indeed, on appeal Video King tacitly recognizes the relevance of such events, arguing that it was entitled to use any information it received from Melange before the agreement was executed to develop OMNI because such information was not confidential. Moreover, any undue burden or expense attendant to Video King's production of pre-January 28, 2005 discovery could have been resolved by proper protective orders. Nevertheless, based entirely on the date that VKGS acquired Video King, the circuit court set a hard limit precluding the discovery of *all* documents created before

January 28, 2005, regardless of the potential relevance of such documents. By so ruling, the circuit court abused its discretion.[3]

On remand, if the circuit court determines that a stay of the proceedings or summary disposition of all claims under MCR 2.116(C)(6) is unwarranted, the circuit court will allow the parties to conduct reasonable pre-January 28, 2005 discovery, but only to the extent that such discovery is relevant to the breach-of-contract claims then remaining and is reasonably calculated to lead to the discovery of admissible evidence.

IV. CONCLUSION

We reverse the circuit court's contested discovery ruling, vacate its subsequent order granting summary disposition under MCR 2.116(C)(6), and remand for further proceedings consistent with this opinion. We do not retain jurisdiction. The parties may not tax costs under MCR 7.219, none having prevailed in full.

BORRELLO, P.J., and WILDER and SWARTZLE, JJ., concurred.

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[3] Because of the timing of the circuit court's improper discovery ruling, we are unable to determine what effect—if any—that ruling had on many of the circuit court's subsequent decisions. Consequently, we are unable to consider several of the claims of error raised by the parties on appeal.

In re KILLICH

Docket No. 329941. Submitted January 13, 2017, at Lansing. Decided April 20, 2017, at 9:00 a.m.

Respondent, minor Taylor A. Killich, pleaded no contest in the Washtenaw Circuit Court, Family Division, to poisoning food, drink, medicine, or water supply, MCL 750.436(2)(a), an offense punishable by imprisonment for 15 years, a fine of $10,000, or both. Respondent was placed on probation for a period of three months, and the probation order required that respondent pay a $100 probation supervision fee. Respondent moved to waive the fee, arguing that the court did not have statutory authority to impose a predetermined flat-rate fee and that the court could only be reimbursed for individualized costs of probation supervision services extended to individual juveniles. After unsuccessfully objecting to the fee at a sentencing hearing before the referee, respondent requested a review hearing. At the review hearing, petitioner argued that three statutory provisions allowed for the imposition of a probation supervision fee: MCL 712A.18(1)(b), MCL 712A.18(3), and MCL 712A.18(12). The court sua sponte called Donna White, a probation supervisor in the juvenile court, who testified that the probation office charges the same $100 probation supervision fee to all juveniles on probation. The court, Timothy P. Connors, J., denied respondent's motion to waive the fee. Respondent appealed.

The Court of Appeals *held*:

1. MCL 712A.18(1)(b) authorizes the court to order a juvenile within its jurisdiction to pay the minimum state cost of not less than $68 for a felony. MCL 712A.18m(5)(a) defines felony as a violation of a penal law of this state for which the offender may be punished by imprisonment for more than one year or an offense expressly designated by law to be a felony. In this case, the offense for which respondent was found guilty, MCL 750.436(2)(a), was a felony under MCL 712A.18m(5)(a) because the offense carried with it a term of imprisonment for more than one year. Accordingly, respondent was required to pay the minimum state cost of $68; however, MCL 712A.18(1)(b) did not authorize the $100 probation supervision fee.

2. MCL 712A.18(12) provides that if the court enters an order of disposition based on an act that is a juvenile offense as defined in MCL 780.901, the court shall order the juvenile to pay the assessment as provided in that act. MCL 780.901(f) defines juvenile offense as an offense committed by a juvenile under the jurisdiction of the juvenile division of the probate court or the family division of circuit court that, if committed by an adult, would be a felony, misdemeanor, or ordinance violation. MCL 780.905(3) provides that the court shall order each juvenile for whom the court enters an order of disposition for a juvenile offense to pay an assessment of $25. In this case, because respondent was convicted of an offense that would be an adult felony, the lower court was required to order respondent to pay the assessment provided in MCL 780.905(3). Accordingly, MCL 712A.18(12) authorized the payment of a $25 assessment, but MCL 712A.18(12) did not authorize the $100 probation supervision fee.

3. MCL 712A.18(3) provides that an order placing a juvenile in the juvenile's own home under MCL 712A.18(1)(b) may contain a provision for reimbursement by the juvenile, parent, guardian, or custodian to the court for the cost of service and that if an order is entered, an amount due shall be determined and treated in the same manner provided for an order entered under MCL 712A.18(2). MCL 712A.18(2) provides that the order of disposition shall contain a provision for reimbursement by the juvenile, parent, guardian, or custodian to the court for the cost of care or service; that the order shall be reasonable, taking into account both the income and resources of the juvenile, parent, guardian, or custodian; and that the amount may be based on the guidelines and model schedule created under MCL 712A.18(6). MCL 712A.18(6) provides that the office of the state court administrator, under the supervision and direction of the supreme court, shall create guidelines that the court may use in determining the ability to pay for the care and any costs of service ordered under MCL 712A.18(2) or (3). The word "reimbursement" is not defined in MCL 712A.18 or in the juvenile code. The plain language of MCL 712A.18(3) allows a court to impose a reimbursement provision before the court has incurred any expense. However, the plain language of MCL 712A.18(3) indicates that the court should be reimbursed for "the cost of service." The use of the definite article "the" signals that the statute is referring to something already in existence, i.e., a cost already incurred. Accordingly, imposed probation fees must be specific to the cost that the state expends on a particular respondent. In this case, White's testimony at the review hearing that the probation office charges the

same $100 probation supervision fee to all juveniles on probation made clear that the $100 fee imposed did not take into account differing supervision costs that the state may need to expend for different juveniles. Therefore, because the fee did not qualify as a reimbursement for "the cost of service" of a particular juvenile, the fee was not statutorily authorized under MCL 712A.18. Additionally, there was no evidence to support a finding that the amount imposed in the order was either less than or equal to the cost of service.

Probation supervision fee vacated; case remanded for entry of a corrected order of disposition.

JUVENILES — PROBATION — REIMBURSEMENT FOR THE COST OF SERVICE — PROBATION SUPERVISION FEES.

MCL 712A.18(3) provides that an order placing a juvenile in the juvenile's own home under MCL 712A.18(1)(b) may contain a provision for reimbursement by the juvenile, parent, guardian, or custodian to the court for the cost of service and that if an order is entered, an amount due shall be determined and treated in the same manner provided for an order entered under MCL 712A.18(2); the plain language of MCL 712A.18(3) allows a court to impose a reimbursement provision before the court has incurred any expense; imposed probation fees must be specific to the cost that the state expends on a particular respondent.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Brian L. Mackie*, Prosecuting Attorney, and *Mark Kneisel*, Assistant Prosecuting Attorney, for the people.

Juvenile Justice Clinic (by *Frank E. Vandervort* and *William Nolan* (under MCR 8.120(D)(3))) for Taylor A. Killich.

Before: M. J. KELLY, P.J., and STEPHENS and O'BRIEN, JJ.

STEPHENS, J. Respondent, minor Taylor Anne Killich, appeals as of right the trial court order dismissing a petition against her for poisoning food, drink, medicine, or water supply, MCL 750.436(2)(a), an offense

punishable by imprisonment for 15 years, a fine of $10,000, or both, and denying her motion to waive a previously ordered $100 probation supervision fee. We vacate and remand.

I. BACKGROUND

Petitioner filed a delinquency-proceedings petition against respondent for violating MCL 750.436(2)(a) after an incident on June 5, 2014. On May 6, 2015, respondent pleaded no contest before a referee. A probationary order was prepared, and respondent was placed on probation for a period of three months. She was ordered to complete 20 hours of community service by August 1, 2015, to participate in a "Victim Awareness" class, and to submit urine screens if requested by her probation officer. Under the proposed order, respondent's probation officer could also impose an additional 20 hours of community service at his or her discretion. The court denied respondent's motion to waive a $100 probation supervision fee.

At the sentencing hearing before the referee, respondent's counsel agreed that probation was an appropriate remedy but objected to the $100 probation supervision fee, citing *People v Juntikka*, 310 Mich App 306; 871 NW2d 555 (2015). Counsel's argument was unsuccessful, and he requested a review hearing before the trial court.

At the September 23, 2015 review hearing, respondent's counsel asserted that respondent completed all probation and community service requirements, but again objected to the $100 probation supervision fee. Respondent's counsel argued that the court did not have statutory authority under the juvenile code, MCL 712A.1 *et seq*., to impose a predetermined flat rate fee and that the juvenile code only permitted the court to

be reimbursed for individualized costs of probation supervision services extended to individual juveniles.

Petitioner argued that three statutory provisions allowed for the imposition of a probation supervision fee: MCL 712A.18(1)(b), MCL 712A.18(3), and MCL 712A.18(12). Petitioner argued that MCL 712A.18(1)(b) required a juvenile under supervision or probation to pay the minimum state costs prescribed by statute and that as a probationer, respondent was at least required to pay a statutory minimum of $68. Petitioner also argued that MCL 712A.18(3) authorized orders of disposition placing a juvenile in the juvenile's own home to contain a provision for reimbursement by the juvenile to the court for the cost of service. Lastly, petitioner argued that MCL 712A.18(12) stated that if a court entered an order of disposition for a juvenile offense, the court "shall order" the juvenile to pay a statutory assessment defined under MCL 780.905, which, in respondent's case, was a fee of $130. Petitioner maintains the same on appeal.

Petitioner also distinguished *Juntikka*, arguing the probation fee in that case was impermissible because it was used to purchase general probation department supplies, whereas in the present case, the $100 probation supervision fee went directly to the Washtenaw County General Fund. The court called Donna White, a probation supervisor in the juvenile court, who testified that the probation office charges the same $100 probation supervision fee to all juveniles on probation and that the funds go to the county's General Fund. The court acknowledged that the fee may go to the general fund but affirmed its imposition, stating:

> So I do think, because of the mechanism of funding and the allocation it is actually a reimbursement, whether or

> not the fact it goes to the general fund, whether or not the fact it is a flat albeit extremely minimal fee compared to the true cost; you may be right in that legal analysis. I will leave that to the Court of Appeals to direct us as to where we go but at this stage the motion is denied.

II. STANDARD OF REVIEW

This case involves the interpretation of multiple statutes contained in the juvenile code, MCL 712A.1 *et seq*. Statutory interpretation is a question of law that we review de novo on appeal. *In re Tiemann*, 297 Mich App 250, 257; 823 NW2d 440 (2012).

III. ISSUE PRESERVATION

To preserve an issue for appellate review, the issue must be raised before, addressed by, and decided by the lower court. *In re TK*, 306 Mich App 698, 703; 859 NW2d 208 (2014). Respondent filed a challenge to the $100 fee and argued against its imposition at the subsequent motion hearing. The court disagreed. Because this issue was raised before, addressed, and decided by the trial court, it is preserved for review.

IV. ANALYSIS

We find, as did the trial court, that local units of government share the costs for juvenile adjudication and supervision, whether in-home or otherwise within the state. Unlike the adult offender, a delinquent juvenile becomes a ward of the state, and we will look to the caselaw and statutes addressing penalties, fines, fees, and costs for adjudication of state offenses under the juvenile code. In Michigan, a court cannot impose penalties or costs in a criminal case unless specifically authorized by statute. *People v Cunningham*, 496 Mich 145, 149-151; 852 NW2d 118 (2014). As respondent

points out, delinquency proceedings under the juvenile code are not criminal cases. However, when addressing a question implicating the juvenile code, this Court routinely looks to the adult criminal code and cases that interpret it so long as they are not in conflict or duplicative of a juvenile code provision. *In re McDaniel*, 186 Mich App 696, 698-699; 465 NW2d 51 (1991); see also *In re Carey*, 241 Mich App 222, 227; 615 NW2d 742 (2000) (discussing that juvenile proceedings are not considered adversarial in nature but are still closely analogous to the adversarial criminal process).

When examining the relevant statutory provisions, this Court must interpret statutory language reasonably and in context, keeping in mind the purpose of the statute. *McCahan v Brennan*, 492 Mich 730, 739; 822 NW2d 747 (2012). The Legislature is presumed to have intended the meaning it plainly expressed. *People v Gardner*, 482 Mich 41, 50; 753 NW2d 78 (2008). If the meaning of statutory language is clear, judicial construction is normally neither necessary nor permitted. *In re Receivership of 11910 South Francis Rd*, 492 Mich 208, 222; 821 NW2d 503 (2012).

Petitioner asserts here, as it did in the trial court, that there is statutory authority for upholding the fee. Petitioner first contends that the $100 probation supervision fee is authorized by MCL 712A.18(1)(b). We disagree. MCL 712A.18(1)(b) allows a court to enter an order of disposition placing a juvenile under probation or supervision. In pertinent part, MCL 712A.18(1)(b) specifically states that "[t]he court also shall order, as a condition of probation or supervision, that the juvenile shall pay the minimum state cost prescribed by section 18m of this chapter." MCL 712A.18m(1)(a) instructs that

> [i]f a juvenile is within the court's jurisdiction . . . and is ordered to pay any combination of fines, costs, restitution, assessments, or payments arising out of the same juvenile proceeding, the court shall order the juvenile to pay costs of not less than . . . $68.00, if the juvenile is found to be within the court's jurisdiction for a felony.

MCL 712A.18m(5)(a) defines felony as "a violation of a penal law of this state for which the offender may be punished by imprisonment for more than 1 year or an offense expressly designated by law to be a felony."

The language of MCL 712A.18(1)(b) is plain, and the intent is clear. It authorizes the court to order a juvenile within its jurisdiction to pay the minimum state cost of not less than $68 for a felony. The offense of which respondent was found guilty, MCL 750.436(2)(a), was a felony under MCL 712A.18m(5)(a) because it carried with it a term of imprisonment for more than one year. Accordingly, respondent must pay the minimum state cost of $68; however, contrary to petitioner's understanding, MCL 712A.18(1)(b) does not authorize the $100 probation supervision fee.

Petitioner next contends that the $100 probation supervision fee is authorized by MCL 712A.18(12). Again, we disagree. MCL 712A.18(12) states that "[i]f the court enters an order of disposition based on an act that is a juvenile offense as defined in section 1 of 1989 PA 196, MCL 780.901, the court shall order the juvenile to pay the assessment as provided in that act." MCL 780.901(f) defines juvenile offense as "an offense committed by a juvenile under the jurisdiction of the juvenile division of the probate court or the family division of circuit court . . . that if committed by an adult would be a felony, misdemeanor, or ordinance violation . . . ." Again, respondent stands convicted of an offense that would be an adult felony. Therefore, the

lower court was required to order respondent to pay the assessment provided in MCL 780.905(3).

MCL 780.905(3) states: "The court shall order each juvenile for whom the court enters an order of disposition for a juvenile offense to pay an assessment of $25.00. The court shall order a juvenile to pay only 1 assessment under this subsection per case." This $25 assessment "shall be used to pay for crime victim's rights services." MCL 780.905(4). Plainly read, MCL 712A.18(12) authorizes the payment of a $25 assessment by juveniles who have an order of disposition entered against them. The statute does not otherwise provide authority for imposing the $100 probation supervision fee.[1]

Lastly, petitioner contends that the $100 probation supervision fee is authorized by MCL 712A.18(3). MCL 712A.18(3) states as follows:

> An order of disposition placing a juvenile in the juvenile's own home under [MCL 712A.18(1)(b)] may contain a

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[1] Although not dispositive of the issue raised, petitioner incorrectly asserts that the crime victim's rights services assessment imposed on respondent should be $130 under MCL 780.905(1)(a) instead of $25 under MCL 780.905(3). Neither MCL 780.905(1) nor (2) addresses juvenile dispositions. Indeed, MCL 780.905(2) clearly instructs that a $130 assessment under MCL 780.905(1)(a) is applicable to adults in criminal cases, not juvenile dispositions. MCL 780.905(2) states, "The court shall order a defendant to pay only 1 assessment under subsection (1) *per criminal case*." (Emphasis added.)

It is MCL 780.905(3) that addresses juvenile dispositions: "The court shall order each juvenile for whom the court enters an order of disposition for *a juvenile offense* to pay an assessment of $25.00. The court shall order a juvenile to pay only 1 assessment under this subsection per case." (Emphasis added.) See *People v Earl*, 495 Mich 33, 37; 845 NW2d 721 (2014) (explaining that under the crime victim's rights assessment, MCL 780.904, "a convicted felon is assessed $130, those convicted of misdemeanors are assessed $75, and juveniles are assessed $25 when the court enters an order of disposition for a juvenile offense").

> provision for reimbursement by the juvenile, parent, guardian, or custodian to the court for the cost of service. If an order is entered under this subsection, an amount due shall be determined and treated in the same manner provided for an order entered under [MCL 712A.18(2)].

Respondent contends that the $100 probation supervision fee is not authorized by MCL 712A.18(3) because it is not a "reimbursement" within the purview of the statute.

In relevant part, MCL 712A.18(2) states:

> An order of disposition placing a juvenile in or committing a juvenile to care outside of the juvenile's own home . . . shall contain a provision for reimbursement by the juvenile, parent, guardian, or custodian to the court for the cost of care or service. The order shall be reasonable, taking into account both the income and resources of the juvenile, parent, guardian, or custodian. The amount may be based upon the guidelines and model schedule created under [MCL 712A.18(6)].

MCL 712A.18(6) states:

> The office of the state court administrator, under the supervision and direction of the supreme court, shall create guidelines that the court may use in determining the ability of the juvenile, parent, guardian, or custodian to pay for care and any costs of service ordered under [MCL 712A.18(2) or (3)]. The guidelines shall take into account both the income and resources of the juvenile, parent, guardian, or custodian.

Respondent argues the $100 probation supervision fee falls outside the purview of MCL 712A.18(3) because the statute only authorizes "reimbursements" and the $100 fee is not a reimbursement. The crux of respondent's contention is that an imposed fee can only be classified as a reimbursement if the state has already incurred an expense. We disagree.

Unless defined in the statute, every word or phrase of a statute should be accorded its plain and ordinary meaning. *Spectrum Health Hosps v Farm Bureau Mut Ins Co of Mich*, 492 Mich 503, 515; 821 NW2d 117 (2012). The word "reimbursement" is not defined in MCL 712A.18 or the juvenile code.[2] When construing statutory language, the context in which it is placed must be considered. *Menard Inc v Dep't of Treasury*, 302 Mich App 467, 471; 838 NW2d 736 (2013).

Again, MCL 712A.18(3) provides that "[a]n order of disposition placing a juvenile in the juvenile's own home under [MCL 712A.18(1)(b)] may contain a provision for reimbursement . . . to the court for the cost of service." The statute clearly refers to providing for reimbursement when the order of disposition is issued. That is, the statute provides authority for placing a reimbursement provision in the disposition order. *In re Brzezinski*, 454 Mich 890 (1997), supports this reading of the statute. Adopting the dissenting opinion from the Michigan Court of Appeals, *In re Brzezinski*, 214 Mich App 652, 677; 542 NW2d 871 (1995) (GRIFFIN, P.J., dissenting), the Supreme Court ruled that MCL 712A.18(2) "provides for the reimbursement order to be included in the order that originally places a child under state supervision. Thus, the court must order a party to reimburse the state's expenses before it is aware how much the state will ultimately spend on a child." While the authority granted differs between MCL 712A.18(2) and MCL 712A.18(3)—§ 18(2) uses

[2] The guidelines promulgated under MCL 712A.18(6) provide that "[a] reimbursement order should not exceed the actual cost-of-care and/or service. The intent of reimbursement is to recover the cost of expenses or services." SCAO, *Guidelines for Court Ordered Reimbursement and Procedures for Reimbursement Program Operations* (October 1990), p 3. Respondent does not argue that the fee imposed on respondent exceeded the state's actual cost to supervise her.

the imperative "shall" while § 18(3) uses the permissive "may"—both have the same timing constraint.

In sum, the plain language of MCL 712A.18(3) allows a court to impose a reimbursement provision before the court has incurred any expense.

Whether the $100 probation supervision fee falls outside the purview of MCL 712A.18(3) because MCL 712A.18(3) does not authorize flat rate assessments is a different question. On this point, we agree because the plain language of the statute indicates that the court should be reimbursed for "the cost of service." The use of the definite article signals that the statute is referring to something already in existence, i.e., a cost already incurred. See SCAO, *Guidelines for Court Ordered Reimbursement and Procedures for Reimbursement Program Operations* (October 1990), p 3.

Similarly, *Juntikka*, 310 Mich App 306, supports the proposition that imposed probation fees must be specific to the cost that the state expends on a particular respondent. In *Juntikka*, an adult respondent was sentenced to a five-year probationary term and ordered to pay a $100 probation enhancement fee. *Id*. at 308. On appeal, the Court considered whether the $100 probation enhancement fee was authorized by the statute that governs conditions a trial court may impose during a term of adult probation, MCL 771.3. *Id*. at 308-309. The Court held that the fee was improper because it was not specific to the respondent and was imposed to account for general operating costs incurred by the probation department. *Id*. at 314. Although the present case involves a juvenile, the same underlying principle is at play.

White stated that the $100 fee was "standard for any young person going on probation" and that the probation department charges the fee to all juveniles on

probation regardless of their level of probation. White's testimony makes clear that the $100 fee imposed did not take into account differing supervision costs that the state may need to expend for different juveniles. Therefore, because the fee does not qualify as a reimbursement for "the cost of service" of a particular juvenile, it is also not statutorily authorized under MCL 712A.18.

Respondent was under state supervision for a period of three months. At the motion hearing, the trial court reasoned as follows: "I am quite certain that . . . $100.00 from a juvenile for the time and costs that it costs the taxpayers to handle their case is noth — [sic] isn't even one ice cube — not even the tip of the iceberg." The trial court further concluded that the $100 probation supervision fee was an "extremely minimal fee compared to the true cost" of state supervision. While we do not doubt that this conclusion is reasonable, there is no evidence in the record of this proceeding to support a finding that the amount imposed in the order is either less than or equal to the cost of service.

We vacate the $100 probation supervision fee and remand for entry of a corrected order of disposition. We do not retain jurisdiction.

M. J. KELLY, P.J., and O'BRIEN, J., concurred with STEPHENS, J.

PEOPLE v WALDEN

Docket No. 330144. Submitted April 4, 2017, at Detroit. Decided April 20, 2017, at 9:05 a.m. Leave to appeal denied 501 Mich 951.

Robert L. Walden was convicted by a jury in the Monroe Circuit Court of voluntary manslaughter, MCL 750.321, in connection with the stabbing death of Bryan Allen. The court, Daniel S. White, J., sentenced defendant as a second-offense habitual offender, MCL 769.10, to 120 to 270 months in prison, which constituted an upward departure of 13 months from the recommended guidelines minimum sentence range. Defendant appealed his sentence.

The Court of Appeals *held*:

1. The trial court did not clearly err by assessing 10 points for Offense Variable (OV) 9, MCL 777.39. Under MCL 777.39(2)(a), each person who was placed in danger of physical injury or loss of life is considered a victim for the purposes of scoring OV 9. Witnesses testified that several men were present when the altercation between defendant and Allen began, and defendant himself testified that at least three people were near him when he drew a knife and began swinging it for what he claimed was his own protection. Accordingly, the 10-point score was properly assessed.

2. The trial court did not abuse its discretion by sentencing defendant to a term that departed upward from the recommended guidelines minimum sentence range by 13 months. The sentencing guidelines were rendered advisory in *People v Lockridge*, 498 Mich 358 (2015), and sentencing courts are no longer required to articulate substantial and compelling reasons to depart from the recommended guidelines minimum sentence range. Instead, departure sentences are reviewed for reasonableness by determining whether the sentence is proportional considering the nature of the offense, the background of the offender, and factors not adequately considered or not considered at all by the guidelines. The sentence in this case was proportional and therefore reasonable considering the modest nature of the upward departure; the trial court's statements in support of the sentence, which noted the seriousness of the offense as well as defendant's low potential

for rehabilitation, lack of remorse, and failure to testify truthfully; and the record, which indicated that defendant had been charged with eight previous crimes and was the subject of a personal protection order obtained by the mother of his children.

Affirmed.

Judge GLEICHER, concurring in part and dissenting in part, agreed that OV 9 was correctly scored, but would have remanded for resentencing and instructed the trial court to explain why the departure sentence it imposed was more proportionate to the offense and the offender than a sentence within the guidelines. The four general reasons advanced by the trial court to justify its departure relied on facts that were either accounted for by the guidelines or irrelevant to the principles of proportionality. When the trial court gives no relevant explanation for a departure, there has been an abuse of discretion that renders the sentence unreviewable except by improperly substituting the appellate court's subjective judgment for the judgment of the trial court.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *William P. Nichols*, Prosecuting Attorney, and *Michael C. Brown*, Assistant Prosecuting Attorney, for the people.

Law Office of John D. Roach, Jr., PLC (by *John D. Roach, Jr.*), for defendant.

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

BOONSTRA, J. Defendant appeals by right his conviction, following a jury trial, of voluntary manslaughter, MCL 750.321. The trial court sentenced defendant as a second-offense habitual offender, MCL 769.10, to 120 to 270 months' imprisonment. The issues raised on appeal relate only to defendant's sentence. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

This appeal arises out of the fatal stabbing of Bryan Allen on October 1, 2014, in the 300 block of Almyra

Avenue in Monroe, Michigan. Derek Brown testified that at 9:30 p.m. or 10:00 p.m., he and Allen were on Almyra Avenue, playing on their cellular telephones, with their backs to a group of people engaged in an ongoing altercation nearby.

Brown testified that defendant came up suddenly behind them and said, "I got something for you." Defendant then threw a jacket over Allen's face and made two "motions" towards Allen's abdomen. Brown assumed that defendant had punched Allen. Allen pushed the jacket off him, and defendant "peeled off" in a car parked a couple of feet away. Allen, perhaps not realizing he had been stabbed, told Brown, "come on, let's go," and the two walked across the street and through a backyard on their way to Allen's mother's home. On the way, Allen told Brown that he was "messed up," claimed that defendant had stabbed him, and fell to the ground. Brown pulled up Allen's shirt, which was soaked with blood, and observed Allen's intestines hanging out. Brown began calling for help. Three people unknown to Brown came to assist. A truck then pulled up, and by Brown's recollection, three individuals loaded Allen into the truck and rushed him to Mercy Hospital. Allen succumbed to his injuries and died that night.

Defendant testified that at around 9:30 p.m. or 10:00 p.m., he went to Almyra Avenue to gamble. When he arrived in his girlfriend's car, roughly 10 to 15 people were in the street shooting dice. Defendant testified that a participant in the dice game, Kelly Aaron, "jumped" him, punched him, kicked him, and stomped on his head. According to defendant, he was able to escape with the assistance of another participant in the dice game, but Aaron followed him, hitting him, punching him, and chasing him around the car. Allen

and Brown then "walked up" on defendant, and defendant pulled out a pocketknife for protection because he was afraid for his life. Being surrounded, defendant began to "sling," or wave, the pocketknife around to keep people back. Defendant did not think that he hit anyone with the knife. Eventually, defendant was able to get into the car, which he dropped off at the home of a friend of his girlfriend. Defendant then paid an unknown individual to take him to Detroit. On the way, defendant threw his pocketknife out the window. Defendant learned later that night that Allen had died.

Defendant was convicted as described earlier. At sentencing, the trial court assessed 10 points for offense variable (OV) 9 (number of victims). The trial court also departed upward by 13 months from the advisory minimum sentencing guidelines range, stating in support of the departure:

> In this matter the sentencing guidelines are 43 to 107 months as . . . both attorneys have indicated. It's advisory at this point in time given [*People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015)]. [Defendant] had three misdemeanors but he was out on bond for aggravated assault at the time this thing occurred. . . . [T]he jury didn't buy the self[-]defense argument and I don't buy the self[-]defense argument.
>
> * * *
>
> Now, the Lockridge case says that I don't have to find a substantial and compelling reason to deviate from the guidelines anymore or I don't have to elucidate those reasons. However, I think just a couple of things that came out in trial; you testified yourself . . . that you got stabbed four times. I don't know if that's true or not true but I don't know why in God's name you'd be carrying a knife if you were the victim of being stabbed before.

> Once this took place there was immediately [sic] leaving the scene, changing the cars and as [the prosecutor] pointed out because it struck me as well, you were driven to Detroit by an anonymous or random person, which I don't believe in a million years. I don't think you told the truth there and I don't think you really told the truth about the facts and circumstances as they went down at the time.
>
> All lives do matter. Bryan Allen will not see his child graduate from high school, get married, do all the things that you're still going to have an opportunity no matter what I do, you're still going to have an opportunity to see your children do. And that's just not right and that's just not fair but I can't make that right and I can't make it fair.

This appeal followed.

II. OFFENSE VARIABLE 9

Defendant argues that the trial court incorrectly assessed 10 points for OV 9. The substance of defendant's argument is that because there was only one victim, Allen, OV 9 should have been scored at zero points. We disagree.

We review the trial court's factual determinations regarding an OV score for clear error; such determinations 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 the statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which [this Court] reviews de novo." *Id*.

MCL 777.39 governs the scoring of OV 9, providing in pertinent part as follows:

> (1) Offense variable 9 is number of victims. Score offense variable 9 by determining which of the following

apply and by assigning the number of points attributable to the one that has the highest number of points:

* * *

(c) There were 2 to 9 victims who were placed in danger of physical injury or death[1] ..... 10 points

(d) There were fewer than 2 victims who were placed in danger of physical injury or death ..... 0 points

(2) All of the following apply to scoring offense variable 9:

(a) Count each person who was placed in danger of physical injury or loss of life or property as a victim.

Under MCL 777.39(2)(a), each person who was placed in danger of physical injury or loss of life is considered a victim for the purposes of scoring OV 9. *People v McGraw*, 484 Mich 120, 128-129; 771 NW2d 655 (2009). See also *People v Sargent*, 481 Mich 346, 350 n 2; 750 NW2d 161 (2008) (stating that "in a robbery, the defendant may have robbed only one victim, but scoring OV 9 for multiple victims may nevertheless be appropriate if there were other individuals present at the scene of the robbery who were placed in danger of injury or loss of life").

The facts in this case support the trial court's determination that more than one victim was placed in danger of physical injury or loss of life. Witnesses testified that several men were gambling in a dice game when the altercation between defendant and Aaron began. By defendant's own testimony, at least three people were near defendant when he drew a knife and began swinging it for protection so that he

[1] Because it is not evident from the formatting, we note that language not relevant to this case has been omitted from our quotation of MCL 777.39(1)(c) and (d).

could get into his car and leave. Therefore, although Allen was the only person stabbed, at least two other people were placed in immediate danger of physical injury or loss of life and are thus victims for the purpose of scoring OV 9. MCL 777.39(2)(a); *Sargent*, 481 Mich at 350 n 2. Accordingly, defendant was properly assessed 10 points for OV 9, because between two and nine victims were placed at risk of physical injury or loss of life. MCL 777.39(1)(c). Because defendant's OVs were scored on the basis of accurate information, he is not entitled to resentencing. *People v Francisco*, 474 Mich 82, 88; 711 NW2d 44 (2006).

III. UPWARD SENTENCING DEPARTURE

Defendant also argues that his sentence was procedurally and substantively unreasonable under MCL 769.34(3)(b)[2] and, accordingly, that he is entitled to have his case remanded for resentencing. We disagree. There are no special steps that a defendant must take to preserve the question whether the sentence was proportional; a defendant properly presents the issue for appeal by providing this Court a copy of the presentence investigation report. *People v Cain*, 238 Mich App 95, 129; 605 NW2d 28 (1999), citing MCR 7.212(C)(7); see also *People v Oswald*, 208 Mich App 444, 446; 528 NW2d 782 (1995). Further, there is no preservation requirement when the trial court imposes a sentence more severe than the sentencing guidelines

[2] MCL 769.34(3)(b) states:

> The court shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight.

recommend. *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008). We review a trial court's upward departure from a defendant's calculated guidelines range for reasonableness. *Lockridge*, 498 Mich at 391-392. We review the reasonableness of a sentence for an abuse of the trial court's discretion. See *People v Steanhouse*, 313 Mich App 1, 44-47; 880 NW2d 297 (2015), lv gtd 499 Mich 934 (2016), citing *People v Milbourn*, 435 Mich 630, 634-636; 461 NW2d 1 (1990). We conclude from the circumstances of this case, the record, and the trial court's statements during sentencing that the sentence imposed was reasonable.

We first reject defendant's initial contention that his sentence is procedurally unreasonable because OV 9 was incorrectly scored, and that his total OV score is therefore incorrect. As discussed earlier, OV 9 was properly scored. Even if defendant's position had merit, his total OV score would only drop from 100 points to 90 points, which would not have any effect on his guidelines minimum sentence range.

With regard to defendant's claim that his sentence was substantively unreasonable, our Supreme Court in *Lockridge*, 498 Mich at 364-365, rendered the Michigan sentencing guidelines advisory. Additionally, the Court in *Lockridge* determined that trial courts are no longer required to articulate substantial and compelling reasons to depart from the minimum sentencing guidelines range; rather, the sentence must only be reasonable. *Id*. at 391-392. This Court has stated that a sentence is reasonable under *Lockridge* if it adheres to the principle of proportionality set forth in *Milbourn*. *Steanhouse*, 313 Mich App at 47-48.[3] "[T]he

[3] Our Supreme Court has granted leave to appeal in *Steanhouse* and in *People v Masroor*, 313 Mich App 358; 880 NW2d 812 (2015), and directed the parties in those cases to address the following issues:

principle of proportionality . . . requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender." *Milbourn*, 435 Mich at 636. Put another way, "the [trial] judge . . . must take into account the nature of the offense and the background of the offender." *Id*. at 651. As our Supreme Court has stated:

> [D]epartures [from the minimum sentencing guidelines] are appropriate where the guidelines do not adequately account for important factors legitimately considered at sentencing. . . . [T]rial judges may continue to depart from the guidelines when, in their judgment, the recommended range under the guidelines is disproportionate, in either direction, to the seriousness of the crime. [*Id*. at 657.]

Factors that may be considered by a trial court under the proportionality standard include, but are not limited to:

> (1) the seriousness of the offense; (2) factors that were inadequately considered by the guidelines; and (3) factors not considered by the guidelines, such as the relationship

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> (1) 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, see MCL 8.5; (2) whether the prosecutor's application asks this Court in effect to overrule the remedy in [*Lockridge*, 498 Mich at 391], and, if so, how *stare decisis* should affect this Court's analysis; (3) whether it is proper to remand a case to the circuit court for consideration under Part VI of this Court's opinion in [*Lockridge*] where the trial court exceeded the defendant's guidelines range; and (4) what standard applies to appellate review of sentences following the decision in [*Lockridge*]. [*People v Steanhouse*, 499 Mich 934 (2016).]

The Supreme Court heard oral argument in those cases on January 10, 2017. The Supreme Court has not yet issued a ruling that would clarify the standard for assessing the reasonableness of a departure sentence post-*Lockridge*.

> between the victim and the aggressor, the defendant's misconduct while in custody, the defendant's expressions of remorse, and the defendant's potential for rehabilitation. [*Steanhouse*, 313 Mich App at 46 (citations omitted).]

In this case, defendant was sentenced on August 6, 2015, after *Lockridge* was decided by our Supreme Court. The trial court in fact made specific reference to *Lockridge*, and it therefore was fully aware that any sentencing departure was subject to a reasonableness requirement. The guidelines minimum sentence range was 43 to 107 months' imprisonment. The trial court sentenced defendant, as a second-offense habitual offender, MCL 769.10, to a minimum term of 120 months' imprisonment, a departure of 13 months over the maximum minimum sentence of 107 months.

Considering the modest nature of the upward departure, the trial court's statements in support of the sentence, and the record, we conclude that the trial court did not abuse its discretion and that the sentence imposed satisfied the requirement that a sentencing departure be "proportionate to the seriousness of the circumstances of the offense and the offender." *Milbourn*, 435 Mich at 636. The trial court noted the seriousness of the offense as well as several factors not accounted for in the guidelines, relating in part to defendant's low potential for rehabilitation and lack of remorse. The court noted, for example, that defendant was on bond for aggravated assault at the time he committed the instant offense.[4] Indeed, defendant was not merely "on bond"; rather, he was on bond for *aggravated assault*, and the record reflects that defen-

[4] Although MCL 777.56 provides for the scoring of points for an offender on bond awaiting sentencing for a felony or misdemeanor, and defendant was scored 5 points for this under Prior Record Variable (PRV) 6, the trial court clearly felt this factor was given inadequate weight.

dant posted a bond on that earlier aggravated assault charge on September 26, 2014, and that he committed the instant offense a mere five days later. And this current offense is a homicide carried out by way of yet another assault, this one carried out with a knife (notwithstanding that defendant claimed to have himself been the victim of multiple stabbings) with such a level of vicious brutality as to physically disembowel (and cruelly end the life of) his victim. The trial court additionally noted that defendant immediately fled the scene, switched cars, and claimed to have been driven to Detroit by an individual he could not identify. The trial court expressed its belief that defendant had not given truthful testimony regarding the events that had occurred.

The record further reflects that defendant, by the age of 21, had a criminal history composed of three prior adult convictions (not including the aggravated assault charge for which he was on bond at the time of the current offense, for which charge defendant escaped prosecution in light of his manslaughter conviction in this case), and three juvenile convictions (not including one additional charge for which defendant was granted diversion). This was therefore his ninth charged criminal offense. At the time of his arrest, he was also subject to an active personal protection order securing the protection of the mother of his children.

The prosecution recommended an upward departure sentence of 180 to 270 months, substantially greater than that imposed by the trial court, offering the following reasons:

> 1) many @ scene sought help for the deceased — NOT [DEFENDANT] (FAILURE TO HELP TAKES AWAY FROM CLAIM OF ACCIDENT/SELF-DEFENSE)

> 2) every reasonable "OV" total well over 75 points — the maximum
>
> 3) it is one thing to run from the scene — it is another to "switch cars" and hide out in another city [and be driven by a "random person".] here OV 19 clearly given "inadequate" weight
>
> 4) trial testimony of defendant
>
> 5) deterrence of "street crime" where witnesses often do not come forward. [Bracketed phrase in original.]

In relation to the prosecution's recommendation, the upward departure imposed was modest indeed.

For all these reasons, and although the trial court did not explicitly refer to the principle of proportionality, we conclude under the circumstances presented that its decision conformed to the law as articulated in *Milbourn*, that the sentence was proportional under *Milbourn*, and accordingly that it was reasonable under *Lockridge*. Therefore, defendant is not entitled to resentencing on the ground that his sentence was unreasonable.

With due respect to our partially dissenting colleague, we conclude that the trial court's articulation of departure reasons was sufficient and was appropriately directed to proportionality principles, and that the reasonableness of the departure sentence imposed was more than supported by the record. Moreover, notwithstanding the dissent's characterization, our review, as stated at the outset of this opinion, is for an abuse of discretion. Indeed, *Lockridge expanded* a trial court's sentencing discretion, subject to reasonableness review. Greater trial court discretion constricts an appellate court's wherewithal to find an abuse of discretion. We therefore remain true to the abuse of discretion standard and are not, as the dissent suggests, "employing a form of de novo review."

Finally, we note that defendant did not raise a challenge to his sentence based on *Alleyne v United States*, 570 US 99; 133 S Ct 2151; 186 L Ed 2d 314 (2013), in either the trial court or this Court. Any such challenge would be unpreserved and reviewed for plain error affecting defendant's substantial rights. *Lockridge*, 498 Mich at 392-393. Such a challenge would not in any event be legitimate because the trial court sentenced defendant with full knowledge of *Lockridge* and the advisory nature of the guidelines, and a change in the scoring of OV 9 would not alter the applicable guidelines minimum sentence range. And there can be no plain *Lockridge* error when there was an upward departure. *Lockridge*, 498 Mich at 395 & n 31. We therefore conclude that the *Crosby*[5] remand procedure outlined in *Lockridge* is not required in this case. Were we to determine that defendant's sentence was unreasonable, we would instead vacate that sentence and remand for resentencing, but because we find the departure reasonable, we affirm.

Affirmed.

O'CONNELL, P.J., concurred with BOONSTRA, J.

GLEICHER, J. (*concurring in part and dissenting in part*). The majority makes a compelling case in support of the reasonableness of the "modest" departure sentence imposed in this case. It may well be that a poll of the judges on this Court would yield unanimous agreement that the departure sentence was thoroughly reasonable. My respectful disagreement centers on the rule of decision guiding the majority's analysis and the standard of review the majority has employed.

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[5] *United States v Crosby*, 397 F3d 103 (CA 2, 2005).

The majority concedes that the principle of proportionality supplies the analytical framework that a trial judge must use when imposing a departure sentence. *People v Smith*, 482 Mich 292, 303; 754 NW2d 284 (2008). And although the majority doesn't explicitly say so, I assume that it would agree that "sentencing courts must justify the sentence imposed in order to facilitate appellate review." *People v Lockridge*, 498 Mich 358, 392; 870 NW2d 502 (2015). These precedents demand that a trial court justify a departure sentence by explaining why the sentence selected better fits the crime and the offender than would a guidelines sentence.

Here, the trial court failed to reference any grounds relevant to the principles of proportionality when it departed from the guidelines range. While I agree that OV 9 was correctly scored, I would remand for resentencing, tasking the trial court to explain why the departure sentence it imposed is more proportionate to the offense and the offender than a sentence within the guidelines. Further, I suggest that the majority has substituted its own well-crafted rationale for a departure sentence in place of the trial court's patently deficient explanation. A remand would permit us to approach defendant's sentence in a manner more consistent with our role.

I

The majority acknowledges that before departing from the minimum sentencing guidelines range, a trial court must engage in at least some reasoning consistent with the "principle of proportionality" set forth in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). Our Supreme Court highlighted the integral role of

proportionality analysis in *People v Babcock*, 469 Mich 247, 262; 666 NW2d 231 (2003):

> In determining whether a sufficient basis exists to justify a departure, the principle of proportionality—that is, whether the sentence is proportionate to the seriousness of the defendant's conduct and to the defendant in light of his criminal record—defines the standard against which the allegedly substantial and compelling reasons in support of departure are to be assessed.

Although the Supreme Court has eliminated "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," *Lockridge*, 498 Mich at 364-365, the Court did not endorse unexplained departures or departures predicated on improper grounds. Logically, a departure sentence lacking a pertinent rationale is unreviewable for reasonableness or for an abuse of discretion. "[T]he linchpin of a reasonable sentence is a plausible sentencing rationale and a defensible result." *United States v Martin*, 520 F3d 87, 96 (CA 1, 2008).

The trial court explained the rationale for defendant's departure sentence as follows:

> In this matter the sentencing guidelines are 43 to 107 months as . . . both attorneys have indicated. It's advisory at this point in time given the Lockridge case. [Defendant] had three misdemeanors but he was out on bond for aggravated assault at the time this thing occurred. . . . [T]he jury didn't buy the self[-]defense argument and I don't buy the self[-]defense argument. You know, it just doesn't make sense. I'm really disappointed that we didn't have more people come forward and testify. I don't why [sic] they didn't. [Defense counsel] speculated why they might not have but as [the prosecutor] indicated all lives matter and it's disappointing that they didn't come here

> and tell the truth. Not testifying for one person or the other, but just tell the truth as to what happened.
>
> Now, the Lockridge case says that I don't have to find a substantial and compelling reason to deviate from the guidelines anymore or I don't have to elucidate those reasons. However, I think just a couple of things that came out in trial; you testified yourself . . . that you got stabbed four times. I don't know if that's true or not true but I don't know why in God's name you'd be carrying a knife if you were the victim of being stabbed before.
>
> Once this took place there was immediately [sic] leaving the scene, changing the cars and as [the prosecutor] pointed out because it struck me as well, you were driven to Detroit by an anonymous or random person, which I don't believe in a million years. I don't think you told the truth there and I don't think you really told the truth about the facts and circumstances as they went down at the time.
>
> All lives do matter. [The victim] will not see his child graduate from high school, get married, do all the things that you're still going to have an opportunity no matter what I do, you're still going to have an opportunity to see your children do. And that's just not right and that's just not fair but I can't make that right and I can't make it fair.

The court advanced four general reasons for departing from the guidelines: (1) defendant had three misdemeanor convictions and "was out on bond for aggravated assault at the time this thing occurred," (2) "I don't know why in God's name you'd be carrying a knife if you were the victim of being stabbed before," (3) "I don't think you really told the truth about the facts and circumstances as they went down at the time," and (4):

> All lives do matter. [The victim] will not see his child graduate from high school, get married, do all the things that you're still going to have an opportunity [to do]. And that's just not right and that's just not fair but I can't make that right and I can't make it fair.

Lockridge commands us to review a departure sentence for "reasonableness." *Lockridge*, 498 Mich at 392. We measure "reasonableness" against the principles of proportionality detailed in *Milbourn* and *Babcock*, bearing in mind that the guidelines themselves incorporate proportionality principles and define the presumptively reasonable sentence range. *Babcock*, 469 Mich at 263-264. We conduct this reasonableness review under an abuse of discretion standard. A trial court abuses its discretion when it misinterprets or misapplies the law. See *Bynum v ESAB Group, Inc*, 467 Mich 280, 283; 651 NW2d 383 (2002) (stating that an abuse of discretion occurs when the trial court "misapprehends the law to be applied").

In applying the principles of proportionality, a departing court's reliance on facts subsumed within a defendant's guidelines score is misplaced:

> [D]epartures are appropriate where the guidelines do not adequately account for important factors legitimately considered at sentencing. For example, as the dissent points out, a sentencing judge could legitimately depart from the guidelines when confronted by the unlikely prospect of a one hundred-time repeat offender, since the guidelines do not take such extensive criminal records into account. In addition, we emphasize that the guidelines should continue to reflect actual sentencing practice. To require strict adherence to the guidelines would effectively prevent their evolution, and, for this reason, trial judges may continue to depart from the guidelines when, in their judgment, the recommended range under the guidelines is disproportionate, in either direction, to the seriousness of the crime. [*Milbourn*, 435 Mich at 657.][1]

MCL 769.34(3)(b) similarly provides:

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[1] In this same vein, the *Milbourn* Court quoted approvingly from Judge SHEPHERD's concurring opinion in *People v Rutherford*, 140 Mich App 272, 280-281; 364 NW2d 305 (1985):

> The court shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from facts contained in the court record . . . that the characteristic has been given inadequate or disproportionate weight.

Here, the trial court relied on facts either accounted for by the guidelines or irrelevant to the principles of proportionality.

Under PRV 5, defendant received 10 points for having three or four prior misdemeanor convictions. Under PRV 6, five points were scored because defendant was on bond and awaiting adjudication for a misdemeanor at the time he committed the sentencing offense. Perhaps these scores do not adequately account for the egregiousness of defendant's prior record. However, the trial court offered no reasoning that

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> "If the guidelines did set binding limits on the trial court's discretion, I would be constrained to remand when the judge states reasons for departing from the guidelines which are already considered therein. The problem we face in these cases is that the guidelines include factors such as the severity of the offense, the past record of the defendant, and the sentences historically imposed throughout the state. If the trial judge justifies a departure from the guidelines by stating that he does so because of the nature of the offense and the record of the offender, the trial court has considered these factors twice. If we say that the trial judge may, in an individual case, place greater emphasis on any given factor by simply announcing on the record his intention to do so, the guidelines become nothing more than a litany of magic words used to mask the imposition of subjective, arbitrary and disparate sentences—the very problem which . . . the guidelines were designed to eliminate. If the sentencing judge is not held to have abused his discretion by emphasizing a factor already included in the guidelines as a basis for departing from them, and if the record is devoid of evidence showing whether a sentence beyond the guidelines is disparate, we are furnished with no basis other than our own subjective reactions upon which to base a decision. The risk of imposing an arbitrary and disparate sentence is thus shifted from the trial courts to the Court of Appeals." [*Milbourn*, 435 Mich at 658-659.]

would allow us to reach that conclusion. The majority concedes this fact but deliberately ignores it; in the majority's view, "the trial court clearly felt this factor was given inadequate weight." I decline to read the trial court's mind or put words in its mouth, and respectfully suggest that doing so contravenes our standard of review. How can we determine whether the trial court abused its discretion when we do not know how it weighed the facts and how the facts bore on the nature of the offense and offender?

Under OV 1, defendant was scored 25 points for having stabbed the victim (the highest score available for that variable), and under OV 2, five points were assessed because defendant used a knife. Given that defendant's possession of a knife was accounted for in the guidelines (not once, but twice), what made this fact especially relevant to the seriousness of the offense or the character of the offender? The trial court has not told us. It's not our job to guess, as doing so resembles de novo rather than discretionary review.

The trial court's third ground for departure was that it did not believe defendant's testimony. I would hold that without further elaboration, this constitutes an improper ground for departure, as the court failed to explain whether defendant willfully offered false testimony that was material to the case. See *People v Adams*, 430 Mich 679, 693; 425 NW2d 437 (1988). The jury apparently credited defendant's testimony to some extent, as it convicted defendant of voluntary manslaughter rather than murder. The trial court did not explain why its disbelief of defendant's testimony demonstrated that defendant was incorrigible or harbored some other relevant character flaw. Finally, the trial court's statement prefaced with "all lives do matter" touches on the seriousness of the offense. But

the same statement can be made in all homicide cases, and in my view these feelings do not supply a proper ground for departure from the sentencing range selected by the Legislature.

II

Further, I respectfully disagree with the majority's determination that the departure sentence is reasonable. Absent any reasoning consistent with appropriate grounds for departure, I would hold that we have nothing to review.

It is the trial court's responsibility to justify a departure sentence. We review the court's rationale under an abuse of discretion standard, focusing on the sentence's reasonableness. *Lockridge*, 498 Mich at 392. When there is no explanation for a departure that qualifies as relevant, there has been an abuse of discretion. Unlike the majority, I would refrain from finding a departure sentence reasonable by employing a form of de novo review to fill in the yawning gap created by the trial court's failure to explain its rationale in a legally appropriate manner. The majority implies that we may circumvent the trial court's omission by speaking for the trial court, supplanting an inadequate record with our subjective view of the reasonableness of defendant's sentence. As appellate judges, we respect the role of trial courts by refraining from substituting our judgment for theirs. "[A]bsent any explanation, we cannot do our job as an appellate court: we would be placed in the position of offering our own justifications for the sentence rather than reviewing the district court's reasons." *United States v Boultinghouse*, 784 F3d 1163, 1179 (CA 7, 2015).

Finally, I fear that the majority has selected an easy case as a prototype for future appellate overreaching.

Defendant was charged with open murder and convicted of voluntary manslaughter. He killed a young man. His self-defense claim was not terribly convincing. The upward departure was only 13 months (although I am certain that even small differences in a sentence matter to a defendant). Given these facts, it is easy to look the other way when a trial court reaches a result that may well be just, but fails to explain how it got there in a manner approved by our Legislature. It is equally easy for us to abandon our responsibility to review only that which is truly reviewable—why not regard the trial court's omission as essentially harmless when we would have sentenced him in a similar way?

Absent an explanation that conforms to the rule of decision reflected in our sentencing principles, the trial court's sentence is improper and our review equally so. Whether two or three appellate judges feel a departure sentence is well deserved is a retrospective and fundamentally subjective determination.

Proceeding down the majority's path is the first step on a slippery slope that would permit appellate judges to cherry-pick a record, finding reasons to enforce our own judgments about why a departure was justified. *Smith*, 482 Mich at 304. And the next case may not be quite as straightforward, opening the door to a patchwork of inconsistent appellate judgments concerning the contours of "reasonableness" and a panoply of subjective and widely inconsistent sentences.

PEOPLE v FOSTER

Docket No. 329992. Submitted January 12, 2017, at Lansing. Decided April 20, 2017, at 9:10 a.m.

Michael E. Foster pleaded guilty in the Iosco Circuit Court to two counts of breaking and entering with the intent to commit a felony, MCL 750.110, and one count of possession of a controlled substance with the intent to deliver, MCL 333.7401(2)(b)(*i*). The court, William F. Myles, J., sentenced Foster to concurrent terms of 19 months to 10 years of imprisonment for the breaking and entering convictions, to be served consecutively to a term of 78 months to 20 years for the controlled substance conviction. Foster was also ordered to pay a $500 fine, restitution for the two breaking and entering offenses, and restitution for two misdemeanor retail fraud offenses. Restitution was made joint and several with Foster's codefendants in each case, and both misdemeanor charges were dismissed pursuant to the terms of his guilty pleas to the felony offenses. In addition to the restitution ordered and the sentences received, Foster pleaded guilty to the three felonies in exchange for sentencing without consideration of his habitual-offender status. The Court of Appeals granted Foster's delayed application for leave to appeal.

The Court of Appeals *held*:

1. A sentence agreement may address a defendant's term of imprisonment, any fine to be imposed, and the amount of restitution to be paid. However, a defendant is entitled to withdraw his or her plea when the sentence imposed differs from the sentence agreed on in the sentence agreement. In this case, Foster pleaded guilty to the felony charges—breaking and entering with intent to commit a felony and possession of a controlled substance with intent to deliver—in exchange for the dismissal of two misdemeanor retail fraud charges, minimum sentences at the bottom of the range recommended by the sentencing guidelines, concurrent sentences for the breaking and entering convictions to be served consecutively to the sentence for the controlled substance conviction, and disregard of Foster's habitual-offender status. The $500 fine the court ordered Foster to pay was not mentioned in the sentence agreement, and the trial court erred by

imposing the $500 fine without giving defendant the opportunity to withdraw his plea. Accordingly, the fine had to be vacated.

2. Two separate statutes, MCL 780.766 and MCL 769.1a, require a defendant to pay full restitution for a victim's losses resulting from the defendant's course of criminal conduct giving rise to a conviction. Ordinarily, restitution cannot be ordered for a course of conduct not giving rise to a conviction. However, a sentence agreement may address restitution for offenses that are dismissed pursuant to a sentence agreement, and a defendant may agree as part of a sentence agreement to pay restitution for offenses not resulting in convictions. In this case, Foster agreed to pay restitution for both misdemeanor charges of retail fraud as a condition of his guilty pleas. Because Foster expressly agreed to pay restitution for the losses in the two misdemeanor cases, he cannot now claim that the restitution orders were improper.

3. Generally, a defendant cannot be penalized for uncharged conduct without violating the defendant's constitutional right to due process; that is, under US Const, Ams VI and XIV, the defendant is entitled to have the prosecution prove every element of the charge beyond a reasonable doubt. In this case, however, Foster agreed to pay restitution as a condition of his plea to the felony charges and the sentence agreement's dismissal of the two misdemeanor charges. A defendant's constitutional right to have all elements of a crime proved beyond a reasonable doubt is not implicated when the defendant expressly agrees to pay restitution as part of a bargain between the defendant and the prosecution from which the defendant will benefit. In fact, a defendant intentionally waives his or her right to have the prosecution prove the elements of a charge when the defendant agrees to plead guilty to an offense. Because Foster waived this right and agreed to pay restitution, the trial court did not err by ordering restitution for the two dismissed misdemeanor charges.

4. Pursuant to MCL 780.766(2) and Const 1963, art 1, § 24, a crime victim is entitled to full restitution for direct or threatened physical, financial, or emotional harm caused by a defendant's commission of a crime, and a defendant whose conduct caused the harm is responsible for paying full restitution. In this case, Foster argued that he should not be jointly and severally liable for the amount of restitution ordered in each case. Rather, Foster asserted that the trial court should divide the total restitution in each case among him and his codefendants. Otherwise, according to Foster, the restitution he was ordered to pay was not proportionate to the offender and the offense as required under *People v Milbourn*, 435 Mich 630 (1990). However, the restitution statute

does not authorize this arrangement when restitution is ordered. Each defendant involved in a crime is responsible for making full restitution to the victims of that crime. The principle of proportionality in *Milbourn* does not apply to restitution; it applies to the proportionality of punishment imposed in light of the offense committed and the offender who committed it. Restitution is neither punishment nor penalty. Therefore, the trial court did not abuse its discretion by ordering that restitution be joint and several among Foster and his codefendants.

5. Under US Const, Ams VI and XIV, any fact that increases the penalty for a crime must be submitted to the jury and proved beyond a reasonable doubt or admitted to by the defendant. Restitution, however, is not a penalty—its focus is on compensating a victim for the harm done, not on punishing a defendant. Therefore, an order to pay restitution to a victim does not increase the penalty for a crime, and the facts supporting the restitution order need not be submitted to a jury or admitted to by a defendant. Accordingly, Foster's constitutional rights were not violated by the fact that the facts supporting the restitution order were neither submitted to the jury nor admitted by Foster.

6. A defendant has a constitutional right under US Const, Am VI and Const 1963, art 1, § 20 to the effective assistance of counsel in a criminal prosecution against him or her. Counsel is effective when he or she possesses the skill and knowledge necessary to respond to the charges against a defendant and when his or her performance satisfies an objective standard of reasonableness under prevailing professional norms. In this case, Foster contends that his counsel was ineffective for failing to object to the $500 fine and the order of restitution imposed on Foster. However counsel may have advised Foster about his guilty plea did not prejudice Foster. Withdrawing his plea may have resulted in the sacrifice of the benefits of his plea. Further, because the trial court did not err by ordering Foster to pay the amount of restitution it did, any motion by defense counsel regarding the restitution order would have been futile.

Affirmed in part, vacated in part, and remanded to the trial court for correction of the judgment of sentence.

1. CRIMINAL LAW — SENTENCE AGREEMENTS — RESTITUTION — DISMISSED CHARGES.

A defendant may agree as part of a sentence agreement to pay restitution for a criminal offense not giving rise to a conviction, including a criminal offense that was dismissed pursuant to the sentence agreement.

2. CRIMINAL LAW — SENTENCING — RESTITUTION — JOINT AND SEVERAL LIABILITY.

MCL 780.766(2) and Const 1963, art 1, § 24 entitle a crime victim to full restitution for direct or threatened physical, financial, or emotional harm caused by a defendant's criminal conduct; when more than one defendant causes the harm, each defendant may be made jointly and severally liable for making full restitution to a victim of the defendants' criminal conduct.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, and *Nichol J. Palumbo*, Prosecuting Attorney, for the people.

State Appellate Defender (by *Jeanice Dagher-Margosian*) for defendant.

Before: M. J. KELLY, P.J., and STEPHENS and O'BRIEN, JJ.

STEPHENS, J. Defendant, Michael Eugene Foster, pleaded guilty to two counts of breaking and entering with intent to commit a felony, MCL 750.110, and one count of possession with intent to deliver a controlled substance, MCL 333.7401(2)(b)(*i*). Defendant appeals by delayed leave granted[1] the judgment of sentence, which ordered defendant to serve concurrent prison terms of 19 months to 10 years for the breaking and entering convictions, consecutive to a term of 78 months to 20 years for the possession with intent to deliver conviction. Defendant was also ordered to pay a $500 fine for the possession of a controlled substance offense, and, *inter alia*, restitution in the amount of $419.02 for two dismissed misdemeanor offenses. We affirm in part, vacate in part, and remand to the trial court for correction of the judgment of sentence.

[1] *People v Foster*, unpublished order of the Court of Appeals, entered December 7, 2015 (Docket No. 329992).

I. BACKGROUND

Defendant does not contest the factual basis of this prosecution. In LC No. 14-008881-FH, defendant pleaded guilty to one count of breaking and entering and stated that around September 21 or 22, 2014, he entered a barn located at a golf course on Cedar Lake Road in Iosco County and "took 11 batteries" after his "co-defendant opened the door." He later sold the batteries for their scrap value. Defendant also pleaded guilty to one count of breaking and entering in LC No. 14-008692-FH and stated that, on June 5, 2014, he entered a garage "[o]n the corner of Jordonville Road and US-23" "in Iosco County" and "me and my co-defendant carried a generator out." In LC No. 15-009012-FH, defendant pleaded guilty to one count of possessing with the intent to deliver the controlled substance of methamphetamine and stated that around December 16, 2014, he "had a substantial amount of Methamphetamine. And we got pulled over, and it was found in the vehicle, and I admitted it was mine." Defendant added that he possessed the methamphetamine for the purpose of "[s]hooting it, smoking it, snorting it. . . . Yeah, there was an intent to sell some of it."

Defendant and the prosecution entered a plea agreement on the record. In exchange for defendant's pleas of guilty, the prosecution and defendant agreed that the breaking and entering sentences would be served concurrently to each other and consecutively to the possession with intent to deliver offense and that defendant would be sentenced without consideration of his habitual-offender status to a "max/minimum . . . at the bottom of the sentence guidelines" on all three offenses. The parties also agreed that "two misdemeanor Retail Fraud matters

in District Court would be dismissed with restitution to be paid in full on those — in addition to the restitution on these files that are being pled guilty to."

The trial court informed defendant that breaking and entering is an offense that carries with it a maximum penalty of ten years' incarceration for each conviction and that possession with intent to deliver the controlled substance of methamphetamine carries with it a maximum penalty of twenty years' incarceration, a $25,000 fine or both. The trial court also informed defendant that the court was not bound by the plea agreement at sentencing and that, if the court imposed a sentence different from that agreed to, then defendant could withdraw his pleas. The court accepted all three pleas and referred defendant to the Department of Corrections for preparation of a presentence investigation report (PSIR).

At the sentencing hearing, the court followed the recommendations of the Department of Corrections as provided in the PSIR. In LC No. 14-008692-FH, defendant was sentenced as previously stated and ordered to pay restitution in the amount of $232.19 to Helen Bero jointly and severally with codefendants Allen Preston and Zachary Williams. Defendant was further ordered to pay a $68 minimum state cost, a crime victims assessment in the amount of $130, $1,100 in court costs, and a $500 fine. In LC No. 14-008881-FH, defendant was sentenced as previously stated and ordered to pay restitution in the amount of $887.52 to Lakewood Shores Golf Resort jointly and severally with codefendant Paul Sivrais. Defendant was also ordered to pay a $68 minimum state cost and a crime victims assessment in the amount of $130. In LC No. 15-40-SM, the case involving the dismissed misdemeanors, defendant was ordered to pay restitution in

the amount of $223.76 to Walmart jointly and severally with codefendant Valerie Foster and restitution in the amount of $195.26 to Walmart.[2] In LC No. 15-009012-FH, defendant was sentenced as previously stated and ordered to pay a $68 minimum state cost and a crime victims assessment in the amount of $130.

The trial court asked defendant and his counsel if they were "aware of any additions, deletions, or corrections that need to be made with regard to any of the factual matters contained within the [presentence] report." Defense counsel indicated that he did not have any changes. The prosecution noted two minor changes. Additionally, the prosecution, defendant, and defendant's counsel all stated that they did not have any objection to the scoring of the sentencing guidelines. The trial court then sentenced defendant as recommended by the Department of Corrections.

II. THE VALIDITY OF THE FINE

Defendant first challenges the $500 fine imposed by the court in LC No. 14-008692-FH, the case involving the breaking and entering conviction related to the generator theft. Defendant contends that because the fine was not a part of his sentence recommendation and he was not given the opportunity to withdraw his plea after the fine was imposed, the fine should be vacated. We agree.

A. STANDARD OF REVIEW

Defendant did not challenge at sentencing the trial court's authority to order the fine. This Court reviews unpreserved claims of error under the plain error rule.

[2] The restitution ordered for the misdemeanor offenses is included in the judgment of sentence for LC No. 14-008881-FH.

People v Carines, 460 Mich 750, 763; 597 NW2d 130 (1999). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Id*. (citation omitted).

B. ANALYSIS

"If the prosecuting attorney and the defendant choose to negotiate, and in fact reach a sentence agreement or sentence recommendation, the court shall require disclosure in open court of the details of the agreement at the time the plea is offered."[3] *People v Killebrew*, 416 Mich 189, 206; 330 NW2d 834 (1982).

In *Killebrew*, our Supreme Court held that when a plea agreement contains a nonbinding prosecutorial sentence recommendation,

> the judge may accept the guilty plea . . . , yet refuse to be bound by the recommended sentence. The judge retains his freedom to choose a different sentence. However, the trial judge must explain to the defendant that the recom-

[3] Although a written plea agreement is not included in the record on appeal, the trial court appeared to treat the plea agreement as a sentence recommendation rather than a sentence agreement. See *People v Killebrew*, 416 Mich 189, 206-208; 330 NW2d 834 (1982) (explaining the difference between a sentence agreement and a sentence recommendation). When the trial court accepted defendant's pleas, it stated that it was not bound by the "sentence agreement." Because acceptance of a sentence agreement binds the trial court to the agreed-upon sentence, see *id*. at 206-207, whereas a sentence recommendation allows a trial court to accept the plea but impose a different sentence than that recommended by the prosecution under the prosecution's agreement with the defendant, see *id*. at 207-208, the trial court's statement that it would accept the plea but not be bound by the agreement indicated that the pleas were based on a sentence recommendation.

> mendation was not accepted by the court, and state the sentence that the court finds to be the appropriate disposition. The court must then give the defendant the opportunity to affirm or withdraw his guilty plea. [*Id*. at 209-210.]

No written plea agreement is included in the record on appeal. According to defendant, his counsel, and the prosecution at the plea hearing, defendant agreed to plead guilty to the three felonies and pay restitution on those charges and on two misdemeanor retail fraud charges in exchange for the dismissal of the two misdemeanors. In addition, defendant understood that no habitual-offender notices were to be filed, and he was to be sentenced at the bottom of the sentencing guidelines. The record contains no indication that a fine was contemplated by the agreement.

At the plea hearing, the trial court informed defendant that it was not bound by the "sentence agreement," that the offense of possession of a controlled substance with intent to deliver carried with it a maximum fine of $25,000, and that defendant would be allowed to withdraw his plea in the event the trial court deviated from the agreement at sentencing. However, the sentencing record indicates that the trial court imposed a $500 fine in connection with LC No. 14-008692-FH, involving one of the breaking and entering charges, and that thereafter, the court did not afford defendant an opportunity to withdraw his plea. Because the fine imposed was not part of the sentencing agreement and not contemplated by the parties in relation to the breaking and entering charge for which it was assessed, we conclude that the trial court plainly erred by not giving defendant an opportunity to affirm or withdraw his plea after the fine was imposed. Accordingly, we vacate that portion of the judgment of

sentence in LC No. 14-008692-FH that requires defendant to pay a $500 fine. *People v Morse*, 480 Mich 1074 (2008).

III. THE VALIDITY OF THE RESTITUTION

Defendant next challenges the trial court's order of restitution for the misdemeanor offenses on the grounds that it ordered restitution for uncharged conduct, that the restitution was not proportionate to defendant's participation in the crimes, and that restitution for uncharged conduct not submitted to a jury violated defendant's Sixth and Fourteenth Amendment rights. US Const, Ams VI and XIV.

A. STANDARD OF REVIEW

Defendant did not challenge the court's authority to order restitution related to the dismissed misdemeanor charges or to impose restitution in general in the trial court. "The proper application of MCL 780.766(2) and other statutes authorizing the assessment of restitution at sentencing is a matter of statutory interpretation, which we review de novo." *People v McKinley*, 496 Mich 410, 414-415; 852 NW2d 770 (2014). "We review a court's calculation of a restitution amount for an abuse of discretion, *People v Gubachy*, 272 Mich App 706, 708; 728 NW2d 891 (2006), and its factual findings for clear error, *People v Fawaz*, 299 Mich App 55, 64; 829 NW2d 259 (2012)." *People v Corbin*, 312 Mich App 352, 361; 880 NW2d 2 (2015). However, this Court reviews unpreserved claims of error under the plain error rule. *Carines*, 460 Mich at 763. "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The

third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Id*. (citation omitted).

A criminal defendant need not "take any special steps to preserve the question of the proportionality of her sentence." *People v Cain*, 238 Mich App 95, 129; 605 NW2d 28 (1999). This Court reviews the proportionality of a trial court's sentence for an abuse of discretion. *People v Paquette*, 214 Mich App 336, 344-345; 543 NW2d 342 (1995). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *People v Cross*, 281 Mich App 737, 739; 760 NW2d 314 (2008).

B. ANALYSIS

1. RESTITUTION AS PART OF DEFENDANT'S SENTENCE RECOMMENDATION

Defendant first argues that according to *McKinley*, he cannot be ordered to pay restitution for a charge that was dismissed. In *McKinley*, our Supreme Court held that "any course of conduct that does not give rise to a conviction may not be relied on as a basis for assessing restitution against a defendant." *McKinley*, 496 Mich at 419-420. Defendant posits that he cannot be ordered to pay restitution in connection with his two dismissed retail fraud charges because those charges did not result in a conviction. This is an issue of first impression. Defendant's circumstance is different from that presented in *McKinley* because he agreed to pay the restitution he now challenges in exchange for the charges to be dismissed.

> There are two main statutes that govern restitution in Michigan: MCL 780.766 (part of the [Crime Victim's Rights Act (CVRA), MCL 780.751 *et seq*.]) and MCL 769.1a

> (the general restitution statute).[4] Both statutes begin by defining "victim" as "an individual who suffers direct or threatened physical, *financial*, or emotional harm as a result of the commission of a crime." The statutes then declare that sentencing courts "shall order" a defendant convicted of a crime to "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." [*People v Garrison*, 495 Mich 362, 367; 852 NW2d 45 (2014).]

MCL 769.1a and MCL 780.766 contain nearly identical mandates. MCL 769.1a(2) provides that

> 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.

Likewise, under MCL 780.766(2),

> 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. . . .[5]

Our Legislature enacted the CVRA and its component part, MCL 780.766,

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[4] MCL 769.1a was first adopted by 1985 PA 89, effective July 10, 1985. MCL 780.766 was enacted by 1985 PA 87, effective October 9, 1985. *People v Persails*, 192 Mich App 380, 382; 481 NW2d 747 (1991).

[5] The following text is included in MCL 780.766(2), but not in MCL 769.1a(2): "For an offense that is resolved by assignment of the defendant to youthful trainee status, by a delayed sentence or deferred judgment of guilt, or in another way that is not an acquittal or unconditional dismissal, the court shall order the restitution required under this section."

> as part of a movement intended to balance the rights of crime victims and the rights of criminal defendants. One aim of [the CVRA] was "to enable victims to be compensated fairly for their suffering at the hands of convicted offenders." The Legislature's statutory direction to order defendants to pay complete, entire, and maximum restitution effectuates this goal of fair compensation. [*Garrison*, 495 Mich at 368.]

MCL 769.1a and MCL 780.766 previously had permissive language allowing, but not requiring, the trial court to award restitution to crime victims; however, these statutes were amended in 1993 to require trial courts to award restitution to crime victims. *Id*. at 373; see also 1993 PA 343 (substituting "shall" for "may" in MCL 769.1a(2)); 1993 PA 341 (substituting "shall" for "may" in MCL 780.766(2)).[6]

Prior to *McKinley*, the courts of this state held that MCL 769.1a and MCL 780.766 grant the trial court broad authority to order restitution in excess of what might seem appropriate for the crime of which a defendant was convicted so long as the loss occurred within the same *course of conduct* as the conduct underlying the conviction. The scope and breadth of the definition of "course of conduct" encompassed both criminal conduct involving multiple victims and multiple crimes involving the same victim. See *People v Littlejohn*, 157 Mich App 729, 731-732; 403 NW2d 215 (1987) (holding that when the defendant was convicted

[6] The record is unclear whether the trial court awarded restitution under MCL 769.1a or MCL 780.766. The trial court did not mention any specific statute at trial or in its judgment. In any event, because MCL 769.1a and MCL 780.766 contain nearly identical language, a trial court generally would have little reason to differentiate between the two when awarding restitution to a crime victim. Indeed, this Court and our Supreme Court have often ruled simultaneously on the application of the two statutes. See, e.g., *Persails*, 192 Mich App at 383; *Garrison*, 495 Mich at 372-373.

of one count of embezzlement but admitted to previous instances of embezzlement against the same retail establishment, the trial court was within its authority to order the defendant to pay restitution for all instances of embezzlement); *People v Persails*, 192 Mich App 380, 383; 481 NW2d 747 (1991) (holding that when the defendant was convicted of one count of malicious destruction of property but had engaged in "several nearly identical offenses within approximately one month," the court could award restitution to victims of the uncharged conduct); *People v Bixman*, 173 Mich App 243, 246; 433 NW2d 417 (1988) (holding that the defendant who pleaded guilty to writing a nonsufficient funds check of $1,400 could be ordered to pay more than $17,000 in restitution for writing other nonsufficient funds checks).

The Supreme Court, in *McKinley*, addressed and narrowed the broad definitions of "course of conduct" and "arising out of," stating that "MCL 780.766(2) does not authorize trial courts to impose restitution based *solely* on uncharged conduct." *McKinley*, 496 Mich at 424 (emphasis added). We are keenly aware of the Court's use of the word "solely" as a qualifier on the court's proscription against imposing restitution in such circumstances, just as we are mindful of its clear intent that previous precedent "should be overruled to the extent that it held that MCL 780.766(2) 'authorizes the sentencing court to order criminal defendants to pay restitution to all victims, even if those specific losses were not the factual predicate for the conviction.' " *Id*. (citation omitted). The Court defined "uncharged conduct" as "criminal conduct that the defendant allegedly engaged in that was not relied on as a basis for any criminal charge and therefore was not proved beyond a reasonable doubt to a trier of fact." *Id*. at 413 n 1. Therefore, "conduct for which a defendant is

not criminally charged and convicted is necessarily *not* part of a course of conduct that gives rise to the conviction." *Id*. at 420. The *McKinley* Court did not specifically address the application of its rule to MCL 769.1a. However, because MCL 769.1a(2) contains language identical to MCL 780.766(2) and MCL 769.1a(2) could be considered the precedential equal of MCL 780.766(2),[7] the rule set forth in *McKinley* for MCL 780.766(2) should extend to MCL 769.1a(2).

McKinley, however, has yet to be applied to a case like this one in which the defendant was charged for crimes that were dismissed under a plea agreement when an agreement to pay restitution was a condition of the plea. We do not find that either the rule announced in *McKinley*, or its analytical framework, renders unconstitutional a situation in which restitution is part of a negotiated plea agreement. The facts in *McKinley* were very different from those in the instant appeal. In *McKinley*,

> police officers arrested the defendant because they believed him to be responsible for a series of thefts of commercial air conditioning units in the area. Following a trial, a jury found the defendant guilty of larceny over $20,000,[8] malicious destruction of property over $20,000,

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[7] The *McKinley* Court specifically overruled its previous interpretation of "course of conduct" as articulated in *People v Gahan*, 456 Mich 264, 270; 571 NW2d 503 (1997), in which the Court determined that the Legislature's use of the term "course of conduct" in MCL 780.766 should be given broad application based on this Court's interpretation of MCL 771.3(1)(e). *McKinley*, 496 Mich at 418 n 8. The *McKinley* Court further noted that MCL 769.1a(2) was identical to MCL 771.3(1)(e) "for all relevant purposes." *Id*. In doing so, the *McKinley* Court suggested that the precedent resulting from its opinion should not be limited to MCL 780.766.

[8] In *People v McKinley*, unpublished opinion per curiam of the Court of Appeals, issued May 16, 2013 (Docket No. 307360), p 1, this Court vacated the defendant's larceny conviction but otherwise affirmed his

> and inducing a minor to commit a felony. . . . The trial court reserved a decision on restitution until after sentencing. Following a hearing, and over defense counsel's objection to the amount of restitution assessed, the trial court entered an amended judgment of sentence to reflect the imposition of $158,180.44 in restitution against the defendant. Of that total, the defendant was ordered to pay $63,749.44 to the four victims of the offenses of which he was convicted and $94,431 to the victims of uncharged thefts attributed to the defendant by his accomplice. [*McKinley*, 496 Mich at 413-414.]

When the *McKinley* Court determined that a trial court could not award restitution for uncharged conduct under MCL 780.766(2), it specifically declined to address the constitutional issue raised in the appeal. The *McKinley* Court's grant of leave was limited to: " '(1) whether an order of restitution is equivalent to a criminal penalty, and (2) whether Michigan's statutory restitution scheme is unconstitutional insofar as it permits the trial court to order restitution based on uncharged conduct that was not submitted to a jury or proven beyond a reasonable doubt.' " *McKinley*, 496 Mich at 414, quoting *McKinley*, 495 Mich 897 (2013). The *McKinley* Court avoided the latter constitutional question and rather determined that MCL 780.766(2) did not grant trial courts authority to order restitution for uncharged conduct. The Court explained in a footnote:

> Notably, and we believe further supporting our decision not to reach the constitutional issue, the apparent reason other courts have not been asked to address the [constitutional] argument that the defendant raises here is because those courts have (seemingly uniformly) con-

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convictions and sentences. The panel rejected the defendant's argument that Michigan's restitution scheme is unconstitutional because it permits trial courts to impose restitution on the basis of facts not proven to the trier of fact beyond a reasonable doubt. *Id*. at 8-9.

> strued their restitution statutes as allowing the assessment of restitution based only on convicted conduct. See, e.g., *Hughey v United States*, 495 US 411, 413; 110 S Ct 1979; 109 L Ed 2d 408 (1990); *State v Clapper*, 273 Neb 750, 758; 732 NW2d 657 (2007); *Commonwealth v McIntyre*, 436 Mass 829, 835 n 3; 767 NE2d 578 (2002) (collecting cases applying various standards requiring a causal relationship between the restitution award and the conviction). Accordingly, we are aware of no court that has reached the argument defendant preserved below: whether *Apprendi* [*v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000)] and its progeny bar the assessment of restitution based on uncharged conduct. See also *United States v Sharma*, 703 F3d 318, 323 (CA 5, 2012) ("The [Mandatory Victim Restitution Act, 18 USC 3663A] limits restitution to the actual loss directly and proximately caused by the defendant's offense of conviction. An award of restitution cannot compensate a victim for losses caused by conduct not charged in the indictment or specified in a guilty plea, or for losses caused by conduct that falls outside the temporal scope of the acts of conviction."). [*McKinley*, 496 Mich at 417 n 6.]

