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DAVID H. SAWYER	2017
WILLIAM B. MURPHY	2019
MARK J. CAVANAGH	2021
KATHLEEN JANSEN	2019
HENRY WILLIAM SAAD	2021
JOEL P. HOEKSTRA	2017
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PETER D. O'CONNELL	2019
KURTIS T. WILDER	2017
PATRICK M. METER	2021
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PAT M. DONOFRIO	2017
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STEPHEN L. BORRELLO	2019
DEBORAH A. SERVITTO	2019
JANE M. BECKERING	2019
ELIZABETH L. GLEICHER	2019
CYNTHIA DIANE STEPHENS	2017
MICHAEL J. KELLY	2021
DOUGLAS B. SHAPIRO	2019
AMY RONAYNE KRAUSE	2021
MARK T. BOONSTRA	2021
MICHAEL J. RIORDAN	2019
MICHAEL F. GADOLA	2017

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	Term Expires January 1 of
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Justices	
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MARY BETH KELLY	2019
BRIAN K. ZAHRA	2023
BRIDGET M. McCORMACK	2021
DAVID F. VIVIANO	2017
RICHARD H. BERNSTEIN	2023

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TABLE OF CASES REPORTED

PAGE

P

R

S

T

COURT OF APPEALS CASES

PEOPLE v BOSCA

Docket No. 317633. Submitted December 2, 2014, at Detroit. Decided March 26, 2015, at 9:00 a.m. Leave to appeal sought.

Vincent Ralph Bosca was convicted by a jury in Macomb Circuit Court, David F. Viviano, J., of extortion, MCL 750.213; four counts of unlawful imprisonment, MCL 750.349b; four counts of assault with a dangerous weapon (felonious assault), MCL 750.82; possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b(a); delivery and manufacture of marijuana, MCL 333.7401(2)(d)(*iii*); and maintaining a drug house, MCL 333.7405(d). Four minor boys, assisted by defendant's son, broke into defendant's home and stole marijuana from defendant. Defendant and two of his associates lured the boys back to his home and forced them into the basement where they were held captive for approximately three hours. Defendant and his associates duct-taped the four boys to chairs; kicked and beat them; struck them with a firearm, the blunt end of a hatchet and the sheath of a sword; and threatened to harm them with the sword, the firearm, the hatchet, an electric circular saw, a cigar cutter, a pair of pliers, and a flammable liquid. Defendant claimed his intention was to obtain information so that he could contact the parents of the boys. Defendant was sentenced to 57 months to 20 years of imprisonment for the extortion conviction, 57 months to 15 years of imprisonment for each conviction of unlawful imprisonment, 2 to 4 years of imprisonment for each assault conviction and for the conviction of manufacture and delivery of marijuana, 2 years of imprisonment for the felony-firearm conviction, and 1 to 2 years of imprisonment for the conviction of maintaining a drug house. In addition to various restitution requirements, defendant was also required to register under the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq*. He appealed.

The Court of Appeals *held*:

1. The trial court properly denied defendant's motion for resentencing because the plain language of the applicable version of SORA required registration for a conviction of unlawful imprisonment of a minor. Offenses that are expressly listed in SORA,

such as unlawful imprisonment of a minor, need not include a sexual component. The trial court properly required defendant to register under SORA for his conviction of unlawful imprisonment of a minor even though the conduct underlying the conviction was not sexual in nature. The Court of Appeals suggested, however, that the Legislature consider amending the short title of the sex offenders registration act and including a definition of "sex offender" in light of the Legislature's decision to include as listed offenses certain nonsexual offenses against minors.

2. The trial court properly denied defendant's motion for new trial or judgment of acquittal because the jury's verdicts were not against the great weight of the evidence; that is, the evidence introduced at trial did not so heavily preponderate against the verdicts that allowing the verdicts to stand would be a miscarriage of justice. Defendant's convictions were supported by sufficient evidence; that is, the evidence taken in the light most favorable to the prosecution adequately supported a rational juror in finding defendant guilty beyond a reasonable doubt.

3. Defendant's claims of prosecutorial error were meritless, and the trial court properly denied defendant's motion for new trial or judgment of acquittal. The prosecution did not commit error during discovery by failing to supply defendant with the boys' medical records because the prosecution is not required to search for and obtain evidence sought by a defendant. The prosecution's duty is to provide a defendant with potentially exculpatory evidence in its possession. In addition, the prosecution adequately disclosed to the jury the sentencing agreement made with defendant's associate in exchange for the associate's testimony at trial. Further, defendant failed to show how including a minimal amount of marijuana belonging to his associate in the total quantity on which his drug charge was based would have negated the drug charge against him or have been so prejudicial to him that he was denied a fair trial. Defendant's associate admitted that the small amount of marijuana belonged to him, and the jury was made aware of that fact. Finally, the prosecution did not err by demonstrating the operation of the circular saw defendant and his associates used to threaten the boys during their unlawful imprisonment. The demonstration was a brief repetition of a demonstration of the saw that occurred during trial and in light of the amount of evidence and testimony at trial regarding what took place in defendant's basement, the demonstration of the circular saw was not so unfair that defendant was deprived of his right to due process.

4. Defendant was not denied the effective assistance of counsel at his trial. Defendant failed to demonstrate how he was prejudiced by his counsel's alleged lack of experience. Moreover, defendant failed to establish that his counsel's conduct related to discovery was objectively unreasonable or prejudicial. Defense counsel's decisions regarding the use of discovery materials at trial are presumed to be matters of trial strategy, and defendant failed to show that any change in his counsel's use of discovery materials or other evidence would have altered the outcome of the proceedings. Additionally, defense counsel's alleged failure to submit written jury instructions was not erroneous because counsel did submit instructions regarding defendant's affirmative defense under the Michigan Medical Marihuana Act, MCL 333.26421 *et seq*., and because counsel engaged in extensive discussions about the jury instructions before counsel ultimately approved them. Defendant failed to prove that his counsel's approval of the instructions was insufficiently considered or ill-advised or that additional or different instructions would have altered the outcome of trial. Finally, defendant's assertion that the jury instructions as delivered were deficient failed because defendant did not identify or provide any jury instructions requested but not given, and defendant did not indicate how any omitted instructions prejudiced him.

5. Defendant's convictions of unlawful imprisonment of a minor and felonious assault did not violate the prohibition against double jeopardy because unlawful imprisonment of a minor and felonious assault each clearly require proof of an element that the other does not.

6. The trial court properly conducted a joint trial of defendant and one of his associates because both defendant and his associate asserted defenses that were fully consistent with one another and were neither mutually exclusive nor irreconcilable. The defenses asserted by defendant and his associate would not have forced the jury to believe either defendant or his associate at the expense of the other.

7. Defendant was not improperly bound over for trial after his preliminary examination. Because sufficient evidence presented at trial supported his convictions, his claim that the bindover was erroneous need not be addressed.

8. The trial court properly scored all but one of the offense variables applicable to defendant's convictions. Offense Variable (OV) 12, contemporaneous felonious criminal acts, was improperly scored at 25 points. OV 12 accounts for offenses other than the sentencing offense that occurred within 24 hours of the

sentencing offense but will not result in a separate conviction. In defendant's case, all offenses did occur within 24 hours of the sentencing offense, but each offense resulted in a separate conviction. Therefore, a score of 25 points for OV 12 was improper, and remand was necessary so that the trial court could amend defendant's judgment of sentence to reflect the proper OV 12 score. The error in scoring did not require resentencing, however, because the reduction in defendant's OV score did not alter the minimum sentence range under the sentencing guidelines.

9. The trial court did not clearly err by refusing to impose a sentence on defendant that represented a downward departure from the recommended sentence under the sentencing guidelines. At sentencing, the trial court reviewed the testimony and evidence elicited at trial, discussed the minors' credibility issues and the defenses asserted, and explained in significant detail the reasoning for its sentencing determination. Instead of departing downward, the trial court imposed on defendant a sentence near the bottom of the recommended guidelines range. There existed no substantial and compelling reasons for departure, and there was nothing exceptional about the case to justify a departure.

10. The trial court properly applied the 2011 version of SORA—the version in effect at the time of defendant's sentencing—in deciding to require defendant to register under SORA, even though SORA, as it existed at the time defendant committed the offenses, did not include unlawful imprisonment of a minor as a listed offense requiring registration. The retroactive application of the amended version of SORA did not offend the Ex Post Facto Clause of the United States or the Michigan Constitutions because SORA is not punitive in nature; rather, it is a regulatory scheme designed to protect the public and to provide a civil remedy.

11. Because SORA's registration requirement is not punitive as applied to adult offenders but is instead structured for and focused on the protection of the public, SORA registration does not constitute cruel and unusual punishment, even when the underlying offense has no sexual component.

12. Defendant's constitutional right to procedural due process was not violated by the absence of a hearing at which defendant could be heard and present a defense against his required SORA registration. SORA registration does not trigger procedural due process protections because registration does not represent the state's deprivation of a defendant's rights. The consequence of SORA registration is solely a result of a defendant's conviction

and is not an additional determination by the state that would require a defendant to receive notice and an opportunity to be heard.

13. Defendant's constitutional right to substantive due process was not violated when he was required to register under SORA for his conviction of an offense expressly included in the group of listed offenses for which registration is required, even though the conduct underlying the conviction did not include a sexual component. A substantive due process challenge is subject to rational basis review unless a fundamental right is implicated. SORA registration does not implicate a fundamental right; therefore, whether defendant's right to substantive due process was violated is subject to rational basis review. Requiring a defendant convicted of a nonsexual listed offense committed against a child is rationally related to SORA's stated legitimate government purpose of protecting the public, particularly children, from offenders who pose potential danger to the health, safety, morals, and welfare of society.

14. Including unlawful imprisonment of a minor in the group of listed offenses for which registration is required does not violate the Title-Object Clause of the Michigan Constitution because it neither offends the title-body standard nor represents a change of purpose. Defendant's title-body challenge failed because the title of the Sex Offenders Registration Act adequately expresses its contents, expresses the general purpose or object of the act, and gives the Legislature and the public fair notice of the challenged provision. Specifically, the title of SORA indicates that individuals convicted of certain offenses are required to register under the act, and those certain offenses are identified in the body of SORA as listed offenses, one of which is unlawful imprisonment of a minor. Defendant's contention that the short title of SORA does not adequately reflect the extension of SORA registration to certain nonsexual offenses involving minors also failed because the subject matter of the 2011 amendment to SORA that added unlawful imprisonment of a minor was germane to the original purpose of SORA, which has not changed appreciably since it was enacted in 1994.

Conviction is affirmed; remanded for correction of sentence.

1. SEX OFFENDERS REGISTRATION ACT (SORA) — LISTED OFFENSES — NONSEXUAL CONDUCT.

An offense requiring registration as a sex offender under SORA need not involve conduct of a sexual nature; the listed offenses in SORA expressly include unlawful imprisonment of a minor, and

there is no requirement that the conduct constituting unlawful imprisonment of a minor include a sexual component.

2. SEX OFFENDERS REGISTRATION ACT (SORA) — PURPOSE.

Although the Legislature's statement of SORA's purpose specifically states that it was enacted to prevent and protect against the commission of future criminal sexual acts by convicted sex offenders, the Legislature's addition of nonsexual offenses against children to the group of listed offenses appearing in SORA indicates that SORA's application is not limited to individuals whose offenses involved conduct of a sexual nature.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Eric J. Smith*, Prosecuting Attorney, and *Mary Jo Diegel*, Assistant Prosecuting Attorney, for the people.

Lawrence S. Katz for defendant.

Before: RIORDAN, P.J., and BECKERING and BOONSTRA, JJ.

BOONSTRA, J. Defendant appeals by right his jury trial convictions of extortion, MCL 750.213; four counts of unlawful imprisonment, MCL 750.349b; four counts of assault with a dangerous weapon (felonious assault),[1] MCL 750.82; possession of a firearm during the

[1] Defendant has characterized his convictions as convictions of assault and battery, MCL 750.81. Assault and battery is a misdemeanor. The judgment of sentence lists his convictions as "assault or assault and battery" and indeed cites MCL 750.81. Additionally, at least one pretrial order refers to the charges against defendant as being assault with intent to commit great bodily harm less than murder, MCL 750.84. However, the trial transcript reveals, and defendant correctly characterized at oral argument on appeal, that defendant was actually convicted of four counts of assault with a dangerous weapon, MCL 750.82. At sentencing, the court also referred to his convictions as being for assault with a dangerous weapon. Finally, the presentence investigation report lists defendant's convictions as being for assault with a dangerous weapon, MCL 750.82. We therefore analyze defendant's

commission of a felony (felony-firearm), MCL 750.227b(1); delivery and manufacture of marijuana, MCL 333.7401(2)(d)(*iii*); and maintaining a drug house, MCL 333.7405(d). Defendant was sentenced to 57 months to 20 years' imprisonment for the extortion conviction, 57 months to 15 years' imprisonment for each conviction of unlawful imprisonment, 2 years to 4 years' imprisonment for each assault conviction and for the conviction of manufacture and delivery of marijuana, 2 years' imprisonment for the felony-firearm conviction, and 1 year to 2 years' imprisonment for the conviction of maintaining a drug house. In addition to various restitution requirements, defendant was also required to register in accordance with the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq*. We affirm defendant's convictions and sentences. We reject defendant's constitutional challenges with regard to SORA registration, but call on the Legislature to address aspects of the SORA statute. We remand to the trial court for entry of an amended judgment of sentence conforming defendant's sentences to the jury verdict.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Defendant's convictions arise out of an incident that occurred on June 13, 2011, in Sterling Heights, Michigan. A few days before the incident at issue, four minors, all teenaged boys, had broken into defendant's home with the help of defendant's son to steal defendant's marijuana. Defendant planned to entice the boys involved in the break-in to return to the house on June 13 while he and two associates, Gerald King and

convictions as being under MCL 750.82. As stated at the end of this opinion, we remand for administrative correction of the judgment of sentence to conform to the jury verdict.

Allen Brontkowski, lay in wait for them. Some of the boys involved in the incident on June 13 were among those minors who had broken into defendant's house a few days before June 13 and had stolen marijuana.

On June 13, the day of the second incident, two boys entered defendant's home through a kitchen window. They opened the front door to admit a third boy, while a fourth remained on the porch. Defendant and his associates captured three of the boys, but one of them managed to escape. Defendant and his associates held the boys against their will in the basement. The boys testified that they were duct-taped to chairs, hit with a pistol, kicked and beaten, and threatened with a sword, a hatchet, pliers, a cigar cutter, flammable liquids, and a circular saw.

Defendant forced one of the three boys to call the boy who had escaped and tell him to return to the house and assist with the removal of marijuana;[2] defendant forced another of the boys to call others who had been involved in the prior theft of marijuana and tell them "he needed help getting the marijuana out of the house." Two more boys arrived at the house shortly thereafter. Defendant and his associates were able to catch one of them, and they threw him down the stairs into the basement with the original three imprisoned boys. The new arrival was able to call 911 before defendant smashed his phone. As punishment, defendant broke the sheath of his sword over the boy's head. Defendant then duct-taped the boy's hands and legs together.

The Sterling Heights police responded to the 911 call. By that time, at least some of the boys had been

[2] The boy who escaped the initial confrontation did not return to defendant's house; he testified that he went to a nearby mall and did not contact the police.

held captive for approximately three hours. Two of the boys were transported to the hospital for treatment, one in an ambulance and one by his mother. In searching defendant's home, police discovered a sword and a broken sheath, duct tape, a cigar cutter, an electric circular saw, pliers, and a loaded handgun possessed by Brontkowski. Officers found blood stains on the basement floor and walls, as well as on the sword sheath and Brontkowski's pants; the blood on the sheath and pants was DNA-matched to one of the boys. Defendant admitted to duct-taping the boys to chairs.

Marijuana plants and marijuana were found in the basement and garage. Detective Jason Modrzejewski of the Sterling Heights Crime Suppression Unit collected evidence from the residence and dismantled defendant's grow operation. Two grow locations were identified: one was in a room attached to the garage at the south end of the residence and the other was in the basement. Modrzejewski asserted that he could detect the odor of marijuana from the driveway before entering the residence. He collected seedlings from a basement cabinet and found jars of marijuana "all over the place," including behind insulation, in floor joists, and in cabinets. He also confiscated marijuana from the saddlebag of a motorcycle in the garage. He opined at trial that the total amount of marijuana confiscated exceeded that permissible for personal medical marijuana use. A controlled substance unit expert determined that the amount of plant material identified as marijuana totaled 578.6 grams, or 1.27 pounds. The police confiscated 87 plants, 78 of which were identified as marijuana.

At trial, defendant asserted that he was a licensed caregiver under the Michigan Medical Marihuana Act

(MMMA), MCL 333.26421 *et seq*.,[3] and presented the testimony of an expert, Frank Telewski, a Michigan State University professor of water and plant biology. Telewski opined that the plants seized were under a moderate level of stress and showed evidence of mold, spider mites and eggs. He believed that the infestation had degraded and killed some of the plants and that it was unlikely that the infested plants could be used for medical marijuana. He asserted that the amount confiscated, when considering the damaged plants and the status of some of the material as uncured, did not exceed the amount that five patients could use in accordance with defendant's MMMA licensure.

The jury convicted defendant as described above. At his sentencing hearing on September 4, 2012, defendant's counsel sought to disqualify the prosecutor's office, asserting that the prosecutor had only pursued legal action against defendant on behalf of the boys as victims but had concurrently ignored defendant's status as a victim of the boys based on the prior break-in and theft from his home. The prosecution responded, citing the discretion afforded in bringing criminal charges, and the trial court denied the motion. At sentencing, defendant indicated that there were inaccuracies in the presentence investigation report and objected to the scoring of Offense Variables (OVs) 1, 2, 3, 4, 7, 8, 10, and 13. He also asserted that a downward departure from the guidelines would have been appropriate. The trial court imposed the sentences described above.

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[3] Although the title and provisions of the MMMA refer to "marihuana," "by convention this Court uses the more common spelling 'marijuana' in its opinions." *People v Carruthers*, 301 Mich App 590, 593 n 1; 837 NW2d 16 (2013) (citation omitted). This opinion will thus refer to "marijuana" except when directly quoting statutory language or referring to the title of the MMMA.

Following sentencing, defendant filed a motion for a new trial or judgment of acquittal, and for resentencing. Specifically, defendant challenged the great weight of the evidence and asserted a lack of evidence of criminal intent to support the convictions, and asserted that the prosecution committed misconduct by failing to disclose or obtain cellular telephone records and medical records of the victims. He also requested a *Ginther*[4] hearing on the ineffective assistance of his trial counsel, citing the failure of counsel to pursue or obtain these records through discovery. Defendant also challenged the requirement that defendant register as a sex offender under SORA. Defendant contended that registration under SORA was an unconstitutional violation of his rights to due process and to be free from cruel and unusual punishment.

The trial court issued a written opinion and order on defendant's motion on July 24, 2013. In evaluating defendant's numerous sentencing challenges, the trial court indicated satisfaction with the original handling of defendant's objections to the scoring of the various OVs and determined that reassessment of the scoring was unnecessary. The trial court similarly found it unnecessary to revisit defendant's request for a downward departure because "these issues . . . were previously addressed and adequately supported by the record." The trial court determined that defendant's challenge to the requirement that he register under SORA "should be fully litigated." The trial court instructed the prosecutor to respond to defendant's challenges on this issue and to that extent granted defendant's motion for resentencing in part. The trial court denied the remainder of defendant's motion. The trial court did not make a final ruling on the SORA issue

[4] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

before August 9, 2013, when defendant filed a claim of appeal. Thereafter, on March 6, 2014, the trial court issued an opinion and order denying defendant's motion for resentencing regarding the SORA issue. On March 25, 2014, this Court granted defendant's motion (which was unopposed by plaintiff) to file a supplemental brief on appeal with respect to the SORA issue, and accepted defendant's previously submitted supplemental brief for filing. Plaintiff filed a supplemental brief in response on April 15, 2014.[5]

II. GREAT WEIGHT OF THE EVIDENCE

Defendant first contends that the jury's verdicts are against the great weight of the evidence. Defendant contends that the acknowledged lack of veracity of the witnesses and their own criminal conduct in the events that led to the charges against defendant render their testimony inherently implausible or patently incredible. We disagree.

"An appellate court will review a properly preserved great-weight issue by deciding whether 'the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand.' " *People v Cameron*, 291 Mich App 599, 616-617; 806 NW2d 371 (2011) (citation omitted). A trial court's denial of a motion for a new trial is reviewed for an

[5] For clarity, we note that defendant's trial was held before, and the September 4, 2012 judgment of sentence was issued by, then Circuit Judge David F. Viviano. The July 24, 2013 opinion and order denying defendant's motion for new trial or judgment of acquittal, denying in part defendant's motion for resentencing, and ordering plaintiff to respond to defendant's motion for resentencing (relative to the SORA issue), was issued by Judge Thomas W. Brookover. The March 6, 2014 opinion and order denying defendant's motion for resentencing relative to the SORA issue was issued by Judge Jennifer Faunce.

abuse of discretion. *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008).

It is well recognized that the threshold necessary for a judge to overrule a jury and grant a new trial "is unquestionably among the highest in our law." *People v Plummer*, 229 Mich App 293, 306; 581 NW2d 753 (1998) (quotation marks and citation omitted). "When analyzing a great-weight challenge, no court may sit as the '13th juror' and reassess the evidence." *People v Galloway*, 307 Mich App 151, 167; 858 NW2d 520 (2014) (citation omitted). "[I]n general, conflicting testimony or a question as to the credibility of a witness are not sufficient grounds for granting a new trial . . . ." *People v Lemmon*, 456 Mich 625, 643; 576 NW2d 129 (1998) (quotation marks and citations omitted). "[A]bsent exceptional circumstances," issues of witness credibility are within the exclusive province of the trier of fact. *Id*. at 642, 646. "To support a new trial, the witness testimony must 'contradict[] indisputable physical facts or laws,' be 'patently incredible or def[y] physical realities,' be 'so inherently implausible that it could not be believed by a reasonable juror,' or have been 'seriously impeached' in a case that was 'marked by uncertainties and discrepancies.' " *Galloway*, 307 Mich App at 167 (citation omitted; alterations in original).

Copious testimony was elicited during trial from the boys involved in this matter acknowledging the earlier entry into defendant's residence, the theft of marijuana on a previous occasion, and their entry on the later occasion with the intent to procure additional marijuana for their personal use and sale. The boys also admitted to being untruthful when interviewed by the police. While testimony varied regarding who wielded the various weapons used, who engaged in

verbal threats, and who initiated the physical contact and the number of times the boys were struck, testimony was consistent that these incidents occurred while the boys were in defendant's home. In addition, testimony was consistent regarding the use of duct tape to restrain the boys. King confirmed being contacted by defendant and being asked to be present at defendant's home in the event of another home invasion on the date of the second incident. When defendant and his associates heard a knock on the front door on the second occasion, they did not act to prevent another home invasion by answering the door, but instead waited, anticipating that the boys would enter the home. Testimony was also elicited indicating that defendant coerced two of the boys to contact others who may have been involved in the prior break-in to attempt to induce them to return to the residence. King testified that he had a hatchet and that Brontkowski had a handgun. King further acknowledged that he, defendant, and Brontkowski hit the boys with their fists, pushed them down the basement stairs, blocked their escape, struck them with the blunt end of a hatchet, a sword sheath, and their fists, threatened them with a cigar cutter, a circular saw and a handgun, and subjected them to a plethora of verbal threats. Physical evidence corroborated a great deal of this testimony.

In terms of the marijuana charges, testimony was elicited that defendant was a licensed grower. Evidence was also introduced regarding the extensiveness of defendant's grow operation and the amounts of marijuana and the number of plants confiscated. Contradictory testimony was introduced regarding the viability of certain plants, whether some of the marijuana was fully cured, and the damage to part of the crop due to infestation. Conflicting opinions were also

elicited regarding whether the amount of marijuana in defendant's possession exceeded the amount permitted by his licensure under the MMMA.

In sum, the jury had before it a substantial amount of testimony and evidence, which was both consistent and contradictory on certain points. We conclude that the evidence available to the jury was not so incredible or contradictory that it necessitated or permitted judicial intervention. *Galloway*, 307 Mich App at 167. The jury was repeatedly informed that the boys had been untruthful and had engaged in illegal activity by entering defendant's residence and by seeking to procure marijuana. They admitted to the illegal use of marijuana, including its use on the day of these events. Defendant repeatedly asserted a theory of his case based on his right to defend his home and property from intruders and theft, and based on the absence of any criminal intent in seeking to scare the intruders in his home. It was acknowledged that defendant was a licensed grower, but controversy existed regarding the amount of marijuana in his possession. The jury clearly rejected defendant's position and found, instead, that the boys' testimony was credible. We will not interfere with the jury's role in ascertaining both credibility and the weight of the evidence. *People v Bennett*, 290 Mich App 465, 472; 802 NW2d 627 (2010).

III. SUFFICIENCY OF THE EVIDENCE

Next, defendant generally asserts the absence of sufficient evidence to sustain any of his 12 convictions. Initially, we note that, other than citing the law pertaining to issue preservation and standard of review, defendant merely relies on his great weight of the evidence argument. He provides no further explanation or citation to the law or the record, and he fails to

address how the evidence was insufficient to support any particular element of any particular offense, resulting in an abbreviated argument in support of this claim of error. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *People v Payne*, 285 Mich App 181, 195; 774 NW2d 714 (2009) (quotation marks and citation omitted). Although we could thus deem the issue abandoned, we find that it is also without merit. See *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001).

"In determining whether the prosecutor has presented sufficient evidence to sustain a conviction, an appellate court is required to take the evidence in the light most favorable to the prosecutor." *People v Tennyson*, 487 Mich 730, 735; 790 NW2d 354 (2010). "[T]he question on appeal is whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt." *Id*. (quotation marks and citation omitted). "All conflicts in the evidence must be resolved in favor of the prosecution and we will not interfere with the jury's determinations regarding the weight of the evidence and the credibility of the witnesses." *Unger*, 278 Mich App at 222. "Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *People v Allen*, 201 Mich App 98, 100; 505 NW2d 869 (1993). "[B]ecause it can be difficult to prove a defendant's state of mind on issues such as knowledge and intent, minimal circumstantial evidence will suffice to establish the defendant's state of mind, which can be inferred from all the evidence presented." *People v Kanaan*, 278 Mich App 594, 622; 751 NW2d 57 (2008).

To evaluate the sufficiency of the evidence, we must review the evidence in the context of the elements of the charged crimes.

A. EXTORTION

Our Supreme Court recently revisited the elements of extortion in *People v Harris*, 495 Mich 120, 122-123; 845 NW2d 477 (2014). There, the Court stated:

> [T]he plain language of the extortion statute, MCL 750.213, defines extortion in terms of whether the defendant maliciously threatened a person with harm in order to "compel the person so threatened to do . . . *any* act against his will." Thus, the Legislature clearly intended the crime of extortion to occur when a defendant maliciously threatens to injure another person with the intent to compel that person to do any act against his will, without regard to the significance or seriousness of the compelled act. [*Harris*, 495 Mich at 122-123.]

In this instance, there was repeated testimony that defendant and his associates verbally threatened the boys with physical harm, in addition to using various weapons or items to inflict injury. Several of the threats were directed at the boys to compel or encourage them to provide defendant with the identity and contact information of other individuals who had previously entered his home and removed marijuana, and to solicit their assistance in luring those individuals back to defendant's home. In addition, defendant and his associates engaged in these activities to compel the boys to provide information regarding their own identities and to obtain their parents' contact information. This satisfies the "threat" and "act against his will" elements of the crime. *Id.* at 123.