None of the cases cited in *McKinley* addresses the issue whether a defendant can affirmatively agree to pay restitution related to dismissed conduct. The multijurisdictional survey was offered to support the decision to preclude restitution for uncharged acts on a purely statutory basis. The Court noted in the footnote that other state courts had taken the same approach and declined to address the application and implications of *Apprendi v New Jersey*, 530 US 466, 490; 120 S Ct 2348; 147 L Ed 2d 435 (2000), to their restitution processes. The federal case cited also declined to make a constitutional ruling. In *Sharma*, 703 F3d at 323, the court vacated a restitution order imposed on the defendants for fraudulent billing to various insurers after a plea agreement under the federal Mandatory Victim Restitution Act (MVRA), 18 USC 3663A. The *Sharma*

defendants objected to the amount of restitution that compensated the victims for more than their actual losses resulting from the charged conduct. *Id*. at 321. The court cited a number of legal and factual errors in the award, including the fact that the restitution awarded compensation for conduct that predated the charged conspiracy; in other words, restitution was awarded for uncharged conduct. *Id*. at 323.

While not addressed by the *Sharma* court or noted in the *McKinley* footnote, we are aware that the MVRA specifically provides that "[t]he court shall also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense." 18 USC 3663A(a)(3). This allows a defendant to agree to compensate persons for uncharged conduct. It is a reasonable inference that by citing *Sharma* our Court was aware of the possibility that a defendant might enter into a stipulation to pay restitution that exceeded the losses resulting from charged conduct when it pointedly used the word "solely" in its discussion of the limits of court authority in Michigan. At the very least, aware of the possibility under the MVRA, the Court declined to criticize the option.

We share the *McKinley* Court's concern that allowing a trial court to order restitution for uncharged conduct would offend the defendant's due process right to have the prosecution prove to a trier of fact every element of the charge beyond a reasonable doubt. See *McKinley*, 496 Mich at 413 n 1; *People v Goss (After Remand)*, 446 Mich 587, 596; 521 NW2d 312 (1994) (opinion by LEVIN, J.). However, we do not find this right implicated when the defendant expressly agrees to pay restitution to receive the benefit of a bargain struck with the prosecution. In this case, defendant's conduct at Walmart formed the basis of two counts of

retail fraud for which defendant was charged in district court. Defendant's agreement to have those misdemeanor charges dismissed but still pay the restitution owed to Walmart was, "[i]n essence, . . . the act of self-conviction by the defendant in exchange for various official concessions." *Killebrew*, 416 Mich at 199, citing Alschuler, *Plea Bargaining and Its History*, 13 Law & Society Rev 211, 213 (1979). When a conviction is exchanged for restitution, a defendant intentionally relinquishes his right to have the prosecution prove every element of the charge beyond a reasonable doubt.[9]

2. PROPORTIONALITY

Defendant next argues that the trial court's order of restitution violated the principle of proportionality. We disagree.

A crime victim's right to "[r]estitution is afforded both by statute and by the Michigan Constitution." *People v Newton*, 257 Mich App 61, 68; 665 NW2d 504 (2003). See also Const 1963, art 1, § 24. The Crime Victim's Rights Act mandates that

> 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. [MCL 780.766(2).]

MCL 780.766(1) defines a victim as "an individual who suffers direct or threatened physical, financial, or

[9] "[W]aiver is the 'intentional relinquishment or abandonment of a known right.' " *United States v Olano*, 507 US 725, 733; 113 S Ct 1770; 123 L Ed 2d 508 (1993), quoting *Johnson v Zerbst*, 304 US 458, 464; 58 S Ct 1019; 82 L Ed 1461 (1938).

emotional harm as a result of the commission of a crime." And, under certain circumstances, a victim means "a sole proprietorship, partnership, corporation, association, governmental entity, or any other legal entity that suffers direct physical or financial harm as a result of a crime." *Id*.

"[I]n determining the proper amount of restitution, the court *shall* consider the amount of loss sustained by the victim, the financial resources and earning ability of the defendant, the financial needs of the defendant and the defendant's dependents, and such other factors as the court deems appropriate." *People v Avignone*, 198 Mich App 419, 422; 499 NW2d 376 (1993). See also MCL 780.767(1). Traditionally, this Court has reviewed orders of restitution to determine if the amount was authorized by statute, see, e.g., *People v Gaines*, 306 Mich App 289, 323 n 10; 856 NW2d 222 (2014); whether the amount of restitution ordered was proved by a preponderance of the evidence, see, e.g., *Gubachy*, 272 Mich App at 709; or whether the defendant had the financial ability to pay that amount, see, e.g., *People v Hart*, 211 Mich App 703, 707; 536 NW2d 605 (1995).

Defendant does not challenge the restitution order in this case on any of these grounds. Rather, defendant argues that the order violates the principle of proportionality set forth in *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990), because the order awards joint and several restitution rather than individually fixing an amount for which each defendant would be responsible. *Milbourn* held that a trial court abuses its discretion when it imposes a sentence that is not "proportionate to the seriousness of the circumstances surrounding the offense and the offender." *Id*. We conclude that a *Milbourn* analysis is inapplicable here.

"A central proposition to the holding of *Milbourn* was that discretionary sentencing decisions are subject to review by the appellate courts to ensure that the exercise of that discretion has not been abused." *People v Norfleet*, 317 Mich App 649, 663; 897 NW2d 195 (2016). The majority of appellate claims under *Milbourn* concern whether a trial court's imposition of a *sentence of imprisonment* that departs from the sentencing guidelines violates the principle of proportionality. See, e.g., *People v St John*, 230 Mich App 644, 649; 585 NW2d 849 (1998); *People v Steanhouse*, 313 Mich App 1, 46-48; 880 NW2d 297 (2015) (holding that appellate courts must judge departures from the sentencing guidelines based on the *Milbourn* proportionality standard), lv gtd 499 Mich 934 (2016); *People v Shank*, 313 Mich App 221, 225; 881 NW2d 135 (2015), app held in abeyance 882 NW2d 528 (2016). "[O]ur Legislature, in setting forth a range of appropriate punishments for criminal offenses, has entrusted sentencing courts with the responsibility of selecting the appropriate punishment from statutorily authorized sentencing ranges. These sentencing ranges embody the 'principle of proportionality' because they allow a sentencing judge to tailor the sentence to the particular offense and offender at issue." *People v Hyatt*, 316 Mich App 368, 422-423; 891 NW2d 549 (2016). "The limit on the judicial discretion to be exercised when imposing penalties is that the punishment should be proportionate to the offender and the offense." *Id*. at 423.

The sentencing considerations present in *Milbourn* are not applicable here. In the case of a sentence involving imprisonment, a court may exercise discretion by choosing from a range of possible years. In the case of a sentence involving restitution, the court is not granted discretion to order that the defendant be

responsible for any amount less than full restitution. See *People v Garrison*, 495 Mich 362, 373; 852 NW2d 45 (2014). The plain reading of MCL 780.766(2) clearly provides that the court *shall* order "that the defendant make *full* restitution to any victim . . . ." (Emphasis added.) When our Legislature enacted MCL 780.766(2), it made restitution to crime victims a mandatory part of a convicted criminal defendant's sentence. Defendant's theory of individualizing, and therefore limiting, the total amount of restitution owed by each person involved is not authorized by the statute because each defendant can be ordered to pay all of the restitution. Additionally, the principle of proportionality is concerned with whether the punishment is proportionate to the crime, *Hyatt*, 316 Mich App at 423, and our Supreme Court has held that restitution is not punishment, nor is it a penalty.[10]

In *People v Grant*, 455 Mich 221, 233, 244; 565 NW2d 389 (1997), our Supreme Court approved an order of restitution making the codefendants jointly and severally liable for restitution payments. Although our Supreme Court was not asked to determine whether joint and several liability violated the principle of proportionality in *Grant*, our Supreme Court had already determined by the time *Grant* was decided that proportionality was required for all sentences. *Milbourn*, 435 Mich at 636. Additionally, ten years after *Grant* was decided, our Supreme Court issued an order on an application for leave to appeal that remanded the case "for correction of the judgments of sentence to reflect that the restitution ordered shall be joint and several with the codefendant." *People v Slotkowski*, 480 Mich 852 (2007). In determining the proportionality of a codefendant's sentence of incar-

[10] *People v Grant*, 455 Mich 221, 230 n 10; 565 NW2d 389 (1997).

ceration, this Court has held that when a trial court sentences a codefendant within the sentencing guidelines range, even to the statutory maximum for that offense, the codefendant's "minimum culpability is not an unusual circumstance that overcomes the presumption of proportionality." *St John*, 230 Mich App at 650. Also, our statutes do not apportion criminal liability based on a codefendant's degree of participation in the crime. Even one who merely aids a crime he does not personally commit "shall be punished as if he had directly committed such offense." MCL 767.39. Although restitution awards are not contemplated by the sentencing guidelines because restitution is a mandatory part of a convicted defendant's sentence, we find this rule applies equally to restitution orders. See *People v Bell*, 276 Mich App 342, 350; 741 NW2d 57 (2007) (MCL 767.39 applied to MCL 780.766(2) "makes clear that [the defendant] must pay restitution for her crime just as if she were a principal.").

Accordingly, we conclude that a trial court may order a codefendant to pay the entirety of the restitution owed to a crime victim without violating the principle of proportionality.

3. CONSTITUTIONALITY

Defendant next argues that he was "subject to an amount of restitution that is not factually supported by either an admission under oath, or a jury finding," as is required under the Sixth and Fourteenth Amendments of the Constitution of the United States. We disagree.

The Sixth Amendment of the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been

> committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation . . . .

The Sixth Amendment applies to prosecutions under state law via the Fourteenth Amendment of the United States Constitution. In *Apprendi*, 530 US at 490, "the United States Supreme Court announced the general Sixth Amendment principle [that] '[o]ther than the fact of a prior conviction, *any fact that increases the penalty for a crime* beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.' " *People v Lockridge*, 498 Mich 358, 370; 870 NW2d 502 (2015). In *Alleyne v United States*, 570 US 99, 112; 133 S Ct 2151; 186 L Ed 2d 314 (2013), the United States Supreme Court held that, in mandatory sentencing schemes, " 'fact[s] increasing *either end of the* [sentencing guidelines] *range* produce[] a new penalty' " and are subject to the rule set forth in *Alleyne*. *Lockridge*, 498 Mich at 372.

In *Lockridge*, 498 Mich at 389, our Supreme Court "concluded that Michigan's sentencing guidelines violate the Sixth Amendment rule from *Apprendi*." To remedy this violation, the Court severed MCL 769.34(2) to the extent that it rendered the sentencing guidelines mandatory. *Id*. at 391.

In *Southern Union Co v United States*, 567 US 343, 346; 132 S Ct 2344; 183 L Ed 2d 318 (2012), the Supreme Court of the United States held that the rule from *Apprendi* applies to criminal fines. The Supreme Court further stated that "[c]riminal fines . . . are penalties inflicted by the sovereign for the commission of offenses," and therefore, "while judges may exercise discretion in sentencing, they may not inflict punishment that the jury's verdict alone does not allow." *Id*. at 348-349 (quotation marks and citation omitted). In

People v Corbin, 312 Mich App 352, 372; 880 NW2d 2 (2015), this Court considered *Southern Union* in the context of restitution and held that "[a] criminal fine and restitution are not synonymous . . . ." The *Corbin* Court further held that judicial fact-finding as to the amount owed does not implicate a defendant's Sixth Amendment right to a jury trial and noted that "[n]othing in *Lockridge* suggests that its reasoning encompasses restitution orders entered in conjunction with sentencing." *Id*. at 373 n 5.

In any event, this Court has consistently held that the focus of restitution is on the victims' losses, not on punishing criminal defendants. In *People v Allen*, 295 Mich App 277, 282; 813 NW2d 806 (2012), this Court held that "with the Crime Victim's Rights Act, the Legislature plainly intended to shift the burden of losses arising from criminal conduct—as much as practicable—from crime victims to the perpetrators of the crimes; thus, it is remedial in character . . . ." (Quotation marks and citation omitted.) See also *People v Fawaz*, 299 Mich App 55, 65; 829 NW2d 259 (2012). Similarly, in *Newton*, 257 Mich App at 68, this Court held that "[t]he purpose of restitution is to allow crime victims to recoup losses suffered as a result of criminal conduct." (Quotation marks and citation omitted.) See also *People v Crigler*, 244 Mich App 420, 423; 625 NW2d 424 (2001). In *Gubachy*, 272 Mich App at 713, this Court reiterated that the focus of restitution is not on the defendant's actions but rather on "what a victim lost because of the defendant's criminal activity."

Accordingly, because a restitution order is not a penalty, the Sixth Amendment protections recognized in *Apprendi* do not apply. Therefore, defendant is not entitled to have the order of restitution vacated on this ground.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant lastly argues that his counsel was ineffective for failing to object to the imposition of the $500 fine and the order of restitution.

A. STANDARD OF REVIEW

Defendant did not move the trial court for a new trial on the grounds of ineffective assistance of counsel or request an evidentiary hearing to further develop that issue; therefore, this issue is unpreserved. See *People v Sabin (On Second Remand)*, 242 Mich App 656, 658; 620 NW2d 19 (2000).

When a defendant fails to request a *Ginther*[11] hearing or move for a new trial in the matter, this Court's "review of this issue is limited to mistakes apparent on the appellate record." *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). "If the record does not contain sufficient detail to support defendant's ineffective assistance claim, then he has effectively waived the issue." *Id*.

B. ANALYSIS

Under the Sixth Amendment of the United States Constitution, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."[12] The right to counsel plays a crucial role in the Sixth Amendment's guarantee of a fair trial by ensuring that the defendant has access to the "skill and knowledge" necessary to respond to the

[11] *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973).

[12] See also Const 1963, art 1, § 20. Our state Constitution's guarantee of the right to counsel is coextensive with the Sixth Amendment's guarantee of the right to counsel. *People v Pickens*, 446 Mich 298, 302; 521 NW2d 797 (1994).

charges against him or her. *Strickland v Washington*, 466 US 668, 685; 104 S Ct 2052; 80 L Ed 2d 674 (1984). "The right to counsel also encompasses the right to the effective assistance of counsel." *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996). See also *Strickland*, 466 US at 686.

Under *Strickland*, 466 US at 687, reversal of a conviction is required when "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" and the errors prejudiced the defendant. Accordingly, a defendant requesting reversal of an otherwise valid conviction bears the burden of proving that "(1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different." *Sabin*, 242 Mich App at 659.

To prove the first prong, "[t]he defendant must overcome a strong presumption that counsel's assistance constituted sound trial strategy." *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). "This Court does not second-guess counsel on matters of trial strategy, nor does it assess counsel's competence with the benefit of hindsight." *People v Russell*, 297 Mich App 707, 716; 825 NW2d 623 (2012). Moreover, counsel is not ineffective for failing to make a futile motion. *Sabin*, 242 Mich App at 660.

Regarding the $500 fine, defendant's controlled substance conviction carried with it a maximum penalty of $25,000, and the plea agreement for all three felonies included the dismissal of two misdemeanor charges while recommending sentencing at the guidelines minimum. The $500 fine was not mentioned in the plea

agreement. Defendant would have forgone the benefits of his plea if he had withdrawn it. To the extent that counsel may have advised defendant about the plea, we see no prejudice to defendant as a result. Further, because defendant has not shown that the trial court erred by ordering him to pay restitution, any motion defense counsel could have made with regard to that order would have been futile. Therefore, defendant's trial counsel was not constitutionally deficient.

The $500 fine is vacated in accordance with our reasoning in Part II of this opinion. We remand this matter for the trial court to correct the judgment of sentence in LC No. 14-008692-FH by deleting the $500 fine. In all other respects, the court's order of restitution is affirmed. We do not retain jurisdiction.

M. J. KELLY, P.J., and O'BRIEN, J., concurred with STEPHENS, J.

PEOPLE v RIDGE

PEOPLE v OLNEY

Docket Nos. 333790 and 333791. Submitted April 4, 2017, at Lansing. Decided April 25, 2017, at 9:00 a.m.

Daniel Ridge and Debra Olney were each charged in the Eaton Circuit Court with owning a dangerous animal causing injury, MCL 287.323(2), after a dog they owned attacked and injured a person working in the yard next to their yard. On September 10, 2015, Jill Flietstra, a landscaper employed by Scott's Lawn Care, was spraying fertilizer and weed control in defendants' neighbors' yard. Defendants' two large dogs were in their yard, which was separated by a chain link fence from the yard in which Flietstra was working. The dogs began jumping on the fence, and one of the dogs, Roscoe, got partially under the fence and grabbed Flietstra's foot. Eventually Roscoe got completely into the neighbors' yard and attacked Flietstra. Flietstra screamed and fought, which got the attention of another nearby neighbor who called 911. The responding police officer shot and killed the dog when it appeared that the dog might attack the officer. Flietstra sustained injuries, including broken bones and puncture wounds, that required medical treatment. After defendants' preliminary examination, the district court found probable cause to bind them both over for trial. Defense counsel filed a memorandum of law claiming that the prosecution had failed to establish its burden of proof. The court reopened the proofs and heard additional testimony. Defendants moved to dismiss the complaints, and the court denied the motion and again bound defendants over for trial. On appeal in the circuit court, Janice K. Cunningham, J., denied defendants' motions to quash their bindovers. Defendants applied for delayed leave to appeal in the Court of Appeals. The prosecution agreed to a stay of the proceedings in the circuit court pending the outcome of defendants' applications for leave to appeal and urged the Court to grant the applications and to consolidate the appeals. The Court granted defendants' applications for leave to appeal and consolidated the appeals.

The Court of Appeals *held*:

An individual is guilty of a felony under MCL 287.323(2) if he or she owns a dangerous animal that bites or attacks a person and causes that person serious injury other than death. According to MCL 287.321(a), a dangerous animal is an animal, including dogs but not including livestock, that bites or attacks a person or a dog that bites or attacks and causes serious injury or death to another dog while the other dog is on the property or under the control of its owner. A conviction under MCL 287.323(2) requires the prosecution to establish four elements: (1) that defendants owned or harbored a dog or other qualifying animal, (2) that the dog or other animal met the definition of a dangerous animal under MCL 287.321(a) before and during the incident at issue, (3) that before the incident defendants knew that the animal was a dangerous animal, and (4) that the animal bit or attacked a person causing serious injury other than death. Although the first and fourth elements were satisfied in this case—defendants owned a qualifying animal and the animal bit or attacked a person—the prosecution failed to produce sufficient evidence at defendants' preliminary examination to establish the second element, that Roscoe qualified as a dangerous animal for purposes of MCL 287.321(a), because there was no evidence that Roscoe had in the past ever bitten or attacked a person or another dog. To "attack" means to set upon or work against with violent force, or to affect or act upon injuriously or harmfully. Evidence of Roscoe's jumping on the fence and attacking the tire on a neighbor's riding lawnmower served only to show that Roscoe had previously attacked *objects*, not *people*. That Roscoe may have scared people and had an aggressive disposition also did not establish that Roscoe was a dangerous animal. For the same reason, the prosecution failed to produce sufficient evidence of the third element—that defendants knew Roscoe was a dangerous animal that posed a threat to the safety of other persons. Therefore, the district court abused its discretion by binding defendants over for trial.

Reversed and remanded to the circuit court to quash defendants' bindovers.

1. CRIMINAL LAW — OWNING A DANGEROUS ANIMAL CAUSING INJURY OTHER THAN DEATH — ELEMENTS OF CRIME.

Under MCL 287.323(2), an individual is guilty of owning a dangerous animal causing injury other than death if the individual owned a dangerous animal as defined in MCL 287.321(a), the animal bit or attacked a person causing serious injury other than death, the animal qualified as a dangerous animal before the

incident at issue, and the individual knew, before the incident at issue, that the animal was a dangerous animal.

2. CRIMINAL LAW — OWNING A DANGEROUS ANIMAL CAUSING INJURY OTHER THAN DEATH — ELEMENTS OF CRIME — DEFINITION OF DANGEROUS ANIMAL.

In order for a dog to qualify as a dangerous animal causing serious injury for purposes of the crime defined in MCL 287.323(2), the dog must have bitten or attacked a person, or bitten or attacked another dog causing it serious injury or death while it was on the property or under the control of its owner, before the incident at issue; that a dog displays aggression or that other persons are afraid of the dog does not make the dog a dangerous animal as defined in MCL 287.321(a), nor does the fact that the dog previously attacked an object.

3. CRIMINAL LAW — OWNING A DANGEROUS ANIMAL CAUSING INJURY OTHER THAN DEATH — ELEMENTS OF CRIME — DEFINITION OF ATTACK.

For purposes of MCL 287.321(a) and MCL 287.323, to attack means to set upon or work against with violent force, or to affect or act upon injuriously or harmfully.

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.

Cataldo & Meeks, PLLC (by *Donald J. Cataldo II*), for defendants.

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

BORRELLO, P.J. In these consolidated cases, defendants Daniel Ridge (Docket No. 333790) and Debra Olney (Docket No. 333791) appeal by delayed leave granted[1] a June 27, 2016 circuit court order denying

[1] *People v Ridge*, unpublished order of the Court of Appeals, entered November 9, 2016 (Docket No. 333790); *People v Olney*, unpublished order of the Court of Appeals, entered November 9, 2016 (Docket No. 333791).

their motions to quash their bindovers on charges of owning a dangerous animal causing serious injury in violation of MCL 287.323(2). For the reasons set forth in this opinion, we reverse and remand to the circuit court for entry of an order quashing the bindovers.

I. FACTS

Defendants Daniel Ridge and Debra Olney are married. In September 2015, the couple lived in a residential neighborhood and owned two dogs. The dog at issue in this case was a "possible pit bull, Shar-Pei mix" named Roscoe.

Jill Flietstra, an employee of Scott's Lawn Care, testified that when she arrived at the property next door to defendants' home on September 10, 2015, she "saw two large dogs in [defendants'] backyard." Flietstra testified that the property she was working on and defendants' property were separated by a chain-link fence. Flietstra testified that the dogs "seemed like normal dogs" to her and denied that their behavior caused her concern—even when they were jumping on the fence.

Flietstra testified that she began spraying fertilizer and weed control, but took care to avoid spraying around the animals. Flietstra testified that when she was spraying near the fence line at issue, she was three or four feet away from the fence. Her back was to the fence and she was "spraying forward." Janis Strang (Janis), one of defendants' next-door neighbors, testified that she observed Flietstra spraying the day she was injured. Janis testified that Flietstra was approximately five feet from the fence when spraying and that Flietstra was "probably" spraying about five or six feet away from her body.

Flietstra testified that while she was spraying, Roscoe got "partially underneath the fence" and "grabbed [her] by the boot." Flietstra testified that Roscoe "pulled [her] leg partially underneath" the fence during the ensuing struggle. She said she "couldn't get away from its grasp, so [she] let it take [her] boot off . . . ." After she lost her boot, Roscoe "completely came underneath the fence[, s]quared off with [her] and started coming after [her]." Flietstra testified that when the dog "charged," she tried to "block it" using her hands, which were gloved; Roscoe then "kept biting" and "was grabbing, clenching, and then shaking its head" while biting her hands. Flietstra testified that Roscoe also "got a hold of [her] pants" and was "biting everywhere that it could."

Flietstra testified that "[e]ventually, the dog kind of tired out a little bit and [she] seized that opportunity to jump on top of it." Flietstra testified that when the police arrived she was holding Roscoe by the collar with one hand, while the "other hand [was] in its mouth so it would stop biting [her] abdomen and [her] legs and everything."

Janis Strang testified that she heard a lot of barking from defendants' yard. Janis noted that defendants' dogs "bark all the time, but they acted like something was really agitating them" that day. Janis described the dogs as "barking at something on the other side of the fence. And I mean really barking; they were hitting the fence, and -- and jumping." Janis testified that she heard Flietstra scream "get off me" and then continue screaming. Janis stated that she could not see Flietstra, but saw Roscoe "shaking . . . like [he] was attacking." She called 911. Janis denied ever calling animal control or the police regarding Roscoe before the attack on Flietstra.

Eaton County Sheriff's Department Deputy Joe Travis testified that he was notified by dispatch of an "animal bite in progress." Travis arrived at the Strang home, and Janis pointed to where a woman was being attacked. Travis ran to the next yard where he saw a dog pulling Flietstra. Travis approached and yelled something, and the dog released. Travis testified that he then shot and killed the dog as it appeared ready to charge at him.

Travis testified that Flietstra "stated that she could not move her arms" and "that she thought she had several broken bones," and he observed "several punctures and -- and bleeding." Flietstra testified that she "had bite marks just everywhere, all over [her] body, contusions, bruising." She explained that "the dog bit through a [bone] in [her] left hand" and that she had "one more fracture in [her] left hand near [her] pinkie bone." She also said that she "had to get six large puncture wounds stitched up with eleven stitches."

Eaton County Sheriff's Department Detective Christopher Burton investigated the attack on Flietstra. Burton testified that he spoke with defendants. According to Burton, Ridge described the dog as a "family dog." Burton testified that Ridge and Olney had had Roscoe for about "six to eight months" before the incident. Ridge informed Burton that "the dog's never been aggressive before" and that he had "never heard him growl at anybody or bite anybody before." Burton testified that Olney echoed Ridge's statements, stating that "she was very surprised this would happen . . . because [the dog] wasn't violent towards anyone in the past." Burton said also that "they have a lot of people that are in and out of the house[, a]nd the dogs have never shown any violence towards them in the house." However, Ridge acknowledged that Roscoe previously

attacked a neighbor's lawnmower and, on one occasion, Roscoe punctured a tire on Dennis Strang's lawnmower.

Dennis Strang (Dennis) testified that Roscoe bit his tractor tires twice. The first time Roscoe bit the lawnmower tires the dog got his face under the fence and bit the tire, causing enough damage to necessitate repairs. According to Dennis, the second time he "pulled [Roscoe] the rest of the way through the fence" by reversing his tractor. Dennis testified that as he was taking Roscoe back to defendants' property, he "wouldn't look at the dog[, b]ecause an animal can sense fear, and [he] was afraid if [he] looked at that dog he might attack [him]." Dennis testified that he spoke with Ridge after the second incident and that Ridge told him "they were trying to find another home for the dog." Dennis denied informing Ridge that he was afraid of Roscoe.

Dennis testified that after the second attack on the lawnmower he began carrying his handgun with him while he mowed his lawn. Dennis also testified that he observed Ridge "put[ting] some more fencing up" and that he himself had "cut a piece of four-by-four and put it down by that fence so the dog couldn't get through again." Burton testified that defendants "tried securing the bottom of the fence and put some meshing on the bottom of the fence along both fence lines" and that "[t]hey put some slats that they got from another neighbor or from someone to try and block the view of the dog . . . ."

Dr. Jennifer Link, an associate veterinarian at Miller Animal Clinic, testified that Roscoe was a "neutered male" dog born May 24, 2014, and was treated at Miller Animal Clinic. Link testified that Olney requested "a letter of the temperament of the dog." That letter indicated that "[a]ccording to [the clinic's] re-

cords [the dog] never displayed any signs of aggression or required the use of a muzzle or sedation to be handled."

Janis testified that she did not have any previous "contact" with Roscoe because she did not "go in the backyard." Janis testified that she kept to her deck because "you can get back in the house really fast because the slider's right there." "[I]f I ever went down to, like, water my plants," she continued, "[Roscoe] was always there barking and being really aggressive." Janis also testified that "[n]one of [her] grandkids would go in the backyard" and noted that Roscoe "was scary" and would bark at "anything that moved." Dennis testified that their grandchildren "didn't play in the backyard 'cause the dogs just raised so much hell that there's no reason[.]" Dennis also testified that he saw Roscoe playing with defendants' children and had not witnessed the dog be aggressive with them. Dennis stated that defendants' dogs would run at the fence when he was in his backyard and would bark, jump, and bite the fence.

Victoria Steffy, an acquaintance of Olney, testified that Olney described Roscoe as a pit bull and said that "they were having some issues with his behavior and with their neighbors." Steffy testified that Olney told her she was having a problem with Roscoe "biting tires of lawn mowers" and with "the neighbors being afraid of him." Steffy told Olney that biting tires was "unacceptable behavior for any dog."

Following the conclusion of the police investigation into the dog attack, defendants were charged under MCL 287.323(2), which provides:

> If an animal that meets the definition of a dangerous animal in [MCL 287.321(a)] attacks a person and causes serious injury other than death, the owner of the animal is

> guilty of a felony, punishable by imprisonment for not more than 4 years, a fine of not less than $2,000.00, or community service work for not less than 500 hours, or any combination of these penalties.

MCL 287.321(a) defines "dangerous animal" in relevant part as:

> a dog or other animal that bites or attacks a person, or a dog that bites or attacks and causes serious injury or death to another dog while the other dog is on the property or under the control of its owner.

After the preliminary examination,[2] defense counsel moved to dismiss the complaint. The district court denied the motion, explaining: "It comes down to what was in the mind of Ms. Olney and -- and Mr. Ridge. So the question is did they genuinely and reasonably believe that the animal was safe around other people and animals. I think that's the ultimate issue in the case." The district court went on to conclude that "there's some evidence here that they knew that there was a problem," and it determined that the prosecution "has met [its] burden of some credible evidence, though I think that [it] would have a hard time at trial." The district court went on to find:

> I mean, . . . the dog had not bitten anybody. But . . . certainly they had shown enough dangerous proclivity that . . . Mr. Ridge and Ms. Olney were . . . considering making a change. . . .

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[2] The district court held a preliminary examination hearing on February 9, 2016. At the close of proofs, the district court found probable cause to bind defendants over for trial. Thereafter, defense counsel filed a memorandum of law arguing that the prosecution failed to establish its burden of proof. The district court then granted the prosecution's motion to reopen proofs and heard additional testimony on March 11, 2016. At the close of that hearing, defense counsel moved to dismiss the complaint. The district court denied the motion and bound defendants over for trial.

> The burden in a preliminary examination is quite low. It's just is there some evidence to support each element. I'm not at all convinced that a jury would look at this as being something that these people should be socked with a felony. . . .
>
> But there's some evidence here that they knew that there was a problem because this is a dog that they probably loved and they were willing to take steps to get rid of the dog, to send it to a shelter. So they had to have some kind of knowledge that there was some dangerous element.

Based on these findings, the district court bound the case over for trial. Defendants then moved in the circuit court to quash the bindover. The circuit court denied defendants' motion, reasoning:

> I believe here the evidence supports the justification for [the district court's] ruling, that the defendants should be bound over. Based on a review of the record, the defendants were aware that the dog scared people and had an aggressive disposition. The dog had exhibited aggressive behavior, such as barking, running up and down the fence, making noise, biting . . . lawnmowers, tires and damaging the tire prior to the incident in question.

The circuit court entered a written order on June 27, 2016. Defendants filed applications with this Court for delayed leave to appeal. This Court granted defendants' applications and consolidated the appeals.

II. STANDARD OF REVIEW

We commence our analysis of this matter by observing that the preliminary examination is a creation of our Legislature, and is therefore a statutory right. *People v Yost*, 468 Mich 122, 125; 659 NW2d 604 (2003). "[T]he preliminary examination has a dual function, i.e., to determine whether a felony was committed and whether there is probable cause to believe the defen-

dant committed it." *Id*. at 125-126; see also MCR 6.110(E). Probable cause requires enough evidence to cause a person of ordinary caution and prudence "to conscientiously entertain a reasonable belief" of the defendant's guilt. *Id*. at 126 (quotation marks and citation omitted). If it appears to the district court that there is probable cause to believe that a felony was committed and that the defendant committed it, the court must bind the defendant over for trial. MCL 766.13; MCR 6.110(E). "A circuit court's ruling regarding a motion to quash an information and the district court's decision to bind over a defendant are reviewed to determine whether the district court abused its discretion in making its decision." *People v Waltonen*, 272 Mich App 678, 683; 728 NW2d 881 (2006) (quotation marks and citation omitted). Significant to this case, we have previously stated that if the bindover decision "entails a question of statutory interpretation, i.e., whether the alleged conduct falls within the scope of a penal statute, the issue is a question of law that we review de novo." *Id*. at 683-684 (quotation marks and citation omitted). See also *People v Stone*, 463 Mich 558, 561; 621 NW2d 702 (2001); *People v Hotrum*, 244 Mich App 189, 191; 624 NW2d 469 (2000).[3]

III. ANALYSIS

Defendants make two arguments. First, defendants argue that the prosecution failed to introduce evidence at the preliminary examination sufficient to support a finding that defendants owned a dangerous animal for purposes of MCL 287.323. Next, defendants argue that

[3] This authority undermines the prosecution's central argument, which rests on its belief that the question whether the dog was a "dangerous animal" under the statute was for the jury and not this Court to decide.

there was no evidence that they were aware that Roscoe was "a dangerous animal" as that term is defined in MCL 287.321(a).

As noted, defendants were charged under MCL 287.323(2), which provides that the owner of a dangerous animal under MCL 287.321(a) that attacks a person and causes serious injury other than death is guilty of a felony. In relevant part, MCL 287.321(a) defines "dangerous animal" as "a dog or other animal *that bites or attacks a person*, or a dog that bites or attacks and causes serious injury or death to another dog while the other dog is on the property or under the control of its owner." (Emphasis added.)

In *People v Janes*, 302 Mich App 34; 836 NW2d 883 (2013), this Court stated that "the statute requires proof that the owner knew that his or her animal was a dangerous animal within the meaning of the dangerous animal statute before the incident at issue." *Id*. at 38. "[W]e find it unthinkable that the Legislature intended to subject law-abiding, well-intentioned citizens to a possible four-year prison term if, despite genuinely and reasonably believing their animal to be safe around other people and animals, the animal nevertheless harms someone." *Id*. at 49. Accordingly, "the Legislature's decision to limit an owner's liability to situations in which an animal 'that meets' the definition of a dangerous animal 'attacks' a person means that the prosecution must prove, in relevant part, that the animal has previously bitten or attacked a person." *Id*. at 51.

To sustain a conviction against defendants under MCL 287.323(2), the prosecution must prove the following elements:

> (1) that [defendants] owned or harbored a dog or other animal, (2) that the dog or other animal met the definition

> of a dangerous animal provided under MCL 287.321(a) before and throughout the incident at issue, (3) that [defendants] knew that the dog or other animal met the definition of a dangerous animal within the meaning of MCL 287.321(a) before the incident at issue, and (4) that the animal attacked a person and caused a serious injury other than death. [*Janes*, 302 Mich App at 54.]

As the parties agree, the central issue in this case is whether plaintiff introduced evidence to support elements (2) and (3). To resolve that issue, we must determine whether there was evidence that, before the attack on Flietstra, defendants' dog, Roscoe, met the statutory definition of "dangerous animal" in MCL 287.321(a). That is, we must determine whether, before the incident at issue, Roscoe qualified as a dog that bit or attacked a person or another dog. *Janes*, 302 Mich App at 50. MCL 287.321(a) further states that the following do not qualify as dangerous animals:

> (*i*) An animal that bites or attacks a person who is knowingly trespassing on the property of the animal's owner.
>
> (*ii*) An animal that bites or attacks a person who provokes or torments the animal.
>
> (*iii*) An animal that is responding in a manner that an ordinary and reasonable person would conclude was designed to protect a person if that person is engaged in a lawful activity or is the subject of an assault.
>
> (*iv*) Livestock.

"Our purpose when interpreting a statute is to determine and give effect to the Legislature's intent. If the plain and ordinary meaning of a statute's language is clear, we enforce it as written. This Court will not interpret statutes in a way that renders any part of the statute surplusage." *People v Armstrong*, 305 Mich App 230, 243; 851 NW2d 856 (2014). "We begin by examin-

ing 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) (quotation marks and citation omitted).

Review of the plain language of MCL 287.321(a) inexorably leads to the conclusion that an animal is a "dangerous animal" if it (1) bites *or* attacks a person or (2) bites or attacks another dog while the other dog is on the property or under the control of its owner, causing serious injury or death to the other dog.

In this case, it is undisputed that the victim was not a trespasser on defendants' property and that the victim did not provoke or torment Roscoe. MCL 287.321(a)(*i*) and (*ii*). Similarly it is undisputed that Roscoe was not protecting another person, and the case did not involve livestock. MCL 287.321(a)(*iii*) and (*iv*). Also, there was no evidence that Roscoe previously bit or attacked another dog. Accordingly, the last remaining inquiry for the Court is whether there was evidence presented that, before the attack, Roscoe previously bit *or* attacked *a person*.

The Legislature's use of the coordinating conjunction "or" between the verbs "bites" and "attacks" indicates that an animal can be a dangerous animal under either alternative. See *Auto-Owners Ins Co v Stenberg Bros, Inc*, 227 Mich App 45, 50; 575 NW2d 79 (1997) (explaining that "[t]he word 'or' generally refers to a choice or alternative between two or more things"). The words "and" and "or" "are not interchangeable and their strict meaning should be followed when their accurate reading does not render the sense dubious and there is no clear legislative intent to have the

words or clauses read in the conjunctive." *Id*. at 50-51 (quotation marks and citation omitted). In this case, reading the term "or" does not render the statute dubious or ambiguous. Rather, in using the conjunction "or," the Legislature clearly indicated that an animal is considered dangerous when (1) the animal bites a person, without any further aggressive behavior being necessary, or (2) the animal attacks a person, whether or not the attack included biting.

The prosecution does not dispute that there exists no evidence that Roscoe previously bit a person; therefore, resolution of the case turns on whether there was evidence showing that Roscoe previously attacked *a person* and that defendants knew of the attack. See *Janes*, 302 Mich App at 54.

The statutory scheme does not define the word "attack." "Where, as here, the Legislature has not expressly defined terms used within a statute, we may turn to dictionary definitions to aid our goal of construing those terms in accordance with their ordinary and generally accepted meanings." *People v Morey*, 461 Mich 325, 330; 603 NW2d 250 (1999). *Merriam-Webster's Collegiate Dictionary* (11th ed) defines the verb "attack" as "to set upon or work against forcefully" and "to begin to affect or to act on injuriously . . . ." *The American Heritage Dictionary of the English Language* (2011) defines "attack" as "[t]o set upon with violent force" and "[t]o act on in a detrimental way; cause harm to . . . ."

Applying these definitions to the evidence in the record exposes an absence of proof from which a trier of fact could conclude that Roscoe previously attacked a person. There exists no evidence that Roscoe set upon or worked against a person with violent force, or that the dog acted on a person injuriously or harmfully.

While the prosecution argues that Roscoe "attacked" other persons when he attacked the fence and lawnmower tires, this evidence only demonstrates that Roscoe attacked other *objects*, not that he attacked other *people*. To be considered a dangerous animal, *Janes* requires a showing that the animal previously attacked a person, not that the animal threatened a person or attacked an object. Thus, Roscoe's actions against the fence and the lawnmower are not synonymous with an attack against a person sufficient to render Roscoe a "dangerous animal" for purposes of MCL 287.321(a). Therefore, the district court erred when it bound defendants over for trial. Similarly, the circuit court erred by affirming the district court when the circuit court held that there was evidence to support the bindover because defendants were aware that Roscoe "scared people and had an aggressive disposition."[4] Under MCL 287.321(a), an animal is not deemed a "dangerous animal" if it has previously frightened people or exhibited an "aggressive disposition." Rather, as *Janes* concludes, there must be proof that the animal previously acted in a certain manner—i.e., that it bit or attacked a person.[5] *James*, 302 Mich App at 54; MCL 287.321(a). To incorporate other forms of aggressive behavior into the statute would be to improperly expand the statute beyond the scope of its plain language. See *Bay Co Prosecutor v Nugent*, 276 Mich App 183, 189; 740 NW2d 678 (2007) (noting that "[w]e may read nothing into an unambiguous

[4] The circuit court correctly set forth the standard of review when acting as an appellate court but did not articulate the standard of review when considering a question of statutory interpretation. See *Waltonen*, 272 Mich App at 683-684.

[5] We acknowledge, though not at issue in this case, that a dog may meet the statutory definition of a dangerous animal by other means specifically set forth in MCL 287.321(a).

statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself") (quotation marks and citation omitted).

In sum, because the prosecution did not introduce any evidence to prove that Roscoe was a "dangerous animal" as that term is defined under MCL 287.321(a), the prosecution failed to introduce sufficient evidence of the second and third elements necessary to show probable cause that defendants violated MCL 287.323(2)—i.e., that defendants owned a dangerous animal at the time of the attack in this case, and that defendants knew that the animal was dangerous within the meaning of MCL 287.321(a). *Janes*, 302 Mich App at 54. The district court therefore abused its discretion by binding defendants over for trial in that it erred as a matter of law in applying MCL 287.321(a). See *People v Giovannini*, 271 Mich App 409, 417; 722 NW2d 237 (2006) (noting that a trial court abuses its discretion when it errs as a matter of law).

Reversed and remanded to the circuit court for entry of an order quashing the bindovers. We do not retain jurisdiction.

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

PEOPLE v PARKER

Docket No. 330898. Submitted April 12, 2017, at Grand Rapids. Decided April 25, 2017, at 9:05 a.m.

Sabrina R. Parker was convicted by plea in the Kalamazoo Circuit Court of identity theft, MCL 445.65, and conspiracy to steal and retain a financial transaction device without consent, MCL 750.157n(1). She was sentenced as a fourth-offense habitual offender to concurrent sentences of 4 to 15 years of imprisonment for each offense. The court, Alexander C. Lipsey, J., ordered that the sentences be served consecutively to sentences imposed on Parker in 2010—one in Kent County imposed in October 2010 and one in Monroe County imposed in November 2010—that were not completed because the Department of Corrections (DOC) erroneously released Parker in 2011. Parker moved to amend her sentences to make all her sentences run concurrently, arguing that the consecutive sentencing statute, MCL 768.7a, did not apply because she was not incarcerated at the time of the instant offenses. Parker contended that she was not liable to serve the incomplete sentences because she had been discharged and the DOC did not exercise control over her. The court denied her motion. According to the court, although Parker had been released, she was still subject to the DOC's jurisdiction and liable to serve the 2010 sentences because she could have been apprehended and jailed for the remainder of the sentences. Parker appealed by delayed leave granted.

The Court of Appeals *held*:

1. Consecutive sentencing must be authorized by statute and applies only under well-defined circumstances. Under MCL 768.7a(1), a sentence imposed on a person who is convicted of a crime committed while that person was incarcerated in a penal or reformatory institution, or had escaped from such an institution, must be made to run consecutively to the term or terms of imprisonment the person was serving at the time of the crime or the term or terms the person had become liable to serve at the time he or she committed the crime. Further, consecutive sentencing is mandated by MCL 768.7a(2) when a defendant is convicted of a crime committed while the defendant was on parole

from a previous sentence. In this case, Parker satisfied none of the situational prerequisites mandating consecutive sentencing under MCL 768.7a. Neither of the statutes under which Parker was convicted, MCL 445.65 and MCL 750.157n(1), authorized consecutive sentencing. Further, although a person need not be literally confined in a penal or reformatory institution to be considered incarcerated for purposes of MCL 768.7a(1), the DOC must exercise some control over the care, custody, or supervision of a person inside or outside such an institution. In this case, Parker had been erroneously discharged—she was not literally confined, nor was she under the control of the DOC after her erroneous release. Therefore, Parker was not incarcerated in a penal or reformatory institution for purposes of MCL 768.7a(1). Moreover, Parker had not escaped and was not on parole at the time of the instant offenses. Therefore, the trial court erred by imposing consecutive sentences.

2. Although Parker could have been made to serve the remainder of her 2010 sentences if the DOC had attempted to exercise control over her, being "liable to serve" a term of imprisonment does not satisfy the consecutive sentencing requirement in MCL 768.7a(1) that a defendant be incarcerated when he or she commits the subsequent crime. The purpose of consecutive sentencing is to deter incarcerated persons from committing crimes while they are incarcerated by ensuring that they will actually serve a term of imprisonment for the crime committed while incarcerated. Making Parker's instant sentences consecutive to her 2010 sentences would not further that purpose.

3. The interplay between MCL 768.6, MCL 768.7, and MCL 768.7a(1) does not support a finding that Parker was incarcerated in a penal or reformatory institution as required by MCL 768.7a(1). MCL 768.6 authorizes the same punishment for a person who commits a crime while incarcerated as for a person who is not incarcerated. MCL 768.7 simply expands the applicability of MCL 768.6 to persons incarcerated who are temporarily outside the limits of the penal or reformatory institutions when they commit a crime—that is, those persons temporarily outside the limits of an institution may be punished just as if they had been within the confines of an institution. And MCL 768.7a mandates consecutive sentencing for crimes committed by persons in either circumstance. Contrary to the prosecution's argument in this case, Parker was not merely temporarily outside the limits of the institution when she committed her crimes. The dictionary definition of "temporarily" is "during a limited time,"

and there is no indication that Parker's erroneous release was for a limited time. The DOC did nothing to exercise control over Parker or to notify her of the error. Therefore, consecutive sentencing was not authorized under these provisions.

Reversed and remanded for correction of the judgment of sentence.

1. CRIMINAL LAW — SENTENCING — CONSECUTIVE SENTENCES — CRIME COMMITTED WHILE TEMPORARILY OUTSIDE THE LIMITS OF A PENAL INSTITUTION.

A person who was erroneously discharged from confinement before serving his or her entire sentence is not considered "temporarily outside the limits" of a penal or reformatory institution under MCL 768.7 when the Department of Corrections has not attempted to assert control over the person or to notify the person of the error.

2. CRIMINAL LAW — SENTENCING — CONSECUTIVE SENTENCES — LIABLE TO SERVE A SENTENCE.

A person who may be "liable to serve" an incomplete prison sentence because he or she was erroneously discharged before serving his or her complete sentence is not "incarcerated in a penal or reformatory institution" for purposes of the consecutive sentencing mandate in MCL 768.7a(1).

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Jeffrey S. Getting*, Prosecuting Attorney, and *Mark A. Holsomback*, Assistant Prosecuting Attorney, for the people.

Cyril C. Hall for defendant.

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

PER CURIAM. Defendant, Sabrina Racine Parker, appeals by leave granted her guilty pleas to identity theft, MCL 445.65, and conspiracy to steal and retain a financial transaction device without consent, MCL 750.157n(1). The trial court sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to 4 to 15 years' imprisonment for each offense. The trial

court ordered these sentences to run concurrently to one another, but consecutively to sentences imposed on defendant in 2010 that she failed to complete because the Department of Corrections (DOC) erroneously released her into the community in 2011. Given the absence of statutory authority to support the trial court's imposition of consecutive sentences in this case, we remand to the trial court to correct defendant's judgment of sentence by striking the provision that her current sentences are to run consecutively to her sentences from 2010.

I. PERTINENT FACTS

In October 2010, defendant was convicted in Kent County of possession of a stolen financial transaction device and sentenced to 21 to 72 months' imprisonment. In November 2010, while serving her Kent County sentence, defendant was convicted in Monroe County of possession of a stolen financial transaction device and sentenced to 32 to 48 months' imprisonment. On June 7, 2011, the DOC erroneously released defendant before she finished serving either of her sentences.

The charges in the current case arose from conduct initiated on January 9, 2013, when defendant stole five credit cards from a victim while the victim was participating in a yoga class. Defendant was arrested on January 17, 2013, and subsequently entered guilty pleas to identity theft under MCL 445.65 and conspiracy to steal and retain a financial transaction device without consent under MCL 750.157n(1). In April 2014, the trial court sentenced defendant to concurrent sentences of 4 to 15 years' imprisonment for each offense. Because defendant's release from prison in 2011 before she completed serving her sentences

from 2010 was a result of clerical error, her presentence investigation report indicated that she was "in prison." Accordingly, pursuant to MCL 768.7a, the trial court ordered defendant's sentences in this case to run consecutively to the completion of her sentences from 2010.[1]

II. ANALYSIS

On appeal, defendant argues that the trial court erred by ordering her current sentences to run consecutively to her sentences from 2010 because the consecutive sentencing provisions of MCL 768.7a do not apply to her situation. We agree.

Whether a consecutive sentence may be imposed is a question of statutory interpretation that we review de novo. *People v Gonzalez*, 256 Mich App 212, 229; 663 NW2d 499 (2003). Resolution of this issue requires us to interpret MCL 768.7a and related statutes. "The purpose of statutory interpretation is to give effect to the intent of the Legislature. If a statute is clear, we enforce it as plainly written. However, if a statute is susceptible to more than one interpretation, we must engage in judicial construction and interpret the statute." *People v Denio*, 454 Mich 691, 699; 564 NW2d 13 (1997) (citations omitted). The purpose of a consecutive sentencing statute is "to deter persons convicted of one crime from committing other crimes by removing the security of concurrent sentencing." *People v Phillips*, 217 Mich App 489, 499; 552 NW2d 487 (1996). Accordingly, " 'consecutive sentencing statute[s] should be construed liberally in order to achieve the deterrent

[1] Notably, the record contains a May 2014 letter from the DOC to the trial court indicating that it did not believe that defendant's current sentences should run consecutively to her 2010 sentences.

effect intended by the Legislature.'" *Id*., quoting *People v Kirkland*, 172 Mich App 735, 737; 432 NW2d 422 (1988).

A trial court may only impose a consecutive sentence if specifically authorized by statute. *People v Lee*, 233 Mich App 403, 405; 592 NW2d 779 (1999). Neither of the statutes under which the court sentenced defendant in this case specifically authorizes consecutive sentencing. See MCL 445.65; MCL 750.157n. As authority for imposing consecutive sentences, the trial court relied on MCL 768.7a, which states in pertinent part:

> (1) A person who is incarcerated in a penal or reformatory institution in this state, or who escapes from such an institution, and who commits a crime during that incarceration or escape which is punishable by imprisonment in a penal or reformatory institution in this state shall, upon conviction of that crime, be sentenced as provided by law. The term of imprisonment imposed for the crime shall begin to run at the expiration of the term or terms of imprisonment which the person is serving or has become liable to serve in a penal or reformatory institution in this state.
>
> (2) If a person is convicted and sentenced to a term of imprisonment for a felony committed while the person was on parole from a sentence for a previous offense, the term of imprisonment imposed for the later offense shall begin to run at the expiration of the remaining portion of the term of imprisonment imposed for the previous offense.

According to the plain language of MCL 768.7a, a person is subject to consecutive sentencing when that person is convicted of a crime committed during the person's incarceration in a penal or reformatory institution, or during the person's escape or parole from such an institution. It is undisputed that defendant

was neither an escapee nor a parolee when she committed the 2013 offenses. Therefore, the question before this Court is whether defendant was "incarcerated in a penal or reformatory institution" at the time of the 2013 offenses, thus warranting imposition of a consecutive sentence pursuant to MCL 768.7a(1).

It is also undisputed that defendant was not literally incarcerated at the time she committed the crimes charged in this case. Therefore, interpreting MCL 768.7a(1) according to its plain language leads to the conclusion that defendant was not subject to its provisions, and the trial court improperly ordered her to serve the sentences imposed for her current crimes consecutively to those imposed for her 2010 convictions. However, "[f]or consecutive sentencing purposes, the term 'penal or reformatory institution' is broadly construed to include any grounds under the control of any person authorized by the Department of Corrections to have a prison inmate under care, custody or supervision either in an institution or outside an institution." *People v Sanders*, 130 Mich App 246, 250-251; 343 NW2d 513 (1983) (quotation marks and citation omitted). Literal confinement, therefore, "is not a controlling factor if the person continues to be under the control of the Department of Corrections." *People v Lakin*, 118 Mich App 471, 474; 325 NW2d 460 (1982) (concluding that a person on "pre-parole" status remained subject to the consecutive sentencing statute); see also *Kirkland*, 172 Mich App at 737 (holding that "incarcerated in a penal or reformatory institution," as stated in MCL 768.7a(1), applies "to inmates who are participating in community corrections programs, assigned to halfway houses, or on extended furloughs").

However, given the particular facts of this case, even a liberal construction of the phrase "incarcerated in a

penal or reformatory institution" does not bring defendant within MCL 768.7a(1) for sentencing purposes. After the DOC erroneously released defendant on June 7, 2011, the DOC's control over defendant or her activities ceased. There is no evidence that the DOC was aware of defendant's erroneous release or that it attempted to contact defendant afterward. Defendant's only connection with the DOC after her release in 2011 was that she had time left unserved on her sentences from 2010, and she could have been ordered to serve it under the DOC's jurisdiction. See *Michigan ex rel Oakland Co Prosecutor v Dep't of Corrections*, 199 Mich App 681, 694; 503 NW2d 465 (1993) (indicating that a prisoner whose early release resulted from an incorrect method of calculating good-time and special good-time credits could have been required to complete his sentence). Nevertheless, as Michigan's Supreme Court has determined, this connection alone is not sufficient to find that defendant was "incarcerated in a penal or reformatory institution" for purposes of MCL 768.7a(1). *People v Veilleux*, 493 Mich 914 (2012).

People v Veilleux, unpublished opinion per curiam of the Court of Appeals, issued March 29, 2012 (Docket No. 302335), involved a defendant who had previously been sentenced to 365 days in jail and three years' probation for a felony drug violation, plus seven 90-day sentences for contempt of court arising from the defendant's outbursts at the sentencing hearing. *Id*. at 1-2. The trial court had ordered the seven sentences for contempt of court to be served consecutively, and all of the contempt sentences were to be consecutive to the sentence for the underlying felony. *Id*. at 2. However, the DOC released the defendant in error after he served 365 days in jail on the felony violation, without having served any of his sentences for contempt of court. *Id*. Three weeks after his erroneous release,

police arrested the defendant for assault. Although the assault charge was dismissed, the defendant's blood alcohol level at the time of his arrest had been .17% and therefore the defendant was found in violation of the terms of his probation. *Id*. The trial court resentenced the defendant to 34 months to 15 years' imprisonment, and ordered the sentence to be served consecutively to the seven sentences for contempt, relying in part on MCL 768.7a(1).[2] *Id*. This Court granted the defendant's delayed application for leave to appeal, "limiting [its] inquiry to whether the trial court erred in ordering defendant's 34[-]month to 15-year prison term [to] run consecutive[ly] to his sentences for contempt of court." *Id*. Relying heavily on the Court's decision in *Williams*, a two-member majority affirmed the trial court's order of consecutive sentencing on the ground that the defendant had to complete the sentence "*he remained liable* to serve" at the time of his resentencing. *Id*. at 4.

The defendant in *Veilleux* sought leave to appeal this Court's decision in the Michigan Supreme Court. In lieu of granting leave to appeal, the Supreme Court reversed

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[2] The trial court also relied on this Court's decision in *People v Williams*, unpublished opinion per curiam of the Court of Appeals, issued May 12, 2005 (Docket No. 254628). At issue in *Williams* was whether a trial court could order multiple contempt sentences to run consecutively. *Veilleux*, unpub op at 3. The *Williams* Court determined in relevant part that "[t]he clear and unambiguous language of MCL 768.7a(1) requires that each of defendant's sentences for contempt . . . be consecutive to 'terms of imprisonment which the person . . . has become liable to serve.' " *Williams*, unpub op at 8, quoting MCL 768.7a(1). Accordingly, the Court concluded, "each contempt sentence is required to be served consecutively to those prior contempt sentences for which defendant had already become liable to serve." *Williams*, unpub op at 8. *Williams* was not quite on point, because unlike the defendant in *Veilleux*, the defendant in *Williams* did not contest the trial court's authority to order the contempt sentences to run consecutively to the sentence for an underlying crime. *Veilleux*, unpub op at 3.

this Court's judgment and remanded the matter to the trial court "for it to correct the judgment of sentence by striking those provisions making the sentences for contempt consecutive to each other and consecutive to defendant's sentence for the underlying felony." *Veilleux*, 493 Mich at 914. Regarding the applicability of MCL 768.7a(1), the Supreme Court explained:

> Contrary to the lower courts' holdings, MCL 768.7a(1) does not specifically authorize the consecutive sentences imposed here. MCL 768.7a(1) only applies to "[a] person who is incarcerated in a penal or reformatory institution in this state, or who escapes from such an institution." When defendant committed the contempts of court at issue here, he was not at the time incarcerated in a penal or reformatory institution and he was not an escapee. [*Veilleux*, 493 Mich at 914, quoting MCL 768.7a(1).]

In *Veilleux*, our Supreme Court rejected the idea that merely being "liable to serve" a sentence is tantamount to being "incarcerated in a penal or reformatory institution" for purposes of MCL 768.7a(1). The *Veilleux* Court's decision underscores that the purpose of the portion of MCL 768.7a(1) at issue is to deter incarcerated persons from committing crimes while incarcerated "by removing the security of concurrent sentencing," thereby ensuring that they will actually serve additional time for the crimes committed. *Phillips*, 217 Mich App at 499. That defendant had time remaining on her sentences from 2010 is not, by itself, sufficient to find that defendant was "incarcerated in a penal or reformatory institution" within the meaning of MCL 768.7a(1). Accordingly, the trial court erred when it relied on MCL 768.7a(1) to order that defendant's current sentences run consecutively to the completion of her sentences from 2010.

The prosecution argues that defendant should be considered "incarcerated in a penal or reformatory

institution" on the basis of the interplay between MCL 768.6, MCL 768.7, and MCL 768.7a(1). MCL 768.6 provides:

> Any person now or hereafter confined in any penal or reformatory institution in this state, and who during the term of such confinement shall commit any crime or offense punishable under the laws of this state by imprisonment in such institution, shall be subject to the same punishment as if the crime had been committed at any other place or by a person not so confined.

And MCL 768.7 provides in relevant part as follows:

> The circuit court for the county in which the prison or institution named in the preceding section is, shall have jurisdiction over cases arising under the foregoing section . . . . The provisions of this and the preceding section shall apply to persons who are temporarily outside the limits of the institutions named in such sections, except those prisoners who have received a parole by due process of law and are at liberty under the terms of such parole.

MCL 768.6 applies when a person commits a crime while "confined in any penal or reformatory institution." MCL 768.7 expands the applicability of MCL 768.6 to persons "temporarily outside the limits" of such institutions at the time the person commits a crime. Thus, a person who commits a crime while "temporarily outside the limits" of a penal or reformatory institution may be punished as though the person committed the crime while incarcerated in a penal or reformatory institution. MCL 768.6; MCL 768.7. If a person commits a crime while "incarcerated in a penal or reformatory institution," the person is subject to consecutive sentencing pursuant to MCL 768.7a(1). On the basis of this interplay between MCL 768.6, MCL 768.7, and MCL 768.7a(1), the prosecution argues that defendant was subject to consecutive sentencing pursuant to

MCL 768.7a(1) because she committed the crimes in this case while "temporarily outside the limits" of a penal or reformatory institution.

We find the prosecution's argument unpersuasive. MCL 768.7 does not define "temporarily," nor is a definition provided in the relevant section of the Code of Criminal Procedure, MCL 761.1. When terms are undefined, a court may consult a dictionary regarding their plain and ordinary meaning. *People v Ackah-Essien*, 311 Mich App 13, 25; 874 NW2d 172 (2015). The dictionary defines the word "temporarily" as "during a limited time." *Merriam-Webster's Collegiate Dictionary* (11th ed). Nothing in the record indicates that defendant's erroneous release from prison was for a "limited time" only, after which she would be returning to incarceration. The DOC did not attempt to bring defendant back under its control or to notify her that she was out by mistake. The DOC did not even seem aware that an error had occurred. In other words, nothing in the record suggests that defendant's time at liberty was other than unlimited. If there was no limit on defendant's time at liberty, there is no possible interpretation of MCL 768.7 that would allow for defendant's time outside a penal or reformatory institution to be considered temporary.

Accordingly, we conclude that the trial court erred by ordering defendant's current sentences to run consecutively to her previous sentences from 2010. Therefore, we remand the case to the trial court to correct the judgment of sentence by striking the provisions making defendant's instant sentences consecutive to her previous sentences. We do not retain jurisdiction.

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

SAGINAW EDUCATION ASSOCIATION v EADY-MISKIEWICZ

Docket Nos. 329419, 329425 through 329431, 331398, 331762, and 331875. Submitted March 15, 2017, at Lansing. Decided May 2, 2017, at 9:00 a.m. Leave to appeal denied 501 Mich 1027.

These consolidated cases involve the question whether a union's policy of limiting the opportunity to resign one's union membership to one month per year violates an employee's right to refrain from union activity under the public employment relations act (PERA), MCL 423.201 *et seq*., as amended by 2012 PA 349.

In Docket Nos. 329419 and 329425 through 329431, Kathy Eady-Miskiewicz, Matt Knapp, Jason LaPorte, and Susan Romska filed charges in the Michigan Employment Relations Commission (MERC), alleging that the Saginaw Education Association and the Michigan Education Association (MEA) had engaged in unfair labor practices by violating the charging parties' right under PERA to refrain from joining or assisting a labor organization. In September 2013, three of the charging parties sent letters to respondents declaring their resignations from the unions and revoking their authorizations to deduct their union dues, and the fourth charging party informed a union representative that he no longer wanted to pay dues. An MEA bylaw provided that a person could only terminate membership in the MEA by submitting a written request to do so between August 1 and August 31 of each year. The charging parties alleged that respondents' refusal to accept their resignations, continued attempts to collect union dues, and failure to adequately notify them of how to effectively resign their memberships and end their obligation to pay dues violated MCL 423.209(2)(a) and MCL 423.210(2)(a), as amended by 2012 PA 349. MERC ruled that it had jurisdiction to decide the matter, that respondents could no longer make rules that interfered with employees' rights to refrain from union activity in light of 2012 PA 349, and that the charging parties had the right to resign their union memberships and cease paying dues, subject to any lawful constraints in their membership contracts, as soon as they provided the unions with notice of their resignations. MERC also ruled that, to the extent 2012 PA 349 impaired existing contractual rights, the impairment was justified because the

legislation had a significant and legitimate public purpose. Finally, MERC ruled that respondents had not violated any duty to provide information about how 2012 PA 349 affected the charging parties' opportunities to resign. Respondents appealed the ruling, and the charging parties cross-appealed.

In Docket No. 331398, Mark Norgan filed an unfair-labor-practice charge in MERC against the Standish-Sterling Educational Support Personnel Association MEA/NEA after it refused to accept the resignation he tendered in October 2013 because it was outside the MEA's August window period for resignations. MERC ruled that respondent's actions violated PERA as amended by 2012 PA 349, and respondent appealed.

In Docket No. 331762, Mary Carr filed an unfair-labor-practice charge in MERC against the Grand Blanc Clerical Association and the MEA after they refused to accept the resignation she tendered outside the MEA's August window period for resignations. MERC ruled that respondents' actions violated PERA as amended by 2012 PA 349, and respondents appealed.

In Docket No. 331875, Alphia Snyder filed an unfair-labor-practice charge in MERC against the Battle Creek Educational Secretaries Association and the MEA after they refused to accept the resignation she tendered in April 2013 because it was outside the MEA's August window period for resignations. In September 2013, after receiving information about respondents' enrollment process for paying dues electronically, Snyder sent an e-mail to the MEA indicating that she believed her April resignation had automatically become effective in August, during the resignation period. In October 2013, the MEA informed her that her resignation was not effective because it had not been submitted during the August resignation period. Snyder filed an unfair-labor-practice charge in March 2014. Respondents argued that the charge was untimely because it had not been filed within six months of the MEA's refusal to accept her resignation in April 2013. MERC ruled that respondents' actions violated PERA as amended by 2012 PA 349 and that the charge was timely because the period of limitations did not begin to run until October 2013, when the MEA rejected Snyder's attempts from September 2013 to confirm or effectuate her resignation. Respondents appealed.

The Court of Appeals consolidated the cases.

The Court of Appeals *held*:

1. MERC had jurisdiction to decide whether respondents' practice of accepting resignations only during limited windows of opportunity violated PERA. PERA provides that MERC has both exclusive jurisdiction over claims involving unfair labor

practices and the power to prevent or correct those practices. The 2012 amendments to PERA prohibited unions or employers from requiring employees to support unions financially and expressly recognized the right of public employees to refrain from joining or supporting labor organizations. Restricting the opportunity to resign from a union to one month out of the year effectively forces continued affiliation for however long it happens to take in a given situation until that time of year arrives. Because violating the right to refrain from union activity constituted an unfair labor practice, MERC had jurisdiction to decide the matter under MCL 423.216.

2. MERC did not commit a substantial or material error of law by concluding that limiting the opportunity to resign from a union to one month per year constituted an unfair labor practice under PERA. MCL 423.209(2)(a) prohibits a person from forcing a public employee to remain a member of a labor organization or bargaining representative or otherwise affiliate with or financially support a labor organization or bargaining representative. MCL 423.210(1)(a) prohibits a public employer from interfering with, restraining, or coercing public employees in the exercise of their rights guaranteed in MCL 423.209, and MCL 423.210(2)(a) imposes the same prohibition on labor organizations. Although MCL 423.210(2)(a) allows a labor organization to prescribe its own rules with respect to the acquisition or retention of membership, respondents offered no authoritative support for the proposition that a rule limiting resignation rights to an annual one-month period was permissible under MCL 423.210(2)(a) considering the statutory provisions that expressly recognize a person's rights to refrain from union activity.

3. MERC correctly ruled that the membership agreements signed by the charging parties, which limited their resignation rights to a specified annual period, did not constitute a waiver of their right to discontinue union affiliation at will. While respondents characterize the membership agreements as contracts rather than as a product of collective bargaining that addressed conditions of employment, union memberships are not generally analyzed using the principles of contract law. Further, waivers of statutory rights must be clear, explicit, and unmistakable. Merely joining or remaining a member of a union with a bylaw or constitutional provision purporting to limit the right to resign does not constitute a clear, explicit, and unmistakable waiver of the statutory right to refrain from union affiliation. Moreover, the charging parties signed their membership agreements before the

right to refrain from union activity was enacted into law by 2012 PA 349.

4. MERC's determination that the charging parties did not have to respect respondents' resignation windows did not infringe respondents' expressive or associational rights under the federal and state Constitutions. A contrary determination would have infringed their members' associational rights, and resolving that tension in favor of union members' freedom to disassociate better comported with the right-to-work, or right-to-refrain, policy now embodied within PERA. The characterization of MERC's position as compelling respondents to accept the participation of members they would prefer to exclude was without merit. To the extent that respondents raised a legitimate concern over members' accepting a union benefit on one day then ending union support the next, and if locking members into fixed periods of obligation to provide financial support were the only way to avoid such imbalances between benefits received and contributions provided, respondents' remedy would be to offer membership agreements that clearly and unmistakably set forth waivers of the right to discontinue financial support before a specified date.

5. MERC did not commit a substantial and material error of law by concluding that its recognition of the right to discontinue union support at will, absent a clear, explicit, and unmistakable waiver of that right, did not violate the constitutional prohibitions of legislation that impairs obligations of contract. To make this determination, a court considers whether the state law has operated as a substantial impairment of a contractual relationship, whether the legislative disruption of contractual expectancies is necessary to the public good, and whether the means chosen by the Legislature to address the public need were reasonable. If the legislative impairment of a contract is severe, then to be upheld, it must be affirmatively shown that there was a significant and legitimate public purpose for the regulation and that the means adopted to implement the legislation were reasonably related to the public purpose. Because MERC correctly recognized that the relationship between union and union member is not strictly contractual in nature and correctly took the position that the membership agreements on which respondents rely did not constitute waivers of the right to discontinue financial support for want of clear, explicit, and unmistakable statements to that effect, MERC's determination that the charging parties' right to refrain from union participation included the right to discontinue financial support at will neither substantially impaired a contractual relationship nor disrupted contractual

expectancies. Further, establishing a broad right to refrain from union affiliation was reasonably related to the legislatively identified public need for voluntary unionism.

6. MERC did not err by determining that the charge of an unfair labor practice in Docket No. 331875 was timely filed. Generally, under MCL 423.216(a), a person bringing an unfair-labor-practice charge before MERC must do so within six months of the act engendering the charge. The limitation period commences when the person knows of the act that caused the injury and has good reason to believe that the act was improper or done in an improper manner. In this case, the charging party e-mailed an MEA representative in April 2013, announcing her resignation from the union and revocation of her authorization for a dues deduction; the MEA representative informed her by e-mail on April 17, 2013, that her resignation was untimely and would not be accepted; she sent an e-mail on September 17, 2013, asserting that she had indeed resigned in April and expected the resignation to become effective in August; and on October 9, 2013, the MEA representative again informed her that her resignation was not timely. The charging party filed an unfair-labor-practice charge over the matter on March 18, 2014. MERC properly determined the timeliness of that charge by calculating the period of limitations not from the April 17, 2013 e-mail of the MEA's representative but rather from that representative's October 9, 2013 e-mail in response to the charging party's efforts in September 2013 to ensure that her membership had ended. In so doing, MERC did not improperly afford the charging party the benefit of the continuing-wrongs doctrine, according to which the period of limitations does not begin to run on the occurrence of the first wrongful act but rather when the continuing wrong is abated. Instead, MERC properly treated the MEA's October 2013 communication to the charging party not as a mere reiteration of its April 2013 communication but as a separate and independent unfair labor practice.

7. MERC correctly concluded that respondents did not fall short of their duty of fair representation by declining to take the initiative to provide information to their members on applicable resignation procedures. A labor organization has a statutory duty to fairly represent its members. This duty includes an obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct. The cross-appealing charging parties cite no authority for the proposition that this duty of fair representation extends to

activity antagonistic to the union goal of promoting the mutual benefit of its membership, such as actively publicizing the procedures for disassociating from it. Further, the Legislature signaled that it did not intend for unions to spread information about 2012 PA 349 by having included within the legislation an appropriation to the Department of Licensing and Regulatory Affairs to respond to public inquiries about the legislation and to inform public employers, employees, and attendant labor organizations concerning their rights and responsibilities under the legislation. Moreover, while the respondents at issue did not actively publicize the procedure for resignation, the record indicates that the information was provided to any union member who requested it.

Affirmed.

Mackinac Center Legal Foundation (by *Patrick J. Wright* and *Derk A. Wilcox*) for the charging parties in Docket Nos. 329419 and 329425 through 329431.

John N. Raudabaugh for the charging party in Docket No. 331398.

John N. Raudabaugh, *Amanda K. Freeman*, and *Milton L. Chappell* for the charging parties in Docket Nos. 331762 and 331875.

White Schneider PC (by *James J. Chiodini*, *Jeffrey S. Donahue*, and *Catherine E. Tucker*) and *Michael M. Shoudy* for respondents in Docket Nos. 329419 and 329425 through 329431.

White Schneider PC (by *James J. Chiodini*, *Jeffrey S. Donahue*, and *Catherine E. Tucker*) for respondents in Docket Nos. 331398, 331762, and 331875.

Before: BECKERING, P.J., and O'CONNELL and SWARTZLE, JJ.

PER CURIAM. These consolidated appeals mainly concern the effects of legislative modifications of the public

employment relations act (PERA), MCL 423.201 *et seq*., since 2012—the legislation transforming Michigan into a so-called right-to-work state.

In Docket Nos. 329419 and 329425 through 329431, respondents, the Michigan Education Association (the MEA) and its local affiliate, the Saginaw Education Association, appeal as of right the September 23, 2015 decision of the Michigan Employment Relations Commission (the MERC) declaring in violation of PERA a union rule that allows members to resign only during a one-month window each year and ordering those respondents to accept resignations the charging parties offered outside that window. The attendant charging parties in turn cross-appeal that order insofar as it rejected their claim that respondents violated their duty of fair representation by not more actively informing their members of their resignation rights.

In Docket No. 331398, respondent, the Standish-Sterling Education Support Personnel Association MEA/NEA, appeals the January 15, 2016 decision of the MERC insofar as it, too, recognized the attendant parties' right to end their union affiliations at will.

In Docket Nos. 331762 and 331875, respondents—the MEA and its local affiliates, the Grand Blanc Clerical Association, and the Battle Creek Educational Secretaries Association—appeal as of right the February 11, 2016 decision of the MERC insofar as the MERC again held that the charging parties were entitled to end union affiliations at will. The latter union and the MEA additionally contend that the MERC erred by declining to dismiss the charge underlying Docket No. 331875 as untimely.

For the reasons set forth below, we affirm all the MERC decisions at issue.

I. STATUTORY AND PROCEDURAL HISTORY

A. RIGHT-TO-WORK LEGISLATION

Section 9(1)(a) of PERA, MCL 423.209(1)(a), establishes that public employees may organize themselves into collective bargaining units. 2012 PA 349, effective March 28, 2013, added § 9(1)(b), establishing that public employees may refrain from such activity. 2012 PA 349 also added Subsection (2), which prohibits any person from resorting to coercion to compel a public employee to become or remain a member of a labor organization, to compel a public employee to refrain from doing so, or to compel a public employee to support a labor organization financially. Section 10(1)(a) of PERA, MCL 423.210(1)(a), in turn prohibits a public employer from interfering with, restraining, or coercing public employees "in the exercise of their rights guaranteed in section 9." Section 10(2)(a) imposes the same prohibition on labor organizations while adding that it "does not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership." 2012 PA 349 added Subsection (3), which, but for exceptions not applicable here, prohibits requiring "an individual . . . as a condition of obtaining or continuing public employment" to "[b]ecome or remain a member of a labor organization or bargaining representative," to support such an organization financially, or to "[r]efrain or resign from membership in, voluntary affiliation with, or voluntary financial support of a labor organization or bargaining representative." MCL 423.210(3). 2012 PA 53, effective March 16, 2012, amended § 10 to prohibit public school employers from using "public school resources to assist a labor organization in collecting dues or service fees from wages of public school employees" except in connection with

collective bargaining agreements already in effect when that provision became operative. MCL 423.210(1)(b).

B. DOCKET NOS. 329419 AND 329425 THROUGH 329431

The MERC's decision and order in connection with the eight cases involving the Saginaw Education Association included a convenient summary of the underlying facts:

> [E]ach of the Charging Parties is employed by Saginaw Public Schools (Employer) and is part of the bargaining unit represented by the Respondent Saginaw Education Association (SEA). The SEA is a local affiliate of Respondent Michigan Education Association (MEA), and members of the SEA are also members of the MEA and the National Education Association (NEA) due to the organizations' unified membership structure.
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> Around the time they were hired, each of the Charging Parties signed a "Continuing Membership Application" agreeing to join Respondents' unions and authorizing the Employer to deduct union dues from their pay and transmit those funds to Respondent SEA. Just above the signature line on the application, there are two checkboxes, one for cash payment and one for payroll deduction. The language next to the cash payment checkbox states: "Membership is continued unless I reverse this authorization in writing between August 1 and August 31 of any year." The language next to the payroll deduction checkbox states: "I authorize my employer to deduct Local, MEA and NEA dues, assessments and contributions as may be determined from time to time, unless I revoke this authorization in writing between August 1 and August 31 of any year." . . .
>
> Article I of the MEA bylaws provides in relevant part: ". . . Continuing membership in the Association shall be terminated at the request of a member when such a request is submitted to the Association in writing, signed

by the member and postmarked between August 1 and August 31 of the year preceding the designated membership year." . . .

The collective bargaining agreement between the Employer and Respondent SEA that covered the 1995 to 1998 academic years contained a union security agreement and required the Employer to deduct union dues from employees' wages when authorized by the respective employees. That contract expired June 30, 1998. The subsequent collective bargaining agreements did not contain a union security agreement, but did require the Employer to deduct union dues from employees' wages when authorized by the respective employees. . . .

2012 PA 53 . . . , which amended PERA to prohibit public school employers from assisting labor organizations in collecting union dues or service fees, became effective March 16, 2012. However, where the public school employer collected dues or service fees pursuant to a collective bargaining agreement that was in effect on the effective date of Act 53, the prohibition did not apply until the contract expired. The collective bargaining agreement in place immediately prior to the matter at issue expired on June 30, 2013.

On December 11, 2012, the Michigan Legislature passed 2012 PA 349, which, among other things, expressly provided that public employees have a right to refrain from union activity and made agency shop illegal for most public employees.

On January 18, 2013, Respondent MEA prepared a letter designed to be provided to members who inquired about resigning from membership. The letter indicated that resignation from membership must be submitted in writing and postmarked during the annual August window period.

Pursuant to 2012 PA 53, which prohibited public school employers from collecting union dues or services fees from their employees, the Employer ceased dues deductions after the collective bargaining agreement with Respondent SEA expired on June 30, 2013. Subsequently, Re-

> spondents established an e-dues program to allow employees to pay their union dues electronically. . . . None of the four Charging Parties signed up for the e-dues program; nor did any of the four pay union dues after the Employer stopped dues deductions.
>
> * * *
>
> In September 2013, [three] Charging Parties . . . sent letters to Respondents resigning from the Unions and revoking their dues deduction authorizations. Respondents informed each of them that their resignations were not timely in light of the August window period for resignations. . . .
>
> Also, in September 2013, [the fourth charging party] told an SEA representative that he no longer wanted to pay union dues. On September 11, he received an e-mail from an MEA UniServ director acknowledging his statement that he was "not interested in paying dues at this time" and asking him to meet with her to discuss his options in light of that statement. On October 7, [that charging party] sent an e-mail to Respondents explaining that he had assumed he was no longer a union member if he did not sign up for the e-dues program. . . . In response, Respondents' agent contacted [that party], explained the window period, and informed him that failing to sign up for the e-dues program did not constitute a resignation from the Unions.