In addition, "only those threats made with the intent to commit a wrongful act without justification or ex-

cuse, or made in reckless disregard of the law or of a person's legal rights, rise to the level necessary to support an extortion conviction." *Id*. at 136. "The existence of malice . . . depends on the facts and circumstances of each case and can be inferred from a defendant's conduct." *Id*. at 139. Defendant and his associates threatened the boys with physical harm if they did not cooperate. These threats were enhanced by the use of weapons in an effort to obtain the desired information. More than one boy testified that defendant became more incensed and violent when told of his own son's involvement in the prior theft. The evidence was thus sufficient to satisfy the element of malice. Consequently, sufficient evidence existed to establish the elements of extortion.

B. UNLAWFUL IMPRISONMENT

The elements of unlawful imprisonment are delineated in MCL 750.349b as follows:

> (1) A person commits the crime of unlawful imprisonment if he or she knowingly restrains another person under any of the following circumstances:
>
> (a) The person is restrained by means of a weapon or dangerous instrument.
>
> (b) The restrained person was secretly confined.
>
> (c) The person was restrained to facilitate the commission of another felony or to facilitate flight after commission of another felony.

The term "restrain" is defined within the statute as "to forcibly restrict a person's movements or to forcibly confine the person so as to interfere with that person's liberty without that person's consent or without lawful authority." MCL 750.349b(3)(a). Restraint need not occur "for any particular length of time."

MCL 750.349b(3)(a); see also *People v Railer*, 288 Mich App 213, 218-219; 792 NW2d 776 (2010). The term "secretly confined" is defined as (a) "[t]o keep the confinement of the restrained person a secret" or (b) "[t]o keep the location of the restrained person a secret." MCL 750.349b(3)(b). This definition was further explained in *People v Jaffray*, 445 Mich 287, 309; 519 NW2d 108 (1994), as follows:

> [T]he essence of "secret confinement" as contemplated by the statute is deprivation of the assistance of others by virtue of the victim's inability to communicate his predicament. "Secret confinement" is not predicated solely on the existence or nonexistence of a single factor. Rather, consideration of the totality of the circumstances is required when determining whether the confinement itself or the location of confinement was secret, thereby depriving the victim of the assistance of others.

Sufficient evidence was adduced at trial to sustain defendant's four convictions of unlawful imprisonment. There was no dispute that the boys were forced down the basement steps and their escape prevented. They were restrained with duct tape. Their cellular telephones were confiscated. Defendant restricted the boys' ability to access their telephones and monitored the information communicated, threatening them with injury or harm should they not comply with his instructions. The boys were fearful, as evidenced by the fact that two of them lost control of their bodily functions. They were precluded from securing outside assistance, and one boy's telephone was destroyed when he attempted to contact the police by calling 911.

Defendant contends that his imprisonment of the boys was not "without lawful authority." MCL 750.349b(3)(a). Defendant asserts that he was entitled to defend himself and his home, to stand his ground, to stop a fleeing felon, to eject trespassers, to arrest and

detain felons, and to pursue and retake a person who has escaped or been rescued from a lawful arrest. Assuming all of that to be true, however, the evidence in this case does not implicate any such rights. Rather, the evidence established that defendant constructed a scenario to lure the boys to his home and, after apprehending them, defendant engaged in a level of conduct and force that the jury deemed excessive in relation to the threat presented by the boys. We will not interfere with a jury's assessment of the weight of the evidence or the credibility of the witnesses. *People v Dunigan*, 299 Mich App 579, 582; 831 NW2d 243 (2013).

Moreover, even assuming that defendant possessed a right to "arrest" the boys who had entered his home on the day of the second incident, he was obligated by law to "without unnecessary delay deliver the person arrested to a peace officer . . . ." MCL 764.14. Defendant did not do so. To the contrary, defendant imprisoned the boys for several hours, during which time he and his associates assaulted and threatened them. Further, defendant sought to prevent the boys from contacting the police, and thereby he acted precisely contrary to his lawful obligation to deliver the boys to the police "without unnecessary delay." *Id*. Consequently, sufficient evidence was presented to support defendant's four convictions under MCL 750.349b.

C. ASSAULT WITH A DANGEROUS WEAPON

"The elements of [assault with a dangerous weapon] are (1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery." *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). "A person who aids or abets the commission of a crime

may be convicted and punished as if he directly committed the offense." *People v Izarraras-Placante*, 246 Mich App 490, 495; 633 NW2d 18 (2001); see also MCL 767.39.

> To support a finding that a defendant aided and abetted a crime, the prosecution must show that (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement. [*Izarraras-Placante*, 246 Mich App at 495-496 (quotation marks and citation omitted).]

"The aiding and abetting statute encompasses all forms of assistance rendered to the perpetrator of a crime and comprehends all words or deeds that might support, encourage, or incite the commission of a crime." *Id*. at 496 (citation omitted). Intent may be inferred from a defendant's "words, acts, means, or the manner used to commit the offense." *People v Harrison*, 283 Mich App 374, 382; 768 NW2d 98 (2009). A dangerous weapon is defined by MCL 750.226 as "a pistol or other firearm or dagger, dirk, razor, stiletto, or knife having a blade over 3 inches in length, or any other dangerous or deadly weapon or instrument" carried with the intent to unlawfully use the weapon against another person. In addition, "[a] dangerous weapon can also be an instrumentality which, although not designed to be a dangerous weapon, is used as a weapon and, when so employed, is dangerous." *People v Barkley*, 151 Mich App 234, 238; 390 NW2d 705 (1986).

Testimony and other evidence demonstrated that an assault was perpetrated on all of the boys. All were intimidated and sustained some form of injury, albeit

not life-threatening injury. The boys were struck with or threatened by fists, a handgun, a circular saw, pliers, a cigar cutter, a hatchet and a sword sheath, and were physically forced into defendant's basement. While defendant did not physically wield every weapon, testimony indicated that he told Brontkowski to bring a gun to the residence, and that he handed items to King for use in threatening the boys. Several of the boys testified that defendant wielded the sword sheath that struck them and inflicted injury. While defendant challenges the intent element of this crime, it is undisputed that his intent was, at a minimum, to scare the boys. His success in accomplishing this was demonstrated by testimony and physical evidence that the boys were crying and that two of them lost control of their bodily functions because of the level of fear they experienced. The evidence is sufficient to sustain defendant's convictions for assault with a dangerous weapon either directly or under an aiding and abetting theory.

D. FELONY-FIREARM

"The elements of felony-firearm are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony." *Avant*, 235 Mich App at 505. Several witnesses testified to the presence of a handgun in defendant's residence and its use to threaten or intimidate the boys to effectuate the conduct underlying the charges of extortion and unlawful imprisonment. Under an aiding and abetting theory, it is irrelevant that the handgun belonged to and was most frequently wielded by Brontkowski. See *Izarraras-Placante*, 246 Mich App at 495-496. Physical evidence of a text message sent by defendant to Brontkowski instructing him to bring his gun to the resi-

dence on the day of these events demonstrates defendant's complicity in the procurement and use of the handgun under an aiding and abetting theory. See *id*. at 496. As such, there is sufficient evidence to support defendant's conviction of felony-firearm.

E. MANUFACTURING A CONTROLLED SUBSTANCE

The elements of manufacturing a controlled substance are (1) the defendant manufactured a substance, (2) the substance manufactured was the controlled substance at issue, and (3) the defendant knowingly manufactured it. *People v Meshell*, 265 Mich App 616, 619; 696 NW2d 754 (2005). The manufacture of a controlled substance is defined as "the production, preparation, propagation, compounding, conversion, or processing of a controlled substance, directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis." MCL 333.7106(2);[6] see also *People v Hunter*, 201 Mich App 671, 676; 506 NW2d 611 (1993). Further, " '[m]arihuana' means all parts of the plant Canabis [sic] sativa L., growing or not; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant or its seeds and resins." MCL 333.7106(3).[7]

There was no dispute that the plants and plant materials removed from defendant's residence consti-

[6] MCL 333.7106 was amended by 2014 PA 548, effective January 15, 2015. The definition of "manufacture" did not change. However, a new definition was added to the statute and the statute's provisions were renumbered; the definition of "manufacture" is now in MCL 333.7106(3).

[7] Renumbered as MCL 333.7106(4), effective January 15, 2015. 2014 PA 548. Amendments of the definition of "marihuana" are not applicable to this case.

tuted marijuana. While the efficacy of certain plants and products derived from the plants was in dispute, the identification of the plant materials as marijuana was not contested. Evidence was introduced verifying the confiscation of at least 78 marijuana plants and at least 578.6 grams of harvested marijuana. Testimony indicated that marijuana was found throughout the residence, including behind insulation, in floor joists, and in cabinets and other areas, and that its presence was so pervasive in the home that its odor could be detected from the driveway. Although the amounts confiscated included marijuana retrieved from King's motorcycle saddlebag, this amount, asserted by King to comprise one-quarter ounce, was minimal in the overall context of the plant material confiscated. Although defendant was acknowledged to be a licensed grower, the dispute actually centered on whether the amount he manufactured and maintained exceeded the legal amount permitted by his licensure. While contradictory testimony was introduced on this issue, the jury apparently found more credible the testimony indicating that there was an excessive amount of marijuana within the home and convicted defendant of manufacturing marijuana. This Court will not second guess on appeal a jury's determination of credibility and the weight of the evidence. *Kanaan*, 278 Mich App at 619. Hence, sufficient evidence exists to support defendant's conviction on this charge.

F. MAINTAINING A DRUG HOUSE

Finally, the crime of maintaining a drug house is governed by MCL 333.7405(d), which provides that a person

> [s]hall not knowingly keep or maintain a store, shop, warehouse, dwelling, building, vehicle, boat, aircraft, or

> other structure or place, that is frequented by persons using controlled substances in violation of this article for the purpose of using controlled substances, or that is used for keeping or selling controlled substances in violation of this article.

"The phrase 'keep or maintain' implies usage with some degree of continuity that can be deduced by actual observation of repeated acts or circumstantial evidence . . . that conduces to the same conclusion." *People v Thompson*, 477 Mich 146, 155; 730 NW2d 708 (2007).

Sufficient evidence was adduced for a rational trier of fact to find that defendant kept or maintained the residence, and that it was used with "some degree of continuity" for "keeping or selling" controlled substances. MCL 333.7405(d); *Thompson*, 477 Mich at 155. It was undisputed that defendant owned and resided at this location. Additionally, there was no dispute that defendant used the premises to grow marijuana. Once again, the dispute was over whether defendant manufactured more marijuana than legitimately permitted under his license as a grower. Premised on the jury's factual determination that defendant's crop exceeded the amount he was authorized to manufacture, sufficient evidence was presented to sustain this conviction.

IV. PROSECUTORIAL ERROR[8]

Defendant next asserts a myriad of alleged acts of

[8] Courts and litigants frequently have referred to claims such as those raised by defendant as "prosecutorial misconduct." This Court has recently stated that "the term 'misconduct' is more appropriately applied to those extreme . . . instances where a prosecutor's conduct violates the rules of professional conduct or constitutes illegal conduct." *People v Cooper*, 309 Mich App 74, 87-88; 867 NW2d 452 (2015) (citation omitted). The *Cooper* Court concluded that claims "premised on the contention that the prosecutor made a technical or inadvertent error at

prosecutorial error involving discovery and other actions in contradiction of the requirements mandated by *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963). Specifically, defendant asserts that (1) the prosecution improperly delayed or precluded the discovery of the boys' cellular telephone records, medical records, and taped statements to the police, (2) the prosecution failed to fully disclose the sentencing agreement it made with King in return for his trial testimony, (3) errors occurred in the failure to distinguish marijuana confiscated from King's motorcycle saddlebag from the marijuana retrieved from defendant's home, and (4) the prosecution's operation of the circular saw during rebuttal closing argument was improper and unduly prejudicial to defendant.

This Court reviews a trial court's decision regarding a discovery violation for an abuse of discretion. MCR 6.201(J). Defendant bears the burden of proving that any missing evidence was exculpatory or, in the case of failure to preserve evidence, that the police acted in bad faith. *People v Hanks*, 276 Mich App 91, 95; 740 NW2d 530 (2007). "This Court reviews a trial court's decision to grant or deny a motion for new trial for an abuse of discretion." *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). "Underlying questions of law are reviewed de novo, while a trial court's factual findings are reviewed for clear error." *People v Terrell*, 289 Mich App 553, 559; 797 NW2d 684 (2010) (citations omitted). To prevail on a claim of prosecutorial error, a defendant must demonstrate that he or she was "denied a fair and impartial trial." *People v Brown*, 294 Mich App 377, 382; 811 NW2d 531 (2011). "We review

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trial" are "more fairly presented as claims of 'prosecutorial error,' with only the most extreme cases rising to the level of 'prosecutorial misconduct.' " *Id.* at 88.

de novo [a] defendant's constitutional due-process claim." *People v Schumacher*, 276 Mich App 165, 176; 740 NW2d 534 (2007).

A. DISCOVERY VIOLATION

Discovery in a criminal case is governed by MCR 6.201. *People v Phillips*, 468 Mich 583, 588; 663 NW2d 463 (2003). Although it is well recognized that "[t]here is no general constitutional right to discovery in a criminal case," *People v Elston*, 462 Mich 751, 765; 614 NW2d 595 (2000), a defendant can show that the police's failure to preserve possibly exculpatory evidence violated his right to due process if law enforcement personnel acted in bad faith. *Hanks*, 276 Mich App at 95. Even when "potentially useful" evidence is destroyed and the destruction would constitute a violation of due process, the evidence must have been destroyed in bad faith. *Arizona v Youngblood*, 488 US 51, 58; 109 S Ct 333; 102 L Ed 2d 281 (1988).

Further, a defendant's right to due process may be violated by the prosecution's failure to produce exculpatory evidence in its possession. As recognized by our Supreme Court in *People v Chenault*, 495 Mich 142, 149; 845 NW2d 731 (2014):

> The Supreme Court of the United States held in *Brady* that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." [Citations omitted.]

A three-factor test has been devised to identify the primary elements of a *Brady* violation:

> The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeach-

> ing; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued. [*Strickler v Greene*, 527 US 263, 281-282; 119 S Ct 1936; 144 L Ed 2d 286 (1999).]

In other words, a *Brady* violation occurs when the prosecution has suppressed material evidence that is favorable to the accused. See *Chenault*, 495 Mich at 150. Under those circumstances, bad faith is not required for a *Brady* violation. *Id*.

Defendant appears to assign error to the prosecution's failure to provide discovery, or its delay in providing discovery, for both the preliminary examination and trial. In part, defendant suggests that the alleged discovery delays negatively impacted the outcome of the preliminary examination. With regard to the preliminary examination, as noted in *People v Laws*, 218 Mich App 447, 451-452; 554 NW2d 586 (1996):

> The district court may order discovery in carrying out its duty to conduct preliminary examinations. Discovery may be ordered before the preliminary examination. . . . "The purpose of a preliminary examination is to determine whether a crime has been committed and if there [is] probable cause to believe that the defendant committed it." Significantly, when conducting a preliminary examination, "[a]n examining magistrate may weigh the credibility of witnesses." However, the role of the magistrate is not that of ultimate finder of fact; where the evidence conflicts and raises a reasonable doubt regarding the defendant's guilt, the issue is one for the jury, and the defendant should be bound over. [Citations omitted; alterations in original.]

Defendant's entire argument about the alleged failure to disclose medical records in time for the preliminary examination merely suggests, without citation to any supporting authority, that it impaired defendant's abil-

ity to demonstrate the lack of credibility of the boys as witnesses at the preliminary examination. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

Further, the lower court record reveals that the preliminary examination was initially delayed, by stipulation of the parties, to allow for the provision of discovery. When the preliminary examination was held on August 3, 2011, there was no indication by defense counsel of any need for discovery materials that had not been received from the prosecution. A defendant generally cannot claim error premised on an error to which he contributed by plan or negligence. *People v Gonzalez*, 256 Mich App 212, 224; 663 NW2d 499 (2003).

Additionally, defendant appears to assume that the prosecution must secure discoverable information on behalf of defendant. It need not do so. *People v Coy*, 258 Mich App 1, 21; 669 NW2d 831 (2003). There is no evidence in the record that the prosecution ever obtained the boys' medical records; thus, there existed no necessity to provide them to defendant. Moreover, defendant acknowledges in his brief on appeal having received the boys' medical records by February 6, 2012, four months before trial. Further, the extent of injury to the boys was not an element of the crimes charged and so was irrelevant to the bindover decision by the district court. Additionally, there is nothing to suggest that the records were in any manner exculpatory. Even if the boys' injuries did not fully match their testimony, the discrepancy for purposes of the preliminary examination was irrelevant, as the district judge was not the

ultimate finder of fact. "[W]here the evidence conflicts and raises a reasonable doubt regarding the defendant's guilt, the issue is one for the jury, and the defendant should be bound over." *Laws*, 218 Mich App at 452. Consequently, defendant has failed to demonstrate either a *Brady* violation, or other discovery violation, concerning any alleged failure to produce medical records in time for the preliminary examination.[9]

Defendant further asserts that the prosecution committed error by failing to preserve the boys' cellular telephone records. Again, defendant fails to demonstrate that the prosecution failed to provide defendant with the information it had or that the information was actually exculpatory. The prosecution did provide defendant with information secured from the cellular telephones of defendant and Brontkowski, and from one of the phones obtained from the scene belonging to one of the boys. Defendant and Brontkowski were permitted to subpoena the boys' telephone records. The prosecution is not required to "seek and find exculpatory evidence" or assist in building or supporting a defendant's case, nor is it required to "negate every theory consistent with defendant's innocence." *Coy*, 258 Mich App at 21. Defendant has thus again failed to demonstrate a *Brady* violation.

With regard to the police's alleged failure to preserve cellular telephone record evidence, defendant also has not shown bad faith on the part of the police deriving from the failure of various cellular service providers to maintain data beyond a specified time period. See

[9] Defendant acknowledges that trial counsel received the medical records before trial. The boys were also present in court and subject to cross-examination, during which defense counsel repeatedly attacked their individual credibility and the discrepancies among their statements to the police, at the preliminary examination, and at trial.

Youngblood, 488 US at 58. As noted, defendant was provided with the records obtained by the police. Consequently, defendant has not demonstrated a violation of his right to due process regarding the cellular phone records.

Defendant also accuses the prosecution of misconduct by virtue of its allegedly "piecemeal" provision of the recorded statements given to the police by the boys. Defendant does not suggest that recordings of the statements were not provided, but merely complains of a delay in the provision of certain statements, which he has not specifically identified on appeal. As with the other alleged discovery violations, defendant fails to demonstrate that the information contained in the statements was exculpatory to defendant. Instead, he merely contends that the boys' statements support his contention that the boys were not credible based on discrepancies between their statements to the police and their trial testimony. In terms of the preliminary examination, this is once again irrelevant as the district judge was not the ultimate finder of fact. *Laws*, 218 Mich App at 452. Defendant acknowledges, on appeal, having received copies of the statements months before trial. The lower court record demonstrates that counsel for defendant repeatedly exercised the opportunity to attack the credibility of the witnesses and to impeach their testimony. Defendant has failed to establish that the prosecution suppressed the evidence. In fact, the prosecution provided defense counsel an opportunity to review its file. Defendant's contention that a *Brady* violation occurred is again without support.

B. FAILURE TO DISCLOSE KING'S SENTENCE

Defendant also takes issue with the alleged failure of the prosecution to disclose the "actual agreement"

regarding the sentence that King would receive following his testimony in this case. King testified at trial regarding his role in and observation of the events. He acknowledged pleading guilty to the same charges as defendant, with the exception of the two drug charges. King asserted that he was not granted immunity and that he was unaware of what his sentence ultimately would be, but he indicated that in exchange for his plea he had agreed to a sentence of at least 66 months in prison. The prosecution read into the trial court record a portion of the transcript of King's October 11, 2011 plea proceeding, at which King agreed to plead guilty to ten charges in return for a 66-month minimum sentence. The trial court denied, on more than one occasion, the existence of any secret agreement regarding King's sentencing. "Under MCR 6.201(B)(5), a prosecutor has a duty to disclose the details of a witness's plea agreement, immunity agreement, or other agreement in exchange for testimony." *People v McMullan*, 284 Mich App 149, 157; 771 NW2d 810 (2009). "Similarly, pursuant to [*Brady*, 373 US 83], the prosecutor must disclose any information that would materially affect the credibility of his witnesses." *Id*. Our Supreme Court has stated: "[I]t is one thing to require disclosure of facts (immunity or leniency) which the jury should weigh in assessing a witness's credibility. It is quite another to require 'disclosure' of future possibilities for the jury's speculation." *People v Atkins*, 397 Mich 163, 174; 243 NW2d 292 (1976). In this instance, the prosecution recommended to the trial court a sentence for King, which the trial court was free to accept or reject. At the time of his testimony, the jury was informed of facts pertaining to King and his testimony that were sufficient for the jury to evaluate his credibility. "The focus of required disclosure is not on factors which may motivate a prosecutor

in dealing subsequently with a witness, but rather on facts which may motivate the witness in giving certain testimony." *Id*. Although defendant contends that the trial court ultimately imposed on King a more lenient sentence than the prosecution had recommended, nothing indicated that the more lenient sentence was the result of any undisclosed sentencing agreement. King's agreement with the prosecution was acknowledged and defense counsel had the opportunity to cross-examine King. Therefore, the prosecution made the requisite disclosure, and it was sufficient to permit the jury to evaluate King's credibility on the witness stand. We find no error.

C. INCLUSION OF KING'S MARIJUANA

Defendant further contends that the prosecution committed error by including the amount of marijuana retrieved from King's motorcycle in the amount of marijuana used to charge defendant. King testified that he possessed one-quarter ounce of marijuana in his motorcycle saddlebag. The evidence at trial showed that at least 78 marijuana plants were confiscated from defendant's residence, in addition to 578.6 grams of processed marijuana in various types of containers. Defendant fails to explain how, or to cite any authority to suggest that, including the minimal amount of King's marijuana in the overall quantity attributable to defendant denied him a fair trial, particularly given the testimony acknowledging the minimal portion of marijuana belonging to King. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *Kelly*, 231 Mich App at 640-641. The jury was made aware of this distinc-

tion and defendant fails, in any manner, to demonstrate or substantiate that a reduction in the amount of confiscated marijuana by one-quarter ounce, given the amount actually attributable to defendant, would serve to negate the drug charges or be so prejudicial to defendant as to deny him a fair trial.

D. USE OF CIRCULAR SAW

Defendant also alleges misconduct by the prosecution in demonstrating the operation of the circular saw during rebuttal closing argument. The prosecution contends that it demonstrated the operation of the saw in response to defense counsel's closing argument that the boys were not truthful regarding their fear following the threats made to them while in defendant's basement. Defense counsel moved for a mistrial following the prosecution's operation of the saw during rebuttal closing argument. Defense counsel admitted to a delay in objecting to the prosecution's use of the saw based on his uncertainty that the prosecution "was going to do anything more than show the saw to the jury." The trial court rejected defense counsel's request for a mistrial.

"Where there is no allegation that prosecutorial misconduct violated a specific constitutional right, a court must determine whether the error so infected the trial with unfairness as to make the resulting conviction a denial of due process of law." *People v Blackmon*, 280 Mich App 253, 262; 761 NW2d 172 (2008). The prosecution was permitted, during trial, to briefly demonstrate the circular saw. During rebuttal, the prosecution again plugged the saw into an outlet and ran it briefly in response to argument by defense counsel attempting to minimize the effect of defendant's behavior on the boys. In general, prosecutors are

afforded " 'great latitude regarding their arguments and conduct' " during closing argument. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995) (citation omitted). In this case, there is nothing to suggest that the brief repetition of the sound of the saw for the jury was so unfair that it deprived defendant of his right to due process, particularly given the plethora of evidence and testimony regarding the events that occurred in defendant's residence and the treatment of the boys. In addition, because defendant has failed to suggest that the trial court erred in admitting the saw and permitting the prosecution to demonstrate the saw to the jury during trial, it cannot be shown that the prosecution's reference to, or re-demonstration of, the saw during rebuttal closing argument constituted prosecutorial error or misconduct. Prosecutors "are 'free to argue the evidence and all reasonable inferences from the evidence as it relates to [their] theory of the case.' " *Id*. at 282 (citation omitted; alteration in original).

V. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant next claims he was denied the effective assistance of counsel at trial and asserts a variety of alleged failings on the part of his trial counsel. "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *People v Johnson*, 293 Mich App 79, 90; 808 NW2d 815 (2011).

Criminal defendants have a right to the effective assistance of counsel under the United States and Michigan Constitutions. US Const, Am VI; Const 1963,

art 1, § 20; *United States v Cronic*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *People v Vaughn*, 491 Mich 642, 669; 821 NW2d 288 (2012). To establish that a defendant's trial counsel was ineffective, a defendant must demonstrate that "(1) counsel's performance was below an objective standard of reasonableness under prevailing professional norms and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Lockett*, 295 Mich App 165, 187; 814 NW2d 295 (2012); see also *Strickland v Washington*, 466 US 668, 689-696; 104 S Ct 2052; 80 L Ed 2d 674 (1984). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *Lockett*, 295 Mich at 187. There also exists a strong presumption that the assistance provided by counsel constituted sound trial strategy. *People v Armstrong*, 490 Mich 281, 290; 806 NW2d 676 (2011). Decisions pertaining to what evidence to present and which issues to raise during closing argument are presumed to be matters of trial strategy. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008).

Defendant contends that his trial counsel was unprepared due to his lack of experience in criminal law. Specifically, defendant argues that trial counsel failed to (1) obtain and enforce orders for production of discovery materials and to cross-examine the police regarding the delay in providing discovery materials, (2) use certain evidence in his possession to cross-examine witnesses, (3) introduce evidence of defendant's compliance with the MMMA, (4) elicit witness testimony regarding the boys' motive for breaking into defendant's home, (5) submit proposed jury instructions regarding the "fleeing felon rule," the common-law right to eject trespassers, and the statutory right

to citizen's arrest, and (6) present a "focused and coherent theory" from which the jury could find defendant not guilty.

When asserting ineffective assistance of counsel premised on counsel's unpreparedness, a defendant must demonstrate prejudice resulting from the lack of preparation. *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990). Lack of experience, standing alone, does not establish ineffective assistance. *Kevorkian*, 248 Mich App at 415. Further, a claim of ineffective assistance of counsel incorporates "both a performance component and a prejudice component. Both prongs of the test must be fulfilled." *People v Reed*, 449 Mich 375, 400; 535 NW2d 496 (1995) (opinion by BOYLE, J.).

Although defendant asserts that counsel was ineffective for failing to enforce or procure discovery, he has failed to demonstrate that such conduct was objectively unreasonable or prejudicial. Defendant received the statements the boys made to the police months before trial began. He was permitted to obtain the cellular telephone records of the boys. How counsel used this information or data is presumed to be a matter of trial strategy, and this Court "will not second guess strategic decisions with the benefit of hindsight." *Dunigan*, 299 Mich App at 590. Similarly, the failure to use the boys' medical records at trial also constituted trial strategy as counsel may have consciously elected not to highlight or focus on the alleged injuries sustained, particularly as they were not an element of the crimes charged and may have garnered sympathy for the boys. In addition, defendant presents nothing to suggest or support that this evidence would have been exculpatory or altered the outcome of the proceedings. On appeal, defendant

continues to mistakenly assert that evidence of the prior break-in of his home was exculpatory evidence. While there was repeated acknowledgment throughout the trial that an earlier break-in and theft had occurred involving some of the boys, defendant erroneously concludes that this prior act served as complete justification for his behavior and the treatment of the boys without any recognition of limitations on a person's right to defense of self or property. Although defendant contends that counsel's failure to secure certain discovery impaired his ability to cross-examine witnesses, this is without support in the record as counsel in fact engaged in extensive cross-examination of all witnesses.

Defendant also contends that counsel was ineffective for failing to call as a witness at trial an individual involved in the earlier break-in of defendant's home, but defendant does not submit any evidence to support his theory that this witness would have testified in the manner he suggests. Not only is the decision whether to call certain witnesses or present certain evidence generally a matter of trial strategy, *Horn*, 279 Mich App at 39, but even if we were to assume that the witness would have testified to a previous break-in at defendant's residence, that testimony would have been merely cumulative, as this was discussed and acknowledged by several witnesses at trial.