On October 21, 2013, the charging parties filed unfair-labor-practice charges, alleging violations of MCL 423.209(2)(a) and MCL 423.210(2)(a), as recently amended. The following month, they amended their respective charges to allege that respondents had breached their duties of fair representation for having "restrained or coerced Charging Parties in the exercise of their § 9 right to refrain from joining and/or assisting a labor organization." Thus, the charging parties alleged that respondents violated "§ 10(2)(a) of PERA,

by refusing to allow Charging Parties to resign their memberships when they attempted to do so and by threatening to attempt to collect dues they allegedly owed by hiring a debt collector and/or suing Charging Parties to collect the alleged debt." The charging parties further alleged that respondents "violated their duty of fair representation under § 10(2)(a) by failing to adequately notify them and other teachers of the 'steps they would need to take to extricate themselves fully from any financial obligation to the unions.' "

The administrative law judge (ALJ) concluded that the insertion of right-to-refrain language in § 9 of PERA occasioned a departure from earlier caselaw regarding "whether the MEA's August window period violates § 10(2)(a) of PERA."[1] The ALJ then surveyed instructive caselaw and stated that "[i]t is unclear whether a member could, by any means, waive his or her right to resign full membership at any time," but "it is clear . . . that members do not waive their right to resign full membership merely by voluntarily becoming a member of a union that has a rule in its constitution or bylaws restricting the right to resign." The ALJ elaborated that an employee may waive the right to refrain from continuing financial support of a union after resigning, but "because this is an agreement to waive a statutory right, the waiver must be clear, explicit, and unmistakable." The ALJ opined that the charging parties "did not clearly and explicitly

[1] Specifically, the MERC concluded in *West Branch-Rose City Ed Ass'n, MEA*, 17 MPER 25 (2004), that the MEA's window period was reasonable and organizationally necessary. However, *West Branch* was decided before 2012 PA 349 added the "right to refrain" language to PERA, and the MERC noted that it would not infer a right to refrain from union activity in the absence of clear legislative intent. *Id*. at 72 n 5. The passage of 2012 PA 349 adding such language in § 9(1)(b) provided this clear legislative intent.

waive that right either by joining Respondents when that organization had a bylaw that restricted when they could resign or by the Continuing Memberships agreements which they signed" and that respondents' "continued maintenance and enforcement of the August window period . . . violated § 10(2)(a) of PERA because it constituted an unlawful restriction on employees' right to resign."

Respondents objected that the MERC lacked jurisdiction over what respondents characterized as an internal union matter. They argued alternatively that 2012 PA 349 did not allow union members to resign at will and that ordering respondents to refrain from maintaining and enforcing the policy restricting the timing of resignations would bring about an unconstitutional impairment of respondents' contractual relation with their members.

The MERC rejected these arguments. Concerning its jurisdiction, the MERC noted that recent statutory amendments to PERA prohibited unions or employers from requiring employees to financially support unions and expressly recognized the right of public employees to refrain from joining or supporting labor organizations. Therefore, the MERC concluded, "we have jurisdiction to determine whether Respondents' actions in refusing to allow Charging Parties to resign from the Unions outside the August window period is an unlawful restraint on Charging Parties' right to refrain from union activity."

The MERC further opined that respondents' retention of the right to make their own rules concerning the acquisition or retention of members under § 10(2)(a) did not permit them to deny public employees the rights provided by § 9, "which now include the right to refrain from union activity." "Accordingly, . . . where

employees have a right to refrain from union activity, the union may not make rules interfering with or restraining employees in the exercise of that right." The MERC additionally opined that "as of the effective date of Act 349, Charging Parties had the right to resign their union memberships, subject to any lawful constraints in the parties' membership contract" and also that "Charging Parties' membership obligations to Respondents, including the obligation to pay dues, should end at the point Charging Parties provided the Unions with notice of their resignations." Accordingly, "the Unions' refusal to allow Charging Parties to resign their union memberships after Charging Parties effectively notified Respondent SEA of their respective resignations" constituted "a breach of the duty of fair representation in violation of § 10(2)(a) of PERA."

Concerning the claim of unconstitutional impairment of contract rights, the MERC concluded that "the language of § 10(5) indicates that the Legislature intended to make it clear that the changes to PERA in § 10(3) were not to impair existing contracts[.]" Additionally, to the extent that other amendments establishing an immediate right to refrain from union affiliation worked a substantial impairment of existing contractual rights, such impairment was justified in light of the "significant and legitimate public purpose" behind the legislation.

The charging parties asserted that the ALJ erred by concluding that respondents had not failed in any duty to provide its members with "adequate information to make an informed choice during the August window period." The MERC agreed with the ALJ that the record indicated that respondents had not violated any duty to provide information regarding how the recent legislation affected their members' resignation opportunities.

C. DOCKET NO. 331398

The MERC's summary of the facts underlying its decision and order in connection with respondent the Standish-Sterling Educational Support Personnel Association included the following:

> Charging Party . . . is employed as a custodian by the Standish-Sterling Community Schools (the Employer) and is part of the bargaining unit represented by the Respondent Standish-Sterling Educational Support Personnel Association (SSESPA). The SSESPA is a local affiliate of the Michigan Education Association (MEA), and members of the SSESPA are also members of the MEA and the National Education Association (NEA) . . . .
>
> On September 14, 2001, the Charging Party signed a "Continuing Membership Application" agreeing to join Respondent and authorizing the Employer to deduct union dues from his pay and transmit those funds to Respondent. On the application, . . . language next to the payroll deduction checkbox states: "I authorize my employer to deduct Local MEA and NEA dues, assessments and contributions as may be determined from time to time, unless I revoke this authorization in writing between August 1 and August 31 of any year." Charging Party checked the box for payroll deduction.
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> * * *
>
> Respondent and the Employer have been party to a series of collective bargaining agreements each of which contained a provision requiring members of Respondent's bargaining unit to authorize the Employer to deduct union membership dues or service fees from their paychecks. . . . The most recent agreement was entered into on November 12, 2012, and expired on June 30, 2015.
>
> * * *
>
> On October 7, 2013, . . . Charging Party sent a letter to the MEA Uniserv Director resigning from the Union,

> notifying the Union that he would only pay those dues and fees he could lawfully be compelled to pay as a condition of employment, and revoking his dues deduction authorization. On October 31, 2013, Respondent informed Charging Party that his resignation was not timely in light of the August window period for resignations.
>
> * * *
>
> Charging Party continued to pay full dues after receiving Respondent's October 31, 2013 letter and, on February 6, 2014, filed the instant unfair labor practice charge against Respondent.

As noted, the issues raised in Docket No. 331398 are identical to those raised in the several consolidated appeals discussed earlier, which the MERC decided in this case consistently with its decision in those cases.

D. DOCKET NOS. 331762 AND 331875

The cases involving the MEA and its local affiliates the Battle Creek Educational Secretaries Association (BCESA) and the Grand Blanc Clerical Association (GBCA) also resulted from continuing-membership agreements through which the charging parties authorized their employers—the Battle Creek Schools and the Grand Blanc Schools, respectively—to deduct union dues from their paychecks. The last collective bargaining agreement between the Battle Creek Schools and the BCESA containing a union security agreement expired before April 2013. The last collective bargaining agreement between the Grand Blanc Schools and respondent GBCA that contained a union security agreement and a dues check-off provision expired on June 30, 2013.

The MERC summarized the case involving respondents the BCESA and the MEA as follows:

On April 4, 2013, . . . Charging Party . . . sent a letter to the MEA resigning from membership in the Union and revoking her dues deduction authorization. On April 17, 2013, the MEA informed her that her resignation was not timely because it was not submitted during the August window period for resignations. Charging Party . . . continued to pay dues through June 2013.

On September 17, 2013, after receiving a BCESA communication regarding the MEA's e-dues process, [the charging party] sent an email to the MEA stating that she had resigned in April:

> I received information regarding upcoming dues you are expecting from me. I would like to remind you that I sent my resignation letter to you last April which was effective immediately. I understood it would not be effective until August of this year and I continued to pay my dues. Please let the appropriate departments know that I will not be paying any more dues since I am no longer a paying member.

On October 9, the MEA . . . again informed [the charging party] that her resignation was not timely. [The charging party] replied on October 10 as follows:

> . . . I have resigned and that is it. I will no longer be paying union dues. . . . [W]hen Michigan passed its Right to Work law, it also amended its public-sector labor law to provide employees with a new right to "refrain" from joining or supporting a union. . . . Therefore it is illegal now to make restrictions on resignation in Michigan.

On October 31, 2013, [the charging party] received a letter from MEA . . . in which the executive director . . . informed [the charging party] that her resignation was ineffective because it was not submitted during the MEA's August window period.

On November 9, 2013, after receiving this letter, [the charging party] again emailed the MEA and reiterated her belief that she resigned in April and informed the MEA

> that she would not be paying any more dues. On March 18, 2014, [she] filed the unfair labor practice charge involved in this dispute.

In the case involving the GBCA and the MEA, the charging party sent a letter to the MEA announcing her resignation on November 4, 2013. On December 19, 2013, the MEA replied that, to be effective, her resignation must be submitted between August 1 and August 31. The MEA continued to demand dues and other assessments through April 2014. The charging party sent a check covering dues through her November resignation date and filed her unfair-labor-practice charge.

As noted, the issues raised in these two appeals are identical to those raised in the several consolidated appeals discussed earlier; the MERC resolved the issues consistently with its decisions in the other cases.

The BCESA additionally objected that its charging party's March 18, 2014 unfair-labor-practice charge was not filed within six months of the MEA's April 2013 refusal to accept her resignation. The MERC rejected that challenge by calculating the period of limitations as starting not with the initial MEA communication refusing to recognize the resignation but with the MEA's October 2013 rejection of the charging party's efforts in September 2013 to confirm or effectuate her resignation.

II. ANALYSIS

A. JURISDICTION

All respondents challenge the MERC's jurisdiction to decide whether respondent unions' continued practice of accepting resignations only during limited windows of opportunity violated PERA, as recently amended.

A tribunal must be vigilant in respecting the limits of its jurisdiction. See *Straus v Governor*, 230 Mich App 222, 227; 583 NW2d 520 (1998). The existence of jurisdiction is a question of law that this Court reviews de novo. *Etefia v Credit Technologies, Inc*, 245 Mich App 466, 472; 628 NW2d 577 (2001). Issues of statutory interpretation are also reviewed de novo. *In re Rovas Complaint*, 482 Mich 90, 102; 754 NW2d 259 (2008). A reviewing court should give an administrative agency's interpretation of statutes it is obliged to execute respectful consideration, but not deference. *Id*. at 108.

" 'The power and authority to be exercised by boards or commissions must be conferred by clear and unmistakable language, since a doubtful power does not exist.' " *Union Carbide Corp v Pub Serv Comm*, 431 Mich 135, 151; 428 NW2d 322 (1988) (citation omitted). Accordingly, "powers specifically conferred on an agency cannot be extended by inference; . . . no other or greater power was given than that specified." *Herrick Dist Library v Library of Mich*, 293 Mich App 571, 582-583; 810 NW2d 110 (2011) (quotation marks and citations omitted). However, an administrative agency may exercise such implied authority as is "necessary to the due and efficient exercise of the powers expressly granted by the enabling statute." *Id*. at 586 (quotation marks and citation omitted).

MCL 423.201(1)(b) states that "commission," for purposes of PERA, "means the employment relations commission . . . ." This Court has noted that "PERA provides that the Michigan Employment Relations Commission (MERC), the agency created to administer the act, has both *exclusive jurisdiction* over claims involving [unfair labor practices] *and* the power, through resort to injunctive relief, to prevent or correct

[unfair labor practices]." *Senior Accountants, Analysts & Appraisers Ass'n v Detroit*, 218 Mich App 263, 272; 553 NW2d 679 (1996), citing MCL 423.216.

At issue is whether the MERC properly exercised jurisdiction over the question of respondents' resignation windows, given that the issue related to union management with no direct relationship to conditions of employment. In rejecting the jurisdictional challenge, the MERC noted that the recent amendments to PERA prohibited unions or employers from requiring employees to support unions financially and expressly recognized the right of public employees to refrain from joining or supporting labor organizations. Accordingly, the MERC concluded that it had jurisdiction to determine whether unions' actions in refusing to allow their members to resign from them outside the August window periods was an unlawful restraint on the members' rights to refrain from union activity.

Respondents argue that the MERC exceeded its statutory authority by reaching the issue of resignation windows, asserting that in doing so it "has interpreted out of existence" the provisions of §§ 9(2), 9(3), and 10(3) of PERA. However, MCL 423.209(3) merely sets forth the penalty for violations of Subsection (2), and respondents do not explain why the MERC's having decided the issue of resignation windows is inconsistent with the command in MCL 423.209(2)(a) that no person "force" a public employee to "remain a member of a labor organization or bargaining representative or otherwise affiliate with or financially support a labor organization or bargaining representative." We agree with the reasoning implicit in the MERC's decision that restricting the opportunity to resign from a union to one month out of the year effectively forces continued affiliation for however long

it happens to take in a given situation until that time of year arrives.

Respondents emphasize that MCL 423.210(3)(b) sets forth its prohibition of requiring a person to "remain a member of a labor organization or bargaining representative" only where that requirement is imposed "as a condition of obtaining or continuing public employment." However, bearing more directly on the issue is Subsection (2)(a), which, again, prohibits a labor organization from restraining or coercing public employees "in the exercise of the rights guaranteed in section 9."

Recent caselaw offers some guidance:

> Notably, the Legislature did not change MCL 423.210(2)(a) when it enacted the right-to-work law in 2012. We conclude that the plain language of MCL 423.210(2)(a) makes all of the provisions of MCL 423.209, including MCL 423.209(2), "rights guaranteed in section 9." Therefore, the violation thereof by defendants as alleged by plaintiff is an "unfair labor practice[]" pursuant to MCL 423.216. [*Bank v Mich Ed Ass'n-NEA*, 315 Mich App 496, 501-502; 892 NW2d 1 (2016) (alteration in original).]

For these reasons, we conclude that the MERC correctly recognized its jurisdiction to decide the question of the propriety of unions' confining their members' resignation opportunities to one month each year.

B. UNION MEMBERSHIP AND GOVERNANCE

Respondents contend MERC's conclusion that respondents breached the duty of fair representation by refusing to immediately cancel the charging parties' memberships or financial obligations upon request was without factual support and that the duty of fair representation does not apply to the formation or enforcement of membership agreements that have no

direct impact on employment. We hold that, given the recent amendments to PERA, the MERC committed no substantial or material error of law by concluding that respondents' resignation windows consisting of one month per year constituted unfair labor practices under PERA.

"Appellate review of a MERC decision is limited." *Org of Sch Administrators & Supervisors, AFSA, AFL-CIO v Detroit Bd of Ed*, 229 Mich App 54, 64; 580 NW2d 905 (1998). The MERC's "findings of fact are conclusive if they are supported by competent, material, and substantial evidence on the record considered as a whole." *Grandville Muni Executive Ass'n v City of Grandville*, 453 Mich 428, 436; 553 NW2d 917 (1996); see also Const 1963, art 6, § 28 and MCL 423.216(e). "The 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." *Grandville Muni Executive Ass'n*, 453 Mich at 436, citing MCL 24.306(1)(a) and (f).

The Legislature's recent enactment of MCL 423.209(2)(a) prohibits a person from forcing a public employee to "remain a member of a labor organization or bargaining representative or otherwise affiliate with or financially support a labor organization or bargaining representative." MCL 423.210(1)(a) in turn prohibits a public employer from interfering with, restraining, or coercing public employees "in the exercise of their rights guaranteed in section 9." MCL 423.210(2)(a) imposes the same prohibition on labor organizations while adding that it "does not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership."

Respondents insist that their policy allowing members only a one-month window per year to resign falls

under the provision in MCL 423.210(2)(a) preserving a labor organization's right "to prescribe its own rules with respect to the acquisition or retention of membership." The MERC acknowledged that unions generally retain the right to make rules governing when an employee may become, or cease to be, a member, when those rules do not affect the members' employment relationships. The MERC noted, however, that respondents offered no authoritative support for the proposition that a rule limiting resignation rights to an annual one-month period was permissible under § 10(2)(a) in the face of legislation expressly recognizing an employee's rights to refrain from union activity.

The MERC additionally took instruction from the United States Supreme Court's observation, while construing nearly identical language in 29 USC 158(b)(1)(A),[2] that "[n]either the [National Labor Relations] Board nor this Court has ever interpreted the proviso as allowing unions to make rules restricting the right to resign. Rather, the Court has assumed that 'rules with respect to the . . . retention of membership' are those that provide for the expulsion of employees from the union." *Pattern Makers' League of North America v Nat'l Labor Relations Bd*, 473 US 95, 108-109; 105 S Ct 3064; 87 L Ed 2d 68 (1985), quoting 29 USC 158(b)(1)(A).[3]

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[2] 29 USC 158(b)(1)(A) provides that it shall be an unfair labor practice for a labor organization or its agents to restrain or coerce employees in the exercise of the rights guaranteed in 29 USC 157, "*Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein[.]"

[3] In support of this assertion, the Court referred to legislative history of the Taft-Hartley Act consistent with the Court's interpretation of the proviso:

Respondents undertake to distinguish *Pattern Makers* on two grounds. First, *Pattern Makers* concerned the reasonableness of the National Labor Relations Board's holding that for a union to fine an employee who resigns from membership and then returns to work during a strike is to engage in an unfair labor practice. Second, the United States Supreme Court reasoned that, at the time of the enactment of the federal legislation respecting a union's right to make its own rules regarding the acquisition or retention of membership, restrictions in union constitutions or bylaws on the right to resign were generally unknown and therefore could not have been contemplated by Congress when it enacted the provision. See *id*. at 102-103, 110. By contrast, respondents contend, the MERC has recognized such restrictions since at least 1970 and had earlier approved one-month resignation windows. Respondents further contend that the pertinent federal legislation and caselaw addressed a history of "abuses" involving requiring union membership as a condition of employment.

Senator Holland, the proviso's sponsor, stated that § 8(b)(1)(A) should not outlaw union rules "which ha[ve] to do with the admission *or the expulsion* of members." 93 Cong. Rec. 4271 (1947) (emphasis added). Senator Taft accepted the proviso, for he likewise believed that a union should be free to "refuse [a] man admission to the union, or *expel him from the union*." *Id*., at 4272 (emphasis added). Furthermore, the legislative history of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 401 *et seq*., confirms that the proviso was intended to protect union rules involving admission and expulsion. Accordingly, we find no basis for refusing to defer to the [National Labor Relations] Board's conclusion that League Law 13 is not a "rule with respect to the retention of membership," within the meaning of the proviso. [*Pattern Makers*, 473 US at 109-110 (alterations in original).]

In our view, however, the pertinent statutory history is that of our own Legislature's having enacted the right-to-work amendments to PERA against the historical backdrop that respondents describe. The obvious intent behind MCL 423.209(1)(b) and MCL 423.209(2), whether we agree with it or not, included protecting public employees against barriers to acting on the desire to discontinue union affiliation or support.

For these reasons, the MERC correctly concluded that "the language of § 10(2)(a) relied upon by Respondents does not permit unions to deny a public employee the rights provided by § 9, which now include the right to refrain from union activity" and that "where employees have a right to refrain from union activity, the union may not make rules interfering with or restraining employees in the exercise of that right."[4] Accord-

[4] We note that this interpretation of the "right to refrain" language is consistent with relevant caselaw interpreting "right to refrain" language found in the federal analogue to MCL 423.209(1), 29 USC 157. The National Labor Relations Board opined in *Machinists Local 1327, Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO, Dist Lodge 115*, 263 NLRB 984 (1982) (referred to here and in *Pattern Makers* as "*Dalmo Victor II*"), enforcement den 725 F2d 1212 (CA 9, 1984), that restricting the right to resign for 30 days for union members who resigned while a strike was looming or ongoing was reasonable given the competing interests of the union and the would-be resigner. In a seminal concurrence, two members of the Board stated that *any* restraint on the right to resign violated a member's statutory right to refrain under 29 USC 157. *Id*. at 988 (Van de Water and Hunter concurring). In *Int'l Ass'n of Machinists & Aerospace Workers, Local Lodge 1414, AFL-CIO (Neufeld Porsche-Audi)*, 270 NLRB 1330 (1984), the Board relied on several decisions from the United States Supreme Court that, among other things, developed the distinction between internal union actions and external matters to overrule *Dalmo Victor II* and its progeny and adopted the position of Van de Water and Hunter. It was this position that the United States Supreme Court cited with approval in *Pattern Makers*, 473 US at 105, as consistent with the policy of voluntary unionism. Subsequent to its *Pattern Makers* decision, the Court granted certiorari in *Dalmo Victor II* and remanded it to the United States Court of Appeals for

ingly, the MERC did not commit a substantial and material error of law when it concluded that, in limiting resignation opportunities to one month of each year, respondents were stepping beyond establishing membership policy and governance as allowed under § 10(2)(a) and into the substantial forcing of continued union affiliation or support in violation of MCL 423.209(2)(a). Section 9(2)(a) commands that no person "force" a public employee to "remain a member of a labor organization or bargaining representative or otherwise affiliate with or financially support a labor organization or bargaining representative," and this provision is made applicable to labor organizations through MCL 423.210(2)(a).

C. WAIVER

Respondents argue that the MERC erred by rejecting their argument that the charging parties waived

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the Ninth Circuit for further consideration in light of *Pattern Makers*. *Nat'l Labor Relations Bd v Machinists Local 1327, Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO, Dist Lodge 115*, 473 US 901 (1985).

As the ALJ in the cases at bar pointed out, *Pattern Makers* and its predecessors discussed voluntary unionism in the context of full union membership rather than "financial-core" membership. In other words, the cases addressed when a full union member could resign and escape the discipline of the union for actions like not supporting a concerted action, rather than when a member whose obligation to the union extended only to financial support could resign. In *Int'l Brotherhood of Electrical Workers, Local No. 2088, AFL-CIO (Lockheed Inc)*, 302 NLRB 322, 330 (1991), the Board extended the principle of voluntary unionism to allow a financial-core member not subject to a union security agreement to resign outside the window provided by the member's dues-checkoff authorization agreement. While decisions of the National Labor Relations Board certainly are not binding, Michigan courts have long recognized that "precedents under the National Relations Act (NLRA), from which the PERA is derived, are to be persuasively considered." *Lamphere Sch v Lamphere Federation of Teachers*, 400 Mich 104, 120; 252 NW2d 818 (1977); see also *Detroit Police Officers Ass'n v Detroit*, 137 Mich App 87, 95; 357 NW2d 816 (1984).

the right to discontinue union affiliation at will by voluntarily entering into membership agreements that limited their resignation rights to the specified annual periods.[5] Respondents emphasize that the agreements at issue here were not the product of collective bargaining and did not address any condition of employment, and they characterize those agreements as contracts whose terms the MERC should have enforced.

The United States Supreme Court has recognized that "many union rules" violate members' statutory rights even though they are otherwise "valid under the common law of associations . . . ." *Pattern Makers*, 473 US at 113. The Court similarly acknowledged the rationale that "a member, by joining the union, enters into a contract, the terms of which are expressed in the union constitution and by-laws," but held that "union discipline cannot be analyzed primarily in terms of the common law of contracts" because union membership "contemplates a continuing relationship with changing obligations . . . as far removed from the main channel of contract law as the relationships created by marriage, the purchase of a stock certificate, or the hiring of a servant." *Id*. at 113 n 26 (quotation marks and citations omitted). We agree that respondents' reliance on conventional contract principles in this instance is inapt.

The MERC distinguished union *membership* in the sense of formal personal affiliation from *financial-core*

[5] Although the Standish-Sterling Education Support Personnel Association joined the other respondents in raising this issue in the cases below, the MERC expressly declined to decide it in connection with that respondent on the ground that it was simply satisfied to recognize that the pertinent charging party's "resignation from the union, though outside the window period, was sufficient to end his membership." If a party has raised an issue below, the lower tribunal's failure to decide it should not be treated as the party's failure to preserve it. See *Klooster v Charlevoix*, 488 Mich 289, 310; 795 NW2d 578 (2011).

membership, meaning the obligation to pay union dues or related fees, and it refrained from deciding whether the right to resign union membership in the pure sense may be waived while holding that a member may contractually waive the right to disengage from financial-core commitments at will if it is done in clear, explicit, and unmistakable terms.[6]

The MERC correctly recognized that waivers of statutory rights must be clear and unambiguous. See *Staple v Staple*, 241 Mich App 562, 568; 616 NW2d 219 (2000); 51A CJS, Labor Relations, § 330, p 37 ("The contractual waiver of a statutory right in a labor agreement must be clear and unmistakable or must be established by clear and express contractual language."). We further agree with the MERC that merely joining or remaining a member of a union with a bylaw or constitutional provision purporting to limit the right to resign does not constitute a clear, explicit, and unmistakable waiver of the statutory right to refrain from union affiliation. The MERC also correctly differentiated, for present purposes, membership in a union from financial support of a union. See *Communications Workers of America, CIO v Nat'l Labor Relations Bd*, 215 F2d 835, 838 (CA 2, 1954) (stating that "a member of a voluntary association is free to resign at will, subject of course to any financial obligations due and owing the association").

We also note that the charging parties signed their membership agreements before enactment of the "right to refrain" language in PERA, and when their collective bargaining agreements authorizing their employers' collection of dues expired, they attempted in various ways to resign or let their membership lapse. The union agreements at issue here did not define

[6] See, e.g., *Lockheed Inc*, 302 NLRB at 328-329.

"membership" as the obligation to pay dues or fees, or otherwise specify that restrictions set forth on disassociation opportunities were limited to the latter. For that reason, and because the restrictions on resignation opportunities as set forth merely reflected general union policy, we agree with the MERC that the charging parties below did not clearly, explicitly, and unambiguously waive their right to discontinue their financial support of, or other forms of affiliation with, their respective respondent unions.

Accordingly, we conclude that the MERC correctly held that the right to discontinue financially supporting a union may be waived if the waiver is clear, explicit, and unmistakable, but that the agreements on which respondents rely did not constitute such explicit and unmistakable waivers of the charging parties' statutory right to refrain from union membership at any time.

D. EXPRESSIVE ASSOCIATIONAL RIGHTS

Respondents argue that the MERC's determinations that the charging parties did not have to respect respondents' resignation windows intruded on the latter's expressive or associational rights under the federal and state Constitutions. See US Const, Am I; Const 1963, art 1, §§ 3 and 5. In raising this issue, however, respondents fail to address the question of preservation below, in violation of MCR 7.212(C)(7), or otherwise give any indication that the MERC was asked to consider it.[7] Although this Court reviews

[7] Respondents remind this Court that the MERC does not have the authority to decide a constitutional claim but nonetheless has a duty to interpret its enabling statutes in ways that avoid raising constitutional issues. See *Jackson Co Ed Ass'n v Grass Lake Community Sch Bd of Ed*, 95 Mich App 635, 641; 291 NW2d 53 (1979).

constitutional questions de novo, *In re Ayres*, 239 Mich App 8, 10; 608 NW2d 132 (1999), unpreserved issues are reviewed for plain error affecting substantial rights, *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000).

Respondents argue that the MERC's interpretation of the pertinent statutory scheme, as recently amended, to allow union members to withdraw their union support at will infringes their associational rights. The obvious retort is that to hold otherwise, such that labor organizations could hold members to financial obligations until the next resignation window came about, would infringe their members' associational rights. Resolving that tension in favor of union members' freedom to disassociate better comports with the right-to-work, or right-to-refrain, policy now embodied within PERA.

Respondents protest that the MERC's decision in this regard "allows . . . individuals who would otherwise be excluded to elect Association leaders and spokespeople and to participate in governance decisions that directly shape the message and priorities of the Association . . . ." Further, it allows individuals to "take advantage of the member-only benefits available to them on September 1 and . . . resign on September 2, creating an entirely new class of free-rider," and also forces respondents "to convey the message that 'no commitment' 'free-riders' are welcome within the Association . . . ." We reject the characterization of the MERC's position concerning resignation windows as compelling respondents to accept the participation of members they would prefer to exclude. If respondents raise a legitimate concern over members' accepting a union benefit on one day then ending union support the next, and if locking members into fixed periods of

obligation to provide financial support were the only way to avoid such imbalances between benefits received and contributions provided, respondents' remedy would be to offer membership agreements that clearly and unmistakably set forth waivers of the right to discontinue financial support before a specified date, as discussed earlier.

To the extent that respondents reiterate for this issue their arguments from contract law, we reiterate that the United States Supreme Court has recognized that "union discipline cannot be analyzed primarily in terms of the common law of contracts." *Pattern Makers*, 473 US at 113 n 26.

For these reasons, we conclude that the MERC did not commit a substantial and material error of law, or plain error, when it decided these cases without taking it upon itself to develop and resolve in respondents' favor arguments relating to constitutional rights of expression and association.

E. IMPAIRMENT OF CONTRACT

Respondents argue that the MERC has interpreted 2012 PA 349 in a way that violates the constitutional prohibitions of legislation that impairs obligations of contract. See US Const, art I, § 10, cl 1 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ."); Const 1963, art 1, § 10 ("No . . . law impairing the obligation of contract shall be enacted.").

Respondents again rely on contract principles in support of their contention that the charging parties may not resign outside of the month of August in any given year, but this position is likewise foiled by the unsuitability of characterizing union membership agreements as contracts. See *Pattern Makers*, 473 US at 113 n 26. Indeed, the impropriety of trying to

analyze an issue of union discipline in accordance with ordinary contract law is apparent from consideration of the criteria for analyzing a constitutional claim of this sort:

> A three-pronged test is used to analyze Contract Clause issues. The first prong considers whether the state law has operated as a substantial impairment of a contractual relationship. The second prong requires that legislative disruption of contractual expectancies be necessary to the public good. The third prong requires that the means chosen by the Legislature to address the public need be reasonable. . . . [I]f the legislative impairment of a contract is severe, then to be upheld it must be affirmatively shown that (1) there is a significant and legitimate public purpose for the regulation and (2) that the means adopted to implement the legislation are reasonably related to the public purpose. [*Health Care Ass'n Workers Compensation Fund v Dir of Bureau of Worker's Compensation*, 265 Mich App 236, 241; 694 NW2d 761 (2005) (citations omitted).]

Because, as discussed earlier, the MERC correctly recognized that the relationship between union and union member is not strictly contractual in nature and correctly took the position that the membership agreements on which respondents rely did not constitute waivers of the right to discontinue financial support for want of clear, explicit, and unmistakable statements to that effect, the MERC's determination that the charging parties' right to refrain from union participation included the right to discontinue financial support at will neither substantially impaired a contractual relationship nor disrupted contractual expectancies. Concerning whether the Legislature chose a reasonable means of addressing a public need, we hold that establishing a broad right to refrain from union affiliation is reasonably related to the legislatively identified public need for *voluntary* unionism.

For these reasons, we conclude that the MERC did not commit a substantial and material error of law by concluding that its recognition of the right to discontinue union support at will, absent a clear, explicit, and unmistakable waiver of that right, did not work a substantial impairment of the obligations of contract.

F. TIMELINESS OF ONE CHARGE

The BCESA and the MEA argue that the MERC erred by failing to recognize that the charging party in Docket No. 331875 filed her unfair-labor-practices charge after the applicable period of limitations had run. We disagree.

But for an exception relating to persons serving in the armed forces, a person bringing an unfair-labor-practice charge before the MERC must do so within six months of the act engendering the charge. MCL 423.216(a). That limitation period "commences when the person knows of the act which caused his injury and has good reason to believe that the act was improper or done in an improper manner." *Huntington Woods v Wines*, 122 Mich App 650, 652; 332 NW2d 557 (1983). "[I]t is not necessary that the person recognize that he has suffered invasion of a legal right." *Id*.

Not in dispute in this case is that the charging party e-mailed a letter in April 2013 to an MEA representative announcing her resignation from the union and revocation of her authorization for a dues deduction, that the MEA's representative informed her by e-mail on April 17, 2013, that her resignation was untimely and would not be accepted, that she sent an e-mail on September 17, 2013, asserting that she had indeed resigned in April, and that on October 9, 2013, the MEA's representative again informed her that her resignation was not timely. The charging party then

filed her unfair-labor-practice charge over the matter on March 18, 2014. The timeliness of that charge, then, depends on whether one calculates the period of limitations from the April 17, 2013 e-mail of the MEA's representative or from that representative's e-mail of October 9, 2013, in response to the charging party's efforts in September 2013 to ensure that her membership had ended. The MERC deemed the charge timely on the ground that the October communication of the MEA's representative "constituted a separate, independent unfair labor practice in violation of § 10(2)(a)."

Respondents protest that the MERC thus improperly afforded the charging party the benefit of the continuing-wrongs doctrine, according to which "the period of limitations does not begin to run on the occurrence of the first wrongful act; rather, the period of limitations will not begin to run until the continuing wrong is abated." *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 280; 769 NW2d 234 (2009). We agree with respondents that application of the continuing-wrongs doctrine in connection with an unfair-labor-practice charge would be inapt. See *Blazer Foods, Inc v Restaurant Props, Inc*, 259 Mich App 241, 247; 673 NW2d 805 (2003) (recognizing application of the doctrine only in connection with actions in trespass, nuisance, and civil rights); *Garg v Macomb Co Community Mental Health Servs*, 472 Mich 263, 290; 696 NW2d 646 (2005) (holding that "the 'continuing violations' doctrine . . . has no continued place in the jurisprudence of this state"), amended on unrelated grounds on denial of rehearing 473 Mich 1205 (2005). But the MERC did not invoke the doctrine, having properly treated the MEA's October 2013 communication to the charging party not as a mere reiteration of its April 2013 communication but as a separate and independent unfair labor practice.

The charging party made clear in her September 2013 communication that, at that time, she accepted respondents' assertion that her April 2013 resignation would not be effective until the following August and that she had continued to pay her dues, but that when August came she expected respondents to accept her resignation without further action on her part. Accordingly, the indication of a refusal by the MEA's representative, as communicated in October 2013, to honor the charging party's April resignation on any terms, including the charging party's expectation that it would become effective in August, was an adverse action in connection with a substantially new controversy. The MERC therefore committed no legal error by treating the charge filed in March 2014 as timely relating to a grievance originating with the MEA's October 2013 communication.

G. DUTY OF FAIR REPRESENTATION

On cross-appeal, the charging parties in the cases involving the Saginaw Education Association and the MEA argue that the MERC erred by rejecting their contention that those unions violated their duty of fair representation by failing to provide sufficient information to their members on applicable resignation procedures. We agree with the MERC that the Legislature signaled that it did not intend for unions to spread information about 2012 PA 349 by having included within the legislation an appropriation to the Department of Licensing and Regulatory Affairs to respond to public inquiries about the legislation and to inform public employers, employees, and attendant labor organizations concerning their rights and responsibilities under the legislation. See MCL 423.210(7)(a) and (c).

"It is clear that a labor organization has a duty, imposed by various labor law statutes, to fairly represent its members." *Goolsby v Detroit*, 419 Mich 651, 660; 358 NW2d 856 (1984), citing PERA, along with the National Labor Relations Act, 29 USC 151 *et seq*., and the labor mediation act, MCL 423.1 *et seq*. This duty "includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Goolsby*, 419 Mich at 661 (quotation marks and citations omitted); see also *id*. at 664. However, the cross-appealing charging parties cite no authority that stands for the proposition that a union's duty of fair representation extends to activity antagonistic to the union goal of promoting the mutual benefit of its membership, such as actively publicizing the procedures for disassociating from it. We therefore agree with the MERC that the Legislature recognized that the duty of fair representation did not include a duty to take active responsibility for disseminating information about the new options for disassociation from union activities under 2012 PA 349 by assigning that responsibility to the Department of Licensing and Regulatory Affairs.

Further, it is not as if the respondents at issue wholly failed to provide such information to their members. The MERC summarized the situation as follows, the factual particulars of which the cross-appealing charging parties do not dispute:

> Charging Parties' membership in the Unions was voluntary. . . . At the time each of them joined the Unions, they signed a Continuing Membership Application that provided their membership would continue unless they revoked the membership authorization in writing between August 1 and August 31 of any year. . . . That document put them on notice that they had the right to terminate both their membership and their obligation to pay union dues upon

> submitting written notice during August of any given year. . . . Charging Parties have not denied that they received a copy of the Continuing Membership Application. Moreover, the MEA bylaws contain language describing the procedure for resignation from membership. Those bylaws are posted on the MEA website and are available to the general public.
>
> . . . There is no evidence that Charging Parties requested information about the procedure for resigning before they submitted letters of resignation. After receiving Charging Parties' letters of resignation, Respondent informed them that, because they did not submit their resignations during the August window period, they could not resign at that time. Respondents provided each of the Charging Parties with information about resigning after they attempted to resign.
>
> While Respondents did not actively publicize the procedure for resignation, there is no evidence that either Respondent declined to provide the necessary information about resignation to any requesting union member. Indeed, the record indicates that the information was provided to any union member who requested it.

The MERC thus identified enough avenues that respondents made available for their members to discover pertinent resignation procedures to put to rest the allegation that respondents engaged in some kind of campaign to exploit its members' ignorance in that regard.

For these reasons, we conclude that the MERC correctly concluded that respondents did not fall short of their duty of fair representation by declining to take the initiative to provide information to their members on applicable resignation procedures.

III. CONCLUSION

To summarize, we hold that establishing a broad right to refrain from union affiliation is reasonably

related to the legislatively identified public need for *voluntary* unionism. We conclude that, in a proper exercise of jurisdiction, the MERC committed no substantial or material error of law in concluding that respondents' resignation windows of one month per year constituted unfair labor practices under PERA as recently amended and that such windows exceeded matters of internal union policy and governance. We further conclude that the MERC did not commit a substantial and material error of law, or plain error, when it decided these cases without taking it upon itself to develop and resolve in respondents' favor arguments relating to constitutional rights of expression and association when it concluded that the right of a union member to resign union membership at will, absent a clear, explicit, and unmistakable waiver of that right, did not work a substantial impairment of the obligations of contract. Finally, we conclude that the MERC committed no legal error by treating the charge filed in March 2014 (Docket No. 331875) as timely relating to a grievance originating with the MEA's October 2013 communication.

Affirmed.

BECKERING, P.J., and O'CONNELL and SWARTZLE, JJ., concurred.

PEOPLE v TACKMAN

PEOPLE v HORNER

PEOPLE v VANTOL

Docket Nos. 330654, 330656, and 331874. Submitted March 8, 2017, at Lansing. Decided May 2, 2017, at 9:05 a.m.

In Docket No. 330654, Vernon B. Tackman, Jr., was charged in the Bay Circuit Court with delivery or manufacture of 5 kilograms or more but less than 45 kilograms or 20 plants or more but fewer than 200 plants of marijuana, MCL 333.7401(2)(d)(*ii*), second or subsequent offense, MCL 333.7413(2); possession of firearm ammunition by a felon, MCL 750.224f(6); maintaining a drug house, MCL 333.7405(1)(d) and MCL 333.7406, second or subsequent offense, MCL 333.7413(2); and possession of less than 25 grams of a narcotic, MCL 333.7403(2)(a)(*v*), second or subsequent offense, MCL 333.7413(2), in connection with the seizure of 21 marijuana plants, 81.1 grams of marijuana, and other items from his home after the execution of a search warrant by the Hampton Township Police Department.

In Docket No. 330656, Terry L. Horner was charged in the Bay Circuit Court with delivery or manufacture of 5 kilograms or more but less than 45 kilograms or 20 plants or more but fewer than 200 plants of marijuana, MCL 333.7401(2)(d)(*ii*), second or subsequent offense, MCL 333.7413(2), and possession of firearm ammunition by a felon, MCL 750.224f(6), in connection with the seizure of 36 marijuana plants, firearm ammunition, and other items from his home after the execution of a search warrant by the same police department that was involved in the search at Tackman's house.

In Docket No. 331874, Steven M. Vantol was charged in the Bay Circuit Court with the manufacture of less than 5 kilograms or fewer than 20 plants of marijuana, MCL 333.7401(2)(d)(*iii*), in connection with his presence at Horner's house—in the garage where the marijuana was located—when the police executed the search warrant.

Both Tackman and Horner were registered qualifying patients and registered primary caregivers under the Michigan Medical

Marihuana Act (MMMA), MCL 333.26421 *et seq*. After receiving his registry identification cards but before the seizure that resulted in the instant charges, Tackman had been found guilty of delivery or manufacture of less than 5 kilograms or fewer than 20 plants of marijuana, MCL 333.7401(2)(d)(*iii*); the terms of probation in that case allowed him to continue acting as a registered primary caregiver until August 2014. Similarly, after receiving his cards but before the seizure that resulted in the instant charges, Horner had pleaded guilty of maintaining a drug house and delivery or manufacture of less than 5 kilograms or fewer than 20 plants of marijuana, MCL 333.7401(2)(d)(*iii*). Tackman moved to dismiss the manufacture and delivery charge in this case, arguing that he was immune from prosecution under MCL 333.26424(a) and (b) of the MMMA because the amount of marijuana seized did not exceed the amount he was allowed to possess under the MMMA as a qualifying patient and registered primary caregiver. The court, Harry P. Gill, J., rejected the prosecution's argument that Tackman's caregiver card was invalid on the date the warrant was executed because the unrelated 2014 felony conviction disqualified him from possessing a caregiver card. The court reasoned that the caregiver card was still valid for purposes of immunity under the MMMA because the Secretary of State had failed to revoke it after the unrelated 2014 felony. The court accordingly granted Tackman's motion and dismissed the charge, concluding that Tackman had immunity from prosecution because he had a valid primary caregiver card and the amount of marijuana seized was within the limits allowed under the MMMA. Horner moved to dismiss the manufacture and delivery charge in this case on grounds similar to those asserted by Tackman; Horner also challenged the search warrant and moved to suppress the evidence seized on that basis. The same court dismissed the charges against Horner, reasoning that although Horner had a felony conviction, which made him ineligible for a caregiver card under the MMMA, the card was valid for purposes of immunity because the Secretary of State had not revoked Horner's card. Vantol moved to suppress the evidence seized during the search of Horner's house, and he also moved to dismiss the charge brought against him, arguing that he was acting as Horner's agent at the time of the offense and that he therefore was entitled to the same caregiver immunity as Horner. The court did not address Vantol's suppression motion, but it dismissed the charge, reasoning that Horner's caregiver immunity

extended to Vantol. The prosecution appealed in each case, and the Court of Appeals consolidated the cases.

The Court of Appeals *held*:

1. MCL 333.26427(a) provides that the medical use of marijuana is allowed in Michigan to the extent that it is carried out in accordance with the provisions of the MMMA. MCL 333.26424(a) and (b) of the MMMA grant immunity from criminal prosecution and civil penalties to qualifying patients and primary caregivers. To that end, the MMMA allows registered qualifying patients and registered primary caregivers to legally possess a certain amount of usable marijuana and marijuana plants. Under MCL 333.26423(k) of the MMMA, the terms "primary caregiver" or "caregiver" are defined as a person who is at least 21 years old and who has agreed to assist with a patient's medical use of marijuana and who has not been convicted of any felony within the past 10 years and has never been convicted of any felony involving illegal drugs or a felony that is an assaultive crime.

2. MCL 333.26426(a) and (d) require the Department of Licensing and Regulatory Affairs to issue a registry identification card to a qualifying patient—and to issue a registry identification card to the primary caregiver, if any, who is named in a qualifying patient's approved application—if certain conditions are met. Under MCL 333.26426(c), the department may deny an application or renewal if it determines that the applicant provided falsified information, and under MCL 333.26426(*l*), a primary caregiver's card must be revoked if the caregiver sells marijuana to someone who is not allowed the medical use of marijuana.

3. The trial court erred by dismissing the respective charges against each defendant. Even though Tackman and Horner each possessed a caregiver card at the time their houses were searched, neither defendant was entitled to the caregiver immunity under MCL 333.26424(b) because both had been convicted of a felony before the 2014 search of their homes, contrary to the MMMA definition of caregiver. Their respective caregiver cards were accordingly invalid even though the department had not formally revoked their cards, and the trial court erred by concluding that a caregiver card remains valid until revoked or not renewed by the department. Tackman and Horner were also not entitled to immunity as qualifying patients under MCL 333.2624(a) because it was undisputed that each possessed more

than the amount allowed a patient under the MMMA. Because Horner was not entitled to immunity as a qualifying patient or as a primary caregiver, the trial court erred by extending derivative immunity to Vantol.

Reversed and remanded.

CONTROLLED SUBSTANCES — MICHIGAN MEDICAL MARIHUANA ACT — SECTION 4 IMMUNITY — VALIDITY OF PRIMARY CAREGIVER CARD — FELONY CONVICTION AFTER CARD ISSUED.

MCL 333.26424(b) of the Michigan Medical Marihuana Act, MCL 333.26421 *et seq*., grants immunity from criminal prosecution and civil penalties to primary caregivers who possess a registry identification card; MCL 333.26423(k) defines the terms "primary caregiver" or "caregiver" as a person who is at least 21 years old and who has agreed to assist with a patient's medical use of marijuana and who has not been convicted of any felony within the past 10 years and has never been convicted of any felony involving illegal drugs or a felony that is an assaultive crime; a licensed primary caregiver is not entitled to immunity under MCL 333.26424(b) if he or she is convicted of a felony after receiving the caregiver card regardless of whether the Department of Licensing and Regulatory Affairs has revoked the card.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Kurt C. Asbury*, Prosecuting Attorney, and *Sylvia L. Linton*, Assistant Prosecuting Attorney, for the people.

Reyes & Bauer (by *Matthew L. Reyes*) for Vernon B. Tackman, Jr., and Terry L. Horner.

Kenneth M. Malkin for Steven M. Vantol.

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

PER CURIAM. In these consolidated appeals, the prosecution appeals as of right the trial court's orders dismissing the criminal charges that had been filed against defendants Vernon B. Tackman, Jr., Terry L. Horner, and Steven M. Vantol, under the provisions of

the Michigan Medical Marihuana[1] Act (MMMA), MCL 333.26421 *et seq*.[2] We reverse in all three cases and remand for proceedings not inconsistent with this opinion.

I. DOCKET NOS. 330654 AND 330656

Tackman was issued a registry identification card on October 19, 2011, allowing him to use medical marijuana as a patient. Sometime before September 10, 2014, Tackman also became a registered medical marijuana caregiver. Although the number of patients he served overall is unclear, Tackman asserted that on September 10, 2014, he served two qualifying patients who possessed medical marijuana cards. On or about May 1, 2014, Tackman was convicted of delivery or manufacture of less than 5 kilograms or fewer than 20 plants of marijuana, MCL 333.7401(2)(d)(*iii*), a felony. Tackman was placed on probation under terms that allowed him to continue being a caregiver until the middle of August 2014.

Horner was issued a registry identification card for personal use of medical marijuana in 2012 and 2013. In 2013, he was also granted an MMMA registry card to act as a caregiver for up to five patients. On or about November 1, 2013, Horner was convicted of maintaining a drug house, MCL 333.7405(1)(d), and the felony

[1] The spelling "marihuana" will be used when quoting the MMMA in deference to the spelling employed therein. Otherwise, the more common spelling, i.e., "marijuana," will be used. See *People v Carruthers*, 301 Mich App 590, 593 n 1; 837 NW2d 16 (2013).

[2] When discussing the MMMA, we refer to the most recent version of the statute. See MCL 333.26421 *et seq*., as amended by 2016 PA 283. We note that any language or organizational differences between the MMMA version in effect during the period relevant to the charged offenses and the current version of the MMMA do not affect our analysis of the issues.

of delivery or manufacture of less than 5 kilograms or fewer than 20 plants of marijuana, MCL 333.7401(2)(d)(*iii*). Horner was placed on probation and the court delayed sentencing. The terms of Horner's probation prohibited him from "us[ing] or possess[ing] any controlled substances or drug paraphernalia, unless prescribed for [him] by a licensed physician, or be[ing] with anyone [he] know[s] to possess these items" but allowed Horner to use marijuana "so long as he has a valid medical marijuana card."

On or about September 9, 2014, Hampton Township Police Officer John May, Jr., drove by Tackman's home and noted the smell of marijuana coming from the home. He also noted that the garage door was covered with plywood and that there were three air conditioners on the east side of the garage. May contacted Tackman's probation officer and the two of them searched Tackman's home on September 10, 2014. The search revealed what May termed a marijuana "grow operation," including dehumidifiers and glass pipe, suspected (and later confirmed) cocaine residue, 36 marijuana plants, pieces of marijuana, other marijuana, and ammunition for guns. From the items transported to them, the Michigan State Police crime lab identified 21 marijuana plants and 81.1 grams of marijuana. On the basis of these findings, the prosecution issued four criminal charges against Tackman as a second-offense habitual offender, MCL 769.10: (1) delivery or manufacture of 5 kilograms or more but less than 45 kilograms or 20 plants or more but fewer than 200 plants of marijuana, MCL 333.7401(2)(d)(*ii*), second or subsequent offense, MCL 333.7413(2), (2) possession of firearm ammunition by a felon, MCL 750.224f(6), (3) maintaining a drug house, MCL 333.7405(1)(d) and MCL 333.7406, second or subse-

quent offense, and (4) possession of less than 25 grams of a narcotic, MCL 333.7403(2)(a)(*v*), second or subsequent offense.

May received information from officers who had responded to an alarm at Horner's home on August 12, 2014, that they had noticed an odor of growing marijuana coming from Horner's detached garage. Another officer was in the area of Horner's home on September 9, 2014, and noted an odor of marijuana. The officer also noticed that air conditioners were running, which was suspicious in light of the cool temperature. This information was also relayed to May. May obtained a search warrant for Horner's home and executed the same on September 18, 2014. When he and other officers arrived, Vantol was inside the garage. Also inside the garage, May found 36 marijuana plants (21 of which were identified as such by the controlled substances unit), drug paraphernalia, and ammunition for a .45 caliber weapon. On the basis of these findings, Horner was charged as a third-offense habitual offender, MCL 769.11, with delivery or manufacturing of 5 kilograms or more but less than 45 kilograms or 20 plants or more but fewer than 200 plants of marijuana, MCL 333.7401(2)(d)(*ii*), second or subsequent offense, and possession of firearm ammunition by a felon, MCL 750.224f(6).

Horner's and Tackman's cases proceeded in tandem. Both Horner and Tackman moved to dismiss Count I of their respective informations, involving delivery or manufacture of marijuana, pursuant to § 4 of the MMMA, MCL 333.26424, known as the immunity provision. Both asserted that they were "licensed medical marijuana cardholder[s]" who acted as "caregiver[s]" and "possessed" and grew less than the maximum amount of medical marijuana permitted under

the MMMA. On this basis, both Horner and Tackman claimed immunity from prosecution for the delivery or manufacture of marijuana.

The prosecution admitted that Tackman was a qualifying medical marijuana patient but denied that he had a valid caregiver card on the date that his home was searched because Tackman could not act as a caregiver after August 20, 2014, under the terms of his probation. The prosecution further maintained that Tackman did not qualify for § 4 patient immunity because he had possessed more marijuana than the MMMA permitted a medical marijuana patient. Similarly, the prosecution admitted that defendant Horner was a qualifying medical marijuana patient, but denied that he had a valid caregiver card on the date that his home was searched because Horner's November 1, 2013, felony drug convictions left him ineligible for such a card.

Tackman and Horner both also moved to suppress the evidence recovered in the searches of their respective homes. Tackman argued that his probation officer lacked authority to search his home. Tackman additionally asserted that he was a licensed MMMA caregiver on the day of the search, which allowed him to legally possess the marijuana. Horner asserted that the search warrant was not supported by probable cause and that he was a "licensed medical marijuana patient . . . and . . . caregiver" on the date that his home was searched.

The trial court concluded that Horner had MMMA "immunity" because "at all times during these proceedings . . . [Horner] was vested with a caregiver card under the" MMMA, that the MMMA is not "self-effectuating," but rather "the statute" "call[s] for the

Secretary of State[3] to issue cards to various people . . . upon satisfaction of certain conditions," and that "[i]t is incumbent on the Secretary of State . . . to have procedures in place that adequately comply with" the MMMA. And the trial court concluded that "there is no dispute" that the amount of marijuana found was within the amounts authorized by the statute. Accordingly, the trial court granted Horner's motion to dismiss Count I, and then dismissed all charges against him.

The trial court similarly concluded that Tackman was immune from prosecution under the MMMA. The trial court "believe[d] it [was] incumbent upon the Secretary of State . . . to revoke [Tackman's] card in the event a felony has been entered" and found that "the Secretary of State did not revoke [Tackman's] caregiver card." Accordingly, it granted Tackman's motion to dismiss Count I, and then dismissed all charges against him. These appeals followed.

On appeal, the prosecution argues that the trial court reversibly erred by dismissing the MMMA charges against Tackman and Horner. We agree.

A trial court's factual findings relating to § 4 immunity under the MMMA are reviewed for clear error, but the attendant legal determinations are reviewed de novo. *People v Hartwick*, 498 Mich 192, 201; 870 NW2d 37 (2015). A trial court's decision on a motion to dismiss criminal charges is reviewed for an abuse of discretion, which occurs when the "decision falls outside the range of principled outcomes." *People v Nicholson*, 297 Mich

[3] Although the trial court stated that the Secretary of State is responsible for issuing registry identification cards under the MMMA, it is the Department of Licensing and Regulatory Affairs that has the authority and responsibility to do so. See MCL 333.26423(c) and MCL 333.26426(a).

App 191, 196; 822 NW2d 284 (2012). Also, "[a] trial court necessarily abuses its discretion when it makes an error of law." *People v Waterstone*, 296 Mich App 121, 132; 818 NW2d 432 (2012).

MCL 333.26427(a) of the MMMA provides that "[t]he medical use of marihuana is allowed under state law to the extent that it is carried out in accordance with the provisions of th[e] act." In addition, § 4 of the MMMA provides that qualifying patients and caregivers are allowed to possess marijuana, in relevant part, as follows:

> (a) A qualifying patient who has been issued and possesses a registry identification card is not subject to arrest, prosecution, or penalty in any manner . . . provided that the qualifying patient possesses an amount of marihuana that does not exceed a combined total of 2.5 ounces of usable marihuana and usable marihuana equivalents . . . . The privilege from arrest under this subsection applies only if the qualifying patient presents both his or her registry identification card and a valid driver license or government-issued identification card that bears a photographic image of the qualifying patient.
>
> (b) A primary caregiver who has been issued and possesses a registry identification card is not subject to arrest, prosecution, or penalty in any manner . . . for assisting a qualifying patient to whom he or she is connected through the department's registration process with the medical use of marihuana in accordance with this act. . . . This subsection applies only if the primary caregiver possesses marihuana in forms and amounts that do not exceed any of the following:
>
> (1) For each qualifying patient to whom he or she is connected through the department's registration process, a combined total of 2.5 ounces of usable marihuana and usable marihuana equivalents.
>
> (2) For each registered qualifying patient who has specified that the primary caregiver will be allowed under

> state law to cultivate marihuana for the qualifying patient, 12 marihuana plants kept in an enclosed, locked facility.

The MMMA defines the terms "primary caregiver" or "caregiver" as follows:

> [A] person who is at least 21 years old and who has agreed to assist with a patient's medical use of marihuana and who has not been convicted of any felony within the past 10 years and has never been convicted of a felony involving illegal drugs or a felony that is an assaultive crime as defined in section 9a of chapter X of the code of criminal procedure, 1927 PA 175, MCL 770.9a. [MCL 333.26423(k).]

The MMMA defines the terms "qualifying patient" or "patient" as "a person who has been diagnosed by a physician as having a debilitating medical condition." MCL 333.26423(*l*).

It is undisputed that both Tackman and Horner had been convicted of a felony before the September 2014 searches of their homes. For that reason, neither was eligible for § 4(b) caregiver immunity. That is necessarily so because MCL 333.26423(k) of the MMMA in part defines a "primary caregiver" or "caregiver" as one who "has not been convicted of any felony within the past 10 years and has never been convicted of a felony involving illegal drugs . . . ." Neither Tackman nor Horner meets that definition.

Moreover, neither Tackman nor Horner was eligible for § 4(a) patient immunity because each exceeded the "volume limitations" for a qualifying patient. See *Hartwick*, 498 Mich at 201. Again, § 4(a) specifies that patients may possess amounts that do not exceed "2.5 ounces of usable marijuana" and, if lacking a primary caregiver, up to "12 marihuana plants." But officers found 81.1 grams of marijuana and 21 marijuana

plants at Tackman's residence, and they found 21 marijuana plants at Horner's residence. The MMMA provides no basis for the trial court's conclusion that Tackman and Horner retained immunity from prosecution because their registration cards had not been officially revoked, and the court cited no MMMA provision or caselaw supporting this conclusion. Further, neither party on appeal puts forward any caselaw or statutory provision supporting that aspect of the decision below.

The MMMA states that the Department of Licensing and Regulatory Affairs must issue a registry identification card to a caregiver if a qualifying patient names the person as his or her primary caregiver and the caregiver has no more than five qualifying patients. MCL 333.26423(c); MCL 333.26426(a) and (d). "The department may deny an application or renewal . . . if [it] determines that the information provided was falsified." MCL 333.26426(c). Registry identification cards "expire 2 years after the date of issuance." MCL 333.26426(e). And a caregiver's card must be revoked if the caregiver "sells marihuana to someone who is not allowed the medical use of marihuana under" the MMMA. MCL 333.26424(*l*). We are aware of no other revocation provisions within the MMMA. The definition of "caregiver" specifically restricts that status to persons who have "not been convicted of any felony within the past 10 years" or who have not been convicted "of a felony involving illegal drugs or . . . a felony that is an assaultive crime," regardless of whether that person happened to possess a caregiver card at the time of the conviction. MCL 333.26423(k). For that reason, whether the caregiver card was revoked or not is irrelevant. Accordingly, Tackman's May 2014 conviction deprived him of caregiver status in connection with the September 2014 search of his

home and the criminal proceedings that followed. Similarly, Horner's November 2013 conviction deprived him of caregiver status when the September 2014 search of his home took place.[4]

Instead of relying on the MMMA itself, the trial court looked beyond it and analogized the department's failure to revoke a caregiver card to the failure of the Secretary of State to revoke a driver's license following a driving offense that requires such revocation. In fact, the record contains no evidence of such a Secretary of State procedure. The Michigan Vehicle Code, MCL 257.1 *et seq*., does require that when a person has a certain number of operating-while-intoxicated convictions within a certain period, "the secretary of state shall revoke [the offender's] operator's . . . license . . . ." MCL 257.303(2)(c). And, of course, a person is subject to criminal prosecution for driving with a revoked license. MCL 257.904(1) and (3). But there is no similar scheme within the MMMA that criminalizes a person acting as a caregiver after a felony conviction. Rather, manufacture and delivery of marijuana remains a crime in this state, *Hartwick*, 498 Mich at 209; MCL 333.7401(2)(d), but a person may be immune from prosecution by complying with § 4 of the MMMA. Accordingly, the revocation of an MMMA caregiver card has no bearing on the criminality of delivery and manufacture of marijuana. Therefore, the trial court's likening of the revocation of a caregiver card to the revocation of a driver's license was a poor analogy. Because neither defendant qualified for the MMMA's § 4, the trial court abused its discretion by

[4] If the Department of Licensing and Regulatory Affairs issued Horner another caregiver card on August 12, 2015, as he claims, it would have done so in error because, as explained, he did not meet the definition of "caregiver."

dismissing the charges against Tackman and Horner on this basis. See *Waterstone*, 296 Mich App 132.

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As already stated, when May executed the search warrant at Horner's home on September 18, 2014, he found Vantol inside Horner's garage. Vantol, Horner's neighbor, admitted to watering the marijuana plants at Horner's home on several occasions when Horner was gone. Vantol was thereafter charged with one felony count of manufacturing less than 5 kilograms or fewer than 20 plants of marijuana, contrary to MCL 333.7401(2)(d)(*iii*), second offense. There is no evidence that Vantol was ever a qualifying patient or caregiver under the MMMA.

Vantol moved to suppress the evidence recovered in the search of Horner's home, asserting his own standing to challenge the warrant for lack of probable cause. Vantol further argued that the trial court should quash the information because the prosecution failed to establish probable cause at the preliminary hearing that he had manufactured marijuana. The trial court granted Vantol's motion to dismiss pursuant to the MMMA. The trial court explained that because Horner possessed a valid caregiver card that had not been officially revoked, Horner was legitimately in business for purposes of the MMMA and thus that Vantol came under the protections of the MMMA. The prosecution agreed with the trial court's position that if its ruling on Horner's case was upheld, it would leave no basis for proceeding against Vantol.

On appeal, the prosecution asserts that the trial court reversibly erred by granting Vantol's motion to dismiss, because Vantol was neither a qualifying patient nor a caregiver under the MMMA and was

therefore not entitled to any protections or immunities available under it. We agree.

Patients and caregivers who comply with the MMMA may be immune from prosecution under § 4 of the MMMA. *Hartwick*, 498 Mich at 209. The MMMA defines the terms "qualifying patient" or "patient" as "a person who has been diagnosed by a physician as having a debilitating medical condition." MCL 333.26423(*l*). The MMMA defines the terms "primary caregiver" or "caregiver" as "a person . . . at least 21 years old . . . who has agreed to assist with a patient's medical use of marihuana and who has not been convicted of any felony within the past 10 years and has never been convicted of a felony involving illegal drugs or a felony that is an assaultive crime . . . ." MCL 333.26423(k).

Section 4(a) of the MMMA governs patient immunity. Section 4(b) of the MMMA governs caregiver immunity. To claim immunity under these provisions, a putative patient or caregiver must show "by a preponderance of the evidence that, at the time of the charged offense," he or she "possessed a valid registry identification card," complied with the § 4 "volume limitations," "stored any marijuana plants in an enclosed, locked facility," and "was engaged in the medical use of marijuana." *Hartwick*, 498 Mich at 201. Section 4(a) specifies that a patient may possess amounts that do not exceed "2.5 ounces of usable marijuana" and, if lacking a caregiver, up to "12 marihuana plants." Section 4(b) specifies that a caregiver may possess amounts that do not exceed "2.5 ounces of usable marihuana" and "12 marihuana plants" per "qualifying patient."

In this case, Vantol moved to dismiss the charge brought against him under § 4 because he was acting

as Horner's agent at the time of the instant offenses, thus hoping that Horner's compliance with the MMMA would extend immunity to him. The trial court agreed[5] and granted his motion. But, as explained earlier in this opinion, Horner did not in fact qualify for MMMA immunity because he possessed more marijuana than allowed a single patient, and Horner did not meet the definition of a "caregiver." Because Horner did not qualify for immunity, no agent of his may claim immunity derivatively from Horner.

Tackman, Horner, and Vantol raise additional arguments that were never addressed by the trial court. Because appellate review is limited to issues actually decided by the trial court, we need not address those issues on appeal. *Heydon v MediaOne of Southeast Mich, Inc*, 275 Mich App 267, 278; 739 NW2d 373 (2007).

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

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

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[5] The trial court did not expressly state that it found that Vantol had in fact acted as Horner's "agent," but because Vantol's motion was premised on an agency argument, the matter seems little in doubt.

In re LFOC

Docket No. 334870. Submitted April 5, 2017, at Detroit. Decided May 4, 2017, at 9:00 a.m.

AEO and JAS filed a motion in the Wayne Circuit Court, Family Division, requesting that the court make the special findings required to enable their minor child, LFOC, to petition the federal government for special immigrant juvenile (SIJ) status. LFOC was an undocumented juvenile immigrant from Honduras. AEO was LFOC's mother. AEO was married to JAS, and after the parental rights of LFOC's biological father were terminated, the court granted AEO and JAS's petition for JAS's stepparent adoption of LFOC. LFOC was placed in AEO and JAS's home. The court, Christopher J. Dingell, J., concluded at the initial hearing on the motion that it did not have the power or the authority to make the special findings. According to the court, only the federal government could make the requested findings and classify an individual on the basis of alienage. AEO and JAS moved for reconsideration, and the court again stated that it was without the authority to make the findings. The court nonetheless denied the motion on the basis that the evidence did not satisfy the criteria for SIJ status. AEO and JAS appealed.

The Court of Appeals *held*:

1. An unmarried and undocumented juvenile under the age of 21 may apply to the United States Citizenship and Immigration Services (USCIS) for SIJ status if a state court has made certain special, or predicate, findings under 8 USC 1101(a)(27)(J). There are no procedural guidelines for a state court's method of making the special findings; the only requirement is that the state court meets the federal definition of a "juvenile court" found in 8 CFR 204.11(a) (2017); that is, a state court must be a court in the United States having jurisdiction under state law to make judicial determinations about the custody and care of juveniles. Predicate findings require a court to determine whether (1) the juvenile immigrant has been declared dependent on a United States juvenile court, (2) reunification with one or both of the juvenile immigrant's parents is not viable because of abuse, neglect, abandonment, or a similar basis under state law, and (3)

it would not be in the juvenile immigrant's best interests to be returned to the immigrant's or his or her parents' previous country of nationality or country of last habitual residence. In this case, the trial court—the Wayne Circuit Court, Family Division—clearly satisfied the definition of the term "juvenile court" in the Code of Federal Regulations. Because the trial court in this case was a juvenile court for purposes of making the predicate findings, it erred by concluding that it did not have the authority to make the special findings.

2. The process of classifying a juvenile immigrant as an SIJ is a hybrid proceeding requiring first that a state court meeting the federal requirements of a juvenile court make certain special findings and, second, that the federal government review the findings and determine whether the juvenile immigrant will be classified as an SIJ. A state court is directed to make the special findings because it has special expertise and institutional competence to determine issues of abuse and neglect, to evaluate the best-interest factors, and to ensure safe and appropriate custodial arrangements. Although the state court has authority to issue findings regarding SIJ status, the federal government retains sole authority to award SIJ status to a juvenile immigrant.

3. Abuse, neglect, or abandonment by both parents is not required for the purpose of a state court's predicate findings in SIJ cases. The USCIS has determined that abuse, neglect, or abandonment by only one parent is sufficient to support that aspect of the predicate findings.

4. The appropriate remedy when the trial court incorrectly determined that it did not have the authority to issue the predicate SIJ findings is to reverse and remand for consideration on the merits. This approach recognizes the practice of giving due regard to a trial court's opportunity to assess the credibility of witnesses who appear before it.

Reversed and remanded for consideration on the merits of JAS and AEO's motion for special findings.

1. CHILDREN — IMMIGRATION — SPECIAL IMMIGRANT JUVENILE STATUS — PROCEDURE FOR FINDINGS.

A state court meeting the definition of "juvenile court" in 8 CFR 204.11(a) (2017) has the authority and the obligation to make special, or predicate, findings in cases involving the issue of special immigrant juvenile (SIJ) status when those findings are requested; there are no guidelines or express requirements for the hearing process in which the findings are to be determined;

the ultimate authority to grant SIJ status to a juvenile rests solely with the federal government.

2. CHILDREN — IMMIGRATION — SPECIAL IMMIGRANT JUVENILE STATUS — STATE JUVENILE COURT'S PREDICATE FINDINGS.

Making special or predicate findings regarding special immigrant juvenile status requires the court to review the evidence to determine whether it is sufficient to support finding that (1) the juvenile immigrant has been declared dependent on a United States juvenile court, (2) reunification with the juvenile's parent or parents is not viable because of abuse, neglect, abandonment, or a similar basis under state law, and (3) it would not be in the juvenile's best interests to be returned to the juvenile's or his or her parents' previous country of nationality or last habitual residence.

3. CHILDREN — IMMIGRATION — SPECIAL IMMIGRANT JUVENILE STATUS — ABUSE, NEGLECT, OR ABANDONMENT BY ONLY ONE PARENT.

Special immigrant juvenile status may be achieved even when only one of a juvenile's parents has abused, neglected, or abandoned the juvenile; a juvenile's special immigrant juvenile status does not require that both parents have abused, neglected, or abandoned the juvenile.

4. CHILDREN — IMMIGRATION — SPECIAL IMMIGRANT JUVENILE STATUS — APPELLATE REVIEW.

When a state juvenile court has failed to make the requested special findings involving the question of special immigrant juvenile status, remand is appropriate; an appellate court ought not itself make the special findings even when the record is adequate for doing so because the appellate court's role is to review a lower court's factual findings for clear error, giving due regard to the lower court's opportunity to assess the credibility of witnesses who appeared before it.

Michigan Immigrant Rights Center (by *Darren L. Miller*) for AEO and JAS.

Amici Curiae:

Elinor Jordan for Samaritas and Bethany Christian Services of Michigan.

Before: SAWYER, P.J., and SAAD and RIORDAN, JJ.

PER CURIAM. Petitioners, JAS and AEO, appeal as of right an order denying their motion for special findings on the issue of "special immigrant juvenile" (SIJ) status for the minor child, LFOC, in this stepparent adoption case. We reverse the trial court's determination that it lacked authority to make those findings and remand for consideration of petitioners' motion on the merits.

LFOC is an undocumented juvenile immigrant from Honduras. AEO, the mother of LFOC, is married to JAS; they live in Michigan. LFOC's biological father is CCO. JAS and AEO filed a petition for stepparent adoption of LFOC by JAS. Following a hearing, the trial court terminated CCO's parental rights to LFOC, granted the request for a stepparent adoption, and placed LFOC in petitioners' home. Petitioners then filed a motion for special findings on the issue of LFOC's SIJ status. In particular, petitioners asked the trial court to make the following findings:

> 1. That [LFOC] has been declared dependent upon a juvenile court;
>
> 2. That reunification with one or both of [LFOC's] parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law;
>
> 3. That it is not in [LFOC's] best interest to be returned to his country of origin; and
>
> 4. Any other relief this Court deems just and proper.

Petitioners sought these findings so that LFOC could then submit a request to the United States Citizenship and Immigration Services (USCIS), a division of the United States Department of Homeland Security (USDHS), for SIJ status pursuant to 8 USC 1101(a)(27)(J). The trial court denied the request, stating, in relevant part, that it lacked authority to issue the requested findings.

On appeal, petitioners argue that the trial court erred by concluding that it lacked authority to make the requested factual findings pertinent to the issue of SIJ status. We agree.

"Questions of law, including statutory interpretation, are reviewed de novo on appeal." *Gorman v American Honda Motor Co, Inc*, 302 Mich App 113, 116; 839 NW2d 223 (2013). This standard of review applies to the interpretation of federal statutes and regulations:

> Statutory interpretation is a question of law we review de novo, as is the interpretation of administrative regulations. This standard applies to the interpretation of federal statutes and regulations, though reasonable administrative interpretations of regulations operating as statutory gap-fillers are entitled to deference. Clear and unambiguous statutory language is given its plain meaning, and is enforced as written. [*In re Petition of Attorney General for Investigative Subpoenas*, 274 Mich App 696, 698; 736 NW2d 594 (2007) (quotation marks and citations omitted).]

Jurisdictional issues are also reviewed de novo. *Pontiac Food Ctr v Dep't of Community Health*, 282 Mich App 331, 335; 766 NW2d 42 (2009). A trial court's factual findings are reviewed for clear error. See MCR 2.613(C); *In re ALZ*, 247 Mich App 264, 271; 636 NW2d 284 (2001). "A finding is clearly erroneous if, although there is evidence to support it, we are left with a definite and firm conviction that a mistake was made." *In re ALZ*, 247 Mich App at 271-272.

At the hearing on the motion for special findings on the issue of SIJ status, the trial court initially noted that "classification based upon alienage is reserved solely for the federal government, so I'm not supposed to pay attention to that." The trial court went on to recognize that "[h]ere the request I have asks me to do

something that's at least slightly different from that." The trial court then described the findings it was being asked to make and concluded that it had difficulty making those findings with what had been presented to the court. The trial court entered an order finding that the criteria for SIJ status had not been satisfied. At the hearing on petitioners' motion for reconsideration, the trial court again stated that only the federal government may classify on the basis of alienage and stated that the court lacked the "power" or "authority" to make the requested decisions. Given that the trial court stated that it lacked authority to make findings on the issue of SIJ status, we agree with petitioners that it is necessary to address whether a trial court has such authority.

"The Immigration and Nationality Act of 1990 (Act) first established SIJ status as a path for resident immigrant children to achieve permanent residency in the United States." *In re Estate of Nina L*, 2015 Ill App 152223, ¶ 15; 397 Ill Dec 279; 41 NE3d 930 (2015).[1] 8 USC 1101(a)(27)(J) defines a "special immigrant" to include:

> an immigrant who is present in the United States—
>
> (i) who has been declared dependent on a juvenile court located in the United States or whom such a court has legally committed to, or placed under the custody of, an agency or department of a State, or an individual or entity appointed by a State or juvenile court located in the

[1] "When interpreting federal statutes, we may look to decisions from other jurisdictions for guidance." *In re Lampart*, 306 Mich App 226, 235 n 6; 856 NW2d 192 (2014). Although not binding, the decisions of courts from other states may be considered as persuasive authority. See *K & K Constr, Inc v Dep't of Environmental Quality*, 267 Mich App 523, 559 n 38; 705 NW2d 365 (2005). Because there is no Michigan caselaw addressing the issues in this case, it is necessary to consider authorities from other jurisdictions.

> United States, and whose reunification with 1 or both of the immigrant's parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law;
>
> (ii) for whom it has been determined in administrative or judicial proceedings that it would not be in the alien's best interest to be returned to the alien's or parent's previous country of nationality or country of last habitual residence; and
>
> (iii) in whose case the Secretary of Homeland Security consents to the grant of special immigrant juvenile status, except that—
>
> (I) no juvenile court has jurisdiction to determine the custody status or placement of an alien in the custody of the Secretary of Health and Human Services unless the Secretary of Health and Human Services specifically consents to such jurisdiction; and
>
> (II) no natural parent or prior adoptive parent of any alien provided special immigrant status under this subparagraph shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter[.]

"Juvenile court means a court located in the United States having jurisdiction under State law to make judicial determinations about the custody and care of juveniles." 8 CFR 204.11(a) (2017). Following the issuance of special, or predicate, findings by a juvenile court, a juvenile may file a petition with the USCIS for SIJ classification. See 8 CFR 204.11(b) (2017); *Recinos v Escobar*, 473 Mass 734, 735; 46 NE3d 60 (2016); *In re Diaz v Munoz*, 118 AD3d 989, 989; 989 NYS2d 52 (2014). 8 CFR 204.11(c) (2017) provides:

> Eligibility. An alien is eligible for classification as a special immigrant under section 101(a)(27)(J) of the Act if the alien:
>
> (1) Is under twenty-one years of age;

(2) Is unmarried;

(3) Has been declared dependent upon a juvenile court located in the United States in accordance with state law governing such declarations of dependency, while the alien was in the United States and under the jurisdiction of the court;

(4) Has been deemed eligible by the juvenile court for long-term foster care;

(5) Continues to be dependent upon the juvenile court and eligible for long-term foster care, such declaration, dependency or eligibility not having been vacated, terminated, or otherwise ended; and

(6) Has been the subject of judicial proceedings or administrative proceedings authorized or recognized by the juvenile court in which it has been determined that it would not be in the alien's best interest to be returned to the country of nationality or last habitual residence of the beneficiary or his or her parent or parents; or

(7) On November 29, 1990, met all the eligibility requirements for special immigrant juvenile status in paragraphs (c)(1) through (c)(6) of this section, and for whom a petition for classification as a special immigrant juvenile is filed on Form I–360 before June 1, 1994.

Also, as explained in 8 CFR 204.11(a):

Eligible for long-term foster care means that a determination has been made by the juvenile court that family reunification is no longer a viable option. A child who is eligible for long-term foster care will normally be expected to remain in foster care until reaching the age of majority, unless the child is adopted or placed in a guardianship situation. For the purposes of establishing and maintaining eligibility for classification as a special immigrant juvenile, a child who has been adopted or placed in [a] guardianship situation after having been found dependent upon a juvenile court in the United States will continue to be considered to be eligible for long-term foster care.

As stated in *Estate of Nina L*, 2015 Ill App 152223, ¶ 16:

> The requirement of eligibility for long-term foster care was modified in 2008 and, as presently formulated, the statute now requires that a state or juvenile court place the minor in the custody of either (i) a state agency or department or (ii) an individual or entity appointed by the court and that the dependency determination be due to a finding that reunification with one or both parents is not viable due to abuse, neglect or abandonment. Separately, the court must also find that return to the minor's country of nationality is not in the minor's best interest. [Citations omitted.]

See also *HSP v JK*, 223 NJ 196, 209; 121 A3d 849 (2015) (noting that the 2008 amendment of the federal statute "liberalized the requirements for SIJ status by eliminating the requirement that the child be eligible for long-term foster care").

Also, the "USCIS, the agency charged with administering the Act, including applications for SIJ status, has taken the position that abuse, neglect or abandonment by one parent [as opposed to both parents] is sufficient for purposes of SIJ predicate findings." *Estate of Nina L*, 2015 Ill App 152223 at ¶ 26. See also *id*. at ¶¶ 23-26 (noting a split of authority on the issue but concluding that abuse, neglect, or abandonment by only one parent is sufficient to support the predicate finding).

In short, 8 USC 1101(a)(27)(J) and 8 CFR 204.11 (2017) afford "undocumented children, under the jurisdiction of a juvenile court, the ability to petition for special immigrant juvenile status in order to obtain lawful permanent residence in the United States." *In re Luis G*, 17 Neb App 377, 385; 764 NW2d 648 (2009); see also *In re JJXC*, 318 Ga App 420, 424; 734 SE2d 120 (2012) ("Federal law provides a path to lawful permanent residency in the United States to resident alien children who qualify for 'special immigrant juve-

nile' (SIJ) status."). "Although the juvenile court determines whether the evidence supports the findings, the final decision regarding SIJ status rests with the federal government, and, as shown, the child must apply to that authority." *In re JJXC*, 318 Ga App at 424-425. Predicate factual findings of the state juvenile court are used to petition for SIJ status in the federal system. See *In re Luis G*, 17 Neb App at 385; *In re Diaz*, 118 AD3d at 991.