Similarly, counsel's election to not use a timeline as a demonstrative tool before the jury was trial strategy; defense counsel may have been trying to avoid any emphasis on the amount of time the boys were actually restrained in defendant's home. "A particular strategy does not constitute ineffective assistance of counsel simply because it does not work." *People v Matuszak*, 263 Mich App 42, 61; 687 NW2d 342 (2004).

To the extent defendant asserts that counsel failed to elicit information regarding the motives of the boys, this is unavailing as their illegal intent was not dispositive of or relevant to the crimes charged and was fully developed at trial through the testimony of the boys, who admitted that they had entered defendant's home to steal marijuana.

Defendant's claim of ineffectiveness of counsel regarding the reasons for King's agreement to testify is speculative. King was sufficiently cross-examined regarding his plea agreement to enable the jury to consider his motivation and self-interest when evaluating his credibility. Defendant also faults counsel for his failure to provide the prosecution with copies of letters exchanged between King and Barbara Westervelt (defendant's girlfriend), in which King implied a political motive for the prosecution. Any such suggestion by King within the letters was of questionable admissibility and relevance. There is also no record evidence to suggest that defendant's counsel had or was privy to these letters at an earlier time during the proceedings. Further, counsel had the opportunity to impeach King's testimony through cross-examination regarding his plea agreement. Additional evidence pertaining to King's motivation to testify and credibility would have been merely cumulative for purposes of impeachment.

Defendant also suggests that counsel was ineffective for failing to adequately demonstrate defendant's compliance with the MMMA. Contrary to defendant's claims, counsel admitted into evidence defendant's status as a licensed grower. A police officer acknowledged that some of the marijuana confiscated from defendant's home was in a locked cabinet. An expert was presented on defendant's behalf to establish prob-

lems with his crop, the infestation of spider mites, defendant's treatment of the problem, and the usability of the infected plants. The expert also opined that the amount of usable marijuana removed from defendant's residence was consistent with the amount permissible in accordance with his license. Although defendant contends that counsel failed to introduce sufficient evidence that his marijuana grow operation was legal, and thus hampered his ability to refute the prosecution's theory (that defendant's failure to contact the police when the boys broke into his house was due to a desire to protect his illegal or excessive drug operation), he does not explain what further evidence defense counsel should have introduced. Further, defendant contended at trial that his intent was to scare the boys and that informing their parents, rather than the police, would be an adequate and a preferable means of dealing with the problem. The failure to present certain evidence constitutes ineffective assistance of counsel only if it deprived defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). This has not been demonstrated. Relatedly, the assertion that trial counsel's closing argument was ineffectual cannot be sustained as decisions pertaining to what evidence to present and which issues to raise during closing argument are presumed to be matters of trial strategy. *Horn*, 279 Mich App at 39.

Finally, defendant contends that counsel was ineffective based on the failure to submit proposed jury instructions. This statement is inaccurate, as defense counsel stated on the record that he had submitted proposed instructions related to defendant's medical marijuana affirmative defense, and the trial court indicated that it had received those instructions. Defense counsel further requested that instructions on

misdemeanor assault be included in the instructions for the assault charges. In addition, there were extensive discussions between counsel and the trial court regarding the instructions to be provided to the jury. Given the extensive discussions on the jury instructions, defendant provides no support for his contention that the failure, if any, of defense counsel to submit proposed written instructions was actually detrimental to him or that defense counsel's approval of the jury instructions was ill-advised or insufficiently considered, or that additional or different instructions would have altered the outcome of the proceedings.

VI. DOUBLE JEOPARDY

Defendant next asserts that his convictions and sentences for unlawful imprisonment and assault with a dangerous weapon[10] violate the Double Jeopardy Clauses of the United States and Michigan Constitutions, because the alleged actions comprised a sequence of events that was one continuous transaction. To preserve appellate review of a double jeopardy violation, a defendant must object at the trial court level. See *Meshell*, 265 Mich App at 628. Because defendant did not object on the basis of double jeopardy in the trial court, the issue is not preserved for appellate review. "A double jeopardy challenge presents a question of constitutional law that this Court reviews de novo." *People v Nutt*, 469 Mich 565, 573; 677 NW2d 1 (2004). Because defendant did not preserve this issue by raising it below, this Court's review is for plain error affecting substantial rights. *Meshell*, 265 Mich App at 628.

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[10] Again, defendant has referred to his convictions as being for assault and battery; see note 1 of this opinion.

"The prohibition against double jeopardy provides three related protections: (1) it protects against a second prosecution for the same offense after acquittal; (2) it protects against a second prosecution for the same offense after conviction; and (3) it protects against multiple punishments for the same offense." *Nutt*, 469 Mich at 574. Cumulative punishments do not violate double jeopardy protections if the Legislature intends to authorize cumulative punishments. *People v Calloway*, 469 Mich 448, 451; 671 NW2d 733 (2003).

Defendant's four convictions for assault with a dangerous weapon and four convictions for unlawful imprisonment do not infringe his double jeopardy protection. Each of the assault and unlawful imprisonment charges involved distinct acts and conduct pertaining to four different individuals. To ascertain whether a defendant is being punished twice for the same offense, Michigan courts apply the *Blockburger*[11] test. *Nutt*, 469 Mich at 576. The focus of the *Blockburger* test is on the statutory elements of the charged offenses. *Id*. If each offense necessitates proof of a fact that the other does not, the prohibition against double jeopardy is not violated, " 'notwithstanding a substantial overlap in the proof offered to establish the crimes.' " *Id*., quoting *Iannelli v United States*, 420 US 770, 785 n 17; 95 S Ct 1284; 43 L Ed 2d 616 (1975).

It is readily apparent that assault with a dangerous weapon and unlawful imprisonment are separate and distinct offenses and that " 'each [offense] requires proof of a fact that the other does not . . . .' " *Nutt*, 469 Mich at 576, quoting *Iannelli*, 420 US at 785 n 17. Specifically, the elements of assault with a deadly weapon are "(1) an assault, (2) with a dangerous

[11] *Blockburger v United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932).

weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery." *Avant*, 235 Mich App at 505. In contrast, a person is guilty of unlawful imprisonment when that person knowingly restrains another person and (1) the restraint was "by means of a weapon or dangerous instrument," (2) "[t]he restrained person was secretly confined," or (3) "[t]he person was restrained to facilitate the commission of another felony or to facilitate flight after commission of another felony." MCL 750.349b(1). Further, this Court has recognized that "[t]wo or more separate criminal offenses can occur within the 'same transaction.' " *People v Ryan*, 295 Mich App 388, 402; 819 NW2d 55 (2012). Accordingly, defendant's assertion that his convictions of felonious assault and unlawful imprisonment violated his right against double jeopardy is without merit.

VII. JOINT TRIAL

Defendant next contends that the trial court erred in trying defendant and Brontkowski jointly before a single jury. This Court reviews for an abuse of discretion a trial court's decision regarding the severance of trials when multiple defendants are involved. *People v Hana*, 447 Mich 325, 346; 524 NW2d 682 (1994). A trial court abuses its discretion when it chooses an outcome that is outside the range of principled outcomes. *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008).

MCR 6.121(C) provides: "On a defendant's motion, the court must sever the trial of defendants on related offenses on a showing that severance is necessary to avoid prejudice to substantial rights of the defendant." "Severance is mandated under MCR 6.121(C) only when a defendant provides the court with a supporting affidavit, or makes an offer of proof, that clearly,

affirmatively, and fully demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice." *Hana*, 447 Mich at 346. "The failure to make this showing in the trial court, absent any significant indication on appeal that the requisite prejudice in fact occurred at trial, will preclude reversal of a joinder decision." *Id*. at 346-347.

There is no absolute right to separate trials, and in fact, "[a] strong policy favors joint trials in the interest of justice, judicial economy, and administration." *People v Harris*, 201 Mich App 147, 152; 505 NW2d 889 (1993). Severance should be granted when defenses are antagonistic. *Id*. " 'A defense is deemed antagonistic when it appears that a codefendant may testify to exculpate himself and to incriminate the defendant.' " *Id*. at 153, quoting *People v Jackson*, 158 Mich App 544, 555; 405 NW2d 192 (1987). Further, "defenses must be not only inconsistent, but also mutually exclusive or irreconcilable." *People v Cadle (On Remand)*, 209 Mich App 467, 469; 531 NW2d 761 (1995). In other words, the "tension between defenses must be so great that a jury would have to believe one defendant at the expense of the other." *Hana*, 447 Mich at 349 (quotation marks and citation omitted). "Incidental spillover prejudice, which is almost inevitable in a multi-defendant trial, does not suffice." *Id*. (quotation marks and citation omitted; alteration omitted). "Finger pointing by the defendants when [an aider and abettor] theory is pursued does not create mutually exclusive antagonistic defenses." *Id*. at 360-361. Because an aider and abettor can also be held liable as a principal, both defendants can be convicted at a single trial "without any prejudice or inconsistency[.]" *Id*. at 361.

With the exception of the drug charges against defendant, defendant and Brontkowski were charged with precisely the same crimes. The witnesses and evidence to be admitted on the shared charges did not vary between defendant and Brontkowski. Defendant and Brontkowski did not deny that the events transpired or that they participated in them. Both, however, challenged the intent element of the crimes charged and asserted the right to defend a home against intruders. Because the defenses asserted at trial were fully consistent with one another and were neither mutually exclusive nor irreconcilable, there existed no basis for severance of the trials.

VIII. BINDOVER

Defendant contends that the trial court also erred by denying his motion to quash, which was based primarily on the questionable credibility of the boys as witnesses and their own criminal intent in the events that transpired. He further asserts that bindover on the assault charges was erroneous because of the absence of any intent to do harm. According to defendant, the only intent demonstrated was defendant's effort to scare the boys so that he could secure information and inform their parents about their conduct. Defendant also argues that the felony-firearm charge should be dismissed if his felony convictions are reversed on appeal. Because we find that sufficient evidence was adduced at trial to uphold defendant's convictions, we need not address his claim of an erroneous bindover. "If a defendant is fairly convicted at trial, no appeal lies regarding whether the evidence at the preliminary examination was sufficient to warrant a bindover." *People v Wilson*, 469 Mich 1018 (2004). Additionally, defendant's argument regarding his

felony-firearm conviction is meritless in light of our upholding his underlying felony convictions.

IX. JURY INSTRUCTIONS

Next, defendant cites a number of statutes in asserting that the jury instructions delivered at trial were deficient, but he does not identify or provide to this Court any instructions that were requested but not given. Nor does defendant indicate how any missing instructions were applicable to the evidence or the theories of defendant's case. Finally, defendant fails to show the manner in which the omission of any instructions prejudiced defendant. We thus consider this issue abandoned. See *Kevorkian*, 248 Mich App at 389. Moreover, defense counsel's verbal indication that he had no objections to the instructions as the trial court read them to the jury constitutes a waiver. *People v Kowalski*, 489 Mich 488, 505 n 28; 803 NW2d 200 (2011) ("The Court of Appeals has consistently held that an affirmative statement that there are no objections to the jury instructions constitutes express approval of the instructions, thereby waiving review of any error on appeal.").

X. INABILITY TO PRESENT A DEFENSE

Defendant also contends that the trial court precluded him from presenting a defense. To preserve an issue for appellate review, a party must object below and specify the same ground for objection that it argues on appeal. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). "As a general rule, issues that are not properly raised before a trial court cannot be raised on appeal absent compelling or extraordinary circumstances." *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). Because defendant did not raise this

issue in the lower court, it is not preserved for appellate review. Whether a defendant was deprived of his constitutional right to present a defense is reviewed de novo. *Unger*, 278 Mich App at 247. Unpreserved constitutional issues are reviewed for plain error affecting a defendant's substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). An error is plain if it is clear or obvious. *Id*. at 763. An error affected a defendant's substantial rights if it affected the outcome of the lower court proceedings. *Id*.

It is well established that a criminal defendant has a constitutional right to a "meaningful opportunity to present a complete defense." *People v King*, 297 Mich App 465, 473; 824 NW2d 258 (2012) (quotation marks and citations omitted). A criminal defendant must be provided a meaningful opportunity to present evidence in his or her own defense. *Unger*, 278 Mich App at 249. That right is not unlimited. This Court has explained:

> The right to present a complete defense "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." Michigan, like other states, "has a legitimate interest in promulgating and implementing its own rules concerning the conduct of trials." And our Supreme Court has "broad latitude under the Constitution to establish rules excluding evidence from criminal trials." Thus, an "accused must still comply with 'established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.' " The Michigan Rules of Evidence do not infringe on a defendant's constitutional right to present a defense unless they are " 'arbitrary' or 'disproportionate to the purposes they are designed to serve.' " [*King*, 297 Mich App at 473-474 (citations omitted).]

Defendant asserts that the trial court denied him the opportunity to present witnesses and evidence

consistent with his claims of self-defense, defense of his home, the fleeing-felon rule, the common-law right to eject trespassers and the statutory right of a citizen to detain and arrest a felon. However, he fails to identify any such potential witnesses or to reference a citation to the lower court record demonstrating any such denial. Defendant also fails to provide information pertaining to the allegedly precluded evidence or testimony, or how the trial court's alleged failure to admit it hindered his ability to present a defense. Defendant provides no detailed assertions or analysis in support of his contention of error on this issue. As noted in conjunction with other of defendant's issues on appeal:

> 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. [*Kevorkian*, 248 Mich App at 389 (quotation marks and citation omitted).]

Because defendant has failed to sufficiently develop this argument or to provide any record citation in support of his claim, we find that the issue has been abandoned on appeal. *Id*.

Further, defendant in fact argued at trial that he had the right to defend himself and his home from intruders and that he attempted to make a "citizen's arrest." Defendant has not demonstrated plain error with regard to this issue.

XI. SCORING OF OFFENSE VARIABLES

Defendant next challenges the trial court's scoring of eight offense variables. Specifically, the trial court scored the challenged offense variables as follows: (a) OV 1 at 15 points, (b) OV 2 at 5 points, (c) OV 3 at 10

points, (d) OV 4 at 10 points, (e) OV 7 at 50 points, (f) OV 8 at 15 points, (g) OV 10 at 10 points, and (h) OV 12 at 25 points.

As delineated in *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013):

> Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence. Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo. [Citation omitted.]

MCL 777.31 governs the scoring of OV 1 and pertains to the aggravated use of a weapon. MCL 777.31 provides for a score of 25 points if "[a] firearm was discharged at or toward a human being or a victim was cut or stabbed with a knife or other cutting or stabbing weapon," and for a score of 15 points if "[a] firearm was pointed at or toward a victim or the victim had a reasonable apprehension of an immediate battery when threatened with a knife or other cutting or stabbing weapon." MCL 777.31(1)(a) and (c). In this case, OV 1 was initially scored at 25 points, but was adjusted by the trial court to 15 points. Testimony was elicited at trial regarding the placement of a circular saw at the throat of one of the boys and later being run in the vicinity of a boy while duct-taped. This Court in *People v Lange*, 251 Mich App 247, 256; 650 NW2d 691 (2002), examined the difference between objects "designed for the purpose of bodily assault or defense" that "carry their dangerous character because so designed and are, when employed, *per se*, deadly" and those objects that "are not dangerous weapons unless turned to such purpose." (Quotation marks and cita-

tions omitted.) Both types of objects qualify as "weapons" under MCL 777.31. *Lange*, 251 Mich App at 256-257; see also *People v Brown*, 406 Mich 215, 222-223; 277 NW2d 155 (1979). In addition, testimony and evidence pertaining to other "cutting" instruments, such as a hatchet and a knife, were produced at trial. The manner in which defendant and his associates used the circular saw to instill fear, coupled with the "cutting" nature of the saw, supported the trial court's score of 15 points for this offense variable.

OV 2 relates to the possession or use of a lethal weapon and is governed by MCL 777.32, which provides for a score of 5 points if "[t]he offender possessed or used a pistol, rifle, shotgun, or knife or other cutting or stabbing weapon." MCL 777.32(d). In scoring 5 points for OV 2, the trial court explained, "The Court's already indicated, I'm persuaded that there was a cutting weapon used by these Defendants, even if not this Defendant in particular." Further, under an aiding and abetting theory, defendant's associate, Brontkowski, had a firearm that was displayed to the boys, in addition to King's possession of a sheathed samurai sword and a hatchet. The trial court was justified in scoring 5 points for this offense variable.

Defendant objected to the scoring of 10 points for OV 3, asserting that the trial court improperly implied that medical treatment was sought or procured by more than one of the boys. This offense variable is governed by MCL 777.33, which provides for a score of 10 points if "[b]odily injury requiring medical treatment occurred to a victim[.]" MCL 777.33(1)(d). The lower court record established that one of the boys was transported by his mother to Macomb Hospital. Another of the boys was also reportedly transported to the hospital in an ambulance after police arrived. Suffi-

cient evidence existed to support the trial court's scoring of this offense variable.

Defendant also challenges the trial court's scoring of 10 points for OV 4, which concerns psychological injury to a victim. MCL 777.34. MCL 777.34(1)(a) provides for a score of 10 points if "[s]erious psychological injury requiring professional treatment occurred to a victim[.]" In scoring 10 points for this variable, the trial court noted that at trial one of the boys testified that he was in counseling for PTSD (posttraumatic stress disorder) and that he was experiencing problems with memory and increased anger, and another asserted that he had also consulted a therapist. Sufficient evidence was presented to support the trial court's scoring of this variable.

Defendant also objected to the scoring of 50 points for OV 7, MCL 777.37, which pertains to aggravated physical abuse. MCL 777.37(1)(a) provides for a score of 50 points if "[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense[.]" In scoring 50 points for OV 7, the trial court stated that the "last category [conduct designed to substantially increase the fear and anxiety a victim suffered during the offense] appears to apply on all force [sic] with what the jury found in this case." In this case, defendant and his associates blindfolded and duct-taped the boys and made verbal threats accompanied by the sounds of a circular saw in addition to striking the boys with fists, a sheathed sword, and a hatchet. The use of the circular saw is akin to the racking of a shotgun as in *Hardy* as a mechanism to "substantially increase the fear of [a] victim beyond the usual level that accompanies a [crime], to the point where the victim feared

imminent death." *Hardy*, 494 Mich at 445. Two of the boys lost control of their bodily functions during the events and the threats that occurred in defendant's residence. Several of the boys testified to being placed in sufficient fear to evoke crying and screaming. Two indicated that there were additional threats to sever their toes or fingers—the defendant or his associates grabbed the boys' extremities while some form of tool or implement was shown, and the defendant or his associates also used the saw in conjunction with these verbal threats. The trial court did not err in its scoring of this offense variable.

Defendant also objected to the scoring of 15 points for OV 8, MCL 777.38(1)(a), which provides for a score of 15 points when "[a] victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense[.]" At sentencing, defendant argued that there was no asportation of the boys, citing the short time during which they were restrained in the home. In scoring 15 points, the trial court referred to the seizure of one of the boys from the porch and his forceful asportation to the basement. Further, there was evidence that the boys were physically restrained while they were threatened and struck with fists and other implements after having been moved to, and after having their egress prevented from, the basement of defendant's residence. Scoring 15 points for OV 8 was appropriate.

Defendant challenged the scoring of 10 points for OV 10, MCL 777.40, suggesting that the boys were "almost adults . . . who put up quite a struggle in this." According to MCL 777.40(1)(b), 10 points are to be scored for OV 10 when "[t]he offender exploited a victim's physical disability, mental disability, youth or agedness, or a

domestic relationship, or the offender abused his or her authority status[.]" MCL 777.40(3)(b) defines "exploit" as the "manipulat[ion of] a victim for selfish or unethical purposes[.]" " 'Abuse of authority status' means a victim was exploited out of fear or deference to an authority figure, including, but not limited to, a parent, physician, or teacher." MCL 777.40(3)(d). The juvenile status of the boys was not in dispute. As noted by the trial court, defendant's position as a parent was a factor in his authority status and the acts that served to sustain his conviction for extortion qualify as the abuse of authority status.

Finally, defendant objects to the scoring of 25 points for OV 12, MCL 777.42. This offense variable is scored for contemporaneous felonious criminal acts. MCL 777.42(1). A score of 25 points is assessed if three or more contemporaneous crimes against a person were committed. MCL 777.42(1)(a). For an act to be deemed contemporaneous it must have "occurred within 24 hours of the sentencing offense" and "not result in a separate conviction." MCL 777.42(2)(a)(*i*) and (*ii*). Defendant was convicted of extortion, four counts of unlawful imprisonment, four counts of assault with a dangerous weapon, felony-firearm, and two drug offenses. There is no evidence or explication by the trial court that defendant committed additional felonious acts within the requisite time frame for which there was no separate conviction; defendant was sentenced for all acts involved in the commission of the crimes charged and the resultant convictions. "[T]he language of OV 12 clearly indicates that the Legislature intended for contemporaneous felonious criminal acts to be acts other than the sentencing offense and not just other methods of classifying the sentencing offense." *People v Light*, 290 Mich App 717, 726; 803 NW2d 720 (2010). Consequently, OV 12 was improperly scored.

Resentencing is not required, however, as the deduction of 25 points from defendant's OV score does not alter the minimum sentence range under the guidelines. *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006).

XII. DOWNWARD DEPARTURE

Defendant also contests as error the trial court's failure to grant his request for a downward departure in sentencing. This Court reviews for clear error a trial court's determination of whether a particular factor for departure exists. See *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008).

At sentencing, defendant sought a downward departure from his recommended guidelines range, premised on his lack of a criminal record, his standing in the community and history of employment and charity, his cooperation with the police, and his conduct throughout trial. The trial court reviewed the testimony and evidence elicited at trial and discussed issues of credibility pertaining to the boys and the defenses asserted. Although the trial court denied the departure request, it found it appropriate to sentence defendant near the "bottom of the guidelines."

The Michigan sentencing guidelines generally require a trial court to impose a minimum sentence that falls within the appropriate sentencing guidelines range. MCL 769.34(2); *People v Buehler*, 477 Mich 18, 24; 727 NW2d 127 (2007). "A court may depart from the appropriate sentence range established under the sentencing guidelines . . . if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure." MCL 769.34(3); see also *Buehler*, 477 Mich at 24. To be substantial and compelling, a reason must be "objective and verifiable." *Smith*, 482 Mich at 299. " 'To be objective and verifi-

able, a reason must be based on actions or occurrences external to the minds of those involved in the decision, and must be capable of being confirmed.' " *People v Anderson*, 298 Mich App 178, 183; 825 NW2d 678 (2012), quoting *Horn*, 279 Mich App at 43 n 6. The reason or reasons given justifying the departure "must be of considerable worth in determining the length of the sentence and should keenly or irresistibly grab the court's attention. Substantial and compelling reasons for departure exist only in exceptional cases." *Smith*, 482 Mich at 299. " '[T]he trial court . . . must justify on the record both the departure and the extent of the departure.' " *Anderson*, 298 Mich App at 184, quoting *Smith*, 482 Mich at 313 (emphasis omitted).

The trial court rejected defendant's request for a downward departure and, instead, sentenced defendant at the lower end of his guidelines range. The mere fact of defendant's prior, relatively unblemished criminal history was not a substantial and compelling reason for departure from the guidelines. Further, while the facts of this case are somewhat unusual, there is nothing exceptional regarding the case to justify or require a departure. The trial court explained in significant detail the reasoning for its sentencing determination, and the trial court's denial of defendant's request for resentencing and for a downward departure in sentencing was not clear error.

XIII. SORA REGISTRATION

Finally, defendant asserts in his supplemental brief various constitutional challenges to the trial court's requirement that he register in accordance with SORA, MCL 28.721 *et seq*., as a result of his conviction for unlawful imprisonment of a minor. Those challenges include that the required registration (1) con-

stitutes cruel and unusual punishment under the Eighth Amendment of the United States Constitution, (2) violates his right to due process under the Fourteenth Amendment of the United States Constitution, (3) violates the Title-Object Clause of the Michigan Constitution, and (4) fails the constitutionally required rational-relationship test. This Court reviews constitutional issues de novo. *People v Fonville*, 291 Mich App 363, 376; 804 NW2d 878 (2011). Similarly, "we review de novo the interpretation and application of statutes." *People v Waclawski*, 286 Mich App 634, 645; 780 NW2d 321 (2009) (quotation marks and citation omitted). "In determining whether a sentence is cruel or unusual, we look to the gravity of the offense and the harshness of the penalty, comparing the penalty to those imposed for other crimes in this state as well as the penalty imposed for the same offense by other states and considering the goal of rehabilitation." *People v Poole*, 218 Mich App 702, 715; 555 NW2d 485 (1996).

A. RIPENESS

Initially, we address the prosecution's assertion, in its initial brief on appeal, that this issue is not ripe for appellate review, as the trial court had not yet ruled, as of that time, on defendant's motion for resentencing insofar as it related to SORA. "[I]n determining whether an issue is justiciably 'ripe,' a court must assess 'whether the harm asserted has matured sufficiently to warrant judicial intervention.' Inherent in this assessment is the balancing of 'any uncertainty as to whether defendant[] will actually suffer future injury, with the potential hardship of denying anticipatory relief.' " *People v Carp*, 496 Mich 440, 527; 852 NW2d 801 (2014) (quotation marks and citations omit-

ted; second alteration in original). In other words, the ripeness doctrine precludes adjudication of a hypothetical or contingent claim before an actual injury is incurred. See *Thomas v Union Carbide Agricultural Prod Co*, 473 US 568, 580-581; 105 S Ct 3325; 87 L Ed 2d 409 (1985). In this case, defendant's judgment of sentence required his registration under SORA. Moreover, as noted, the trial court has since ruled on defendant's motion for resentencing insofar as it related to SORA, this Court has authorized the filing of supplemental briefs on the issue, and both parties have now briefed it on appeal. This issue is therefore ripe for appellate review.

B. STATUTORY ANALYSIS

Before addressing the constitutional issues raised in the supplemental briefs, we first address the issue of whether SORA applies at all in this circumstance, where the record reflects that there was nothing "sexual" about the conduct that led to defendant's conviction for unlawful imprisonment. We note that defendant does not argue that SORA is inapplicable; rather, defendant's argument is purely a constitutional one, i.e., that in this circumstance, the requirement that he register as a "sex offender" under SORA is constitutionally impermissible. However, we do not consider the constitutionality of a statute unless it is essential to the disposition of the case before us. *People v Higuera*, 244 Mich App 429, 441; 625 NW2d 444 (2001). Therefore, before undertaking a constitutional analysis, and in order to give that analysis context, we first address the issue as a matter of statutory interpretation and consider whether SORA, by its language, applies to the crimes of which defendant was convicted.

1. APPLICABLE VERSION OF SORA

We must first determine which version of SORA applies in this case. SORA requires registration by an "individual[] who [is] domiciled . . . in this state" and "who is convicted of a listed offense after October 1, 1995." MCL 28.723(1)(a). At the time defendant's offenses were committed in June 2011, an earlier version of the statute was in effect. Under that earlier version of the statute, SORA did not include as a "listed offense" a violation of MCL 750.349b (unlawful imprisonment) when the victim was a minor. See 2005 PA 301.[12]

However, SORA was amended in 2011. See 2011 PA 17, effective July 1, 2011. This amended version of SORA was in effect at the time of defendant's convictions and sentencing. Under this amended version of SORA,[13] a listed offense is defined by MCL 28.722(k) as a "tier I, tier II, or tier III offense." In turn, MCL 28.722(s)(*iii*) defines a tier I offense as including "[a] violation of section 349b of the Michigan penal code, 1931 PA 328, MCL 750.349b, if the victim is a minor." MCL 750.349b is the statute pertaining to unlawful imprisonment, and defendant has four convictions under this provision.[14] There is no dispute that the four

[12] The earlier version of SORA did include as a "listed offense" a violation of MCL 750.349 (kidnapping), "if a victim is an individual less than 18 years of age." See 2005 PA 301 (under which MCL 28.722(e)(*vi*) then identified this listed offense). Defendant was not, however, convicted under MCL 750.349.

[13] A more recent amendment to SORA was effective on January 14, 2015. 2014 PA 328. That amendment is not pertinent to the issues raised in this appeal.

[14] The trial court's July 24, 2013 opinion and order stated that "[n]one of Defendant's convictions are identified as a 'listed offense.' " The trial court instead determined at that time that an issue existed regarding whether defendant's conduct satisfied MCL 28.722(e)(*xi*), a provision

individual victims involved in defendant's violation of this statute were all minors. MCL 28.722(*l*) defines a minor as "a victim of a listed offense who was less than 18 years of age at the time the offense was committed."[15]

Given that SORA was amended after the commission of defendant's offenses and before his convictions and sentencing, we must first ascertain which version of SORA is applicable. In doing so, we find instructive the methodology employed by our Supreme Court in *People v Earl*, 495 Mich 33, 48-49; 845 NW2d 721 (2014), in construing the William Van Regenmorter Crime Victim's Rights Act, MCL 780.751 *et seq*. There, the Court determined that the crime victim's rights assessment was "civil" and not "punitive" in nature, such that the retroactive application of a statutory amendment increasing the amount of the crime vic-

within SORA that the trial court described as "a 'catch all' provision that requires registration for '[a]ny other violation of a law of this state or a local ordinance of a municipality that by its nature constitutes a sexual offense against an individual who is less than 18 years of age.' " But in so referring to MCL 28.722(e)(*xi*) and the "listed offenses" of SORA, the trial court apparently focused on the earlier version of SORA. See 2005 PA 301. As we hold in this opinion, that focus was improper, as it is the 2011 version of SORA that applies in this case. The 2011 version of SORA contains an analogous catchall provision within the definition of a tier I offense in MCL 28.722(s)(*vi*). However, the parties do not argue on appeal the applicability of any catchall provision, but instead properly focus on the applicability of SORA to a conviction of the listed offense of unlawful imprisonment of a minor, as set forth in the 2011 version of SORA. See MCL 28.722(s)(*iii*), as amended by 2011 PA 17. The trial court, in its March 6, 2014 opinion, did properly focus on the 2011 version of SORA and its applicability to the crime of unlawful imprisonment of a minor.

[15] MCL 28.722(w)(*ii*) defines a tier III offense as including "[a] violation of section 349 of the Michigan penal code, 1931 PA 328, MCL 750.349, committed against a minor." MCL 750.349 is the statute pertaining to kidnapping. Again, defendant was not convicted under that provision.

tim's rights assessment was not a violation of the Ex Post Facto Clauses of the United States and Michigan Constitutions.

Similarly, this Court has determined that SORA is not punitive in nature, but is rather a regulatory scheme designed to protect the public and to provide a civil remedy. *People v Golba*, 273 Mich App 603, 617; 729 NW2d 916 (2007); *People v Pennington*, 240 Mich App 188, 193-197; 610 NW2d 608 (2000). Thus, registration under SORA "is governed by [the version of] the statute in effect at the time of sentencing." See *People v Lueth*, 253 Mich App 670, 693; 660 NW2d 322 (2002). That version is the version adopted in 2011, effective July 1, 2011. See 2011 PA 17. Moreover, application of the 2011 version of SORA to defendant, notwithstanding that defendant's offenses were committed before its effective date, "does not violate the prohibition against ex post facto laws." *Pennington*, 240 Mich App at 197. We therefore hold that the trial court ultimately was correct in applying the 2011 version of SORA, and in considering its applicability to the "listed offense" of unlawful imprisonment, MCL 750.349b, when the victims were minors. See MCL 28.722(s)(*iii*).

2. SORA'S APPLICABILITY TO NONSEXUAL OFFENSES

Having determined that it is the 2011 version of SORA that we must apply, we must next assess the scope of its reach. Specifically, we must determine whether SORA applies when the "listed offense," which in this case is unlawful imprisonment, MCL 750.349b, of a minor, arises from conduct that the record reflects was not of a sexual nature.[16]

[16] The prosecution does not argue on appeal, nor did it argue below, that the underlying conduct was in any manner of a sexual nature. To the contrary, in responding to defendant's motion for resentencing, in

a. APPLICABLE CASELAW

We initially glean some guidance from prior decisions of this Court that have upheld SORA registration requirements notwithstanding that the offense of which the defendant was convicted did not include a sexual component. In *Golba*, for example, the defendant was charged with possession of child sexually abusive material, MCL 750.145(c)(4), (which is a listed offense under SORA), and unauthorized access to computers, MCL 752.795 (which is not a listed offense under SORA). *Golba*, 273 Mich App at 605. The jury convicted the defendant only of the latter charge. *Id*. Since the conviction was not for a listed offense, this Court evaluated the defendant's conviction under SORA's catchall provision, which requires registration where the offense "by its nature constitutes a sexual offense against an individual who is less than 18 years of age." See former MCL 28.722(e)(*xi*).[17] This Court

which defendant had contended that "there was not the slightest hint of sexual motive in the acts charged or the crime charged," the prosecution described in detail, citing the evidentiary record, how the underlying conduct of defendant and his associates constituted "torture." The prosecution recounted that defendant and his associates told the boys that they were going to "kill them," "f--- them up," and "cut off their hands and feet." Defendant and his associates also "doused [the boys] with flammable liquid and threatened to set [them] on fire; [they] had a gun pointed at [the boys'] heads; [they] threatened to have [the boys'] throat, hands, and feet cut with an electric saw; [they] hit [the boys] with the back of a hatchet; and [they] threatened to have [the boys'] fingers torn off with a pliers." We are satisfied from our review of the parties' briefing and the evidentiary record below that there was no basis for requiring SORA registration under SORA's catchall provision and that we instead must evaluate whether SORA registration was proper based solely on defendant's conviction of the "listed offense" of false imprisonment, MCL 750.349b, of a minor. See MCL 28.722(s)(*iii*).

[17] The catchall provision in effect at the time of *Golba*. See 2005 PA 301. The current and equivalent catchall provision now appears in MCL 28.722(s)(*vii*). See 2014 PA 328.

affirmed the trial court's order that the defendant register under SORA, holding that "the underlying factual basis for a conviction governs" whether SORA's catchall provision applies and that "whether an offense is 'by its nature . . . a sexual offense' within the meaning of MCL 28.722(e)(*xi*) depends on the defendant's conduct that formed the basis for the conviction, regardless of the fact that the statute could be applied to nonsexual behavior in other circumstances." *Golba*, 273 Mich App at 611 (citation omitted).

Similarly, in *People v Lee*, 288 Mich App 739; 794 NW2d 862 (2010) (*Lee I*), rev'd on other grounds 489 Mich 289 (2011) (*Lee II*), the defendant was charged as a fourth-offense habitual offender with second-degree criminal sexual conduct and second-degree child abuse. *Lee II*, 489 Mich at 292. The underlying conduct involved flicking the penis of a neighbor's three-year-old child to get his attention while attempting to diaper and dress the child. *Lee II*, 489 Mich at 292; *Lee I*, 288 Mich App at 746. The defendant pleaded *nolo contendere* to third-degree child abuse as a second-offense habitual offender. Third-degree child abuse was not a specified listed offense under SORA. *Lee II*, 489 Mich at 295. The defendant's conduct was therefore evaluated under the catchall provision then denominated as MCL 28.722(e)(*xi*). *Lee II*, 489 Mich at 295. The original trial court judge did not decide that question; instead, the trial court issued a judgment of sentence that did not require registration under SORA and left open the question of SORA registration pending subsequent testimony on the issue. *Id*. at 293. Approximately 20 months later, a second trial court judge held a hearing on the issue and ruled that SORA registration was required. *Id*. at 293-294. This Court affirmed. *Lee I*, 288 Mich App at 746. Citing *Golba* and *People v Althoff*, 280 Mich App 524, 534; 760 NW2d 764 (2008),

this Court in *Lee I* held that "the particular facts of a violation, and not just the elements of the violation, are to be considered." *Lee I*, 288 Mich App at 745. Our Supreme Court reversed solely on the basis of the trial court's procedural errors and failure to follow the requirements of the statute; it did not otherwise disturb the holding of this Court. *Lee II*, 489 Mich at 297-301.[18]

This caselaw is instructive, in that it demonstrates that SORA registration may be required even where the offense requiring registration is not necessarily itself of a sexual nature. The *Golba* and *Lee I* Courts instead determined, in the circumstances presented, that it was appropriate to consider the underlying factual basis for the conviction, which in *Golba* and *Lee I*—unlike in the instant case—did involve conduct of a sexual nature. However, those cases do not answer the precise question before us, because the defendants in those cases were not convicted of listed offenses and the Courts were therefore obliged to construe SORA's catchall provision to determine whether the underlying conduct "by its nature constitute[d] a sexual offense against an individual who [was] less than 18 years of age." MCL 28.722(e)(*xi*).

The catchall provision is not at issue in this case. Therefore, we need not construe the statutory lan-

[18] Although the Supreme Court overruled our decision in *Lee I*, it did so "[b]ecause the trial court . . . failed to satisfy th[e] statutory requirements [regarding SORA registration, and] its subsequent decision at a postsentencing hearing held 20 months after the sentence was entered to require registration was erroneous." *Lee II*, 489 Mich at 301. The Supreme Court did not otherwise disturb this Court's reasoning, consonant with *Golba*, that "the particular facts of a violation, and not just the elements of the violation, are to be considered" when determining whether the conduct underlying a conviction constitutes "by its nature . . . a sexual offense against an individual who is less than 18 years of age." See MCL 28.722(e)(*xi*); *Lee I*, 288 Mich App at 745.

guage of that provision to resolve this case. Rather, the issue before us is whether defendant's conviction of a listed offense requires him to register under SORA even though the record reflects that the conduct underlying his conviction was not sexual in nature. In other words, must listed offenses, like those falling within the catchall provision, be sexual in nature?

This Court addressed that question to some extent in *Fonville*, and upheld a defendant's required registration under SORA for the offense of child enticement, MCL 750.350, a listed tier III offense under the current version of SORA, MCL 28.722(w)(*iii*). *Fonville*, 291 Mich App at 379-380.[19] The defendant in that case pleaded guilty to child enticement after failing to return at the agreed-on time children who had been voluntarily placed in his care. Instead, the defendant kept the children with him in his vehicle while he and his friend drove around under the influence of alcohol and drugs. *Id*. at 367-370. This Court noted that "the offense of child enticement includes no express sexual component as a requirement for a conviction of the offense . . . ." *Id*. at 380. Yet the *Fonville* Court concluded that "the Legislature has nevertheless deemed registration for those convicted of that crime to be a necessary measure to protect the safety and welfare of the children of this state. And in that case, Fonville admitted that his conduct, while not sexual in nature, 'endangered two young kids[.]' " *Id*. (alteration in original). Similarly, here, defendant's conduct definitely endangered his minor victims.

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[19] The *Fonville* panel analyzed defendant's challenge to his SORA registration under a previous version of the statute. See MCL 28.722(e)(*vii*); 2005 PA 301. However in both versions, child enticement is a listed offense.

Fonville thus directs our conclusion that where, as here, a defendant is convicted of a listed offense, SORA registration is required even though the underlying conduct is not sexual in nature. Because the rationale for the Court's conclusion in *Fonville* may not be readily apparent, however, we find it helpful to delve into the statutory basis that we believe resulted in the conclusion reached in *Fonville*.

b. STATUTORY BASIS

The starting point of our statutory analysis is, as always, with the language of the statute itself. See *People v Stone*, 463 Mich 558, 562; 621 NW2d 702 (2001). The short title of SORA is the "sex offenders registration act." MCL 28.721. While that description is not dispositive in and of itself, see *H J Tucker & Assoc, Inc v Allied Chucker & Engineering Co*, 234 Mich App 550, 559; 595 NW2d 176 (1999), the short title of SORA thus suggests that it serves to require that only "sex offenders" must register under the act. Unfortunately, SORA does not itself define the term "sex offender."

However, in enacting 2011 PA 17, the Michigan Legislature described SORA, by its then-existing long-form title, as follows:

> An act to require persons convicted of *certain offenses* to register; to prohibit certain individuals from engaging in certain activities within a student safety zone; to prescribe the powers and duties of certain departments and agencies in connection with that registration; and to prescribe fees, penalties, and sanctions[.] [2011 PA 17, title (emphasis added).][20]

[20] Certain elements of this long-form title, which are not pertinent to this part of our analysis, were added after the initial enactment of SORA in 1994. The original long-form title of SORA, as enacted in 1994, was

See also *People v Dowdy*, 489 Mich 373, 379-380; 802 NW2d 239 (2011) ("SORA is a conviction-based registration statute that requires individuals convicted of certain 'listed offenses' to register as sex offenders."). While arguably counterintuitive, the term "sex offender," under a broad reading of this language, would derive its meaning from the satisfaction of the specified condition; that is, persons who are convicted of "certain offenses" that are "listed offenses" under SORA are, by definition, "sex offenders," regardless of the nature of the offense.

SORA describes its legislative purpose as follows:

> The legislature declares that the sex offenders registration act was enacted pursuant to the legislature's exercise of the police power of the state with the intent to better assist law enforcement officers and the people of this state in preventing and protecting against the commission of future criminal sexual acts by convicted sex offenders. The legislature has determined that a person who has been convicted of committing an offense covered by this act poses a potential serious menace and danger to the health, safety, morals, and welfare of the people, and particularly the children, of this state. The registration requirements of this act are intended to provide law enforcement and the people of this state with an appropriate, comprehensive, and effective means to monitor those persons who pose such a potential danger. [MCL 28.721a.]

The first sentence of this provision speaks of "preventing and protecting against the commission of future criminal sexual acts *by convicted sex offenders*." *Id*. (emphasis added). Arguably, this language again

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"AN ACT to require persons convicted of certain offenses to register; to prescribe the powers and duties of certain departments and agencies in connection with that registration; and to prescribe penalties and sanctions." 1994 PA 295, title.

suggests an intent that SORA apply only to those who have been convicted of crimes of a sexual nature. However, reading this sentence in the overall context of the provision arguably again supports the conclusion that the term "sex offender" merely means "a person who has been convicted of committing an offense covered by this act" and whom the Legislature has determined to therefore be a person who poses the described potential danger. *Id*.

c. HISTORICAL CONTEXT

We glean some further guidance from the fact that the 2011 amendment of SORA, as set forth in 2011 PA 17, was enacted in order to bring Michigan into compliance with the federal Sex Offender Registration and Notification Act (SORNA), 42 USC 16901 *et seq*. SORNA was enacted as a component of the Adam Walsh Child Protection and Safety Act of 2006, PL 109-248; 120 Stat 587 (2006), and established "a comprehensive national system" for the registration of "sex offenders and offenders against children" that, among other things, required states to separate sex offenders according to three tiers of listed offenses. 42 USC 16901; 42 USC 16911; *United States v Lafferty*, 608 F Supp 2d 1131, 1138 (D SD, 2009). We initially note that while SORNA established a "Sex Offender Registration and Notification Program," 42 USC 16902, it more broadly declared its purpose to be the protection of the public from "sex offenders and offenders against children." 42 USC 16901. Moreover, unlike SORA, the federal SORNA legislation defines the term "sex offender" and correspondingly defines the term within the context of each of the three tiers of listed offenses. "The term 'sex offender' means an individual who was convicted of a sex offense." 42 USC 16911(1). While

that verbiage again suggests that the offense must be of a sexual nature, closer inspection of SORNA reveals a definition of "sex offense" as including both:

> (i) a criminal offense that has an element involving a sexual act or sexual contact with another;
>
> (ii) a criminal offense that is a specified offense against a minor. [42 USC 16911(5)(A).]

The fact that those two alternative components of a "sex offense" stand in contradistinction to each other, and yet both constitute a "sex offense," compels the conclusion that a "criminal offense that is a specified offense against a minor" need not necessarily "ha[ve] an element involving a sexual act or sexual contact with another." See *United States v Mi Kyung Byun*, 539 F3d 982, 987 (CA 9, 2008) ("Because we hold Byun committed a sex offense under § 16911(5)(A)(ii), we do not address whether Byun's crime qualifies as a sex offense under § 16911(5)(A)(i)."). To read the provision otherwise would render certain parts of its language surplusage, which is not permitted. *People v Peltola*, 489 Mich 174, 181; 803 NW2d 140 (2011). Moreover, the term "specified offense against a minor" is defined to mean "an offense against a minor that involves any of" a number of specified offenses or activities. 42 USC 16911(7). Many of the specified activities involve conduct of an inherently sexual nature: solicitation to engage in sexual conduct; use in a sexual performance; solicitation to practice prostitution; video voyeurism; possession, production, or distribution of child pornography; criminal sexual conduct involving a minor or use of the Internet to facilitate or attempt such conduct; and any conduct that by its nature is a sex offense against a minor. 42 USC 16911(7)(C), (D), (E), (F), (G), (H), and (I). However, other of the specified activities involve con-

duct that is not necessarily sexual in nature, provided that it is an offense against a minor: an offense involving kidnapping or false imprisonment, "unless committed by a parent or guardian," for example. 42 USC 16911(7)(A) and (B); see also *Byun*, 539 F3d at 992.

42 USC 16912(a) requires that "[e]ach jurisdiction shall maintain a jurisdiction-wide sex offender registry conforming to the requirements of this title." "Jurisdiction" is defined to include "[a] State." 42 USC 16911(10)(A). Michigan was therefore obliged to amend SORA to conform to the requirements of SORNA. It did so in 2011 with the enactment of 2011 PA 17.

42 USC 16912(b) provides that the United States Attorney General "shall issue guidelines and regulations to interpret and implement [SORNA]." In accordance with that directive, the United States Department of Justice adopted The National Guidelines for Sex Offender Registration and Notification in July 2008. See 73 Fed Reg 38030 (July 2, 2008). Consistent with SORNA's requirement that states "conform[] to the requirements" of the federal legislation, 42 USC 16912(a), the guidelines confirm that "SORNA establishes a national baseline for sex offender registration and notification programs. In other words, the Act generally constitutes a set of *minimum* national standards and sets a floor, not a ceiling, for jurisdictions' programs." 73 Fed Reg at 38046.

Consequently, given that SORNA expressly includes kidnapping and false imprisonment as "specified offense[s] against a minor" that, as such, by definition constitute "sex offense[s]" requiring registration, Michigan was obliged to conform to that minimum national standard by similarly including within SORA the crimes of kidnapping and unlawful imprisonment

against a minor. See MCL 28.722(s)(*iii*); MCL 750.349; MCL 750.349b.[21]

Given this backdrop and context, we hold, from a statutory interpretation perspective, that the reach of SORA extends generally to the offense of unlawful imprisonment where the victim is a minor, without regard to whether the underlying conduct was in any way sexual in nature.[22]

C. CONSTITUTIONAL CHALLENGES

We now turn to defendant's constitutional chal-

[21] The federal guidelines confirm that

> [t]he relevant offenses are those whose gravamen is abduction or unlawful restraint of a person, which go by different names in different jurisdictions, such as "kidnapping," "criminal restraint," or "false imprisonment." Jurisdictions can implement the offense coverage requirement of these clauses by requiring registration for persons convicted of offenses of this type (however designated) whose victims were below the age of 18. It is left to jurisdictions' discretion under these clauses whether registration should be required for such offenses in cases where the offender is a parent or guardian of the victim. [Office of the Attorney General, *The National Guidelines for Sex Offender Registration and Notification*, 73 Fed Reg 38030, 38051 (July 2, 2008).]

In Michigan, the crime of false imprisonment is named "unlawful imprisonment," MCL 750.349b. The fact that the guidelines recognize states' discretion over whether registration for this offense should be required where the offender is a parent or guardian of a victim (which is not required under SORNA) suggests that states do not otherwise have discretion over whether to require registration for this offense.

[22] For all of these reasons, we similarly decline to interpret the language of SORA's catchall provision ("[a]ny *other* violation . . . that by its nature constitutes a sexual offense against an individual who is a minor," MCL 28.722(s)(*vi*), as amended by 2011 PA 17 (emphasis added)), to limit all listed offenses under SORA to those that by their nature constitute sexual offenses, but instead interpret the term "listed offenses" more broadly to include other violations of law, provided that the specified conditions are satisfied.

lenges to his required registration under SORA, and find them unavailing.[23] The party challenging the constitutionality of a statute has the burden of proving the law's invalidity. *People v Sadows*, 283 Mich App 65, 67; 768 NW2d 93 (2009). When evaluating the constitutionality of a statute, we presume statutes are constitutional and "exercise the power to declare a law unconstitutional with extreme caution, and we never exercise it where serious doubt exists with regard to the conflict." *Phillips v Mirac, Inc*, 470 Mich 415, 422; 685 NW2d 174 (2004). We indulge "[e]very reasonable presumption" in favor of a statute's validity. *Id*. at 423. A statute is not unconstitutional merely because it appears "undesirable, unfair, unjust, or inhumane" nor because it appears that the statute "is unwise or results in bad policy." *People v Boomer*, 250 Mich App 534, 538; 655 NW2d 255 (2002). Such arguments should be addressed to the Legislature. *Id*. Rather, we will construe a statute as constitutional unless its unconstitutionality is "clearly apparent." *Id*. at 539. This presumption is so strong it " 'may justify a narrow construction or even a construction against the natural interpretation of the statutory language.' " *People v Malone*, 287 Mich App 648, 658; 792 NW2d 7 (2010), quoting *Lueth*, 253 Mich App at 675.

1. CRUEL AND UNUSUAL PUNISHMENT

Defendant first argues that SORA registration is cruel and unusual punishment under the Eighth Amendment of the United States Constitution insofar as it applies to a conviction for unlawful imprison-

[23] In its supplemental brief on appeal, the prosecution only addresses defendant's argument that SORA registration constitutes cruel and unusual punishment on these facts.

ment.[24] The trial court did not address this aspect of defendant's argument. However, this Court has expressly held that the SORA registration requirement does not constitute cruel and unusual punishment even when the underlying offense has no sexual component. See *Fonville*, 291 Mich App at 380-381. We are bound by that decision. MCR 7.215(C)(2). Moreover, this Court has consistently ruled that SORA's registration requirement, as applied to adult offenders, does not constitute punishment and is, instead, structured or focused on the protection of the public. *Pennington*, 240 Mich App at 193-197. This is confirmed by the previously quoted purpose underlying SORA, as reflected in MCL 28.721a.

Specifically, SORA has been construed not to be punitive, but to constitute "a remedial regulatory scheme furthering a legitimate state interest." *Golba*, 273 Mich App at 617. "In sum, . . . any detrimental effects of SORA on sex-offender registrants were not so significant as to warrant finding that the act imposed a criminal penalty affecting constitutional rights." *Id*. Quite recently this Court has reaffirmed this conclusion:

> In sum, the relevant . . . factors indicate that SORA does not impose punishment as applied to defendant. SORA has not been regarded in our history and traditions as punishment, it does not impose affirmative disabilities or restraints, it does not promote the traditional aims of punishment, and it has a rational connection to a nonpunitive purpose and is not excessive with respect to this

[24] Michigan's Constitution prohibits "cruel *or* unusual punishment" and has been interpreted as providing broader protection than its federal counterpart. Const 1963, art 1, § 16 (emphasis added); see *People v Bullock*, 440 Mich 15, 30; 485 NW2d 866 (1992). Defendant does not argue that his SORA registration is prohibited by the Michigan Constitution; even if he had done so, it would not alter our analysis.

> purpose. Defendant therefore has failed to show by "the clearest proof" that SORA is "so punitive either in purpose or effect" that it negates the Legislature's intent to deem it civil. Accordingly, as applied to defendant, SORA does not violate the Ex Post Facto Clause or amount to cruel or unusual punishment because it does not impose punishment. [*People v Temelkoski*, 307 Mich App 241, 270-271; 859 NW2d 743 (2014) (citations omitted).]

Accordingly, we reject defendant's contention that the requirement that he register under SORA constitutes cruel and unusual punishment.

2. DUE PROCESS/RATIONAL RELATIONSHIP

Defendant next argues that his registration under SORA violates his right to due process of law and, in a separate subheading, argues that SORA is not rationally related to any governmental interest. As discussed below, and although defendant has woefully developed this argument, we conclude that defendant appears to raise a vague-as-applied due process claim as well as a substantive due process claim; we find both of these claims unavailing.

The United States and Michigan Constitutions guarantee that no one may be deprived of life, liberty or property without due process of law. US Const, Am V; US Const, Am XIV; Const 1963, art 1, § 17; *Elba Twp v Gratiot Co Drain Comm'r*, 493 Mich 265, 288; 831 NW2d 204 (2013). Michigan's Due Process Clause is construed no more broadly than its federal equivalent. *People v Sierb*, 456 Mich 519, 523-524; 581 NW2d 219 (1998).

Due process claims may be procedural or substantive. Procedural due process involves the fairness of procedures used by the state that result in the deprivation of life, liberty, or property. *In re Parole of Hill*,

298 Mich App 404, 412; 827 NW2d 407 (2012). With regard to criminal statutes, procedural due process is generally satisfied by providing a defendant with reasonable notice of the charge against him or her and an opportunity to be heard and present a defense. *In re Oliver*, 333 US 257, 273; 68 S Ct 499; 92 L Ed 682 (1948); *People v Eason*, 435 Mich 228, 233; 458 NW2d 17 (1990); *People v Aspy*, 292 Mich App 36, 48-49; 808 NW2d 569 (2011). By contrast, the right to substantive due process bars "certain government actions regardless of the fairness of the procedures used to implement them." *Sacramento Co v Lewis*, 523 US 833, 840; 118 S Ct 1708, 140 L Ed 2d 1043 (1998) (quotation marks and citation omitted); see also *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 197; 761 NW2d 293 (2008). A substantive due process challenge may be facial or "as applied." A facial challenge to a statute may be upheld only if the challenger demonstrates that there is no application of the statute that is constitutional. See *United States v Salerno*, 481 US 739, 745; 107 S Ct 2095; 95 L Ed 2d 697 (1987). A statute may also be challenged on the grounds that it is unconstitutional "as applied" to the challenger, notwithstanding that some applications of the statute may be constitutionally sound. See *Troxel v Granville*, 530 US 57, 73; 120 S Ct 2054; 147 L Ed 2d 49 (2000).

Within the realm of due process claims, a statute may also be challenged as void for vagueness. *Ray Twp v B & BS Gun Club*, 226 Mich App 724, 732; 575 NW2d 63 (1997). A statute is unconstitutionally vague if it does not provide "fair notice of the conduct it regulates" and "gives the trier of fact unstructured and unlimited discretion in determining whether the statute has been violated." *Id.*; see also *People v Loper*, 299 Mich App 451, 458; 830 NW2d 836 (2013). Vagueness challenges that do not involve First Amendment freedoms

must be "examined in light of the facts of each particular case." *People v Lino*, 447 Mich 567, 575; 527 NW2d 434 (1994); *People v Dillon*, 296 Mich App 506, 510; 822 NW2d 611 (2012). The challenged statute must be construed with reference to the "entire text of the statute" to determine whether the requisite certainty exists. *People v Hayes*, 421 Mich 271, 284; 364 NW2d 635 (1984).