> Implementing regulations require that an application for SIJ status attach an order from a state juvenile court containing the findings as set forth in the statute. Once an order containing the required findings is entered, the juvenile may apply to the U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS) for SIJ status. At the same time, the juvenile files an application to become a lawful permanent resident. [*Estate of Nina L*, 2015 Ill App 152223, ¶ 18 (citation omitted).]

"If the application is granted, the juvenile may become a lawful permanent resident who, after five years, is eligible to become a United States citizen. Denial of SIJ status renders the applicant subject to deportation." *Estate of Nina L*, 2015 Ill App 152223, ¶ 19 (citation omitted).

It is therefore clear that a state juvenile court has authority to issue factual findings pertinent to a juvenile's SIJ status. As explained in *In re JJXC*, 318 Ga App at 425:

> Thus, the juvenile court is charged with making the factual inquiry relevant to SIJ status when an unmarried, resident alien child is found to be dependent on the court. The SIJ statute affirms the institutional competence of state courts as the appropriate forum for child welfare determinations regarding abuse, neglect, or abandonment, and a child's best interests. Accordingly, courts in

> other states have held that a juvenile court errs by failing to consider a request for SIJ findings. [Quotation marks and citations omitted.]

Likewise, in *HSP*, 223 NJ at 209, it was observed that "[t]he process for obtaining SIJ status is a unique hybrid procedure that directs the collaboration of state and federal systems." (Quotation marks and citations omitted.) The ultimate determination whether to grant SIJ status to a juvenile "rests squarely with the federal government. Congress chose to rely on state courts to make initial factual findings because of their special expertise in making determinations as to abuse and neglect issues, evaluating the best interest factors, and ensuring safe and appropriate custodial arrangements." *Id*. at 211 (quotation marks, brackets, and citation omitted). That is, the federal statute

> implements a two-step process in which a state court makes predicate factual findings—soundly within its traditional concern for child welfare—relative to a juvenile's eligibility. The juvenile then presents the family court's factual findings to USCIS, which engages in a much broader inquiry than state courts, and makes the ultimate decision as to whether or not the juvenile's application for SIJ status should be granted. Thus, the findings made by the state court only relate to matters of child welfare, a subject traditionally left to the jurisdiction of the states. All immigration decisions remain in the hands of USCIS, the agency charged with administering the [federal immigration statute]. [*Id*. at 212 (quotation marks and citation omitted).]

See also *Recinos*, 473 Mass at 738 (noting that the juvenile court's special findings are limited to child welfare determinations and that the juvenile court is not to engage in an immigration analysis or decision). Also, "courts around the country hear SIJ evidence in a variety of settings, including custody proceedings,

adoption petitions and probate issues." *Simbaina v Bunay*, 221 Md App 440, 454; 109 A3d 191 (2015). "The federal statute places no restriction on what is an appropriate proceeding or how these SIJ factual findings should be made. The only limitation is that the court entering the findings fit the federal definition of a 'juvenile court.' " *Id*. at 455.

In the present case, the trial court erred to the extent that it found that it lacked authority to make predicate factual findings pertaining to the issue of SIJ status. The trial court's expression of concern that only the federal government may classify on the basis of alienage disregarded the limited nature of the findings to be made by a state juvenile court in the SIJ context. That is, as explained, a juvenile court's findings are limited to areas falling within the institutional competence of such courts: child welfare determinations concerning abuse, neglect, and abandonment, as well as the child's best interests. *HSP*, 223 NJ at 211; *In re JJXC*, 318 Ga App at 425. The ultimate immigration decision remains with the federal government, *HSP*, 223 NJ at 212; *In re JJXC*, 318 Ga App at 424-425, and the state juvenile court is not allowed to engage in an immigration analysis or decision, *Recinos*, 473 Mass at 738.

Also, the trial court in this case qualifies as a juvenile court under the federal definition, i.e., "a court located in the United States having jurisdiction under State law to make judicial determinations about the custody and care of juveniles." 8 CFR 204.11(a) (2017). "When determining which court qualifies as a juvenile court under the Federal statute, it is the function of the State court and not the designation that is determinative." *Recinos*, 473 Mass at 738. For example, "[i]n Massachusetts, the Juvenile Court and the Probate and Family Court both have jurisdiction to make

judicial determinations about the care and custody of juveniles despite only one court being designated as a juvenile court." *Id*. In Michigan, the family division of the circuit court has jurisdiction over adoption cases. See MCL 600.1021(1)(b). The trial court exercised its jurisdiction in this case by terminating CCO's parental rights to LFOC, granting a stepparent adoption to JAS, and placing LFOC in the home of JAS and AEO. Because the trial court qualifies as a juvenile court under the federal definition, it possesses the authority to issue predicate factual findings pertinent to the issue of SIJ status in this case. See 8 USC 1101(a)(27)(J); 8 CFR 204.11 (2017); *HSP*, 223 NJ at 211-212; *In re JJXC*, 318 Ga App at 425. Therefore, the trial court erred to the extent that it concluded that it lacked authority to issue such findings.

Because the trial court suggested that it lacked authority to issue findings pertinent to SIJ status, the proper remedy is to remand the case to the trial court for it to make the relevant SIJ findings on the basis of the facts and law. The trial court's reasoning is somewhat unclear and could arguably be interpreted to suggest that the trial court was declining to make the requested findings on the merits. But given the additional language used by the court suggesting that it lacked authority to issue the requested findings, we remand the case to the trial court to consider and decide the motion. Such a remedy was granted in *In re JJXC*, 318 Ga App at 425-426. In the instant case, the trial court on remand shall review the matter and make relevant findings in light of this Court's conclusion that the trial court has authority to make findings pertinent to the issue of SIJ status.

Amici curiae suggest that this Court should issue the requested findings itself, citing cases in which an

appellate court alone made findings on the basis of the lower court record. See, e.g., *In re Diaz*, 118 AD3d at 991. But we conclude that the remedy of remanding the case to the trial court to review the case and to make relevant findings is more appropriate. Such a remedy is consistent with that afforded in *In re JJXC*, 318 Ga App at 426, and is more in keeping with this Court's appellate role of reviewing the factual findings of lower courts for clear error, giving due regard to the special opportunity of the trial court to assess the credibility of witnesses who appeared before it. See MCR 2.613(C); *In re ALZ*, 247 Mich App at 271-272.

Because the appropriate remedy is to remand the case to the trial court for consideration of petitioners' motion on the merits, it is unnecessary to address petitioners' arguments that the trial court erred on the merits when it refused to make the second and third requested findings. To the extent that the trial court reached the merits, its findings were too cursory to permit meaningful appellate review.

We reverse the trial court's determination that it lacked authority to make the predicate factual findings pertinent to the issue of SIJ status, and we remand the case to the trial court to consider the request for SIJ findings on the merits and to make relevant findings. We do not retain jurisdiction.

SAWYER, P.J., and SAAD and RIORDAN, JJ., concurred.

DAWLEY v HALL

Docket No. 331800. Submitted April 4, 2017, at Lansing. Decided May 9, 2017, at 9:00 a.m. Vacated 501 Mich 166.

Joanne D. Dawley, individually and as personal representative of the Estate of James Armour II, brought an action in the Wayne Circuit Court against Rodney W. Hall for various tort claims following a motor vehicle collision between Hall and Armour in Lake County. Armour died allegedly as a result of injuries he sustained in the collision. Neither Dawley nor Hall was a resident of Lake County, the site of the collision. Dawley resided in Wayne County; Hall resided in New Mexico and was a member of Hall Investments, LLC, a limited liability company that owned Barothy Lodge, a resort property in Mason County. While Hall did not personally own Barothy Lodge, he was involved in the operations of the resort during five to six months out of the year. Hall moved to transfer venue to either Lake County or Mason County, and the Wayne Circuit Court, John A. Murphy, J., transferred the lawsuit to the Mason Circuit Court. Dawley moved to return the lawsuit to the Wayne Circuit Court, arguing that Hall did not "conduct[] business" in Mason County for purposes of establishing venue under MCL 600.1621(a). The Mason Circuit Court, Susan K. Sniegowski, J., denied the motion, concluding that Hall's actions on behalf of Hall Investments, LLC, constituted his conducting business within Mason County for purposes of MCL 600.1621(a). Dawley moved for interlocutory leave to appeal in the Court of Appeals. The Court of Appeals, MURPHY, P.J., and BECKERING and BOONSTRA, JJ., granted leave to appeal in an unpublished order, entered May 23, 2016, and the Mason Circuit Court stayed the action pending the decision of the Court of Appeals.

The Court of Appeals *held*:

1. Under MCL 600.1651, once an action is transferred from one circuit court to another, the transferee court has full jurisdiction of the action as though the action had been originally commenced therein, and as a consequence, the transferor court has none. In this case, the Wayne Circuit Court transferred the action to the Mason Circuit Court; accordingly, the Mason Circuit

Court, as the transferee court, had jurisdiction to hear and rule on Dawley's motion to return venue to the Wayne Circuit Court. While Hall mischaracterized Dawley's motion as an "appeal" of the Wayne Circuit Court transfer order, this mischaracterization was not binding. Contrary to Hall's argument, Dawley was not required to first move in the Wayne Circuit Court for reconsideration of the original order transferring the lawsuit to the Mason Circuit Court.

2. MCL 600.1621(a) provides that venue is proper in the county in which a defendant resides, has a place of business, or conducts business, or in which the registered office of a defendant corporation is located. MCL 600.1621(b) provides, in relevant part, that if none of the defendants meets one or more of the criteria in MCL 600.1621(a), then venue is proper in the county in which a plaintiff resides. In this case, Hall argued that he personally "conducts business" in Mason County through his membership in the limited liability company that owns Barothy Lodge as well as through his efforts in operating Barothy Lodge. Applying the standards that govern Michigan limited liability companies, Hall Investments, LLC, was a separate legal entity from its members, including Hall; Hall did not personally own any of the property associated with Barothy Lodge or have any personal rights or interests in Barothy Lodge; and as a member or manager of Hall Investments, LLC, Hall was acting as an agent of the company. Under Michigan law, the activities of an agent are ordinarily attributed to the principal and not to the agent; therefore, while Hall's activities might show that he conducted business on behalf of Hall Investments, LLC, in Mason County, the activities did not show that Hall conducted business on his own behalf in Mason County. Absent any arguments and evidence supporting the proposition that the corporate veil should be pierced, Hall's activities on behalf of Hall Investments, LLC, could not be transformed into activities Hall undertook on behalf of himself. Accordingly, because Hall's membership in the limited liability company and his active operation of the company were not sufficient to establish that Hall personally conducted business in Mason County for purposes of MCL 600.1621(a), venue in Mason County was not proper. Because Hall did not meet one or more of the criteria in MCL 600.1621(a), venue was proper in Wayne County under MCL 600.1621(b).

Reversed and remanded to the Mason Circuit Court with orders to transfer the action to the Wayne Circuit Court.

BORRELLO, P.J., concurred in the result only.

VENUE — WORDS AND PHRASES — CONDUCTS BUSINESS — MEMBERSHIP IN A LIMITED LIABILITY COMPANY THAT OWNS A BUSINESS LOCATED IN A MICHIGAN COUNTY AND ACTIVE OPERATION OF THE BUSINESS IN THAT COUNTY — NOT SUFFICIENT.

MCL 600.1621(a) provides that venue is proper in the county in which a defendant resides, has a place of business, or conducts business, or in which the registered office of a defendant corporation is located; an individual defendant's membership in a limited liability company that owns a business located in a Michigan county and the individual defendant's active operation of the business in that county are not sufficient to establish that the individual defendant personally conducts business in the county for purposes of MCL 600.1621(a).

Law Offices of David A. Priehs, PC (by *David A. Priehs*), for plaintiff.

Siemion Huckabay, PC (by *Raymond W. Morganti*), for defendant.

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

SWARTZLE, J. A limited liability company owns a business located in a Michigan county. A member of the limited liability company is active in the operation of the business during certain months of the year, but the member otherwise resides out of state. Are the facts of (1) membership and (2) active operation sufficient to establish that the member personally "conducts business" in the county for purposes of venue?

The short answer is no.

I. BACKGROUND

In July 2013, defendant-appellee Rodney Hall and James Armour II were in a motor vehicle collision in Lake County. Police ticketed Hall for failing to yield at a stop sign. Armour was injured during the collision,

and he subsequently died, allegedly as a result of the injuries. Armour's wife, plaintiff-appellant Joanne Dawley, sued Hall for various tort claims on her own behalf as well as on behalf of Armour's estate.

With respect to where to file the lawsuit, neither Dawley nor Hall was a resident of Lake County—Dawley resided in Wayne County with her husband and Hall resided in New Mexico. Apparently concluding that Hall neither had a place of business nor conducted business in a Michigan county, Dawley sued Hall in the Wayne Circuit Court under MCL 600.1621(b). Hall immediately moved to transfer venue to Lake County, as the site of the collision, or Mason County, purportedly where he conducted business on behalf of Barothy Lodge, a resort property in that county. The Wayne Circuit Court transferred venue to the Mason Circuit Court.

The parties engaged in discovery after the lawsuit was transferred to Mason County. Information exchanged in discovery made clear that Hall did not personally own Barothy Lodge. Instead, the resort is owned by Hall Investments, LLC, a Michigan limited liability company, and Hall is a member of the company along with two brothers and six grandchildren. (The company also owns an aluminum factory in Hastings, Michigan.) Hall testified that he "runs" the resort during five to six months out of the year but that the resort also has full-time managers who live and work there year round. When at the resort, Hall's normal daily routine is to check the mail at the office, to see if there are any "fires to put out," and to deal with any contractors on-site as well as "guest-related issues." When he got into the collision with Armour, Hall was returning from a musical festival that he attended on behalf of Barothy Lodge. Thus, the record

shows that while Hall did not personally own any part of Barothy Lodge, he was a member of the limited liability company that owned the resort and was involved in the operations of the resort during part of the year.

Dawley moved to return the lawsuit to the Wayne Circuit Court, arguing that Hall did not conduct business in Mason County. (Dawley did not seek alternative relief via a transfer to Lake County.) The Mason Circuit Court denied the motion, concluding that Hall's actions on behalf of Hall Investments, LLC constituted his conducting business within the county for purposes of MCL 600.1621(a). We granted Dawley's request for an interlocutory appeal, and the Mason Circuit Court stayed the action pending our decision.

II. ANALYSIS

A. THE MASON CIRCUIT COURT HAD JURISDICTION OVER THE MOTION TO TRANSFER

To clear the brush, we first address Hall's argument that the Mason Circuit Court did not have jurisdiction to hear Dawley's motion to transfer. According to Hall, Dawley instead should have moved for reconsideration before the Wayne Circuit Court of the original order transferring the lawsuit to the Mason Circuit Court. The argument is without merit.

Once an action is transferred from one circuit court to another, the transferee court has "full jurisdiction of the action as though the action had been originally commenced therein," MCL 600.1651, and as a consequence, "the transferor court has none," *Frankfurth v Detroit Med Ctr*, 297 Mich App 654, 658; 825 NW2d 353 (2012). "Any motion for rehearing or reconsideration would have to be heard by whichever court has juris-

diction over the action at the time the motion is brought, which, after entry of an order changing venue, would be the transferee court." *Id*. at 661.

While Hall mischaracterizes Dawley's motion as an "appeal" of the Wayne Circuit Court transfer order, we are not bound by such mischaracterization. Whether deemed a motion for reconsideration or an original motion, there is no doubt that the Mason Circuit Court, as the transferee court, had jurisdiction to hear and rule on the motion.

We now take up the central issue of this appeal—whether Hall conducted business in Mason County.

B. VENUE FOR TORT ACTIONS

The Legislature has enacted statutes governing venue for various types of lawsuits. MCL 600.1629 covers venue for tort cases, and while there are various permutations set forth in Section 1629, we and the parties agree that no county satisfies the first three criteria in Subdivisions (1)(a)-(c). Accordingly, we look to Subdivision (1)(d), which provides in relevant part, "a county that satisfies the criteria under section 1621 or 1627 is a county in which to file and try an action."

Looking first to MCL 600.1627, this section places venue in "the county in which all or a part of the cause of action arose." Here, this would seem to indicate that Lake County would be an appropriate venue to try the instant action. But, on Hall's motion, the Wayne Circuit Court transferred the action to Mason County, not Lake County, and in seeking to have the action transferred out of Mason County, neither party has asked to have the matter transferred to Lake County. Thus, unless there is no other county where venue is proper, it would appear that Lake County is out of the running.

Turning next to MCL 600.1621, this section sets forth the following priority for venue:

> (a) The county in which a defendant resides, has a place of business, or conducts business, or in which the registered office of a defendant corporation is located, is a proper county in which to commence and try an action.
>
> (b) If none of the defendants meet 1 or more of the criteria in subdivision (a), the county in which a plaintiff resides or has a place of business, or in which the registered office of a plaintiff corporation is located, is a proper county in which to commence and try an action.

Hall concedes that he does not reside in Michigan, and he does not argue on appeal that he has a place of business in Michigan. He does argue, however, that he personally "conducts business" in Michigan through his membership in the limited liability company that owns Barothy Lodge as well as through his efforts in operating the resort. If Hall is correct, then venue would lie in Mason County under Subdivision (a). If Hall is incorrect, then none of the criteria of Subdivision (a) would be met, and venue would instead lie in Wayne County under Subdivision (b).

C. LLCs UNDER MICHIGAN LAW

To determine whether Hall is correct that he conducts business in Mason County, we must consider several standards governing Michigan limited liability companies. *First*, a limited liability company is a separate legal entity and "has all powers necessary or convenient to effect any purpose for which the company is formed." MCL 450.4210; see also MCL 450.1261; *Salem Springs, LLC v Salem Twp*, 312 Mich App 210, 223; 880 NW2d 793 (2015) (explaining "that the rules regarding corporate form apply equally to limited liability companies"). *Second*, ownership in a

limited liability company is made up of one or more members. MCL 450.4102(p). *Third*, "[a] membership interest is personal property" and "[a] member has no interest in specific limited liability company property." MCL 450.4504(1), (2). *Fourth*, a person who is a member or manager of a limited liability company is not ordinarily liable "for the acts, debts, or obligations" of the company. MCL 450.4501(4). And *Fifth*, a manager of the limited liability company "is an agent" of the company. MCL 450.4406.

Applying these standards here, the following is clear: Hall Investments, LLC is a separate and distinct legal entity from that of its nine members, including Hall. Hall does not personally own Barothy Lodge; rather, Hall Investments, LLC is the owner of the resort. Nor does Hall own any of the property associated with Barothy Lodge; again, the property is owned by the limited liability company. Moreover, Hall's membership in the limited liability company does not give him any personal rights to or interests in Barothy Lodge, either as a business or as real property. And while Hall enjoys protection from liability for the acts, debts, or obligations of Hall Investments, LLC, Dawley is suing Hall personally, not Hall in his capacity as a member or the limited liability company directly. Finally, as for his efforts at operating the resort, the most that can be said is that Hall was acting as a manager of the limited liability company's property and, as such, was an agent of the company under Michigan law. Given this—separate entity; no personal rights to or interests in the resort or its property; sued in his personal capacity; and acting as an agent—the question becomes whether his ownership in the company and his activities on behalf of the company constitute conducting business for purposes of venue in Mason County?

D. OWNERSHIP AND AGENCY NOT SUFFICIENT TO SHOW THAT A PARTY "CONDUCTS BUSINESS"

In *Hills & Dales Gen Hosp v Pantig*, 295 Mich App 14; 812 NW2d 793 (2011), this Court considered whether a medical center, organized as a limited liability company, conducted business in the county where it held limited liability membership interests in two healthcare clinics. The Court concluded that it did not. Like a corporation, a limited liability company "is its own 'person' under Michigan law, an entity distinct and separate from its owners," the Court explained. *Id*. at 20. "Equating stock ownership with 'conducting business' expands the statutory language beyond the plain meaning of the term." *Id*. at 21. Absent evidence that the two healthcare clinics were "mere instrumentalities" or "alter egos" of the defendant medical center, the Court refused to impose on the center a form of "vicarious venue." *Id*. (quotation marks omitted).

Hall maintains, however, that *Hills & Dales Gen Hosp* is not controlling because, according to him, the defendant medical center was "nothing more than a passive investor." There are several problems with this argument. First, the factual proposition is not accurate. The medical center in that case solicited business for the two clinics, as described in the opinion, but such activity did "not amount to conducting business" by the center. *Id*. at 23. Second and more importantly, even assuming that Hall was somehow more active in the operation of Barothy Lodge than the center was in soliciting business for the two clinics in *Hills & Dales Gen Hosp*, the record reflects that Hall acted as an agent on behalf of Hall Investments, LLC. Under Michigan law, the activities of an agent are ordinarily attributed to the principal and not to the agent himself. 1 Michigan Civil Jurisprudence (2009 rev),

Agency, § 7, p 211 ("Thus, an agent is a person who acts on behalf of another, particularly with regard to the conduct of business transactions."); see also *Farwell v May*, 437 Mich 953, 953-954; 467 NW2d 593 (1991) (holding that an individual defendant's employment in Oakland County was "an insufficient nexus to conclude that he 'conducts business' there" for purposes of venue); *Stephenson v Golden (On Rehearing)*, 279 Mich 710, 737; 276 NW 849 (1937) (stating that an agent generally does not "possess any individual interests" in a transaction involving the principal) (citation and quotation marks omitted); *Salem Springs*, 312 Mich App at 221 (explaining that "[a] manager is considered an agent of the limited liability company for the purpose of its business" and holding that the manager was a separate and distinct entity for purposes of bringing suit). Applying straightforward principal-agency principles, Hall's activities might show that he conducted business on behalf of *Hall Investments, LLC* in Mason County, but the activities do not show that Hall conducted business on *his own* behalf in that county.

To get past this straightforward application, Hall would have to establish that his activities on behalf of Hall Investments, LLC should instead be attributed to himself. And yet, Hall has never argued (nor provided any evidence) that we should pierce the corporate veil and find that Hall Investments, LLC was the mere instrumentality or alter ego of Hall. The closest he gets to this line is when he argued at one point that "Barothy Lodge was simply another name for Hall Investments, LLC." He fails, however, to provide any further explanation of why we should disregard the corporate form here, and in fact, during oral argument, Hall's counsel specifically declined to make any argument that the corporate veil should be pierced. Absent

argument and evidence supporting such veil-piercing, there is no legal alchemy that can transform Hall's activities on behalf of Hall Investments, LLC into activities on behalf of himself for the purpose of venue.

III. CONCLUSION

As explained earlier, Hall personally did not conduct business in Mason County and, as a result, MCL 600.1621(a) does not support venue in that county. Venue would be proper in Lake County under MCL 600.1627 or Wayne County under MCL 600.1621(b). The Legislature has not provided any priority between the two options, MCL 600.1629(1)(d), and a plaintiff's preferred forum should ordinarily be "accorded deference," *Radeljak v DaimlerChrysler Corp*, 475 Mich 598, 604; 719 NW2d 40 (2006). Accordingly, we reverse the decision of the Mason Circuit Court and remand this case to that court with orders to transfer the action to the Wayne Circuit Court. We do not retain jurisdiction.

WILDER, J., concurred with SWARTZLE, J.

BORRELLO, P.J. (*concurring in result*). I concur in result only.

In re $55,366.17 SURPLUS FUNDS

Docket No. 331880. Submitted May 3, 2017, at Lansing. Decided May 9, 2017, at 9:05 a.m.

Robert E. Parker, personal representative of the estate of Kathryn Kroth, deceased, filed an action in the Livingston Circuit Court, seeking to recover under MCL 600.3252 of the Revised Judicature Act, MCL 600.3201 *et seq*., the surplus funds remaining after the foreclosure sale of the decedent's property. In 2003, the decedent and her husband granted a mortgage on real property to National City Mortgage Services Company, and in 2008, they executed a second mortgage on the property in favor of National City Bank. PNC Bank, N.A., later held both mortgages as successor in interest after a series of bank mergers. After default and the mortgagors' deaths, PNC foreclosed by advertisement on the first mortgage; a third party purchased the property for an amount that satisfied the first mortgage and created a surplus of $55,336.17. The surplus funds were deposited with the circuit court pursuant to MCL 600.3252 after PNC—as the holder of the junior mortgage—filed a claim in the court for the surplus proceeds. Acting on behalf of the decedent's estate, Parker filed a competing notice of claim for the surplus proceeds as an interested person. PNC moved for disbursement of the funds in its favor under MCL 600.3252, and Parker requested the court to instead distribute the surplus funds to the estate in accordance with the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq*. The court, Theresa M. Brennan, J., granted PNC's motion and ordered the funds disbursed to PNC, reasoning that under MCL 600.3252, PNC's second mortgage had priority over the interests of the decedent, who was a mortgagor. Parker appealed.

The Court of Appeals *held*:

1. A mortgage is the conveyance of an interest in real estate to secure the performance of an obligation, typically a debt. A mortgagee's recorded interest in real property is superior to the mortgagor until that interest is extinguished, either by satisfaction of the mortgage or default and foreclosure. MCL 565.29 provides that Michigan is a race-notice state in that the owner of

an interest in real property, including mortgagees and lienholders, may 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. The purpose of mortgage foreclosure is to ensure that the mortgagor's debt, secured by a mortgage to a mortgagee, is satisfied. The foreclosure of a senior mortgage extinguishes the lien of a junior mortgage if the junior mortgagee does not exercise its right to redeem at the foreclosure sale; however, there is a statutory period during which a junior mortgagee and others have a right to redeem the property. When property is not redeemed, all rights, title, and interest in the property vest in the purchaser.

2. MCL 600.3252—which addresses who is entitled to surplus funds that remain after foreclosure of a mortgage by advertisement—is limited to situations in which a junior mortgagee or lienholder has an interest in the foreclosed property at the time of the foreclosure. The statute provides that when any real estate is sold, if there is surplus money remaining after the mortgage on which the real estate was sold is satisfied and the costs and expenses of the foreclosure and sale are paid, the surplus must be paid to the mortgagor, unless at the time of the sale or before the surplus is paid over, a subsequent mortgagee or lienholder files a written claim with the person who made the sale. In that way, the statute protects subsequent mortgagee claimants or lienholders by granting them a limited interest in any surplus proceeds from a foreclosure sale after the senior mortgage is satisfied that is superior to the interest of the mortgagor; the rights of any subsequent mortgagee or lienholder in the surplus funds are coincidental to their interests in the property on foreclosure. If a junior mortgagee or lienholder notifies the person who sold the foreclosed property of his or her claim to the surplus funds, the person who sold the foreclosed property must file the claim and the surplus funds with the circuit court clerk in the county where the property was sold; the court must hold a hearing on the claim if requested by a person interested in the surplus. Under the statute, a subsequent mortgagee or lienholder may file the claim for the surplus proceeds from the foreclosure sale at the time of the foreclosure sale or before the surplus funds are paid over to the mortgagor, without regard to a continuing security interest in the property itself or the statutory redemption period. The statute requires the circuit court to distribute the surplus funds to any subsequent mortgagees or lienholders in accordance with their respective priorities under MCL 565.29 and caselaw.

3. In this case, PNC complied with MCL 600.3252 when it filed a claim for the surplus funds on the day the surplus proceeds were deposited with the circuit court, and PNC was therefore entitled under the statute to consideration as a claimant to the surplus funds. PNC's claim, as a junior mortgagee, was superior to that of Parker, who stood in the shoes of the decedent mortgagor. Regardless of whether PNC's *security interest in the property* as junior mortgagee continued until the expiration of the statutory redemption period, under the clear language of MCL 600.3252, PNC had a *priority interest in the surplus funds* over the decedent mortgagor as a subsequent mortgagee or lienholder at the time of the foreclosure sale. The circuit court correctly distributed the surplus funds to PNC because, under MCL 565.29, PNC had priority as the junior mortgagee. Parker's argument that the surplus funds should have been turned over to the estate to allow PNC to file a claim under EPIC was moot to the extent that Parker conceded PNC would be entitled under that statute to the surplus as a creditor; moreover, Parker did not argue that EPIC required the circuit court to turn the funds over to the estate, rather than following the clear language of MCL 600.3252, which provides an avenue for junior mortgagees and lienholders to collect surplus proceeds before they are disbursed to the mortgagor.

Affirmed.

MORTGAGES — FORECLOSURE OF MORTGAGE BY ADVERTISEMENT — CLAIMS FOR SURPLUS — PRIORITY OF CLAIMS.

Under MCL 600.3252, when any real estate is sold, if there is surplus money remaining after the mortgage on which the real estate was sold is satisfied and the costs and expenses of the foreclosure and sale are paid, the surplus must be paid to the mortgagor, unless at the time of the sale or before the surplus is paid over, a subsequent mortgagee or lienholder files a written claim with the person who made the sale, who in turn must notify the circuit court of the claim; if there are competing claims for the surplus proceeds from the foreclosure sale, the court must distribute the surplus proceeds according to the priority of interests in the foreclosed property as determined by MCL 565.29 and caselaw.

Parker and Parker (by *Robert E. Parker*) for appellant.

Trott Law, PC (by *Matthew D. Levine*), for appellee.

Before: GADOLA, P.J., and JANSEN and SAAD, JJ.

PER CURIAM. Appellant, Robert E. Parker, as personal representative of the estate of decedent Kathryn Kroth, appeals as of right an order granting appellee, PNC Bank, N.A. (PNC) the surplus funds remaining after the foreclosure sale of decedent's property. We affirm.

In this case of first impression, we are called upon to interpret and apply the language of MCL 600.3252 (alternatively, the surplus statute), a subsection of Chapter 32 of the Revised Judicature Act (RJA), MCL 600.3201 *et seq*., which governs the distribution of surplus funds after a mortgage foreclosure by advertisement.

The facts of this case are not in dispute. In March 2003, decedent and her husband, Thomas Kroth, granted National City Mortgage Services Company a mortgage on real property located in Brighton, Michigan (the property). In February 2008, the Kroths executed a second mortgage on the property in favor of National City Bank. After a series of mergers, PNC came to hold both mortgages as successor in interest. Thomas predeceased Kathryn by nine months, and Kathryn died in December 2014. Following default, PNC initiated foreclosure of the property under the first mortgage by advertisement proceedings. The property was purchased at a September 2, 2015 sheriff's sale by a third party for an amount sufficient to satisfy the first mortgage and create a surplus of $55,336.17.

A month after the sale, PNC filed a verified claim for the surplus proceeds in the circuit court as holder of the junior mortgage, still worth $119,538.40, and the

surplus amounts were thereafter deposited with the court pursuant to MCL 600.3252, which provides:

> If after any sale of real estate, made as herein prescribed, there shall remain in the hands of the officer or other person making the sale, any surplus money after satisfying the mortgage on which the real estate was sold, and payment of the costs and expenses of the foreclosure and sale, the surplus shall be paid over by the officer or other person on demand, to the mortgagor, his legal representatives or assigns, unless at the time of the sale, or before the surplus shall be so paid over, some claimant or claimants, shall file with the person so making the sale, a claim or claims, in writing, duly verified by the oath of the claimant, his agent, or attorney, that the claimant has a subsequent mortgage or lien encumbering the real estate, or some part thereof, and stating the amount thereof unpaid, setting forth the facts and nature of the same, in which case the person so making the sale, shall forthwith upon receiving the claim, pay the surplus to, and file the written claim with the clerk of the circuit court of the county in which the sale is so made; and thereupon any person or persons interested in the surplus, may apply to the court for an order to take proofs of the facts and circumstances contained in the claim or claims so filed. Thereafter, the court shall summon the claimant or claimants, party, or parties interested in the surplus, to appear before him at a time and place to be by him named, and attend the taking of the proof, and the claimant or claimants or party interested who shall appear may examine witnesses and produce such proof as they or either of them may see fit, and the court shall thereupon make an order in the premises directing the disposition of the surplus moneys or payment thereof in accordance with the rights of the claimant or claimants or persons interested.

In December 2015, appellant filed a notice of claim in the circuit court for the surplus proceeds as a person interested. PNC subsequently moved for disbursement of the surplus proceeds in its favor and appellant objected. Appellant argued that nothing in

MCL 600.3252 established a senior interest in PNC as a junior mortgagee. To the contrary, appellant suggested that PNC's junior lien had been extinguished upon foreclosure of the first mortgage, rendering PNC "just a creditor" without a remaining security interest in the property. Appellant asked the circuit court to distribute the surplus proceeds in accordance with the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq*. At a March 1, 2016 hearing on PNC's motion, the circuit court considered the language of MCL 600.3252 and concluded that the statute's explicit mention of subsequent mortgagees directly contradicted appellant's claim that PNC was not entitled to priority because PNC's interests as junior mortgagee had been extinguished. Rather, the circuit court reasoned that the statute's mention of subsequent mortgagees indicated intent to prioritize the claims of junior mortgagees over the original mortgagor. The circuit court ordered the release of surplus proceeds to PNC.

Appellant takes issue with the trial court's interpretation of MCL 600.3252, arguing that PNC was not entitled to priority under MCL 600.3252 because its security interest in the property as junior mortgagee was extinguished on the date of the foreclosure sale. Further, appellant suggests that neither the statute itself nor relevant caselaw explicitly guides the trial court in its determination of priority and asks this court to consider the question of priority as a matter of first impression. We agree that this is a matter of first impression but conclude that the circuit court correctly interpreted MCL 600.3252 as prioritizing the interest of a junior mortgagee over a mortgagor.

This Court reviews de novo questions of statutory interpretation. *Rock v Crocker*, 499 Mich 247, 260; 884

NW2d 227 (2016). Our primary goal in statutory interpretation is to reasonably infer the legislative intent as evidenced by the statutory language. *Krohn v Home-Owners Ins Co*, 490 Mich 145, 156; 802 NW2d 281 (2011). "If the language of a statute is clear and unambiguous, the statute must be enforced as written and no further judicial construction is permitted." *Whitman v City of Burton*, 493 Mich 303, 311; 831 NW2d 223 (2013). "[I]f the intent of the Legislature is not clear, courts must interpret statutes in a way that gives effect to every word, phrase, and clause in a statute and 'avoid an interpretation that would render any part of the statute surplusage or nugatory.' " *Haynes v Village of Beulah*, 308 Mich App 465, 468; 865 NW2d 923 (2014) (citation omitted). "Words and phrases used in a statute should be read in context with the entire act and assigned such meanings as to harmonize with the act as a whole." *City of Rockford v 63rd Dist Court*, 286 Mich App 624, 627; 781 NW2d 145 (2009) (quotation marks and citation omitted). Further, "[s]tatutes that relate to the same subject or that share a common purpose are *in pari materia* and must be read together as one law, even if they contain no reference to one another and were enacted on different dates." *Walters v Leech*, 279 Mich App 707, 709-710; 761 NW2d 143 (2008).

MCL 600.3252 is a part of a chapter of the RJA titled "Foreclosure of Mortgage by Advertisement," and should be read in the context of the entire chapter. A mortgage is "[a] conveyance of an interest in real estate to secure the performance of an obligation," *State Bar Grievance Administrator v Van Duzer*, 390 Mich 571, 577; 213 NW2d 167 (1973), typically a debt. The very purpose of mortgage foreclosure is to ensure that the mortgagor's debt, secured by a mortgage to a mortgagee, is satisfied. MCL 600.3252 applies when, after a

foreclosure on one mortgage results in a surplus, a claimant specifically declares "a subsequent mortgage or lien encumbering the real estate, or some part thereof . . . ." MCL 600.3252 sets forth a general rule for distribution of the surplus amounts from the sale of foreclosed property, an exception to the general rule, and a process for resolution of circumstances after the exception is invoked. Under the plain language of the statute, all surplus proceeds must be paid on demand to "the mortgagor, his legal representatives or assigns," *unless* another claimant makes a claim of, specifically, "a subsequent mortgage or lien encumbering the real estate." MCL 600.3252; see *Schwartz v Oakland Co Sheriff*, 4 Mich App 628, 632; 145 NW2d 357 (1966). The Legislature unmistakably limited application of the surplus statute to situations in which a junior mortgagee or lienholder held an interest in the foreclosed property at the time of the foreclosure. Once such a claimant has filed a claim with the person conducting the foreclosure sale, typically the sheriff, the person who conducted the sale is required to deposit the surplus proceeds with the clerk of the circuit court pending resolution of conflicting claims. MCL 600.3252. Then, "any person or persons interested in the surplus, may apply to the court for an order to take proofs of the facts and circumstances contained in the claim or claims so filed." MCL 600.3252. The circuit court is tasked with examining the proofs and entering an order distributing the surplus funds in accordance with the rights of the claimants and interested persons. MCL 600.3252.

Appellant argues that PNC was no longer a subsequent mortgagee when it filed its claim pursuant to MCL 600.3252, because its security interest in the property was extinguished by the foreclosure of the senior mortgage, and PNC was therefore precluded

from claiming priority under MCL 600.3252. Appellant is correct that, in Michigan, the foreclosure of a senior mortgage extinguishes the lien of a junior mortgagee where the junior mortgagee does not exercise its right to redeem. *Advanta Nat'l Bank v McClarty*, 257 Mich App 113, 125; 667 NW2d 880 (2003). When property is not redeemed, "all right, title, and interest in the property vest[s]" in the purchaser. *Trademark Props of Mich, LLC v Fed Nat'l Mtg Ass'n*, 308 Mich App 132, 139; 863 NW2d 344 (2014). However, after the sale of property, there is a statutory period during which a junior mortgagee, amongst others, has a right to redeem the property. Consequently, PNC argues that its security interest in the property was not extinguished until the expiration of the redemption period. While there is some support for PNC's argument in this regard,[1] we find it unnecessary to resolve the issue

[1] Although we have held that "[t]he foreclosure of a senior mortgage extinguishes the lien of a junior mortgagee where the junior mortgagee did not redeem at the foreclosure sale," *Advanta Nat'l Bank*, 257 Mich App at 125, the sheriff's deed after foreclosure does not become operative and junior interests in the property are not extinguished until the statutory redemption period expires, see *id*. (stating that the plaintiff's junior mortgage "was extinguished after the four-month redemption period expired"). See also MCL 600.3240; MCL 600.3236; *Bankers Trust Co of Detroit v Rose*, 322 Mich 256, 260; 33 NW2d 783 (1948) (" 'Legal title does not vest at once upon the auction sale on statutory foreclosure . . . but only at the expiration of the period allowed for redemption.' "), quoting *McCreery v Roff*, 189 Mich 558, 564; 155 NW 517 (1915); *Detroit Fidelity & Surety Co v Donaldson*, 255 Mich 129, 131-132; 237 NW 380 (1931) (holding that the mortgagor did not lose all interest in the property until the time for redemption under the foreclosure decree had expired). Additionally, Michigan caselaw has long recognized a junior mortgagee's right to redeem the property from a superior mortgagee in order to protect the junior interest, *Advanta Nat'l Bank*, 257 Mich App at 125; *Carter v Lewis*, 27 Mich 241, 242-243 (1873); *Powers v Golden Lumber Co*, 43 Mich 468, 470-472; 5 NW 656 (1880), and such a right could not logically exist if all of the junior mortgagee's interest was extinguished on the date of the foreclosure sale.

here. Regardless of whether PNC's *security interest* in the property as junior mortgagee persisted until the expiration of the statutory redemption period, PNC retained a right to claim a priority interest *in the surplus funds* over the mortgagor as a subsequent mortgagee or lienholder at the time of the foreclosure sale pursuant to the explicit language of MCL 600.3252.

"Courts should not abandon common sense when construing a statute." *Diallo v LaRochelle*, 310 Mich App 411, 418; 871 NW2d 724 (2015). To accept appellant's argument would be to render nugatory all of MCL 600.3252, which provides for nothing other than an avenue for junior mortgagees and lienholders to claim an interest in surplus funds following a foreclosure sale. If the priority interest of all junior mortgagees and lienholders *to the surplus proceeds* was extinguished at the time of the foreclosure sale, along with their security interests in the property itself, there would be no claimants to support the application of MCL 600.3252. It is clear that the surplus statute "was intended to apply for the protection of subsequent mortgage claimants or lienholders," *Schwartz*, 4 Mich App at 632, granting them a limited interest in foreclosure sale surplus proceeds superior to the mortgagor after a senior mortgage is satisfied. Granting subsequent mortgagees and lienholders a priority interest in foreclosure sale surplus proceeds is not inconsistent with the extinguishment of their security interests in the real property itself. Additionally, while not explicitly citing MCL 600.3252, our Supreme Court and this Court have stated that a junior mortgagee is entitled to claim the surplus after the foreclosure of a senior mortgage. See, e.g., *Bank of America, NA v First American Title Ins Co*, 499 Mich 74, 91; 878 NW2d 816 (2016) (" 'No one disputes that the mortgagee is en-

titled to recover only his debt. Any surplus value belongs to others, namely, the mortgagor or subsequent lienors.' "), quoting *Smith v Gen Mtg Corp*, 402 Mich 125, 128-129; 261 NW2d 710 (1978); *Citizens State Bank v Nakash*, 287 Mich App 289, 295; 788 NW2d 839 (2010) ("[D]efendant's bid on the foreclosed property was in excess of his recoverable interest, entitling plaintiff, as a junior mortgagee, to claim the surplus."). Appellant concedes that PNC retained an interest in repayment as a general creditor. We think it clear that through MCL 600.3252, the Legislature intended to provide a limited avenue for collection of foreclosure sale surplus proceeds to subsequent mortgagees and lienholders, whose security interests in real property have been extinguished by the foreclosure of a senior mortgage, independent of their option to redeem.

The plain language of MCL 600.3252 provides that the surplus should be paid to the mortgagor "unless at the time of the sale, or before the surplus shall be so paid over" a claim is filed by a subsequent mortgagee or lienholder. The Legislature therefore provided a period during which a subsequent mortgagee or lienholder may file a claim to foreclosure sale surplus proceeds, without regard to continuing security interests in the property itself or the statutory redemption period.[2]

[2] We acknowledge that the date on which "the surplus shall be so paid over" to the mortgagor will typically be the date on which the statutory redemption period expires and all subsequent mortgagees forfeit their right to redeem. See MCL 600.3236. However, MCL 600.3252 does not explicitly create a continued security interest in real property until the end of the redemption period, or rest on an implied one. We believe that the statutory deadline in MCL 600.3252 is related to the statutory redemption period through coincidence only. As previously discussed, we decline PNC's request to find within MCL 600.3252 a continued security interest in the foreclosed property until the statutory redemption period's expiration.

PNC filed a verified claim for the surplus just over a month after the foreclosure sale, and the surplus was deposited with the circuit court on the same day. It follows that the surplus had not yet been paid to appellant, and appellant does not assert otherwise. Nor does appellant assert that PNC's claim was otherwise untimely. PNC complied with the plain language of MCL 600.3252, and PNC was therefore entitled under the statute to consideration as a claimant to the foreclosure sale surplus proceeds.

Next, appellant argues that the trial court erred in its priority determination because "[n]owhere does it actually say in any published case or in the statute itself, where the surplus funds are to go, or how the court is to determine the priority of the claimants." However, we find that the language in the final clause of MCL 600.3252 is unambiguous and clear in its direction. The statute plainly provides that the court shall enter an order "directing the disposition of the surplus moneys or payment thereof *in accordance with the rights of the claimant or claimants or persons interested*." MCL 600.3252 (emphasis added). As previously discussed, the Legislature clearly intended to limit application of the surplus statute to situations in which a junior mortgagee or lienholder held an interest in the foreclosed property at the time of the foreclosure sale. The rights of any subsequent mortgagees or lienholders are therefore coincidental to their interests in the property on foreclosure.

Our statutes and caselaw provide clear guidance for a court's determination of interest priority in such cases. "In general, Michigan is a race-notice state under MCL 565.29,[3] wherein the owner of an interest in land can protect his or her interest by properly

[3] MCL 565.29, Michigan's race-notice statute, provides:

recording it, and the first to record an interest typically has priority over subsequent purchasers or interest holders." *Wells Fargo Bank, NA v SBC IV REO, LLC*, 318 Mich App 72, 96; 896 NW2d 821 (2016). The principle that the first interest owner to record obtains priority applies to liens and mortgages on real property. *Coventry Parkhomes Condo Ass'n v Fed Nat'l Mtg Ass'n*, 298 Mich App 252, 256; 827 NW2d 379 (2012). It is axiomatic that each mortgagee to record holds an interest in the property superior to the mortgagor until that interest is extinguished, either by satisfaction of the mortgage or default and foreclosure. Therefore, we conclude that MCL 600.3252 requires the court to distribute surplus funds from a mortgage foreclosure sale by advertisement to any subsequent mortgagees or lienholders in accordance with their respective priorities under MCL 565.29 and related caselaw. While these interests may compete or conflict, MCL 600.3252 allows the court, in situations involving conflicting interests, to take proofs at a hearing and direct the disposition accordingly. Any remaining balance may then be distributed to the mortgagor, the mortgagor's representatives, or the mortgagor's assigns.

Appellant does not dispute the general application of the race-notice principles or argue that an exception to the general rule applies in this case. There is no question that PNC's interest in the surplus funds, as a

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> 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 fact that such first recorded conveyance is in the form or contains the terms of a deed of quit-claim and release shall not affect the question of good faith of such subsequent purchaser, or be of itself notice to him of any unrecorded conveyance of the same real estate or any part thereof.

junior mortgagee, was superior to appellant's, as the legal representative of the mortgagor. The trial court therefore did not err when it entered an order distributing the $55,336.17 in surplus funds to PNC.

Appellant suggests that the circuit court "could have merely turned over the sums to the Estate," and allowed PNC to file its creditor claim pursuant to the terms of EPIC. However, appellant does not argue that the circuit court was required to do so. MCL 600.3252 provides a clear avenue for junior mortgagees and lienholders to collect surplus proceeds *before* they are dispersed to the mortgagor, the mortgagor's representatives, or the mortgagor's assigns. The personal representative of the mortgagor's estate stands in the mortgagor's shoes and has no greater interest than the mortgagor. Further, to the extent appellant concedes that PNC would be entitled to the surplus as a creditor under EPIC, appellant's argument is moot as having no practical effect on this case. *Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 386; 803 NW2d 698 (2010).

Finally, appellant asserts that the trial court erred when it provided "no findings of fact or application of law to any facts to render an important decision concerning the surplus funds." However, appellant did not identify any disputed facts in the lower court and has not done so on appeal. Indeed, before oral argument, appellant informed the trial court that "appearance before the court" would be "for arguments of law only" and that "[t]he facts in this case are not in dispute." Appellant has therefore effectively waived any challenge to the court's findings of fact, or lack thereof. See *The Cadle Co v City of Kentwood*, 285 Mich App 240, 254; 776 NW2d 145 (2009) ("The usual manner of waiving a right is by acts which indicate an

intention to relinquish it . . . .") (quotation marks and citation omitted); *Lewis v LeGrow*, 258 Mich App 175, 210; 670 NW2d 675 (2003) ("[E]rror 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."). Further, as discussed, the trial court correctly reasoned that, given the undisputed facts, the surplus should be released to PNC in satisfaction of its lien on the property.

In sum, a reading of MCL 600.3252 leads us to conclude that a court must distribute foreclosure sale surplus funds claimed under that statute according to the priority of interests in the foreclosed property. In this case, PNC filed its claim for the surplus funds in accordance with MCL 600.3252, and the circuit court properly entered an order distributing the surplus funds to PNC after determining that PNC's interest had priority. Because we affirm the circuit court's decision, we need not address appellant's "general concern" regarding bias in the lower court or appellant's request for judicial reassignment.

Affirmed.

GADOLA, P.J., and JANSEN and SAAD, JJ., concurred.

LOCKPORT TOWNSHIP v CITY OF THREE RIVERS

Docket No. 331711. Submitted May 2, 2017, at Grand Rapids. Decided May 9, 2017, at 9:10 a.m. Leave to appeal denied 501 Mich 952.

Lockport Township filed suit in the St. Joseph Circuit Court against the city of Three Rivers to prevent the city from annexing land adjacent to the township. The township had installed an underground water transmission line on the property pursuant to a permanent nonexclusive easement obtained by the township in 2006 from the property's owner, Northern Construction Services Corporation. On February 1, 2016, the city purchased the land from Northern Construction and on the following day approved a resolution to annex the land. The township filed suit on February 3, 2017, to prevent the annexation, and the court entered a temporary restraining order against the annexation. The township moved for a preliminary injunction, and the city moved for summary disposition. At the hearing on both motions, the court, Jeffrey Middleton, J., denied the township's motion and granted summary disposition in favor of the city. The court determined that the township's lawsuit could not succeed on its merits because the land was vacant for purposes of MCL 117.9(8), the applicable provision of the Home Rule City Act (HRCA). The township appealed.

The Court of Appeals *held*:

1. Under MCL 117.9(8), property adjacent to and owned by a city may be annexed to the city if the property is a park or is vacant and no one resides on the property. There was no dispute that the property was not a park; the parties disputed whether the property was vacant as required by the statute. "Vacant" is not defined in the HRCA for purposes of MCL 117.9(8), but the dictionary defines the term "vacant property" as "real property that is not put to use." Previous nonbinding decisions of the Court interpreted the meaning of "vacant" for purposes of MCL 117.9(8). In *Pittsfield Charter Twp v Saline*, 103 Mich App 99 (1981), the Court held that property was vacant—i.e., "not put to use"—when the only activity on the land was seasonal agricultural use subject to leasing agreements that could have been terminated at any time. The *Saline* case was largely irrelevant because the ease-

ment in this case was permanent and the operation of the water transmission line was not temporary or seasonal. In *Pittsfield Twp v Ann Arbor*, 86 Mich App 229 (1978), the Court held that a highway running through a piece of property prevented the property from being considered vacant because the highway's constant use meant that the property was also in constant use. The constantly operating highway in the *Ann Arbor* case was analogous to the constantly operating water transmission line. Because the instant property was being put to use by the functioning water transmission line, it was not vacant for purposes of MCL 117.9(8), and the trial court erred when it granted the city's motion for summary disposition.

2. The term "property" in MCL 117.9(8) refers to "real property," which can be defined as "land." "Land" includes the surface of the earth and the area immediately above and below the surface. Accordingly, the term "property" in MCL 117.9(8) clearly contemplates the space below the surface. Therefore, the fact that the water transmission line was buried underground in the land at issue in the instant case did not mean that the land could be considered vacant because it was not being put to use.

3. Partial vacancy does not qualify as the vacancy required by MCL 117.9(8) to authorize annexation. A use of property need not be expansive to prevent a finding that the property is vacant. In this case, the water transmission line was installed in a 20-foot strip of the property. The city claimed that this *de minimis* use of the property and the fact that the easement was nonexclusive should have resulted in a finding that the property's partial vacancy satisfied the requirement for annexation. However, the Legislature did not specify partial vacancy as a condition of the property sufficient to allow annexation. In addition, the fact that the easement was nonexclusive had little, if any, effect on the analysis, particularly when, as in this case, the easement was permanent.

Reversed and remanded.

1. PROPERTY — CITY'S ANNEXATION OF ADJACENT PROPERTY — REQUIREMENTS — PROPERTY MUST BE VACANT OR A PARK.

For purposes of MCL 117.9(8), "vacant property" means real property that is not put to use; property is not considered vacant when even a part of the property is constantly used in some manner, such as for the constant operation of a water transmission line buried on the property.

2. PROPERTY — CITY'S ANNEXATION OF ADJACENT PROPERTY — DEFINITIONS — "PROPERTY."

"Property," in MCL 117.9(8), refers to real property, which can be defined as "land"; "land" includes the surface of the earth and the area immediately above and below the surface; a water transmission line that is buried beneath the surface of a piece of property and used constantly puts the property to use and thus prevents a finding that the property is vacant for purposes of annexation.

3. PROPERTY — CITY'S ANNEXATION OF ADJACENT PROPERTY — REQUIREMENTS — "PARTIAL VACANCY" NOT SUFFICIENT.

The fact that a piece of property is partially vacant does not render it vacant for purposes of annexation under MCL 117.9(8); the existence of a nonexclusive easement on a piece of property for use of a *de minimis* portion of the property may prevent a finding that the property is vacant if the easement is permanent.

Bauckham, Sparks, Thall, Seeber & Kaufman, PC (by *Robert E. Thall* and *Seth Koches*), for Lockport Township.

Cunningham Dalman, PC (by *Andrew J. Mulder* and *Vincent L. Duckworth*), for the city of Three Rivers.

Before: WILDER, P.J., and BOONSTRA and O'BRIEN, JJ.

O'BRIEN, J. Lockport Township (the Township) appeals as of right the trial court's order granting summary disposition in favor of the city of Three Rivers (the City). We reverse.

This case arises out of the City's attempt to annex approximately 80 acres of real property from the Township. In 2006, the private owner of the land at issue and the Township executed a "Grant of Easement," which granted the Township a 20-foot easement over the land for the installation of a water transmission line. A water transmission line was installed shortly thereafter. Approximately 10 years later, on February 1, 2016, the City purchased the land at issue from the private owner,

intending to develop a recreation facility. On the day following the purchase, February 2, 2016, the City Commission approved a resolution to annex the land at issue. In response, the Township filed this lawsuit on February 3, 2016, seeking, ultimately, to prevent the annexation. A temporary restraining order was entered, and proceedings continued from there. A hearing on the Township's motion for a preliminary injunction was held on February 17, 2016, and, after hearing the parties' arguments and reviewing the parties' filings, the trial court denied the Township's motion for a preliminary injunction and granted the City's motion for summary disposition. Its decision was based, primarily, on its conclusion that the Township's lawsuit could not succeed on its merits because the land at issue was "vacant" for purposes of MCL 117.9(8). An order reflecting the decision was entered on the date of the hearing. The Township appealed, arguing that the land is not "vacant" under MCL 117.9(8). We agree.

Appellate courts review de novo a trial court's decision on a motion for summary disposition. *Bernardoni v Saginaw*, 499 Mich 470, 472; 886 NW2d 109 (2016). "A motion for summary disposition made under MCR 2.116(C)(10) tests the factual sufficiency of the complaint." *Id*. Summary disposition under MCR 2.116(C)(10) is appropriate when, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10). "In deciding a motion under subrule (C)(10), the trial court views affidavits and other documentary evidence in the light most favorable to the nonmoving party." *Chandler v Dowell Schlumberger Inc*, 456 Mich 395, 397; 572 NW2d 210 (1998).

In this case, the trial court granted the City's motion for summary disposition on the basis of the court's interpretation and application of the Home Rule City Act (HRCA), MCL 117.1 *et seq*. A trial court's interpretation and application of a statutory provision is reviewed de novo on appeal. *Yono v Dep't of Transp*, 499 Mich 636, 645; 885 NW2d 445 (2016). "When interpreting a statute, [the] foremost rule of construction is to discern and give effect to the Legislature's intent. Because the language chosen is the most reliable indicator of that intent, [appellate courts] enforce clear and unambiguous statutory language as written, giving effect to every word, phrase, and clause." *Wyandotte Electric Supply Co v Electrical Tech Sys, Inc*, 499 Mich 127, 137; 881 NW2d 95 (2016) (citation omitted). If the statutory provision at issue is clear and unambiguous, it must be enforced as written, and no judicial construction is permitted or required. *Bank of America, NA v First American Title Ins Co*, 499 Mich 74, 85; 878 NW2d 816 (2016).

Specifically, the trial court interpreted and applied MCL 117.9(8), which provides, in relevant part, as follows:

> Where the territory proposed to be annexed to any city is adjacent to the city and consists of a park or vacant property located in a township and owned by the city annexing the territory, and there is no one residing in the territory, the territory may be annexed to the city solely by resolution of the city council of the city.

Stated simply, this portion of MCL 117.9(8) "authorizes a city to annex certain vacant land that the city owns by enacting a resolution for annexation and requires no affirmative action on the part of the township." *Rudolph Steiner Sch of Ann Arbor v Ann Arbor Charter Twp*, 237 Mich App 721, 733; 605 NW2d 18 (1999). The

issue before this Court in this case is whether the property at issue was "vacant" for purposes of MCL 117.9(8).

The term "vacant" is not defined in MCL 117.9(8) or in the remainder of the HRCA with regard to MCL 117.9(8). Nevertheless, this Court has previously interpreted and applied the term in several decisions, and each party in this case points to one of those decisions as being dispositive. The Township points to *Pittsfield Twp v Ann Arbor*, 86 Mich App 229, 235; 274 NW2d 466 (1978) (the *Ann Arbor* decision), in which this Court concluded that a parcel of land used constantly as a multilane road was not vacant for purposes of MCL 117.9(8). The City, on the other hand, points to *Pittsfield Charter Twp v Saline*, 103 Mich App 99, 107-108; 302 NW2d 608 (1981) (the *Saline* decision), in which this Court concluded that a parcel of land used seasonally for the production of crops and subject to leasing agreements was vacant for purposes of MCL 117.9(8). While neither decision is directly on point, nor is either one binding, MCR 7.215(J)(1), we are of the view that both support the Township's position in this case.

In the *Ann Arbor* decision, this Court, recognizing that the statutory language should be interpreted and applied "according to [its] common and approved usage," turned to the dictionary definition of "vacant" and defined "vacant land as that which is not put to use." *Ann Arbor*, 86 Mich App at 235. Applying that definition, the *Ann Arbor* Court concluded that the parcel at issue was not vacant because it was "in constant use as a road . . . ." *Id*. Three years later, in the *Saline* decision, this Court expressed "agree[ment] with the *Ann Arbor* Court's use of an ordinary meaning test to determine the definition of vacant . . . ." *Saline*, 103 Mich App at 107. Applying that ordinary-meaning test,

the *Saline* Court concluded that the parcel at issue was vacant because it was only seasonally used for the production of crops and subject to "farm leasing agreements" that could be terminated "in any case . . . ."[1] *Id.* at 108. In our view, both of these decisions correctly apply and interpret the statutory language at issue according to its plain and ordinary meaning, and we choose to do the same here.

The term "vacant," as it applies to real property, can still be defined the same way that it was in 1978—as real property that is "not put to use[.]" *Merriam-Webster's Collegiate Dictionary* (11th ed). Under the *Ann Arbor* decision, real property is not vacant when it is in constant use. Under the *Saline* decision, real property is vacant when it is only seasonally used and subject to a lease agreement that may be terminated at any time. In the instant matter, it is undisputed that the real property at issue is currently and constantly being used. The parties agree that there is, in fact, an underground water transmission line located on the land at issue. Like the road in the *Ann Arbor* decision, the waterline "is in constant use[.]" Therefore, the *Ann Arbor* decision best applies to the facts and circumstances of this case. Had the waterline been in "temporary, seasonal" use or subject to a lease that might be terminated at any time, the *Saline* decision would arguably apply. But those are simply not the facts before us in this case.

On appeal, the City argues that, in the *Saline* decision, this Court implicitly rejected the interpreta-

[1] Nearly a decade later, this Court was presented with a similar issue and expressly concluded that agricultural uses, alone, do not render property vacant for purposes of MCL 117.9(8). See *Wheatfield Twp v Williamston*, 184 Mich App 745, 746; 458 NW2d 670 (1990). Agricultural uses are simply distinguishable from the constant presence of the water transmission line at issue in this case.

tion and application of the term "vacant" that was used in the *Ann Arbor* decision. We disagree. While it is true that, in the *Saline* decision, this Court did "part company with [the *Ann Arbor*] panel's further holding that vacancy precludes use 'for any beneficial purpose,' " that distinction has no effect on the outcome of this case. *Saline*, 103 Mich App at 107. Whether MCL 117.9(8) requires that land "not be[] utilized for any beneficial purpose" in order to be vacant is of no relevance to us here because the real property at issue in this case was being "put to use." *Ann Arbor*, 86 Mich App at 235. Consequently, the land at issue is not vacant for purposes of MCL 117.9(8).

On appeal, the City also relies on the fact that "the water line is 'buried' underground" to support its position. Its reliance in this regard is misplaced. MCL 117.9(8) refers to "property," and we are unable to find any authority to support the notion that "property" refers only to the above-ground portion of the land at issue.[2] The word "land" can be defined as "the solid part of the surface of the earth," *Merriam-Webster's Collegiate Dictionary* (11th ed), or "an immovable and indestructible three-dimensional area consisting of a portion of the earth's surface, the space above and below the surface, and everything growing on or permanently affixed to it," *Black's Law Dictionary* (10th ed). Using these definitions, it is, in our view, quite apparent that

[2] The term "property" is defined as "a piece of real estate," which is not particularly helpful under the facts and circumstances of this case. *Merriam-Webster's Collegiate Dictionary* (11th ed). However, it is apparent, in our view, that the Legislature's reference to "property" in this case is a reference to "real property," which can be defined as "[l]and and anything growing on, attached to, or erected on it, excluding anything that may be severed without injury to the land[.]" *Black's Law Dictionary* (10th ed). Consequently, we turn to the definition of "land" to determine the Legislature's intent in this regard.

the term "property" as used in MCL 117.9(8) contemplates the space below the surface, which is precisely where the water transmission line is located.[3]

The City's remaining arguments on appeal emphasize the fact that the water transmission line exists on only "a *de minimis* portion of the [land at issue]" and the fact that the water transmission line exists only due to "a 'non-exclusive' underground . . . easement[.]" In our view, these facts have little, if any, effect on our analysis. First, MCL 117.9(8) requires vacancy, not partial vacancy. Had the Legislature intended to require partial vacancy or otherwise exclude *de minimis* uses, it certainly could have expressed such an intent in the statutory language. It did not. Second, while the City is correct in asserting that the easement is nonexclusive, the City's position fails to acknowledge the fact that the easement is also *permanent*.[4] Had the easement been nonexclusive and temporary, the *Saline* decision described above would arguably be directly on point. But, as indicated above, the easement is permanent and the decision is not on point. These arguments are therefore unpersuasive.

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[3] We also reject any notion that our Supreme Court's decision in *Rutland Twp v Hastings*, 413 Mich 560; 321 NW2d 647 (1982), stands for the proposition that underground structures are irrelevant when determining whether land is "vacant" for purposes of MCL 117.9(8). The Supreme Court merely noted that whether the land at issue was "vacant" was contested at trial and that "[t]he circuit judge found that the parcel subject to annexation was 'vacant' within the meaning of the statute" at trial. *Id*. at 562 n 2. In our view, that brief reference to the land as vacant does not suggest that the Supreme Court held, as a matter of law, that land having only underground structures is vacant under MCL 117.9(8).

[4] The easement agreement expressly "grant[ed] and convey[ed] to the [Township], its successors and assigns, a *permanent*, non-exclusive easement and right of way in which to construct, operate, remove, inspect, repair, maintain and replace, a water transmission line, in, over, across, and through 'the property[.]' " (Emphasis added.)

Accordingly, because the trial court erred in interpreting and applying the term "vacant" as used in MCL 117.9(8), we reverse its order granting summary disposition in favor of the City and remand this matter for the entry of an order granting summary disposition in favor of the Township pursuant to MCR 2.116(I)(2).[5]

Reversed and remanded. We do not retain jurisdiction.

WILDER, P.J., and BOONSTRA, J., concurred with O'BRIEN, J.

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[5] Because the Township is entitled to judgment in its favor as a matter of law, we need not address whether the trial court erred by denying the Township's motion for a preliminary injunction based on the likelihood that the Township's claim would succeed on its merits. Nevertheless, the resolution of that issue is likely apparent in light of our conclusion.

GOODHUE v DEPARTMENT OF TRANSPORTATION

Docket No. 332467. Submitted May 2, 2017, at Lansing. Decided May 16, 2017, at 9:00 a.m.

Thomas Goodhue, a United States Customs and Border Protection Officer who worked at the Blue Water Bridge in Port Huron, brought an action in the Court of Claims against the Department of Transportation, alleging that he sustained injuries at the Blue Water Bridge on April 8, 2015, and that three exceptions to governmental immunity applied: (1) the highway exception, MCL 691.1402; (2) the proprietary-function exception, MCL 691.1413; and (3) the public-building exception, MCL 691.1406. Plaintiff served defendant with a notice of intent to file a claim on May 18, 2015, and plaintiff filed suit in the Court of Claims on October 5, 2015. Defendant moved for summary disposition, alleging that plaintiff's count regarding the proprietary-function exception was barred because defendant's operation of the Blue Water Bridge was not a proprietary function and that plaintiff's counts regarding the roadway exception and the public-building exception were barred because plaintiff violated the notice requirement of MCL 691.1404 by failing to file his claim in the Court of Claims within 120 days from the time the injury occurred. The Court of Claims, MICHAEL J. TALBOT, C.J., granted summary disposition in favor of defendant on all counts. Plaintiff appealed.

The Court of Appeals *held*:

1. MCL 691.1413 provides, in relevant part, that the immunity of the governmental agency shall not apply to actions to recover for bodily injury arising out of the performance of a proprietary function, which is defined as any activity conducted primarily for the purpose of producing a pecuniary profit for the governmental agency, excluding any activity normally supported by taxes or fees. Whether an activity actually generates a profit is not dispositive, but the existence of a profit is relevant to the governmental agency's intent. An agency may conduct an activity on a self-sustaining basis without being subject to the proprietary-function exemption. Additionally, where the profit is deposited and where it is spent indicate intent; if profit is deposited in the general fund or used on unrelated events, the use

indicates a pecuniary motive, but use to defray expenses of the activity indicates a nonpecuniary purpose. In this case, the testimony of defendant's Bureau Director of Finance Administration indicated that while the Blue Water Bridge received income from a variety of sources, the primary source was from tolls, that all the money was placed in the same subfund, that none of the money was placed in the state's general fund, and that the money was used solely for the operation of the Blue Water Bridge. Contrary to plaintiff's argument, the fact that the amount of income defendant received in conjunction with the bridge in the last several years had exceeded its expenses was not dispositive; the surplus funds were planned in anticipation of future costs. Additionally, while any Blue Water Bridge expansion project would provide a financial benefit to the state and the city of Port Huron, any benefit would be ancillary to defendant's operation of the bridge. Accordingly, the trial court properly granted summary disposition in favor of defendant with regard to the proprietary-function exception because defendant operated the Blue Water Bridge on a self-sustaining basis instead of with a pecuniary intent.

2. The notice provisions of MCL 691.1404 governed the two counts regarding the highway and public-building exceptions to governmental immunity. MCL 691.1404(1) provides, in relevant part, that the injured person shall serve notice on the governmental agency of the occurrence of the injury and the defect within 120 days from the time the injury occurred. MCL 691.1404(2) provides, in relevant part, that the notice may be served on any individual who may lawfully be served with civil process directed against the governmental agency; that when the state is a defendant, the notice shall be filed in triplicate with the clerk of the Court of Claims; and that filing of such notice shall constitute compliance with MCL 600.3431. In this case, plaintiff filed his complaint on October 5, 2015, which was more than 120 days after the injury had occurred. Contrary to plaintiff's argument, the language in MCL 691.1404(2) providing that "[f]iling of such notice shall constitute compliance with [MCL 600.6431]" does not incorporate the timing requirement of MCL 600.6431(3) (providing that the claimant shall file with the clerk of the Court of Claims a notice of intention to file a claim or the claim itself within six months following the happening of the event giving rise to the cause of action); instead, the language in MCL 691.1404(2) merely provides that compliance with MCL 691.1404 shall be treated as compliance with MCL 600.6431, irrespective of the fact that the enumerated requirements in MCL 691.6431 may not have been satisfied. Moreover, the phrase "such notice" in

MCL 691.1404(2) does not refer to the notice mentioned in MCL 691.1404(1). The most relevant definition of "such" was "of the character, quality, or extent previously indicated or implied," and therefore the phrase "such notice" in the second sentence of MCL 691.1404(2) (providing that "such notice shall be filed") refers back to the notice in the first sentence of MCL 691.1404(2) (providing that "[t]he notice may be served upon any individual"). Accordingly, the trial court properly granted summary disposition with regard to plaintiff's claims concerning the highway and public-building exceptions because plaintiff's claims were barred for failure to effectuate the statutorily mandated notice.

Affirmed.

1. GOVERNMENTAL IMMUNITY — EXCEPTIONS — PROPRIETARY FUNCTIONS.

Under MCL 691.1413, a governmental activity that is conducted primarily for the purpose of producing a pecuniary profit and that normally cannot be supported by taxes and fees is a proprietary function; whether an activity actually generates a profit is not dispositive, but the existence of a profit is relevant to the agency's intent; an agency may conduct an activity on a self-sustaining basis without being subject to the proprietary-function exemption; where the profit is deposited and where it is spent indicate intent; if profit is deposited in the general fund or used on unrelated events, the use indicates a pecuniary motive, but use to defray expenses of the activity indicates a nonpecuniary purpose.

2. GOVERNMENTAL IMMUNITY — EXCEPTIONS — DEFECTIVE HIGHWAY — PUBLIC BUILDINGS — NOTICE — FILING REQUIREMENTS.

A claimant alleging a defect in a highway must follow the notice requirements of MCL 691.1404 as a condition to any recovery for injuries sustained by reason of the defective highway; similarly, if a claim related to the public-building exception is against the state, then notice shall be given as provided in MCL 691.1404; the language in MCL 691.1404(2) providing that "[f]iling of such notice shall constitute compliance with [MCL 600.6431]" does not incorporate the timing requirement of MCL 600.6431(3); instead, the language in MCL 691.1404(2) merely provides that compliance with MCL 691.1404 shall be treated as compliance with MCL 600.6431, irrespective of the fact that the enumerated requirements in MCL 691.6431 may not have been satisfied.

Law Office of Kevin R. Lynch, PLC (by *Kevin R. Lynch*), for Thomas Goodhue.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Amy M. Patterson*, Assistant Attorney General, for the Department of Transportation.

Before: GADOLA, P.J., and JANSEN and SAAD, JJ.

PER CURIAM. Plaintiff appeals the trial court's order that granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(7). For the reasons provided below, we affirm.

I. BASIC FACTS

Plaintiff was a United States Customs and Border Protection Officer who worked at the Blue Water Bridge in Port Huron. On April 8, 2015, plaintiff stepped into a hole in one of the tollbooth lanes and injured himself.

On May 18, 2015, plaintiff served defendant with a notice of intent to file a claim. And on October 5, 2015, plaintiff filed suit in the Court of Claims. After defendant initially moved for summary disposition under MCR 2.116(C)(7), plaintiff filed an amended complaint, wherein he claimed that three exceptions to governmental immunity applied. In Count I, plaintiff alleged that defendant was not immune from suit on the basis of the roadway exception; in Count II, plaintiff alleged that defendant was not immune from suit because defendant was engaging in a proprietary function at the time of the incident; and in Count III, plaintiff alleged that defendant was not immune from tort liability because of the public-building exception to governmental immunity.

Defendant thereafter filed an amended motion for summary disposition. Defendant argued that Counts I and III were barred because plaintiff failed to file his

claim in the Court of Claims within 120 days, which violates the notice requirement of MCL 691.1404. Defendant also argued that Count II was barred because its operation of the Blue Water Bridge was not a proprietary function. The trial court agreed and ultimately granted defendant's motion on all counts.

II. STANDARD OF REVIEW

We review a trial court's decision on a motion for summary disposition de novo. *Moraccini v Sterling Hts*, 296 Mich App 387, 391; 822 NW2d 799 (2012). Summary disposition is appropriate under MCR 2.116(C)(7) if a claim is barred because of, among other things, "immunity granted by law." When reviewing a motion for summary disposition under this subrule, a court accepts "all well-pleaded factual allegations as true and construe[s] them in favor of the plaintiff, unless other evidence contradicts them." *Dextrom v Wexford Co*, 287 Mich App 406, 428; 789 NW2d 211 (2010). Further,

> [i]f 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. [*Id*. at 429 (citations omitted).]

We also review issues of statutory interpretation de novo. *City of Riverview v Sibley Limestone*, 270 Mich App 627, 630; 716 NW2d 615 (2006).

III. ANALYSIS

Under Michigan's governmental tort liability act (GTLA), MCL 691.1401 *et seq*., governmental agen-

cies are immune from tort liability when they are "engaged in the exercise or discharge of a governmental function." MCL 691.1407(1). However, the act provides several exceptions to this broad grant of immunity.[1] As noted, plaintiff contends that three exceptions are relevant: (1) the highway exception, (2) the proprietary-function exception, and (3) the public-building exception.

A. COUNT II—THE PROPRIETARY-FUNCTION EXCEPTION

In the second count of his amended complaint, plaintiff avers that defendant cannot claim governmental immunity because defendant's operation of the Blue Water Bridge is a proprietary function. Plaintiff argues that the trial court erred when it granted summary disposition to defendant on this count. We disagree.

The proprietary-function exception to governmental immunity is found in MCL 691.1413 and provides, in pertinent part, the following:

> The immunity of the governmental agency shall not apply to actions to recover for bodily injury or property damage arising out of the performance of a proprietary function as defined in this section. Proprietary function shall mean any activity which is conducted primarily for the purpose of producing a pecuniary profit for the governmental agency, excluding, however, any activity normally supported by taxes or fees.

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[1] "The six statutory exceptions are: the highway exception, MCL 691.1402; the motor-vehicle exception, MCL 691.1405; the public-building exception, MCL 691.1406; the proprietary-function exception, MCL 691.1413; the governmental-hospital exception, MCL 691.1407(4); and the sewage-disposal-system-event exception, MCL 691.1417(2) and (3)." *Wesche v Mecosta Co Rd Comm*, 480 Mich 75, 84 n 10; 746 NW2d 847 (2008).

"Therefore, to be a proprietary function, an activity: '(1) must be conducted primarily for the purpose of producing a pecuniary profit; and (2) it cannot be normally supported by taxes and fees.' " *Herman v Detroit*, 261 Mich App 141, 145; 680 NW2d 71 (2004), quoting *Coleman v Kootsillas*, 456 Mich 615, 621; 575 NW2d 527 (1998).

"The first prong of the proprietary function test has two relevant considerations. First, whether an activity actually generates a profit is not dispositive, but the existence of profit is relevant to the governmental agency's intent." *Herman*, 261 Mich App at 145. Importantly, "[a]n agency may conduct an activity on a self-sustaining basis without being subject to the proprietary function exemption." *Id*.; see also *Hyde v Univ of Mich Bd of Regents*, 426 Mich 223, 258-259; 393 NW2d 847 (1986). "Second, where the profit is deposited and where it is spent indicate intent. If profit is deposited in the general fund or used on unrelated events, the use indicates a pecuniary motive, but use to defray expenses of the activity indicates a nonpecuniary purpose." *Herman*, 261 Mich App at 145.

Here, Myron Frierson, defendant's Bureau Director of Finance Administration, testified that the Blue Water Bridge receives income from a variety of sources but that the primary source is from tolls. Frierson explained that regardless of the source of the income, all monies are placed in the same Blue Water Bridge subfund, which is part of the state's trunk-line fund. Importantly, none of the money generated ends up in the state's general fund. He also explained that the money is used solely "for the operation of the Blue Water Bridge." Frierson testified that in addition to daily operations, money from the subfund is used for capital projects and to pay debt service on bonds that were issued for

projects associated with the Blue Water Bridge. We agree with the trial court that "[t]hese facts clearly demonstrate that the operation of the Blue Water Bridge is not to produce a pecuniary profit, but rather, to operate the bridge on a self-sustaining basis."

Plaintiff's reliance on the fact that the amount of income defendant has received in conjunction with the Blue Water Bridge in the last several years has exceeded its expenses is misplaced. As Frierson noted, these excess or surplus funds were planned "in anticipation of the capital needs," i.e., "anticipated future costs." This evidence shows that defendant operates the Blue Water Bridge on a self-sustaining basis and uses the money for the Blue Water Bridge. This is why the generation of a profit is not dispositive. See *id*. Indeed, as the Michigan Supreme Court has noted: "If the availability of immunity turned solely upon an examination of the ledgers and budgets of a particular activity, a fiscally responsible governmental agency would be 'rewarded' with tort liability for its sound management decisions. Such a rule could discourage implementation of cost-efficient measures and encourage deficit spending." *Hyde*, 426 Mich at 258.

We also reject plaintiff's assertion that the operation of the Blue Water Bridge has a real purpose to increase the "profit" of the state because any Blue Water Bridge expansion project will generate significant tax revenue for the state. While Frierson did opine that the state and the city of Port Huron would benefit financially from a future expansion project, the record shows that any such benefits would be ancillary to defendant's operation of the bridge. In sum, there is no evidentiary support for the contention that the primary purpose in running an efficient international bridge crossing is to improve the financial bottom line of any other government.

Accordingly, because the evidence conclusively shows that defendant operates the Blue Water Bridge on a self-sustaining basis instead of with a pecuniary intent, the trial court properly granted summary disposition in favor of defendant on plaintiff's Count II.

B. COUNTS I AND III—THE HIGHWAY AND PUBLIC-BUILDING EXCEPTIONS

Plaintiff argues that the trial court erred when it granted summary disposition to defendant on Counts I and III. Plaintiff asserts, incorrectly, that his claims were not barred because he was not required to file notice in the Court of Claims within 120 days of the accident.