Although defendant does not develop his argument, we conclude that his reference to a lack of a rational relationship to a legitimate governmental interest in the Legislature's addition of the crime of unlawful imprisonment (of a minor) to SORA is effectively a substantive due process challenge. Procedural due process challenges to SORA generally center on the damage to a registrant's reputation from being listed on a public sex offender registry and the argument that before having to register, a potential registrant must be granted notice and the opportunity to be heard and present a defense. In analyzing Connecticut's sex offender registration statute, the United States Supreme Court held that procedural due process concerns were not implicated by the requirement of registration when "the law's requirements turn on an offender's conviction alone—a fact that a convicted offender has already had a procedurally safeguarded opportunity to contest." *Conn Dep't of Pub Safety v Doe*, 538 US 1, 8; 123 S Ct 1160; 155 L Ed 2d 98 (2003). Based on this reasoning, the United States Court of Appeals for the Sixth Circuit has held that sex offender registration does not violate procedural due process when, as in Michigan, registration "is based solely upon the fact of an offender's conviction" and requires no additional individual determinations for which an offender should receive notice and an opportunity to be heard. See *Fullmer v Mich Dep't of*

State Police, 360 F3d 579, 582 (CA 6, 2004).[25] Further, this Court has determined that SORA registration does not trigger procedural due process protections, because registration does not represent the state's deprivation of a defendant's rights. *In re Tiemann*, 297 Mich App 250, 268; 823 NW2d 440 (2012). Damage to registrants' reputations as a result of registration is both " 'speculative' " and " 'flow[s] most directly from [a defendant's] own convicted misconduct and from private citizens' reaction thereto, and only tangentially from state action.' " *Id*., quoting *Doe v Kelley*, 961 F Supp 1105, 1112 (WD Mich, 1997). We therefore conclude that, even if defendant had meant to raise a procedural due process challenge to his SORA registration, such a challenge would be meritless.[26]

Both substantive due process challenges and challenges brought under the Equal Protection Clause (to the woefully inadequate extent defendant raised such challenges) are subject to rational basis review, in the absence of a highly suspect category such as race, national origin, or ethnicity or a category receiving heightened scrutiny such as legitimacy or gender. See US Const, Am XIV; Const 1963, art 1, § 2. Rational basis review considers whether the "legislation is rationally related to a legitimate government purpose." See *Crego v Coleman*, 463 Mich 248, 259; 615 NW2d 218 (2000). However, before reaching rational basis review in an equal protection challenge, a claimant must show that he or she was treated differently than

[25] Decisions of federal courts of appeals, while not binding on this Court, may be persuasive. See *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004).

[26] In *Conn Dep't of Public Safety*, 538 US at 8, and *Fullmer*, 360 F3d at 582, the courts left open the question whether sex offender registration requirements violate *substantive* due process because the plaintiffs did not assert error on that basis.

other persons who were similarly situated. See *Wysocki v Felt*, 248 Mich App 346, 367; 639 NW2d 572 (2001). In this case, defendant has not alleged that he was treated differently than other persons required to register under SORA. Thus, we conclude that defendant's rational relationship challenge to SORA's inclusion of unlawful imprisonment of minors as a "listed offense" (at least as applied to registrants who committed the offense without a sexual purpose) is essentially a substantive due process claim. See *Cummins v Robinson Twp*, 283 Mich App 677, 700-701; 770 NW2d 421 (2009).

"The question whether challenged legislation violates principles of substantive due process depends on the nature of the right affected." *Brinkley v Brinkley*, 277 Mich App 23, 30; 742 NW2d 629 (2007). If the challenged legislation affects a fundamental right or involves a suspect classification, "strict scrutiny applies and a compelling state interest is required to uphold it." *Id*. If not, the rational basis test applies and this Court "examines whether the law is rationally related to a legitimate governmental purpose." *Id*.; see also *Lingle v Chevron USA, Inc*, 544 US 528, 542; 125 S Ct 2074; 161 L Ed 2d 876 (2005); *Conlin v Scio Twp*, 262 Mich App 379, 390; 686 NW2d 16 (2004).

This Court has stated that the requirement of registration under SORA does not implicate a fundamental right. See *In re Wentworth*, 251 Mich App 560, 565-566; 651 NW2d 773 (2002). The Court in *Wentworth* held that SORA registration did not deprive the respondent of a fundamental liberty interest or a constitutional right to privacy. *Id*. Indeed, defendant does not appear to argue that SORA registration deprived him of a fundamental right so as to trigger strict scrutiny.

Regarding rational basis review, this Court has stated:

> Under the traditional or rational basis test, a classification will stand unless it is shown to be essentially arbitrary. Stated differently, one who attacks an enactment must show that it is arbitrary and wholly unrelated in a rational way to the objective of the statute. Few statutes have been found so wanting in "rationality" as to fail to satisfy the "essentially arbitrary" test. Stated positively, the test is that courts must uphold a statutory classification where it is rationally related to a legitimate government purpose. The rational basis test reflects the judiciary's awareness that it is up to legislatures, not courts, to decide the wisdom and utility of legislation. [*Wysocki*, 248 Mich App at 354 (quotation marks and citations omitted).]

With regard to SORA in general, this Court has held that SORA is rationally related to a "legitimate state interest of protecting the public." See *Golba*, 273 Mich App at 620. Put another way, SORA in general is rationally related to the Legislature's stated purpose of protecting the people of Michigan from those who have committed offenses that "pose[] a potential serious menace and danger to the health, safety, morals, and welfare of the people, and particularly the children, of this state." MCL 28.721a; see also *Temelkoski*, 307 Mich App at 270 ("SORA . . . has a rational connection to a nonpunitive purpose . . . ."); *Fonville*, 291 Mich App at 380. However, the issue of whether the requirement of registration for offenders who commit the crime of unlawful imprisonment of a minor without a sexual purpose survives rational basis review appears to be an issue of first impression in Michigan.

Many other jurisdictions have faced similar challenges to the inclusion of false imprisonment crimes, even absent a sexual purpose, in their sex offender

registration statutes.[27] The majority have upheld the statutes under rational basis review. See, e.g., *Moffitt v Commonwealth*, 360 SW3d 247, 255-257 (Ky App, 2012) (concluding that although the defendant's conviction of child kidnapping included a sexual component, the purpose of Kentucky's registration statute was the protection of children and the requirement of registration for certain offenses against minors, regardless of a sexual component, did not offend substantive or procedural due process); *State v Smith*, 323 Wis 2d 377, 397-407; 780 NW2d 90 (Wis, 2010) (holding that even though the offense "was not of a sexual nature," requiring the defendant to register as a sex offender following his conviction for false imprisonment of a minor was rationally related to the government interest in protecting the public and did not violate the defendant's right to due process or equal protection under the law); *Rainer v State*, 286 Ga 675, 676-679; 690 SE2d 827 (2010) (holding that the requirement of sex offender registration for the defendant's conviction of false imprisonment of a minor was not cruel and unusual punishment and did not violate substantive or procedural due process); *People v Cintron*, 46 AD3d 353, 354; 848 NYS2d 616 (2007) (upholding the trial court's determination that the requirement of sex offender registration for "certain nonsexual abduction-related crimes" was constitutional); *People v Johnson*, 225 Ill 2d 573, 591-592; 870 NE2d 415 (2007) (holding that the inclusion of "aggravated kidnapping of a minor by a nonparent" in the Illinois sex offender registration act was not violative of due process "regardless of whether [the offender's] conduct was sexually motivated"); *State v Sakobie*, 165 NC App 447, 453; 598

[27] Our discussion of such challenges in other jurisdictions is not intended to be an exhaustive one.

SE2d 615 (2004) (upholding the defendant's required registration for kidnapping a minor during the commission of a larceny).

However, this conclusion is not universal. See *ACLU of New Mexico v City of Albuquerque*, 139 NM 761, 772; 137 P3d 1215 (NM App, 2006) (stating that the defendant city's sex offender registration ordinance was constitutionally defective to the extent that it included kidnapping and false imprisonment offenses as sex offenses when the city's stated purpose in passing the ordinance was the "protection of victims and potential victims of sex offenses"); *State v Small*, 162 Ohio App 3d 375, 386-390; 833 NE2d 774 (2005) (holding that classifying the defendant as a "sexually oriented offender" after he was convicted of kidnapping minors without a sexual purpose, violated the defendant's right to substantive due process where the statutory definition of "sexual offender" included one who had committed certain criminal offenses against a minor regardless of sexual intent).

Giving due deference to the standards applicable for evaluating the constitutionality of a statute, we agree with the majority of the other jurisdictions that have considered this issue. As we have already noted, "[t]he legislature has determined that a person who has been convicted of committing an offense covered by [SORA] poses a potential serious menace and danger to the health, safety, morals, and welfare of the people, and particularly the children, of this state." MCL 28.721a. Sex offender registration is required for SORA convictions "to provide law enforcement and the people of this state with an appropriate, comprehensive, and effective means to monitor those persons who pose such a potential danger." *Id*. Including in the SORA registration requirement persons who commit

the offense of false imprisonment against minors is not " 'arbitrary and wholly unrelated in a rational way' " to this stated purpose. *Wysocki*, 248 Mich App at 354 (citation omitted). Although defendant asserts that the asportation (and presumably false imprisonment) of minors may occur for many nonsexual reasons, he does not explain how the fact that a crime against a minor may be committed for nonsexual reasons renders its inclusion in SORA "wholly unrelated" to SORA's purpose. See *Fonville*, 291 Mich App at 380. For these reasons, we conclude that defendant's challenge to his required registration under SORA on the grounds of substantive due process must fail.

Finally, defendant's argument that SORA is unconstitutionally vague as applied to his offenses, and thus violates his right to procedural due process, is meritless. Regardless of the validity of such an argument under the previous version of SORA, the 2011 version applicable to defendant's offenses explicitly lists as a tier I offense the crime of which defendant was convicted. MCL 28.722(s)(*iii*). Thus, SORA both provides "fair notice of the conduct it regulates" and does not give "the trier of fact unstructured and unlimited discretion in determining whether the statute has been violated." *Ray Twp*, 226 Mich App at 732. We decline to find SORA unconstitutionally vague and reject defendant's due process claims. See *Harper*, 479 Mich at 621.

3. TITLE-OBJECT CLAUSE

We also reject defendant's challenge to the inclusion within SORA of the crime of unlawful imprisonment of a minor on the ground that it violates the Title-Object Clause of the Michigan Constitution. The Title-Object Clause provides:

> No law shall embrace more than one object, which shall be expressed in its title. No bill shall be altered or amended on its passage through either house so as to change its original purpose as determined by its total content and not alone by its title. [Const 1963, art 4, § 24.]

"The purpose of the Title-Object Clause is to ensure 'that legislators and the public receive proper notice of legislative content and [to] prevent[] deceit and subterfuge.' " *Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 388; 803 NW2d 698 (2010) (citation omitted). "The constitutional requirement should be construed reasonably and permits a bill enacted into law to 'include all matters germane to its object, as well as all provisions that directly relate to, carry out, and implement the principal object.' " *Id*. (citation omitted).

"There are three ways to challenge a statute on the basis of the Title-Object Clause: [(1)] 'a "title body" challenge, (2) a multiple-object challenge, and (3) a change of purpose challenge.' " *Ray Twp*, 226 Mich App at 728, quoting *Kevorkian*, 447 Mich at 453 (opinion by CAVANAGH, C.J., and BRICKLEY and GRIFFIN, JJ.). Defendant does not specify on which of these bases he seeks to challenge SORA. However, the gist of defendant's argument is that "embedding th[e] non-sexual offense [of unlawful imprisonment of a minor] deep within the long list of sexual offenses" does not provide "fair notice to the public of the purpose of the act through its title[.]" Further, defendant suggests that "[i]f . . . the legislature's purpose was to expand the nature of offenses for which registration is to be required, the title of the Act must so reflect, so as to give reasonable notice to the public." We therefore conclude that defendant seeks to bring a "title body" challenge, and perhaps also a "change of purpose" challenge.

a. TITLE-BODY CHALLENGE

To the extent that defendant brings a title-body challenge, he must demonstrate "that the title of [SORA] does not adequately express its contents," *Ray Twp*, 226 Mich App at 728, such that "the body exceeds the scope of the title," *Coalition Protecting Auto No-Fault v Mich Catastrophic Claims Ass'n*, 305 Mich App 301, 314; 852 NW2d 229 (2014) (*CPAN*) (quotation marks and citation omitted). "The title of an act must express the general purpose or object of the act. However, the title of an act is not required to serve as an index to all of the provisions of the act. Instead, the test is whether the title gives the Legislature and the public fair notice of the challenged provision." *Ray Twp*, 226 Mich App at 728-729 (citations omitted). "The fair-notice requirement is violated only 'where the subjects [of the title and body] are so diverse in nature that they have no necessary connection . . . .' " *CPAN*, 305 Mich App at 315, quoting *People v Cynar*, 252 Mich App 82, 85; 651 NW2d 136 (2002) (quotation marks and citations omitted; alteration in original).

Defendant fails to satisfy this test, and therefore to overcome the presumption of constitutionality. See *Phillips*, 470 Mich at 422. Initially, defendant fails to adequately address the "title" of SORA, or how it relates to the contents or general purpose or object of the act. Defendant instead merely declares that "the inclusion of a person convicted of a non-sexual unlawful imprisonment offense in the list of offenders required to register under legislation *entitled* Sexual Offender Registration Act violates the title-object requirement of the Michigan Constitution." (Emphasis added.) Arguably implicit within that declaration is the argument that the "title" of SORA is "Sexual

Offender Registration Act,"[28] and that that title does not adequately express the content of SORA to the extent it applies to nonsexual acts.

However, as noted earlier in this opinion, and as defendant fails to recognize, "sex offenders registration act" is merely the "short title" of SORA. MCL 28.721. Its title reads as follows:

> An act to require persons convicted of *certain offenses* to register; to prohibit certain individuals from engaging in certain activities within a student safety zone; to prescribe the powers and duties of certain departments and agencies in connection with that registration; and to prescribe fees, penalties, and sanctions. [2011 PA 17, title (emphasis added).]

The title of SORA thus nowhere refers, or limits SORA's application, to "sexual" offenses; instead, it broadly provides that SORA applies to "certain offenses," which then are identified in the body of the act as "listed offenses," one of which is unlawful imprisonment of a minor. MCL 28.722(s)(*iii*). The title of SORA therefore "adequately express[es] its contents," "express[es] the general purpose or object of the act," and "gives the Legislature and the public fair notice of the challenged provision." *Ray Twp*, 226 Mich App at 728-729. It thus "cannot be said that the title and body of the act are so 'diverse in nature that they have no necessary connection' between each other . . . ." *CPAN*, 305 Mich App at 316 (citation omitted).[29] Accordingly, defendant's title-body challenge fails.

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[28] In so describing SORA, defendant misstates the Legislature's denomination of SORA as the "sex offenders registration act." MCL 28.721.

[29] Defendant's position essentially boils down to challenging the short title of SORA as inadequately expressing the statute's contents. Indeed, as discussed later, there arguably is a degree of ambiguity or vagueness

b. CHANGE OF PURPOSE CHALLENGE

Defendant additionally argues, without explanation, that "[i]f . . . the legislature's purpose was to expand the nature of offenses for which registration is to be required, the title of the Act must so reflect, so as to give reasonable notice to the public." To the extent that defendant, by this language, seeks to raise a "change of purpose" challenge to SORA under the Title-Object Clause, his challenge again fails.

Defendant's assertion appears to suggest that, in amending SORA in 2011 to add the crime of unlawful imprisonment of a minor, as a listed offense, the Michigan Legislature was required to "so reflect" in the title of the act that it had "expand[ed] the nature of offenses for which registration is to be required . . . ." Conceivably, defendant might also maintain that prior amendments of SORA that added other "listed offenses" of a nonsexual nature (e.g., kidnapping of a minor) also needed to be reflected in the title of the act; defendant does not, however, develop this argument. "A determination whether an amendment or substitute act changed the original purpose depends on whether the subject matter of the amendment or substitute was germane to the original purpose." *Boulton v Fenton Twp*, 272 Mich App 456, 466; 726 NW2d 733 (2006), citing *Cynar*, 252 Mich App at 86.

To determine whether 2011 PA 17 changed SORA's original purpose, we must first ascertain what was the original purpose of SORA, and more specifically, what

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in SORA's short title that may give rise to a perception of injustice in applying SORA in certain circumstances. However, a statute's short title is not the proper subject of a title-object challenge. A title-object challenge focuses on a statute's actual title. Defendant accordingly does not raise a proper challenge under the Title-Object Clause. Moreover, for the reasons stated in this opinion, any such challenge would fail.

its purpose was before the 2011 amendment. We must then analyze whether the 2011 amendment changed that purpose. As noted earlier, SORA was enacted in 1994, at which time the Legislature described it as follows:

> AN ACT to require persons convicted of *certain offenses* to register; to prescribe the powers and duties of certain departments and agencies in connection with that registration; and to prescribe penalties and sanctions. [1994 PA 295, title (emphasis added).]

That descriptive title has been—and remains—unchanged in all respects that are material to our analysis. Since 2006, SORA's title has read as follows:

> "An act to require persons convicted of *certain offenses* to register; to prohibit certain individuals from engaging in certain activities within a student safety zone; to prescribe the powers and duties of certain departments and agencies in connection with that registration; and to prescribe fees, penalties, and sanctions[.]" [2011 PA 17, title (emphasis added).[30]]

The title of SORA thus has not materially changed since its original enactment in 1994. It has always provided that "persons convicted of certain offenses" were required to register.

What has changed since SORA's enactment in 1994 is the definition of the "certain offenses" that require registration. When SORA was originally enacted, it stated:

> (d) "Listed offense" means any of the following:

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[30] Effective January 1, 2006, the Legislature amended SORA to include certain restrictions on activities within a student safety zone, and it thus amended the title of SORA to add the language, "to prohibit certain individuals from engaging in certain activities within a student safety zone[.]" See 2005 PA 127, title.

(*i*) A violation of section 145a, 145b, or 145c of the Michigan penal code, Act No. 328 of the Public Acts of 1931, being sections 750.145a, 750.145b, and 750.145c of the Michigan Compiled Laws.

(*ii*) A third or subsequent violation of any combination of the following:

(A) Section 167(1)(f) of Act No. 328 of the Public Acts of 1931, being section 750.167 of the Michigan Compiled Laws.

(B) Section 335a of Act No. 328 of the Public Acts of 1931, being section 750.335a of the Michigan Compiled Laws.

(C) A local ordinance substantially corresponding to a section described in sub-subparagraph (A) or (B).

(*iii*) A violation of section 455 of Act No. 328 of the Public Acts of 1931, being section 750.455 of the Michigan Compiled Laws.

(*iv*) A violation of section 520b, 520c, 520d, 520e, or 520g of Act No. 328 of the Public Acts of 1931, being sections 750.520b, 750.520c, 750.520d, 750.520e, and 750.520g of the Michigan Compiled Laws.

(*v*) An attempt or conspiracy to commit an offense described in subparagraphs (*i*) to (*iv*).

(*vi*) An offense substantially similar to an offense described in subparagraphs (*i*) to (*v*) under a law of the United States, any state, or any country. [MCL 28.722 as enacted by 1994 PA 295.]

At the time SORA was enacted, listed offenses thus consisted of the following: accosting, enticing, or soliciting a child for immoral purposes, MCL 750.145a and MCL 750.145b; involvement in child sexually abusive activity or child sexually abusive material, MCL 750.145c; indecent or obscene conduct in a public place, MCL 750.167(1)(f); indecent exposure, MCL 750.335a; procuring or inducing a person to engage in prostitution, MCL 750.455; offenses relating to criminal sexual conduct, MCL 750.520b to MCL 750.520e, and MCL 750.520g; attempts or conspiracies to commit such

offenses; and substantially similar offenses under certain local ordinances, or under laws of other states, the United States, or other countries. It thus appears that all of the listed offenses at that time involved conduct that was, in some fashion, of a sexual nature.

Also in 1994, Congress passed, as part of the Violent Crime Control and Law Enforcement Act of 1994, 42 USC 13701 *et seq*., the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 42 USC 14071 *et seq*. (Wetterling Act).[31] The United States Supreme Court has described the Wetterling Act as "condition[ing] certain federal law enforcement funding on the States' adoption of sex offender registration laws and set[ting] minimum standards for state programs." *Smith v Doe*, 538 US 84, 89-90; 123 S Ct 1140; 155 L Ed 2d 164 (2003). By its terms, however, the act directed the United States Attorney General to establish guidelines for the development of state programs that require registration by "a person who is convicted of a criminal offense against a victim who is a minor or who is convicted of a sexually violent offense . . . ." 42 USC 14071(a)(1)(A). States were afforded three years in which to implement the requirements of the Wetterling Act and, in the Attorney General's discretion, an additional two years if making good faith efforts to do so. 42 USC 14071(g)(1). Noncompliance by a state resulted in a loss of federal funding. 42 USC 14071(g)(2).

The Wetterling Act thus directed states to require registration not only by persons convicted of a "sexually violent offense," but additionally of persons convicted of "a criminal offense against a victim who is a

[31] The Wetterling Act was repealed when SORNA, the federal Sex Offender Registration and Notification Act, was enacted. See 42 USC 16901 *et seq*., effective July 27, 2006.

minor." 42 USC 14071(a)(1)(A). Further, it defined the term "criminal offense against a victim who is a minor" as including not only a variety of specified offenses of a sexual nature, but as additionally including "kidnapping of a minor, except by a parent," 42 USC 14071(a)(3)(A)(i), and "false imprisonment of a minor, except by a parent," 42 USC 14071(a)(3)(A)(ii).

The Michigan Legislature responded in 1999 with an amendment of SORA. See 1999 PA 85. That amendment, in part, expanded SORA's definition of listed offenses to include, *inter alia*, "[a] violation of section 349 of the Michigan penal code, 1931 PA 328, MCL 750.349 [kidnapping], if a victim is an individual less than 18 years of age." *Id*.; MCL 28.722(d)(*v*).

Although the Wetterling Act also directed states to require registration of persons convicted of the crime of "false imprisonment of a minor, except by a parent," 42 USC 14071(a)(1)(A) and 42 USC 14071(a)(3)(A)(ii), Michigan did not enact a statute creating a crime of "unlawful imprisonment" until 2006. It was then that Michigan enacted 2006 PA 160, which established in Michigan the crime of unlawful imprisonment, MCL 750.349b. Thereafter, and by the enactment of 2011 PA 17, Michigan amended SORA to include as a tier I listed offense a "violation of section 349b of the Michigan penal code, 1931 PA 328, MCL 750.349b, if a victim is a minor." 2011 PA 17; MCL 28.722(s)(*iii*).

Finally, in 2002, before the 2011 addition—as a "listed offense"—of the crime of unlawful imprisonment of a minor, the Legislature amended SORA in part by adding § 1a, denominated as MCL 28.721a, which declares the Legislature's intent as follows:

> The legislature declares that the sex offenders registration act was enacted pursuant to the legislature's

> exercise of the police power of the state with the intent to better assist law enforcement officers and the people of this state in preventing and protecting against the commission of future criminal sexual acts by convicted sex offenders. The legislature has determined that a person who has been convicted of committing an offense covered by this act poses a potential serious menace and danger to the health, safety, morals, and welfare of the people, and particularly the children, of this state. The registration requirements of this act are intended to provide law enforcement and the people of this state with an appropriate, comprehensive, and effective means to monitor those persons who pose such a potential danger. [MCL 28.721a as added by 2002 PA 542.]

As noted, SORA at that time did not include the crime of unlawful imprisonment of a minor as a listed offense; it did, however, include other crimes of a nonsexual nature, such as kidnapping of a minor, as listed offenses. Consequently, we must conclude that it was the Legislature's intent, in adopting MCL 28.721a in 2002, to include those who were convicted of such nonsexual listed offenses as among the offenders subject to SORA's registration requirement.

This historical backdrop brings us back to whether defendant has stated a valid change of purpose challenge under the Title-Object Clause. We hold that he has not. First, the title of SORA has not appreciably changed since its original enactment in 1994; it has always required registration by persons convicted of "certain offenses." Second, while it is true that SORA was amended from time to time to add additional offenses requiring registration, those amendments did not change the "purpose" of SORA in any fundamental or material way. As stated above, the purpose of SORA is, and always has been, to assist law enforcement and to protect the public, particularly children, from future offenses by offenders who have committed certain

offenses and who the Legislature has deemed at risk of recidivism. MCL 28.721a. The subject matter of the amendments was thus "germane to the original purpose." *Boulton*, 272 Mich App at 466, citing *Cynar*, 252 Mich App at 86.

While the Legislature did use the words "criminal sexual acts" and "sex offenders" in describing SORA's purpose, MCL 28.721a, we do not, indulging the presumption of constitutionality, *Phillips*, 470 Mich at 422-423, and considering the overall context of the enactment and amendment of SORA, as discussed in this opinion, find that the inclusion within SORA of the listed offense of unlawful imprisonment of a minor, or of other offenses not necessarily of a sexual nature against a minor, changes the purpose of SORA so as to run afoul of the Title-Object Clause of the Michigan Constitution.

Having rejected defendant's constitutional arguments, we hold that the trial court did not err, as a matter of constitutional law, by requiring that defendant register under SORA.

D. LEGISLATIVE SOLUTION

There nonetheless remains something troubling about the fact that defendant, while an offender who may properly and constitutionally be required to register in furtherance of the purpose of SORA, is deemed a "sex offender" even though the offenses of which he was convicted, including the offenses for which he is required to register, as well as the conduct underlying them, were wholly nonsexual in nature. In other words, as noted earlier in this opinion, there is a degree of vagueness or ambiguity—although not one rising to the level of a constitutional violation—inherent in SORA's short title ("sex offenders registration act")

and in SORA's use of the term "sex offender"—without defining it—as including offenders convicted of nonsexual crimes against minors.

As we note in this opinion, we conclude that SORA clearly requires that defendant register under the act, and we find nothing unconstitutional in that requirement. However, the depth of the analysis that was required for us to reach that conclusion, and the number of pages that were required for us to properly articulate that conclusion, give us pause. Notwithstanding the lack of constitutional implications, something is amiss. As a practical matter, and as a matter of common parlance, a registrant under SORA is deemed to be a "sex offender." Therefore, it is assumed and understood that the offender was convicted of a crime of a sexual nature, even when the crime, although committed against a minor, was of a nonsexual nature. This, we believe, should be rectified.

Although defendant has not made the case for finding—and we do not find—a constitutional violation, we thus do believe that a remedy is in order. Ultimately, that remedy is properly one for the Legislature to address. Specifically, we invite the Legislature to amend SORA to eliminate its vagueness and ambiguity, which should eliminate any resulting misperceptions. The specifics of any such legislative amendments are properly left to the Legislature; however, we offer the following observations and suggestions, in part derived from legislative approaches in other states. First, an amendment to the "short title" of SORA would seem to be in order. It could be as simple as calling it the "Sex and Child-Victim Offenders Registration Act." Second, we would encourage an amendment to the legislative purpose as set forth in MCL 28.721a—not to change the legislative purpose,

but rather to more clearly articulate the existing legislative purpose as relating both to child-victim offenders and sex offenders. Third, we would encourage the Legislature to consider adding a definition of "sex offender" and "sex offense," as the federal SORNA legislation does. Fourth, because adding such definitions would not eliminate the perceived injustice inherent in labeling a nonsexual-child-victim offender as a "sex offender," the Legislature might consider separately defining "child-victim offender" and "child-victim offense."[32] Fifth, and in lieu of defining "sex offender" and "child-victim offender," the Legislature might consider (as has been done in Kentucky)[33] defining a "registrant" as a person convicted of a "sex offense" or a criminal offense against a minor victim. Finally, the Legislature might consider (as was done in Illinois)[34] creating separate registries for child-victim offenders and sex offenders, perhaps both under the purview of a single "Sex and Child-Victim Offenders Registration Act."

XIV. CONCLUSION

We conclude that defendant's convictions were not against the great weight of the evidence, nor was the evidence insufficient to support his convictions; therefore, defendant also was not bound over in error. We further find no errors requiring reversal in the pros-

[32] We note that Ohio has recently amended its sex offender registration statute to include a category entitled "child-victim offender" for those offenders who have committed "child-victim oriented offenses" including kidnapping abduction and imprisonment offenses. See Ohio Rev Code Ann, 2950.01(C) and (D) (2014).

[33] Ky Rev Stat Ann 17.500(5) (2014); see also *Moffitt*, 360 SW3d at 257.

[34] See 730 Ill Comp Stat Ann 150/1 *et seq*.; 730 Ill Comp Stat Ann 154/1 *et seq*.

ecution's conduct during discovery or trial. Defendant was not denied the effective assistance of counsel. Defendant's convictions did not implicate double jeopardy considerations. Defendant's rights were sufficiently protected during his joint trial. Additionally, we find no reversible error in the trial court's instructions to the jury, nor do we find that defendant was denied the ability to present a defense. We find no errors requiring resentencing; however, we remand for administrative correction of the judgment of sentence to conform to the jury verdict. Finally, we reject defendant's constitutional challenges to his required registration under SORA, but call for legislative action to address aspects of the statute as discussed in this opinion.

Affirmed as to defendant's convictions and sentences. Remanded to the trial court for entry of an amended judgment of sentence conforming defendant's sentences to the jury verdict. We do not retain jurisdiction.

RIORDAN, P.J., and BECKERING, J., concurred with BOONSTRA, J.

GRIMMER v LEE

Docket No. 318046. Submitted January 8, 2015, at Lansing. Decided March 26, 2015, at 9:05 a.m.

Donald Grimmer, as personal representative of the estate of Melody Grimmer, brought a medical malpractice action in the Bay Circuit Court against Daniel T. Lee, M.D.; Stephen J. Mattichak, M.D.; Bay Regional Medical Center (BRMC); Bay Regional Heart and Vascular (BRHV); Antonio Vasquez, M.D.; Antonio Vasquez, M.D., PC; and others. According to the complaint, Vasquez, a vascular surgeon, had examined Melody after she underwent a cardiac catheterization, recognized the presence of a hematoma, but declined to operate. Plaintiff's affidavit of merit charged that Vasquez's failure to intercede constituted professional negligence. The complaint also set forth malpractice claims against Mattichak and Lee, both cardiologists, but plaintiff never filed an affidavit of merit attesting to the cardiologists' negligence. The cardiologist defendants and their principals (BRMC and BRHV) moved for summary disposition on the basis of plaintiff's failure to file an affidavit of merit signed by a cardiologist. The motion for summary disposition brought by BRMC and BRHV did not seek summary disposition of plaintiff's additional claims that they were vicariously liable for Vasquez's negligence. Before deciding the summary disposition motion, the court, Joseph K. Sheeran, J., dismissed Vasquez and his professional corporation without prejudice for want of service. At the summary disposition hearing, the attorney for BRMC and BRHV argued that they could not be held liable for the acts of Vasquez if he was not a party to the case. The court agreed and dismissed the vicarious liability claims with prejudice. Plaintiff appealed.

The Court of Appeals *held*:

1. In a medical malpractice case based on vicarious liability, a plaintiff may elect to sue the principal alone, or to sue the principal and the agent together. When a litigant chooses to proceed against an agent and has been defeated, he or she is thereby barred from litigating the same cause of action against the principal. It follows that a determination of the issue in a suit brought against the principal bars an action against the agents. A

dismissal with prejudice amounts to an adjudication on the merits and bars a further action based on the same facts. But a dismissal without prejudice is not a dismissal on the merits. In this case, the dismissal of Vasquez without prejudice entered by the circuit court was not an adjudication on the merits. Therefore, it did not bar an action against Vasquez's principals. The circuit court erred by affording its order preclusive effect.

2. A circuit court may not grant summary disposition in contravention of a party's due process rights. In this case, plaintiff's counsel did not appear at the summary disposition hearing after communicating that she had no objection to the specific relief sought in the summary disposition motion that was filed. Plaintiff's counsel had no notice that the circuit court intended to consider dismissal of the indirect liability claims raised in relation to Vasquez. By summarily dismissing the defendants who allegedly bore vicarious liability for Vasquez's negligent acts, the circuit court failed to afford plaintiff the basic due process rights of notice and an opportunity to be heard.

Reversed and remanded.

NEGLIGENCE — MASTER AND SERVANT — VICARIOUS LIABILITY.

In a medical malpractice case based on vicarious liability, the dismissal without prejudice of the agent from the case because of a failure to achieve service of process does not bar the action against the principal.

McKeen & Associates, PC (by *Horia R. Neagos*), and *Bendure & Thomas* (by *Mark R. Bendure*), for Donald Grimmer.

Giarmarco, Mullins & Horton, PC (by *Bruce E. Bigler*, *Jennifer A. Engelhardt*, and *Christopher J. Ryan*), for Bay Regional Medical Center and Bay Regional Heart and Vascular.

Before: SHAPIRO, P.J., and GLEICHER and RONAYNE KRAUSE, JJ.

PER CURIAM. Plaintiff, Donald Grimmer, brought a medical malpractice action against a handful of defen-

dants including two cardiologists (defendants Daniel T. Lee, M.D., and Stephen J. Mattichak, M.D.) and a vascular surgeon (defendant Antonio Vasquez, M.D.). The cardiology defendants and their principals sought summary disposition based on Grimmer's failure to file an affidavit of merit signed by a cardiologist. Before hearing that motion, the circuit court dismissed Dr. Vasquez and his professional corporation without prejudice for want of service.

Grimmer's complaint alleged that two defendants, Bay Regional Medical Center (BRMC) and Bay Regional Heart and Vascular (BRHV), bore vicarious liability for Dr. Vasquez's negligence. Neither defendant filed a motion seeking summary disposition of the vicarious liability claims. Nevertheless, the circuit court dismissed the vicarious liability allegations with prejudice. This was error, and we reverse and remand for further proceedings.

I. BACKGROUND FACTS AND PROCEEDINGS

Melody Grimmer died one day after undergoing a cardiac catheterization performed by Dr. Mattichak. An autopsy concluded that a retroperitoneal hematoma containing 3,000 grams of unclotted blood triggered a fatal cardiopulmonary arrest. According to the complaint, defendant Vasquez had examined Melody after the catheterization, recognized the presence of the hematoma, but declined to operate. The complaint and an accompanying affidavit of merit charge that Dr. Vasquez's failure to intercede constitutes professional negligence.

The complaint also sets forth malpractice claims against Dr. Mattichak and another cardiologist, Dr. Lee. However, Grimmer never filed an affidavit of merit attesting to the cardiologists' negligence. They

filed a summary disposition motion on that ground, invoking MCL 600.2912d(1) and MCL 600.2169(1)(a). Counsel for the BRMC and the professional corporations employing Drs. Lee and Mattichak joined in the motion.[1] Notably, none of the summary disposition motions or accompanying briefs mentioned Dr. Vasquez, and none sought summary disposition regarding the complaint's averments of Dr. Vasquez's direct liability or the vicarious liability flowing from his conduct.

After the cardiologists' summary disposition motion was filed but before it was heard, the circuit court entered an order dismissing Dr. Vasquez and his professional corporation without prejudice, noting that these two defendants had not been served with process.

During the summary disposition hearing, the circuit court read aloud an e-mail written by Grimmer's counsel and provided by the attorney for the cardiologists, BRMC and BRHV. The email stated: " 'I am writing to advise you that I will not be appearing at [the] motion today. We will not oppose your motion for summary disposition as to the cardiologists but we cannot stipulate.' " Defendants' counsel then reminded the court that Dr. Vasquez and his professional corporation had been dismissed for failure to serve, continuing:

> In view of that, your Honor, I have prepared an order that dismisses Dr. Lee, Dr. Mattichak, and [BRMC], with prejudice, because the only claims against [BRMC] is [sic] vicarious for the acts of Dr. Lee and Dr. Mattichak, as well as Dr. Vasquez. If Dr. Vasquez is not a party to this

[1] BRMC, BRHV, and defendant Michigan Cardiovascular Institute all sought summary disposition of claims alleging vicarious liability for the negligence of Drs. Lee and Mattichak.

> lawsuit, we can't be vicariously liable for him. And, therefore, the order I have prepared would be a permanent dismissal for Dr. Lee, Dr. Mattichak, and [BRMC].

The court entered an order providing in relevant part:

> IT IS HEREBY ORDERED that Defendants [BRMC]; [BRHV]; Dr. Daniel Lee and Dr. Stephen Mattichak's Motion for Summary Disposition is GRANTED and all claims against Dr. Daniel Lee and Dr. Stephen Mattichak and any claims of vicarious liability against [BRHV] and [BRMC] related to Dr. Daniel Lee, Dr. Stephen Mattichak and Dr. Antonio Vasquez, M.D., are dismissed with prejudice.

Grimmer now appeals as of right from the portion of this order granting summary disposition of Grimmer's vicarious liability claims against BRMC and BRHV premised on Dr. Vasquez's negligence.

II. ANALYSIS

The circuit court should not have summarily dismissed the vicarious liability claims stemming from Dr. Vasquez's negligence for two reasons. First, none of the defendants filed a motion seeking summary disposition of the Vasquez-related allegations. Second, had such a motion been filed, it would have been unsuccessful.

Defendants sought summary disposition under MCR 2.116(C)(7) and (8). A motion brought under either of these subrules "must specify the grounds on which it is based[.]" MCR 2.116(C). Defendants' summary disposition motions and briefs made no mention whatsoever of the vicarious liability claims pleaded in Grimmer's complaint flowing from Dr. Vasquez's actions and inactions. Nowhere in the summary disposition pleadings did defendants "specify" that summary

disposition was sought regarding the claims related to Dr. Vasquez. Although the court rules afford a circuit court the authority to grant summary disposition based on the pleadings, "the trial court may not do so in contravention of a party's due process rights." *Al-Maliki v LaGrant*, 286 Mich App 483, 489; 781 NW2d 853 (2009).

Grimmer's counsel had no notice that the circuit court intended to consider the dismissal of the indirect liability claims raised in relation to Dr. Vasquez, and no reason to anticipate that defense counsel and the court would sua sponte enlarge the pending summary disposition motion to incorporate a legal issue never before mentioned. In summarily dismissing the defendants who allegedly bore vicarious liability for Dr. Vasquez's negligent acts, the circuit court bypassed the basic due process requirements of notice and an opportunity to be heard. For this reason, we must reverse the circuit court.

Further, we respectfully reject defense counsel's contention, made during oral argument in this Court, that Grimmer should be penalized for his counsel's failure to personally attend the motion hearing. Counsel cannot be faulted for deferring a personal appearance after having clearly communicated that she had no objection to the specific relief sought in the motions actually filed. Alternatively stated, Grimmer's attorney was entitled to rely on the good faith of her opposing counsel.

Summary disposition of the vicarious liability claims involving Dr. Vasquez was improper for a second reason as well. Defense counsel's declaration that "[i]f Dr. Vasquez is not a party to this lawsuit, we can't be vicariously liable for him" is fundamentally incorrect.

In a medical malpractice case, "[a] hospital may be 1) directly liable for malpractice, through claims of negligence in supervision of staff physicians as well as selection and retention of medical staff, or 2) vicariously liable for the negligence of its agents." *Cox v Flint Bd of Hosp Managers*, 467 Mich 1, 11; 651 NW2d 356 (2002). This Court explained in *Nippa v Botsford Gen Hosp (On Remand)*, 257 Mich App 387, 392; 668 NW2d 628 (2003), that "the law creates a practical identity between a principal and an agent, and, by a legal fiction, the hospital is held to have done what its agents have done." In *Cox* and *Nippa*, the defendant hospitals were charged with the vicarious liability of nurses or physicians who were not named as individual defendants. In *Al-Shimmari v Detroit Med Ctr*, 477 Mich 280, 294-295; 731 NW2d 29 (2007), the Supreme Court elucidated: "Nothing in the nature of vicarious liability . . . requires that a judgment be rendered against the negligent agent. Rather, to succeed on a vicarious liability claim, a plaintiff need only prove that an agent has acted negligently." As these cases demonstrate, a plaintiff need not necessarily name the agent as a defendant when suing the principal. Alternatively stated, a plaintiff may elect to sue the principal alone, or to sue the principal and the agent together.

Grimmer sued the two together. His complaint alleges that Dr. Vasquez acted as an agent of BRMC and BRHV. Apparently, the circuit court believed that because it had dismissed Dr. Vasquez from the litigation without prejudice, BRMC and BRHV could not be held legally responsible for Dr. Vasquez's negligence. In their appellate brief, defendants argue that due to the dismissal, Grimmer's direct liability claim against Dr. Vasquez is no longer "viable," thereby extinguishing defendants' vicarious liability.

When a litigant chooses to proceed against an agent "and has been defeated, he is thereby barred from litigating the same cause of action against the principal. It follows that a determination of the issue in a suit brought against the principal bars an action against the agents." *DePolo v Greig*, 338 Mich 703, 709-710; 62 NW2d 441 (1954) (quotation marks and citations omitted). A dismissal *with* prejudice amounts to an adjudication on the merits and bars a further action based on the same facts. But a dismissal without prejudice is not a dismissal on the merits. *Yeo v State Farm Fire & Cas Ins Co*, 242 Mich App 483, 484; 618 NW2d 916 (2000). Our Supreme Court has described that the term "without prejudice" signifies "a right or privilege to take further legal proceedings on the same subject, and show that the dismissal is not intended to be *res adjudicata* of the merits." *McIntyre v McIntyre*, 205 Mich 496, 499; 171 NW 393 (1919) (quotation marks and citation omitted). "A dismissal of a suit without prejudice is no decision of the controversy on its merits, and leaves the whole subject of litigation as much open to another suit as if no suit had ever been brought." *Id*. (quotation marks and citation omitted).

The Supreme Court's opinion in *Al-Shimmari* erects no barrier to reinstating this case. In that case, the circuit court granted the physician-agent's motion for summary disposition *with* prejudice.[2] The Supreme Court highlighted that "the trial court stated in its order that the dismissal was 'with prejudice.' " *Al-Shimmari*, 477 Mich at 295. "Therefore," the Court

[2] Like this case, the dismissal at issue in *Al-Shimmari* arose from a failure to serve process on a defendant physician. But unlike this case, the parties in *Al-Shimmari* contested in an evidentiary hearing whether service of process had been timely made. *Al-Shimmari*, 477 Mich at 286. Following that hearing, the defendant physician moved for, and was granted, dismissal with prejudice. *Id*. at 286, 295.

continued, "under MCR 2.504(B)(3), the dismissal of the claims against [the physician] 'operates as an adjudication on the merits.' " *Id*.

> Because the remaining defendants may only be vicariously liable on the basis of the imputed negligence of [plaintiff's physician], plaintiff must demonstrate that [his physician] was negligent in order for the remaining defendants to be found vicariously liable. However, the dismissal of the claims against [the physician] operates as an adjudication on the merits of the claims against [him]. Plaintiff consequently is unable to show that the remaining defendants are vicariously liable for the acts of [the physician], because the dismissal of the claims against [the physician] prevents plaintiff from arguing the merits of the negligence claim against [him]. [*Id*. at 295-296.]

The dismissal without prejudice of Dr. Vasquez entered by the circuit court was not an adjudication on the merits. Thus, it did not bar an action against Dr. Vasquez's principals. The circuit court erred by affording its "without prejudice" dismissal order preclusive effect.

Accordingly, we reverse and remand for proceedings consistent with this opinion. We do not retain jurisdiction. Having prevailed in full, Grimmer may tax costs pursuant to MCR 7.219.

SHAPIRO, P.J., and GLEICHER and RONAYNE KRAUSE, JJ., concurred.

COTTON v BANKS

Docket No. 319001. Submitted February 10, 2015, at Detroit. Decided March 26, 2015, at 9:10 a.m.

Tramaine Cotton brought a wrongful-termination suit in the Wayne Circuit Court against the state of Michigan and Brian Banks (a member of the Michigan House of Representatives by whom Cotton had been hired as a legislative assistant). Cotton alleged that Banks terminated his employment because Cotton rejected Banks's romantic advances. Banks contended that he terminated Cotton's employment after learning that Cotton had been driving without a valid driver's license and that a bench warrant had been issued for Cotton's arrest following his failure to appear at a court hearing related to a traffic violation. Cotton's suit claimed that Banks discriminated against him on the basis of his sex, demanded sexual favors as a condition of employment, created a hostile work environment, and retaliated against him for reporting Banks's conduct. Cotton also claimed that Banks's conduct constituted the tort of intentional infliction of emotional distress. The state moved for summary disposition on the basis that it was not Cotton's employer for purposes of his civil rights claim and that his intentional tort claim should have been brought in the Court of Claims. Banks claimed that his conduct was protected by the legislative immunity provided under the Speech or Debate Clause of Michigan's Constitution, Const 1963, art 4, § 11, and moved for summary disposition on that basis. The court, Susan D. Borman, J., denied Banks's motion and granted the state's motion for summary disposition. The court also granted Cotton's motion to amend his complaint to add the House of Representatives as a defendant. Cotton's amended complaint alleged civil rights violations against Banks and the House of Representatives and one count of intentional infliction of emotional distress against Banks alone. Banks appealed.

The Court of Appeals *held*:

1. The trial court erred by determining that the Civil Rights Act, MCL 37.2101 *et seq*., effectively waived the legislative immunity provided by the Speech or Debate Clause of the Michigan Constitution, Const 1963, art 4, § 11, for certain acts of

legislators, because the Civil Rights Act did not expressly and unequivocally state such a waiver. Waiver of the constitutional immunity offered by the Speech or Debate Clause cannot be made by inference.

2. The trial court properly held that Banks was not immune from civil suit under the Speech or Debate Clause because terminating Cotton's employment did not constitute activity within the legitimate sphere of legislative activity for which the immunity was intended. Banks's decision to terminate Cotton's employment was not integral to the legislative process. That is, Banks's personnel management was not essential to the consideration and passage or rejection of proposed legislation, nor did it involve a matter solely within the jurisdiction of the Legislature.

3. Banks was not protected by the Speech or Debate Clause because his decision to terminate Cotton's employment was administrative, not legislative, in nature. Whether the absolute immunity provided legislators by the Speech or Debate Clause protects a legislator from civil arrest and civil process for the legislator's employment decisions does not depend on the nature of an employee's duties. Rather, the immunity offered by the Speech or Debate Clause depends on whether the legislator is engaged in a true legislative act, not simply an act that has some connection to the legislative process. Trial courts must be careful to distinguish between a true legislative act, and an act that is merely performed by a legislator.

4. The trial court properly denied Banks's motion for summary disposition, which was based on the ground that he was protected by the absolute immunity found in the Speech or Debate Clause. Banks was not entitled to absolute immunity because analysis of Banks's alleged misconduct—terminating Cotton's employment for improper reasons—did not require an investigation into Banks's legislative activity.

5. The trial court did not err by denying Banks's motion for summary disposition based on his contention that the Civil Rights Act provided the exclusive remedy for Cotton's claim of sexual harassment and his consequent allegation of the common-law tort of intentional infliction of emotional distress. The Civil Rights Act did not abrogate Cotton's right to bring suit against Banks, because the statutory language in the Civil Rights Act contains no reference to legislators, and it does not preclude an action for the intentional infliction of emotional distress even when the same facts could give rise to a statutory violation of the Civil Rights Act.

Affirmed.

1. CONSTITUTIONAL LAW — SPEECH OR DEBATE CLAUSE — LEGISLATIVE IMMUNITY — WAIVER.

The Elliott-Larsen Civil Rights Act, MCL 37.2101 *et seq*., does not expressly and unequivocally waive the absolute immunity to which a legislator is entitled under the Speech or Debate Clause of the Michigan Constitution, Const 1963, act 4, § 11, and a waiver of the immunity cannot be made by inference.

2. CONSTITUTIONAL LAW — SPEECH OR DEBATE CLAUSE — LEGISLATIVE IMMUNITY.

The Speech or Debate Clause of the Michigan Constitution immunizes a legislator from civil arrest and civil process premised on actions that the legislator took within the legitimate sphere of legislative activity; a legislator's conduct that is integrally related to the consideration and passage or rejection of proposed legislation or concerns a matter solely within the Legislature's jurisdiction is engaged in conduct within the legitimate sphere of legislative activity.

3. CONSTITUTIONAL LAW — SPEECH OR DEBATE CLAUSE — LEGISLATIVE IMMUNITY — EMPLOYMENT DECISIONS.

Whether a legislator is immune from civil arrest and civil process under the Speech or Debate Clause for decisions related to his or her staff's employment does not depend on the nature of an employee's duties; whether a legislator is entitled to immunity depends on whether the legislator's conduct constituted a true legislative act and was not merely an act performed by a legislator.

4. CONSTITUTIONAL LAW — SPEECH OR DEBATE CLAUSE — LEGISLATIVE IMMUNITY — INVESTIGATION INTO LEGISLATOR'S CONDUCT.

A legislator is absolutely immune from civil arrest and civil process when evaluation of the legislator's conduct would require an investigation into his or her legislative activity.

Darryl K. Segars for Tramaine Cotton.

The Bradley Law Center, LLC (by *Avery J. Bradley* and *Andrea J. Bradley*), for Brian Banks.

Dickinson Wright, PLLC (by *Peter H. Ellsworth*, *Jeffery V. Stuckey*, and *Ryan M. Shannon*), for the Michigan House of Representatives.

Before: SERVITTO, P.J., and STEPHENS and M. J. KELLY, JJ.

M. J. KELLY, J. In this employment dispute, defendant Representative Brian Banks of the Michigan House of Representatives appeals by right the trial court's order denying his motion for summary disposition of the claims by Banks's former staff member, plaintiff, Tramaine Cotton. The primary issue on appeal is whether Banks has absolute immunity from suit under the Speech or Debate Clause of Michigan's Constitution for personnel decisions involving those members of his staff who might have involvement in the legislative process. See Const 1963, art 4, § 11. For the reasons fully explained below, we conclude that there were no errors warranting relief. Accordingly, we affirm.

I. BASIC FACTS

According to Cotton, Banks hired him in January 2013 to serve as a driver. Cotton alleged that, after his hire, Banks continuously expressed his desire to have a dating relationship with him, but Cotton rejected Banks's advances. After Cotton made it clear that he would not agree to a romantic relationship, Cotton maintained that Banks began to assign him tasks that were beyond the scope of his employment and asked him to work on days he was not supposed to work. Cotton alleged that he was constructively discharged in April 2013.

Banks, however, presented a very different version of events in the trial court. Banks stated that he hired Cotton in February 2013 to serve as a legislative assistant and that Cotton's duties included responding to constituent concerns, attending functions, and driving Banks and other representatives between Detroit

and Lansing. Banks claimed that he began proceedings to terminate Cotton's employment after he learned that Cotton had been arrested for driving on a suspended license and had missed a court date, after which a bench warrant issued for Cotton's arrest. He stated that Cotton was terminated from his employment in May 2013 for those reasons.

In May 2013, Cotton sued Banks and the state of Michigan for wrongful termination. Cotton alleged that Banks violated Michigan's Elliott-Larsen Civil Rights Act, MCL 37.2101 *et seq*., by discriminating against him on the basis of his sex, by demanding sexual favors as a condition of employment, by creating a hostile work environment, and by retaliating against him. Cotton also alleged that Banks's sexual harassment constituted the intentional infliction of emotional distress. Cotton alleged that the state, as Banks's employer, was vicariously liable for Banks's wrongful conduct.

In August 2013, the state moved for summary disposition under MCR 2.116(C)(4) and (10). The State argued that, because employees of the House of Representatives were excluded from state civil service, the State was not Cotton's employer for purposes of the Civil Rights Act. The state also argued that the circuit court did not have jurisdiction over Cotton's intentional tort claim—that claim had to be brought in the Court of Claims.

Banks moved for summary disposition under MCR 2.116(C)(7) and (8) in September 2013. Banks argued that he was absolutely immune, under MCL 691.1407(5), from claims arising out of his termination of Cotton's employment. He claimed he was entitled to immunity under an unpublished decision from a circuit court because his decision to terminate Cotton involved

an integral part of the legislative process, but Banks did not specifically argue that he had immunity under Const 1963, art 4, § 11. Additionally, Banks argued that the trial court must dismiss Cotton's claim of retaliation because Cotton did not plead that he reported the alleged sexual harassment to anyone before his discharge. Cotton's claim for intentional infliction of emotional distress similarly had to be dismissed, Banks stated, because that claim, as alleged, involved wrongful sexual discrimination in employment, and the Civil Rights Act is the exclusive remedy for such a claim.

In response, Cotton argued that the Civil Rights Act constitutes an exception to the immunity provided under MCL 691.1407 and, in any event, the acts of sexual harassment were outside the scope of Banks's authority as a representative. He also maintained that the Civil Rights Act is not the exclusive remedy for the harms occasioned by sexual harassment. Therefore, he argued, the trial court should deny Banks's motion for summary disposition.

In his reply brief, Banks cited Const 1963, art 4, § 11, and for the first time argued that he had absolute immunity from suit under the Speech or Debate Clause of Michigan's Constitution for any personnel decisions involving his staff. Banks argued that the undisputed evidence—namely the job description for a legislative assistant and copies of correspondence—showed that Cotton's job duties were integrally related to the legislative process. On that basis, Banks claimed he was immune from liability for his actions related to Cotton's employment.

In October 2013, the trial court held a hearing on the motions. At the hearing, the trial court expressed its belief that the Civil Rights Act created an exception to all governmental immunity, including immunity pro-

vided under the Speech or Debate Clause. The trial court also did not believe that Cotton was so integrally related to the legislative process that immunity would apply. As for Cotton's retaliation claim, the trial court refused to consider Banks's evidence that Cotton did not report the alleged harassment because Banks's motion was brought under MCR 2.116(C)(8). See MCR 2.116(G)(5). Additionally, the trial court did not agree that the Civil Rights Act preempted Cotton's claims for intentional infliction of emotional distress. Finally, the trial court agreed that the state was not Cotton's employer and that the claims against it should be dismissed.

The trial court entered an order granting the state's motion for summary disposition and dismissed the state without prejudice. It also entered a separate order allowing Cotton to amend his complaint to include the House of Representatives as a defendant. Finally, the trial court entered an order denying Banks's motion for summary disposition.

Cotton soon filed his first amended complaint naming the Michigan House of Representatives as a defendant. In his amended complaint, Cotton alleged that he reported the sexual harassment to his superiors. Cotton again alleged four counts against Banks and the House of Representatives premised on violations of the Civil Rights Act, and a fifth claim of intentional infliction of emotional distress against Banks alone.

Banks then appealed in this Court.

II. THE SPEECH OR DEBATE CLAUSE

A. STANDARDS OF REVIEW

Banks first argues that the trial court erred when it denied his motion for summary disposition, which was

based on the ground that he was absolutely immune from suit under Const 1963, art 4, § 11. He maintains that Michigan courts should construe Michigan's Speech or Debate Clause similarly to the federal courts' construction of the federal Speech or Debate Clause. Relying on federal authority, Banks contends that this Court should conclude that the Speech or Debate Clause applies to bar any claims premised on acts or omissions arising from the legislative process. According to Banks, because his decision to terminate Cotton implicated the legislative process, the trial court should have determined that he had absolute immunity under Const 1963, art 4, § 11. This Court reviews de novo a trial court's decision on a motion for summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). This Court also reviews de novo whether the trial court properly interpreted and applied Michigan's Constitution. *Wayne Co v Hathcock*, 471 Mich 445, 455; 684 NW2d 765 (2004).

B. CIVIL IMMUNITY UNDER THE SPEECH OR DEBATE CLAUSE

Michigan's Speech or Debate Clause provides legislators with a privilege against civil arrest and civil process during sessions of the Legislature and immunity from liability for their speech in either house:

> Except as provided by law, senators and representatives shall be privileged from civil arrest and civil process during sessions of the legislature and for five days next before the commencement and after the termination thereof. They shall not be questioned in any other place for any speech in either house. [Const 1963, art 4, § 11.]