In Count I, plaintiff alleges a defect in the highway, which is governed by the GTLA's notice requirements of MCL 691.1404. See *Plunkett v Dep't of Transp*, 286 Mich App 168, 176; 779 NW2d 263 (2009). Plaintiff alleges in Count III that the public-building exception to governmental immunity is implicated. Under MCL 691.1406, if a claim related to the public-building exception is against the state, then notice "shall be given as provided in [MCL 691.1404]." Therefore, the notice provisions of MCL 691.1404 control for both Counts I and III and provide, in pertinent part, as follows:

> (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 subsection (3)[2] 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.

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[2] Subsection (3) deals with injured persons under the age of 18 and is not implicated here.

> (2) The notice may be served upon any individual, either personally, or by certified mail, return receipt requested, who may lawfully be served with civil process directed against the governmental agency, anything to the contrary in the charter of any municipal corporation notwithstanding. In case of the state, such notice shall be filed in triplicate with the clerk of the court of claims. Filing of such notice shall constitute compliance with [MCL 600.6431], requiring the filing of notice of intention to file a claim against the state.

At issue is whether plaintiff satisfied these statutory notice requirements. Subsection (1) provides that notice of the injury, defect, and known witnesses must be filed "within 120 days from the time the injury occurred." Subsection (2) then details how that notice is to be effectuated. Specifically, the first sentence of Subsection (2) provides that the notice may be served upon an appropriate individual. However, the very next sentence clarifies that when the "state"[3] is a defendant, "such notice shall be filed in triplicate with the clerk of the court of claims." Here, plaintiff filed his complaint[4] with the clerk of the Court of Claims on October 5, 2015, which was more than 120 days after the injury occurred. Therefore, plaintiff's filing of the notice is deficient, which is "fatal to a plaintiff's claim against a government agency." *McLean v City of Dearborn*, 302 Mich App 68, 74; 836 NW2d 916 (2013).

Plaintiff claims that his filing with the Court of Claims was timely because he had six months from the time of his injury to file his notice instead of 120 days.

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[3] The GTLA defines "state" to include the state of Michigan along with, in pertinent part, "its agencies" and "departments." MCL 691.1401(g). Thus, there is no question that defendant, the Michigan Department of Transportation, is a "state" under the statute.

[4] For our purposes, we assume, without deciding, that the complaint qualifies as a proper notice.

Plaintiff relies on MCL 691.1404(2)'s reference of MCL 600.6431[5] as incorporating MCL 600.6431(3)'s timing requirements. We are not persuaded. MCL 691.1404(2) provides, "Filing of such notice shall constitute compliance with [MCL 600.6431] . . . ." As the trial court aptly noted, this language merely provides that compliance with MCL 691.1404 shall be treated as compliance with MCL 600.6431, irrespective of the fact that MCL 600.6431's enumerated requirements may not have been satisfied. Nothing in the language of MCL 691.1404(2) shows that it actually incorporates any of MCL 600.6431's requirements.

We also reject plaintiff's view that MCL 691.1404(2)'s use of the language "such notice" does not refer to the notice referenced in MCL 691.1404(1). The first sentence of MCL 691.1404(2) states, "*The notice*

[5] MCL 600.6431 provides:

> (1) No claim may be maintained against the state unless the claimant, within 1 year after such claim has accrued, files in the office of the clerk of the court of claims either a written claim or a written notice of intention to file a claim against the state or any of its departments, commissions, boards, institutions, arms or agencies, stating the time when and the place where such claim arose and in detail the nature of the same and of the items of damage alleged or claimed to have been sustained, which claim or notice shall be signed and verified by the claimant before an officer authorized to administer oaths.
>
> (2) Such claim or notice shall designate any department, commission, board, institution, arm or agency of the state involved in connection with such claim, and a copy of such claim or notice shall be furnished to the clerk at the time of the filing of the original for transmittal to the attorney general and to each of the departments, commissions, boards, institutions, arms or agencies designated.
>
> (3) In all actions for property damage or personal injuries, claimant shall file with the clerk of the court of claims a notice of intention to file a claim or the claim itself within 6 months following the happening of the event giving rise to the cause of action.

may be served . . . ." (Emphasis added.) The second sentence then provides, "In case of the state, *such notice* shall be filed . . . ." (Emphasis added.) Unquestionably, the reference in the second sentence refers back to the notice in the first sentence. Plaintiff claims that a dictionary definition of "such" shows that it is referring to a "similar" or "like" notice. But the most relevant definition of "such" is "of the character, quality, or extent *previously indicated or implied*." *Merriam-Webster's Collegiate Dictionary* (11th ed) (emphasis added).[6]

Consequently, because plaintiff failed to effectuate the statutorily mandated notice, his claims were barred, and the trial court properly granted defendant's motion for summary disposition with respect to plaintiff's Counts I and III.

Affirmed. Defendant, as the prevailing party, may tax costs pursuant to MCR 7.219.

GADOLA, P.J., and JANSEN and SAAD, JJ., concurred.

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[6] The example the dictionary gives for plaintiff's preferred definition is "a bag [such] as a doctor carries." It is easy to see that the use of "such" in that instance is not consistent with the use we are presented with. On the contrary, the pertinent definition uses the example, "[I]n the past few years many [such] women have shifted to full-time jobs," which is more in line with the statute's usage because it implies a previously mentioned noun.

VAN BUREN CHARTER TOWNSHIP v VISTEON CORPORATION

Docket No. 331789. Submitted November 2, 2016, at Detroit. Decided May 16, 2017, at 9:05 a.m. Leave to appeal sought.

Van Buren Charter Township brought an action against Visteon Corporation in the Wayne Circuit Court, alleging a breach of contract and seeking declaratory relief. Plaintiff had issued a series of bonds in 2003 to help finance defendant's development of its national headquarters in the township, and the bonds were secured in part by expected future tax revenues from that development. In 2010, while defendant was undergoing bankruptcy proceedings, the parties entered into an agreement that governed, among other things, defendant's obligations to plaintiff in the event of a shortfall in payments on the bonds. After a cash-flow analysis commissioned by plaintiff projected that such a shortfall would occur between 2017 and 2019 if new revenues were not introduced, plaintiff sent the results to defendant along with a demand that defendant begin negotiations to determine defendant's payment obligations. Defendant responded that it had no obligation to negotiate until after plaintiff actually experienced a bond-payment shortfall. Plaintiff alleged that this failure to negotiate constituted a breach of the 2010 agreement and asked the court to determine the rights and obligations of both parties under the agreement. The court, Muriel D. Hughes, J., granted defendant's motion for summary disposition under MCR 2.116(C)(4) and (C)(8), ruling that the case was not ripe in light of the fact that a payment shortfall had not yet occurred. Plaintiff appealed.

The Court of Appeals *held*:

1. The trial court did not abuse its discretion by ruling that the parties' disagreement regarding the correct interpretation of their agreement did not constitute an actual controversy that entitled plaintiff to a declaratory judgment. MCR 2.605 provides that a court may declare the rights and other legal relations of an interested party seeking a declaratory judgment in a case of actual controversy within its jurisdiction. When there is no actual controversy, the court lacks jurisdiction to issue a declaratory judgment. An actual controversy exists when a declaratory judg-

ment is necessary to guide the plaintiff's future conduct in order to preserve the plaintiff's legal rights. It is not necessary that actual injuries or losses have occurred; rather, a plaintiff must plead and prove facts that indicate an adverse interest necessitating a sharpening of the issues raised. In this case, the agreement provided that, to the extent that the payments made by defendant to plaintiff were inadequate to permit plaintiff to meet its payment obligations on the bonds, defendant agreed to negotiate in good faith to determine the amount of the shortfall and to make a nontax payment to assist plaintiff in making timely bond payments. This language unambiguously indicated that the occurrence of the shortfall was a condition precedent to defendant's obligation to perform. Plaintiff did not require declaratory relief to preserve its legal rights under the agreement because its rights, like defendant's obligations, were clear.

2. The trial court did not err by ruling that plaintiff's asserted damages were hypothetical in nature. Damages are an element of a breach-of-contract claim, and the party asserting a breach of contract has the burden of proving its damages with reasonable certainty. Damages must not be conjectural, speculative, or contingent in nature. When the fact of damages has been established and the only question to be decided is the amount, the certainty requirement is relaxed. However, the fact of damages in this case was not conclusively established. The report on which plaintiff relied to establish the existence of damages acknowledged that taxable-value growth rates were unpredictable and stated that a cash shortfall was inevitable only if there was no substantial increase in the captured taxes or if new revenues were not introduced. Although the trial court was required to view the evidence in a light most favorable to plaintiff, it was not required to accept any factually unsupported assertion advanced by plaintiff in its pleadings. The evidence indicated that any injury plaintiff might sustain from the projected bond-payment shortfall was entirely contingent on the hypothetical possibilities that plaintiff would have a constant revenue moving forward, that plaintiff would not be able to restructure its bond obligations to avoid injury, and that plaintiff would actually experience a bond-payment shortfall. Because plaintiff's purported future damages arose from what plaintiff's own expert described as a possible future harm that might not occur, plaintiff could not recover in contract law now for the hypothetical losses it might one day experience.

3. The trial court did not err by granting defendant's motion for summary disposition on the ground that plaintiff's breach-of-

contract claim was not ripe. The ripeness doctrine requires that a party has sustained an actual injury to bring a claim. Defendant is not obligated to engage in good-faith negotiations to determine the amount of a bond-payment shortfall it is required to pay until after the bond-payment shortfall has occurred. The bond-payment shortfall was still only a projection, and defendant could not have breached its contract by failing to perform before the time of performance had even arrived. Plaintiff's claim that defendant had anticipatorily repudiated its obligation to pay any amount of the bond-payment shortfall was similarly meritless. Under the doctrine of anticipatory repudiation, if, before the time of performance, a party to a contract unequivocally declares the intent not to perform, the innocent party has the option to either sue immediately for the breach of contract or wait until the time of performance. In this case, the evidence did not show that defendant ever unequivocally declared its intention not to perform under the terms of the agreement when the time of performance actually arrived. Defendant maintained only that it was not obligated to negotiate until after the shortfall occurred, that it was not required to pay any amount of the bond-payment shortfall until after it occurred, and that it was not required to pay the full amount of the bond-payment shortfall as claimed by plaintiff's projections.

Affirmed.

Clark Hill PLC (by *Kaveh Kashef* and *Jennifer K. Green*) and *Gasiorek Morgan Greco McCauley & Kotzian, PC* (by *Patrick B. McCauley*), for plaintiff.

Dickinson Wright PLLC (by *Phillip J. DeRosier*, *Michael C. Hammer*, *Robert F. Rhoades*, and *Doron Yitzchaki*) for defendant.

Before: STEPHENS, P.J., and SAAD and METER, JJ.

STEPHENS, P.J. Plaintiff, Van Buren Charter Township, appeals as of right an order granting summary disposition under MCR 2.116(C)(4) (lack of jurisdiction) and (C)(8) (failure to state a claim) in favor of defendant, Visteon Corporation, on plaintiff's request for a declaratory judgment and claim of breach of contract. We affirm.

I. BACKGROUND

This case arises from a Settlement Agreement and Mutual Release (the Agreement) entered in 2010 between plaintiff, a charter township in Wayne County, and defendant, a publicly traded global automobile parts supplier, in the midst of defendant's then-ongoing bankruptcy proceedings. Pertinent here, the Agreement dictated defendant's obligations to plaintiff for a shortfall in payments on bonds defendant received from plaintiff in 2003 for the purpose of financing the development and construction of defendant's national headquarters (Visteon Village, or "the Village") in plaintiff's township. Sometime in 2013, plaintiff engaged Public Financial Management, Inc. (PFM) to conduct a cash-flow analysis for the township. PFM returned a report on September 6, 2013, presenting 15 different cash-flow scenarios, each of which resulted in a shortfall. With regard to "Future Cash Shortfall," the drafter of the report stated, "Since the current Taxable Values within [plaintiff's township] are significantly lower than the original projections in 2003, a cash shortfall is inevitable if new revenues are not introduced." The estimated amount of the shortfall ranged from $23.7 million to $36.4 million, and the shortfall was projected to occur sometime between 2017 and 2019.

Plaintiff forwarded a copy of the PFM Report to defendant, along with a demand letter requesting that defendant engage in immediate negotiations to determine defendant's payment obligation under the Agreement with respect to the projected shortfall. Defendant agreed to meet with plaintiff but disputed any obligation to engage in negotiations until after plaintiff actually experienced a bond-payment shortfall. On the basis of this dispute, plaintiff brought a two-count

complaint against defendant, alleging breach of contract for defendant's failure to negotiate in good faith and anticipatory repudiation of its obligation to pay any amount of the bond-payment shortfall, and requesting a declaratory judgment determining the rights and obligations of both parties pursuant to Paragraph 3 of the Agreement.

The trial court granted defendant's motion for summary disposition under MCR 2.116(C)(4) and (C)(8), deciding that: (1) the parties' disagreement over the meaning of a term in their agreement did not present a justiciable issue, (2) plaintiff's breach-of-contract and declaratory-judgment claims were not ripe for adjudication because the actual damages to plaintiff from the payment shortfall were only "hypothetical" in nature, and (3) plaintiff's breach-of-contract and declaratory-judgment claims were not ripe for adjudication because the payment shortfall was not expected to occur until a future date.

II. STANDARD OF REVIEW

"This Court reviews de novo a trial court's decision on a motion for summary disposition in an action for a declaratory judgment." *Lansing Sch Ed Ass'n, MEA/NEA v Lansing Bd of Ed (On Remand)*, 293 Mich App 506, 512-513; 810 NW2d 95 (2011). "Questions regarding ripeness are also reviewed de novo." *King v Mich State Police Dep't*, 303 Mich App 162, 188; 841 NW2d 914 (2013). Finally, this Court reviews de novo "[q]uestions involving the proper interpretation of a contract or the legal effect of a contractual clause." *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 197; 747 NW2d 811 (2008).

In this case, defendant sought summary disposition pursuant to MCR 2.116(C)(4) and (C)(8). The trial

court indicated that it was granting defendant's motion under both subrules. However, on appeal, the parties contest the propriety of dismissal under MCR 2.116(C)(4). Although we acknowledge inconsistencies among published decisions of this Court and more recent unpublished decisions regarding whether Subrule (C)(4) supports dismissal for failure of justiciability grounds such as ripeness,[1] we need not address the conflict in this case. *Morales v Parole Bd*, 260 Mich App 29, 32; 676 NW2d 221 (2003) ("[T]his Court does not reach moot questions or declare principles or rules of law that have no practical legal effect in [a] case . . . .") (quotation marks and citation omitted). Both parties concede that summary disposition for lack of ripeness is properly considered under MCR 2.116(C)(10). Even if the trial court erroneously granted defendant's motion for summary disposition under Subrule (C)(4) on ripeness grounds, this Court will not reverse when summary disposition is nonetheless appropriate under a different subrule. *Rental Prop Owners Ass'n of Kent Co v Kent Co Treasurer*, 308 Mich App 498, 526-527; 866 NW2d 817 (2014) ("Even if the trial court erred by granting summary disposition under a particular subrule, this Court will not reverse if the error was harmless . . . ."). Because the trial court's dismissal of plaintiff's claims as unripe was appropriate under

[1] See *Braun v Ann Arbor Charter Twp*, 262 Mich App 154, 160; 683 NW2d 755 (2004) (expressly stating that summary disposition under MCR 2.116(C)(4) was proper when an otherwise justiciable takings claim was not ripe for review); see also *Broz v Plante & Moran, PLLC*, unpublished opinion per curiam of the Court of Appeals, issued May 17, 2016 (Docket No. 325884), p 3 (expressly stating that "[b]ecause ripeness falls under constitutional jurisdiction, not subject matter jurisdiction, the trial court erred in treating MCR 2.116(C)(4) as a proper ground for granting defendant summary disposition on the issue of ripeness").

MCR 2.116(C)(10), any error in granting defendant's motion for summary disposition under a separate subrule was harmless.

Additionally, as plaintiff concedes, because the trial court considered evidence beyond the pleadings to decide defendant's motion, this Court must treat the trial court's decision with respect to Subrule (C)(8) as though it were made only pursuant to Subrule (C)(10). See *Sharp v Lansing*, 238 Mich App 515, 518; 606 NW2d 424 (1999), aff'd 464 Mich 792 (2001). Summary disposition is proper under MCR 2.116(C)(10) if "there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). This Court considers the affidavits, pleadings, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). The same is considered to determine whether "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).

III. ANALYSIS

Plaintiff argues that the trial court erred when it granted defendant's motion for summary disposition because: (1) the trial court's conclusion that plaintiff's request for declaratory relief was not ripe was erroneous, as the parties' dispute over the interpretation of Paragraph 3 of the Agreement is clearly an existing and ongoing disagreement necessitating resolution, (2) the trial court's conclusion that plaintiff's future damages, in the form of an inevitable bond-payment short-

fall, were only "hypothetical" in nature was factually unsupported and legally impermissible, and the conclusion that the contract claims were not ripe was based on this erroneous determination, and (3) the trial court failed to recognize that defendant breached the contract when it declined to negotiate in good faith and committed an anticipatory breach when it argued it was not required to pay the amount of the bond shortfall. We address each claim of error in turn.

A. DECLARATORY JUDGMENT

On appeal, plaintiff asserts that, because the parties disagree in their interpretation of Paragraph 3 of the Agreement, an actual controversy exists and plaintiff is entitled to a declaration of its legal rights under that contractual provision. We disagree.

MCR 2.605 governs a trial court's power to enter a declaratory judgment. The court rule provides, in pertinent part, that "[i]n a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted." MCR 2.605(A)(1). The language in this rule is permissive, and the decision whether to grant declaratory relief is within the trial court's sound discretion. *PT Today, Inc v Comm'r of Office of Fin & Ins Servs*, 270 Mich App 110, 126; 715 NW2d 398 (2006).

When there is no actual controversy, the court lacks jurisdiction to issue a declaratory judgment. *Citizens for Common Sense in Gov't v Attorney General*, 243 Mich App 43, 55; 620 NW2d 546 (2000). Thus, "the existence of an 'actual controversy' is a condition precedent to the invocation of declaratory relief." *PT Today, Inc*, 270 Mich App at 127. An actual controversy

exists when a declaratory judgment is necessary to guide the plaintiff's future conduct in order to preserve the plaintiff's legal rights. *Shavers v Attorney General*, 402 Mich 554, 588-589; 267 NW2d 72 (1978). "It is not necessary that 'actual injuries or losses have occurred'; rather 'that plaintiffs plead and prove facts which indicate an adverse interest necessitating a sharpening of the issues raised.' " *Kircher v Ypsilanti*, 269 Mich App 224, 227; 712 NW2d 738 (2005), quoting *Shavers*, 402 Mich at 589.

Plaintiff claims that a disagreement exists regarding the application of a provision in the Agreement obligating defendant to assist plaintiff in the form of nontax payments in the event of a shortfall. The provision, Section 3 of the Agreement, reads as follows:

> [Defendant] acknowledges that [plaintiff] assisted [defendant] in the construction of the Village through the issuance by [plaintiff] of certain bonds supported by the full faith and credit of [plaintiff], the proceeds of which were used to help construct the Village. *To the extent that the property tax payments made by* [*defendant*] *to* [*plaintiff*]*, including payments made by* [*defendant*] *to* [*plaintiff*] *pursuant to Section 2.2, are inadequate to permit* [*plaintiff*] *to meet its payment obligations with respect to that portion of the bonds that were used to help fund the Village,* [*defendant*] *hereby agrees to negotiate with* [*plaintiff*] *in good faith to determine the amount of the shortfall with respect to those bonds and make a non-tax payment, payment in-lieu-of tax, (PILOT) to* [*plaintiff*] *to assist* [*plaintiff*] *in making timely payments on the bonds*. [Emphasis added].

Plaintiff claims that the provision is ambiguous, and could be read to obligate defendant to begin negotiations prior to the occurrence of the shortfall. Plaintiff argues that it is entitled to "timely" payments, which, it argues, requires that defendant engage in negotia-

tions before the shortfall and suggests that the parties' intent should be considered. According to plaintiff, it would not have entered into an agreement through which it would have needed to wait for defendant's assistance until after the shortfall occurred, opening itself up to unforeseeable and catastrophic damages. However, we conclude that, while perhaps inartfully worded, this contractual provision is unambiguous and that plaintiff has failed to present an "actual case or controversy" necessitating declaratory relief.

"Under ordinary contract principles, if contractual language is clear, construction of the contract is a question of law for the court." *Meagher v Wayne State Univ*, 222 Mich App 700, 721; 565 NW2d 401 (1997). "If the contract is subject to two reasonable interpretations, factual development is necessary to determine the intent of the parties and summary disposition is therefore inappropriate." *Id*. at 722. "If the contract, although inartfully worded or clumsily arranged, fairly admits of but one interpretation, it is not ambiguous." *Id*. Clear and unambiguous contractual language must be enforced as written. *Holland v Trinity Health Care Corp*, 287 Mich App 524, 527; 791 NW2d 724 (2010). The judiciary is not authorized to rewrite contracts. This Court has repeatedly held that the straightforward language of a contract must control. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 52; 664 NW2d 776 (2003) ("The notion, that free men and women may reach agreements regarding their affairs without government interference and that courts will enforce those agreements, is ancient and irrefutable."); *Terrien v Zwit*, 467 Mich 56, 71; 648 NW2d 602 (2002) ("The general rule [of contracts] is that competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be

held valid and enforced in the courts.") (quotation marks and citation omitted; alteration in original).

According to the plain language of the contract, defendant is obligated to "negotiate with [plaintiff] in good faith to determine the amount of the shortfall," but only "[t]o the extent that the property tax payments made by [defendant]" are "inadequate to permit [plaintiff] to meet its payment obligations" and only "with respect to that portion of the bonds that were used to help fund the Village." Thereafter, defendant is obligated to "make a non-tax payment" in order to "assist" plaintiff in making "timely" payments on those bonds. In each case, the tense of the verb is present, not future. No reasonable person reading this provision could find it ambiguous or conclude that defendant is obligated to engage in negotiations before the shortfall. Indeed, the contract admits of but one interpretation, in which the occurrence of the shortfall is a condition precedent to defendant's obligation to perform, and defendant is not obligated to do anything until after plaintiff has experienced a shortfall. In fact, defendant is not obligated to perform until after two conditions have been met: (1) a shortfall has occurred, and (2) property taxes paid by defendant are inadequate for plaintiff to pay that portion of the bonds that was used to fund the Village. This second condition cannot be met until *after* the shortfall has occurred and the parties have determined the amount due.

Contrary to plaintiff's assertion on appeal, the requirement that defendant negotiate in good faith to "determine the amount of the shortfall" does not force the implication that defendant must be required to negotiate before the occurrence of a shortfall. Plaintiff forgets that the provision contains qualifying language, requiring defendant to negotiate in good faith to

determine the amount of the shortfall only "with respect to those bonds" that were "supported by the full faith and credit of [plaintiff], the proceeds of which were used to help construct the Village." Defendant is therefore clearly obligated to engage in negotiations once a shortfall occurs, to determine which part of the shortfall can be attributed to bonds it is obligated to assist plaintiff to pay.

It is true that this contract is not particularly strong, or overly beneficial to plaintiff. However, we do not create ambiguities to rewrite or rebalance the equities of a contract, especially when, as in this case, the contract was voluntarily drafted and entered into by consenting parties. As our Supreme Court has explained, "[T]he judiciary is without authority to modify unambiguous contracts or rebalance the contractual equities struck by contracting parties because fundamental principles of contract law preclude such subjective post hoc judicial determinations of 'reasonableness' as a basis upon which courts may refuse to enforce unambiguous contractual provisions." *Rory v Continental Ins Co*, 473 Mich 457, 461; 703 NW2d 23 (2005). Nor do we, as plaintiff requests, look past the plain and unambiguous terms of a contract to impose an obligation on a party that has not been clearly delineated in the parties' agreement. "It is beyond doubt that the actual mental processes of the contracting parties are wholly irrelevant to the construction of contractual terms." *Zurich Ins Co v CCR & Co (On Rehearing)*, 226 Mich App 599, 604; 576 NW2d 392 (1997). "Rather, the law presumes that the parties understand the import of a written contract and had the intention manifested by its terms." *Id*.

Finally, plaintiff's claim that it needs declaratory relief in order to preserve its legal rights under the

contract is untenable, and its assertion that it will be unable to prevent damages without declaratory relief is irrelevant. Plaintiff's rights, like defendant's obligations, under the contract are clear. Defendant is not obligated to perform until after a shortfall, and then is only obligated to "assist" with a certain payment thereof. Plaintiff may take steps, as it should, to prevent loss and attempt to avoid excessive damage from the projected shortfall, and its remedy for any losses actually incurred lies in damages for breach of contract, if defendant fails to meet its obligations when the time for performance has arrived.

It is also worth noting that declaratory relief is not mandatory. Again, the statute governing declaratory relief is permissive. *PT Today, Inc*, 270 Mich App at 126. Even if plaintiff's claims had merit, the decision of whether to grant declaratory relief rests within the sound discretion of the trial court. The decision to decline to offer declaratory relief is within the range of reasonable outcomes. We find no error on appeal.

B. HYPOTHETICAL DAMAGES

Plaintiff argues that, in light of the PFM Report drafter's conclusion that a bond-payment shortfall is "inevitable," the trial court erred when it determined that plaintiff's damages were hypothetical in nature. Again, we disagree.

Damages are an element of a breach-of-contract claim. *Miller-Davis Co v Ahrens Constr, Inc*, 495 Mich 161, 178; 848 NW2d 95 (2014). "The party asserting a breach of contract has the burden of proving its damages with reasonable certainty, and may recover only those damages that are the direct, natural, and proximate result of the breach." *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003).

"[D]amages must not be conjectural or speculative in their nature, or dependent upon the chances of business or other contingencies . . . ." *Doe v Henry Ford Health Sys*, 308 Mich App 592, 602; 865 NW2d 915 (2014) (quotation marks and citation omitted). Although breach-of-contract damages need not be precisely established, "uncertainty as to the fact of the amount of damage caused by the breach of contract is fatal[.]" *Home Ins Co v Commercial & Indus Security Servs, Inc*, 57 Mich App 143, 147; 225 NW2d 716 (1974).

Plaintiff concedes that the amount of its damages is uncertain, but argues that the "unrebutted" PFM Report establishes that the occurrence of damages in the form of a bond-payment shortfall is certain. It is true that when the fact of damages has been established and the only question to be decided is the amount, the certainty requirement is relaxed. *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 108; 535 NW2d 529 (1995). However, plaintiff is mistaken when it concludes that the fact of damages has been conclusively established. Although, as plaintiff notes, defendant has not provided any independent report or any document specifically refuting the findings contained within the PFM Report, defendant was not required to do so, given that the factual uncertainty of plaintiff's damages is apparent from the PFM Report itself. First, the PFM Report contains 15 different projections for a potential bond-payment shortfall amount, many of which are predicted to occur in varying years. As the report drafter makes clear, these projections indicate that "a cash shortfall is inevitable *if new revenues are not introduced*." The drafter also acknowledged that "[b]ecause of the unpredictable nature of Taxable Value growth rates it is not possible to project the exact moment of [plaintiff's] initial cash shortfall with pre-

cise accuracy" and that a shortfall is certain only "without a substantial increase in the captured taxes, or the influx of additional funds by 2017 or 2018 . . . ." The very language of the report on which plaintiff relies in making its claim for damages supports the fact that, at least at this time, plaintiff's alleged damages are conjectural, speculative, and clearly "dependent upon the chances of business or other contingencies." *Doe*, 308 Mich App at 601 (quotation marks and citation omitted).

Plaintiff also argues that the trial court erred when it inappropriately made a "factual finding" regarding the hypothetical nature of plaintiff's bond-payment shortfall rather than accepting plaintiff's characterization of the shortfall as "certain," as plaintiff claims it was required to do when it decided defendant's motion for summary disposition under MCR 2.116(C)(10). Plaintiff is correct that, when deciding such a motion, the trial court is required to view the evidence in a light most favorable to the nonmoving party—here, plaintiff. *Allison*, 481 Mich at 425. However, viewing the evidence in a light most favorable to plaintiff is not the same as accepting, verbatim, any assertion advanced by plaintiff in its pleadings. Indeed, the trial court is permitted to view all of the evidence and is required only to view it in the light *most favorable* to plaintiff, not in a factually unsupported light in order to substantiate plaintiff's otherwise unsubstantiated claims. In this case, the trial court did not "find" any facts not clearly contained within the parties' attachments to the pleadings. The hypothetical nature of plaintiff's claims was apparent after viewing plaintiff's own financial report, and even when viewed in the light most favorable to plaintiff, the projections of the PFM Report could not be interpreted to support the "certainty" of plaintiff's alleged future damages.

Plaintiff's damages are speculative because "they do not arise from [a] purported breach of contract but depend entirely on the occurrence of multiple contingencies which might or might not occur at some point in the future." *Doe*, 308 Mich App at 602. By way of example, we note that plaintiff has already successfully restructured its bond obligation in order to avoid a previously projected deficiency, and plaintiff admitted at the hearing on defendant's motion for summary disposition that it was in the process of obtaining another bond restructuring agreement. This admission alone illustrates the contingent nature of plaintiff's alleged damages. Any injury plaintiff might sustain from the projected bond-payment shortfall is entirely contingent on the hypothetical possibilities that (1) plaintiff will have a constant revenue moving forward, (2) plaintiff will not be able to restructure its bond obligations to avoid injury, and (3) plaintiff will actually experience a bond-payment shortfall. Because plaintiff's purported future damages arise from what plaintiff's own expert describes as a possible future harm that might not occur, plaintiff may not recover in contract law now for the hypothetical losses it might one day experience.

C. BREACH-OF-CONTRACT CLAIMS NOT RIPE

Finally, plaintiff argues that the trial court erred by granting defendant's motion for summary disposition on plaintiff's breach-of-contract claims for lack of ripeness. The doctrine of ripeness is closely related to the standing doctrine in that it "focuses on the timing of the action." *Mich Chiropractic Council v Comm'r of Office of Fin & Ins Servs*, 475 Mich 363, 379; 716 NW2d 561 (2006) (opinion by YOUNG, J.) (emphasis omitted), overruled on other grounds by *Lansing Sch Ed Ass'n v*

Lansing Bd of Ed, 487 Mich 349 (2010). The ripeness doctrine requires that a party has sustained an actual injury to bring a claim. *Huntington Woods v Detroit*, 279 Mich App 603, 615; 761 NW2d 127 (2008). A party may not premise an action on a hypothetical controversy. *Id*. at 615-616.

Plaintiff argues that it has proven injury in the form of a breach of contract because defendant has already failed to negotiate in good faith, as required by Paragraph 3, and anticipatorily repudiated its obligations under Paragraph 3 by unequivocally stating that it will not pay any part of the bond-payment shortfall if it should occur. We disagree.

Michigan law requires a party claiming a breach of contract to prove the existence and terms of a contract, that the defendant breached its terms, and that the breach caused damages to the plaintiff. *Miller-Davis*, 495 Mich at 178. In this case, as previously discussed, the existence of a contract is undisputed and its terms are unambiguous. Defendant is not obligated to engage in good-faith negotiations to determine the amount of a bond-payment shortfall it is required to pay until after the bond-payment shortfall has occurred. At this time, the bond-payment shortfall is still only a projection, and defendant could not have breached its contract by failing to perform before the time of performance has even arrived. Plaintiff's claim that defendant already breached the contract by failing to negotiate therefore fails. Without an actual injury resulting from a breach of contract, the trial court properly dismissed plaintiff's breach-of-contract claim as not ripe for adjudication.

Plaintiff's claim for breach of contract on the theory that defendant anticipatorily repudiated its obligation to pay any amount of the bond-payment shortfall is

similarly meritless. Under the doctrine of anticipatory repudiation, "if, before the time of performance, a party to a contract unequivocally declares the intent not to perform, the innocent party has the option to either sue immediately for the breach of contract or wait until the time of performance." *Stoddard v Mfr Nat'l Bank of Grand Rapids*, 234 Mich App 140, 163; 593 NW2d 630 (1999). "In determining whether an anticipatory breach has occurred, it is the party's intention manifested by acts and words that is controlling, and not any secret intention that may be held." *Paul v Bogle*, 193 Mich App 479, 493; 484 NW2d 728 (1992), citing *Carpenter v Smith*, 147 Mich App 560, 565; 383 NW2d 248 (1985).

In this case, even when considered in a light most favorable to plaintiff, the evidence does not show that defendant ever unequivocally declared its intention not to perform under Paragraph 3 of the Agreement when the time of performance actually arrives. Despite plaintiff's argument to the contrary, none of the evidence it cites on appeal proves that defendant is unwilling to negotiate or to pay *any* amount of the bond-payment shortfall. Defendant simply maintains its position that it is not obligated to negotiate until after the shortfall has occurred, that it is not required to pay any amount of the bond-payment shortfall until after it has occurred, and that it is not required under Paragraph 3, in any case, to pay the full amount of the bond-payment shortfall as claimed by plaintiff's projections. Defendant's position is best illustrated in its counsel's statements at the hearing on defendant's motion for summary disposition:

> [*The Court*]: Is the defense's – one of defense's position [sic] that they have no liability to pay anything towards a certain shortfall?

> [*Counsel for Defendant*]: It's our position that we have a duty, if there is a shortfall to negotiate in good faith the amount. And then to make a non-tax payment, payment in lieu of tax to [plaintiff] to assist [plaintiff]. That's our position.
>
> It's our view as the defense, that those words mean very little, if anything would be due. But we view our duty and obligations what's [sic] stated in that paragraph.

It is clear that while defendant disputes the amount due at this time and asserts that its liability in the event of a shortfall might be minimal, it has not unequivocally repudiated its obligation to pay any amount of the bond-payment shortfall as required by Paragraph 3 of the Agreement. Therefore, even when the evidence is viewed in a light most favorable to plaintiff, it does not support plaintiff's claim for anticipatory repudiation of the Agreement, and summary disposition under MCR 2.116(C)(10) for lack of a ripe controversy is therefore appropriate with regard to both of plaintiff's breach-of-contract claims.

The trial court did not err when it granted defendant's motion for summary disposition on the ground that plaintiff's breach-of-contract claim and request for a declaratory judgment were not yet ripe for adjudication, and reversal is not required.

Affirmed.

SAAD and METER, JJ., concurred with STEPHENS, P.J.

NEAL v DETROIT RECEIVING HOSPITAL

Docket No. 329733. Submitted May 9, 2017, at Detroit. Decided May 16, 2017, at 9:10 a.m.

LaDonna Neal filed a medical malpractice action in April 2013 in the Wayne Circuit Court against Detroit Receiving Hospital and others. The parties reached a confidential settlement agreement in March 2015 and agreed to the entry of two orders dismissing Neal's lawsuit against all defendants. Meridian Health Plan of Michigan, a state Medicaid plan, had paid Neal's medical expenses during her recovery from the injuries giving rise to the malpractice action. Neal incurred medical expenses totaling $298,869.10, but Meridian Health Plan paid only $110,238.19. Meridian Health Plan asserted a lien for the amount it actually paid for the medical expenses incurred by Neal against any tort proceeds received by Neal. In April 2015, Neal moved to reinstate the case to resolve the Medicaid lien with Meridian Health Plan. In June 2015, the parties agreed to allow Meridian Health Plan to intervene as a party plaintiff for the sole purpose of resolving its Medicaid lien. The case was reinstated in July 2015. Neal claimed that the settlement agreement allocated 55% of the tort proceeds she received to noneconomic damages, 40% to economic damages, and 5% to medical expenses. An allocation of 5% of the total settlement amount was purported to be $26,775. First Recovery Group, representing Meridian Health Plan, asserted that MCL 400.106(5) gave it the right to recover the full amount of expenses paid by Meridian Health Plan. Neal contended that MCL 400.106(5) was preempted by the federal anti-lien provision in 42 USC 1396p(a)(1). In September 2015, the court, Daphne Means Curtis, J., held that Meridian Health Plan was entitled to receive from Neal's tort proceeds the full amount it paid for Neal's medical expenses. That is, Neal was ordered to pay $110,238.19 to Meridian Health Plan from the amount of money awarded to her under the tort settlement. Neal appealed.

The Court of Appeals *held*:

1. The Supremacy Clause of the United States Constitution, art VI, cl 2, invalidates state laws that interfere with, or are contrary to, federal law. Medicaid is a state and federal coopera-

tive program funded by both state and federal funds that pays certain medical expenses for indigent individuals. 42 USC 1396a(a)(25)(A) requires states to make reasonable efforts to determine whether any third parties are liable to pay for a Medicaid recipient's medical care, and under 42 USC 1396a(a)(25)(H) and 42 USC 1396k(a)(1)(A), a state Medicaid plan recipient must assign to the state his or her right to receive payment from any third party for medical care. This enables the state to seek reimbursement from a liable third party for the state Medicaid plan's expenditures for a recipient's medical care. When a Medicaid recipient obtains a tort settlement from a liable third party, MCL 400.106(5) indicates that the Medicaid health plan shall recover the full cost of expenses paid under Michigan's Medicaid program unless the health plan agrees to accept a lesser amount. The state Medicaid plan in Michigan is subrogated under MCL 400.106(1)(b)(*ii*) to a recipient's right to recover funds for payment of medical expenses, but Michigan law also permits a Medicaid health plan to place a lien on funds received by a Medicaid recipient from a third-party tort settlement without regard to whether the funds received were allocated for medical expenses. In short, Michigan law permits a state to recover from a recipient's tort settlement the entire amount of money the state paid for a recipient's medical care. But 42 USC 1396p(a)(1) prohibits placing a lien against a recipient's property before the individual's death for the purpose of recovering medical assistance paid or to be paid on the recipient's behalf by a state health plan. When read in conjunction with 42 USC 1396a(a)(25)(H) and 42 USC 1396k(a)(1)(A), the federal prohibition limits a Medicaid plan's recovery to the medical costs allowed for in the tort settlement. Any funds awarded as compensation for other damages are the recipient's property, and federal law expressly prohibits a lien against a recipient's property for the recovery of medical expenses paid by the party claiming the lien. That is, money allocated to compensate a recipient for other types of damages, including economic and noneconomic damages, is not available to pay a state Medicaid plan for medical expenses it paid. As with the Medicaid lien at issue in *Arkansas Dep't of Health & Human Servs v Ahlborn*, 547 US 268 (2006), the state and federal laws directly conflict, and Michigan's law is preempted by federal law. In this case, Meridian Health Plan claimed that it was authorized to reimbursement for the total amount it paid—$110,238.19—rather than the 5% allocated to medical expenses by the settlement agreement—$26,775. Michigan authorizes a lien against the whole of an individual's tort settlement, and federal law prohibits a lien against any portion of

an individual's tort settlement that is not designated as compensation for medical expenses. Consequently, the Supremacy Clause operates to preempt Michigan's law regarding the amount of money Meridian Health Plan is allowed to recover from Neal's tort settlement. The trial court erred in this case by failing to acknowledge that the relevant federal law preempted MCL 400.106(5) and, as a result, Meridian Health Plan could not rely on the statutory provision to recover the full amount of medical expenses it paid on Neal's behalf. Therefore, Neal could not be ordered to pay from her tort settlement the full amount Meridian Health Plan paid for medical expenses she incurred.

2. A state Medicaid plan is not necessarily bound by the allocation of damages agreed on by parties to a tort settlement when the state Medicaid plan was not included in the settlement negotiations and did not approve of the allocation. In this case, Meridian Health Plan's recovery was not necessarily limited to the 5% allocated by the settlement agreement. In the absence of a stipulation regarding a specific amount of medical expenses paid or a judgment indicating the amount of tort proceeds allocated to pay for medical expenses, there exists a risk of settlement manipulation. That is, when the only parties negotiating the amount of money to allocate to medical expenses are the Medicaid recipient and the liable third party, they could negotiate a disproportionately small percentage of the tort proceeds to be recoverable as medical expenses, a result that would be unfair to the Medicaid plan's right to reimbursement from liable third parties. When there is no stipulation regarding a specific percentage or sum, the matter should be submitted to a court for a decision. Of primary importance is preventing a Medicaid plan from taking tort proceeds designated to compensate for other losses suffered by the Medicaid recipient, e.g., economic and noneconomic damages. The trial court erred in this case when it, without holding a proper evidentiary hearing and without reaching a reasoned decision regarding the allocation of damages, ordered Neal to pay from her tort settlement the entire sum of money Meridian Health Plan paid for her medical expenses. On remand, the trial court was required to review the confidential settlement for fairness and reasonableness. The trial court had to consider the true value of the case and Neal's claimed losses to determine how much of Meridian Health Plan's Medicaid lien was recoverable from the proceeds of the tort settlement. Meridian Health Plan's recovery had to be limited to the proportion of the tort settlement the trial court determined should be designated for medical expenses.

3. The trial court failed to deduct from Meridian Health Plan's lien its pro rata share of the costs and attorney fees incurred as a result of Neal's pursuit and ultimate settlement of her tort claim. Because Meridian Health Plan conceded in the trial court that its share was approximately 30%, the trial court was required to adjust Meridian Health Plan's lien accordingly.

Decision reversed, order vacated, and case remanded.

1. CONSTITUTIONAL LAW — SUPREMACY CLAUSE — PREEMPTION — MEDICAID COVERAGE AND TORT SETTLEMENTS.

The Supremacy Clause of the United States Constitution, art VI, cl 2, renders invalid any state law that interferes with or is contrary to federal law; to the extent that Michigan's Medicaid reimbursement statute, MCL 400.106(5), states that Michigan shall recover the full cost of expenses paid, it directly conflicts with 42 USC 1396p(a)(1), the federal law prohibiting liens against an individual's property to obtain reimbursement for medical expenses paid by a Medicaid plan.

2. TORTS — MEDICAID LIEN AGAINST TORT SETTLEMENT PROCEEDS — ALLOCATION OF PROCEEDS — MEDICAL EXPENSES.

A state Medicaid plan is entitled to reimbursement for expenses it paid for a Medicaid recipient's medical care when the Medicaid recipient receives tort proceeds from a liable third party, but the amount of money the state Medicaid plan can recover is limited to the portion of the tort proceeds allocated to pay for medical expenses; the money recovered by a state Medicaid plan cannot be money allocated to compensate the recipient for other losses, e.g., compensation for economic and noneconomic damages (MCL 400.106(5); 42 USC 1396a(a)(25)(H); 42 USC 1396k(a)(1)(a); 42 USC 1396p(a)(1)).

3. TORTS — MEDICAID LIEN AGAINST TORT SETTLEMENT PROCEEDS — ALLOCATION OF PROCEEDS — PARTIES TO NEGOTIATION OF SETTLEMENT.

A state Medicaid plan that was not a party to settlement negotiations between a Medicaid recipient and a liable third party concerning the recipient's tort claim is not bound by the settlement's allocation of funds for medical expenses; when a tort settlement does not specify an allocation, the parties have not agreed to an allocation, or all parties were not part of the settlement negotiations, a court must review the case to determine the real value of the Medicaid recipient's claim and order a fair and reasonable allocation of the settlement in light of the various damages the recipient suffered (MCL 400.106(5); 42 USC 1396p(a)(1)).

Sommers Schwartz, PC (by *Matthew L. Turner* and *Ramona C. Howard*), for LaDonna Neal.

Lewis & Munday, PC (by *Samuel E. McCargo*), for Meridian Health Plan of Michigan.

Amicus Curiae:

Bill Schuette, Attorney General, Aaron D. Lindstrom, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Timothy J. Haynes*, Assistant Attorney General, for the Michigan Department of Health & Human Services.

Before: SERVITTO, P.J., and CAVANAGH and FORT HOOD, JJ.

CAVANAGH, J. Plaintiff, LaDonna Neal, appeals as of right an opinion and order requiring her to pay the full amount of a Medicaid lien, $110,238.19, following the settlement of her medical malpractice action. We reverse the decision, vacate the order, and remand for further proceedings consistent with this opinion.

In April 2013, plaintiff filed a medical malpractice action. It is undisputed that plaintiff's medical care was paid for by Meridian Health Plan of Michigan, a Medicaid plan. Meridian Health Plan was billed $298,869.10, but paid $110,238.19, for plaintiff's medical expenses. Meridian Health Plan asserted a lien in the amount of $110,238.19.

On March 20, 2015, after the parties reached a confidential settlement agreement, the trial court entered two stipulated orders dismissing plaintiff's lawsuit against all defendants.

On April 21, 2015, plaintiff moved to reinstate the case to resolve the Medicaid lien with Meridian Health

Plan.[1] Plaintiff claimed that the confidential settlement agreement between the parties allocated the settlement funds as follows: 55% to noneconomic damages and 40% to economic damages (lost earning capacity, attendant care, and household services). The remaining 5% was allocated to medical expenses, totaling $26,775. Plaintiff asserted that attempts to settle the Medicaid lien with First Recovery Group, the organization that represented Meridian Health Plan with regard to its lien rights, were unsuccessful. First Recovery Group relied on MCL 400.106(5) and claimed a right to recover the full amount of the Medicaid lien, $110,238.19, while plaintiff argued that MCL 400.106(5) was preempted by the Supremacy Clause of the United States Constitution, US Const, art VI, cl 2. That is, as set forth in the leading case of *Arkansas Dep't of Health & Human Servs v Ahlborn*, 547 US 268; 126 S Ct 1752; 164 L Ed 2d 459 (2006), the federal anti-lien provision, 42 USC 1396p(a)(1), invalidated MCL 400.106(5). The *Ahlborn* Court held that states could not recover any amount in excess of the recipient's recovery for medical expenses. And in this case, plaintiff argued, the parties stipulated to the proper allocation of damages and "that stipulation is reasonable and should be respected." Thus, plaintiff requested the court to reinstate the case and enter an order requiring plaintiff to pay $26,775 in full settlement of the Medicaid lien.

Meridian Health Plan responded to plaintiff's motion to reinstate the case to resolve the Medicaid lien, arguing that it was entitled to recover its full lien amount as set forth in MCL 400.106(5), which was not

[1] On June 5, 2015, the trial court entered a stipulated order granting Meridian Health Plan leave to intervene as a party plaintiff for the sole purpose of resolving its Medicaid lien.

preempted by the federal anti-lien provision. According to Meridian Health Plan, "Plaintiff was statutorily obligated to assign her Medicaid recovery rights to [Meridian Health Plan] and *Ahlborn* only applied the anti-lien provision to the extent that the Medicaid lien recovery included attaching a lien to 'property' of the Medicaid recipient other than 'medical expenses'." Further, as the *Ahlborn* Court held, "the risk that parties to a tort suit will allocate away the State's interest can be avoided either by obtaining the State's advance agreement to an allocation or, if necessary, by submitting the matter to a court for decision." *Ahlborn*, 547 US at 288. In this case, plaintiff may have conveniently—and improperly—"allocated away" the state's right to recover the full amount of its Medicaid lien, but Meridian Health Plan neither participated in those negotiations nor agreed to the allocation. Thus, Meridian Health Plan concurred with plaintiff's request to reinstate this case, but requested that the trial court enter an order requiring plaintiff to pay the full amount of its Medicaid lien, $110,238.19.

On July 8, 2015, plaintiff's motion to reinstate the case was granted. On September 29, 2015, the trial court issued an opinion holding that Meridian Health Plan was entitled to recover the full amount of its Medicaid lien, $110,238.19. The trial court noted that, under MCL 400.106(3) and (5), the state had first priority right against the net proceeds of a settlement in an action involving a person receiving medical assistance. Further, the court held, the "medical expenses paid are a sum certain and the lien exists as to the amount paid." Thus, in this case, although Meridian Health Plan had been billed for $298,869.10 in medical expenses, it paid $110,238.19, which was the amount of its lien. The court rejected plaintiff's arguments that MCL 400.106(5) is preempted by the fed-

eral anti-lien provision and that the holding in *Ahlborn* barred Meridian Health Plan's claim for the entire amount of its lien. Plaintiff, as a Medicaid recipient, was obligated to assign the right to reimbursement for medical care to Meridian Health Plan, MCL 400.106(5), as authorized by 42 USC 1396a(a)(25)(H) and 42 USC 1396k(a)(1)(A), and such lien existed prior to and independent of the lawsuit or its subsequent settlement. Accordingly, the trial court held that Meridian Health Plan was entitled to recover the full amount of its lien asserted for medical expenses paid on behalf of plaintiff. An order was subsequently entered requiring plaintiff to pay Meridian Health Plan $110,238.19 to settle the Medicaid lien. This appeal followed.

Plaintiff argues that MCL 400.106(5) is preempted by the federal anti-lien provision, 42 USC 1396p(a)(1), which precludes Meridian Health Plan from recovering on its Medicaid lien an amount greater than the portion of the settlement proceeds designated as payment for medical expenses, $26,775. We agree, in part.

Issues of statutory interpretation, including those related to preemption, are reviewed de novo as questions of law. *Thomas v United Parcel Serv*, 241 Mich App 171, 174; 614 NW2d 707 (2000).

Medicaid is a program that provides medical assistance for the medically indigent under title XIX, 42 USC 1396 *et seq*., of the Social Security Act. MCL 400.105(1); *Workman v Detroit Auto Inter-Ins Exch*, 404 Mich 477, 500; 274 NW2d 373 (1979). The Medicaid program is a cooperative program funded by federal and state funds, and states participating in the program must make reasonable efforts to ascertain the legal liability of third parties to pay for the recipient's medical care. 42 USC 1396a(a)(25)(A). When legal

liability is found to exist, the state is to seek reimbursement. 42 USC 1396a(a)(25)(B). To facilitate the state's reimbursement from liable third parties, the state must enact laws under which it is deemed to have acquired the right to such recovery. 42 USC 1396a(a)(25)(H). Accordingly, a state's Medicaid plan must require the recipient to assign to the state any rights to payment for medical care from any third party as a condition of eligibility for Medicaid. 42 USC 1396k(a)(1)(A).

In an effort to comply with federal requirements of the Medicaid program, Michigan enacted MCL 400.106, which includes the state's subrogation and assignment rights related to a third party's liability for a recipient's medical care.[2] The state is "subrogated to any right of recovery that a patient may have for the cost of [medical care and services] not to exceed the amount of funds expended by the state . . . for the care and treatment of the patient." MCL 400.106(1)(b)(*ii*). And that recipient must execute and deliver an assignment of claim to the state to secure the state's right of recovery. *Id*. In addition, as set forth in MCL 400.106(3), a recipient of medical assistance from the state must notify the state when filing an action in which the state may have a right to recover expenses paid. And if a matter was settled after November 29, 2004, without providing proper notice to the state, the state can sue the recipient, the recipient's legal counsel, or both, to recover the medical expenses that were paid. MCL 400.106(4).

Further, MCL 400.106(5) provides that the state has first priority against the proceeds of the net recovery from any settlement or judgment in an action in which

[2] Our reference to "the state" means the state department, the department of community health, or a state-contracted health plan.

notice has been provided under MCL 400.106(3). With regard to the state's recovery or reimbursement, MCL 400.106(5) provides:

> The state department, the department of community health, and a contracted health plan shall recover the full cost of expenses paid under [Michigan's Social Welfare Act] unless the state department, the department of community health, or the contracted health plan agrees to accept an amount less than the full amount. If the individual [recipient] would recover less against the proceeds of the net recovery than the expenses paid under this act, the state department, the department of community health, or contracted health plan, and the individual shall share equally in the proceeds of the net recovery. As used in this subsection, "net recovery" means the total settlement or judgment less the costs and fees incurred by or on behalf of the individual who obtains the settlement or judgment.

Plaintiff argues that MCL 400.106(5) is preempted by 42 USC 1396p(a)(1), a federal anti-lien provision which prevents the state from imposing a lien against the property of a recipient for medical expenses paid or to be paid under the state plan.[3] More specifically, plaintiff argues, MCL 400.106(5) "allows for a full recovery of Medicaid's medical expenditures from the entire settlement regardless of whether the settlement was for medical expenses or other elements of damages such as wage loss or pain and suffering." Plaintiff further contends that to comply with the federal anti-lien provision, MCL 400.106(5) must limit recovery on a Medicaid lien to only the amount of money received from a third party that is specifically designated as payment for medical expenses.

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[3] According to 42 USC 1396p(a)(1), "[n]o lien may be imposed against the property of any individual prior to his death on account of medical assistance paid or to be paid on his behalf under the State plan . . . ."

The Supremacy Clause of the United States Constitution, US Const, art VI, cl 2, "invalidates state laws that interfere with, or are contrary to, federal law."[4] Whether a federal statute preempts a state statutory provision presents a question of congressional intent. *Thomas*, 241 Mich App at 174. Preemption of state law may be express or implied. "Implied preemption may exist in the form of conflict . . . preemption." *Id*. at 175. "Under conflict preemption, a federal law preempts state law to the extent that the state law directly conflicts with federal law or with the purposes and objectives of Congress." *Packowski v United Food & Commercial Workers Local 951*, 289 Mich App 132, 140; 796 NW2d 94 (2010). And that is the argument made by plaintiff in this case.

In support of her argument, plaintiff relies on the United States Supreme Court's holding in *Ahlborn*, 547 US 268. In that case, the Medicaid recipient filed a tort action against third parties allegedly liable for her injuries. The lawsuit was eventually settled for $550,000, but the parties did not allocate separate amounts for medical expenses or other categories of damages. *Id*. at 274. The state of Arkansas was not a party to the settlement but later asserted a Medicaid lien in the amount of $215,645.30, the full amount it had paid for the plaintiff's medical expenses. *Id*. The plaintiff then brought a declaratory judgment action, arguing that the state of Arkansas could "only recover that portion of her settlement representing payment for past medical expenses." *Ahlborn v Arkansas Dep't of Human Servs*, 397 F3d 620, 622 (CA 8, 2005). The sole issue was "whether federal Medicaid statutes, which provide for the assignment of rights to third-

[4] *Ter Beek v City of Wyoming*, 495 Mich 1, 10; 846 NW2d 531 (2014) (quotation marks and citations omitted).

party payments, but prohibit placing a lien on a Medicaid recipient's property, limit the State's recovery to only those portions of the payments made for medical expenses." *Id*. The parties in *Ahlborn*, including the state of Arkansas, stipulated that medical expenses accounted for about 16.5% of the settlement the plaintiff received; consequently, if the plaintiff prevailed, the state of Arkansas would only recover $35,581.47, rather than $215,645.30. *Id*.

In *Ahlborn*, the Supreme Court held that the state of Arkansas was only entitled to recover that portion of the settlement proceeds designated as payment for medical expenses, $35,581.47. *Ahlborn*, 547 US at 280-282. The remainder of the plaintiff's settlement proceeds for other categories of damages constituted "property" under 42 USC 1396p(a)(1) and was not subject to the Medicaid lien. *Id*. at 283-286.

Like the Michigan statute, which provides that the state "shall recover the full cost of expenses paid," MCL 400.106(5), the Arkansas statute provided that the state would recover "to the full extent of any amount which may be paid by Medicaid," *Ahlborn*, 547 US at 277. The United States Supreme Court noted that the Arkansas statute "claims an entitlement to more than just that portion of a judgment or settlement that represents payment for medical expenses. It claims a right to recover the entirety of the costs it paid on the Medicaid recipient's behalf." *Id*. at 278. In rejecting the state of Arkansas's argument that its statutory scheme was authorized by federal law, the Supreme Court held that the federal third-party statutory provisions[5] only require that a Medicaid recipient

[5] For example, in *Ahlborn*, the Supreme Court noted: (1) as a condition of eligibility, Medicaid recipients must only assign to the participating state any rights "*to payment for medical care* from any third

assign "the right to recover that portion of a settlement that represents payments for medical care." *Id*. at 282.

Further, the Supreme Court in *Ahlborn* held that the federal law expressly limits a state's power to pursue recovery of benefits it paid on the recipient's behalf. *Id*. at 283. Specifically, the anti-lien provision, 42 USC 1396p(a)(1), prohibits the imposition of a lien "against the property of any individual prior to his death on account of medical assistance paid or to be paid on his behalf under the State plan . . . ." *Id*. While the required assignment of the right, or chose in action, to receive payment in reimbursement for medical care is an exception to the anti-lien provision, the anti-lien provision prohibits the placement of a lien on any other portion of the Medicaid recipient's property—and settlement proceeds are the recipient's "property." *Id*. at 284-286. That is, a lien can encumber the portion of settlement proceeds designated as payment for medical care, but the lien may not encumber any portion of the settlement designated as payment for other losses. *Id*. at 284-285.

In reaching its conclusion, the Supreme Court in *Ahlborn* rejected the state of Arkansas's argument that "a rule of full reimbursement is needed generally to avoid the risk of settlement manipulation . . . ." *Id*. at 288. The Court noted that, when there is not a stipulated amount designated as payment for medical expenses, "the risk that parties to a tort suit will allocate away the State's interest can be avoided either by obtaining the State's advance agreement to an alloca-

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party," 42 USC 1396k(a)(1)(A); (2) the applicable statute refers only to the legal liability of third parties "*to pay for care and services*" available under the Medicaid program, 42 USC 1396a(a)(25)(A); and (3) the participating state has acquired "the rights of [the recipient] to payment by any other party *for such health care items or services*," 42 USC 1396a(a)(25)(H). *Ahlborn*, 547 US at 280-281 (emphasis added).

tion or, if necessary, by submitting the matter to a court for decision." *Id*. In summary, then, the *Ahlborn* Court held that the Arkansas statutory lien provision was not authorized by federal Medicaid law and actually conflicted with the anti-lien provision that limits a participating state's recovery to tort proceeds designated as payment or reimbursement for medical expenses incurred by the recipient.

As in *Ahlborn*, plaintiff argues that MCL 400.106(5) conflicts with, and is preempted by, the federal anti-lien provision, 42 USC 1396p(a)(1), to the extent that it operates to permit the recovery of Medicaid expenditures from tort proceeds that were not designated as payment for medical expenses. We agree.

As previously set forth, MCL 400.106(5) provides that the state "shall recover the full cost of expenses paid" unless the state "agrees to accept an amount less than the full amount." The rules of statutory construction are well established and include that the plain and ordinary meaning of unambiguous statutory language governs without further judicial construction. *Velez v Tuma*, 492 Mich 1, 16-17; 821 NW2d 432 (2012). And like the statute at issue in *Ahlborn*, which provided that the state would recover "to the full extent of any amount which may be paid by Medicaid," MCL 400.106(5) does not limit the state's recovery to that portion of the tort judgment or settlement designated as payment for medical expenses. See *Ahlborn*, 547 US at 277. Instead, as the trial court in this case held, MCL 400.106(5) permits recovery of the full amount of the state's Medicaid lien from the total amount of a judgment or settlement regardless of the allocation of damages.

More specifically, in its opinion, the trial court noted that Meridian Health Plan had a first priority right

against the proceeds of the settlement and held that "the lien on the settlement exists with or without the parties' intent to allocate particular percentages for the types of recovery. In other words, medical expenses paid are a sum certain and the lien exists as to the amount paid." The trial court acknowledged plaintiff's contention that "because 5% was the contemplated amount of medical expenses in the settlement agreement, anything more is a lien on the 'remainder of the settlement.' " But the trial court disagreed, stating:

> In the Court's view, Plaintiff, as a Medicaid recipient, had a prior obligation under Michigan law to assign the right to receive payments for medical care. [42 USC 1396k(a)(1)(A)]. In other words, the lien exists prior to and independent of the medical malpractice action and subsequent settlement.
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> . . . Thus, the state may not encumber any part of the settlement other than the amount of medical expenses. In this case, the amount is a known amount and the amount paid for medical expenses by Meridian represents the true amount of a preexisting lien upon the recovery.

One of the clear problems with the trial court's rationale is that the court did not consider or allocate the settlement proceeds between the different classes or categories of damages recovered by plaintiff. In other words, of the total confidential settlement amount, what percentage of the amount is allocated for noneconomic damages, economic damages, and medical expenses? The trial court could not determine how much of the Medicaid lien Meridian Health Plan was entitled to recover without first determining how much plaintiff received in the settlement for medical expenses.

Instead, as permitted by the plain language of MCL 400.106(5), the trial court held that Meridian Health Plan could recover the full amount of its lien from the total amount of settlement regardless of the allocation of damages. In reaching that conclusion, the trial court noted that the lien existed prior to and independent of the lawsuit and was a known amount. But, while the lien existed prior to the lawsuit, only the proceeds that were recovered for plaintiff's medical expenses were subject to that lien. That is so because a Medicaid recipient must only assign to the state any right to payment from a third party for the recipient's medical care, not any right to payment received from a third party for other losses. MCL 400.106(1)(b)(*ii*); see also 42 USC 1396k(a)(1)(A). And the trial court's interpretation of 42 USC 1396a(a)(25)(H) as entitling Meridian Health Plan to recover its full lien amount was expressly rejected by the United States Supreme Court in *Ahlborn*. Quoting the federal statute, the *Ahlborn* Court held that it was clear that states must only be assigned the rights of the Medicaid recipient to payment by any third party for medical expenses and does not sanction an assignment of rights to payment for any other losses. *Ahlborn*, 547 US at 281.

Accordingly, to the extent that MCL 400.106(5) operates to permit recovery of the full amount of a Medicaid lien from a tort judgment or settlement regardless of the allocation of damages, it is in direct conflict with, and is preempted by, the federal anti-lien provision, 42 USC 1396p(a)(1). As the United States Supreme Court made clear in *Ahlborn*, states may not enact statutory provisions designed to recover medical expenditures from the tort proceeds received by Medicaid recipients that are not designated as payment or reimbursement for medical expenses incurred by the recipient. See *Ahlborn*, 547 US at 280-282. Because

MCL 400.106(5) is preempted by federal law, it is " 'without effect.' " *Ter Beek*, 495 Mich at 10, quoting *Maryland v Louisiana*, 451 US 725, 746; 101 S Ct 2114; 68 L Ed 2d 576 (1981). And the trial court's decision granting Meridian Health Plan's request for the full amount of its lien regardless of the allocation of damages is reversed.

Next, plaintiff claims that Meridian Health Plan should only recover 5% of its lien, or $26,775, because her tort action was settled by stipulation for about 19% of her total damages and the parties allocated the settlement funds as 55% for noneconomic damages, 40% for economic damages, and 5% for medical expenses. But, as argued by Meridian Health Plan and the Department of Health and Human Services as amicus curiae, Meridian Health Plan was not a party to any such stipulation, was not involved in the settlement negotiations, and did not consent to a reduced lien amount. And there was no judicial oversight of the parties' settlement. Further, the trial court did not hold any hearing on the matter after the case was reinstated; rather, the court assumed without deciding that Meridian Health Plan was entitled to 100% of the lien amount.

Meridian Health Plan argues that under the circumstances in this case, there was a risk of settlement manipulation as the *Ahlborn* case foretold, *Ahlborn*, 547 US at 288, and that the parties "collaborated and attempted to allocate away all but a small fraction of Meridian's statutory lien." Accordingly, Meridian Health Plan intervened in the matter, and the trial court subsequently determined that it was entitled to recover its full lien amount of $110,238.19. Meridian Health Plan relies on the United States Supreme Court's holding in *Wos v EMA*, 568 US 627; 133 S Ct

1391; 185 L Ed 2d 471 (2013), in support of its argument that the trial court did not err by awarding the full lien amount and, thus, that plaintiff's appeal lacks merit.

In *Wos*, the Supreme Court acknowledged its holding in *Ahlborn* that the federal anti-lien provision, 42 USC 1396p(a)(1), preempts a state statute that attempts to recover any portion of a Medicaid recipient's tort judgment or settlement that was not designated as payment for medical expenses. *Wos*, 568 US at 633-634. But in *Wos*, a North Carolina statute "requir[ed] that up to one-third of any damages recovered by a beneficiary for a tortious injury be paid to the State to reimburse it for payments it made for medical treatment on account of the injury." *Id*. at 630. Thus, when the parties in that case settled an underlying tort action for $2.8 million for injuries allegedly suffered by the Medicaid recipient, the trial court placed one-third of it into an escrow account until the state's Medicaid lien could be conclusively determined. *Id*. at 631-632. North Carolina's Medicaid program had paid for medical expenses totaling $1.9 million. *Id*. at 631. The settlement agreement between the parties did not allocate the settlement amount to different categories of damages, including medical expenses. *Id*.

Thereafter, a declaratory action was filed, challenging North Carolina's statutory scheme as violating the Medicaid anti-lien provision, 42 USC 1396p(a)(1). *Wos*, 568 US at 632. The United States Supreme Court noted that its holding in *Ahlborn* did not address "how to determine what portion of a settlement represents payment for medical care" because in *Ahlborn* the parties had stipulated that about 6% of the tort recovery represented payment for medical care. *Id*. at 634. But North Carolina's statutory provision allocat-

ing for medical expenses an arbitrary, across-the-board, one-third of all recipients' tort recoveries was preempted to the extent that it operated to claim any part of a Medicaid recipient's tort recovery that was not received in payment for medical care. *Id*. at 637.

In *Wos*, the Supreme Court noted that the state of North Carolina could not substantiate its claim that the one-third allocation was reasonable. *Id*. at 1399. But the *Wos* Court held that "[w]hen there has been a judicial finding or approval of an allocation between medical and nonmedical damages—in the form of either a jury verdict, court decree, or stipulation binding on all parties—that is the end of the matter." *Id*. at 638. The *Wos* Court noted that in *Ahlborn* "[a]ll parties (including the State of Arkansas) stipulated that approximately 6 percent of the plaintiff's settlement represented payment for medical costs." *Id*. However, when such a stipulation or judgment does not exist, and "[w]hen the State and the beneficiary are unable to agree on an allocation," the matter may be submitted to the court for a decision as stated by the *Ahlborn* Court. *Id*. That is, a judicial proceeding is necessary. The *Wos* Court acknowledged that where a judgment or stipulation does not exist that allocates the plaintiff's tort recovery among the existing claims, "a fair allocation of such a settlement may be difficult to determine. Trial judges and trial lawyers, however, can find objective benchmarks to make projections of the damages the plaintiff likely could have proved had the case gone to trial." *Id*. at 640. The *Wos* Court rejected the argument that holding "mini-trials" to divide settlement proceeds into medical and nonmedical expenses would be wasteful and time-consuming. *Id*. at 641. The Court noted, in part, that "[t]he task of dividing a tort settlement is a familiar one." *Id*. at 642. But in

any case, the *Wos* Court concluded, state statutory provisions must comply with the terms of the Medicaid anti-lien provision that limits a participating state's recovery to tort proceeds designated as payment for medical expenses. *Id*. at 639, 644.

Meridian Health Plan argues that a judicial proceeding was conducted in this case and the trial court did, in fact, properly resolve the issue of its Medicaid lien. We cannot agree. As discussed above, the trial court did not conduct any proceedings or render any findings as to the allocation of the settlement proceeds between the different classes or categories of damages to which plaintiff was entitled. Again, what percentage of the confidential settlement amount should be allocated for noneconomic damages, economic damages, and medical expenses? Instead, the trial court ordered reimbursement for 100% of the Medicaid lien from the total settlement amount, which may have effectively awarded Meridian Health Plan a portion of plaintiff's settlement proceeds intended to compensate her for losses other than medical expenses.

But we also reject plaintiff's contention that Meridian Health Plan is bound by the allocation of damages made by the settling parties. As the Department of Health and Human Services argues in its amicus brief, if we were to accept such allocations by settling parties, "the state's Medicaid recovery would be subject to manipulation by the artificially low allocations to medical care, while the beneficiary keeps artificially high allocations to other damage categories like pain and suffering, lost wages, and loss of future earnings." There are different ways to deal with the payment of Medicaid liens in tort matters, but the most efficient way is for the plaintiff to ascertain the precise amount the Medicaid lienholder expects to recover and to

negotiate that amount if necessary before settling the underlying tort action. That did not occur here.

Therefore, this matter must be remanded to the trial court for a proper hearing and resolution because (1) there is no indication in the record that the trial court reviewed the confidential settlement and found it reasonable, fair, and proper regarding the different categories of plaintiff's claimed damages, (2) Meridian Health Plan was an affected party but did not participate in the settlement negotiations or consent to a reduced recovery on its lien, and (3) Meridian Health Plan and plaintiff were unable to agree on a resolution of the outstanding Medicaid lien. See *Wos*, 568 US at 638; *Ahlborn*, 547 US at 288. That is, to obviate the possibility that the settling parties allocated away Meridian Health Plan's significant interest in recovering its rightful portion of plaintiff's settlement proceeds, an evidentiary hearing must be conducted. At the hearing, the court must determine the amount of the Medicaid lien that may be recovered from plaintiff's settlement proceeds taking into consideration the true value of the case and plaintiff's claimed losses. Meridian Health Plan would only be entitled to recover its entire Medicaid lien of $110,238.19 if that amount comports with a fair and proper allocation of the settlement proceeds among all of plaintiff's losses—which is possible. But again, Meridian Health Plan may only recover its lien amount from the portion of the tort settlement that represents payment for medical expenses. Therefore, until either the parties reach an agreement or the trial court determines the proper and fair allocation of the settlement, the amount Meridian Health Plan is entitled to recover on its lien remains unresolved. Consequently, the trial court's order requiring plaintiff to pay the full amount of the

Medicaid lien, $110,238.19, is vacated and this matter is remanded for further proceedings to resolve that issue only.[6]

Finally, as plaintiff argues on appeal, the trial court also failed to charge Meridian Health Plan its pro rata share of costs and attorney fees incurred in pursuing plaintiff's tort action and in obtaining the settlement. See MCL 400.106(5). It appears that Meridian Health Plan had conceded in the trial court that its pro rata share was about 30%, but the trial court did not reduce its lien amount accordingly. On remand, the trial court is to make that determination and adjustment.

In summary, to the extent that the provision in MCL 400.106(5)—that the state "shall recover the full cost of expenses paid"—operates to permit recovery of the full amount of a Medicaid lien from a tort judgment or settlement regardless of the allocation of damages, it is in direct conflict with, and is preempted by, the federal anti-lien provision in 42 USC 1396p(a)(1). The trial court's decision granting Meridian Health Plan's request for 100% of its Medicaid lien is reversed, the order requiring plaintiff to pay Meridian Health Plan $110,238.19 is vacated, and this matter is remanded to the trial court for further proceedings consistent with this opinion.

Reversed, vacated, and remanded. We do not retain jurisdiction. Neither plaintiff nor Meridian Health Plan is entitled to tax costs. See MCR 7.219(A).

SERVITTO, P.J., and FORT HOOD, J., concurred with CAVANAGH, J.

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[6] We note and reject Meridian Health Plan's confusing "arguments" that this case presents no justiciable controversy and that the issue of preemption is moot or not ripe.

HASTINGS MUTUAL INSURANCE COMPANY v GRANGE INSURANCE COMPANY OF MICHIGAN

Docket Nos. 331612 and 333193. Submitted May 10, 2017, at Grand Rapids. Decided May 16, 2017, at 9:15 a.m.

Hastings Mutual Insurance Company filed a subrogation action in the Berrien Circuit Court against Grange Insurance Company of Michigan, seeking to recover under the no-fault act, MCL 500.3101 *et seq*., the property protection insurance benefits it had paid to the insured, Williams Farms, LLC—a family-operated business engaged in the business of farming—for property damage caused by a fire in the farm's barn. A Williams Farms' employee used the barn and its equipment to repair and maintain the farm's vehicles as well as the vehicles of family members; a fire began when the employee was working on his sister's vehicle in the barn, and the fire destroyed the barn. Hastings Mutual paid Williams Farms $699,134 for the loss of real and personal property in the fire, and then Hastings Mutual filed a claim as subrogee against Grange Insurance, the no-fault insurer of the vehicle involved in the fire, to recover that amount from Grange. Hastings Mutual filed this action when Grange Insurance denied the claim. Hastings Mutual and Grange Insurance filed competing motions for summary disposition. The court, Sterling R. Schrock, J., granted summary disposition in favor of Hastings Mutual, holding that Grange Insurance was liable under the no-fault act for the property damage and reasoning that the course-of-business exception in MCL 500.3121(1) did not relieve Grange Insurance of liability because Williams Farms was not in the business of repairing, servicing, or maintaining motor vehicles. The circuit court also denied Hastings Mutual's request for attorney fees under MCL 500.3148(1), concluding that Grange Insurance reasonably relied on the course-of-business exception when it denied Hastings Mutual's demand. In Docket No. 331612, Grange Insurance appealed the circuit court's order granting summary disposition in favor of Hastings Mutual. In Docket No. 333193, Hastings Mutual appealed the circuit court's order denying its motion for attorney fees. The Court of Appeals consolidated the cases.

The Court of Appeals *held*:

1. MCL 500.3101(1) provides that the owner or registrant of a motor vehicle required to be registered in Michigan must maintain security for payment of benefits under personal protection insurance, property protection insurance, and residual liability insurance. To that end, MCL 500.3121(1) provides that with regard to property protection insurance, a no-fault insurer is liable to pay benefits for accidental damage to tangible property arising out of the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle subject to MCL 500.3121 and other sections; liability for such accidental damage does not include accidental damage to tangible property, other than the insured motor vehicle, that occurs within the course of a business of repairing, servicing, or otherwise maintaining motor vehicles. Applying dictionary definitions to the language in MCL 500.3121, the term "business" encompasses a person engaged in a service, activity, or enterprise for benefit, gain, advantage, or livelihood, and the phrase "course of business" refers to the normal routine in managing a trade or business. Accordingly, the MCL 500.3121(1) course-of-business exception excludes no-fault coverage for accidental damage to tangible property when the purpose of the business in question is to provide maintenance and repair services for motor vehicles; the exception does not relieve a no-fault insurer of liability when the business peripherally participates in those activities.

2. The course-of-business exception in MCL 500.3121(1) did not relieve Grange Insurance from liability for the damage to Williams Farms' barn. Although a Williams Farms employee repaired the farm's vehicles with tools provided by the farm, the farm's primary business enterprise was farming, and there were no regular outside customers or a fixed price list that would have indicated the farm was also in the business of vehicle repair. In other words, Williams Farms was a farming business, not an automotive-repair business. Accordingly, the trial court correctly granted Hastings Mutual's summary-disposition motion and rejected Grange Insurance's competing motion.

3. Under MCL 500.3148(1) of the no-fault act, an attorney is entitled to a reasonable fee for advising and representing a claimant in an action for personal or property insurance benefits that are overdue. The attorney's fee is a charge against the insurer in addition to the benefits recovered if the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment. In that way, the no-fault act provides for attorney fees when an insurance carrier unrea-

sonably withholds benefits. A delay is not unreasonable if it is based on a legitimate question of statutory construction, constitutional law, or factual uncertainty. A no-fault insurer's delay or refusal to pay may be reasonable even if it is later determined that the insurer is required to pay the benefits. In this case, given the dearth of pertinent caselaw interpreting MCL 500.3121(1) and the facts of the case, Grange Insurance reasonably relied on the opinion of its counsel and outside counsel that MCL 500.3121(1) excluded Grange from liability. Accordingly, the circuit court correctly denied Hastings Mutual's request for attorney fees under MCL 500.3148(1).

Affirmed.

NO-FAULT INSURANCE — PROPERTY PROTECTION INSURANCE — MOTOR-VEHICLE REPAIR BUSINESS — DEFINITION OF COURSE-OF-BUSINESS EXCEPTION.

MCL 500.3121(1) of the no-fault act, MCL 500.3101 *et seq*., provides that with regard to property protection insurance, a no-fault insurer is liable to pay benefits for accidental damage to tangible property arising out of the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle subject to MCL 500.3121 and other sections; liability for accidental damage does not include accidental damage to tangible property, other than the insured motor vehicle, that occurs within the course of a business of repairing, servicing, or otherwise maintaining motor vehicles; no-fault coverage for accidental damage to tangible property is excluded by MCL 500.3121(1) when the purpose of the business is to provide maintenance and repair services for motor vehicles; the course-of-business exception applies only to motor vehicle repair businesses as evidenced by the existence of regular customers, the presence of equipment that is necessary for such repairs, the charging of fixed prices for jobs, and the income received for services performed by a mechanic; it does not relieve a no-fault insurer of liability when the business peripherally participates in motor vehicle repair services.

Logan & Associates (by *Leslie Anne Logan* and *Kyle Peircey*) for Hastings Mutual Insurance Company.

Bremer & Nelson LLP (by *Ann M. Byrne*) for Grange Insurance Company of Michigan.

Before: MARKEY, P.J., and MURPHY and METER, JJ.

MURPHY, J. In Docket No. 331612, defendant, Grange Insurance Company of Michigan (Grange), appeals by right the trial court's order denying its motion for summary disposition and granting summary disposition in favor of plaintiff, Hastings Mutual Insurance Company (Hastings). In Docket No. 333193, Hastings appeals by right the trial court's order denying its motion for attorney fees.[1] We affirm.

This case arises out of a fire that occurred on April 15, 2014, in a barn owned by Williams Farms, LLC, a family-operated farm that grows a variety of vegetables. Ryan Keath, a salaried employee of Williams Farms, regularly used the barn and its equipment to provide repairs and maintenance to the farm's vehicles, as well as to the vehicles of family members. Keath was repairing his sister's motor vehicle when the fire began. The fire ultimately destroyed the barn and all of its contents. Hastings, the insurer of Williams Farms' real and personal property, paid Williams Farms $699,134 in insurance benefits to cover the loss. Hastings later filed a claim in the same amount as subrogee for property protection benefits from Grange, the no-fault insurer of the vehicle involved in the fire. Grange denied the claim by Hastings in August 2014, and Hastings subsequently filed suit against Grange.

Both parties moved for summary disposition under MCR 2.116(C)(10). The trial court granted summary disposition in favor of Hastings, finding that under the no-fault act, MCL 500.3101 *et seq*., Grange was liable for the property damage. The trial court specifically ruled that MCL 500.3121(1) did not relieve Grange of liability, given that Williams Farms was a farm and was not in the business of repairing, servicing, or

[1] We ordered the cases consolidated.

maintaining motor vehicles. Accordingly, the trial court granted Hastings' motion for summary disposition and denied Grange's competing motion.

On appeal, Grange argues that the trial court improperly granted Hastings' motion for summary disposition because Williams Farms was in the business of repairing, servicing, or maintaining motor vehicles for purposes of MCL 500.3121(1) and, therefore, the statute operated to exclude Grange from liability for the property damage. We disagree.

This Court reviews de novo a ruling on a motion for summary disposition, as well as issues of statutory construction. *Johnson v Recca*, 492 Mich 169, 173; 821 NW2d 520 (2012). With respect to 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), set forth the governing principles, stating:

> 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.]

With respect to the construction of MCL 500.3121 and statutes in general, our Supreme Court in *Whitman v City of Burton*, 493 Mich 303, 311-312; 831 NW2d 223 (2013), observed:

> When interpreting a statute, we follow the established rules of statutory construction, the foremost of which is to discern and give effect to the intent of the Legislature. To do so, we begin by examining the most reliable evidence of that intent, the language of the statute itself. If the language of a statute is clear and unambiguous, the statute must be enforced as written and no further judicial construction is permitted. Effect should be given to every phrase, clause, and word in the statute and, whenever possible, no word should be treated as surplusage or rendered nugatory. 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. [Citations omitted.]

MCL 500.3101(1) provides that "[t]he owner or registrant of a motor vehicle required to be registered in this state shall maintain security for payment of benefits under personal protection insurance, *property protection insurance*, and residual liability insurance." (Emphasis added.) MCL 500.3121(1) provides:

> Under property protection insurance an insurer is liable to pay benefits for accidental damage to tangible property arising out of the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle subject to the provisions of this section and [MCL 500.3123, MCL 500.3125, and MCL 500.3127]. *However, accidental damage to tangible property does not include accidental damage to tangible property, other than the insured motor vehicle, that occurs within the course of a business of repairing, servicing, or otherwise maintaining motor vehicles*. [Emphasis added.]

In the present case, the parties dispute whether vehicle repairs performed by a salaried employee of Williams Farms, a business whose primary purpose is farming, qualifies under the course-of-business exception in MCL 500.3121(1). Our Supreme Court has ruled that a "business" encompasses a person engaged in a service, activity, or enterprise for benefit, gain, advantage, or livelihood. *Terrien v Zwit*, 467 Mich 56, 64; 648 NW2d 602 (2002). See also *Allied Prop & Cas Ins Co v Pioneer State Mut Ins Co*, 272 Mich App 444, 450; 726 NW2d 83 (2006) (defining the term "business" as a commercial enterprise or establishment). The phrase "course of business" is defined as "[t]he normal routine in managing a trade or business." *Black's Law Dictionary* (10th ed).

Applying these definitions, it becomes clear that the MCL 500.3121(1) course-of-business exception is meant to exclude property damage when the purpose of the business in question is to provide maintenance and repair services for motor vehicles—and it is not meant to cover just *any* business that peripherally participates in these activities or any person that performs these activities. Although Williams Farms undoubtedly benefits from having vehicle repairs done in-house, its enterprise for gain, advantage, and livelihood is focused on farming, not the repair, maintenance, and servicing of vehicles. In other words, Williams Farms is a farming business, not an automotive-repair business. Therefore, Williams Farms is not in the "business of repairing, servicing, or otherwise maintaining motor vehicles" for purposes of MCL 500.3121(1). Had the Legislature intended MCL 500.3121(1) to exclude repairing, servicing, or maintaining motor vehicles in any business environment, the Legislature could have chosen different language. Instead, the Legislature crafted

MCL 500.3121(1) so that the prepositional phrase "of repairing, servicing, or otherwise maintaining motor vehicles" modifies "a business."

This conclusion is supported by this Court's decision in *Allied Prop*, 272 Mich App 444, wherein this Court held that the no-fault insurer was not liable when property damage resulted from a fire caused by an unlicensed mechanic operating out of his father's home garage. This Court stated that the purpose of the MCL 500.3121(1) exception is "to exempt no-fault carriers from liability for property damage that occurs within the course of a vehicle-repair business . . . ." *Id*. at 449. This Court determined that the large amount of equipment in the garage, the equipment's $30,000 value, the existence of regular customers, the charging of fixed prices for jobs, and the income received from the services performed demonstrated that the mechanic's work was performed in the course of a vehicle-repair business. *Id*. at 451.

In sum, the MCL 500.3121(1) exception applies only to vehicle-repair businesses, which Williams Farms is not. Williams Farms' primary business enterprise is farming, and, although Keath performs services for the farm's benefit with tools provided by the farm, there are no regular outside customers or a fixed price list that would indicate that the farm also operates a vehicle-repair business. Accordingly, MCL 500.3121(1) does not exclude Grange from liability for the damage, and the trial court properly rejected Grange's motion for summary disposition and soundly awarded summary disposition to Hastings.

Following the trial court's grant of summary disposition, Hastings moved for attorney fees in accordance with MCL 500.3148(1) on the basis of Grange's allegedly unreasonable denial of Hastings' claim for prop-

erty protection benefits. The trial court denied the motion, ruling that Grange's denial of the claim was not unreasonable because Grange reasonably believed that it was relieved of liability under MCL 500.3121(1).

On appeal, Hastings argues that the trial court erred by denying its motion for attorney fees because Grange's rejection of the claim was unreasonable. MCL 500.3148(1) provides as follows:

> An attorney is entitled to a reasonable fee for advising and representing a claimant in an action for personal or property insurance benefits which are overdue. The attorney's fee shall be a charge against the insurer in addition to the benefits recovered, if the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment.

In *Ross v Auto Club Group*, 481 Mich 1, 7; 748 NW2d 552 (2008), the Court explained the standards of review associated with a ruling under MCL 500.3148(1), stating:

> The no-fault act provides for attorney fees when an insurance carrier unreasonably withholds benefits. The trial court's decision about whether the insurer acted reasonably involves a mixed question of law and fact. What constitutes reasonableness is a question of law, but whether the defendant's denial of benefits is reasonable under the particular facts of the case is a question of fact.
>
> Whereas questions of law are reviewed de novo, a trial court's findings of fact are reviewed for clear error. A decision is clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake has been made. [Citations and quotation marks omitted.]

In *Attard v Citizens Ins Co of America*, 237 Mich App 311, 317; 602 NW2d 633 (1999), this Court examined the award of attorney fees under MCL 500.3148(1):

> When determining whether attorney fees are warranted for an insurer's delay to make payments under the no-fault act, a delay is not unreasonable if it is based on a legitimate question of statutory construction, constitutional law, or factual uncertainty. When an insurer refuses to make or delays in making payment, a rebuttable presumption arises that places the burden on the insurer to justify the refusal or delay. [Citations omitted.]

A no-fault insurer may have reasonably delayed or refused to pay a claim even if it is later determined that the insurer is required to pay the benefits. *Moore v Secura Ins*, 482 Mich 507, 525; 759 NW2d 833 (2008).

Grange, relying on the opinion of its counsel as well as the opinion of outside counsel, believed that it was excluded from liability under MCL 500.3121(1), and for that reason denied the claim for property protection benefits. Although we hold that Grange is not excluded from liability under MCL 500.3121(1), this does not necessarily mean, as noted in *Moore*, that Grange acted unreasonably in refusing to pay Hastings' claim. Although we believe it to be a close call, given the dearth of pertinent caselaw construing MCL 500.3121(1) and the factual circumstances of the case, we conclude that there existed "a legitimate question of statutory construction." *Attard*, 237 Mich App at 317. Accordingly, we affirm the trial court's ruling on the issue.[2]

Affirmed. Neither party having fully prevailed on appeal, we decline to award taxable costs under MCR 7.219.

MARKEY, P.J., and METER, J., concurred with MURPHY, J.

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[2] Given our holding, we need not address other arguments presented by Grange, such as its assertion that Hastings, as a matter of law, was not entitled to attorney fees under MCL 500.3148(1) given its status as a "subrogee."

JOHNSON v VANDERKOOI

Docket No. 330536. Submitted May 2, 2017, at Grand Rapids. Decided May 23, 2017, at 9:00 a.m. Leave to appeal sought.

Denishio Johnson filed an action in the Kent Circuit Court against Curtis VanderKooi, Elliott Bargas, and the city of Grand Rapids. Johnson asserted claims under 42 USC 1981 and 42 USC 1983 against Grand Rapids Police Department (GRPD) officers VanderKooi and Bargas, alleging that the individual defendants' actions violated the Equal Protection Clause of the Fourteenth Amendment, US Const, Am XIV, violated Johnson's right to be free from unlawful searches and seizures under the Fourth Amendment, US Const, Am IV, violated Johnson's right to just compensation for the taking of private property under the Fifth Amendment, US Const, Am V, and violated Johnson's constitutional right to privacy. Johnson asserted a claim against the city under 42 USC 1983, claiming that the GRPD photograph and print (P&P) policy was enforced discriminatorily against African-Americans, like Johnson. In 2011, there were many vehicle break-ins in the Michigan Athletic Club's (MAC) parking lot by a person described as a young African-American boy who left the area over a grassy hill and in the direction of the apartment where Johnson lived. In August 2011, the GRPD investigated a complaint that a person, eventually identified as Johnson, was looking into vehicles in the MAC parking lot with the potential intent of stealing items from inside the vehicles; when GRPD officers stopped Johnson, he stated that he looked in the car windows to see his reflection, not to find items to steal. After the police officers were unable to confirm Johnson's identity or age in the MAC parking lot, Bargas photographed Johnson in case witnesses to prior thefts could identify him as a suspect and fingerprinted him to compare to latent prints that had been lifted from other thefts; Johnson alleged that Bargas performed the P&P at VanderKooi's direction. VanderKooi, who arrived at the parking lot after Johnson had been identified by his mother, subsequently had Johnson's fingerprints compared to the latent prints from the earlier thefts. Johnson alleged that Bargas and VanderKooi took Johnson's photograph and prints because of the city's P&P policy and that the policy was enforced discriminatorily against African-Americans. The individual defendants and

the city moved separately for summary disposition, and all defendants moved to strike the testimony of Johnson's proposed expert witness, Dr. William Terrill. The court, George J. Quist, J., granted the individual defendants' motions for summary disposition of Johnson's § 1981 and § 1983 claims, reasoning that with regard to the unreasonable-search-and-seizure and expectation-of-privacy claims under the Fourth Amendment, Johnson had no expectation of privacy in his physical features that were readily observable by the public, that Bargas's actions were reasonable given the circumstances, and that Johnson had failed to establish that VanderKooi directed Bargas's actions. The circuit court similarly rejected Johnson's Fifth Amendment claim. The circuit court also concluded that Johnson had abandoned his § 1981 (equal protection) claim and held that, in any event, the individual defendants had qualified immunity from Johnson's claims. The circuit court also granted the city's motion for summary disposition, reasoning that Johnson had failed to establish a violation of his constitutional rights and that Johnson had failed to establish that the P&P policy was unconstitutional on its face or as applied. Finally, the circuit court granted defendants' motion to strike Terrill as Johnson's proposed expert witness, concluding that Johnson had failed, under MRE 702, to establish that Terrill's opinion would assist the trier of fact or that his opinion was based on a recognized form of specialized knowledge. Johnson appealed.

The Court of Appeals *held*:

1. Section 1983 provides a remedy for the violation of rights guaranteed by the federal Constitution or federal statutes. However, a police officer may invoke the defense of qualified immunity to avoid liability for claims brought under § 1983 that involve alleged violations of federal rights. Qualified immunity for governmental officials does not apply if the official's conduct violates statutory or constitutional rights that were clearly established at the time of the alleged violation, such that it would be clear to a reasonable officer that his or her conduct was unlawful. A right is clearly established if there is binding precedent that is directly on point.

2. With regard to his Fourth Amendment claim, Johnson only challenged as unreasonable the taking of his photograph and fingerprints in accordance with the GRPD P&P policy; he did not challenge as unreasonable the initial stop, the length of detainment, or that he was placed in handcuffs and put in the back of a police car. Johnson could therefore not expand his claim to challenge the length of his detention and his being handcuffed; the generalized allegation in Johnson's complaint—that the indi-

vidual defendants violated his rights under the Fourth and Fourteenth Amendments to be free from unlawful search and seizure—did not put the individual defendants on notice that Johnson was challenging not only the P&P policy but also the length of his detention and the handcuffing. Accordingly, the qualified-immunity analysis was limited to whether the individual defendants' use of the P&P procedure violated a clearly established Fourth Amendment right.

3. A Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable. The United States Supreme Court has not definitively held whether fingerprinting during a criminal investigation constitutes a search for purposes of the Fourth Amendment. However, in *United States v Dionisio*, 410 US 1 (1973), the Court suggested that fingerprints are a physical feature regularly exposed to the public. Federal courts have relied on *Dionisio* to hold that photographing and fingerprinting does not constitute a search under the Fourth Amendment, and this Court has held that a person does not have a reasonable expectation of privacy in his or her fingerprints or a photograph taken in public. Because it was not clearly established in the law that fingerprinting and photographing someone during the course of an investigatory stop justified by reasonable suspicion violates the Fourth Amendment prohibition against unlawful search and seizure, the individual defendants were entitled to summary disposition of Johnson's Fourth Amendment claims on the basis of qualified immunity.

4. The Fifth Amendment prohibits the government from taking private property for public use without just compensation. State, federal, and common law define the dimensions of the requisite property rights for purposes of establishing a cognizable taking under the Fifth Amendment. A person's likeness and identity amounts to property in so far as the use may be of benefit to the person or to others. The common-law right of privacy protects against invasions of privacy, including the appropriation of a plaintiff's name or likeness. However, to be compensable, the government must assert its authority to seize title or impair the value of the property taken. The individual defendants did not interfere with Johnson's ability to use his identity or likeness to benefit him or others, and they did not prevent Johnson from carrying out any future endeavors to benefit from his likeness. Accordingly, because it is not clearly established in the law that fingerprinting and photographing a person during a criminal investigation constitutes a governmental taking, the individual

defendants were entitled to summary disposition of Johnson's Fifth Amendment claims on the basis of qualified immunity.

5. A municipality may be held liable under § 1983 for official municipal policies that are unconstitutional, but the municipality may not be held liable for those policies under a theory of respondeat superior. The documentary evidence submitted by Johnson did not support his claim that it was the custom and practice of the GRPD to take pictures and prints of innocent citizens during a field investigation or stop. The GRPD field training manual did not require officers to take P&Ps during every field interrogation or stop in which the subject lacks identification or to P&P so-called innocent citizens. Accordingly, the P&P of Johnson did not implement or execute a policy statement, ordinance, and regulation or decision officially adopted or promulgated by the city through the GRPD. Johnson also failed to establish a genuine issue of material fact that his alleged deprivation was caused by an unwritten custom or policy so persistent and widespread as to practically have the force of law; the individual defendants both testified that the decision whether to P&P a subject was discretionary. Accordingly, the circuit court did not err by granting summary disposition in favor of the city of Johnson's § 1983 claim.

6. The circuit court did not abuse its discretion by granting defendants' motion to strike Terrill's proposed expert testimony concerning the reasonableness of Bargas's actions; Terrill's testimony was an improper legal conclusion based on his interpretation of the same facts the jury would have interpreted. Terrill's remaining testimony was irrelevant because it related to Johnson's abandoned § 1981 claim.

Affirmed.

1. CIVIL RIGHTS — POLICE OFFICERS — QUALIFIED IMMUNITY — PHOTOGRAPHING AND FINGERPRINTING — SEARCH AND SEIZURE CLAIMS.

A police officer is entitled to qualified immunity from a Fourth Amendment claim under 42 USC 1983 for having photographed and fingerprinted a person during a field investigation and stop justified by reasonable suspicion because it is not clearly established in the law that such conduct constitutes an unconstitutional search and seizure (US Const, Am IV).

2. CIVIL RIGHTS — POLICE OFFICERS — QUALIFIED IMMUNITY — PHOTOGRAPHING AND FINGERPRINTING — TAKINGS CLAIMS.

A police officer is entitled to qualified immunity from a Fifth Amendment claim under 42 USC 1983 for having photographed

and fingerprinted a person during a field investigation and stop justified by reasonable suspicion because it is not clearly established in the law that such conduct constitutes a governmental taking (US Const, Am V).

Bernard Schaefer for plaintiff.

Kristen Lee Rewa and *Elliot Gruszka*, Assistant City Attorneys, for defendants.

Amici Curiae:

Miriam J. Aukerman, *Michael J. Steinberg*, *Kary L. Moss*, *Daniel S. Korobkin*, *Edward R. Becker*, and *Margaret Curtiss Hannon* for the American Civil Liberties Union of Michigan.

Before: WILDER, P.J., and BOONSTRA and O'BRIEN, JJ.

BOONSTRA, J. This case arises out of a police contact between plaintiff and city of Grand Rapids Police Department (GRPD) officers, and the application of what is described as GRPD's "photograph and print" (P&P) policy. The trial court granted summary disposition in favor of defendants under MCR 2.116(C)(7) and (10). Plaintiff appeals by right. We conclude that the trial court correctly held that defendants Curtis VanderKooi and Elliott Bargas were shielded by qualified immunity and were therefore entitled to summary disposition under MCR 2.116(C)(7) and that defendant city of Grand Rapids was entitled to summary disposition under MCR 2.116(C)(10) regarding plaintiff's claim for municipal liability under 42 USC 1983. We therefore affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

On August 15, 2011, the GRPD received a telephone complaint that an individual eventually identified as

plaintiff was walking through the Michigan Athletic Club's (MAC) parking lot in Grand Rapids and was looking into several vehicles as if intending to steal something from the vehicles. Officers Greg Edgcombe and Eugene Laudenslager responded and located plaintiff sitting under a shade tree. Plaintiff told Edgcombe that he had merely walked through the parking lot on his way to where he was sitting to meet a friend who was taking the bus. Plaintiff did not have identification with him. According to the police report completed by Edgcombe, numerous items had been stolen from vehicles in the MAC parking lot during the preceding months. The police report stated that some of the reports from the previous incidents contained "descriptions of [a] young black male suspect who left the area over the south parking lot grassy knoll which is directly in the path of where plaintiff lives on Burning Tree Drive." Edgcombe "file checked" his computer system for the name that plaintiff had given him (Denishio Johnson) and did not discover any warrants or previous arrests. Laudenslager spoke with a witness who identified plaintiff as the person he had seen looking into vehicles but who stated that plaintiff had not tried to open or enter any of the vehicles.[1]

Bargas, a sergeant with the GRPD, arrived on the scene after Laudenslager and Edgcombe had made contact and spoken with plaintiff. According to Bargas, Edgcombe was in the process of trying to identify

[1] Edgcombe's report states, "We discovered that [plaintiff] had looked into cars but unlike the initial information he had not tried to open or enter any of the vehicles that he looked into." It is not clear from the record what the phrase "initial information" refers to given that Edgcombe's description of the telephone complaint that had prompted his response to the scene only indicates that the complainant described plaintiff as "looking into several cars as he passed by them in the lot as if looking to steal something if it presented it self [sic] to him."

plaintiff, and Edgcombe reported that plaintiff had told him that he was 15 years old and lived on Burning Tree Drive just south of the MAC parking lot. Bargas testified that plaintiff admitted to walking through the parking lot but that he denied looking into cars. Bargas further testified that plaintiff looked older than 15 years of age and had tattoos. Bargas photographed plaintiff in case there were witnesses from the previous thefts who could identify a suspect. Bargas also fingerprinted plaintiff because the GRPD had tried to obtain latent prints in the previous incidents. Bargas explained that at the time he performed the P&P on plaintiff, he and Edgcombe still were not sure about plaintiff's actual identity and were trying to verify it. Bargas testified that he asked plaintiff if there was someone he could call to come to the scene and confirm his identity. Sometime after the P&P, plaintiff's mother and another family member arrived. Bargas explained to them why plaintiff had been stopped (i.e., that two independent witnesses had described her son as looking into vehicles in the parking lot); plaintiff's mother verified his identity, and she indicated that she would make sure that plaintiff took a different route to avoid any future problems. Plaintiff left with his family.

In the meantime, VanderKooi, a captain with the GRPD, heard the radio traffic regarding the incident in the MAC parking lot and went to the scene. VanderKooi testified that he believed he showed up after plaintiff had left and as things were wrapping up at the scene.[2] VanderKooi further testified that Bargas and Edgcombe explained what had occurred, that he approved of Bargas's actions, and that he then drove away. On the following day, VanderKooi requested that

[2] Bargas testified that he thought that VanderKooi arrived after plaintiff was stopped but before plaintiff's mother arrived.

plaintiff's fingerprints be compared with any latent prints found at the scene of the other larcenies from vehicles in the area. According to VanderKooi, either there was no match between the prints or the quality of the prints was inadequate to make a comparison. VanderKooi took no further action related to this incident.

Plaintiff testified that he was handcuffed for the P&P procedure and that he was placed in the back of a police car for 5 to 10 minutes while waiting for his mother to arrive. Plaintiff denied looking into cars but stated at his deposition that he usually looked at his reflection in car windows as he passed them. Plaintiff denied touching any vehicle. After the officers spoke with plaintiff's mother, they let plaintiff out of the police car and removed his handcuffs. Plaintiff testified that the police did not ask for his consent for the P&P or any search.

On August 7, 2014, plaintiff filed a complaint against Bargas, VanderKooi, and the city of Grand Rapids (the city), alleging violations of 42 USC 1981, 42 USC 1983, and 42 USC 1988. Plaintiff alleged that, without probable cause or legal authority, Bargas had taken fingerprints and photographs of plaintiff, who is an African-American. Plaintiff further alleged that the photographs were stored in the GRPD's files and that VanderKooi had directed Bargas to take the fingerprints and photographs and to store them. Plaintiff also alleged that Bargas and VanderKooi took these actions against plaintiff because he is an African-American. In Count I, the complaint raised a claim against Bargas and VanderKooi under 42 USC 1981 and 42 USC 1983 and asserted that they had violated the Equal Protection Clause of the Fourteenth Amendment, US Const,

Am XIV,[3] plaintiff's right to be free from unlawful searches and seizures under the Fourth Amendment, US Const, Am IV, his rights under the Fifth Amendment, US Const, Am V, barring the taking of private property without just compensation, and his constitutional right to privacy.

In Count II, plaintiff raised a municipal liability claim against the city under 42 USC 1983. According to the complaint, an analysis of police reports from March 2008 to March 2013 was conducted. The complaint alleged that in the reports that contained VanderKooi's name and the phrase "P&P" or a similar reference to photograph and print, there were 11 people, including plaintiff, who were innocent of any wrongdoing but who had still been photographed and printed and an additional person who had only been photographed. The complaint asserted that 75% of those individuals were African-American but that the city's population was only 20% African-American. The complaint alleged that plaintiff's photograph and prints were taken as part of the city's policy, which was enforced in a discriminatory manner.

On September 3, 2014, defendants filed their answer to the complaint and affirmative defenses. The following affirmative defenses were raised: (1) plaintiff failed to state a claim upon which relief could be granted, (2) the initial contact was a consensual police-citizen encounter, (3) reasonable suspicion supported the initial stop and the actions that followed, (4) the initial stop was reasonable, (5) the actions were not discriminatory or based on race, (6) Bargas and VanderKooi were entitled to qualified immunity, (7) plaintiff consented

[3] The Fourteenth Amendment also provides the basis for claims that a state has denied other federal constitutional rights. See *Rendell-Baker v Kohn*, 457 US 830, 837-838; 102 S Ct 2764; 73 L Ed 2d 418 (1982).

to some or all of defendants' actions, and (8) any claimed damages were caused, in whole or in part, by plaintiff's own actions.

On September 11, 2015, the city and the individual defendants separately moved for summary disposition. Bargas and VanderKooi argued that they were entitled to summary disposition under MCR 2.116(C)(7) because they were entitled to qualified immunity given that the law was not clearly established regarding taking fingerprints and photographs during investigatory stops. VanderKooi additionally argued that he was entitled to summary disposition under MCR 2.116(C)(10) because he did not have an active role in the stop. Moreover, Bargas and VanderKooi argued that they were entitled to summary disposition under MCR 2.116(C)(10) because there was no such thing as a constitutional right to privacy, plaintiff could not establish a takings claim, and plaintiff could not establish that he was discriminated against on the basis of race.

The city argued that it was entitled to summary disposition under MCR 2.116(C)(10) because a city employee did not deny plaintiff a constitutional right, the city's P&P practice did not violate the Fourth Amendment, plaintiff could not establish that the city acted with deliberate indifference to the federal civil rights violations, and plaintiff could not establish a pattern, notice, or tacit approval of illegal conduct on the part of the city.

In response, plaintiff stated that he was abandoning his equal protection and § 1981 claims but denied that summary disposition was appropriate with respect to his remaining claims.

Plaintiff planned to have an expert witness, Dr. William Terrill, testify at trial. Terrill, a professor of

criminal justice at Michigan State University, provided an affidavit in which he opined that Bargas's actions in performing the P&P procedure in this case were unreasonable. Defendants moved to strike Terrill's proposed testimony. Defendants argued that Terrill's proposed testimony could be broken down into two categories: numerical opinions on racial profiling and opinions on whether Bargas's actions were reasonable. With respect to the numerical opinions on racial profiling, defendants argued that the opinion was inadmissible and unnecessary to the extent that it involved the ordinary use of computations that any layperson could perform. They further argued that Terrill was unqualified to testify about racial profiling. Moreover, defendants argued that Terrill's analysis was unreliable because it used unadjusted census data as a statistical benchmark—an approach rejected by many courts; that the analysis was unreliable because nothing was used as a control; that the analysis was unreliable because his "preliminary opinions" regarding this case were not developed using the same intellectual rigor as his academic work; and that the analysis involved inadmissible hearsay and was unnecessary for the jury to interpret the facts. Finally, defendants argued that Terrill's opinion contradicted the admissible evidence.

On October 30, 2015, the trial court held a hearing on the motions for summary disposition and the motion to strike. Defendants argued that there was no generalized constitutional right to privacy; that a right to privacy must be tied to a specific amendment; and that, in this case, the applicable amendment is the Fourth Amendment. For that reason, defendants maintained that there could not be a separate claim under a general right to privacy and that the proper analysis is under the Fourth Amendment. Plaintiff did

not dispute that analysis and agreed that his right to privacy should be evaluated in the context of the Fourth Amendment. Defendants further argued that people did not have a reasonable expectation of privacy in their fingerprints or in photographs of themselves as they appeared in public. Plaintiff responded that either a search warrant or probable cause in the field was needed to gather the evidence and that "none of the bases that the Fourth Amendment requires" was present to allow the gathering of photographs and fingerprints in this case.

With respect to the Fifth Amendment, defendants argued that there are no property rights implicated in a person's photograph or fingerprints, that the photograph and fingerprints in this case were not published, and that the underlying incident was an application of police powers rather than a taking under the city's eminent-domain power. Plaintiff argued that the incident involved a taking of intangible property without just compensation, although he conceded that there were certain instances when police could take someone's photograph and fingerprints as an appropriate exercise of police powers. Plaintiff also conceded that he could not find caselaw supporting his argument that the taking of a fingerprint or photograph by the police constituted a taking under the Fifth Amendment, but he maintained that it was an issue of first impression.

Following the hearing, the trial court issued two separate written opinions and orders regarding the motion to strike Terrill and the motions for summary disposition. With respect to the motion to strike, the trial court acknowledged Terrill's substantial training and education in the general field of criminal justice but questioned whether Terrill was qualified to give an expert opinion in the instant case. The trial court held

that, even assuming Terrill was qualified in the area of police conduct at issue in the instant case, plaintiff had failed to establish that Terrill's opinion would assist the trier of fact or that his opinion was based on a recognized form of specialized knowledge. The trial court therefore concluded that plaintiff had failed to satisfy the requirements of MRE 702. In addition, the trial court held that the testimony sought to be introduced did not pass muster under MRE 403 because the information—whether based on Terrill's statistical analysis or on his nonstatistical opinion—was unnecessary to assist the jury given that plaintiff had abandoned his equal-protection claims that were based on race and the statistical information would only confuse the actual issues presented to the jury. Accordingly, the trial court granted the motion to strike.

With respect to Bargas's and VanderKooi's motions for summary disposition, the trial court noted that the complaint was limited to the P&P procedure and that plaintiff "did not challenge the propriety of the initial stop, search of his person, or detention." The trial court held that plaintiff "was in public and had no reasonable expectation of privacy in his various physical features which were readily observable by the public" and that the P&P did not violate the Fourth Amendment. In the alternative, the trial court noted that the Fourth Amendment only prohibited unreasonable searches and seizures, and it held that, even assuming that the P&P constituted a search and seizure, Bargas's actions were reasonable given the circumstances. Further, the trial court held that plaintiff did not establish that VanderKooi directed Bargas's actions. The trial court also rejected plaintiff's argument that he had a constitutional right to privacy in his fingerprints and facial features. The trial court therefore held that summary disposition was appropriate under

MCR 2.116(C)(10) with respect to plaintiff's Fourth Amendment and constitutional right to privacy claim.

Regarding the Fifth Amendment claim, the trial court rejected plaintiff's argument and held that his facial features and fingerprints were "observable by the general public and not protected under the common law right to privacy." It therefore held that summary disposition was appropriate under MCR 2.116(C)(10). The trial court also held that plaintiff had abandoned his equal protection claim under 42 USC 1981. Consequently, it held that summary disposition was appropriate under MCR 2.116(C)(10).

In addition, the trial court held that qualified immunity applied to all of plaintiff's claims against Bargas and VanderKooi. Therefore, the trial court concluded, "Because Plaintiff failed to establish a genuine issue of material fact regarding his [§] 1983 claims, and abandoned his [§] 1981 claim, and because Bargas and VanderKooi are otherwise shielded by qualified immunity, summary disposition is appropriate pursuant to MCR 2.116(C)(7) and 2.116(C)(10)."

With respect to the city's motion for summary disposition, the trial court held that plaintiff had failed to establish a violation of his constitutional rights and had not established that the P&P policy was unconstitutional on its face or as applied; therefore, summary disposition was appropriate under MCR 2.116(C)(10).

The trial court accordingly dismissed plaintiff's claims with prejudice. This appeal followed.

II. INDIVIDUAL DEFENDANTS

Plaintiff argues that the trial court erred by granting summary disposition in favor of Bargas and VanderKooi on his Fourth and Fifth Amendment

claims. Because we conclude that Bargas and VanderKooi were shielded by the doctrine of qualified immunity, we disagree.

A. STANDARD OF REVIEW

"A motion for summary disposition under MCR 2.116(C)(7) asserts that a claim is barred by immunity granted by law" and "may be supported or opposed by affidavits, depositions, admissions, or other documentary evidence; the substance or content of the supporting proofs must be admissible in evidence." *By Lo Oil Co v Dep't of Treasury*, 267 Mich App 19, 25-26; 703 NW2d 822 (2005). "A trial court properly grants a motion for summary disposition under MCR 2.116(C)(7) when the undisputed facts establish that the moving party is entitled to immunity granted by law." *Id*. at 26. We review de novo a trial court's grant of summary disposition pursuant to MCR 2.116(C)(7). *Fisher Sand & Gravel Co v Neal A Sweebe, Inc*, 494 Mich 543, 553; 837 NW2d 244 (2013). Further, we review de novo the question of whether a federal constitutional right was clearly established at the time of the alleged violation so as to preclude the protection of qualified immunity. See *Elder v Holloway*, 510 US 510, 516; 114 S Ct 1019; 127 L Ed 2d 344 (1994); *Morden v Grand Traverse Co*, 275 Mich App 325, 340; 738 NW2d 278 (2007).

B. QUALIFIED IMMUNITY GENERALLY

"Qualified immunity is an established federal defense against claims for damages under § 1983 for alleged violations of federal rights." *Morden*, 275 Mich App at 340. A person is liable under 42 USC 1983 if he or she, "under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or

causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution . . . ." "Section 1983 itself is not the source of substantive rights; it merely provides a remedy for the violation of rights guaranteed by the federal constitution or federal statutes." *York v Detroit (After Remand)*, 438 Mich 744, 757-758; 475 NW2d 346 (1991). "A cause of action under § 1983 is stated where a plaintiff shows (1) that the plaintiff was deprived of a federal right, and (2) that the defendant deprived the plaintiff of that right while acting under color of state law." *Davis v Wayne Co Sheriff*, 201 Mich App 572, 576-577; 507 NW2d 751 (1993). However, "[a] police officer may invoke the defense of qualified immunity to avoid the burden of standing trial when faced with a claim that the officer violated a person's constitutional rights." *Lavigne v Forshee*, 307 Mich App 530, 542; 861 NW2d 635 (2014).

"The doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id*. at 542 (quotation marks and citations omitted). Thus, qualified immunity does not apply if a right was "clearly established" at the time of the violation, such that it "would be clear to a reasonable officer" that his or her conduct was unlawful. *Id*. (quotation marks and citations omitted).

Qualified immunity can apply "even if there were a genuine issue of material fact regarding the underlying [constitutional] claim . . . ." *Morden*, 275 Mich App at 342. See also *Messerschmidt v Millender*, 565 US 535, 546; 132 S Ct 1235; 182 L Ed 2d 47 (2012) ("Qualified immunity gives government officials

breathing room to make reasonable but mistaken judgments, and protects all but the plainly incompetent or those who knowingly violate the law.") (quotation marks and citation omitted). In order for a right to be clearly established, there must be "binding precedent . . . that is directly on point." *Morden*, 275 Mich App at 340 (quotation marks and citation omitted; alteration in original).

In *Saucier v Katz*, 533 US 194, 201; 121 S Ct 2151; 150 L Ed 2d 272 (2001), the United States Supreme Court articulated the initial inquiry for determining whether qualified immunity applies: "Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" If there was no violation of a constitutional right, no further inquiry regarding qualified immunity is required. *Id*. However, "if a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established." *Id*. " '[T]he right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.' " *Id*. at 202, quoting *Anderson v Creighton*, 483 US 635, 640; 107 S Ct 3034; 97 L Ed 2d 523 (1987). In other words, the "dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*, 533 US at 202. See also *Anderson*, 483 US at 640 ("This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful,

but it is to say that in the light of pre-existing law the unlawfulness must be apparent.") (citation omitted).

In *Pearson v Callahan*, 555 US 223, 236; 129 S Ct 808; 172 L Ed 2d 565 (2009), the Court clarified that courts may exercise their sound discretion in deciding "which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." See also *Jones v Byrnes*, 585 F3d 971, 975 (CA 6, 2009) (explaining that "*Pearson* left in place [*Saucier*'s] core analysis" and that it "need not decide whether a constitutional violation has occurred if we find that the officer's actions were nevertheless reasonable").

In this case, the circumstances lead us to conclude that the second prong of the *Saucier* analysis is dispositive of whether Bargas and VanderKooi are entitled to qualified immunity. We therefore decline to address whether, taken in the light most favorable to plaintiff, the P&P procedure violated plaintiff's Fourth and Fifth Amendment rights. Rather, for the reasons stated below, we hold that at the time of the alleged violation, the right asserted by plaintiff was not clearly established. *Saucier*, 533 US at 201.

C. FOURTH AMENDMENT RIGHTS

The Fourth Amendment of the United States Constitution protects against unreasonable searches and seizures. *People v Slaughter*, 489 Mich 302, 310; 803 NW2d 171 (2011). See also *Maryland v King*, 569 US 435, 446; 133 S Ct 1958; 186 L Ed 2d 1 (2013) ("The Fourth Amendment, binding on the States by the Fourteenth Amendment, provides that '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.' "), quoting US Const,

Am IV (alteration in original). There is a dual inquiry for determining whether a search or a seizure is unreasonable: "whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *Terry v Ohio*, 392 US 1, 19-20; 88 S Ct 1868; 20 L Ed 2d 889 (1968).

As stated earlier, a person is liable under 42 USC 1983 if he or she, "under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution . . . ." "Section 1983 itself is not the source of substantive rights; it merely provides a remedy for the violation of rights guaranteed by the federal constitution or federal statutes." *York*, 438 Mich at 757-758. "A cause of action under § 1983 is stated where a plaintiff shows (1) that the plaintiff was deprived of a federal right, and (2) that the defendant deprived the plaintiff of that right while acting under color of state law." *Davis*, 201 Mich App at 576-577. It is undisputed that the officers were acting under the color of state law when the alleged Fourth Amendment violation of plaintiff's rights occurred.

1. NATURE OF PLAINTIFF'S CLAIMS

The factual allegations of plaintiff's complaint relate solely to the taking of plaintiff's photograph and fingerprints. Plaintiff did not challenge his initial stop, the length of his detainment, or the fact that he was handcuffed or placed in a police car, as being unreasonable and violative of his Fourth Amendment rights. Rather, he alleged only that the P&P procedure was an

unlawful search and seizure. This Court must limit its review to the allegations contained in the complaint. See *Sutter v Ocwen L Servicing, LLC*, 499 Mich 874 (2016); see also *Steed v Covey*, 355 Mich 504, 511; 94 NW2d 864 (1959) (explaining the general principles that " '[e]very material fact essential to the existence of the plaintiff's cause of action, and which he must prove to sustain his right of recovery, must be averred, in order to let in proof thereof' " and that " '[e]very issue must be founded upon some certain point, so that the parties may come prepared with their evidence and not be taken by surprise, and the jury may not be misled by the introduction of various matters' "), quoting 41 Am Jur, Pleading, § 77, pp 343-345.

The trial court did not abuse its discretion by limiting plaintiff's claims to those that plaintiff actually pleaded. The entirety of plaintiff's Count I (against Bargas and VanderKooi) reads as follows:

> 9. On August 25, 2011, Plaintiff Johnson was sitting on the grass approximately 150 south [sic] of Burton Street near the intersection of Breton Avenue in the City of Grand Rapids.
>
> 10. Plaintiff Johnson is an African-American.
>
> 11. Officer Greg Edgcombe contacted Plaintiff Johnson following a call from personnel at the Michigan Athletic Club ("MAC").
>
> 12. Despite being told that Plaintiff Johnson had not tried to open or enter any of the vehicles in the MAC parking lot (unlike the initial information), Sgt. Elliott Bargas took a full set of fingerprints and two photos of Plaintiff Johnson, without probable cause, a search warrant or other legal authority to do so.
>
> 13. Upon information and belief, Defendant VanderKooi directed Sgt. Bargas to photograph Plaintiff Johnson and have the photograph stored in the files and

records of the City of Grand Rapids Police Department, without probable cause, a search warrant, or legal authority to do so.

14. Upon information and belief, Defendant VanderKooi directed Sgt. Bargas to take Plaintiff Johnson's fingerprints and have the fingerprints stored in the files and records of the City of Grand Rapids Police Department, without probable cause, a search warrant, or legal authority to do so.

15. Defendants VanderKooi and Bargas took the above actions against Plaintiff Johnson, because he is an African-American.

16. At no time on August 15, 2011, did Plaintiff Johnson commit any offense in violation of the laws of the City of Grand Rapids, State of Michigan, or the United States.

17. There was no legal cause to justify the seizure of Plaintiff Johnson's photographic image and fingerprints.

18. The actions taken by Defendant[s] Bargas and VanderKooi, were unreasonable and excessive.

19. Plaintiff Johnson's constitutionally protected rights that Defendant Bargas and VanderKooi violated include the following:

a. His right to fair and equal treatment guaranteed and protected by the Equal Protection Clause of the Fourteenth Amendment.

b. His rights under the Fourth and Fourteenth Amendments to be free from unlawful search and seizure.

c. His rights under the Fifth Amendment which bars the taking of private property for public use without just compensation.

d. His right to privacy under the U.S. Constitution;

e. His rights protected by 42 U.S.C. § 1981 and 42 U.S.C. § 1983.

20. As a direct and proximate result of Defendant's [sic] conduct, Plaintiff Johnson suffered a loss of freedom, emotional injury, including but not limited to fright,

> shock, embarrassment, and humiliation, and other constitutionally protected rights described above.

Although plaintiff now seeks to expand his claim to encompass a challenge to the length of his detention and to his being handcuffed, plaintiff's complaint itself reflects no such challenge. Moreover, the record reflects that the focal point of this litigation—from beginning to end—was not the duration of the stop or the handcuffing, but rather the P&P procedure. At the summary disposition hearing, for example, trial counsel argued:

> And that's our point, is you have to be careful when you're going to take somebody's pictures or prints. . . .
>
> * * *
>
> So our contention is, no, there's no reasonable suspicion. There's no probable cause to suspect that Mr. Johnson has done anything, and you don't have the authority under the Fourth Amendment to take his photographs – plural – and take his full set of fingerprints.

The P&P procedure has continued to be the focal point on appeal. For example, plaintiff argues:

> At the time of the encounter with Johnson, the law was clearly established regarding the fact that fingerprints could not be taken without probable cause and for that reason summary disposition on Johnson's Fourth Amendment claim was inappropriate.
>
> * * *
>
> This is a case where a person was subject to detention for the sole purpose of obtaining fingerprints, without probable cause. Such action violates the Fourth Amendment . . . .
>
> * * *

> Thus, it should be clear that the compulsory detention of Johnson in this case for the sole purpose of obtaining his fingerprints, without probable cause, violated the Fourth Amendment of the Constitution.
>
> * * *
>
> The issue in this case is the appropriateness of the taking of photographs and fingerprints of innocent people.[4]

Notwithstanding this focus, plaintiff cursorily asserts on appeal that the singular reference in ¶ 19(b) of his complaint to "[h]is rights under the Fourth and Fourteenth Amendments to be free from unlawful search and seizure" was adequate to place defendants on notice that he was challenging not only the P&P procedure but the length of his detention and the fact that he was handcuffed.[5] We disagree.

While Michigan is a notice pleading state, *Johnson v QFD, Inc*, 292 Mich App 359, 368; 807 NW2d 719 (2011), a complaint must still provide reasonable notice to opposing parties, *id*. See also *Dacon v Transue*, 441 Mich 315, 329; 490 NW2d 369 (1992); MCR 2.111(B)(1). A defendant should not be left to "guess upon what grounds plaintiff believes recovery is justi-

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[4] Amicus curiae, the American Civil Liberties Union of Michigan, confines its arguments in support of plaintiff to the P&P procedure.

[5] We note that on appeal plaintiff appears to challenge only the fact that his detention continued *after* officers on the scene spoke with witnesses and plaintiff himself. While plaintiff does not specify the precise length of time during which the detention was allegedly unreasonable, plaintiff testified at his deposition that he was interviewed by the police, his fingerprints and picture were taken, and he was then handcuffed and allowed to call his mother. He further testified that 5 to 10 minutes elapsed from the time that he called his mother and her arrival, and that he was let out of the police car and the handcuffs were removed after his mother spoke with the police. Bargas testified to a brief interaction with plaintiff's mother during which she showed Bargas her identification and identified plaintiff as her son.

fied" after reading the complaint. *Dacon*, 441 Mich at 329. Therefore, MCR 2.111(B)(1) provides that a theory of liability must be supported by "specific allegations necessary reasonably to inform the adverse party" of the pleader's claims. In this case, plaintiff provided specific allegations concerning the P&P procedure; however, the complaint is devoid of any allegations (much less specific ones) concerning the use of handcuffs or the length of plaintiff's detention. In fact, the complaint specifically alleges only that "[t]here was no legal cause to justify the seizure of Plaintiff Johnson's photographic image and fingerprints" and contains absolutely no allegations related to the seizure of plaintiff's person. The complaint's general allegation that the "unreasonable and excessive" actions taken by Bargas and VanderKooi resulted in a violation of plaintiff's Fourth Amendment rights is the sort of general allegation that "gives no hint of the facts to which it refers." *Dacon*, 441 Mich at 330. It can therefore only be interpreted as referring back to the specific allegations that plaintiff did assert relative to the P&P procedure.

The trial court in this case did not abuse its discretion by declining to read plaintiff's general Fourth Amendment allegation as providing sufficient notice to defendants concerning any and all theories of liability that may have arisen from any portion of plaintiff's interaction with the police—particularly when the complaint was devoid of *any* specific allegation concerning the unreasonableness of the seizure of defendant's person. *Id*. at 330. And because plaintiff never sought to amend his complaint to allege that challenge, the trial court was not obliged to offer such an opportunity, and the court cannot be found to have committed plain error by failing sua sponte to do so. See *Kloian v Schwartz*, 272 Mich App 232, 242; 725 NW2d

671 (2006) (holding that the trial court was not required to sua sponte offer the plaintiff leave to amend his complaint absent a request for leave to amend or the defendants' written consent to amend).

For all of these reasons, we must confine our analysis of plaintiff's Fourth Amendment challenge and the issue of whether—for purposes of a qualified-immunity analysis—plaintiff's alleged constitutional rights were clearly established, to the alleged unlawful search and seizure arising from the officers' use of the P&P procedure.

2. APPLICATION

"[A] Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable." *Kyllo v United States*, 533 US 27, 33; 121 S Ct 2038; 150 L Ed 2d 94 (2001). See also *United States v Jacobsen*, 466 US 109, 113; 104 S Ct 1652; 80 L Ed 2d 85 (1984) ("A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed."). "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Katz v United States*, 389 US 347, 351-352; 88 S Ct 507; 19 L Ed 2d 576 (1967) (citations omitted).

When police obtain physical evidence from an individual, there are two different levels at which there might be a potential Fourth Amendment violation. *United States v Dionisio*, 410 US 1, 8; 93 S Ct 764; 35 L Ed 2d 67 (1973). The first level involves the initial " 'seizure' of the 'person' necessary to bring him into contact with government agents," and the second level

involves "the subsequent search for and seizure of the evidence." *Id*. (citations omitted).

The United States Supreme Court has stopped short of deciding whether a brief detention of an individual for the purpose of fingerprinting, based on a reasonable suspicion (i.e., a *Terry* stop, *Terry*, 392 US at 20), is per se unreasonable. See *Davis v Mississippi*, 394 US 721, 722, 728; 89 S Ct 1394; 22 L Ed 2d 676 (1969). In *Davis*, the Court explicitly stated that it was not deciding whether, during a criminal investigation, fingerprints could be obtained in the absence of probable cause. See *id*. at 728 ("We have no occasion in this case, however, to determine whether the requirements of the Fourth Amendment could be met by narrowly circumscribed procedures for obtaining, during the course of a criminal investigation, the fingerprints of individuals for whom there is no probable cause to arrest."). In fact, the Court stated that "[i]t is arguable, however, that, because of the unique nature of the fingerprinting process, such detentions might, under narrowly defined circumstances, be found to comply with the Fourth Amendment even though there is no probable cause in the traditional sense." *Id*. at 727. The *Davis* Court ultimately decided the issue on the grounds that the petitioner's detention at the police headquarters "was not authorized by a judicial officer," that the "petitioner was unnecessarily required to undergo two fingerprinting sessions," and that the "petitioner was not merely fingerprinted during the [initial] detention but also subjected to interrogation." *Id*. at 728.

The conduct challenged in *Davis* thus occurred at the first level of Fourth Amendment analysis (i.e., the initial seizure of the petitioner's person necessary to bring him into contact with government agents), not the taking of the petitioner's fingerprints. See *Dionisio*,

410 US at 11 ("For in *Davis* it was the initial seizure—the lawless dragnet detention—that violated the Fourth and Fourteenth Amendments, not the taking of the fingerprints."). The *Dionisio* Court further stated that "*Davis* is plainly inapposite to a case where the initial restraint does not itself infringe the Fourth Amendment." *Id*. Further, in discussing whether the collection of a voice recording from a suspect required probable cause, the Court explained that a voice exemplar did not require intrusion into the body like a blood extraction, and it stated, "Rather, this is like the fingerprinting in *Davis*, where, though the initial dragnet detentions were constitutionally impermissible, we noted that the fingerprinting itself 'involves none of the probing into an individual's private life and thoughts that marks an interrogation or search.' " *Id*. at 15, quoting *Davis*, 394 US at 727. Therefore, "neither the summons to appear before the grand jury nor its directive to make a voice recording infringed upon any interest protected by the Fourth Amendment . . . ." *Dionisio*, 410 US at 15.

In *Hayes v Florida*, 470 US 811, 814; 105 S Ct 1643; 84 L Ed 2d 705 (1985), the Court concluded that there was no probable cause for the plaintiff to have been arrested, no consent, and no judicial authorization for detaining the defendant for fingerprinting purposes. Although the Court ultimately reversed the defendant's conviction, the reversal was based on the fact that, as in *Davis*, the defendant was forcibly removed from his home without probable cause or a warrant and transported to the police station for the purposes of fingerprinting him. *Id*. at 815-818. Notably, the Court stated, "None of the foregoing implies that a brief detention in the field for the purpose of fingerprinting, where there is only reasonable suspicion not amounting to probable cause, is necessarily impermis-

sible under the Fourth Amendment." *Id*. at 816. The Court explained as follows:

> In addressing the reach of a *Terry* stop in *Adams v. Williams*, 407 U. S. 143, 146[; 92 S Ct 1921; 32 L Ed 2d 612] (1972), we observed that "[a] brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time." Also, just this Term, we concluded that if there are articulable facts supporting a reasonable suspicion that a person has committed a criminal offense, that person may be stopped in order to identify him, to question him briefly, or to detain him briefly while attempting to obtain additional information. *United States v. Hensley*, [469 US 221, 229, 232, 234; 105 S Ct 675; 83 L Ed 2d 604 (1985)]. Cf. *United States v. Place*, 462 U. S. 696[; 103 S Ct 2637; 77 L Ed 2d 110] (1983); *United States v. Martinez-Fuerte*, 428 U. S. 543[; 96 S Ct 3074; 49 L Ed 2d 1116] (1976); *United States v. Brignoni-Ponce*, 422 U. S. 873 [; 95 S Ct 2574; 45 L Ed 2d 607] (1975). There is thus support in our cases for the view that the Fourth Amendment would permit seizures for the purpose of fingerprinting, if there is reasonable suspicion that the suspect has committed a criminal act, if there is a reasonable basis for believing that fingerprinting will establish or negate the suspect's connection with that crime, and if the procedure is carried out with dispatch. Cf. *United States v. Place*, [462 US 696]. Of course, neither reasonable suspicion nor probable cause would suffice to permit the officers to make a warrantless entry into a person's house for the purpose of obtaining fingerprint identification. *Payton v. New York*, 445 U. S. 573[; 100 S Ct 1371; 63 L Ed 2d 639] (1980). [*Hayes*, 470 US at 816-817.]

In short, the United States Supreme Court has not definitively held whether fingerprinting someone constitutes a search under the Fourth Amendment. See *Maryland*, 569 US at 479 (Scalia, J., dissenting); see also *Kaupp v Texas*, 538 US 626, 630 n 2; 123 S Ct

1843; 155 L Ed 2d 814 (2003). And the Court has suggested that fingerprints are a physical feature regularly exposed to the public. See, e.g., *Dionisio*, 410 US at 14-15. Various federal courts have relied on *Dionisio* in holding that photographing and fingerprinting does not constitute a search under the Fourth Amendment. See, e.g., *United States v Farias-Gonzalez*, 556 F3d 1181, 1188 (CA 11, 2009) ("The police can obtain both photographs and fingerprints without conducting a search under the Fourth Amendment."), citing *Dionisio*, 410 US 14-15; *Rowe v Burton*, 884 F Supp 1372, 1381 (D Alas, 1994) ("Courts have consistently refused to accord Fourth Amendment protection to non-testimonial evidence such as photographs of a person, his or her handwriting, and fingerprints. Thus, the photographs and fingerprinting, alone, would not likely constitute a search for purposes of the Fourth Amendment."), citing *Dionisio*, 410 US at 5-7. And the Supreme Court has suggested that a brief seizure, based on reasonable suspicion, that includes the collection of information that is regularly exposed to the public, could be permissible. *Hayes*, 470 US at 816-817; see also *Dionisio*, 410 US at 14 (explaining that "[n]o person can have a reasonable expectation that others will not know the sound of his voice, any more than he can reasonably expect that his face will be a mystery to the world").

Further, although the case did not involve police contact, this Court has also held that "[t]here is no reasonable expectation of privacy in one's fingerprints." *Nuriel v Young Women's Christian Ass'n of Metro Detroit*, 186 Mich App 141, 146; 463 NW2d 206 (1990); see also *People v Hulsey*, 176 Mich App 566, 569; 440 NW2d 59 (1989), citing *Dionisio*, 410 US 14-15. Also, photographing a person as they appear in public does not generally violate any reasonable expec-

tation of privacy. *Sponick v Detroit Police Dep't*, 49 Mich App 162, 198-199; 211 NW2d 674 (1973); *Fry v Ionia Sentinel-Standard*, 101 Mich App 725, 728-729; 300 NW2d 687 (1980); see also 3 Restatement Torts, 2d, Publicity Given to Private Life, § 652D, p 386 (noting that a private individual's right to privacy is not invaded when the individual's photograph is taken in a public place).

It is therefore not clearly established in the law that fingerprinting and photographing someone during the course of an otherwise valid investigatory stop violates the Fourth Amendment. In fact, prior statements from the United States Supreme Court and this Court suggest that such a procedure would be permissible under the Fourth Amendment if the initial stop was justified by a reasonable suspicion. We therefore conclude that Bargas and VanderKooi were entitled to the protection of qualified immunity regarding defendant's Fourth Amendment claims.

D. FIFTH AMENDMENT RIGHTS

In relevant part, the Fifth Amendment of the United States Constitution provides as follows:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. [US Const, Am V.]

The Fifth Amendment is applicable "to the states through the Fourteenth Amendment, US Const, Am XIV." *AFT Mich v Michigan*, 497 Mich 197, 217; 866 NW2d 782 (2015). A " 'taking' can encompass governmental interference with rights to both tangible and intangible property," and "[t]he term 'property' encompasses everything over which a person may have

exclusive control or dominion." *Id*. at 216, 218 (quotation marks and citation omitted). "In order to prevail on a takings claim, a claimant first must demonstrate a cognizable interest in the affected private property." *Mich Soft Drink Ass'n v Dep't of Treasury*, 206 Mich App 392, 402; 522 NW2d 643 (1994). "The Constitution neither creates nor defines the scope of property interests compensable under the Fifth Amendment." *Maritrans Inc v United States*, 342 F3d 1344, 1352 (CA Fed, 2003). Rather, "existing rules and understandings and background principles derived from an independent source, such as state, federal, or common law, define the dimensions of the requisite property rights for purposes of establishing a cognizable taking." *Id*. (quotation marks and citation omitted).

Plaintiff argued before the trial court that the P&P procedure constituted an unlawful taking of his "image or likeness" without just compensation. This Court and the Michigan Supreme Court have recognized a common-law right of privacy that protects against various types of invasions of privacy including the "[a]ppropriation, for the defendant's advantage, of the plaintiff's name or likeness." *Battaglieri v Mackinac Ctr For Pub Policy*, 261 Mich App 296, 300; 680 NW2d 915 (2004), quoting *Tobin v Mich Civil Serv Comm*, 416 Mich 661, 672; 331 NW2d 184 (1982) (quotation marks and emphasis omitted). Yet, causes of action for violations of such a right stem from " 'the interest of the individual in the exclusive use of his own identity, in so far as it is represented by his name or likeness, and in so far as the use may be of benefit to him or to others.' " *Battaglieri*, 261 Mich App at 300-301, quoting 3 Restatement Torts, 2d, Appropriation of Name or Likeness, § 652C, comment *a*, p 381. Therefore, a person's likeness and identity "in so far as the use may be of benefit to him or to others" amounts to "property."

Battaglieri, 261 Mich App at 300 (quotation marks and citation omitted). See also *AFT Mich*, 497 Mich at 216. "To generate a compensable taking, the government must assert its authority to seize title or impair the value of property." *Id*. at 218.

In this case, plaintiff made no argument that the value of his likeness was impaired or that any defendant seized title to his likeness. Bargas and VanderKooi did not interfere with plaintiff's ability to use his identity or likeness to benefit plaintiff or others, and they did not prevent plaintiff from carrying out any future endeavors to benefit from his likeness. In addition, plaintiff's photographs and fingerprints were obtained under the police power rather than the power of eminent domain. See *Bennis v Michigan*, 516 US 442, 452; 116 S Ct 994; 134 L Ed 2d 68 (1996) ("The government may not be required to compensate an owner for property which it has already lawfully acquired under the exercise of governmental authority other than the power of eminent domain."). Plaintiff's counsel admitted to uncovering no caselaw stating that police conduct in photographing and fingerprinting persons for investigatory purposes constituted a governmental taking. Thus, Bargas and VanderKooi were entitled to the protection of qualified immunity with respect to plaintiff's Fifth Amendment claims.

E. CONCLUSION

The alleged constitutional infirmities of the P&P procedure and the rights asserted by plaintiff were not clearly established in view of the preexisting law. See *White v Pauly*, 580 US ___, ___; 137 S Ct 548, 552; 196 L Ed 2d 463 (2017) ("As this Court explained decades ago, the clearly established law must be 'particularized' to the facts of the case. Otherwise, [p]laintiffs

would be able to convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights.") (quotation marks and citation omitted; alterations in original). Bargas and VanderKooi were therefore entitled to the protection of qualified immunity and to summary disposition under MCR 2.116(C)(7).[6]

III. MUNICIPAL DEFENDANT

Plaintiff also argues that the trial court erred by granting summary disposition in favor of the city on plaintiff's claim for municipal liability. We again disagree.

We review de novo a trial court's grant of summary disposition. See *Innovation Ventures v Liquid Mfg*, 499 Mich 491, 506; 885 NW2d 861 (2016). The trial court granted the city's motion for summary disposition under MCR 2.116(C)(10); therefore, the following standards apply:

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. When evaluating a motion for summary disposition under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties . . . in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. [*Id*. at 507 (quotation marks and citation omitted).]

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[6] We note also that there was no evidence presented to the trial court that VanderKooi participated in the P&P of plaintiff or that he ordered Bargas to perform the P&P. To the contrary, Bargas testified at his deposition that it was his decision to perform the P&P. Consequently, even apart from the application of qualified immunity, the evidence presented to the trial court would not support plaintiff's claim against VanderKooi, and VanderKooi would be entitled to summary disposition under MCR 2.116(C)(10).

"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). Moreover, MCR 2.116(G)(4) provides:

> 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.

Under 42 USC 1983, a municipality may be held liable for unconstitutional policies, but § 1983 does not provide for respondeat superior liability. *Payton v Detroit*, 211 Mich App 375, 398; 536 NW2d 233 (1995). Accordingly, "[a] municipality cannot be held liable under § 1983 solely because it employs a tortfeasor," and "in order to sustain a cause of action against a municipality under § 1983, a plaintiff must show that an action pursuant to official municipal policy of some nature caused a constitutional tort." *Id*. (quotation marks and citation omitted). In other words, for a municipality to be liable, a plaintiff must show that an official municipal policy or custom caused his injury. *Connick v Thompson*, 563 US 51, 60-61; 131 S Ct 1350; 179 L Ed 2d 417 (2011); *Los Angeles Co v Humphries*, 562 US 29, 30-31, 36; 131 S Ct 447; 178 L Ed 2d 460 (2010). "Official municipal policy includes the decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law." *Connick*, 563 US at 61.

In this case, plaintiff argues that the city has a policy of requiring P&Ps of "innocent pedestrians who do not happen to have ID on them." In support of this contention, plaintiff alleges that VanderKooi was involved in 11 incidents over five years in which persons "innocent of any wrongdoing," including plaintiff, were subject to the P&P procedure and another incident in which a person was only photographed. The following documentary evidence submitted to the trial court makes reference to this alleged policy or custom:

1. The city's August 28, 2015 response to plaintiff's request for admission, in which the city stated in relevant part:

> [O]fficers taking photos and thumbprints of individuals is a custom or practice of the City of Grand Rapids and has been for decades. The custom or practice has changed over those years with the evolution of technology. . . . [A]lthough it is primarily a thumbprint, another finger or fingers might be printed instead of or in addition to a thumb. . . . A photograph and print might be taken of an individual when the individual does not have identification on them and the officer is in the course of writing a civil infraction or appearance ticket. A photograph and print might be taken in the course of a field interrogation or a stop if appropriate based on the facts and circumstance of that incident.

2. Bargas's deposition testimony, in which he agreed that he performed the P&P procedure in accordance with departmental policy.

3. VanderKooi's deposition testimony, in which the following colloquy occurred between VanderKooi and plaintiff's counsel:

> *Q*. Okay. So, you would agree with the statement that police officers taking photographs and thumbprints known as P and P of individuals with whom they made

contact is a commonly known longstanding custom and practice of the Grand Rapids Police Department?

A. When I started in 1980 they were doing P and P's, yes.

4. An excerpt from the 2004 Grand Rapids Police Manual of Procedures, which contains the following statement relevant to the P&P procedure:

3. Officers issuing appearance tickets shall:

* * *

b. Picture and print all subjects without good identification . . . .

5. An excerpt from the 2009 Grand Rapids Police Department Field Training Manual, which contains the following statements relevant to the P&P procedure:

Under the heading "**FIELD INTERROGATIONS**":

5. Field Interrogation reports

* * *

d. Disposition of suspect (arrest, picture and print, released, etc.).

B. TRAINING CONSIDERATIONS

* * *

9. Picture and print procedures.

6. An excerpt from the same Field Training Manual related to traffic violations that lists the actions an officer may take when a motorist is driving with their driver's license suspended, revoked, or denied and states in relevant part:

(3) Issue citation and obtain a picture and print or arrest.

7. An excerpt from the Grand Rapids Police Department Patrol Sergeant Field Training Tasks Manual[7] that provides in relevant part:

TRAFFIC/ACCIDENT PROCEDURES

* * *

3) Picture and Prints.

a) Carry a Digital Camera and related supplies.

b) Photograph subject clearly and take a readable thumbprint.

(1) Record on P&P card, Subject Identifier (name, race, sex, etc.). Include License Plate in picture if driver or occupant of vehicle.

We conclude that this evidence does not suffice to show that any alleged violation of plaintiff's constitutional rights was the result of an official municipal policy or custom. Plaintiff argues in his brief on appeal that the trial court erred when it failed "to recognize that the custom and practice that [plaintiff] challenges is not the taking of prints and pictures, generally, but the custom and practice of taking prints and pictures of innocent citizens," specifically the P&P of persons taken in the course of a field interrogation or stop. However, the documentation relied upon by plaintiff does not indicate that the city has a policy of requiring P&Ps during field interrogations and stops. The only references to P&P with respect to field interrogations and stops, as opposed to the writing of "appearance

[7] We note that the quoted language is from the 2013 revised manual; the manual was revised after the 2011 incident that forms the basis of this action.

tickets" or citations for driving with a suspended, revoked, or denied driver's license, are found in the guidelines for describing the disposition of the subject in the field interrogation report and the reference to "training considerations" in the Field Training Manual. Nothing about these references indicates that GRPD officers are instructed to take P&Ps during every field interrogation or stop or every such encounter in which the subject lacks official identification or to P&P "innocent citizens." In fact, the majority of the references to the use of the P&P procedures involve its use during the issuance of citations that do not result in arrest; the issuance of these citations would involve, absent bad faith on the part of the issuing officer, at least a good-faith belief that probable cause existed to suspect that an ordinance or statute was violated. See MCL 257.727c; MCL 764.1d; MCL 764.9f; *Detroit v Recorder's Court Judge*, 85 Mich App 284, 292; 271 NW2d 202 (1978). Further, the Patrol Sergeant Field Training Tasks Manual, to the extent it is even relevant to events that occurred before its revision date, discusses P&Ps not in the context of field interrogations or stops, but rather in the section labelled "TRAFFIC/ACCIDENT PROCEDURES."

We conclude that the action that plaintiff alleges to have caused the deprivation of his rights, i.e., a P&P during a field interrogation or stop, did not "implement[] or execute[] a policy statement, ordinance, regulation, or decision officially adopted and promulgated" by the city, whether through GRPD or otherwise. *Monell v Dep't of Social Servs of New York City*, 436 US 658, 690; 98 S Ct 2018; 56 L Ed 2d 611 (1978). We also conclude that, even viewing the evidence in the light most favorable to plaintiff, see *Innovation Ventures*, 499 Mich at 507, plaintiff did not establish a genuine issue of material fact that his alleged depriva-

tion was caused by an unwritten custom or policy "so persistent and widespread as to practically have the force of law." *Connick*, 563 at US 61.

Contrary to plaintiff's contention, the city has not admitted that plaintiff was subjected to a P&P as a result of a custom or policy. The city did admit that the P&P procedure in general exists and did use the words "custom or practice." However, the city also stated that a P&P was discretionary and dependent on the particular facts of the incident in question: "A photograph and print might be taken in the course of a field interrogation or a stop if appropriate based on the facts and circumstance of that incident." Further, Bargas's deposition testimony, read in context, indicates that he agreed that his taking of plaintiff's photograph and fingerprints was "in keeping" with departmental policy; Bargas also testified that he made the decision to P&P plaintiff based on the particular circumstances of the case, specifically that he did not believe plaintiff's claim of identity (apparently based at least in part on Bargas's belief that plaintiff could not have received a tattoo in Grand Rapids if he was under 18), the fact that previous burglaries from cars had been reported in that parking lot, and his belief that latent prints had been taken from the previous burglaries that could either support the conclusion that plaintiff was a suspect in the burglaries or eliminate him as a suspect. Nothing in Bargas's testimony indicates that he was following a custom or policy that had the force of law when he performed a P&P on plaintiff. And VanderKooi's testimony similarly reveals his individualized choices to perform P&Ps or to order them performed in the cases identified by plaintiff.[8]

[8] As stated earlier in this opinion, VanderKooi did not order Bargas to perform the P&P. Nor did VanderKooi's testimony support the inference

"Where a plaintiff claims that the municipality has not directly inflicted an injury, but nonetheless has caused an employee to do so, rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employee." *Bd of Co Comm'rs of Bryan Co, Oklahoma v Brown*, 520 US 397, 405; 117 S Ct 1382; 137 L Ed 2d 626 (1997). In this case, even assuming that plaintiff could demonstrate a violation of his rights, plaintiff cannot show that the city "specifically directed" Bargas to violate plaintiff's rights. *Id*. at 406. Not every constitutional violation by an officer in the field supports a finding of municipal liability for his or her employer; "a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents." *Monell*, 436 US at 693. We therefore conclude that plaintiff failed to raise a genuine issue of material fact concerning whether Bargas's action was taken "under color of some official policy" whether written or unwritten, when the most that can be gleaned from the evidence presented to the trial court was that the P&P procedure was available for use by GRPD officers and could, depending on particularized circumstances, be used during the field interrogation of a person who was never arrested or charged with a crime. The trial court properly granted summary disposition in favor of the city under MCR 2.116(C)(10).

IV. PLAINTIFF'S EXPERT WITNESS

Finally, plaintiff argues that the trial court erred by granting defendants' motion to strike Dr. Terrill's testimony. We disagree. We review for an abuse of discre-

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that Bargas was acting according to the policy alleged by plaintiff, as VanderKooi testified to his belief that Bargas had "consensually obtained" plaintiff's fingerprints.

tion a trial court's determinations regarding "[w]hether a witness is qualified to render an expert opinion and the actual admissibility of the expert's testimony . . . ." *Tate v Detroit Receiving Hosp*, 249 Mich App 212, 215; 642 NW2d 346 (2002). "A trial court does not abuse its discretion when its decision falls within the range of principled outcomes." *Rock v Crocker*, 499 Mich 247, 260; 884 NW2d 227 (2016).

MRE 702 governs expert testimony and provides as follows:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

MRE 702 "requires the circuit court to ensure that each aspect of an expert witness's testimony, including the underlying data and methodology, is reliable," and it "incorporates the standards of reliability that the United States Supreme Court articulated in *Daubert v Merrell Dow Pharm, Inc*," 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993). *Elher v Misra*, 499 Mich 11, 22; 878 NW2d 790 (2016). *Daubert* requires that the trial court ensure all scientific testimony is relevant and reliable. *Id*. at 22-23. Although not dispositive, the absence of supporting literature "is an important factor in determining the admissibility of expert witness testimony." *Id*. at 23. Notably, "it is generally not sufficient to simply point to an expert's experience and background to argue that the expert's opinion is reliable and, therefore, admissible." *Id*. (quotation marks and citation omitted).

In *Kumho Tire Co, Ltd v Carmichael*, 526 US 137, 152; 119 S Ct 1167; 143 L Ed 2d 238 (1999), the United States Supreme Court held that "an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." In other words, *Daubert*'s general gatekeeping function applies to all expert testimony—whether the expert relies on scientific principles or "skill- or experience-based observation." *Id*. at 151. However, "[t]he trial court must have the same kind of latitude in deciding *how* to test an expert's reliability, and to decide whether or when special briefing or other proceedings are needed to investigate reliability, as it enjoys when it decides *whether* that expert's relevant testimony is reliable." *Id*. at 152. "[W]hether *Daubert's* specific factors are, or are not, reasonable measures of reliability in a particular case is a matter that the law grants the trial judge broad latitude to determine." *Id*. at 153.

The trial court did not abuse its discretion by striking Terrill's proposed expert testimony concerning the reasonableness of Bargas's actions in the instant case. Plaintiff cites numerous cases in support of his argument that expert testimony can be used to "educate the trier of fact on police methods and procedures, patterns of expected police response to given situations, and whether those are legal or illegal." However, none of the cases stand for the proposition that expert testimony that invades the province of the jury by making a legal conclusion is permissible. "The opinion of an expert may not extend to the creation of new legal definitions and standards and to legal conclusions." *Lenawee Co v Wagley*, 301 Mich App 134, 160-161; 836 NW2d 193 (2013) (quotation marks and citation omitted). Expert witnesses may not invade the province of

the jury and are "not permitted to tell the jury how to decide the case." *Carson Fischer Potts & Hyman v Hyman*, 220 Mich App 116, 122-123; 559 NW2d 54 (1996).

In this case, Terrill's opinion that Bargas's conduct was unreasonable was a legal conclusion based on Terrill's own interpretation of the same facts that a jury would be tasked with interpreting. See *DeMerrell v Cheboygan*, 206 Fed Appx 418, 426-427 (CA 6, 2006) (holding that "Plaintiff–Appellant's expert testified as to a legal conclusion because he stated that 'it was objectively unreasonable for Officer White to shoot Mr. DeMerrell' " and that the expert made the following other improper legal conclusions: (1) that "a 'reasonable officer on the scene would not have concluded at the time that there existed probable cause that Mr. DeMerrell posed a significant threat of death or serious physical injury to the officer or others' " and (2) that the " 'use of deadly force by [Officer White] was improper and unnecessary' ") (alteration in original); *Hygh v Jacobs*, 961 F2d 359, 364 (CA 2, 1992) (comparing expert testimony that a police officer's "conduct was not 'justified under the circumstances,' not 'warranted under the circumstances,' and 'totally improper' " to improper expert testimony that a person was negligent and holding that the expert "testimony regarding the ultimate legal conclusion entrusted to the jury crossed the line and should have been excluded").[9]

Further, although plaintiff does not present argument on this issue, much of Terrill's testimony related to plaintiff's abandoned equal-protection claim and

[9] Lower federal court decisions "are not binding on state courts" but may be persuasive. *Bienenstock & Assoc, Inc v Lowry*, 314 Mich App 508, 515; 887 NW2d 237 (2016) (quotation marks and citation omitted).

was therefore not relevant to the issues at hand. MRE 401. The trial court did not abuse its discretion by striking Terrill's testimony. Further, even if Terrill's testimony was stricken in error, nothing in his testimony would alter our conclusions in Parts II and III of this opinion. Any error in the trial court's granting of defendants' motion to strike was therefore harmless. See *Lewis v LeGrow*, 258 Mich App 175, 200; 670 NW2d 675 (2003); MCR 2.613(A).

Affirmed.

O'BRIEN, J., concurred with BOONSTRA, J.

WILDER, P.J., did not participate.

FLANAGIN v KALKASKA COUNTY ROAD COMMISSION

Docket No. 330887. Submitted March 7, 2017, at Lansing. Decided May 23, 2017, at 9:05 a.m. Leave to appeal denied 501 Mich 928.

Carrie S. Flanagin filed a lawsuit against the Kalkaska County Road Commission and Andrew Schlagel in the Kalkaska Circuit Court after she collided with a county snowplow driven by Schlagel in the course of his employment with the road commission. Flanagin alleged that Schlagel was driving too fast for the conditions and that the plow truck had crossed the centerline of the road when the accident occurred. Schlagel, who was dismissed from the lawsuit, claimed that the accident occurred when Flanagin crossed the centerline. The road commission moved for summary disposition under MCR 2.116(C)(7). The court, George J. Mertz, J., denied the road commission's motion. The road commission appealed.

The Court of Appeals *held*:

1. Drivers who are excused by statute from obeying the "rules of the road" under specific circumstances are nevertheless required to operate their vehicles in a manner that does not endanger life or property. That is, drivers who are circumstantially permitted to ignore the rules must drive with due regard for the safety of others. MCL 257.603 permits a plow truck to cross the centerline of a road during the plow truck's proper operation. However, the authorization to cross the centerline does not mean that the plow truck's driver is never negligent and that he or she cannot be liable for an accident resulting from his or her operation of the plow truck. A plow truck must adhere to the same standard of care as must emergency vehicles responding to an emergency—they are all required to give due regard to others' safety. Accordingly, the real question in the case was whether there was a genuine issue of material fact that the plow truck was negligently operated.

2. Summary disposition is appropriate under MCR 2.116(C)(10) when there exists no genuine issue of material fact. In this case, both an affidavit and a crash report concerning the accident opined that the plow truck crossed the centerline, but the road commission challenged the timeliness of the evidence.

That the first submitted response to Flanagin's complaint included an unsworn and unsigned affidavit did not prevent the court from considering the affidavit. The court had discretion to accept the affidavit, and it did not abuse its discretion by so doing. Similarly, the crash report was untimely submitted, but the court had discretion to consider it and did not abuse that discretion by doing so. Because there was evidence from which a reasonable jury could conclude that the plow truck was negligently operated, the trial court correctly concluded that summary disposition was not appropriate.

Affirmed.

Henn Lesperance PLC (by *William L. Henn*) for the Kalkaska County Road Commission.

Mark Granzotto, PC (by *Mark Granzotto*), and *Parsons Law Firm PLC* (by *Grant W. Parsons*) for Carrie S. Flanagin.

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

PER CURIAM. The central issue in this case is whether a county road commission is immune from suit for an accident caused by a county snowplow that was operating on the wrong side of the road. We conclude that, while the Michigan Vehicle Code does authorize a plow truck to be operated on the wrong side of the road, the plow truck may nevertheless be negligently operated and, in such cases, a resulting motor vehicle accident falls outside the scope of governmental immunity.

Defendant Kalkaska County Road Commission (defendant) appeals from an order of the circuit court denying its motion for summary disposition under MCR 2.116(C)(7) based on governmental immunity. On appeal, defendant argues that it is immune from suit because (1) MCL 257.603 and MCL 257.634 authorize a plow truck to cross the centerline of a road and (2) even if those statutes were inapplicable, plaintiff failed

to establish a genuine issue of material fact that the plow truck was operated negligently and that the accident fell within the motor vehicle exception to governmental immunity, MCL 691.1405. We disagree and affirm. We review de novo a trial court's decision on a motion for summary disposition, *Oliver v Smith*, 290 Mich App 678, 683; 810 NW2d 57 (2010), on whether immunity applies, *Co Rd Ass'n of Mich v Governor*, 287 Mich App 95, 118; 782 NW2d 784 (2010), and on issues of statutory interpretation, *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003).

Plaintiff's suit alleges that she was injured when the vehicle she was driving collided with a plow truck operated by defendant Andrew Schlagel in the course of his employment with defendant. Schlagel was subsequently dismissed from the suit. Plaintiff alleges that the accident occurred because Schlagel was driving too fast for the conditions and crossed the centerline of the road. Schlagel denies that he crossed the centerline, and it is defendant's position that the accident was caused when plaintiff herself crossed the centerline. The issue of which vehicle crossed the centerline is relevant to the second issue on appeal (whether the motor vehicle exception to governmental immunity applies). But for purposes of resolving the first issue—the applicability and effect of MCL 257.603 and MCL 257.634—we will assume that it was the plow truck that crossed the centerline.

MCL 257.603 provides as follows:

> (1) The provisions of this chapter applicable to the drivers of vehicles upon the highway apply to the drivers of all vehicles owned or operated by the United States, this state, or a county, city, township, village, district, or any other political subdivision of the state, subject to the specific exceptions set forth in this chapter with reference to authorized emergency vehicles.

(2) The driver of an authorized emergency vehicle when responding to an emergency call, but not while returning from an emergency call, or when pursuing or apprehending a person who has violated or is violating the law or is charged with or suspected of violating the law may exercise the privileges set forth in this section, subject to the conditions of this section.

(3) The driver of an authorized emergency vehicle may do any of the following:

(a) Park or stand, irrespective of this act.

(b) Proceed past a red or stop signal or stop sign, but only after slowing down as may be necessary for safe operation.

(c) Exceed the prima facie speed limits so long as he or she does not endanger life or property.

(d) Disregard regulations governing direction of movement or turning in a specified direction.