The purpose of the privilege from civil arrest and civil process, our Supreme Court explained, is "to protect the legislators from the trouble, worry and

inconvenience of court proceedings during the session, and for a certain time before and after, so that the State could have their undivided time and attention in public affairs." *Auditor General v Wayne Circuit Judge*, 234 Mich 540, 542; 208 NW 696 (1926) (construing Const 1908, art 5, § 8, the predecessor to the present Speech or Debate Clause). Although an unreasonably long period of immunity might result in the denial of due process in an extreme case, the privilege must generally be construed to give effect to the policy which underlies it: to prevent both actual distraction and potential distraction from public duty during the legislative session. *Bishop v Wayne Circuit Judge*, 395 Mich 672, 677; 237 NW2d 465 (1976).

The immunity provision in the Speech or Debate Clause is similarly intended to protect legislators from the distraction of litigation. See *Prelesnik v Esquina*, 132 Mich App 341, 347; 347 NW2d 226 (1984). Read literally, the clause only provides senators and representatives with immunity for speeches made in either house—that is, from being "questioned in any other place for any speech in either house." See Const 1963, art 4, § 11. Because Michigan's Speech or Debate Clause is substantially similar to the Speech or Debate Clause found in the Constitution of the United States, it should be similarly construed. See *Prelesnik*, 132 Mich App at 347, citing *Eastland v United States Servicemen's Fund*, 421 US 491; 95 S Ct 1813; 44 L Ed 2d 324 (1975).

The United States Supreme Court has stated that the Speech or Debate Clause was the product of the English experience and was intended to ensure the independence of the legislative branch from interference by the executive branch or a possibly hostile judiciary. *Eastland*, 421 US at 502. But, the Court

noted, it had not limited the protection provided by the Speech or Debate Clause to acts of interference by public officials:

> The applicability of the Clause to private civil actions is supported by the absoluteness of the term "shall not be questioned," and the sweep of the term "in any other Place." In reading the Clause broadly we have said that legislators acting within the sphere of legitimate legislative activity "should be protected not only from the consequences of litigation's results but also from the burden of defending themselves." Just as a criminal prosecution infringes upon the independence which the Clause is designed to preserve, a private civil action, whether for an injunction or damages, creates a distraction and forces Members to divert their time, energy, and attention from their legislative tasks to defend the litigation. Private civil actions also may be used to delay and disrupt the legislative function. Moreover, whether a criminal action is instituted by the Executive Branch, or a civil action is brought by private parties, judicial power is still brought to bear on Members of Congress and legislative independence is imperiled. We reaffirm that once it is determined that Members are acting within the "legitimate legislative sphere" the Speech or Debate Clause is an absolute bar to interference. [*Id*. at 503 (citations omitted).]

Consequently, in the absence of a waiver of the immunity, the Speech or Debate Clause immunizes a legislator from civil suits premised on actions that he or she took within the legitimate sphere of legislative activity. *Id*.

C. WAIVER OF IMMUNITY UNDER THE ELLIOTT-LARSEN CIVIL RIGHTS ACT

Banks initially argued that the trial court should dismiss Cotton's claims because Banks had immunity under MCL 691.1407(5), and Cotton failed to plead in avoidance of that immunity. See *Yono v Dep't of Transp*

(On Remand), 306 Mich App 671, 682; 858 NW2d 128 (2014) (stating that a plaintiff must plead in avoidance of governmental immunity by alleging facts that, if true, would establish that his or her claim falls within an exception to governmental immunity). Cotton did, however, plead claims under the Civil Rights Act, and our Supreme Court has recognized that the act constitutes an exception to the immunity provided by MCL 691.1407. See *Mack v Detroit*, 467 Mich 186, 195; 649 NW2d 47 (2002). Banks later asserted before the trial court that he was also entitled to immunity under the Speech or Debate Clause, Const 1963, art 4, § 11. On appeal, Banks has abandoned any contention that MCL 691.1407 immunizes him from claims brought under the Civil Rights Act; instead, he now relies exclusively on the Speech or Debate Clause as the source of his immunity.

Defendant Michigan House of Representatives notes that at the hearing on Banks's motion for summary disposition, the trial court expressed its belief that there was no immunity for a claim under the Civil Rights Act because that act—by its own terms—applies to governmental employers. It is unclear from the trial court's decision whether it denied Banks's motion on that basis. For that reason, the Michigan House of Representatives urges this Court to clarify that the enactment of the Civil Rights Act did not waive the immunity provided under Const 1963, art 4, § 11.

In *Wilkins v Gagliardi*, 219 Mich App 260, 267-269; 556 NW2d 171 (1996), this Court had to determine whether the Speech or Debate Clause, Const 1963, art 4, § 11, provided immunity from suit for an alleged violation of the Open Meetings Act, MCL 15.261 *et seq*., by the Chairman of the House Oversight Committee.

The Court concluded that the chairman was immune from suit under the Speech or Debate Clause because his actions fell within the scope of legislative activity and the Legislature did not waive the immunity by applying the Open Meetings Act to public officials. *Wilkins*, 219 Mich App at 269-271. In reaching this decision, the Court first expressed doubt that the Legislature had the authority to make an institutional waiver of the immunity provided under Michigan's Constitution. *Id*. at 270. Rather, "the history of the Speech or Debate Clause supported an argument that Congress, as a body, should not be free to strip individual congressmen of the protection guaranteed by that clause." *Id*., citing *United States v Helstoski*, 442 US 477, 492-493; 99 S Ct 2432; 61 L Ed 2d 12 (1979). But even if the Legislature had the authority, the Court stated, it could not make such a waiver by inference—it must explicitly and unequivocally express its intent to waive the immunity provided under the Speech or Debate Clause. *Wilkins*, 219 Mich App at 270. Because the Open Meetings Act did not explicitly waive the individual legislators' immunity by referring to legislators, the Speech or Debate Clause still applied to bar applicable claims against a legislator under that act. *Id*. at 270-271.

The *Wilkins* Court also rejected the contention that the Speech or Debate Clause was subject to statutory modification, as provided by a then-recent amendment to the Constitution:

> Plaintiffs further argue that the amendment of article 4, § 11 that added the words "except as provided by law," gave the Legislature the power to waive the immunity granted under the Speech or Debate Clause. A clear reading of the constitutional provision does not support their argument. The quoted language refers only to the civil arrest and service of process portions of that section.

> The Speech or Debate Clause, being a totally separate provision in that section of the constitution, was not affected by the change. [*Id*. at 271.]

Although the Civil Rights Act, MCL 37.2101 *et seq*., generally applies to the "state or a political subdivision of the state or an agency of the state," MCL 37.2103(g) (defining the term "person"), and MCL 37.2201(a) (defining "employer" to mean a person who has 1 or more employees and an agent of that person), it does not specifically mention legislators or the immunity provided under the Speech or Debate Clause. Therefore, even assuming that the Legislature has the authority to effect an institutional waiver of the individual immunity provided under Const 1963, art 4, § 11, it did not, in the Civil Rights Act, explicitly and unequivocally waive the immunity provided under the Speech or Debate Clause. See *Wilkins*, 219 Mich App at 271. To the extent that the trial court determined that the Speech or Debate Clause did not apply to Banks in this case, it erred.

D. SCOPE OF THE IMMUNITY

A legislator is immune from civil liability for any activities that fall "within the legislative sphere." See *Prelesnik*, 132 Mich App at 347. An activity falls within the legislative sphere when it is integral to the legislative process. *Id*., citing *Gravel v United States*, 408 US 606, 625; 92 S Ct 2614; 33 L Ed 2d 583 (1972). And an activity is integral to the legislative process when it is essential to the consideration and passage or rejection of proposed legislation or involves a matter placed solely within the jurisdiction of either house.

> Legislative acts are not all-encompassing. The heart of the [Speech or Debate] Clause is speech or debate in either House. Insofar as the Clause is construed to reach

> other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House. As the Court of Appeals put it, the courts have extended the privilege to matters beyond pure speech or debate in either House, but "only when necessary to prevent indirect impairment of such deliberations." [*Gravel*, 408 US at 625 (citation omitted).]

This Court has had only limited opportunities to apply the Speech or Debate Clause to specific facts. The Court in *Wilkins* held that the Chairman of the House Oversight Committee had absolute immunity from suit for ordering the sergeant-at-arms to remove a camcorder from a visitor during a hearing because the committee was pursuing legislative business and the chairman was acting in his capacity as the chairman at the time. *Wilkins*, 219 Mich App at 269. This Court has also extended the immunity provided by the Clause to the preparation of an investigatory report by a legislative ombudsman because the job was "pertinent to legislative functions" and authorized by law. *Prelesnik*, 132 Mich App at 347-348. But neither this Court nor our Supreme Court has considered whether, and to what extent, Michigan's Speech or Debate Clause applies to a legislator's personnel decisions. The United States Supreme Court has, however, examined whether a judge's personnel decisions are immune from suit under the common-law absolute immunity for judicial acts.

In *Forrester v White*, 484 US 219, 220-221; 108 S Ct 538; 98 L Ed 2d 555 (1988), the United States Supreme Court had to determine whether a judge had absolute immunity from suit under the common law

for allegedly terminating an employee on the basis of her sex in violation of the federal Civil Rights Act. The Court stated that it had "been quite sparing in its recognition of claims to absolute official immunity," but that it had already recognized absolute immunity in one clear case—"the legislative immunity created by the Speech or Debate Clause." *Id*. at 224. The Court had similarly recognized "a comparatively sweeping form of immunity" to protect judicial independence "by insulating judges from vexatious actions prosecuted by disgruntled litigants." *Id*. at 225. When applied to judicial acts involving the resolution of disputes between parties, the Court explained that "the doctrine of absolute judicial immunity has not been particularly controversial." *Id*. at 227. "Difficulties have arisen," the Court related, "in attempting to draw the line between truly judicial acts, for which immunity is appropriate, and acts that simply happen to have been done by judges." *Id*.

In clarifying the proper test, the *Forrester* Court determined that the relevant inquiry should be on the nature of the function: "the nature of the function performed, not the identity of the actor who performed it," should inform the immunity analysis. *Id*. at 229. Because the judge acted in his administrative capacity when he terminated the employee rather than in any judicial capacity, he was not entitled to absolute judicial immunity. *Id*. Moreover, the fact that the judge's employment decisions implicated the sound administration of the judiciary did not alter the fact that the decisions were administrative: "Those acts—like many others involved in supervising court employees and overseeing the efficient operation of a court—may have been quite important in providing the necessary conditions of a sound adjudicative sys-

tem. The decisions at issue, however, were not themselves judicial or adjudicative." *Id*.

Every federal circuit court to consider the issue since the decision in *Forrester* has adopted the functional test described there for determining whether a legislator's conduct falls under the immunity provided by the federal Speech or Debate Clause. See *Fowler-Nash v Democratic Caucus of Pa House of Representatives*, 469 F3d 328, 332 (CA 3, 2006); *Fields v Office of Eddie Bernice Johnson, Employing Office, United States Congress*, 373 US App DC 32; 459 F3d 1, 13-17 (2006); *Bastien v Office of Senator Ben Nighthorse Campbell*, 390 F3d 1301, 1318 (CA 10, 2004) ("A personnel decision is not a 'legislative act,' as defined by the Supreme Court, and is therefore not entitled to immunity. The Speech or Debate Clause therefore provides protection only if legislative acts must be proved to establish the claim challenging the personnel action."); *Chateaubriand v Gaspard*, 97 F3d 1218, 1220-1221 (CA 9, 1996) ("Applying these factors, courts generally consider legislators' employment and personnel decisions to be administrative, rather than legislative, acts."); *Negron-Gaztambide v Hernandez-Torres*, 35 F3d 25, 27-28 (CA 1, 1994). Nevertheless, on appeal, Banks argues that this Court should adopt a legislative duties test similar to that described in *Agromayor v Colberg*, 738 F2d 55, 58-60 (CA 1, 1984), for determining whether a legislator's employment decisions are immune from suit.

In *Agromayor*, which was decided before the Supreme Court's decision in *Forrester*, the court considered whether the immunity from civil suit under the federal Speech or Debate Clause extended to a legislator's decision not to authorize the hire of an applicant for press officer. *Id*. at 57. Although the United States

Supreme Court had not yet considered whether an employment decision amounted to a legislative act, the *Agromayor* court noted that three United States Supreme Court justices had expressed the opinion that congressional employment decisions should be covered by the clause.[1] *Id*. at 59. The *Agromayor* court also agreed that the dissenting opinion joined by those three justices reflected the proper common-law concern with protecting legislators for acts beyond strict speech and debate. *Id*. at 60. The *Agromayor* court stated that the immunity should only apply to a personnel decision concerning an employee with "enough opportunity for 'meaningful input' into the legislative process," but warned that courts should not inquire too deeply into "the functions performed by a particular personal legislative aide, inasmuch as such an inquiry itself threatens to undermine the principles that absolute immunity was intended to protect." *Id*. at 60. Because the *Agromayor* court believed that the press officer position offered "enough opportunity for 'meaningful input' into the legislative process," the court concluded that the clause applied and "the employment decision should be immunized." *Id*.

Under the test stated in *Agromayor*, courts must look to the employee's duties to determine if legislative immunity applies; if the employee has meaningful input into the legislative process, the legislator has absolute immunity for his or her decisions regarding that employee under the Speech or Debate Clause. Notably, the only other federal circuit court to adopt a test similar to the *Agromayor* test has since disavowed

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[1] See *Davis v Passman*, 442 US 228, 249-250; 99 S Ct 2264; 60 L Ed 2d 846 (1979) (Burger, C.J., dissenting). Notably, the majority in *Davis* did not reach the question whether the employment decision there implicated the Speech or Debate Clause.

it. See *Fields*, 459 F3d at 11-12, rejecting the test previously adopted in *Browning v United States House of Representatives*, 252 US App DC 241; 789 F2d 923, 928-929 (1986).[2]

In *Fields*, the United States Court of Appeals for the District of Columbia examined whether the Speech or Debate Clause immunized legislators from suits challenging their personnel decisions concerning employees who assist in performing legislative functions; more specifically, the court had to address the continuing validity of the approach it applied in *Browning*. *Fields*, 459 F3d at 9 (opinion by Randolph, J.).[3] Under the *Browning* test, immunity turned on the nature of an employee's duties; if the employee's duties were directly related to the due functioning of the legislative process, the legislator's employment decision with regard to that employee would merit immunity under the Speech or Debate Clause. *Id*. at 11 (quotation marks and citation omitted). But, the *Fields* court stated, it had come to believe that this approach was too crude:

> We now see that an employee's duties are too crude a proxy for protected activity. Our holding in *Browning* presumes that a personnel decision with regard to an employee whose duties are "directly related to the due functioning of the legislative process," is always "an integral part of the deliberative and communicative pro-

[2] Although it never specifically overruled *Agromayor*, the First Circuit Court of Appeals apparently no longer applies the test from that case. See *Fowler-Nash*, 469 F3d at 334 ("The Court of Appeals for the First Circuit has repeatedly undermined or ignored *Agromayor* . . . ."). It has instead applied an approach similar to the functional approach stated in *Forrester*. *Id*. at 334-335 (examining precedent from the First Circuit).

[3] Because Judge Rodgers joined Judge Randolph's opinion in every respect except for "how the [Speech or Debate] Clause may limit evidence offered by parties in [Congressional Accountability Act] litigation," Judge Randolph's opinion constituted a majority as to those issues. See *Fields*, 459 F3d at 18 (Rodgers, J., concurring in part).

> cesses." But the presumption is, at a minimum, overinclusive and therefore inconsistent with the Court's practice of being "careful not to extend the scope of the protection further than its purposes require." Any number of counterexamples reveal as much: a legislative aide may be discharged because of budgetary cutbacks; a staff member may be demoted solely for consistent tardiness; a person seeking a top-level staff position might be rejected for having a poor college transcript; and so forth. That the person targeted by the personnel decision performs duties "directly related to . . . the legislative process" is not enough—conduct must be "part of," not merely "related to," the "due functioning" of the "legislative process" to be protected by the Speech or Debate Clause. At best, that an employee's duties are directly related to the legislative process establishes merely "some nexus" between the personnel decision and that process. [*Fields*, 459 F3d at 11-12 (citations omitted).]

The Speech or Debate Clause, the *Fields* court explained, was intended to protect the legislative process, not an individual legislator's legislative goals:

> It may be integral to a Member's legislative goals—indeed, integral even to accomplishing his "constitutionally delegated duties"—to send newsletters to constituents or deliver speeches outside of Congress to generate support for prospective legislation. But such acts are "political," not "legislative," and therefore not protected by the Speech or Debate Clause. [*Id*. at 12 (citations omitted).]

For those reasons, the court in *Fields* rejected the test applied in *Browning* and adopted a functional test. *Id*.

We agree that, in the employment context, the immunity provided by the Speech or Debate Clause should not turn on the nature of the employee's duties; whether the employee's duties have some connection to the legislative process is simply "too crude a proxy for protected activity." *Id*. at 11. Accordingly, we reject the tests stated in *Agromayor* and *Browning* and join those

jurisdictions that have adopted the functional approach stated in *Forrester*. In applying that approach, courts should be careful to distinguish between true legislative acts, which are entitled to absolute immunity, and acts that merely happen to have been performed by a legislator, but are otherwise administrative in nature. See *Forrester*, 484 US at 227-229. Instead of looking at the employee's duties to determine whether the employee had some meaningful input into the legislative process, courts must examine whether the acts on which the plaintiff predicates liability were legislative acts. See *id*. at 229; *Fields*, 459 F3d at 13. Courts should first examine the pleadings to see if it is necessary to inquire into the legislator's legislative acts—"how [the legislator] spoke, how he debated, how he voted, or anything he did in the chamber or in committee"—in order to prove the claim. *Fields*, 459 F3d at 13 (quotation marks and citations omitted). If, on the face of the pleadings, the plaintiff can make out his or her claims without venturing into a defendant's protected conduct, the Speech or Debate Clause will not bar the claims. *Id*. at 13-14.

E. APPLYING THE LAW

Cotton alleged that Banks used his position and authority as an employer to subject Cotton to inappropriate sexual conduct, which amounted to unlawful discrimination under the Civil Rights Act. According to Cotton, when he refused to enter into a romantic relationship with Banks, Banks retaliated against him and ultimately terminated his employment. None of these allegations involve a legislative act; even the ultimate decision to terminate Cotton's employment did not involve legislative concerns, and an analysis of it did not require an investigation of Banks's legisla-

tive acts. Banks's conduct was merely administrative. See *Forrester*, 484 US at 229-230; *Fields*, 459 F3d at 14. Therefore, on the face of the pleadings, the immunity provided under the Speech and Debate Clause does not apply to bar Cotton's claims. See *Yono*, 306 Mich App at 682.

Moreover, even considering Banks's version of events and his evidentiary submissions in support, the result is the same. See *id*. at 679-680 (recognizing that a governmental defendant may submit evidence to contradict the allegations stated in the complaint and, if the undisputed evidence demonstrates that the defendant is entitled to immunity, the trial court must dismiss the claims). Banks did not submit any evidence that Cotton's employment and dismissal would require inquiry into prohibited areas. Banks denied having engaged in any inappropriate sexual conduct with Cotton and stated that he terminated Cotton's employment because Cotton misused his status as a legislative assistant and did not have a valid driver's license. The proffered reasons do not implicate Cotton's involvement in any legislative acts and do not require inquiry into Banks's legislative acts or the motivation behind his legislative acts. See *Fields*, 459 F3d at 14.

The trial court did not err when it denied Banks's motion to dismiss premised on the immunity provided under Const 1963, art 4, § 11.

F. ADDITIONAL SAFEGUARDS

The Michigan House of Representatives asks this Court to adopt the approach for absolute immunity under the Speech or Debate Clause provided by the Court of Appeals for the D.C. Circuit in *Fields*, which we have done. But it also urges this Court to address

and adopt the additional safeguards discussed by that court—namely, the evidentiary privilege as the court applied it to the burden-shifting approach for claims of discrimination.

Although the court in *Fields* determined that the claims at issue there were not barred on the face of the pleadings, it nevertheless concluded that the Speech or Debate Clause might still require dismissal. *Fields*, 459 F3d at 14. This, the court maintained, was because the Clause also provides legislators with an evidentiary privilege:

> When the Clause does not preclude suit altogether, it still "protect[s] Members from inquiry into legislative acts or the motivation for actual performance of legislative acts." This evidentiary privilege includes a "testimonial privilege." A Member "may not be made to answer" questions—in a deposition, on the witness stand, and so forth—regarding legislative activities. "Revealing information as to a legislative act . . . to a jury"—whether by testimony or other evidence—"would subject a Member to being 'questioned' in a place other than the House or Senate, thereby violating the explicit prohibition of the Speech or Debate Clause." [*Id*. (citations omitted; alteration in original).]

"[E]ven if the challenged personnel decisions are not legislative acts, inquiry into the motivation for those decisions may require inquiry into legislative acts," which would not be permitted under the Speech or Debate Clause. *Id*. For that reason, the court felt that the Speech or Debate Clause posed special problems in the context of employment actions involving the burden-shifting approach. *Id*. at 15, citing *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973). A plurality of the *Fields* court went on to provide a framework for addressing the eviden-

tiary problem posed by the Speech or Debate Clause as applied to motions for summary disposition. *Fields*, 459 F3d at 15-17.

Because we have decided this issue on the limited record before us, and that record does not implicate any of these concerns, we decline to consider whether, and to what extent, an evidentiary privilege might apply, and we decline to adopt the additional safeguards discussed in *Fields*. Such issues would best be addressed in the first instance before the trial court after the parties have had an adequate opportunity to develop the record and their arguments. Nevertheless, nothing in this opinion should be construed to preclude Banks from asserting the immunity provided under the Speech or Debate Clause to prevent inquiries into his legislative acts or, after conducting further discovery, from bringing a properly supported motion for summary disposition under MCR 2.116(C)(7), on the ground that one or more of Cotton's claims cannot be established without impermissible inquiry into legislative acts.

III. RETALIATION CLAIM

A. STANDARD OF REVIEW

Banks next argues that the trial court erred when it denied his motion to dismiss Cotton's claim premised on retaliation for reporting Banks's sexual harassment. Specifically, Banks argues that the trial court should have dismissed Cotton's retaliation claim because Cotton failed to allege that he actually reported the harassment to a supervisor and because Cotton failed to present evidence to establish a question of fact on this issue after Banks submitted evidence that Cotton had not reported it. This Court reviews de novo

a trial court's decision on a motion for summary disposition. *Barnard Mfg*, 285 Mich App at 369.

B. ANALYSIS

Banks stated in the factual recitation of his brief in support of his motion for summary disposition that Cotton "had never made any reports to any person . . . concerning harassment or discrimination he may have encountered during his employment [with the Michigan House of Representatives]." He cited an affidavit by the Michigan House of Representatives' office director in support of this factual assertion. Banks further argued that Cotton's retaliation claim had to be dismissed under MCR 2.116(C)(8) because Cotton failed to plead that he had reported the harassment or discrimination before the alleged acts of retaliation.

Although Banks did assert that Cotton would be unable to plead such facts because he never in fact reported any harassment or discrimination, Banks did not move for summary disposition as to this claim under MCR 2.116(C)(10). Furthermore, at the hearing on Banks's motion for summary disposition, the trial court made it clear that it was not going to consider the evidentiary submissions or otherwise consider the office director's affidavit as an oral motion under (C)(10):

> So he claims, he alleges in his Complaint that he did make a complaint. And you're saying he didn't make a complaint and I told you we're not going into issues of fact because this is merely a failure to state a claim. You submitted an affidavit which is improper in this kind of a motion. You need to do discovery. That is a factual thing and he's alleged in his Complaint that he made a complaint. And I have to accept his allegations as true, so that doesn't fly at least at this point.

In ¶ 11 of his complaint, Cotton alleged that Banks engaged in various acts of sexual harassment against him. He then alleged in ¶ 11(k) that he "reported all of the above acts to his superiors, however, the acts continued and never ceased." Cotton incorporated these allegations into his claim for retaliation and further alleged that Banks retaliated against him in several ways for exercising his rights under the Civil Rights Act. These allegations were sufficient to state a claim of retaliation under MCL 37.2701(a). See *Barrett v Kirtland Community College*, 245 Mich App 306, 315; 628 NW2d 63 (2001).

The trial court did not err when it denied Banks's motion for summary disposition of Cotton's retaliation claim under MCR 2.116(C)(8).

IV. EXCLUSIVE REMEDY

A. STANDARD OF REVIEW

Finally, Banks argues that the trial court erred when it denied his motion to dismiss Cotton's claim of intentional infliction of emotional distress on the ground that the Civil Rights Act is the exclusive remedy for claims of sexual harassment and discrimination. This Court reviews de novo a trial court's decision on a motion for summary disposition. *Barnard Mfg*, 285 Mich App at 369.

B. ANALYSIS

In his motion for summary disposition, Banks argued that the Civil Rights Act provided the right to be free from sexual harassment in the work environment and provided the exclusive remedy for violations of that right. Citing *Monroe Beverage Co, Inc v Stroh Brewery Co*, 454 Mich 41, 45; 559 NW2d 297 (1997),

Banks maintained that Cotton could not maintain a common-law claim for intentional infliction of emotional distress premised on the statutorily prohibited sexual discrimination.

Banks's reliance on *Monroe Beverage* is misplaced. In that case, our Supreme Court analyzed a statute that established a cause of action unknown at common law. *Id*. at 45. Because the Legislature created new rights and remedies with this statute, the Court explained, the Court must enforce the statute's limits on who may avail themselves of the rights and may not infer remedies other than those provided by the statute. *Id*. The Court did not hold that the creation of a statutory right necessarily abrogates any common-law action which could conceivably arise from the same set of facts.

Michigan courts have recognized that the common-law tort of intentional infliction of emotional distress vindicates a person's "right to be free from serious, intentional and unprivileged invasions of mental and emotional tranquility." *Campos v Gen Motors Corp*, 71 Mich App 23, 25; 246 NW2d 352 (1976). By contrast, the Civil Rights Act protects a person from discrimination in employment, housing, and public accommodations. See MCL 37.2102(1). Courts will not lightly presume the abrogation or modification of the common law. See *Dawe v Dr Reuven Bar-Levav & Assoc, PC*, 485 Mich 20, 28; 780 NW2d 272 (2010). Because the Civil Rights Act claim and the common-law claim vindicate different rights, we cannot infer that, with the enactment of the Civil Rights Act, the Legislature intended to abrogate any common-law claims where the facts giving rise to a claim might also give rise to a claim under the Civil Rights Act. Moreover, the Legislature specifically provided that the Civil Rights

Act should "not be construed to diminish the right of a person to direct or immediate legal or equitable remedies in the courts of the state." MCL 37.2803. Therefore, Cotton could properly allege a claim for intentional infliction of emotional distress premised on facts which might also support a claim under the Civil Rights Act.

The trial court did not err when it concluded that the Civil Rights Act did not provide the exclusive remedy for claims involving sexual harassment and denied Banks's motion for summary disposition of Cotton's intentional infliction of emotional distress claim.

V. CONCLUSION

The Legislature did not waive the immunity provided under Michigan's Speech or Debate Clause, Const 1963, art 4, § 11, by the enactment of the Civil Rights Act. Because Cotton's claims do not on the face of the pleadings, or considering the record evidence, implicate Banks's legislative acts, the Speech or Debate Clause does not bar Cotton's claims. Therefore, the trial court did not err when it denied Banks's motion for summary disposition premised on the immunity provided by the Speech or Debate Clause. The trial court also did not err when it determined that Cotton sufficiently pleaded the elements of a retaliation claim under the Civil Rights Act to survive a motion under MCR 2.116(C)(8). Finally, the trial court correctly determined that the enactment of the Civil Rights Act did not abrogate the common-law claim for intentional infliction of emotional distress even though the common-law claim involved acts that might also amount to unlawful discrimination under the Civil Rights Act.

There were no errors warranting relief.

Affirmed. There being an important question of public policy on appeal, we order that none of the parties may tax their costs. MCR 7.219(A).

SERVITTO, P.J., and STEPHENS, J., concurred with M. J. KELLY, J.