(4) The exemptions granted in this section to an authorized emergency vehicle apply only when the driver of the vehicle while in motion sounds an audible signal by bell, siren, air horn, or exhaust whistle as may be reasonably necessary, except as provided in subsection (5), and when the vehicle is equipped with at least 1 lighted lamp displaying a flashing, oscillating, or rotating red or blue light visible under normal atmospheric conditions from a distance of 500 feet in a 360 degree arc unless it is not advisable to equip a police vehicle operating as an authorized emergency vehicle with a flashing, oscillating or rotating light visible in a 360 degree arc. In those cases, a police vehicle shall display a flashing, oscillating, or rotating red or blue light visible under normal atmospheric conditions from a distance of 500 feet to the front of the vehicle. Only police vehicles that are publicly owned shall be equipped with a flashing, oscillating, or rotating blue light that when activated is visible under normal atmospheric conditions from a distance of 500 feet in a 360 degree arc.

> (5) A police vehicle shall retain the exemptions granted in this section to an authorized emergency vehicle without sounding an audible signal if the police vehicle is engaged in an emergency run in which silence is required.
>
> (6) The exemptions provided for by this section apply to persons, teams, motor vehicles, and other equipment while actually engaged in work upon the surface of a highway but do not apply to those persons and vehicles when traveling to or from work. The provisions of this chapter governing the size and width of vehicles do not apply to vehicles owned by public highway authorities when the vehicles are proceeding to or from work on public highways.

MCL 257.634(1) provides as follows:

> (1) Upon each roadway of sufficient width, the driver of a vehicle shall drive the vehicle upon the right half of the roadway, except as follows:
>
> (a) When overtaking and passing another vehicle proceeding in the same direction under the rules governing that movement.
>
> (b) When the right half of a roadway is closed to traffic while under construction or repair or when an obstruction exists making it necessary to drive to the left of the center of the highway. A driver who is driving on the left half of a roadway under this subdivision shall yield the right-of-way to an oncoming vehicle traveling in the proper direction upon the unobstructed portion of the roadway.
>
> (c) When a vehicle operated by a state agency or a local authority or an agent of a state agency or local authority is engaged in work on the roadway.
>
> (d) Upon a roadway divided into 3 marked lanes for traffic under the rules applicable on the roadway.

We agree that the effect of MCL 257.603(6) and MCL 257.634(1)(c) is that a plow truck operator is not necessarily committing a moving violation by driving

across the centerline while plowing the road.[1] But that does not lead to the conclusion that the driver is never negligent in such a situation and that he or she cannot be liable for a resulting accident.

It is well established that MCL 257.603, while excusing certain drivers from obeying many "rules of the road," nevertheless requires those drivers to drive in a manner that does not endanger life or property. Those drivers must drive "with due regard for the safety of others." *Fiser v Ann Arbor*, 417 Mich 461, 472-473; 339 NW2d 413 (1983), overruled on other grounds by *Robinson v Detroit*, 462 Mich 439; 613 NW2d 307 (2000). See also *Kalamazoo v Priest*, 331 Mich 43, 46; 49 NW2d 52 (1951); *McKay v Hargis*, 351 Mich 409, 417-418; 88 NW2d 456 (1958). As these cases point out, the Legislature has expressed its intent that while drivers are excused from following the "rules of the road" under certain circumstances, they must do so in a reasonable manner that is mindful of the safety of others on the road. Indeed, it is within the common experience of any driver who has encountered an emergency vehicle on the road: while police cars, ambulances, and fire trucks operating with lights and sirens may proceed through a red light, they may do so only after slowing and ensuring that any cross-traffic has observed them and stopped. The same can be said when those vehicles need to cross the centerline of the road—they must do so only after ensuring that it is, in fact, safe to do so.

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[1] Arguably, MCL 257.634(1)(c) only applies to drivers who encounter work vehicles on a roadway, not to the operators of the work vehicles themselves. Because we conclude that this statute does not excuse the driver of a work vehicle from operating with due regard for the safety of others, we need not resolve that question. For purposes of this appeal, we will assume, without deciding, that MCL 257.634(1)(c) does apply to the plow truck and its operator.

The fact that this case involves a plow truck instead of an authorized emergency vehicle does not change the result. While these earlier cases dealt with police vehicles, we hardly think that the Legislature intended to give road work vehicles greater authorization to disregard the rules of the road while engaged in road work than the authorization it granted to emergency vehicles responding to an emergency. That is, if a police officer pursing a suspect, a fire truck responding to a fire, or an ambulance rushing a critical patient to the hospital is expected to nevertheless give due regard to the safety of others on the road, then certainly so must a plow truck.

In sum, these statutes do not establish a sort of immunity from suit or an excuse to be negligent. Rather, they merely recognize that drivers who are operating a vehicle under the covered circumstances are not violating these particular provisions of the motor vehicle code. The statutes' applicability to a lawsuit arising out of a collision involving one of these vehicles is minimal. It might lead to the conclusion that a plaintiff could not successfully base an argument on negligence per se for a statutory violation (because there would be no violation), but it would not lead to the conclusion that the operator of the emergency or road work vehicle could not be considered negligent simply because the operator was permitted to ignore the ordinary rules of the road under the circumstances.

The real question in this case is whether there is a genuine issue of material fact that the plow truck was being operated negligently. Therefore, this case must be considered in context of the motor vehicle exception to governmental immunity. Defendant contends that it was entitled to summary disposition because (1) the

submissions on which plaintiff relies were untimely and (2) even if not untimely, the submissions do not establish a genuine issue of material fact. We disagree.

At issue are the so-called Petersen affidavit and the Meyers crash report. The Meyers crash report was not submitted with plaintiff's primary response to defendant's motion for summary disposition, and the first version of the Petersen affidavit attached to plaintiff's response was unsigned and unsworn. See *Gorman v American Honda Motor Co, Inc*, 302 Mich App 113, 120; 839 NW2d 223 (2013) (holding that an unsworn, unsigned affidavit cannot be considered on a motion for summary disposition).

A court has discretion to consider untimely documents. See *Prussing v Gen Motors Corp*, 403 Mich 366, 370; 269 NW2d 181 (1978).[2] And because the problem with the first Petersen affidavit was that it was not properly executed, not that it was untimely or irrelevant, the court's decision to consider it was not outside the range of principled outcomes. See *Radeljak v DaimlerChrysler Corp*, 475 Mich 598, 603; 719 NW2d 40 (2006).

Regardless, defendant contends that the second Petersen affidavit and the Meyers report do not generate an issue of material fact because the plow truck could legally cross the centerline. This argument is premised on the assumption that MCL 257.603 or MCL 257.634(1)(c) effectively granted defendant immunity, and, as discussed above, that argument lacks merit.

Defendant also asserts that Petersen and Meyers contradict each other about the extent to which it was

[2] In *Prussing*, the Court held that a trial court did not abuse its discretion by failing to consider an untimely affidavit. *Prussing*, 403 Mich at 370. The Court's reference to the trial court's not having abused its discretion implies the existence of discretion.

possible to reconstruct the accident, but that discrepancy has no bearing on whether there existed a genuine issue of material fact. It would be for a trier of fact to consider how any such discrepancy affected the weight to be given the opinions, if indeed both were presented to the trier of fact.

Both Meyers and Petersen agreed that the plow truck traveled beyond the boundaries of customary lane parameters. The Meyers report concluded that the plow truck was four to six feet over the centerline at the time of the crash. Petersen averred that his analysis of the evidence suggested the plow truck was not in its lane of travel. Although a plow truck driver may legally operate a plow truck over the centerline pursuant to statute, the statutory exemptions do not relieve the driver of the duty to perform his or her work in a non-negligent manner. In this case, the degree to which the plow truck allegedly crossed the centerline and whether doing so was proper in light of the driver's ability to see oncoming traffic given variables like the weather and the curve in the roadway could allow a reasonable jury to conclude that the plow truck was negligently operated at the time of the accident. Therefore, the trial court correctly concluded that summary disposition was not appropriate.

Affirmed. Plaintiff may tax costs. See MCR 7.219.

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

CITIZENS INSURANCE COMPANY OF AMERICA v
UNIVERSITY PHYSICIAN GROUP

Docket No. 328553. Submitted November 2, 2016, at Detroit. Decided May 23, 2017, at 9:10 a.m.

Citizens Insurance Company of America brought an action in the Wayne Circuit Court against University Physician Group (UPG), William E. Sullivan, Henry Ford Health System (Henry Ford), Oakwood Healthcare, Inc. (Oakwood), and Feinberg Consulting, Inc. (Feinberg) for reimbursement of no-fault benefits that were paid to Sullivan, who had been injured in an automobile accident while driving an uninsured vehicle that was registered to Leonardo Terriquez-Bernal. Sullivan applied for no-fault insurance benefits, and his claim was assigned to plaintiff. Plaintiff investigated the matter and ultimately extended no-fault benefits to Sullivan. On August 8, 2012, plaintiff filed a lawsuit against Terriquez-Bernal for reimbursement; however, plaintiff learned that Sullivan was the actual owner of the uninsured vehicle involved in the accident and therefore was not entitled to no-fault benefits. Plaintiff then filed the instant suit, seeking reimbursement for payments made pursuant to its mistaken belief that Sullivan was entitled to no-fault benefits. Oakwood and Henry Ford moved for summary disposition, asserting that plaintiff's claims were barred by the limitations period set forth in MCL 500.3175(3). Plaintiff asserted that the limitations period set forth in MCL 500.3175(3) was inapplicable, instead arguing that the six-year period of limitations set forth in MCL 600.5813 applied. The court, Annette J. Berry, J., entered separate orders granting summary disposition in favor of Henry Ford, Oakwood, UPG, and Feinberg. Plaintiff appealed those orders. The trial court also entered a default judgment against Sullivan. Feinberg was subsequently dismissed from plaintiff's appeal by stipulation.

The Court of Appeals *held*:

MCL 500.3175(3) provides that an action to enforce rights to indemnity or reimbursement against a third party shall not be

commenced after the later of two years after the assignment of the claim to the insurer or one year after the date of the last payment to the claimant. MCL 600.5813 is the residual statute of limitations for personal actions, providing that all personal actions shall be commenced within the period of six years after the claims accrue and not afterwards unless a different period is stated in the statutes. While the general six-year limitations period is applicable to claims of fraud and misrepresentation, plaintiff did not plead any fraud against the medical providers in this case; all assertions of misrepresentation and fraud were against Sullivan, who was not involved in the appeal. The gravamen of plaintiff's lawsuit was an action to enforce rights to indemnity or reimbursement against a third party because plaintiff sought to recover from the medical providers the amounts it had paid; plaintiff used the word "reimbursement" in its complaint and in its first question presented on appeal. The term "third party" in MCL 500.3175(3) included the medical providers, who provided services to Sullivan and received from plaintiff payments for those services. Because plaintiff's lawsuit against the medical providers was an action to enforce rights to indemnity or reimbursement against third parties, it was subject to the limitations period set forth in MCL 500.3175(3). Therefore, the trial court did not err by granting summary disposition to the medical providers because it was undisputed that plaintiff failed to file the lawsuit within the limitations period set forth in MCL 500.3175(3).

Affirmed.

Anselmi & Mierzejewski, PC (by *Casey R. Krause*), for Citizens Insurance Company of America.

Miller Johnson (by *Timothy C. Gutwald*) for University Physician Group.

Foster Swift Collins & Smith, PC (by *Paul J. Millenbach* and *Emory D. Moore, Jr.*), for Henry Ford Health System.

Riley & Hurley, PC (by *Robert F. Riley* and *Allison M. Ensch*), for Oakwood Healthcare, Inc.

Before: STEPHENS, P.J., and SAAD and METER, JJ.

STEPHENS, P.J. Plaintiff, Citizens Insurance Company of America, appeals as of right three orders granting summary disposition in favor of defendants University Physician Group (UPG), Oakwood Healthcare, Inc. (Oakwood), and Henry Ford Health System (Henry Ford) pursuant to MCR 2.116(C)(7). We affirm.

I. FACTS

On August 2, 2009, William Sullivan was injured in an automobile accident while driving an uninsured 1999 Ford F-150 truck that was registered to Leonardo Terriquez-Bernal. Sullivan applied for no-fault insurance benefits with the Michigan Assigned Claims Facility, and his claim was assigned to plaintiff. Plaintiff then hired Data Surveys to investigate whether Sullivan was entitled to no-fault benefits. Plaintiff's investigator reported that Sullivan participated in an unsworn interview and made unsworn written statements in which he denied having any personal automobile insurance and claimed to be an occasional permissive user of the vehicle to which he had no keys. Sullivan further stated that he and the vehicle's registered owner, Terriquez-Bernal, had no specific agreements about this occasional use, that the vehicle was never garaged at his home, and that he was not responsible for any payments relative to the vehicle. On November 24, 2009, plaintiff determined that Sullivan was entitled to no-fault benefits and extended those benefits to Sullivan.

On August 8, 2012, plaintiff filed a lawsuit against Terriquez-Bernal for reimbursement. In response to plaintiff's motion for summary disposition in that suit, Terriquez-Bernal submitted an April 16, 2013 affidavit from Sullivan, which stated:

> 2. I purchased the 1999 Ford F150 when it was new and was the title owner until July, 2008, when I sold the vehicle to Defendant Leonard Terriquez-Bernal ("Defendant") for one dollar.
>
> 3. Essentially, I needed to have the vehicle title in Defendant's name.
>
> 4. From July, 2008, until August 2, 2009, the date of the accident, I used and possessed the 1999 Ford F150 white truck as if I was the owner.
>
> 5. At the time of the accident, I did not have no fault insurance on the 1999 Ford F150 white truck.

Thereafter, on July 12, 2013, plaintiff deposed Terriquez-Bernal. During the deposition, Terriquez-Bernal stated that he transferred the title and registration of the F-150 into his name as a favor to Sullivan, apparently because Sullivan no longer had a driver's license or the identification required to register the vehicle. Terriquez-Bernal said that he was Sullivan's next-door neighbor when this occurred and that after transferring the title and registration into his name, he never took possession of the vehicle, drove the vehicle, or had the keys to the vehicle. Thus, according to Sullivan's affidavit and Terriquez-Bernal's deposition, Sullivan was the actual owner of the uninsured vehicle involved in the accident.[1] He was therefore never entitled to no-fault benefits.[2]

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[1] "MCL 500.3101(2)(h)(i) defines the term 'owner' for purposes of the no-fault act to include '[a] person renting a motor vehicle or having the use thereof, under a lease or otherwise, for a period that is greater than 30 days.' " *Detroit Med Ctr v Titan Ins Co*, 284 Mich App 490, 491; 775 NW2d 151 (2009). See also *Ardt v Titan Ins Co*, 233 Mich App 685, 690; 593 NW2d 215 (1999) (holding that " 'having the use' of a motor vehicle for purposes of defining 'owner,' MCL 500.3101(2)(g)(i); MSA 24.13101(2)(g)(i), means using the vehicle in ways that comport with concepts of ownership").

[2] MCL 500.3113(b) provides:

On April 15, 2014, plaintiff filed the instant suit against Sullivan and four medical care providers who had treated Sullivan for his accident-related injuries, seeking reimbursement for payments made pursuant to its mistaken belief that Sullivan was entitled to no-fault benefits.[3] Oakwood moved for summary disposition, asserting that plaintiff's claims against it were barred by the limitations period set forth in MCL 500.3175(3), which is applicable to actions to enforce rights to indemnity or reimbursement against third parties. Henry Ford filed an essentially identical motion. In response, plaintiff asserted that the limitations period in MCL 500.3175(3) was inapplicable, that the six-year period of limitations set forth in MCL 600.5813 for "[a]ll other personal actions" applied, and, thus, that the motions should be denied. Plaintiff further asserted that it was entitled to summary disposition under MCR 2.116(I)(2) and (C)(10) (no genuine issue of material fact).

After conducting a hearing on the motions, the trial court granted summary disposition in favor of Oak-

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> A person is not entitled to be paid personal protection insurance benefits for accidental bodily injury if at the time of the accident any of the following circumstances existed:
>
> * * *
>
> (b) The person was the owner or registrant of a motor vehicle or motorcycle involved in the accident with respect to which the security required by section 3101 or 3103 was not in effect.

[3] One provider, Feinberg Consulting, Inc., is no longer a party to this appeal because plaintiff and Feinberg reached a settlement and this Court entered an order by stipulation dismissing the appeal against Feinberg. *Citizens Ins Co of America v Univ Physicians Group*, unpublished order of the Court of Appeals, entered January 15, 2016 (Docket No. 328553). Sullivan is also not involved in this appeal; the trial court entered a default judgment against him on June 26, 2015.

wood and Henry Ford and dismissed plaintiff's complaint against Oakwood and Henry Ford pursuant to MCR 2.116(C)(7) (statute of limitations). Thereafter, UPG moved for summary disposition, asserting, as did Oakwood and Henry Ford, that plaintiff's claim against it was barred by the limitations period set forth in MCL 500.3175(3). Plaintiff moved for reconsideration of the decision to grant summary disposition to Oakwood and Henry Ford.

After conducting a hearing on UPG's motion, the trial court granted summary disposition to UPG and dismissed plaintiff's complaint against UPG pursuant to MCR 2.116(C)(7). The trial court also denied plaintiff's motion for reconsideration, finding that it involved the same issues and demonstrated no palpable error. This appeal followed.

II. ANALYSIS

Our resolution of this case depends on statutory interpretation. If MCL 500.3175(3) applies, then plaintiff's claims are time-barred because it is undisputed that plaintiff failed to file the instant suit within the limitations period set forth in MCL 500.3175(3). On the contrary, if MCL 600.5813 applies, then the claims are timely because it is undisputed that plaintiff filed the instant suit within the limitations period set forth in MCL 600.5813.

This Court reviews de novo a trial court's ruling on a motion for summary disposition as well as the legal question of whether a cause of action is barred by a statute of limitations. *Prentis Family Foundation, Inc v Karmanos Cancer Institute*, 266 Mich App 39, 43; 698 NW2d 900 (2005). "Which statute of limitations applied, whether the limitations period was tolled, and when the limitations period ended are questions of

law." *Id*. at 46. Pursuant to MCR 2.116(C)(7), a party may be entitled to summary disposition if a statute of limitations bars the claim. *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 278; 769 NW2d 234 (2009). In deciding a motion under MCR 2.116(C)(7), the court considers all documentary evidence submitted by the parties in the light most favorable to the nonmoving party. *Id*. This Court also reviews de novo questions of statutory interpretation. *Ford Motor Co v Woodhaven*, 475 Mich 425, 438; 716 NW2d 247 (2006).

MCL 600.5813 contains a general six-year limitations period. It states:

> All 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.

MCL 500.3175(3) is a specific statute of limitations addressing lawsuits for indemnification and reimbursement under Michigan's assigned-claims system. *Allstate Ins Co v Faulhaber*, 157 Mich App 164, 166; 403 NW2d 527 (1987). MCL 500.3175(3) provides:

> An action to enforce rights to indemnity or reimbursement against a third party shall not be commenced after the later of 2 years after the assignment of the claim to the insurer or 1 year after the date of the last payment to the claimant.

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). If the language employed by the Legislature is unambiguous, the Legislature is presumed to have intended the meaning clearly expressed, and this Court must enforce the statute as written. *Rowland v*

Washtenaw Co Rd Comm, 477 Mich 197, 202; 731 NW2d 41 (2007). If "a statute specifically defines a given term, that definition alone controls." *Haynes v Neshewat*, 477 Mich 29, 35; 729 NW2d 488 (2007). Undefined terms are given their plain and ordinary meanings. *Id*. at 36. Legal or technical words are presumed to be used according to their "peculiar and appropriate meaning." MCL 8.3a.[4] "A dictionary may be consulted if necessary." *Haynes*, 477 Mich at 36. The gravamen of plaintiff's lawsuit is clearly an "action to enforce rights" under the no-fault act, MCL 500.3101 *et seq*. However, the crucial terms of the rest of the statute, *indemnity*, *reimbursement*, and *third party*, are not defined in MCL 500.3175(3).[5]

Webster's defines "indemnity" as "repayment or reimbursement for loss, damage, etc.; compensation." *Webster's New World Dictionary of the American Language* (2d college ed), p 714. It defines "repay" as "to pay back (money); refund." *Id*. at 1204. It defines "reimburse" as "to pay back (money spent)" and "to repay or compensate (a person) for expenses, damages, losses, etc." *Id*. at 1197. As for *Black's Law Dictionary*, it defines "indemnity" as follows:

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[4] MCL 8.3a provides as follows:

> All words and phrases shall be construed and understood according to the common and approved usage of the language; but 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.

[5] We note that plaintiff, in its brief on appeal and in its pleadings in the trial court, never actually examines the language of this statute or attempts to provide any analysis of it for this Court. In its brief on appeal, plaintiff simply stated that "the statute of limitations contained in MCL 500.3175(3) is not applicable to this matter" and that "MCL 500.3175 is not applicable to this lawsuit."

> **1.** A duty to make good any loss, damage, or liability incurred by another. . . . **2.** The right of an injured party to claim reimbursement for its loss, damage, or liability from a person who has such a duty. **3.** Reimbursement or compensation for loss, damage, or liability in tort; esp., the right of a party who is secondarily liable to recover from the party who is primarily liable for reimbursement of expenditures paid to a third party for injuries resulting from a violation of a common-law duty. [*Black's Law Dictionary* (9th ed), p 837.]

Black's defines "reimbursement" as "[r]epayment" and "[i]ndemnification." *Id*. at 1399. As for "third party," *Black's* defines it as "[a] person who is not a party to a lawsuit, agreement, or other transaction but who is usu. somehow implicated in it; someone other than the principal parties." *Id*. at 1617.

In its complaint, plaintiff set forth two counts against the medical-provider defendants: count two and count four.[6] It did not plead any fraud against the medical providers, nor did it assert that they misrepresented any facts in relation to this matter. All assertions of misrepresentation and fraud were against

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[6] Plaintiff listed four counts in its complaint: (1) "reimbursement of no-fault benefits under the Michigan no-fault act" against Sullivan only, (2) "payment under mistake of fact," (3) "fraud," and (4) "unjust enrichment." (Formatting altered.) For the last three counts, plaintiff refers to the medical-provider defendants and requests judgments against them. However, although plaintiff requests a judgment against the medical-provider defendants with respect to the "fraud" count, it does not mention the medical-provider defendants anywhere else in that section or allege that they committed any fraud. Therefore, the fraud count does not actually apply to the medical-provider defendants. It applies only to Sullivan, who allegedly committed fraud in his application for benefits and in the statements he made to plaintiff. Plaintiff seems to implicitly acknowledge this, because in its brief on appeal, in the section where it asserts that the trial court should have granted it summary disposition, it does not mention the "fraud" claim and only discusses its "payment under mistake of fact" and "unjust enrichment" claims.

Sullivan. We agree with plaintiff that the general statute-of-limitations period of six years is applicable to the claims of fraud and misrepresentation. For the second count, "payment under mistake of fact," plaintiff, in its final paragraph, states that it "is entitled to *reimbursement* of the payments made to each of the Defendants to the extent of the amount of benefits paid to each of them." (Emphasis added.) For the fourth count, "unjust enrichment," plaintiff in its final paragraph states that it "paid in excess of $200,000.00 in No Fault benefits to or on behalf of William Ernest Sullivan including loss adjustment costs, attorney fees and interest to which it is entitled to *reimbursement*." (Emphasis added.) Looking at the complaint and the definitions related to MCL 500.3175(3), we conclude that the action filed by plaintiff is one "to enforce rights to indemnity or reimbursement against a third party . . . ." MCL 500.3175(3). Plaintiff paid defendants for the medical services they provided to Sullivan. Plaintiff in this suit now seeks to recover from defendants the amounts it paid; that is, plaintiff wants the medical providers to "repay" or "pay back" or "refund" the money plaintiff gave them for the care they provided to Sullivan. Plaintiff alleges that it has a right to repayment against defendants and that in this suit it simply seeks to enforce that right to repayment against defendants. Notably, for the second and fourth counts in its complaint, plaintiff actually uses the word "reimbursement" to describe what it is seeking from the medical providers, which is the exact same word that is used in MCL 500.3175(3). Plaintiff does the same thing in its first question presented in this appeal, writing that the trial court barred its "claim seeking *reimbursement* of no-fault benefits paid on behalf of the claimant . . . ." (Emphasis added; formatting altered.) Finally, the term "third party" is broad

enough that it would appear to include the medical-provider defendants who provided services to Sullivan and received from plaintiff payments for those services based on Sullivan's relationship to the assigned-claims plaintiff. In any event, plaintiff has never argued that the medical providers are not "third parties" as that term is used in MCL 500.3175(3).

Because plaintiff's lawsuit is an action "to enforce rights to indemnity or reimbursement against a third party," MCL 500.3175(3), it is subject to the limitations period in MCL 500.3175(3). Further, the trial court did not err by granting summary disposition to defendants and dismissing plaintiff's claim on the ground that plaintiff did not bring its claim within the limitations period set forth in MCL 500.3175(3). For that same reason, plaintiff's argument that the trial court should have granted it summary disposition and that it erred by not doing so is without merit. Plaintiff was not entitled to summary disposition because it did not bring its claim within the limitations period set forth in MCL 500.3175(3).

Affirmed.

SAAD and METER, JJ., concurred with STEPHENS, P.J.

BELLINGER v KRAM

Docket No. 331199. Submitted May 2, 2017, at Detroit. Decided May 25, 2017, at 9:00 a.m. Leave to appeal denied 501 Mich 911.

Elizabeth Bellinger, by next friend Jamie Bellinger, brought an action in the Genesee Circuit Court against Julie Kram, Lakeville Memorial High School, and Lakeville Community Schools after Elizabeth (plaintiff) sustained severe injuries to her hand while operating a table saw during a woodshop class that Kram taught at Lakeville Memorial High School. Plaintiff alleged that her injuries had been caused by Kram's actions in removing a blade guard from the table saw, encouraging students to operate the table saw without the blade guard, and on the day of plaintiff's injury, specifically directing plaintiff to make a cut on the table saw—a cut that she had never before attempted—without any supervision and without the presence of the blade guard. Defendants moved for summary disposition. The court, James A. Callahan, J., granted the motion as to Lakeville Memorial High School and Lakeville Community Schools under MCR 2.116(C)(7) (governmental immunity), but denied the motion as to Kram under the same subrule. Kram appealed.

The Court of Appeals *held*:

1. MCL 691.1407(2)(c) provides qualified governmental immunity from tort liability to a government employee acting within the scope of his or her authority and engaging in the exercise of a governmental function provided that the employee's conduct does not amount to gross negligence that is the proximate cause of the injury or damage. To survive a motion for summary disposition, a plaintiff must show that there was both an issue of material fact on the element of gross negligence and on the element of proximate cause. In this case, because plaintiff presented sufficient evidence to create a genuine issue of material fact on both the elements of gross negligence and proximate cause, the trial court did not err by denying Kram's motion for summary disposition.

2. Under MCL 691.1407(8)(a), gross negligence is defined as conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results. Gross negligence is characterized by a willful disregard of safety measures and a singular

disregard for substantial risks. Generally, allegations or evidence of inaction or claims that a defendant could have taken additional precautions are insufficient; however, evidence that a defendant engaged in affirmative actions contrary to professionally accepted standards does establish gross negligence. In this case, Kram's conduct in removing the blade guard and pressuring plaintiff to make the cut constituted evidence of a willful disregard for safety measures and a substantial disregard for known risks. Moreover, plaintiff presented unrebutted evidence that Kram sought to cover up her actions: Kram's deposition testimony in which she testified that she told students use of the blade guard was optional conflicted with incident reports Kram had filled out immediately following the accident in which Kram blamed plaintiff for the blade guard's absence and stated that plaintiff had been instructed to never use the saw without the blade guard. The evidence viewed in a light most favorable to plaintiff suggested that Kram took active steps to remove and discourage use of the blade guard designed to prevent precisely this type of injury and then pressured plaintiff to use the saw in this unsafe condition to perform a type of cut that she had never before performed while instilling in plaintiff the false belief that plaintiff was not in danger. This evidence was sufficient to create a factual dispute on the issue of gross negligence.

3. The phrase "the proximate cause" in MCL 691.1407(2)(c) means the one most immediate, efficient, and direct cause preceding an injury. In this case, plaintiff was injured as a result of a kickback, an incident that occurs when the workpiece is propelled back toward the table-saw operator, often at very high speeds, causing the potential for injury due to the possibility of the user's hand slipping from the workpiece and contacting the saw blade. The kickback that occurred in this case resulted in plaintiff's hand coming into contact with the saw blade, causing significant injury. Plaintiff presented the testimony of an expert engineer who averred that kickbacks can occur regardless of an operator's level of care and that the only way to prevent their occurrence is the use of a blade guard. Kram contended that the kickback only occurred because plaintiff removed her hands from either the push stick or the push block used with the table saw, but plaintiff contends that she was pushing both down and forward on the workpiece with those tools when the kickback began. Accepting the contentions of plaintiff's expert and her own deposition testimony as true, the one most immediate, efficient, and direct cause of the kickback and resulting injury was the absence of the blade guard. Kram essentially conceded that she was the cause of the blade guard's absence, and Kram testified

that she instructed students that use of the blade guard was optional and that operation of the table saw without the guard did not make the use of the saw any less safe. Accordingly, there was sufficient evidence for a trier of fact to determine that Kram's actions were the proximate cause of the blade guard's absence and of plaintiff's injury.

Affirmed.

Moss & Colella, PC (by *A. Vince Colella* and *Victor Balta*), for Elizabeth Bellinger.

Giarmarco, Mullins & Horton, PC (by *Timothy J. Mullins* and *John L. Miller*), for Julie Kram.

Before: M. J. KELLY, P.J., and BECKERING and SHAPIRO, JJ.

SHAPIRO, J. Defendant Julie Kram appeals as of right the trial court order denying her motion for summary disposition under MCR 2.116(C)(7) (governmental immunity).[1] We affirm.

I. FACTUAL BACKGROUND

Plaintiff, Elizabeth Bellinger, brought this lawsuit after she sustained severe injuries to her hand while operating a table saw during a woodshop class that defendant taught at Lakeville Memorial High School.

[1] Defendant Kram, along with the school-defendants, filed a joint motion for summary disposition under MCR 2.116(C)(7) (governmental immunity), MCR 2.116(C)(8) (failure to state a claim), and MCR 2.116(C)(10) (no genuine issue of material fact). The trial court granted the motion as to the school-defendants and denied the motion as to Kram. While the trial court did not specify the subrule of MCR 2.116(C) on which it based its respective rulings, the substance of its opinion indicates that both the partial grant and the partial denial were under Subrule (C)(7). Plaintiff has not appealed the grant of summary disposition to the school-defendants, so all references to defendant in this opinion will concern defendant Kram.

Plaintiff alleged that her injuries were caused by defendant's actions in removing a blade guard from the table saw, encouraging students to operate the table saw without the blade guard, and on the day of her injury, specifically directing plaintiff to make a cut on the table saw that she had never before attempted without any supervision and without the presence of the blade guard.[2] According to plaintiff's deposition testimony, defendant actively encouraged students not to use the blade guard, telling them that using it was not consistent with how table-saw operation is done in "real life" and that the blade guard was only put on the table saw when the insurance company came for inspections.[3] Defendant did not dispute that she was the person who removed the blade guard and that she instructed students that safe operation of the table saw did not require the guard, only the use of a push stick and a push block.[4] She stated her view that use of the blade guard presented its own safety problems because it had the potential to lull users into a false sense of

[2] Pursuant to photographs and testimony in the record, the blade guard is a square covering designed to hover directly over the saw blade's surface at varying heights and is supported by adjacent mounts that connect the guard to supports away from the table saw's surface. The blade guard operating manual states that to be effective, the blade guard must be engaging the workpiece during the cut.

[3] Plaintiff also testified that defendant generally took a lackadaisical approach to safety in the classroom and recalled instances when defendant and the school's principal got into a disagreement about the extent to which protective eyewear should be worn in the classroom and when defendant simply encouraged students to memorize the answers for the safety test while giving them the impression that those answers were not reflective of how things are done in "real life."

[4] Pursuant to photographs and testimony in the record, a push block is a thick piece of plastic with a handle on top, and a push stick is a long wooden pole with a notch on the end designed to guide the workpiece through the saw while the push block is used to keep adequate downward pressure on the workpiece.

security and to potentially obstruct their vision of the work area. Defendant denied making statements about only putting the guard on when insurance companies conducted inspections.

According to plaintiff, on the day of the accident, defendant asked her to help another student by using the table saw to make an angled cut. At the time, the blade guard was not on the saw, and defendant acknowledged that she would have been the last one to remove it. Plaintiff had never made an angled cut before, and she stated that she initially declined defendant's request and only agreed after what she described as defendant's repeated requests. Even after plaintiff initially failed to properly make the cut, defendant simply made an adjustment to the saw, told plaintiff to try again, and then left plaintiff unsupervised. During plaintiff's second attempt, the table saw experienced what the parties refer to as a "kickback." While the cause of kickbacks generally—and specifically the cause of the kickback that occurred on the day of plaintiff's injury—are matters of dispute, both parties generally agree that a kickback is an incident that occurs when the workpiece is propelled back toward the table-saw operator, often at very high speeds, causing the potential for injury both due to the possibility of the user's hand slipping from the workpiece and contacting the saw blade and the possibility of the user being struck by the propelled workpiece. In this case, the kickback resulted in plaintiff's hand coming into contact with the saw blade, causing significant injury.

Defendant maintains that the kickback occurred because plaintiff removed one of her hands from either the push block or the push stick. In support of this position, defendant points to the written statement and accompanying affidavit of the student for whom plaintiff was

performing the cut. In that statement, the student described the kickback as beginning after plaintiff "reached around to grab the [workpiece]." However, plaintiff's own deposition testimony disputes this account. When asked whether she was pushing both down and forward on the workpiece at the inception of the kickback, plaintiff responded in the affirmative. Plaintiff also presented the expert affidavit of a professional engineer who averred that no one, whether a novice or an expert, should operate a table saw without a blade guard. The expert explained in the affidavit that kickbacks can occur regardless of an operator's level of care, even with the use of a push block and a push stick, and that the only sure way to prevent kickbacks is by using a blade guard.

Following the accident, defendant filled out two accident reports. In the first, which was a narrative of events leading up to the accident, she wrote: "I checked the fence and blade height and angle. All was as it should be. . . . [Plaintiff] was to put the guard on before she made the cut." The second report required defendant to respond to various questions about whether proper safety equipment and procedures were being used and whether the accident was the result of any safety violations, and in that report defendant consistently wrote, "Student had not put guard back on machine after set-up." Also in that report, in response to a question about whether plaintiff had been previously informed of a safety rule that "should have prevented this accident," defendant wrote, "Yes, student was informed all students are taught to never use machine without all the guards in place."

II. STANDARD OF REVIEW

We review the trial court's denial of defendant's motion for summary disposition de novo. *Maiden v*

Rozwood, 461 Mich 109, 118; 597 NW2d 817 (1999). In reviewing a motion for summary disposition under MCR 2.116(C)(7), a court must review the facts in the complaint to determine if they "justify[] a finding that recovery in tort is not barred by governmental immunity." *Harrison v Dir of Dep't of Corrections*, 194 Mich App 446, 449; 487 NW2d 799 (1992). All evidence that is submitted by the parties must be construed in favor of the nonmoving party to determine whether there exists a genuine issue of material fact. *Skinner v Square D Co*, 445 Mich 153, 161-162; 516 NW2d 475 (1994). "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).

III. ANALYSIS

MCL 691.1407(2) provides qualified governmental immunity from tort liability to a government employee acting within the scope of his or her authority and engaging in the exercise of a governmental function provided that the employee's "conduct does not amount to gross negligence that is the proximate cause of the injury or damage." Therefore, in order to have survived defendant's motion for summary disposition, plaintiff was required to show that there was both an issue of material fact on the element of gross negligence and on the element of proximate cause.

A. GROSS NEGLIGENCE

"Gross negligence" is statutorily defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(8)(a). Grossly negligent conduct must be con-

duct that is "substantially more than negligent." *Maiden*, 461 Mich at 122. Generally, allegations or evidence of inaction or claims that a defendant could have taken additional precautions are insufficient. See *Tarlea v Crabtree*, 263 Mich App 80, 84-86, 90-92; 687 NW2d 333 (2004) (requiring students to exercise in high temperatures and high humidity was not gross negligence when the defendants required student athletes to obtain a physical examination before participation, provided student athletes with adequate water and food, and allowed breaks). However, evidence that a defendant engaged in affirmative actions contrary to professionally accepted standards and then sought to cover up those actions does establish gross negligence. See *Maiden*, 461 Mich at 128-130 (performing an autopsy without the requisite anatomical knowledge and then attempting to conceal the results of that autopsy from the police and prosecutor constituted gross negligence). We have previously characterized gross negligence "as a willful disregard of safety measures and a singular disregard for substantial risks." *Oliver v Smith*, 290 Mich App 678, 685; 810 NW2d 57 (2010).

In this case, the evidence viewed in a light most favorable to plaintiff suggests that defendant did far more than simply fail to take additional precautions. There is evidence that defendant took active steps to remove and discourage use of the safety guard designed to prevent precisely this type of injury and then pressured plaintiff to use the saw in this unsafe condition to perform a type of cut that she had never before performed.

Moreover, plaintiff's expert engineer averred that not even an expert operator should perform work on a table saw without a blade guard. This expert further averred that the safety devices defendant considered

adequate alternatives were insufficient to protect against injury and that, without a blade guard, serious injury could occur despite an operator's level of care. Defendant has not presented any evidence to counter these conclusions. Plaintiff also presented evidence that defendant created a classroom atmosphere wherein safety was considered antithetical to "real life" and wherein the blade guard was simply treated as a device to appease the insurance company. Concerning defendant's conduct on the day of the accident, plaintiff testified that defendant persistently pressured her to make a specific cut on the table saw that she had never before made without any supervision all the while instilling in plaintiff the false belief that she was not in danger. This is evidence of a willful disregard for safety measures and a substantial disregard for known risks.[5]

Additionally, plaintiff presented unrebutted evidence that defendant sought to cover up her actions. In the incident reports she filled out in the accident's immediate aftermath, defendant blamed plaintiff for the blade guard's absence and stated that plaintiff had been instructed to never use the saw without the blade guard. Not only do these statements evidence defendant's attempt to cover up her own failure to ensure the blade guard was on the saw, but they contradict defendant's deposition testimony, wherein she testified that she told students use of the blade guard was optional, and they contradict her theory on appeal that the blade guard presented its own safety problems. A jury could certainly conclude from this evidence that defendant had guilty knowledge, i.e., she knew that

[5] While defendant vigorously contests plaintiff's characterization of the evidence, "summary disposition is precluded in cases in which reasonable jurors could honestly have reached different conclusions with regard to whether the defendant's conduct amounted to gross negligence." *Vermilya v Dunham*, 195 Mich App 79, 83; 489 NW2d 496 (1992).

the blade guard should have been on and that she was primarily concerned with deflecting blame rather than accurately reporting what occurred. Sufficient evidence existed to show that defendant, through her affirmative actions, showed a willful disregard for professionally accepted safety standards, displayed a singular disregard for substantial risks on the day of the injury, and sought to cover up her actions in the immediate aftermath. This is sufficient to create a factual dispute on the issue of gross negligence.

B. PROXIMATE CAUSE

Caselaw has interpreted the phrase "the proximate cause" in MCL 691.1407(2)(c) "as meaning the one most immediate, efficient, and direct cause preceding an injury." *Robinson v Detroit*, 462 Mich 439, 458-459; 613 NW2d 307 (2000). In the present case, it appears uncontested that plaintiff was injured as a result of a kickback that occurred while she was attempting to use the table saw for a fellow student without the presence of the blade guard. Defendant contends on the basis of the written statement of the student for whom the cut was being performed that the kickback only occurred because plaintiff reached around to grab the workpiece on the trailing end, thereby removing one of her hands from either the push stick or the push block. However, this contention is rebutted by plaintiff's own deposition testimony that the kickback began while she was pushing both down and forward on the workpiece. Plaintiff's explanation is supported by the affidavit of her expert engineer who averred that kickbacks can occur regardless of an operator's level of care and that the only way to prevent their occurrence is the use of a blade guard. Again, defendant has not presented any evidence to counter these conclusions.

Accepting the contentions of plaintiff's expert and her own deposition testimony as true, the one most immediate, efficient, and direct cause of the kickback and resulting injury was the absence of the blade guard. And even discounting plaintiff's evidence about defendant actively discouraging students from using the blade guard, suggesting to them that in "real life" the blade guard would not be used and inferring that the blade guard's purpose was simply to appease the insurance company, defendant has essentially conceded that she was the cause of the blade guard's absence. She acknowledged that she would have been the last one to remove the blade guard. And while she vigorously disputes plaintiff's testimony about her overall approach to classroom safety and about her references to insurance company inspections, defendant testified that she instructed students that use of the blade guard was optional and that she told her students that operation of the table saw without the guard did not make the use of the saw any less safe. Therefore, there was sufficient evidence for a trier of fact to determine that defendant's actions were the proximate cause of the blade guard's absence and of plaintiff's injury.

IV. CONCLUSION

Plaintiff presented sufficient evidence to create a genuine issue of material fact on both the elements of gross negligence and proximate cause. Therefore, the trial court did not err by denying defendant's motion for summary disposition.

Affirmed.

M. J. KELLY, P.J., and BECKERING, J., concurred with SHAPIRO, J.

PEOPLE v PARKER

Docket No. 335541. Submitted May 9, 2017, at Detroit. Decided May 25, 2017, at 9:05 a.m.

Timothy M. Parker was charged in the 72d District Court with operating a vehicle while intoxicated, MCL 257.625(1), driving with a suspended license, MCL 257.904, and possessing an open container of alcohol in a vehicle, MCL 257.624a, after a police officer found defendant's running vehicle parked at a stop sign with defendant sleeping in the driver's seat. Defendant, who admitted that he had been drinking, failed two field sobriety tests and refused to take a third. The officer placed defendant under arrest and obtained a warrant for a blood draw. At the preliminary examination, the court, Michael L. Hulewicz, J., admitted a laboratory report outlining the results of the blood draw over defendant's objection, concluded that the prosecution had presented sufficient evidence to find probable cause that defendant was operating while intoxicated, and bound defendant over to the St. Clair Circuit Court. Defendant moved to quash the bindover, alleging that while MCL 766.11b appeared to render the laboratory report admissible for purposes of the preliminary examination, MCR 6.110(C) (providing that a preliminary examination must be conducted in accordance with the Michigan Rules of Evidence, thereby rendering the laboratory report inadmissible hearsay under MRE 802) controlled. The circuit court, Cynthia A. Lane, J., held that the report was inadmissible pursuant to MCR 6.110(C) and remanded the case for continuation of the preliminary examination. The prosecution sought leave to appeal, which the Court of Appeals, SAAD, P.J., and SERVITTO and GLEICHER, JJ., granted in an unpublished order, entered December 12, 2016.

The Court of Appeals *held*:

1. The Michigan Legislature is vested with the authority to enact substantive law under Article 4, § 1 of the 1963 Constitution, while the Supreme Court is vested with the authority to establish, modify, amend, and simplify the practice and procedure of state courts under Article 6, § 5. When there appears to be a conflict between a court rule and a statute, the court must first determine whether the conflict is irreconcilable before deciding

whether the legislative enactment amounts to a procedural rule or a substantive law. If the court determines that a court rule irreconcilably conflicts with a statute, the conflict is resolved in the rule's favor if it concerns a matter of procedure but in the statute's favor if it concerns a matter of substance.

2. An irreconcilable conflict existed between MCR 6.110(C) and MCL 766.11b. MCR 6.110(C) provides that the district court must conduct a preliminary examination in accordance with the Michigan Rules of Evidence, and MRE 802 prohibits a district court from admitting hearsay evidence absent an exception found in the rules of evidence. The laboratory report qualified as hearsay because it was offered to prove the truth of the matters asserted in the report—namely, defendant's blood alcohol levels. Because laboratory reports prepared in anticipation of litigation do not generally qualify for one of the hearsay exceptions, the district court would have had to exclude the report had it applied MCR 6.110(C). Conversely, MCL 766.11b(1)(d) provides that although the rules of evidence generally apply at a preliminary examination, a laboratory report is not to be excluded from a preliminary examination under the hearsay prohibition; accordingly, under MCL 766.11b(1)(d), the district court would have had to—and did—admit the report irrespective of the hearsay rule. Given these two opposed outcomes, an irreconcilable conflict existed between MCR 6.110(C) and MCL 766.11b with respect to the admission of laboratory reports during a preliminary examination.

3. MCL 766.11b is an enactment of a substantive rule of evidence, not a procedural one; accordingly, the specific hearsay exception in MCL 766.11b took precedence over the general incorporation of the Michigan Rules of Evidence found in MCR 6.110(C). In determining whether a statute addresses a procedural or substantive rule of evidence, the Supreme Court has stated that if a statutory rule of evidence reflects some policy consideration beyond mere court administration or the judicial dispatch of litigation, then the statute will survive constitutional challenge and will be enforced. Examples of procedural rules of evidence include those designed to let the jury have evidence free from the risks of irrelevancy, confusion, and fraud, whereas examples of substantive rules of evidence include those governing the admission of expert medical testimony as well as certain other-acts evidence against minors. In this case, the statutory exception against hearsay existed only at the district court level during a preliminary examination and did not implicate a rule designed to protect juries against irrelevant, confusing, or

fraudulent evidence. A defendant has no right to have the examination heard by a jury, and a district court judge, as a trained jurist, is presumed to know how to sift through reliable versus unreliable evidence, lessening any prejudicial impact of hearsay admitted into evidence. Moreover, the policy consideration went beyond mere court administration or the dispatch of judicial business: suspending the hearsay rule during the preliminary examination comports with the Legislature's longstanding policy of reducing the number of times a drug analyst is required to testify in criminal proceedings, and the Legislature strengthened this hearsay exception when it amended MCL 766.11b in 2014 to remove the defendant's right to request that a laboratory technician testify in person with sufficient written notice. Therefore, the district court properly admitted the laboratory report pursuant to the statutory hearsay exception in MCL 766.11b, and the circuit court abused its discretion by remanding the case to the district court for continuation of the preliminary examination.

Reversed and remanded.

RONAYNE KRAUSE, J., concurred in result only.

CONFLICT OF LAWS — EVIDENTIARY RULES — ADMISSION OF LABORATORY REPORTS DURING A PRELIMINARY EXAMINATION.

The Michigan Legislature is vested with the authority to enact substantive law, while the Supreme Court is vested with the authority to establish, modify, amend, and simplify the practice and procedure of state courts; when there appears to be a conflict between a court rule and a statute, the court must first determine whether the conflict is irreconcilable before deciding whether the legislative enactment amounts to a procedural rule or a substantive law; if the court determines that a court rule irreconcilably conflicts with a statute, the conflict is resolved in the rule's favor if it concerns a matter of procedure but in the statute's favor if it concerns a matter of substance; an irreconcilable conflict exists between MCR 6.110(C) and MCL 766.11b with respect to the admission of laboratory reports during a preliminary examination; MCL 766.11b is an enactment of a substantive rule of evidence and takes precedence over the general incorporation of the Michigan Rules of Evidence in MCR 6.110(C) (Const 1963, art 4, § 1; Const 1963, art 6, § 5).

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Michael D. Wendling*, Pros-

ecuting Attorney, and *Hilary B. Georgia*, Senior Assistant Prosecuting Attorney, for the people.

Brian M. Thomas for defendant.

Before: RIORDAN, P.J., and RONAYNE KRAUSE and SWARTZLE, JJ.

SWARTZLE, J. Under Michigan Court Rule 6.110(C), a district court is required to conduct a preliminary examination "in accordance with the Michigan Rules of Evidence," including the rule against hearsay (MRE 802). In 2014, the Legislature created a statutory exception to this rule, whereby "[t]he rules of evidence apply at the preliminary examination except" that the hearsay rule does not preclude certain laboratory reports from being admitted, among other things. MCL 766.11b(1), as enacted by 2014 PA 123. This statutory exception is not reflected in any court rule, thereby creating an irreconcilable conflict between the two.

To resolve the conflict, we look to whether the subject matter of the rule and statute is procedural or substantive. Under our Constitution, a court rule will trump a statute when the two irreconcilably conflict on a procedural matter. With respect to a substantive matter, however, a statute will trump a court rule. Neither the Supreme Court nor our Court has yet addressed the issue of whether, during a preliminary examination, a district court should preclude a laboratory report as hearsay under MCR 6.110(C) and MRE 802 or, instead, admit the report under the statutory hearsay exception in MCL 766.11b(1). As explained in this opinion, we conclude that the conflict involves a substantive matter and, accordingly, a district court should apply the statutory exception.

I. BACKGROUND

Defendant Timothy Parker was charged with operating a vehicle while intoxicated (OWI), MCL 257.625(1), driving with a suspended license, MCL 257.904, and possessing an open container of alcohol in a vehicle, MCL 257.624a. At defendant's preliminary examination, Officer Robert Jenkins testified that on August 5, 2015, he was dispatched to the Harsens Island ferry to respond to an OWI complaint. He arrived at the ferry at approximately 12:45 a.m. and found defendant's running vehicle parked at a stop sign with defendant sleeping in the driver's seat. Officer Jenkins observed a box of wine on the passenger seat and a glass containing ice and a liquid in the center console. The officer testified that he knocked on the window for approximately 10 minutes before defendant finally woke up. Defendant admitted that he had been drinking and stated that he was on his way to Harsens Island to go home.

Officer Jenkins testified that defendant's speech was slurred, his eyes were bloodshot, and he appeared disoriented. Defendant failed two field sobriety tests and refused a third. Officer Jenkins placed defendant under arrest and obtained a warrant for a blood draw. During the preliminary examination, the district court admitted a laboratory report outlining the results of that blood draw over defendant's objection. The report indicated that defendant's blood alcohol content was 0.163.

The district court concluded that the prosecution had presented sufficient evidence to find probable cause that defendant was operating while intoxicated and bound defendant over to the circuit court. Defendant then filed a motion in the circuit court to quash the bindover, arguing that the laboratory report was

inadmissible under MCR 6.110. Defendant acknowledged that MCL 766.11b appeared to render the report admissible but argued that MCR 6.110 trumped MCL 766.11b. The circuit court agreed and remanded the case for continuation of the preliminary examination.

The prosecution sought leave to appeal, which this Court granted.[1] On appeal, the prosecution argues that the statutory exception to the hearsay rule in MCL 766.11b supersedes MCR 6.110 as a statement of substantive law by the Legislature.

II. ANALYSIS

A. STANDARD OF REVIEW

This Court reviews a trial court's ruling on a motion to quash for an abuse of discretion. *People v McKerchie*, 311 Mich App 465, 470-471; 875 NW2d 749 (2015). An abuse of discretion occurs when, for example, a trial court premises its decision on an error of law. *Id*. at 471. The interpretation of a statute or court rule, including whether a statute is unconstitutional, involves a question of law that we review de novo. *McDougall v Schanz*, 461 Mich 15, 23-24; 597 NW2d 148 (1999). When reviewing the constitutionality of a statute, we apply "the well-established rule that a statute is presumed to be constitutional unless its unconstitutionality is clearly apparent." *Id*. at 24.

B. WHEN A STATUTE AND COURT RULE IRRECONCILABLY CONFLICT

Under our Constitution, the Michigan Legislature is vested with the authority to enact substantive law, Const 1963, art 4, § 1, while the Supreme Court is

[1] *People v Parker*, unpublished order of the Court of Appeals, entered December 12, 2016 (Docket No. 335541).

vested with the authority "by general rules [to] establish, modify, amend and simplify the practice and procedure" of state courts, Const 1963, art 6, § 5. Thus, the Legislature is not authorized to enact statutes that "establish, modify, amend [or] simplify the practice and procedure" of courts. *McDougall*, 461 Mich at 26. By the same token, the Supreme Court "is not authorized to enact court rules that establish, abrogate, or modify the substantive law." *Id*. at 27. When a court rule irreconcilably conflicts with a statute, the conflict is resolved in the rule's favor if it concerns a matter of procedure but in the statute's favor if it concerns a matter of substance.

Before deciding whether a legislative enactment amounts to a procedural rule or a substantive law, we must first address the penultimate question—whether there exists an irreconcilable conflict between MCR 6.110(C) and MCL 766.11b in the context of admitting a laboratory report during a preliminary examination. *People v Watkins*, 491 Mich 450, 467; 818 NW2d 296 (2012). Beginning with MCR 6.110, Subrule (C) provides that the district court must conduct a preliminary examination "in accordance with the Michigan Rules of Evidence." And for its part, MRE 802 prohibits a district court from admitting hearsay evidence absent an exception found in the rules of evidence (e.g., MRE 803).

We agree with the parties that the laboratory report in this case qualified as hearsay, as it was offered to prove the truth of the matters asserted within the report. While the rules of evidence provide certain exceptions to the hearsay rule, caselaw makes clear that laboratory reports prepared in anticipation of litigation do not generally qualify for one of the exceptions. *People v McDaniel*, 469 Mich 409, 412-414; 670

NW2d 659 (2003) (concluding that a similar laboratory report was not admissible under the hearsay exceptions of MRE 803(6) (business records) or (8) (public records)). Thus, were the district court to have applied MCR 6.110(C) here, the court would have had to exclude the report as hearsay.

Turning to MCL 766.11b, the Legislature provided in Subdivision (1)(d) that although the rules of evidence generally apply at a preliminary examination, a laboratory report is not to be excluded from a preliminary examination under the hearsay prohibition. Thus, were the district court to have applied MCL 766.11b here—which it in fact did—the court would have had to admit the report irrespective of the hearsay rule. Given these two opposed outcomes, it is clear that MCR 6.110(C) and MCL 766.11b create an irreconcilable conflict with respect to the admission of laboratory reports during a preliminary examination.

C. IS MCL 766.11b PROCEDURAL OR SUBSTANTIVE?

Finding an irreconcilable conflict, we turn next to whether the Legislature addressed a procedural or substantive matter with the statute. As noted earlier, if the statute covers a procedural matter, then we would conclude that the Legislature was impermissibly attempting to infringe on the Supreme Court's authority to promulgate rules relating to judicial practice and procedure. If, instead, the statute covers a substantive matter, then the Legislature would be well within its legislative authority and the statutory language would prevail over the court rule. *McDougall*, 461 Mich at 27.

When looking at similar questions involving evidentiary matters, the Supreme Court has eschewed the position that when it creates a rule of evidence, "that rule is, ipse dixit, one encompassing only procedure."

Id. at 27 n 11. Instead, the Supreme Court has "adopt[ed] a more thoughtful analysis that takes into account the undeniable distinction between *procedural* rules of evidence and evidentiary rules of substantive law." *Id*. at 29 (citation, quotation marks, and ellipsis omitted). Thus, if a statutory rule of evidence reflects some policy consideration beyond mere "court administration" or the "judicial dispatch of litigation," then the statute will survive constitutional challenge and will be enforced. *Id*. at 30-31 (quotation marks and citation omitted). Examples of procedural rules of evidence include those "designed to let the jury have evidence free from the risks of irrelevancy, confusion and fraud." *Id*. at 30 n 15, quoting 3 Honigman & Hawkins, Michigan Court Rules Annotated (2d ed), p 403. Examples of substantive rules of evidence include those governing the admission of expert medical testimony as well as certain other-acts evidence against minors. See *McDougall*, 461 Mich at 36-37; *Watkins*, 491 Mich at 476-477.

In determining whether MCL 766.11b is a procedural or substantive rule of evidence, we first note that the statutory exception against hearsay does not implicate a rule designed to protect juries against irrelevant, confusing, or fraudulent evidence. The exception exists only at the district court level during a preliminary examination, and a defendant does not have the right to have the examination heard by a jury. MCL 767.42(1); *People v Glass (After Remand)*, 464 Mich 266, 278-279; 627 NW2d 261 (2001) (stating that there is no constitutional right to indictment by a grand jury). Moreover, as a trained jurist, a district court judge is presumed to know how to sift through reliable versus unreliable evidence, lessening any prejudicial impact of hearsay admitted into evidence.

See *People v Jones*, 168 Mich App 191, 194; 423 NW2d 614 (1988).

With respect to the policy of admitting a laboratory report during a preliminary examination in lieu of testimony by the report's author, this Court long ago recognized that the policy was "designed to reduce the number of times a drug analyst is required to testify in criminal proceedings." *People v Anderson*, 88 Mich App 513, 518; 276 NW2d 924 (1979) (reviewing a prior version of the policy in MCL 600.2167 (repealed by 2014 PA 124)). Before 2014, this policy was found in MCL 600.2167; in 2014, a stronger version of this policy was added to MCL 766.11b. Although MCL 600.2167 was repealed at the same time that MCL 766.11b was amended,[2] we see nothing in the code or public act to suggest that the Legislature was no longer concerned about burdening laboratory technicians' resources. In fact, the Legislature strengthened the exception by removing the defendant's right to request that the technician testify in-person with sufficient written notice. Compare MCL 600.2167(4) (2013) with MCL 766.11b (2014). Rather, it appears clear that the additions to MCL 766.11b made the prior language in MCL 600.2167 superfluous.

Read in light of this history, the current version of MCL 766.11b continues the Legislature's long-adopted goal of reducing the number of times a laboratory professional has to testify in a criminal case by suspending the hearsay rule during the preliminary examination. This policy conserves local and state law-enforcement resources, and while there may be some similar savings to district courts, the policy does, in fact, go beyond mere court administration or the dis-

[2] 2014 PA 123 amended MCL 766.11b, and 2014 PA 124 repealed MCL 600.2167. The two public acts were tie-barred.

patch of judicial business. Thus, MCL 766.11b is an enactment of a substantive rule of evidence, not a procedural one. Accordingly, the specific hearsay exception in MCL 766.11b takes precedence over the general incorporation of the Michigan Rules of Evidence found in MCR 6.110(C).

III. CONCLUSION

The district court properly admitted the laboratory report pursuant to the statutory hearsay exception in MCL 766.11b. The circuit court abused its discretion by remanding defendant's case to the district court for continuation of the preliminary examination. We reverse the circuit court's order and remand this action for continuation of the proceedings before the circuit court. We do not retain jurisdiction.

RIORDAN, P.J., concurred with SWARTZLE, J.

RONAYNE KRAUSE, J. (*concurring*). I concur in result only.

PEOPLE v MAGGIT

Docket No. 335651. Submitted April 12, 2017, at Grand Rapids. Decided May 30, 2017, at 9:00 a.m.

Demetrius T. Maggit was charged in the Kent Circuit Court with possession of a controlled substance analogue, MCL 333.7403(2)(b)(*ii*), resisting and obstructing a police officer, MCL 750.81d(1), and possession with intent to distribute an imitation controlled substance, MCL 333.7341(3), in connection with an incident that began in a parking lot. Because certain business owners were concerned about illegal activities occurring in their parking lot, which was open to the public, one of the business owners filed a letter with the Grand Rapids Police Department (GRPD) indicating that it intended to prosecute any trespassers. A police officer, who was watching the parking lot from across the street behind a van, saw defendant and another man walk into the parking lot from an adjoining sidewalk; the men walked toward the rear corner of the parking lot, past a no-trespassing sign that was located in the middle of the lot. Although the police officer was unable to see what the men were doing in the back of the lot, given his experience, the officer thought a drug exchange had occurred. The police officer followed defendant and the other man when they left the parking lot, intending to stop them for trespassing and violating an ordinance, Grand Rapids Code, § 9.133(1), which in part prohibits persons from unlawfully remaining on the premises of another to the annoyance or disturbance of the lawful occupants. The police officer identified himself and told the two men to stop. When defendant continued to walk away, the officer told defendant that he had to stop and that defendant was under arrest for trespassing. Defendant ran away when the police officer reached for his handcuffs, and two other police officers eventually caught defendant. During the struggle to arrest him, defendant discarded or dropped a container with a controlled substance analogue, and bags containing an unknown substance were also found in his pockets when he was searched. The police officers arrested defendant, determined his identity, and then discovered that defendant had an outstanding warrant for absconding parole. Defendant moved to suppress the evidence, and the court, Paul J. Sullivan, J.,

granted the motion. The Court of Appeals granted the prosecution leave to appeal.

The Court of Appeals *held*:

1. The Fourth Amendment of the United States Constitution and Article 1, § 11 of Michigan's 1963 Constitution guarantee the right of people to be free from unreasonable searches and seizures. For purposes of the Fourth Amendment, a custodial arrest based on probable cause is not unreasonable, and any search incident to a lawful arrest is lawful as well. Probable cause to arrest exists when the facts and circumstances known to a police officer are sufficient to warrant a person of reasonable caution to believe that an offense has been or is being committed. A court reviews the facts and circumstances objectively when deciding whether probable cause existed for an arrest. At the time of the initial stop, the police officer did not have probable cause to arrest defendant for violating § 9.133(1). Defendant was in the parking lot for only a brief amount of time, there was no evidence that defendant was told to leave the parking lot at that time or on a prior occasion, and there was no evidence that defendant annoyed or disturbed anyone when he was in the parking lot. The intent-to-prosecute letter signed by the business owner did not establish an element of the trespassing ordinance; instead, the letter authorized the GRPD to ask a person in the parking lot to leave the property if they were not there for one of the businesses and to arrest that person if he or she refused. The small no-trespassing sign and the letter were insufficient to notify any person entering the public lot that he or she could be arrested without warning and did not establish probable cause for the police officer to arrest defendant for trespassing.

2. For purposes of the Fourth Amendment, a mistake of law or fact can give rise to the reasonable suspicion necessary to uphold a seizure under the Fourth Amendment. Specifically, search or seizure may be permissible even though the justification was based on a police officer's reasonable mistake of law or fact, and those mistakes, whether of fact or of law, must be objectively reasonable for a reasonable suspicion supporting the search or seizure to exist. Because the mistake must be objectively reasonable, a reviewing court does not examine the subjective understanding of the officer involved in the arrest. The police officer's conclusion that defendant had violated the clear and unambiguous Grand Rapids trespassing ordinance was not reasonable given that defendant was on the property for only a brief period of time and did very little while he was there; there was no evidence that defendant annoyed or disturbed anyone during that time, and he was never

informed that his presence annoyed or disturbed anyone. Accordingly, the police officer's seizure of defendant was unlawful.

3. Evidence found as the result of a warrantless, unconstitutional search may be excluded from evidence as the fruit of the poisonous tree. The purpose of the exclusionary rule is to deter police misconduct and to prevent future Fourth Amendment violations. Evidence is not subject to exclusion if the link between the unconstitutional conduct and the discovery of the evidence is too attenuated to justify suppression. Three factors are considered when determining whether the causal chain has been sufficiently attenuated to dissipate the taint of the illegal conduct: (1) the elapsed time between the illegality and the acquisition of the evidence, (2) the presence of intervening circumstances, and (3) the purpose and flagrancy of the official misconduct. Because all three factors favored suppression, the attenuation doctrine did not bar suppression of the evidence in this case. There was a minimal lapse in time between when defendant was unlawfully seized by the first police officer and when the controlled substances were seized by the other police officers after catching defendant. Discovery of the valid search warrant for defendant's arrest was not an intervening act that broke the causal chain between the initial, unlawful detention and the discovery of the evidence. Instead, the evidence came to light through the original unlawful detention, rather than by other means that were sufficiently distinguishable to purge the taint from the illegal conduct. Further, the police officer's determination that defendant violated the no-trespassing ordinance—by simply walking into and out of a busy parking lot that was open to the public—was not reasonable. The GRPD's practice of handing out no-trespassing letters to property owners in the area and arresting suspects in reliance on the letter could also have been part of systemic or recurrent police misconduct. The Supreme Court's decision in *Utah v Strieff*, 579 US ___; 136 S Ct 2056 (2016), was factually distinguishable and therefore not controlling because the police officer in this case did not discover defendant's arrest warrant until after both the unlawful detention and after the controlled substances had been discovered. Accordingly, the attenuation doctrine did not apply, and the circuit court did not err by granting defendant's motion to suppress.

Affirmed.

SEARCHES AND SEIZURES — ILLEGAL ARREST — EXCLUSIONARY RULE — ATTENUATION DOCTRINE — OUTSTANDING WARRANTS.

The discovery of an outstanding arrest warrant after an illegal arrest does not attenuate the taint of the initial illegal arrest so as to

> make admissible any incriminating evidence that was discovered after the illegal arrest but before the arrest warrant was discovered.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *William A. Forsyth*, Prosecuting Attorney, and *Kimberly M. Manns*, Assistant Prosecuting Attorney, for the people.

Kalniz, Iorio & Reardon Co, LPA (by *Julia Anne Kelly*), for defendant.

Amicus Curiae:

David A. Moran, *Miriam J. Aukerman*, *Michael J. Steinberg*, and *Kary L. Moss* for the American Civil Liberties Union of Michigan and LINC-UP.

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

PER CURIAM. In this interlocutory appeal, the prosecution appeals by leave granted the trial court's order granting defendant Demetrius Terrell Maggit's motion to suppress his statements and physical evidence obtained following his seizure and subsequent search by the police. We affirm the trial court's ruling.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Defendant is currently charged with possession of a controlled substance analogue (Clonazepam), MCL 333.7403(2)(b)(*ii*), resisting and obstructing, MCL 750.81d(1), and possession with intent to distribute an imitation controlled substance, MCL 333.7341(3). The charges arose out of an incident that began in a parking lot located at 101 Sheldon in Grand Rapids, Michigan. At approximately 10:00 a.m. on or about April 27, 2016, the Grand Rapids police officer involved

in defendant's arrest was positioned behind a van in an adjacent parking lot across the street. The officer had worked in the neighborhood for the past four years and was watching the parking lot because it was known for drug sales and use. The parking lot primarily serves two establishments, the Cherry Street Dental Clinic and Dwelling Place. According to the officer, the owners of those establishments had concerns about the illegal activities that occurred in the parking lot, and "the management from Dwelling Place has signed a letter of intent to prosecute trespassers" as a result of those concerns. The letter was kept on file with the Grand Rapids Police Department (GRPD) and was not generally known to the public.

The morning of the incident was sunny, and the parking lot had frequent traffic that day. In addition, the establishments that used the parking lot were open to the public for business. The police officer observed two men—later identified as defendant and Carson Brown—walk to the parking lot from an adjacent sidewalk. The men did not walk toward the only door that led to Dwelling Place or the dental clinic. Instead, they walked toward the rear corner of the parking lot where there was no door. Neither man attempted to move toward any of the cars in the parking lot. The officer opined that the path the men traversed would have taken them "a little more than a car length" from a no-trespassing sign located in the center of the parking lot. In light of his experience in that neighborhood and other drug transactions he had witnessed, the officer suspected "that there was an exchange" of narcotics between the two men. However, given his positioning across the street, the officer could only see that the two men were standing next to each other in the parking lot, and he could not see whether they engaged in any type of narcotics transaction.

Defendant and Brown left the parking lot and returned to the sidewalk. They then began walking south on the sidewalk toward Cherry Street. At that point, the officer notified dispatch that he was "going to be stopping two that were trespassing" and that he needed backup.[1] The officer approached the men from behind, identified himself as a police officer, and told them, "you have to stop." Brown complied with the command, but defendant continued to walk. Thereafter, defendant was told, "[T]his is the police, you have to stop. *You are under arrest for trespassing*." (Emphasis added.) The officer testified that he decided "to go hands-on" with defendant, and he told defendant to place his hands on the top of his head so that he could handcuff defendant. Defendant raised his hands to be handcuffed. As the officer reached for his handcuffs, defendant turned and ran back to the parking lot, where he ran down a set of stairs at the back of the lot that enters onto 106 South Division.

The officer briefly pursued defendant, but eventually gave way to two other officers who were coming to the area because of his request for backup. The record is not entirely clear, and the details come primarily from the parties' written submissions to the trial court, but it appears that the other officers eventually caught defendant and that some sort of struggle ensued. Also at some point—again, it is not entirely clear given the evidence presented at the suppression hearing—defendant dropped or discarded a white container with 14 green pills inside of it. In addition, the other officers searched

[1] Although he did not note as much in his police report, the officer who initiated contact with defendant testified at the suppression hearing that he also believed he could stop defendant and Brown for what he suspected was a drug transaction in the parking lot. The officer testified that he had a "reasonable suspicion" of a narcotics sale at that point.

defendant and found bags containing an unknown substance or substances that tested negative for any controlled substances.

After the other officers arrested defendant, they took him back to the initial officer, who had detained Brown. At this point, the officers ran defendant's name through the Law Enforcement Information Network (LEIN), and they discovered that he had an outstanding arrest warrant for "Absconding parole." Until that time, the officers did not know who defendant was or that he had an outstanding warrant for his arrest. In a written opinion and order, the trial court found—and the prosecution has not contested this finding—that by the time the officers discovered the valid arrest warrant, they had already arrested and seized defendant. That is, the discovery of the warrant came *after* the search and seizure in this case.

Defendant moved to suppress the evidence. At issue in the motion was whether the police officer's seizure and attempted arrest[2] of defendant were lawful and whether the exclusionary rule should apply to the evidence seized in this case. The trial court granted the motion.

II. WAS THERE AN UNREASONABLE SEARCH AND SEIZURE?

A. STANDARD OF REVIEW

"This Court reviews a trial court's factual findings at a suppression hearing for clear error, and the court's

[2] The prosecution made no effort to argue that a seizure did not occur at this time, nor did the prosecution argue that any such seizure ended when defendant fled from the first officer. Further, the prosecution made no time-of-seizure argument based on the United States Supreme Court's decision in *California v Hodari D*, 499 US 621; 111 S Ct 1547; 113 L Ed 2d 690 (1991). Accordingly, we accept the prosecution's apparent concession of these matters and only decide the issues before us.

ultimate ruling de novo." *People v Cohen*, 294 Mich App 70, 74; 816 NW2d 474 (2011).

B. ANALYSIS

"US Const, Am IV, and Const 1963, art 1, § 11, guarantee the right of the people to be free from unreasonable searches and seizures." *People v Brown*, 279 Mich App 116, 130; 755 NW2d 664 (2008). At the heart of any issues concerning the constitutional guarantee is reasonableness. *People v Williams*, 472 Mich 308, 314; 696 NW2d 636 (2005). A search and seizure conducted without a warrant is unreasonable per se, subject to certain exceptions. *Brown*, 279 Mich App at 131. One well-recognized exception is that "[a] custodial arrest based on probable cause is not an unreasonable intrusion under the Fourth Amendment." *People v Nguyen*, 305 Mich App 740, 751; 854 NW2d 223 (2014). Moreover, if an arrest is lawful, i.e., based on probable cause, any search incident to that arrest is lawful as well. *Id*. at 756.

"This probable cause standard 'is a practical, nontechnical conception' judged from the totality of the circumstances before the arresting officers." *Cohen*, 294 Mich App at 75, quoting *Maryland v Pringle*, 540 US 366, 370; 124 S Ct 795; 157 L Ed 2d 769 (2003). "Probable cause to arrest exists where the facts and circumstances within an officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996).[3] In determining whether

[3] In addition, MCL 764.15(1)(a) provides statutory authorization for a police officer to make an arrest without a warrant for a felony, a misdemeanor, or an ordinance violation committed in the officer's presence.

probable cause existed, a reviewing court is to make an objective inquiry based on the facts and circumstances of the case, and a police officer's subjective characterization of the events is not controlling. *Nguyen*, 305 Mich App at 758.

The issue as the prosecution has presented it in this case is whether the police officer had probable cause to arrest defendant for violating a Grand Rapids city ordinance prohibiting trespassing when he first approached defendant.[4] The ordinance declares, in relevant part, that no person shall "[t]respass upon the premises of another or unlawfully remain upon the premises of another to the annoyance or disturbance of the lawful occupants." Grand Rapids Code, § 9.133(1). This Court interprets ordinances in the same manner it interprets statutes, *People of Grand Rapids v Gasper*, 314 Mich App 528, 536; 888 NW2d 116 (2016), meaning that it begins, and ends, with the plain language of the ordinance in order to ascertain the ordinance's meaning, see *People v Williams*, 288 Mich App 67, 83; 792 NW2d 384 (2010). The ordinance at issue contains two prohibitions: (1) a prohibition on "trespassing" and (2) a prohibition against "unlawfully remain[ing]" on land "to the annoyance or disturbance of the lawful occupants." The prosecution does not raise an argument about the first prohibition, i.e., the undefined term of "trespass"; instead, the prosecution

[4] The issue before the trial court concerned whether probable cause existed for the officer who initiated contact to believe that defendant either violated the city ordinance or MCL 750.552, the criminal trespassing statute. Because the prosecution does not make an argument about the statute on appeal, we do not consider it in detail. However, for many of the reasons articulated later in this opinion—mainly that defendant was on property that was open to the public and he was never told to leave the property before his arrest—there was no probable cause to arrest for that offense, either.

argues that the officer had probable cause to believe defendant violated the second part of the ordinance—remaining at 101 Sheldon to the annoyance or disturbance of the lawful occupants.

We agree with the trial court's conclusion that there was no probable cause to arrest defendant for trespassing at 101 Sheldon under the city ordinance against trespassing. The evidence produced at the suppression hearing reveals that defendant was on property that was open to the public, during business hours, for a very brief period of time. During that brief time, no indication was given that defendant was told to leave or that he annoyed or disturbed anyone. The officer testified that he did not have any prior contact with, or knowledge of, defendant, nor did he have knowledge that anyone at 101 Sheldon ever gave any indication that defendant was not welcome there. The plain language of the ordinance states that a violation occurs when one: (1) remains on the property and (2) does so to the annoyance or disturbance of the lawful occupants. On the evidence presented at the suppression hearing, there is no indication that a lawful occupant of the property was annoyed or disturbed by defendant's presence. Indeed, there is no testimony that anyone—other than Brown—had any type of communication with defendant while he was on the property. And again, there is no evidence that defendant had previously been told not to enter the property. Accordingly, the facts as they were known gave no indication that defendant annoyed or disturbed anyone, much less that he *remained* at 101 Sheldon after annoying or disturbing a lawful occupant.

The fact that the officer knew the parking lot at 101 Sheldon was often used for illegal drug transactions and other illicit purposes does not change the analy-

sis.[5] Although a drug transaction would likely annoy or disturb the lawful occupants of 101 Sheldon, there was no evidence that any lawful occupant on the property—the subject officer was *not* on the property at the time—was annoyed or disturbed by anything that occurred in this case. Further, there was scant evidence for a reasonable officer to believe that defendant and Brown had engaged in a drug transaction. The two men merely stood in a corner of the parking lot for a short period of time. In addition, even assuming that this could satisfy the requirement of "annoyance or disturbance," there is no evidence, and the prosecution has not articulated an argument in this regard, that the men "remained" upon the premises in violation of the ordinance. According to the only evidence presented at the suppression hearing, the men were in the parking lot for a very brief time and they left immediately after standing together. In fact, they had already left the parking lot before the officer had a chance to approach them.

In arguing that probable cause existed, the prosecution cites a "no-trespassing letter" signed by one of the occupants of 101 Sheldon as well as the no-trespassing sign in the parking lot. Essentially, the prosecution contends that the no-trespassing letter informed the GRPD that the lawful property owners at 101 Sheldon were annoyed and disturbed by illegal activity occurring in the parking lot and that the no-trespassing sign on the property communicated as much to all who entered the property, including defendant. In other words, according to the prosecution, police had the

[5] This Court appreciates the fact that the police are attempting to eradicate illegal activities in the community; however, the issue before us is whether there was probable cause to arrest defendant under the presenting circumstances. All members of the community remain entitled to freedom from unreasonable searches and seizures.

unilateral authority to revoke defendant's permission to be on the property and to arrest defendant *without* telling defendant that he was not welcome on the property. This argument is unconvincing. Initially, as the trial court recognized in this case, the no-trespassing letter does not create or establish an element of the trespassing ordinance; it merely grants authorization to police officers to ask occupants of the parking lot to leave the parking lot. In this regard, the letter contains an express authorization allowing "the GRPD to ask unauthorized persons to leave the property," and if such persons refuse, the letter authorizes "the GRPD to enforce any violations of the law on the property." But here, the officer never asked defendant to leave the property, nor did he have any kind of contact with defendant before the attempted arrest.

Moreover, any reliance by the prosecution upon the no-trespassing sign is equally without merit. The sign—which is printed in relatively small lettering—merely informed visitors to the parking lot that "no trespassing" would be tolerated and "violators will be prosecuted." An admonition not to do that which is against the law—trespass—can hardly be read as giving notice to all who enter property that is open to the public that, if they "annoy" or "disturb" anyone, they are subject to immediate arrest without warning. In short, to adopt the prosecution's contention would be to find that a letter of which the public is generally unaware and a small sign made all who entered property that was held open to the public subject to immediate arrest without warning. The plain language of the ordinance does not support this view.[6]

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[6] In a conclusory footnote, the prosecution contends that a reasonable law enforcement officer in the Grand Rapids police officer's position would have had probable cause to believe that defendant violated a

In arguing that this Court should not find a violation of the Fourth Amendment, the prosecution directs this Court's attention to the United States Supreme Court's opinion in *Heien v North Carolina*, 574 US ___; 135 S Ct 530; 190 L Ed 2d 475 (2014). The prosecution argues that even assuming there was no violation of the trespassing ordinance, any mistake in concluding that there was an ordinance violation was a reasonable mistake of law. Given this reasonable mistake, according to the prosecution, there can be no Fourth Amendment violation.

In *Heien*, the Supreme Court addressed the issue of whether a law enforcement officer's mistaken view of the law "can nonetheless give rise to the reasonable suspicion necessary to uphold [a] seizure under the Fourth Amendment." *Id*. at ___; 135 S Ct at 534; 190 L Ed 2d at 480. The Court held that a *reasonable* mistake of law could make an investigatory stop lawful. *Id*. at ___; 135 S Ct at 534; 190 L Ed 2d at 480. In that case, Sergeant Matt Darisse stopped a vehicle for having one working brake light. *Id*. at ___; 135 S Ct at 534; 190 L Ed 2d at 480. That stop led to a search of the car and to the discovery of a bag of cocaine. *Id*. at ___; 135 S Ct at 534; 190 L Ed 2d at 480-481. One of the occupants, Nicholas Brady Heien, moved to suppress the cocaine, arguing that the stop and search violated the Fourth

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different part of the ordinance, § 9.133(3), which prohibits, among other matters, a person "conceal[ing]" himself on the premises of another to commit a crime or any offense. This argument, which is given cursory enough treatment to be considered abandoned, see *People v Payne*, 285 Mich App 181, 195; 774 NW2d 714 (2009), is meritless. Although defendant stood in the rear corner of the parking lot, there is no evidence in the record to conclude that he concealed himself in any way. Indeed, the officer testified that he saw defendant, who was standing in a parking lot open to the public on a sunny morning, the entire time. In fact, the only thing that obstructed the officer's view of defendant was the officer's own positioning behind a van.

Amendment. *Id*. at ___; 135 S Ct at 535; 190 L Ed 2d at 481. The North Carolina Court of Appeals held that the initial stop of the vehicle was not valid because driving with only one working brake light was not a violation of state law, regardless of what Sergeant Darisse believed. *Id*. at ___; 135 S Ct at 535; 190 L Ed 2d at 481. This was based on the conclusion that the relevant statute, NC Gen Stat Ann 20-129(g) (2007), mandated that all vehicles must be equipped with "a stop lamp on the rear of the vehicle." *Heien*, 574 US at ___; 135 S Ct at 535; 190 L Ed 2d at 481. The North Carolina Supreme Court reversed, concluding that a different statutory provision, which required originally installed "rear lamps" to be functional, made Darisse's mistaken belief about the necessity of having two working lamps reasonable. *Id*. at___; 135 S Ct at 535; 190 L Ed 2d at 481 (citation omitted). And, because the Fourth Amendment requires reasonableness, there was no Fourth Amendment violation, according to the North Carolina Supreme Court. *Id*. at ___; 135 S Ct at 535; 190 L Ed 2d at 481.

The United States Supreme Court held that a mistake of law can "give rise to the reasonable suspicion necessary to uphold [a] seizure under the Fourth Amendment." *Id*. at ___; 135 S Ct at 534; 190 L Ed 2d at 480. In so concluding, the Court began by acknowledging that "the ultimate touchstone of the Fourth Amendment is reasonableness." *Id*. at ___; 135 S Ct at 536; 190 L Ed 2d at 482 (citation and quotation marks omitted). "To be reasonable is not to be perfect," explained the Court, "and so the Fourth Amendment allows for some mistakes on the part of government officials, giving them fair leeway for enforcing the law in the community's protection." *Id*. at ___; 135 S Ct at 536; 190 L Ed 2d at 482 (citation and quotation marks omitted). Historically, the Court had held that the

"reasonableness" standard permitted mistakes of fact, so long as the mistakes were "those of reasonable men." *Id*. at ___; 135 S Ct at 536; 190 L Ed 2d at 482 (citation and quotation marks omitted).

"But reasonable men make mistakes of law, too," explained the Court,

> and such mistakes are no less compatible with the concept of reasonable suspicion. Reasonable suspicion arises from the combination of an officer's understanding of the facts and his understanding of the relevant law. The officer may be reasonably mistaken on either ground. Whether the facts turn out to be not what was thought, or the law turns out to be not what was thought, the result is the same: the facts are outside the scope of the law. There is no reason, under the text of the Fourth Amendment or our precedents, why this same result should be acceptable when reached by way of a reasonable mistake of fact, but not when reached by way of a similarly reasonable mistake of law. [*Id*. at ___; 135 S Ct at 536; 190 L Ed 2d at 482-483.]

Turning to the case before it, the Court in *Heien*, *id*. at ___; 135 S Ct at 539; 190 L Ed 2d at 485, explained that the alleged mistake of law "relates to the antecedent question of whether it was reasonable for an officer to suspect that the defendant's conduct was illegal. If so, there was no violation of the Fourth Amendment in the first place." And in that case, the Court had "little difficulty concluding that the officer's error of law was reasonable." *Id*. at ___; 135 S Ct at 540; 190 L Ed 2d at 486. While referring to pertinent provisions of North Carolina law, which to that point had not previously been construed by the state's appellate courts, the Court explained why Darisse's mistaken view of the law was reasonable:

> Although the North Carolina statute at issue refers to "*a* stop lamp," suggesting the need for only a single working

> brake light, it also provides that "[t]he stop lamp may be incorporated into a unit with one or more *other* rear lamps." NC Gen Stat Ann § 20–129(g) (emphasis added). The use of "other" suggests to the everyday reader of English that a "stop lamp" is a type of "rear lamp." And another subsection of the same provision requires that vehicles "have all originally equipped rear lamps or the equivalent in good working order," § 20–129(d), arguably indicating that if a vehicle has multiple "stop lamp[s]," all must be functional.
>
> The North Carolina Court of Appeals concluded that the "rear lamps" discussed in subsection (d) do not include brake lights, but, given the "other," it would at least have been reasonable to think they did. Both the majority and the dissent in the North Carolina Supreme Court so concluded, and we agree. This "stop lamp" provision, moreover, had never been previously construed by North Carolina's appellate courts. It was thus objectively reasonable for an officer in Sergeant Darisse's position to think that Heien's faulty right brake light was a violation of North Carolina law. And because the mistake of law was reasonable, there was reasonable suspicion justifying the stop. [*Heien*, 574 US at ___; 135 S Ct at 540; 190 L Ed 2d at 486-487 (some citations omitted; alterations in original).]

In the instant case—ignoring for purposes of this decision whether the rule from *Heien* is limited to ambiguous statutes, see *Sinclair v Lauderdale Co*, 652 Fed Appx 429, 435 (CA 6, 2016); *United States v Stanbridge*, 813 F3d 1032, 1037 (CA 7, 2016) ("The statute isn't ambiguous, and *Heien* does not support the proposition that a police officer acts in an objectively reasonable manner by misinterpreting an *unambiguous* statute."); but see *Cahaly v Larosa*, 796 F3d 399, 408 (CA 4, 2015)—we decline to find that *Heien* changes the outcome because any mistake of law in this case was *unreasonable*. As an initial matter, the

ordinance at issue in this case was not ambiguous[7] in regard to the conduct it prohibited. The ordinance prohibited remaining on property to the annoyance or disturbance of the lawful owner. As noted, at some level, this required knowledge on the part of defendant that he was annoying or disturbing someone on the property; otherwise it could not fairly be said that he "remained" on the property to the annoyance or disturbance of the lawful occupants. And here, defendant was only on the property for a brief period of time and did relatively little while he was on the property. Given the elements of the ordinance, the conclusion that defendant violated the ordinance was not objectively reasonable.

Comparing the instant case to the situation in *Heien* is useful. In essence, the officer in *Heien* stopped the defendant for only having one working brake light when a fair reading of the statute gave the officer the express authority to do so. In addition, no state appellate court had interpreted the statute at issue. In this case, by contrast, the ordinance was clear, and it plainly did not permit an arrest in a situation such as the one that occurred in this case. On this record, we decline to find a reasonable mistake of law.

Next, in addition to arguing that the police officer had probable cause to arrest, the prosecution argues that, given the officer's observations and his experience regarding drug transactions, the officer had a reasonable suspicion that defendant and Brown had engaged in a drug transaction, thereby justifying a stop or seizure of the men.

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[7] Regardless of whether the finding of statutory ambiguity is necessary for an application of *Heien*, the clarity—or lack thereof—of the ordinance is relevant in considering whether a mistaken interpretation of the ordinance was reasonable.

If a police officer has a reasonable, articulable suspicion that criminal activity is afoot, the officer may briefly detain a suspect for the purpose of performing an investigatory stop. See *People v Barbarich*, 291 Mich App 468, 473; 807 NW2d 56 (2011), citing *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968). A detention for the purpose of investigating criminal behavior does not violate the Fourth Amendment. *Barbarich*, 291 Mich App at 473. However, "[t]he scope of any search or seizure must be limited to that which is necessary to quickly confirm or dispel the officer's suspicion." *Id*. Police officers are permitted to take action in order to ensure their safety during *Terry* stops, see *People v Nimeth*, 236 Mich App 616, 624; 601 NW2d 393 (1999), and in some instances this can include the use of handcuffs, see *Brown v Lewis*, 779 F3d 401, 415 (CA 6, 2015).

We agree with the trial court that the prosecution's argument with regard to reasonable suspicion and a *Terry* stop are without merit in this case. The trial court found that the officer attempted to effectuate an arrest of defendant and that he did not attempt to merely conduct an investigatory stop. This was a factual finding—which is reviewed for clear error, see *Cohen*, 294 Mich App at 74—that was based on the officer's testimony that he intended to arrest defendant and Brown and that he told defendant "you have to stop. *You are under arrest*." (Emphasis added.) As is apparent from the suppression hearing and the body camera video, the officer went to handcuff defendant immediately. On this record, the trial court's factual finding was not clearly erroneous. Moreover, because there is no basis to conclude that the officer conducted an investigatory stop or attempted to make an investigatory stop, whether he had reasonable suspicion

that would have justified an investigatory stop and a brief detention are irrelevant in this case.[8]

III. SHOULD THE EXCLUSIONARY RULE APPLY?

Having agreed with the trial court's decision that an unlawful seizure[9] occurred in this case, we next consider whether the exclusionary rule should bar the use of the unlawfully seized evidence at defendant's trial. The prosecution contends that the discovery of the valid warrant for defendant's arrest attenuated the connection between the unlawful stop and the evidence seized from defendant.

"[E]vidence discovered in a search incident to an unlawful arrest may be subject to the exclusionary rule as the 'fruit of the poisonous tree.' " *People v Reese*, 281 Mich App 290, 295; 761 NW2d 405 (2008) (citation omitted). The exclusionary rule is a judicially created doctrine intended to compel compliance with the right of persons to be free from unreasonable searches and

[8] Had this incident entailed a *Terry* stop, at issue would be whether a police officer has reasonable suspicion to stop two men for having briefly spoken to one another in a parking lot and then leaving. If two people talking in an area known for drug transactions can serve as the basis for a *Terry* stop, then anyone having a conversation in certain neighborhoods can be frisked at any time. This suggests that there is an exception to the Fourth Amendment for all people living in or passing through certain neighborhoods. In the absence of seeing a hand-off or other conduct supporting a concern that an illegal transaction was taking place, we would not deem the facts here sufficient to justify a *Terry* stop.

[9] Again, based on the arguments presented, we only concern ourselves with the seizure as articulated by the prosecution: that is, the seizure that occurred when the officer who initiated contact attempted to arrest defendant. Also, given that the prosecution makes no effort to argue that the evidence in this case was discovered apart from that initial seizure, we accept for purposes of our decision that the evidence, which was later discarded during defendant's flight, was discovered as a result of the officer's initial seizure.

seizures. *People v Hill*, 299 Mich App 402, 412; 829 NW2d 908 (2013), quoting *Davis v United States*, 564 US 229, 236; 131 S Ct 2419; 180 L Ed 2d 285 (2011). The rule "is a harsh remedy designed to sanction and deter police misconduct where it has resulted in a violation of constitutional rights and should be used only as a last resort." *People v Corr*, 287 Mich App 499, 508; 788 NW2d 860 (2010) (citation and quotation marks omitted). The purpose of the exclusionary rule is to deter police misconduct and to prevent future Fourth Amendment violations. *Hill*, 299 Mich App at 412, quoting *Davis*, 563 US at 236-237. "Where suppression fails to yield appreciable deterrence, exclusion is clearly . . . unwarranted." *Davis*, 564 US at 237 (citation and quotation marks omitted).

Application of the exclusionary rule is not predicated on a simple but-for test of whether the evidence " 'would not have come to light but for the illegal actions of the police.' " *Reese*, 281 Mich App at 295, quoting *Wong Sun v United States*, 371 US 471, 488; 83 S Ct 407; 9 L Ed 2d 441 (1963). "Rather, the more apt question in such a case is whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Wong Sun*, 371 US at 488 (citation and quotation marks omitted).

One such means by which the "primary taint" of illegal conduct may be purged is the attenuation doctrine. *Utah v Strieff*, 579 US ___, ___; 136 S Ct 2056, 2059; 195 L Ed 2d 400, 405 (2016). In *Strieff*, the Court explained that "[i]n some cases . . . the link between the unconstitutional conduct and the discovery of the evidence is too attenuated to justify suppression." *Id*.

at ___; 136 S Ct at 2059; 195 L Ed 2d at 405. In that case, a police officer, Douglas Fackrell, observed the defendant, Edward Strieff, exit a home in which drug activity was suspected and walk toward a nearby convenience store, where Fackrell then detained him. *Id*. at ___; 136 S Ct at 2059-2060; 195 L Ed 2d at 406. Fackrell relayed Strieff's information to a police dispatcher, who informed Fackrell that Strieff had an outstanding arrest warrant. *Id*. at ___; 136 S Ct at 2060; 195 L Ed 2d at 406. Fackrell arrested Strieff and discovered narcotics and drug paraphernalia during a search incident to arrest. *Id*. at ___; 136 S Ct at 2060; 195 L Ed 2d at 406. The Supreme Court accepted the contention that Fackrell's initial detention of Strieff was unlawful.[10] The issue in that case became "whether the discovery of a valid arrest warrant was a sufficient intervening event to break the causal chain between the unlawful stop and the discovery of drug-related evidence on Strieff's person." *Id*. at ___; 136 S Ct at 2061; 195 L Ed 2d at 408. In evaluating this issue, the Court considered three factors:

> First, we look to the "temporal proximity" between the unconstitutional conduct and the discovery of evidence to determine how closely the discovery of evidence followed the unconstitutional search. Second, we consider "the presence of intervening circumstances." Third, and "particularly" significant, we examine "the purpose and flagrancy of the official misconduct." [*Id*. at ___; 136 S Ct at 2062; 195 L Ed 2d at 408 (citations omitted).]

The Court found that the first factor—temporal proximity between the unlawful stop and the search—favored suppression. *Id*. at ___; 136 S Ct at 2062; 195 L

[10] "At the suppression hearing, the prosecutor conceded that Officer Fackrell lacked reasonable suspicion for the stop . . . ." *Id*. at ___; 136 S Ct at 2060; 195 L Ed 2d at 406. See also *id*. at ___; 136 S Ct at 2061-2062; 195 L Ed 2d at 407.

Ed 2d at 408. The Court remarked, "Our precedents have declined to find that this factor favors attenuation unless 'substantial time' elapses between an unlawful act and when the evidence is obtained." *Id*., quoting *Kaupp v Texas*, 538 US 626, 633; 123 S Ct 1843; 155 L Ed 2d 814 (2003). And in *Strieff*, 579 US at ___; 136 S Ct at 2062; 195 L Ed 2d at 408, Officer Fackrell discovered the evidence "only minutes after the illegal stop."

The Court found that the second factor—the presence of intervening circumstances—"strongly favors the State." *Id*. at ___; 136 S Ct at 2062; 195 L Ed 2d at 408. The existence of a valid arrest warrant in that case, reasoned the Court, favored finding that "the connection between unlawful conduct and the discovery of evidence [was] sufficiently attenuated to dissipate the taint." *Id*. at ___; 136 S Ct at 2062; 195 L Ed 2d at 409 (citation and quotation marks omitted). The warrant was valid, it predated the investigation that led to Strieff's arrest, "and it was entirely unconnected with the stop." *Id*. at ___; 136 S Ct at 2062; 195 L Ed 2d at 409. Moreover, the arrest warrant *compelled* Fackrell to arrest Strieff, "[a]nd once Officer Fackrell was authorized to arrest Strieff, it was undisputedly lawful to search Strieff as an incident of his arrest to protect Officer Fackrell's safety." *Id*. at ___; 136 S Ct at 2063; 195 L Ed 2d at 409.

As to the purpose and flagrancy of police misconduct, the Court found that this factor also "strongly favors the State." *Id*. at ___; 136 S Ct at 2063; 195 L Ed 2d at 409. The Court explained that the factor reflects the rationale that exclusion exists to deter police misconduct "by favoring exclusion only when the police misconduct is most in need of deterrence—that is, when it is purposeful or flagrant." *Id*. at ___; 136 S Ct

at 2063; 195 L Ed 2d at 409. And in that case, reasoned the Court, Fackrell was at most negligent in concluding that he had sufficient cause to initiate a stop/detention of Strieff. *Id*. at ___; 136 S Ct at 2063; 195 L Ed 2d at 409. In addition, the Court explained that Fackrell should have asked if Strieff would be willing to speak with him, rather than demanding that Strieff speak with him, thereby effectuating a seizure. *Id*. at ___; 136 S Ct at 2063; 195 L Ed 2d at 409-410. The Court explained that although Fackrell made a few errors in judgment, "these errors in judgment hardly rise to a purposeful or flagrant violation of Strieff's Fourth Amendment rights." *Id*. at ___; 136 S Ct at 2063; 195 L Ed 2d at 410. Moreover, the Court concluded that "there is no indication that this unlawful stop was part of any systemic or recurrent police misconduct. To the contrary, all the evidence suggests that the stop was an isolated instance of negligence that occurred in connection with a bona fide investigation of a suspected drug house." *Id*. at ___; 136 S Ct at 2063; 195 L Ed 2d at 410.

Applying all of the factors, the Court held that application of the exclusionary rule was not warranted in that case. *Id*. at ___; 136 S Ct at 2063; 195 L Ed 2d at 410.

A decision from this Court, *Reese*, 281 Mich App at 290, is instructive as well on the issue of the attenuation doctrine. In that case, police officers approached Richard Reese outside of an apartment complex that was known for narcotics trafficking. After a verbal exchange with Reese, the officers informed him that the area was known for drug trafficking and that if he did not leave—or visit a friend whom he claimed he was visiting in the complex—he might be guilty of loitering. *Id*. at 292. Reese did not leave; the officers

arrested Reese for loitering and, upon running Reese's information in the LEIN network, the officers learned of the existence of an outstanding misdemeanor warrant. *Id*. at 293. One of the officers informed Reese that he was being placed under arrest pursuant to the warrant—as well as for loitering—and the officers called a tow truck to have an inventory search performed on Reese's car. *Id*. The search revealed cocaine that later became the subject of a motion to suppress. *Id*. According to Reese, the officers lacked probable cause to arrest for loitering, and any evidence discovered thereafter had to be suppressed as the fruit of an illegal search. *Id*. at 293-294. The circuit court agreed and suppressed the cocaine. *Id*. at 294.

On appeal in this Court, the prosecution argued that, even assuming the loitering arrest was unlawful, the misdemeanor arrest was lawful, and the officers could lawfully conduct a search of Reese's car incident to that arrest. *Id*. The issue before this Court was "whether the discovery of this preexisting warrant constitutes an independent basis, which dissipates the taint from the initial illegal arrest, for conducting the search of Reese's car." *Id*. at 297. Similar to the manner in which the United States Supreme Court evaluated the issue in *Strieff* some eight years later, this Court used the same three-factor test and weighed: (1) the time between the illegal conduct and the discovery of the evidence, (2) the presence of intervening circumstances, and (3) the purpose and flagrancy of police misconduct. *Id*. at 299, 303-304. In addition, the Court focused primarily on the following two points:

> (1) what evidence did the police obtain from the initial illegal stop *before* they discovered the outstanding arrest warrant, and (2) whether that initial illegal stop was a manifestation of flagrant police misconduct—i.e., conduct that was obviously illegal, or that was particularly egre-

> gious, or that was done for the purpose of abridging the defendant's rights. [*Id*. at 304 (citation and quotation marks omitted).]

In that case, this Court concluded that there was no evidence of police misconduct or an improper purpose by the officers. *Id*. at 304 ("Indeed, the officers not only made it clear to Reese that he was free to go, they actually asked him to leave at least twice."). Hence, there was no misconduct at issue. Moreover, this Court found significant the fact that the officers only discovered the drugs *after* they discovered the valid arrest warrant. *Id*. at 304-305. In sum, this Court held:

> Because the officers' initial misconduct—the arrest for loitering—was not particularly egregious or motivated by bad faith and only yielded Reese's identity, the subsequent discovery of the preexisting arrest warrant was not tainted by the illegality of that initial arrest. As such, the discovery of the preexisting warrant constituted an intervening circumstance that broke the causal connection between the illegal arrest and the discovery of the cocaine evidence. Because the search was independently justified as a search incident to the lawful arrest on the warrant, Reese was not entitled to have the cocaine evidence suppressed. [*Id*. at 305.]

In reaching this conclusion, this Court, in a footnote that should be considered dicta, offered its opinion on a hypothetical scenario that is relevant to this case. This Court considered the outcome of a scenario in which the police would have conducted the search following the illegal arrest and then later discovered the valid warrant only after discovering the narcotics. *Id*. at 305 n 4. In such a scenario, opined the Court, the "taint" of the illegal arrest would not have been purged by the after-the-fact discovery of a valid warrant:

> Had the officers searched Reese's car under authority of the illegal arrest and only later discovered the preexisting

> warrant, the discovery of the preexisting arrest warrant could not have served to dissipate or attenuate the illegality of the arrest and, accordingly, the cocaine evidence would clearly have been the "fruit" of the illegal arrest. [*Id*.]

Turning to the instant case, it should be noted from the outset that this case involves facts that differ significantly from those present in *Strieff* and *Reese* in regard to when the warrant and the evidence were discovered. While *Strieff* and *Reese* involved fact patterns that included (1) an invalid seizure, (2) the discovery of a valid arrest warrant, and (3) the search and discovery of contraband, the instant case, as it has been argued by the prosecutor, involves a different fact pattern that includes (1) an invalid seizure, (2) the search and discovery of contraband, and (3) the discovery of a valid arrest warrant.

Given the differences between this case and *Strieff* and *Reese*, we hold that the attenuation doctrine does not operate to bar the exclusion of the evidence. Looking to the factors enunciated in *Strieff* and *Reese*, we note the first factor in this case favors suppression because by all accounts the time between the illegal detention and the discovery of the evidence was relatively short. See *Strieff*, 579 US at ___; 136 S Ct at 2062; 195 L Ed 2d at 408. The second factor is where this case begins to take a significantly different path from *Strieff* and *Reese*. From the evidence presented in this case, the discovery of the valid warrant for defendant's arrest was not an intervening act that "broke" the causal chain between the initial, unlawful detention and the discovery of the evidence. Indeed, according to the officer's testimony at the suppression hearing, the warrant had no effect on the actions taken by police in this case, nor did it have any effect on the evidence that was recovered from defendant. In short,

the instant case does not involve the discovery of a warrant as an intervening act that "purged" the taint from the illegal seizure; rather, it involves an after-the-fact discovery of a valid warrant and an attempt to apply that warrant as a post-hoc panacea for unlawful actions that were wholly unrelated to that warrant. Stated differently, the evidence "came to light through exploitation of the illegal conduct" rather than "by means sufficiently distinguishable to be purged of the taint from the illegal conduct." *Reese*, 281 Mich App at 299. Because of the factual differences between this case and *Strieff* and *Reese*, this second factor strongly favors suppression.

The final factor considers the purpose and flagrancy of police misconduct, with heed being paid to the idea that the exclusionary rule is intended to deter police misconduct. *Strieff*, 579 US at ___; 136 S Ct at 2063; 195 L Ed 2d at 409. In *Strieff*, the United States Supreme Court emphasized that deterrence was not warranted in that case because the officer's actions were "at most negligent" and there was "no indication that this unlawful stop was part of any systemic or recurrent police misconduct." *Id*. at ___; 136 S Ct at 2063; 195 L Ed 2d at 409-410. In the instant case, however, the case for suppression—and deterrence—is stronger. Although there is no suggestion from the record that the police officer acted with ill intent, and every indication that the Grand Rapids police are attempting to remedy a real problem, the case nevertheless involves an arrest—or attempted arrest—for simply walking into and out of a busy parking lot that was open to the public. As already noted, the idea that this conduct satisfied the elements of trespassing as it is defined under the pertinent ordinance was not reasonable. Moreover, the officer's justification for the arrest—the no-trespassing letter—brings up another

important consideration. According to the officer's testimony at the suppression hearing, the GRPD has a practice of handing out such letters and arresting suspects in reliance, at least in part, on the letters.[11] This pattern of behavior suggests that the seizure in this case could have been part of the "systemic or recurrent police misconduct" about which the Court in *Strieff*, 579 US at ___; 136 S Ct at 2063; 195 L Ed 2d at 410, was concerned. Thus, the instant case presents a case for deterrence.

In sum, in evaluating the three factors present in this case, we conclude that the attenuation doctrine should not apply, and we affirm the trial court's decision to suppress the evidence seized in this case.

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[11] In its opinion and order, the trial court took note of and found to be persuasive an unpublished decision from this Court, *People v Clay*, unpublished opinion per curiam of the Court of Appeals, issued April 11, 1997 (Docket No. 183101). In *Clay*, *id*. at 1, the same police department at issue in this case arrested the defendant for trespassing when he walked through the parking lot of an Amoco gas station, as the officers perceived that he was "cutting across" the lot. The arresting officer was aware of a letter that the owner of the gas station had on file with the police department giving the police permission to arrest trespassers on the lot. *Id*. at 2. This Court held that there was not probable cause to arrest defendant for trespassing under the trespassing statute, MCL 750.552, because the statute "applies when an individual has been forbidden to enter or was notified to depart and neglects or refuses to do so." *Id*. The Court noted that the defendant "was not told to depart from the premises, and inasmuch as the lot was open to the public, the 'No Trespassing' signs were inadequate to inform defendant that he was forbidden to enter the parking lot." *Id*. at 2-3. This Court suppressed the evidence obtained as a result of the improper arrest. *Id*. at 3.

The American Civil Liberties Union of Michigan and LINC UP submitted an amicus brief in this case and attached two Kent County cases—one from the circuit court in 2010 and one from the district court in 2012—which involved similar police conduct in reliance on merchant letters, resulting in successful suppression motions. These cases, while not binding, serve to further support our conclusion that suppression is warranted for deterrence purposes.

IV. CONCLUSION

There was no probable cause to arrest defendant for trespassing under the city ordinance, and any mistake in concluding that there was probable cause was unreasonable. Therefore, the only seizure we have been asked to evaluate in this case was unreasonable. Moreover, given the factors announced in *Reese* and *Strieff*, we find application of the exclusionary rule is appropriate in this case.

Affirmed.

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

HENRY v DOW CHEMICAL COMPANY

Docket No. 328716. Submitted May 3, 2017, at Lansing. Decided June 1, 2017, at 9:00 a.m. Reversed in part and remanded 501 Mich 965.

Gary and Kathy Henry own property downstream of Dow Chemical Company's facility on the Tittabawassee River in Midland, Michigan. In March 2003, plaintiffs filed a lawsuit against Dow in the Saginaw Circuit Court and sought certification of two different classes of individuals who owned property located on the Tittabawassee River floodplain. The first class was composed of approximately 2,000 property owners residing on the Tittabawassee River floodplain who claimed to have lost the free use and enjoyment of their property and whose property values had declined as a result of contamination caused by Dow's discharge of dioxins into the Tittabawassee River. The second class of individuals, 173 plaintiffs and thousands of putative class members, requested that the court institute a medical program to monitor them for any negative effects the dioxins might have on their health. The court denied defendant's motion for summary disposition of plaintiffs' medical monitoring claims and the Court of Appeals denied defendant's interlocutory application for leave to appeal, but the Michigan Supreme Court granted defendant's emergency application for leave to appeal. The Supreme Court heard and decided the matter in *Henry v Dow Chem Co*, 473 Mich 63 (2005) (*Henry I*). The Supreme Court determined that the class of plaintiffs seeking medical monitoring failed to support their negligence claim because they could not show a present physical injury. The Court declined to create a cause of action—medical monitoring—for the threat of possible future harm to plaintiffs' health. On remand, the circuit court dismissed plaintiffs' medical monitoring claim but certified the first class of individuals who alleged negligence and nuisance regarding the property damage caused by contamination of the floodplain. In a divided unpublished opinion issued on January 24, 2008 (Docket No. 266433), the Court of Appeals, FORT HOOD, J. (METER, P.J., concurring in part and dissenting in part, and KELLY, J., dissenting), affirmed the class certification with respect to defendant's liability only. The Supreme Court granted defendant leave to appeal and, in *Henry v Dow Chem Co*, 484 Mich 483 (2009) (*Henry II*), the Court

articulated the standards by which a request for class certification should be judged and remanded the case to the circuit court for compliance with the evaluative framework announced in *Henry II*. The circuit court affirmed its certification. Shortly after that, the United States Supreme Court decided *Wal-Mart Stores, Inc v Dukes*, 564 US 338 (2011), which clarified the requirements for class certification. The circuit court revisited and reversed its certification of the class, explaining that plaintiffs had failed to demonstrate commonality under the United States Supreme Court's standard. Defendant again moved for summary disposition, arguing that (1) pursuant to MCR 2.116(C)(7) and (C)(8), plaintiffs' claims were time-barred by the applicable statute of limitations and (2) plaintiffs had failed to state a claim on which relief could be granted because they did not show the present physical injury necessary to establish negligence or nuisance. The circuit court, Frederick L. Borchard, J., denied defendant's motion. Defendant filed an application for leave to appeal in the Court of Appeals, and while the application was pending, plaintiffs moved in the circuit court to file an amended complaint. The circuit court denied plaintiffs' request and instead decided that plaintiffs' claims had not been properly joined and severed them with the instruction that each plaintiff wishing to pursue a claim against defendant must do so before February 5, 2016. The Court of Appeals denied defendant's application for leave to appeal in an unpublished order issued on December 17, 2015 (Docket No. 328716). Defendant filed an application for leave to appeal in the Supreme Court, and the Court, in lieu of granting leave to appeal, remanded the matter to the Court of Appeals for consideration as on leave granted. *Henry v Dow Chem Co*, 499 Mich 965 (2016).

The Court of Appeals *held*:

1. According to MCR 600.5805(10) and MCL 600.5827, a claim of negligence or nuisance that results in property damage must be brought within three years of the claim's accrual. In *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378, 388 (2007), the Supreme Court held that the wrong is done at the time a plaintiff is harmed rather than at the time a defendant acted. In this case, the parties disputed when the plaintiffs' claims accrued—that is, when the wrong was done and plaintiffs were harmed—and consequently, when the period of limitations began to run. Defendant asserted that plaintiffs' claims accrued no later than 1984 when the public was first made aware that the Tittabawassee River contained dioxins. According to defendant, the information about dioxins in the early 1980s put plaintiffs on notice

that their land could become contaminated and that any damage suffered by plaintiffs since then was merely a continuing wrong that did not toll the period of limitations given that the continuing-wrongs doctrine had been abrogated in *Garg v Macomb Co Community Mental Health Servs*, 472 Mich 263, 290 (2005). Plaintiffs claimed that they were not harmed until February 2002 when the Michigan Department of Environmental Quality (MDEQ) released the first of several bulletins concerning dioxin contamination in the Tittabawassee River floodplain. That bulletin indicated that the MDEQ would begin its investigation in the spring of 2002. A bulletin released by the MDEQ in the spring of 2002 advised area residents to not allow their children to play in the soil or sediment near contamination sites. No evidence suggested that the soil was contaminated as early as the Tittabawassee waters were contaminated. In this case, plaintiffs' harm did not exist in any tangible form until 2002 when the MDEQ issued its notice that the dioxins in plaintiffs' soil had reached potentially toxic levels. The harm caused to plaintiffs consisted of their loss of the use and enjoyment of their property and the diminution of their property's value. A plaintiff's claim does not accrue for purposes of the statute of limitations until every element of the claim, including damages, is present. There was no evidence of damage to plaintiffs' property until 2002. Thus, all elements of plaintiffs' claims were not present until 2002. Because plaintiffs brought their action in March 2003, they were well within the three-year period of limitations, and the trial court properly held that plaintiffs' action was timely filed and correctly denied defendant's motion for summary disposition under MCR 2.116(C)(7).

2. In addition to economic loss, Michigan's tort system requires evidence of a present physical injury to person or property to recover under a theory of negligence. The second class of plaintiffs, those in *Henry I* who sought a system of medical monitoring for future health consequences of the dioxin contamination, failed because they could not show that they suffered any present physical injury to person or property. *Henry I* clearly required the second class of plaintiffs alleging negligence to show present physical injury to support their claim. Because the second class of plaintiffs failed to do so, their claims were summarily dismissed. The burden is no less for the first class of plaintiffs alleging that Dow's negligence damaged their properties. Plaintiffs whose property was uncontaminated could not show present physical injury, and their claims of negligence could not survive defendant's motion for summary disposition. Plaintiffs in the instant case whose property was contaminated with toxic levels of dioxins according to the MDEQ analysis and who had been

warned not to allow their children to play in the soil on their property had to, and did, provide evidence of present physical injury in their pleadings sufficient to establish a claim for which relief could be granted under MCR 2.116(C)(8).

3. As with negligence, a plaintiff claiming nuisance must show a present physical injury to property to avoid a defendant's motion for summary disposition under MCR 2.116(C)(8). Plaintiffs in the instant case have alleged specific existing defects sufficient to avoid summary disposition. Plaintiffs' allegations of harm include (1) the contamination of groundwater and real property indicated by the MDEQ's 2002 notice and its subsequent investigation, (2) the warning that it was unsafe for plaintiffs' children to play in soil and sediment near contaminated sites, (3) the decrease in property values, and (4) the difficulty of selling contaminated property and the burden of mandatory disclosure to prospective buyers of the contamination and risk of harm. The trial court properly denied defendant's motion for summary disposition for plaintiffs who pleaded specific and existing defects that constituted a significant and continuing interference with the use and enjoyment of their property.

4. Judicial estoppel is an equitable doctrine that generally prohibits a party from prevailing in one phase of a case on the basis of an argument and later relying on a contradictory argument to prevail in another phase of the case. Judicial estoppel is an extraordinary remedy and may apply only when a party's claims are wholly inconsistent. In this case, plaintiffs' claims were not wholly inconsistent. Defendant argued that plaintiffs should be estopped from asserting the present physical injury of person or property because their argument in the previous attempt at certification focused exclusively on the threat of future injury. However, judicial estoppel did not apply because plaintiffs' arguments were not wholly inconsistent—plaintiffs first argued that there was a threat of future injury to their health, and secondly, they argued that there was a present injury to their property. Plaintiffs did not argue that the threat of future harm was the only injury they suffered. Also, plaintiffs did not prevail on the first argument, which is a necessary element for the application of judicial estoppel. Because judicial estoppel did not apply, the trial court did not err by denying defendant's motion for summary disposition.

Affirmed.

GADOLA, P.J., dissenting, disagreed with the majority's conclusion that the applicable period of limitations, MCL 600.5805(10), began to run when the MDEQ issued its first bulletin in 2002.

Michigan no longer follows the discovery rule, which allowed for tolling the period of limitations until the harm was discovered. The harm in this case occurred when defendant dumped dioxins in the Tittabawassee River and they reached plaintiffs' soil, not when plaintiffs first became aware of the damage to their property. MCL 600.5827 and Michigan caselaw expressly state that the claim accrues at the time that the wrong on which the claim is based occurs, regardless of the time when damage results. The harm to plaintiffs was the presence of dioxins in the soil on their property, and the 2002 MDEQ bulletin did not place the dioxins in the soil—the bulletin simply alerted plaintiffs to the harm, i.e., plaintiffs discovered the harm as a result of the 2002 bulletin. Because the harm occurred at the time the dioxins were dumped into the water—as early as the 1970s—the period of limitations began to run at that time, and it expired three years later, well before plaintiffs filed their complaints. The case should have been remanded to the trial court to determine when plaintiffs' claim accrued—that is, when plaintiffs were harmed—and to calculate the period of limitations from the time the claim accrued. If the trial court were to determine that the harm was done—and the claim accrued—more than three years before plaintiffs filed their complaint in March 2003, summary disposition in favor of defendant would be appropriate.

Trogan & Trogan, PC (by *Bruce F. Trogan*), *Stueve Siegel Hanson LLP* (by *Todd M. McGuire* and *Norman E. Siegel*), *Spencer Fane LLP* (by *Michael F. Saunders*), and *The Woody Law Firm PC* (by *Teresa A. Woody*) for plaintiffs.

Dickinson Wright PLLC (by *Kathleen A. Lang* and *Phillip J. DeRosier*), *Braun Kendrick Finkbeiner, PLC* (by *Craig W. Horn*), and *Kirkland & Ellis LLP* (by *Douglas J. Kurtenbach, PC*, *Douglas G. Smith, PC*, *Scott A. McMillin, PC*, and *Jeffrey Bossert Clark*) for defendant.

Amici Curiae:

Honigman Miller Schwartz and Cohn LLP (by *John D. Pirich* and *Andrea L. Hansen*) for the Michigan Chamber of Commerce.

Miller, Canfield, Paddock and Stone, PLC (by *Clifford W. Taylor*, *Paul D. Hudson*, and *Kamil Robakiewicz*), for the Michigan Manufacturers Association.

Miller, Canfield, Paddock and Stone, PLC (by *Brian M. Schwartz*), and *Jenner & Block LLP* (by *Matthew S. Hellman*) for the Chamber of Commerce of the United States of America.

Butzel Long, PC (by *Joseph E. Richotte* and *Haley A. Jonna*), for the Michigan Defense Trial Counsel.

Before: GADOLA, P.J., and JANSEN and SAAD, JJ.

JANSEN, J. Defendant appeals by leave granted a July 17, 2015 order denying its motion for summary disposition pursuant to MCR 2.116(C)(7) and (C)(8). For the reasons that follow, we affirm.

I. FACTS AND PROCEDURAL HISTORY

This case involves allegations of negligence and nuisance brought by plaintiffs, who are owners of property downstream of defendant's Midland, Michigan, manufacturing operation on the Tittabawassee River flood plain. Plaintiffs claim that they have suffered loss of the free use and enjoyment of their property, as well as damages in the form of decreased property value, as a result of dioxin contamination discovered in the flood plain soil and connected to defendant's activities.

This case has an extensive appellate history. The Michigan Supreme Court first considered issues related to the present appeal in *Henry v Dow Chem Co*, 473 Mich 63; 701 NW2d 684 (2005) (*Henry I*), describing the basic facts and procedural history as follows:

> Defendant, The Dow Chemical Company, has maintained a plant on the banks of the Tittabawassee River in Midland, Michigan, for over a century. The plant has produced a host of products, including, to name only a few, "styrene, butadiene, picric acid, mustard gas, Saran Wrap, Styrofoam, Agent Orange, and various pesticides including Chlorpyrifos, Dursban and 2, 4, 5–trichlorophenol."
>
> According to plaintiffs and published reports from the MDEQ [Michigan Department of Environmental Quality], defendant's operations in Midland have had a deleterious effect on the local environment. In 2000, General Motors Corporation was testing soil samples in an area near the Tittabawassee River and the Saginaw River when it discovered the presence of dioxin, a hazardous chemical believed to cause a variety of health problems such as cancer, liver disease, and birth defects. By spring 2001, the MDEQ had confirmed the presence of dioxin in the soil of the Tittabawassee flood plain. Further investigation by the MDEQ indicated that defendant's Midland plant was the likely source of the dioxin.
>
> In March 2003, plaintiffs moved for certification of two classes in the Saginaw Circuit Court. The first class was composed of individuals who owned property in the flood plain of the Tittabawassee River and who alleged that their properties had declined in value because of the dioxin contamination. The second group consisted of individuals who have resided in the Tittabawassee flood plain area at some point since 1984 and who seek a court-supervised program of medical monitoring for the possible negative health effects of dioxin discharged from Dow's Midland plant. This latter class consists of 173 plaintiffs and, by defendant's estimation, "thousands" of putative members. [*Henry I*, 473 Mich at 69-70 (citations omitted).]

Defendant immediately moved under MCR 2.116(C)(8) for summary disposition of plaintiffs' medical monitoring claims, which involved requests for class certification and creation of a program, funded by defendant, to monitor the class members for future manifestations of dioxin-related disease. *Id*. at 68.

After the circuit court denied defendant's motion and the Court of Appeals denied defendant's interlocutory application for leave to appeal, our Supreme Court granted defendant's emergency application for leave to appeal. *Id*. at 70. In *Henry I*, the Court considered the viability of plaintiffs' medical monitoring claims, opining that plaintiffs had raised a novel issue within the context of "toxic tort" causes of action by alleging that defendant's negligence created only the *risk* of disease. *Id*. at 67, 71-72. The Court concluded that without proof of a present physical injury, plaintiffs did not assert a viable negligence claim under Michigan's common law. *Id*. at 68. The Court declined to create a cause of action for medical monitoring in Michigan, explaining that drastic changes to the common law ought to be left to the Legislature. *Id*. at 68, 82-88. The Court remanded the matter for entry of summary dismissal of plaintiffs' medical monitoring claim. *Id*. at 68.

After *Henry I*, plaintiffs' remaining proposed class, which plaintiffs estimated to include approximately 2,000 persons, consisted of all "persons owning real property within the 100-year flood plain of the Tittabawassee River on February 1, 2002." On remand, the circuit court dismissed plaintiffs' medical monitoring claims and certified the proposed class with respect to the remaining claims of negligence and nuisance. This Court granted defendant's application for leave to appeal the class certification. In a divided decision, we affirmed the class certification with respect to defendant's liability only. *Henry v Dow Chem Co*, unpublished opinion per curiam of the Court of Appeals, issued January 24, 2008 (Docket No. 266433). Defendant obtained leave to appeal to the Michigan Supreme Court. *Henry v Dow Chem Co*, 482 Mich 1043 (2008). The Michigan Supreme Court articulated the require-

ments for class certification in Michigan before concluding that "the circuit court potentially used an evaluative framework that is inconsistent with this Court's interpretation of the rule and articulation of the proper analysis for class certification . . . ." *Henry v Dow Chem Co*, 484 Mich 483, 496-504, 509; 772 NW2d 301 (2009) (*Henry II*). The Supreme Court remanded the matter to the circuit court for clarification. *Id*. at 507.

On remand, the circuit court concluded that it had applied the appropriate standard and reaffirmed plaintiffs' class certification. The certification was short-lived. After the United States Supreme Court clarified the requirements for class certification in *Wal-Mart Stores, Inc v Dukes*, 564 US 338; 131 S Ct 2541; 180 L Ed 2d 374 (2011), the circuit court revisited the certification. The circuit court concluded that plaintiffs had not demonstrated commonality under the standard expressed in *Wal-Mart Stores* and revoked plaintiffs' class certification.

Members of the proposed class were notified of the revocation, and on September 12, 2014, defendant filed the motion for summary disposition at the heart of the instant appeal. Defendant argued that plaintiffs suffered an injury no later than 1984, when the public became aware of contamination resulting from defendant's release of potentially harmful dioxins into the Tittabawassee River, and defendant sought dismissal of plaintiffs' claims as time-barred under MCR 2.116(C)(7). Defendant also sought summary disposition pursuant to MCR 2.116(C)(8), citing *Henry I* as proof that plaintiffs had not suffered a present physical injury and noting that, without injury, plaintiffs could not make a claim in negligence or nuisance.

The circuit court denied defendant's motion on July 17, 2015. With respect to the issue of present physical injury, the circuit court explained:

> Plaintiffs allege that [defendant's] handling and disposal of dioxin has caused a long-lasting and significant contamination of Plaintiffs' property; has created a continuing nuisance which unreasonably and significantly interferes with Plaintiffs' use and enjoyment of their property; has resulted in the inability of Plaintiffs to freely use their property; and has resulted in devaluation of the Plaintiffs' properties.
>
> . . . Plaintiffs allege that their injury is distinct and different from that suffered by the general public because the dioxin released by [defendant] into the Tittabawassee [R]iver directly and permanently contaminated their individual private property as well as public property, has unreasonably interfered with [P]laintiffs' use and enjoyment of both public and private property, and has caused Plaintiffs to suffer individual financial harm in the form of decreased property values. Therefore, such allegation of present, physical injury, in addition to resulting financial damage, satisfies the pleading requirements of Michigan law for the tort of negligence.

The circuit court also determined that plaintiffs' remaining causes of action were not time-barred, reasoning that

> [t]he types of injuries Plaintiffs allege began, at the earliest, in February of 2002, and Plaintiffs' initial action here was filed well within the three years allowed by MCL 600.5805. Plaintiffs' causes of action accrued in February of 2002 when the MDEQ's phase I sampling results were released to the public and concluded that elevated dioxin concentrations were pervasive in the Tittabawassee river floodplain. Prior to this time, Plaintiffs were free to use and enjoy their property without worry or restriction, and to sell their property without loss of value. After this time, MDEQ's dioxin-based restrictions unreasonably and significantly interfered with Plaintiffs' use and enjoyment of

their property, prevented Plaintiffs from freely using their property, and devalued Plaintiffs' property.

Defendant filed an application for leave to appeal the circuit court order in this Court on August 7, 2015. While the application was pending, plaintiffs sought leave to file a joint amended and supplemental complaint. The circuit court denied the request, instead finding that plaintiffs' claims had been misjoined. The circuit court severed the claims in plaintiffs' third amended class action complaint, directing each plaintiff wishing to pursue a claim against defendant to raise specific allegations in an individual complaint before February 5, 2016.

This Court denied defendant's request for leave to appeal the order denying defendant's motion for summary disposition. *Henry v Dow Chem Co*, unpublished order of the Court of Appeals, entered December 17, 2015 (Docket No. 328716). Thereafter, defendant applied for leave to appeal to the Michigan Supreme Court, and, in lieu of granting leave to appeal, the Supreme Court remanded the matter to this Court for consideration as on leave granted. *Henry v Dow Chem Co*, 499 Mich 965 (2016). By the time the Supreme Court ordered the remand, 43 individual complaints had been filed in the circuit court by plaintiffs owning property in the Tittabawassee River flood plain as of February 1, 2002. Defendant has not challenged, and the circuit court has not ruled on, any of the pending individual complaints. Our consideration is limited to the issues defendant raises with respect to the September 12, 2014 motion for summary disposition.

II. STATUTE OF LIMITATIONS

Defendant argues that the circuit court erred when it denied defendant's motion for summary disposition

pursuant to MCR 2.116(C)(7) after finding that plaintiffs' complaint was filed within the applicable three-year limitations period. We disagree.

"This Court reviews de novo a trial court's decision on a motion for summary disposition under MCR 2.116(C)(7)." *Terlecki v Stewart*, 278 Mich App 644, 649; 754 NW2d 899 (2008); see also *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When addressing a motion under MCR 2.116(C)(7), we consider all documentary evidence submitted by the parties, *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001), and we "accept as true the allegations of the complaint unless contradicted by the parties' documentary submissions," *Terlecki*, 278 Mich App at 649. "In the absence of disputed facts, we also review de novo whether a cause of action is barred by the applicable statute of limitations." *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378, 386; 738 NW2d 664 (2007). Summary disposition under MCR 2.116(C)(7) is proper when a claim is barred by the statute of limitations. *Terlecki*, 278 Mich App at 649.

The parties do not dispute that the applicable limitations period is three years for property damage claims arising in negligence and nuisance. MCL 600.5805(10). The parties disagree, however, on when the period of limitations started to run. Under MCL 600.5827, the limitations period begins to run at "the time the claim accrues," which is "the time the wrong upon which the claim is based was done regardless of the time when damage results." See also *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 279; 769 NW2d 234 (2009). According to the Supreme Court, the "wrong is done when the plaintiff is harmed rather than when

the defendant acted." *Trentadue*, 479 Mich at 388 (quotation marks and citation omitted). And, according to this Court, "[o]nce all of the elements of an action for . . . injury, including the element of damage, are present, the claim accrues and the statute of limitations begins to run." *Froling Trust*, 283 Mich App at 290 (quotation marks and citation omitted; alteration in original).

Plaintiffs espouse injury in the form of direct contamination of their property with dioxins, toxic chemicals allegedly accumulating in the flood plain soil as a result of defendant's upstream activities. Plaintiffs also claim that recent warnings and restrictions, issued by the MDEQ after the 2002 discovery of dioxins in the flood plain soil, have led to a significant loss of the use and enjoyment of plaintiffs' property and a diminution in property value.

In their third amended class action complaint, plaintiffs allege specific facts to support the argument that they did not sustain injury until, at the earliest, February 2002, when the MDEQ released "the first in a series of bulletins to inform area communities about progress, future plans, meeting dates, and other activities regarding the Tittabawassee/Saginaw River Flood Plain Dioxin Environmental Assessment Initiative." In the 2002 notice, the MDEQ explained that it had discovered "the presence of significant concentrations of dioxin in soil located in an area of the flood plain" in 2000, suggesting "the possibility that dioxins have migrated along the Tittabawassee River . . . and have been deposited onto the Tittabawassee River flood plain." MDEQ Environmental Response Division, *Information Bulletin: Tittabawassee/Saginaw River Flood Plain, Environmental Assessment Initiative*, February 2002, p 1. The 2002 notice alerted plaintiffs

to the *possibility* that dioxins were present in their soil, but stated that further analysis would determine the full extent of soil contamination. The MDEQ informed area residents, including plaintiffs, that it would *begin* an investigation of dioxin presence in floodplain soil in "Spring 2002." *Id*. at 2. In the spring of 2002, the MDEQ issued warnings to residents via a dioxin fact sheet advising that children should not play in the soil or sediment near contamination sites. Plaintiffs brought suit in March 2003. In June 2003, the MDEQ released another bulletin confirming the presence of toxic levels of dioxin within the flood plain and connecting the dioxin contamination with defendant's activities. In conjunction with the 2003 bulletin, the MDEQ released a supplemental advisory to the owners of "all property within the 100-year flood plain downstream of the city of Midland, that is frequently flooded by the Tittabawassee River," requiring disclosure to any person acquiring an interest in the property of "the general nature and extent of contamination" in order to "reduce health and environmental risks that would otherwise result from the actions of uninformed property owners[.]" MDEQ, *Supplemental Advisory: Regarding Part 201 Requirements Applicable to Property Contaminated by Dioxin*.

Defendant argues that plaintiffs' claims accrued no later than 1984 when, as plaintiffs concede, the public was first made aware of the presence of dioxins in the Tittabawassee River. Defendant offers a number of documentary exhibits in support of its assertion that there was evidence of dioxin pollution in the Tittabawassee River available to the public in the early 1980s. According to defendant, evidence of dioxins in the river put plaintiffs on notice that their land might also be contaminated, and the information contained in the MDEQ fact sheet could therefore cause plaintiffs noth-

ing more than continuing damages from a previous injury. Noting the Michigan Supreme Court's abrogation of the discovery doctrine and the continuing violations doctrine, defendant argues that plaintiffs' claims were brought well outside the three-year statute of limitations.

We disagree with the assertion that plaintiffs' claims accrued in the early 1980s when defendant's activities were first connected to toxic dioxin contamination of the Tittabawassee River. Again, for purposes of the limitations statute, the wrong is done and the claim accrues when the plaintiff is *harmed* rather than when the defendant acted. Defendant does not put forth any evidence to prove that its activities directly harmed plaintiff property owners as early as it harmed the waters of the Tittabawassee River. That is, nothing suggests that the soil contamination occurred as early as did the initial contamination of the water. While defendant's exhibits unequivocally illustrate public knowledge of river contamination and the dangers posed by the consumption of dioxin-exposed fish as early as the 1980s, none of them suggest that dangerous levels of dioxin had reached the flood plain soils. We disagree with defendant's contention that toxic contamination of the river, its runoff, and its floodwaters is the same as contamination of soil and sediment and that public notice of the contamination of the water is enough to place ordinary property owners on notice that nearby property may also be contaminated. The documentary evidence before this Court tends to support the inference that contamination of the flood plain soil did not occur until many years after the contamination of the Tittabawassee River. In October 2002, defendant issued a press release acknowledging concerns over "the levels of dioxin *found* in the Tittabawassee River flood plain by the [MDEQ] in 2002,"

and insisting that since 1985, it had "believed that the levels of dioxins in the river were not significant." (Emphasis added.) Defendant's assertion that the public was aware of flood plain soil contamination in the 1980s is further contradicted by the admission of the Environmental Protection Agency (EPA) in a 2004 memorandum indicating that the EPA had conducted a study of the Tittabawassee flood plain in 1988 and concluded that "sediment contamination by dioxins was not likely to be significant." In the same 2004 memorandum, the EPA acknowledged that based on "recent" data, its "original conclusion regarding dioxin in sediments was not correct."

We also disagree with plaintiffs' argument that the harm did not occur until plaintiffs "learned that the levels of dioxin released by [defendant] into the River had accumulated in floodplain soils deposited onto their properties at levels so high that the MDEQ issued notices restricting Property Owners' rights to use those properties." As our Supreme Court made clear when it abrogated the common-law discovery rule in *Trentadue*, 479 Mich at 387-393, the period of limitations begins to run when a plaintiff suffers harm, not when a plaintiff first learns of the harm. Regardless of when plaintiffs were presented with adequate information to support their claims, their claims accrued and the period of limitations began to run when plaintiffs first suffered the harm of toxic levels of dioxin present in their soil. However, we find the distinction here to be one without a practical difference.

The 2002 MDEQ notice did not simply inform plaintiffs of the harm caused by defendant's activities. It marked the creation of the damages element necessary for plaintiffs' nuisance and negligence claims. Plaintiffs' damages, including loss of the use and enjoyment

of their property and depreciation of their property values, arose from the harm created when dioxins in their soil reached potentially toxic levels, but the damages did not exist in any tangible form until the MDEQ published its 2002 notice. As the circuit court aptly noted, "Prior to this time, Plaintiffs were free to use and enjoy their property without worry or restriction, and to sell their property without loss of value." A claim does not accrue for purposes of the limitations statute until every element of the claim, *including damages*, is present. *Froling Trust*, 283 Mich App at 290. Plaintiffs' claims did not accrue until the 2002 MDEQ notice was released and plaintiffs first suffered damages as a result of dioxin contamination. The circuit court therefore did not err when it found that plaintiffs' March 2003 complaint was filed within the three-year limitations period, and the court properly denied defendant's motion for summary disposition under MCR 2.116(C)(7).

Although defendant argues otherwise, we find that our conclusion is consistent with our Supreme Court's holdings in *Trentadue* and *Garg v Macomb Co Community Mental Health Servs*, 472 Mich 263; 696 NW2d 646 (2005). In *Trentadue*, the Supreme Court abrogated the discovery doctrine after finding that "the statutory scheme is exclusive and thus precludes th[e] common-law practice of tolling accrual based on discovery in cases where none of the statutory tolling provisions apply." *Trentadue*, 479 Mich at 389. The Court explained that "[u]nder a discovery-based analysis, a claim does not accrue until a plaintiff knows, or objectively should know, that he has a cause of action and can allege it in a proper complaint." *Id*. at 389. However, the *Trentadue* Court confirmed that a claim accrues when the wrong is done, and "[t]he wrong is done when the plaintiff is harmed[.]" *Id*. at 388. In

other words, *Trentadue* abrogated the discovery rule, which had applied to extend the period of limitations on a claim for which all of the elements were present, but one or more of the necessary elements was unknown, or should not reasonably have been known, to the plaintiff. It does not follow that application of the discovery doctrine was necessary to extend the period of limitations on a claim that had not yet accrued because one of the elements was not yet present. Presence of a necessary element and knowledge of an existing cause of action are simply not the same. Application of the discovery doctrine was not necessary to save plaintiffs' claims from the period of limitations, which did not begin to run until all the elements of plaintiffs' nuisance and negligence claims were present. The *Trentadue* Court's abrogation of the discovery doctrine does not limit our decision here.

Similarly, in *Garg*, 472 Mich at 290, the Michigan Supreme Court expressly abrogated the "continuing-wrongs doctrine" after finding that use of the doctrine was contrary to the express intent of the Legislature. The continuing-wrongs doctrine, an exception to the statute of limitations that was previously recognized by our courts, states that "[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 the defendant's tortious conduct continues." *Horvath v Delida*, 213 Mich App 620, 626; 540 NW2d 760 (1995). The *Garg* Court held that the continuing-wrongs doctrine is contrary to the plain language of MCL 600.5805 and "has no continued place in the jurisprudence of this state." *Garg*, 472 Mich at 290. The *Garg* Court's abrogation of the continuing-wrongs doctrine is not relevant to the issues presented in this case. Plaintiffs filed their complaint within the appli-

cable limitations period and have not attempted to rely on the continuing-wrongs doctrine to extend that period beyond the three years from the time their claims accrued.

Because we find that plaintiffs' complaint was filed within the three-year limitations period under Michigan law, we need not address plaintiffs' contention that the discovery rule in § 309 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 USC 9601 *et seq*., preempts our Supreme Court's interpretation of the Michigan statute of limitations to provide for application of a discovery rule in toxic tort cases. See 42 USC 9658(b)(4)(A).

III. PRESENT PHYSICAL INJURY

Next, defendant argues that plaintiffs failed to allege a present physical injury and that the trial court erred by denying summary disposition under MCR 2.116(C)(8). We disagree.

Summary disposition under MCR 2.116(C)(8) is appropriate when a plaintiff "has failed to state a claim on which relief can be granted." "A motion brought under subrule (C)(8) tests the legal sufficiency of the complaint solely on the basis of the pleadings." *Dalley v Dykema Gossett PLLC*, 287 Mich App 296, 304; 788 NW2d 679 (2010). "A party may not support a motion under subrule (C)(8) with documentary evidence such as affidavits, depositions, or admissions." *Id*. at 305. When this Court reviews motions for summary disposition under MCR 2.116(C)(8), we accept all well-pleaded factual allegations as true and construe them in a light most favorable to the nonmovant. *Maiden*, 461 Mich at 119. A motion brought 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 a right of recovery." *Dalley*, 287 Mich App at 305 (quotation marks and citation omitted).

In support of its motion for summary disposition under MCR 2.116(C)(8), defendant relies heavily on the Supreme Court's opinion in *Henry I*. Defendant interprets *Henry I* as requiring plaintiffs to establish a present physical injury to person or property in order to bring any tort action, including negligence and nuisance. However, as previously discussed, the *Henry I* Court addressed a novel claim for medical monitoring, brought by one of two distinct classes of individuals. *Henry I*, 473 Mich at 67. The medical monitoring class "consisted of individuals who have resided in the Tittabawassee flood plain area at some point since 1984 and who seek a court-supervised program of medical monitoring for the possible negative health effects of dioxin," and the medical monitoring class was separate and distinct from a second class "composed of individuals who owned property in the flood plain of the Tittabawassee River . . . who alleged that their properties had declined in value because of the dioxin contamination." *Id*. at 70. In *Henry I*, the Court considered only the claim for medical monitoring, finding that negative health effects had yet to present themselves and that plaintiffs' claim was based solely on fear of future physical injuries. *Id*. at 71-72. The Supreme Court "reaffirm[ed] the principle that a plaintiff must demonstrate a present physical injury to person or property *in addition to* economic losses that result from that injury in order to recover under a negligence theory," *id*. at 75-76, and it remanded the matter to the circuit court for entry of summary disposition in favor of defendant of plaintiffs' medical monitoring claim. *Id*. at 102. However, it made no

ruling with regard to the sufficiency of the negligence and nuisance claims raised by the class of property owners.

Later, in *Henry II*, the Supreme Court considered the circuit court's certification of the second class, estimated to consist of approximately 2,000 persons, with respect to the remaining claims of negligence and nuisance. *Henry II*, 484 Mich at 491-492. Again, the Court did not consider the sufficiency of plaintiffs' remaining claims, but remanded the matter to the circuit court for evaluation in accordance with its articulated requirements for class certification. *Id*. at 509. In a separate opinion, Justice CORRIGAN, author of the majority opinion in *Henry I*, suggested that the circuit court carefully consider on remand the issue of actual injury, which many of the 2,000 proposed class members were unable to prove. Justice CORRIGAN explained that "*Henry I* created a bright line rule by unambiguously requiring a plaintiff alleging *negligence* to prove *present physical injury*," before opining that "the owners of uncontaminated property do not have present physical injuries" and "cannot allege *negligence* under Michigan law." *Henry II*, 484 Mich at 533 (CORRIGAN, J., concurring in part; some emphasis added). While the *Henry I* Court declined to expand the definition of present physical injury to include medical monitoring, it did not, as defendant contends, hold that plaintiffs could not succeed in proving some present injury, or that the requirement of present physical injury applied in all tort cases. We agree with Justice CORRIGAN's conclusion that owners of uncontaminated property could not demonstrate present injury to support a negligence action, regardless of whether they had already incurred economic damages. See *id*. As the Supreme Court explained in *Henry I*:

> It is no answer to argue, as plaintiffs have, that the need to pay for medical monitoring is *itself* a present injury sufficient to sustain a cause of action for negligence. In so doing, plaintiffs attempt to blur the distinction between "injury" and "damages." While plaintiffs arguably demonstrate economic losses that would otherwise satisfy the "damages" element of a traditional tort claim, the fact remains that these economic losses are wholly derivative of a *possible*, *future* injury rather than an *actual*, *present* injury. A financial "injury" is simply not a present physical injury, and thus not cognizable under our tort system. [*Henry I*, 473 Mich at 78.]

As Justice CORRIGAN noted in her partial concurrence in *Henry II*, many of the proposed class members were unable to prove that their property was contaminated and that they suffered anything more than economic losses. *Henry II*, 484 Mich at 533. However, this fact did not entitle defendant to summary disposition of plaintiffs' negligence claim under MCR 2.116(C)(8). A motion under MCR 2.116(C)(8) must be based on the pleadings alone and construed in favor of the nonmoving party. Plaintiffs, in their third amended class action complaint, alleged actual injury in the form of direct contamination and restrictions on the use of their property. Factual issues relating to damages were not properly before the circuit court and are not before this Court on appeal. Accepted as true, plaintiffs' allegations identify a present physical injury to support their negligence claims.

Similarly, the trial court did not err when it denied defendant's motion for summary disposition of plaintiffs' nuisance claims under MCR 2.116(C)(8). Plaintiffs alleged both public and private nuisance. "A private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land." *Adkins v Thomas Solvent Co*, 440 Mich 293, 302; 487 NW2d 715 (1992). "The essence of private nuisance is

the protection of a property owner's or occupier's reasonable comfort in occupation of the land in question." *Id*. at 303. "A public nuisance is an unreasonable interference with a common right enjoyed by the general public." *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 190; 540 NW2d 297 (1995). According to our Supreme Court, "[t]here are countless ways to interfere with the use and enjoyment of land including interference with the physical condition of the land itself, disturbance in the comfort or conveniences of the occupant including his peace of mind, and threat of future injury that is a present menace and interference with enjoyment." *Adkins*, 440 Mich at 303. "The pollution of ground water may constitute a public or private nuisance." *Id*. at 304. Importantly, while a defect threatening or imposing danger may support a cause of action for nuisance, *id*. at 303-304, property depreciation related to fear of future injuries, on its own, is insufficient, *id*. at 311-312.

Defendant's contention that plaintiffs have only stated a claim for fear of future injury is not supported by the record. In their third amended class action complaint, plaintiffs alleged injury in the form of direct contamination of their groundwater and restrictions on the use of their property. In contrast to plaintiffs' claims for personal injury, which were dismissed after *Henry I* because the injuries had not yet manifested themselves in physical form, plaintiffs are alleging actual injury to their property, as well as a depreciation of property value. Specifically, and among other allegations, plaintiffs claim that based on the 2002 MDEQ notice and subsequent investigation by the MDEQ and the EPA, their children are no longer safe to play in the soil or sediment near sites of known or suspected contamination. Plaintiffs allege that dioxins were detected in samples extracted from local, free-

range chickens owned by residents with property in the flood plain. Plaintiffs allege that their ability to sell their homes and move from the area has been impeded because they are now required to disclose information regarding the contamination and risk of harm to potential home buyers. Although the diminution in property value on its own would not support plaintiffs' nuisance claims, plaintiffs have also alleged specific, existing defects caused by defendant's actions that constitute a significant and continuing interference with the use and enjoyment of plaintiffs' property. Accepted as true, these allegations preclude summary disposition under MCR 2.116(C)(8).

IV. JUDICIAL ESTOPPEL

Finally, defendant argues that the trial court erred by denying its motion for summary disposition based on judicial estoppel. According to defendant, plaintiffs should be estopped from asserting a present physical injury where they repeatedly represented their damages as limited to a threat of future injury. We disagree.

We review de novo the application of judicial estoppel. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008); *Szyszlo v Akowitz*, 296 Mich App 40, 46; 818 NW2d 424 (2012). "Judicial estoppel is an equitable doctrine, which 'generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.' " *Spohn v Van Dyke Pub Sch*, 296 Mich App 470, 479; 822 NW2d 239 (2012) (citation omitted). "Judicial estoppel is an 'extraordinary remedy to be invoked when a party's inconsistent behavior will otherwise result in a miscarriage of justice.' " *Opland v Kiesgan*, 234 Mich App 352, 364; 594 NW2d 505 (1999)

(quotation marks, citation, and brackets omitted). "It is not meant to be a technical defense for litigants seeking to derail potentially meritorious claims . . . ." *Id*. (quotation marks and citations omitted). Michigan has adopted the "prior-success model" of judicial estoppel. See *Paschke v Retool Indus*, 445 Mich 502, 509; 519 NW2d 441 (1994) (involving administrative proceedings). This means that "[f]or judicial estoppel to apply, a party must have successfully and 'unequivocally' asserted a position in a prior proceeding that is 'wholly inconsistent' with the position now taken." *Szyszlo*, 296 Mich App at 51, quoting *Paschke*, 445 Mich at 509-510. "[T]he mere assertion of inconsistent positions is not sufficient to invoke estoppel; rather, there must be some indication that the court in the earlier proceeding accepted that party's position as true. Further, in order for the doctrine of judicial estoppel to apply, the claims must be wholly inconsistent." *Spohn*, 296 Mich App at 480 (quotation marks and citation omitted).

Defendant argues that plaintiffs should be estopped from asserting that they have suffered a present physical injury because they supported their request for class certification and medical monitoring with a representation that the claims shared by each member of the class were based on the threat of future injury. However, defendant's argument is not supported by the record. Plaintiffs have not asserted wholly inconsistent arguments. As we have already noted, plaintiffs' third amended class action complaint references present injury in the form of direct contamination and interference with plaintiffs' use and enjoyment of property to support claims of negligence and nuisance. The complaint, which defendant now challenges, was filed in 2003, before the Supreme Court's decisions in *Henry*

I and *Henry II*, and plaintiffs' positions throughout the proceedings have been consistent with their assertion of present physical injury.

In *Henry I*, the Supreme Court considered plaintiffs' claims for future injury with respect to the medical monitoring claim, but there is no evidence that plaintiffs unequivocally stated that their *only* injuries were related to threats of future harm or that the Court relied on any such representation. Plaintiffs' negligence and nuisance claims, which are based on allegations separate and distinct from those supporting plaintiffs' medical monitoring claims, were not at issue in *Henry I*. Indeed, the Court in *Henry I* was careful to limit application of its decision to plaintiffs' request for medical monitoring. Then, in *Henry II*, the Court explicitly stated that it was considering a dispute concerning the circuit court's decision to grant plaintiffs' motion for class certification, "based on theories of negligence and nuisance," and arising from allegations that plaintiffs, "along with the proposed class members, have incurred property damage caused by the dioxin contamination." *Henry II*, 484 Mich at 488-489. The Supreme Court's statement directly contradicts any implication that the Court assumed that all of plaintiffs' claims were based only on the threat of future injury. In any case, plaintiffs did not prevail in their request for medical monitoring, which was based only on the threat of future injury. Nor did plaintiffs successfully obtain class certification. Judicial estoppel simply does not apply.

V. CONCLUSION

We find that the trial court did not err when it determined that plaintiffs' claims accrued in 2002 and were not barred by the statute of limitations. We also conclude that the trial court did not err when it

determined that plaintiffs have alleged a present physical injury with regard to their negligence and nuisance claims and that the doctrine of judicial estoppel does not bar plaintiffs' claims. The trial court properly denied defendant's request for summary disposition pursuant to MCR 2.116(C)(7) and (C)(8).

Affirmed.

SAAD, J., concurred with JANSEN, J.

GADOLA, P.J. (*dissenting*). Defendant appeals as on leave granted the July 17, 2015 order of the trial court denying its motion for summary disposition under MCR 2.116(C)(7)[1] and (C)(8). The majority opinion concludes, in part, that the trial court properly denied summary disposition under MCR 2.116(C)(7) upon finding that plaintiffs' claims were not barred by the statute of limitations. Because I disagree with this conclusion, I respectfully dissent.

This case involves plaintiffs' contention that defendant is responsible for the presence of dioxin on their real property located in the Tittabawassee River flood plain, downstream from defendant's plant. As described by the majority opinion, this lawsuit has a lengthy history. Plaintiffs acknowledge in their amended complaint that dioxin was present in the Tittabawassee River by the 1980s. In fact, according to a 2004 letter from the United States Environmental Protection Agency (EPA), as early as the 1970s dioxin emissions from defendant's Midland plant had been identified as the primary source of dioxin contamina-

[1] The trial court's order does not specify that summary disposition was denied under MCR 2.116(C)(7). Defendant, however, moved for summary disposition pursuant to that subsection on the ground that plaintiffs' claims were barred by the statute of limitations, and the trial court specifically ruled against defendant on that ground.

tion in that area and had further been identified as posing a high risk of harm to human health and the environment. Defendant avers that throughout the 1970s and 1980s, the dioxin contamination of the river and the flood plain featured prominently in the local and national media, state and federal regulatory notices were released, congressional hearings were held, a Michigan Attorney General Special Task Force was formed, an EPA study released in 1985 confirmed that defendant's wastewater was the source of the dioxin in the river, and a 1986 publication of the DNR warned residents to avoid contact with floodwater downstream from defendant's Midland plant.

In any event, the parties do not dispute that in 2001 the Michigan Department of Environmental Quality (MDEQ) again confirmed the presence of dioxin in the soil of the river's flood plain and later indicated that defendant's Midland, Michigan, plant was the likely source of the contamination. In February 2002, the MDEQ issued an information bulletin regarding an environmental assessment of the river's flood plain. In 2003, plaintiffs filed this action alleging that their real property had declined in value as a result of the dioxin contamination emanating from defendant's actions and alleging liability based on theories of negligence and nuisance.

After much litigation and appellate review, as described in the majority opinion, defendant moved before the trial court for summary disposition, in part pursuant to MCR 2.116(C)(7), arguing that plaintiffs' claims were barred by the applicable statute of limitations. The trial court rejected this argument, concluding that

> [t]he types of injuries Plaintiffs allege began, at the earliest, in February of 2002, and Plaintiffs' initial action

> here was filed well within the three years allowed by MCL 600.5805. Plaintiffs' causes of action accrued in February of 2002 when the MDEQ's phase I sampling results were released to the public and concluded that elevated dioxin concentrations were pervasive in the Tittabawassee [R]iver floodplain. Prior to this time, Plaintiffs were free to use and enjoy their property without worry or restriction, and to sell their property without loss of value. After this time, MDEQ's dioxin-based restrictions unreasonably and significantly interfered with Plaintiffs' use and enjoyment of their property, prevented Plaintiffs from freely using their property, and devalued Plaintiffs' property.

The trial court consequently denied defendant's motion for summary disposition pursuant to MCR 2.116(C)(7). Defendant now appeals to this Court from that decision.

This Court reviews de novo the grant or denial of summary disposition. *Graham v Foster*, 500 Mich 23, 28; 893 NW2d 319 (2017). When reviewing a trial court's decision on a motion for summary disposition under MCR 2.116(C)(7), this Court considers all documentary evidence and accepts the complaint as factually accurate unless it is specifically contradicted by affidavits or other appropriate documents. *Frank v Linkner*, 500 Mich 133, 140; 894 NW2d 574 (2017). Further, we consider all documentary evidence in the light most favorable to the nonmoving party. *RDM Holdings, Ltd v Continental Plastics Co*, 281 Mich App 678, 687; 762 NW2d 529 (2008). If there is no factual dispute, whether the claim is barred by the statute of limitations is a question of law for the Court. *Id*.

Defendant argues that the trial court erred by denying its motion for summary disposition because plaintiffs' claims were barred by the statute of limitations. A statute of limitations is a " 'law that bars

claims after a specified period; specif[ically], a statute establishing a time limit for suing in a civil case, based on the date when the claim *accrued*.' " *Frank*, 500 Mich at 142, quoting *Black's Law Dictionary* (10th ed) (alteration in original). In this case, the parties agree that the applicable statute of limitations is MCL 600.5805(10), which states that "the period of limitations is 3 years after the time of the death or injury for all actions to recover damages for the death of a person, or for injury to a person or property."

The parties dispute, however, when the three-year period of limitations began and whether plaintiffs timely filed their claim within that three-year period of limitations. To answer those questions, we must determine when plaintiffs' claims accrued for purposes of calculating the starting point of the three-year limitations period. The time of accrual for claims subject to the limitations period of MCL 600.5805(10) is defined by MCL 600.5827, which provides that the limitations period begins to run "from the time the claim accrues," and that "the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results." See also *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378, 388; 738 NW2d 664 (2007).

Our Supreme Court in *Trentadue*, interpreting this language, explained that "the wrong is done when the plaintiff is harmed rather than when the defendant acted." *Id*. at 388 (quotation marks, citation, and alteration omitted). This language stems from our Supreme Court's decision in *Stephens v Dixon*, 449 Mich 531, 534-535; 536 NW2d 755 (1995), which in turn referred to its decision in *Connelly v Paul Ruddy's Equip Repair & Serv Co*, 388 Mich 146, 151; 200 NW2d 70 (1972), in which our Supreme Court stated, "[o]nce

all of the elements of an action for . . . injury, including the element of damage, are present, the claim accrues and the statute of limitations begins to run. Later damages may result, but they give rise to no new cause of action, nor does the statute of limitations begin to run anew as each item of damage is incurred." *Id.*; see *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 290; 769 NW2d 234 (2009).

The Court in *Trentadue* also expressly rejected the common-law discovery rule, stating that "the statutory scheme is exclusive and thus precludes this common-law practice of tolling accrual based on discovery in cases where none of the statutory tolling provisions apply." *Trentadue*, 479 Mich at 389. Similarly, in *Garg v Macomb Co Community Mental Health Servs*, 472 Mich 263, 282; 696 NW2d 646 (2005), our Supreme Court held that Michigan does not recognize the "continuing violations" doctrine, explaining that nothing in the statute of limitations "permits 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." Thus, in determining when plaintiffs' claims accrued under MCL 600.5827, and mindful of *Trentadue* and *Garg*, we must ascertain when plaintiffs were harmed, not when plaintiffs learned they had been harmed nor when they learned the extent of the harm. We undertake this analysis mindful of the precept that the claim accrues and the period of limitations begins to run once all elements of the action, including damages, are present.

The majority opinion in this case states that "[r]egardless of when plaintiffs were presented with ad-

equate information to support their claims, their claims accrued and the period of limitations began to run when plaintiffs first suffered the harm of toxic levels of dioxin present in their soil." I agree. The majority, however, then concludes that "[t]he 2002 MDEQ notice did not simply inform plaintiffs of the harm caused by defendant's activities. It marked the creation of the damages element necessary for plaintiffs' nuisance and negligence claims. Plaintiffs' damages, including the loss of the use and enjoyment of their property and depreciation of their property values, arose from the harm of dioxins in their soil reaching potentially toxic levels but did not exist in any tangible form until the MDEQ published its 2002 notice." On this point, I must disagree. It may be true that the value of plaintiffs' property changed when the MDEQ published its 2002 bulletin, but plaintiffs' discovery in 2002 that their damages were greater than originally supposed when the dioxin was deposited on their properties, possibly as early as the 1970s, did not create a new accrual date for plaintiffs' claims. Such reasoning overlooks the clear directive of MCL 600.5827 that "the claim accrues at the time the wrong upon which the claim is based was done *regardless of the time when damage results*." (Emphasis added.)

The harm to plaintiffs is the presence of dioxins in the soil of their properties. The publication of the MDEQ bulletin did not place the dioxins in plaintiffs' soil. Presumably, defendant's actions did that. The MDEQ bulletin was, at most, new information to plaintiffs and others that dioxins were present in the soil of the river's flood plain at a potentially harmful level; in other words, the bulletin facilitated the "discovery" of the level of damages. Thus, the publication of the MDEQ bulletin is not the "wrong" on which the claim is based as envisioned by MCL 600.5827, nor is it

the "harm" described by *Trentadue*. The MDEQ bulletin, at most, marks the *discovery* by plaintiffs of the extent of the harm and the level of damages.

Because Michigan has rejected the discovery rule as a mechanism to toll the running of the period of limitations and because MCL 600.5827 is explicit that the time when damage results is not the operative factor for accrual, the 2002 issuance of the MDEQ bulletin does not alter in any way the date on which the harm occurred. Instead, the period of limitations began to run from the date that plaintiffs were harmed, which occurred (if at all) when the dioxin dumped into the river by defendant reached plaintiffs' properties or otherwise reached a particular plaintiff. A claim then accrued, regardless of whether it was possible at that time to calculate the level of monetary damage. The circuit court erred by calculating the running of the period of limitations from the date the 2002 MDEQ bulletin was issued. I would therefore remand this case to the circuit court to redetermine the accrual date of plaintiffs' claims. On remand, for defendant to prevail on its motion for summary disposition pursuant to MCR 2.116(C)(7) on the theory that plaintiffs' claims were barred by the statute of limitations, defendant would be required to establish that plaintiffs were harmed, if at all, more than three years before plaintiffs filed their complaint.