AUTO-OWNERS INSURANCE COMPANY v SEILS

SEILS v PINK

Docket Nos. 315891, 315901, and 316511. Submitted October 15, 2014, at Detroit. Decided March 26, 2015, at 9:15 a.m. Leave to appeal sought.

Chad Seils, as personal representative of the estates of Carrie M. Seils (his ex-wife) and Skyler Seils (their daughter) and as next friend of their other daughter, Heavyn Seils, brought an action in the Wayne Circuit Court against Todd Pink (Pink); Richard Pink; the Fraternal Order of Police Associates, Grosse Pointe Lodge 102 (FOPA); and Olympia Entertainment, Inc. Seils alleged that after drinking heavily, Pink and Carrie attended the 2010 Hoedown festival in Detroit. Pink, who was visibly intoxicated, then consumed more beer purchased from festival vendors, including FOPA, which as a nonprofit charitable organization that was engaged in fundraising had entered into a concession agreement with Olympia for the event and had a temporary license from the Liquor Control Commission for a beer tent. Later in the day, Pink returned to Carrie's residence and killed her and Skyler and seriously injured Heavyn. Seils alleged that FOPA's sale of alcohol to Pink while he was visibly intoxicated violated the dramshop act, MCL 418.1801. FOPA and Olympia separately sought summary disposition. The court, Robert J. Ziolkowski, J., denied both motions, and FOPA and Olympia were separately granted leave to appeal in Docket Nos. 315901 and 316511.

Auto-Owners Insurance Company brought a declaratory judgment action in the Wayne Circuit Court against Olympia, FOPA, and Seils. FOPA's concession agreement with Olympia required FOPA to obtain comprehensive general-liability insurance, workers' compensation coverage, and host liquor-liability insurance that included Olympia as an additional named insured. It also required FOPA to indemnify Olympia with respect to claims arising out of FOPA's performance of the agreement. FOPA did not obtain liquor-liability insurance. The commercial general-liability policy that Auto-Owners issued to FOPA expressly excluded coverage for liquor liability, but the exclusion applied only

if the insured was in the business of manufacturing, distributing, selling, serving, or furnishing alcoholic beverages. The policy also excluded coverage for contractual liability, but the exclusion did not apply to liability for certain damages assumed in an insured contract pertaining to the insured's business under which the insured assumed the tort liability of another party to pay for bodily injury or property damage to a third person or organization. The court, Robert L. Ziolkowski, J., ruled that the general-liability policy Auto-Owners had issued to FOPA provided both dramshop and contractual-liability coverage for the incident involving Pink. The court held that FOPA was not in the business of selling, serving, or furnishing alcoholic beverages, so the policy's liquor-liability exclusion did not apply. The court also ruled that the concession agreement pertained to FOPA's fundraising for its business of civic and charitable activities and that the contractual liability exclusion of the policy therefore did not apply. Accordingly, the court entered an order that denied Auto-Owners' motion for summary disposition, granted summary disposition to FOPA, required Auto-Owners to defend and indemnify FOPA in the underlying dramshop action, and required Auto-Owners to defend and indemnity Olympia. Auto-Owners appealed in Docket No. 315891, and the Court of Appeals consolidated the appeals.

The Court of Appeals *held*:

1. Because the commercial general-liability policy in this case did not exclude all coverage for liquor liability and contractual liability and because under the facts and circumstances of this case the exceptions to the exclusions arguably apply, the trial court did not err by strictly construing the exclusions in favor of coverage. Insurance policy exclusions must be strictly construed against the insurer and in favor of coverage. The insurance policy in this case was sold to a nonprofit group whose primary purpose and activities were charitable and civic. But FOPA also engaged in limited annual fundraising through alcohol sales permitted under a temporary license. Its sale of alcoholic beverages was not part of a permanent and ongoing commercial venture. Accordingly, the trial court did not err by ruling that FOPA was not in the business of manufacturing, distributing, selling, serving, or furnishing alcoholic beverages and did not abuse its discretion by ruling that the exception to the liquor-liability exclusion applied and that the policy provided coverage for Seils's dramshop action.

2. With respect to the contractual-liability exclusion, the trial court also properly rejected Auto-Owners' argument that the term "business" must be construed consistently throughout the policy.

Rather, the word "business" must be construed in context and read in light of the contract as a whole, and a clearly different context surrounds the term "business" in the contractual-liability exclusion than in the exception to the liquor-liability exclusion. The contractual-liability exclusion did not apply to an insured contract, that is, a contract pertaining to FOPA's business. The trial court correctly ruled that FOPA was not in the business of selling alcoholic beverages as described in the exception to the liquor-liability exclusion, but the concession agreement pertained or related to FOPA's business because it related to FOPA's fundraising activities for its business of civic and charitable activities. Therefore, the trial court correctly ruled that the exception to the contractual-liability provision applied because the concession agreement pertained to FOPA's business.

3. The trial court erred by not granting summary disposition to FOPA and Olympia. To establish his dramshop action, Seils had to show that FOPA violated MCL 436.1801(2) by selling, furnishing, or giving alcohol to Pink while he was visibly intoxicated. MCL 436.1801(3) imposes liability on a liquor licensee whose unlawful sale or furnishing of alcoholic liquor to a minor or visibly intoxicated person caused or contributed to the intoxication that was a proximate cause of damage, injury, or death. A dramshop action may be premised on an allegedly intoxicated person's assaultive criminal conduct, but there still must be sufficient evidence that furnishing the alcohol to the person was a proximate cause of the violent behavior. Proof of proximate cause requires establishing two elements: (1) cause in fact and (2) legal cause or proximate cause. Cause in fact requires that the harmful result would not have come about but for the defendant's conduct. A plaintiff must adequately establish cause in fact in order for legal cause or proximate cause to become a relevant issue. Whether proximate cause or legal cause is established normally requires examining the foreseeability of the consequences and whether the defendant should be held legally responsible for those consequences. The chain of causation between the defendant's conduct and the plaintiff's injuries can be broken by an intervening or a superseding cause, which is one that actively operates in producing harm to another after the original actor committed the negligent act or omission. An intervening cause breaks the chain of causation and constitutes a superseding cause that relieves the original actor of liability unless the intervening act was reasonably foreseeable. Accordingly, the issue of proximate causation requires focusing on whether the result of conduct that created a risk of harm and any intervening causes were foreseeable. In general, invitors have a duty to respond

reasonably to situations occurring on their premises that pose a risk of imminent and foreseeable harm to identifiable invitees, but they have no duty to otherwise anticipate and prevent the criminal acts of third parties. Both the question of duty and proximate cause depend in part on foreseeability. Criminal acts by third parties can be foreseeable. Seils, however, identified no evidence from which FOPA could have reasonably foreseen Pink's intentional criminal acts, and Pink's decision to commit murder and other assaults was an intervening or superseding cause of the injuries Seils alleged.

4. The dramshop act does not permit imposition of liability on a third party under a common-law theory of vicarious liability in which the third party is the principal and the liquor licensee the agent. Under MCL 436.1801(2), the only vicarious liability that exists is for liability flowing upward to the licensee from its clerk, agent, or servant who actually sells, furnishes, or gives alcoholic liquor to a person who is visibly intoxicated. MCL 436.1801(10) provides that the dramshop act is the exclusive remedy for money damages against a licensee arising out of the selling, giving, or furnishing of alcoholic liquor to a minor or intoxicated person. Consequently, because Olympia was not the liquor licensee in this case, its lack of vicarious liability provided an alternative basis for reversal.

5. MCL 436.1801(4) requires that a plaintiff give written notice of a dramshop action to all defendants within 120 days after entering an attorney-client relationship for the purpose of pursuing a dramshop claim. Failure to give written notice within the time specified is grounds for dismissal of the claim with respect to any defendants that did not receive notice unless sufficient information for determining that a retail licensee might be liable under that section was not known and could not reasonably have been known within the 120 days. Seils's attorney sent a letter to FOPA stating that he intended to pursue a dramshop claim against it. Approximately two months later, he sent a letter to Olympia that contained a courtesy copy of the letter to FOPA but did not assert a claim under MCL 436.1801 against Olympia. This courtesy copy notice of Seils's intent to pursue a dramshop claim against FOPA could not, by its plain terms, be read as notice of a dramshop claim against Olympia. Seils's failure to give Olympia the timely written notice required by MCL 436.1801(4) provided another alternative basis for reversal.

Affirmed in Docket No. 315891.

Reversed in Docket Nos. 315901 and 316511 and remanded to trial court for entry of orders granting summary disposition to FOPA and Olympia.

Willingham & Coté, P.C. (by *Kimberlee A. Hillock*, *John A. Yeager*, and *Frederick M. Baker*), for Auto-Owners Insurance Company.

Peter J. Parks for Chad Seils.

Cummings, McClorey, Davis & Acho, P.L.C. (by *Douglas J. Curlew*), for Olympia Entertainment, Inc., in Docket No. 315891.

Cummings, McClorey, Davis & Acho, P.L.C. (by *T. Joseph Seward* and *Lindsey J. Kaczmarek*), for Olympia Entertainment, Inc., in Docket No. 316511.

David Franks, P.C. (by *David J. Franks*), for Fraternal Order of Police Associates, Grosse Pointe Lodge 102 in Docket No. 315891.

Secrest Wardle (by *Drew W. Broaddus* and *Thomas J. Azoni*) for Fraternal Order of Police Associates, Grosse Pointe Lodge 102 in Docket No. 315901.

Before: BOONSTRA, P.J., and MARKEY and K. F. KELLY, JJ.

PER CURIAM. These cases are consolidated for purposes of appeal. In Docket No. 315891, Auto-Owners Insurance Company appeals by right the trial court's declaratory ruling that the commercial general-liability policy (CGL) it issued to defendant Fraternal Order of Police Associates, Grosse Pointe Lodge 102 (FOPA) provided both dramshop and contractual-liability coverage for an incident in which an allegedly intoxicated person (AIP) murdered and severely in-

jured several people. In Docket No. 315901, this Court granted the FOPA's application for leave to appeal the trial court's denial of its motion for summary disposition of the underlying dramshop action. Similarly, in Docket No. 316511, defendant Olympia Entertainment, Inc., appeals by leave granted the trial court's denial of its motion for summary disposition with respect to the same dramshop action. For the reasons discussed in this opinion, we conclude that the trial court did not err in its ruling in Docket No. 315891 but that in Docket No. 315901 and Docket No. 316511 it should have granted summary disposition to those defendants regarding the dramshop action because the plaintiff in that case, Chad Seils, cannot establish proximate cause. MCL 436.1801(2) and (3).

I. SUMMARY OF PERTINENT FACTS AND PROCEEDINGS

A. DOCKET NO. 315891

According to the testimony of Robert Estabrook, its treasurer and one of its incorporators, the FOPA is a nonprofit corporation organized for the purpose of supporting the police and various charities such as Special Olympics and other community charities. The FOPA also directly supports local police by doing things like buying GPS units for detectives' cars and bulletproof vests for new officers. Its articles of incorporation as a domestic nonprofit corporation state that in addition to "inculcat[ing] loyalty and allegiance" to the Constitution and the nation, the FOPA's purpose is to "join together fraternally . . . to promote and foster the impartial enforcement of law and order; to assist in all reasonable and ethical ways our parent lodge, Fraternal Order of Police, Grosse Pointe Lodge No. 102, in their endeavor to support and assist their members and family . . . ."

To raise money for its stated purposes, the FOPA would each year obtain a temporary license from the Liquor Control Commission to staff a beer tent at various community special events and, in particular, staff a beer tent at an annual three-day event known as the Detroit Hoedown (the Hoedown). It is undisputed that this event had been the FOPA's main fundraiser for 20 years preceding the events of May 2010. CBS Radio and Live Nation Entertainment promoted the Hoedown, and concessions were run by a succession of event managers, ending in 2010 with Olympia. For the 2010 Hoedown, Olympia and the FOPA entered into a concession agreement. Twelve other civic groups also signed concession agreements as "sub-licensees" to staff beer tents at the Hoedown under the auspices of the FOPA's special liquor license. Estabrook testified that Olympia recruited, trained, and supervised the other civic groups and that the FOPA was responsible for only one beer tent. The FOPA earned $8,010.19 from the 2010 Hoedown, representing an 8% commission on gross sales from the beer tent it staffed; gross beer sales at the entire event were $875,351.70. The other civic groups likewise received an 8% commission on gross sales from the beer tent the civic group staffed.

The concession agreement required the FOPA to obtain and certify to Olympia that it had obtained "(i) comprehensive general liability insurance . . . ; (ii) required worker's compensation coverage; and (iii) host liquor liability insurance of not less than $500,000 for each occurrence." Also, these insurance policies were to include Olympia, CBS Radio, Live Nation, the Hoedown, and the city of Detroit as additional named insured parties. The FOPA did not obtain liquor-liability insurance.

The concession agreement also contained an indemnification clause providing that "[i]rrespective of the amount of insurance provided, [the FOPA] shall be liable for and shall indemnify, defend and hold harmless [Olympia] . . . against and with respect to any claim, liability, obligation, loss, damage, assessment, judgment, cost and expense . . . arising out of or as result of or related to" the FOPA's performance of the agreement.

The issues presented in this appeal concern the application of two exclusions in the CGL policy that Auto-Owners issued to the FOPA. The "Tailored Protection Policy" identifies the insured on its face page as "FOP LODGE #102" and as a "Club" that is "Not For Profit." The policy both excluded and provided coverage for liquor liability by providing the following in § I(A)(2)(c) under "Exclusions":

> This Insurance does not apply to:
>
> * * *
>
> **c. Liquor Liability**
>
> "Bodily injury" or "property damage" for which any insured may be held liable by reason of:
>
> (1) Causing or contributing to the intoxication of any person;
>
> (2) The furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or
>
> (3) Any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages.
>
> This exclusion applies only *if you are in the business of* manufacturing, distributing, *selling, serving or furnishing alcoholic beverages*. [Emphasis added.]

The policy also both excluded and provided coverage for contractual liability by providing in § I(A)(2)(b) under "Exclusions" that the insurance also did not apply to the following:

> **b. Contractual Liability**
>
> "Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:
>
> (1) Assumed in a contract or agreement that is an "insured contract", provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement. However, if the insurance under this policy does not apply to the liability of the insured, it also does not apply to such liability assumed by the insured under an "insured contract".

The meaning of "insured contract" pertinent to this case is found in § V(10) of the policy setting forth various definitions. The parties agree that it means:

> That part of *any other contract or agreement pertaining to your business* . . . under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement. [Emphasis added.]

At an April 1, 2013 hearing on the parties' motions for summary disposition, the trial court ruled with respect to § I(A)(2)(c) of the policy that the FOPA was not "in the business of . . . selling, serving or furnishing alcoholic beverages." Therefore, the liquor-liability exclusion of the CGL policy did not apply. The trial court first noted that "business" was undefined and opined that

> if it's defined as purposeful activity, then the exclusion might apply.
>
> But if we look at other definitions in the business, where we talk about on -- ongoing commercial activity to provide a livelihood to a person, in this case an organization, then it wouldn't apply.

The court also found pertinent a distinction found in some cases of "a single activity or a single incident versus a continuous activity," which favored the FOPA. The court then ruled that the FOPA was not in the business of selling, serving or furnishing alcoholic beverages.

The trial court rejected Auto-Owners' contention that if the FOPA is not in the business of selling alcohol, and the contract between the FOPA and Olympia concerned selling alcohol, then the concession agreement could not be an insured contract because it did not pertain to the FOPA's business. The trial court ruled that the policy definition of "insured contract"—i.e., "pertaining to your business"—was broader than the language "in the business" as used in the liquor-liability exclusion. On this basis, the trial court ruled that the concession agreement pertained to the FOPA's fundraising for its business of civic and charitable activities. Therefore, the contractual-liability exclusion of Auto-Owners' CGL policy did not apply.

For these reasons, the trial court entered an order on April 17, 2013, denying Auto-Owners' motion for summary disposition and granting summary disposition to the FOPA. This order required Auto-Owners to defend and indemnify the FOPA in the underlying dramshop action. On the basis of its ruling on the contractual-liability exclusion, the trial court also ordered that Auto-Owners defend and indemnify Olympia because the concession agreement between

the FOPA and Olympia regarding the staffing of beer tents at the three-day Hoedown was an "insured contract."

B. DOCKET NOS. 315901 AND 316511

Plaintiff Chad Seils (Seils) is the ex-husband of decedent Carrie Marie Seils and the father of their children, decedent Skyler Seils and Heavyn Seils.[1] On May 15, 2010, Carrie and Skyler were killed at their home in Clinton Township by a man whom Carrie had been dating, defendant Todd Michael Pink (Pink). Pink also shot Carrie's roommate, James Pagano, and seriously injured Heavyn. Following a jury trial in April 2011, Pink was convicted of two counts of first-degree premeditated murder, two counts of felony murder, two counts of assault with intent to murder, four counts of possession of a firearm during the commission of a felony, one count of first-degree home invasion, one count of assaulting or resisting a police officer, and one count of being a felon in possession of a firearm. This Court affirmed Pink's convictions and sentences but remanded for the correction of the judgment of sentence.[2]

On August 31, 2011, Seils, as personal representative of the estates of Carrie and Skyler and as next friend of Heavyn, sued the FOPA, Olympia, Pink, and Pink's father, Richard Pink.[3] In relevant part, the first amended complaint alleged that on the evening of Friday, May 14, 2010, and throughout the day on Saturday, May 15, 2010, Pink and Carrie "were en-

[1] At the time, Skyler was three, and Heavyn was five years old.

[2] *People v Pink*, unpublished opinion per curiam of the Court of Appeals, issued August 28, 2012 (Docket No. 304909).

[3] The register of actions indicates that the trial court dismissed Richard Pink on June 28, 2013.

gaged in a joint alcohol drinking binge" and that by mid-afternoon, Pink was visibly intoxicated. In the afternoon, Pagano, Pink, and Carrie decided to attend the Hoedown at Hart Plaza. Pagano drove, and Carrie's children went along with the three adults. Seils alleged that Pink purchased and consumed "several beers" from the beer vendors shortly after arriving at the festival, that Pink's behavior became increasingly disruptive and aggressive from his increasing intoxication, and that "he precipitated several near violent confrontations with festival attendees." Pagano and Carrie decided they should leave the festival to "avoid a brawl from erupting" and insisted that Pink "accompany them before he got himself arrested." During the drive home, Pink and Carrie engaged in an argument about leaving the festival. Upon arriving at the residence in Clinton Township, Pink drove off in his car and went to the mobile home where his father lived and retrieved a loaded handgun. Upon returning to the Clinton Township residence, Pink kicked in the door, shot Pagano in the head, and then fatally shot Carrie. Pink aimed the gun at Heavyn, but the gun jammed and did not discharge. Pink then chased the children into the kitchen, grabbed a large knife and fork, and stabbed the children multiple times.

In relevant part, the amended complaint alleged that the FOPA was granted a special license by the Liquor Control Commission to serve intoxicating beverages at the festival, that the FOPA sold alcoholic beverages to Pink, who the FOPA knew or should have known was visibly intoxicated in violation of MCL 436.22,[4] and that the furnishing of alcoholic beverages

[4] MCL 436.22 was the predecessor of the current applicable statute, MCL 436.1801, which has been in effect since April 14, 1998. MCL 436.1801 is commonly referred to as the dramshop act.

"caused and/or contributed to the horrific violent crimes" Pink committed while he was severely intoxicated.

In Docket No. 315901, the FOPA appeals by leave granted the trial court's separate April 17, 2013 order denying its motion for summary disposition of Seils's dramshop action on the basis that the actions of Pink in committing first-degree premeditated murder and assault with intent to murder were not reasonably foreseeable such that Seils could not establish the necessary element of proximate causation. The FOPA argued that under the undisputed facts, Pink's actions were deliberate and premeditated and therefore not a foreseeable consequence of serving alcohol to a visibly intoxicated adult and that Pink's specific intent severed any causal chain with respect to any improper serving of alcohol. Olympia filed a concurrence in this aspect of the FOPA's motion below. The trial court ultimately denied the motion, relying on *Weiss v Hodge (After Remand)*, 223 Mich App 620; 567 NW2d 468 (1997) (holding that the dramshop act permits imposition of liability for intentional torts), and concluded that the issue of proximate cause was a question of fact.

In Docket No. 316511, Olympia appeals by leave granted the trial court's May 14, 2013 order denying its motion for summary disposition with respect to Seils's dramshop action. The parties argued this motion the same day as the FOPA's motion. In addition to ruling that the issue of proximate cause presented a question of fact for trial, the trial court rejected Olympia's arguments that it could not be held liable under the dramshop act because it was not the liquor licensee and because Seils had failed to provide it with written notice as required by MCL 436.1801(4).

II. DOCKET NO. 315891

A. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition. *DeFrain v State Farm Mut Auto Ins Co*, 491 Mich 359, 366; 817 NW2d 504 (2012). Summary disposition is proper if the evidence, affidavits, pleadings, and admissions viewed in a light most favorable to the other party demonstrate that there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law. *Hastings Mut Ins Co v Safety King, Inc*, 286 Mich App 287, 291; 778 NW2d 275 (2009); MCR 2.116(C)(10). A trial court's decision regarding declaratory relief is reviewed for an abuse of discretion. *Pioneer State Mut Ins Co v Dells*, 301 Mich App 368, 376; 836 NW2d 257 (2013).

We also review de novo the interpretation of a contract and the legal effect of one of its clauses. *Rory v Continental Ins Co*, 473 Mich 457, 461, 464; 703 NW2d 23 (2005). We construe insurance contracts in the same manner as other contracts, assigning the words in the contract their "ordinary and plain meaning if such would be apparent to a reader of the instrument." *DeFrain*, 491 Mich at 366-367 (quotation marks and citation omitted). A dictionary may be consulted to ascertain the plain and ordinary meaning of words or phrases used in the contract. *Citizens Ins Co v Pro-Seal Serv Group, Inc*, 477 Mich 75, 84; 730 NW2d 682 (2007). A "court must look at the contract as a whole and give meaning to all terms." *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 566; 489 NW2d 431 (1992). After ascertaining the meaning of a contract's terms, "a court must construe and apply unambiguous contract provisions as written." *Rory*, 473

Mich at 461. A contract is ambiguous when, after considering the entire contract, its words may reasonably be understood in different ways. *Farm Bureau Mut Ins Co of Mich v Nikkel*, 460 Mich 558, 566; 596 NW2d 915 (1999). Thus, when "a fair reading of the entire contract of insurance leads one to understand that there is coverage under particular circumstances and another fair reading of it leads one to understand there is no coverage under the same circumstances the contract is ambiguous . . . ." *Raska v Farm Bureau Mut Ins Co of Mich*, 412 Mich 355, 362; 314 NW2d 440 (1982). An ambiguous provision in an insurance contract is construed against the insurer and in favor of coverage. *Id*.; *Heniser v Frankenmuth Mut Ins Co*, 449 Mich 155, 160; 534 NW2d 502 (1995).

A two-step analysis is used when interpreting an insurance policy: first, does the general insurance policy provide coverage for the occurrence, and second, if coverage exists, does an exclusion negate the coverage? *Hunt v Drielick*, 496 Mich 366, 373; 852 NW2d 562 (2014). "It is the insured's burden to establish that his claim falls within the terms of the policy." *Heniser*, 449 Mich at 172. In this case, the parties do not seriously dispute that if the exclusions at issue do not apply, Auto-Owners' claims come within the general terms of the CGL policy that Auto-Owners issued to the FOPA and also that the general terms of the policy cover the contractual liability of the FOPA to Olympia under the concession agreement. The insurance company has the burden to prove that one of the policy's exclusions applies. *Id*. at 161 n 6; *Dells*, 301 Mich App at 378. "Exclusionary clauses in insurance policies are strictly construed in favor of the insured." *Churchman*, 440 Mich at 567. But clear and specific exclusions will be enforced as written so that the insurance company

is not held liable for a risk it did not assume. *Id*.; *Group Ins Co of Mich v Czopek*, 440 Mich 590, 597; 489 NW2d 444 (1992).

B. ANALYSIS

Auto-Owners argues that the trial court erred by ruling that the insurance policy's liquor-liability exclusion did not apply on the facts of this case because the FOPA was "in the business of . . . selling, serving, or furnishing alcoholic beverages." Furthermore, Auto-Owners contends that if the FOPA was not in the business of selling alcoholic beverages, for purposes of avoiding the liquor-liability exclusion, then the concession agreement cannot pertain to the FOPA's business because it was totally about the sale of alcohol and, therefore, coverage for Olympia is excluded. We conclude that because the policy in this case did not exclude *all* coverage for liquor liability and contractual liability and because under the facts and circumstances of this case the exceptions to the exclusions arguably apply, the trial court did not err by strictly construing the exclusions at issue in favor of coverage. *Churchman*, 440 Mich at 567. Moreover, in light of foreign caselaw interpreting liquor-liability exclusions analogous to that at issue,[5] a fair reading of the policy as a whole could lead to opposite conclusions regarding coverage; therefore, the policy "should be construed against its drafter and in favor of coverage." *Raska*, 412 Mich at 362.

The Auto-Owners policy does not define the key word "business" or the critical phrases "in the business

[5] Cases from other jurisdictions are not binding precedent, but we may consider them to the extent this Court finds their legal reasoning persuasive. *Hiner v Mojica*, 271 Mich App 604, 612; 722 NW2d 914 (2006).

of" and "pertaining to your business." Consequently, when determining the plain and ordinary meaning of these words and phrases it is appropriate to consult a dictionary. *Safety King*, 286 Mich App at 294. Further, contractual terms must be construed in context, *Vushaj v Farm Bureau Gen Ins Co of Mich*, 284 Mich App 513, 516; 773 NW2d 758 (2009), and read in light of the contract as a whole, *Churchman*, 440 Mich at 566.

In *Random House Webster's College Dictionary* (1992), "business" is defined as

> **1.** an occupation, profession, or trade. **2.** the purchase and sale of goods in an attempt to make a profit. **3.** a person, partnership, or corporation engaged in commerce, manufacturing, or a service. **4.** volume of trade; patronage or custom. **5.** a store, office, factory, etc., where commerce is carried on. **6.** that with which a person is principally and seriously concerned: *Words are a writer's business*.

The American Heritage Dictionary, Second College Edition (1985), similarly defines the word "business" as

> **1. a.** The occupation, work, or trade in which a person is engaged: *in the wholesale food business.* **b.** A specific occupation or pursuit: *really knew her business.* **2.** Commercial, industrial, or professional dealings: *new systems now being used in business.* **3.** A commercial enterprise or establishment: *bought his uncle's business*.

And *Black's Law Dictionary* (10th ed) defines "business" as

> **1.** A commercial enterprise carried on for profit; a particular occupation or employment habitually engaged in for livelihood or gain. . . . **2.** Commercial enterprises <business and academia often have congruent aims>. **3.** Commercial transactions <the company has never done business in Louisiana>.

While these dictionary definitions support Auto-Owners' argument that "business" could mean any

"occupation, profession, or trade," nothing in the wording of the exception to the liquor-liability exclusion or the rest of the policy supports its argument that the exception is intended to apply only to furnishing alcoholic beverages in a social-host setting. Also, contrary to Auto-Owners' argument that the focus of the exception is on the activity of the insured at the time of the occurrence, the wording of the exception, "if *you* are in the business of . . . selling, serving or furnishing alcoholic beverages," places emphasis on the defining aspect of the insured.[6] Auto-Owners could have, but did not, place the focus of the liquor-liability exclusion on the nature of the activity giving rise to the claim, as did the policies at issue in some of the out-of-state cases the parties cite, such as *McGriff v US Fire Ins Co*, 436 NW2d 859, 861-862 (SD, 1989), and *Fraternal Order of Eagles v Gen Accident Ins Co of America*, 58 Wash App 243, 246; 792 P2d 178 (1990), both involving the Fraternal Order of Eagles. In each of these cases, the liquor-liability exclusion applied when the insured "organization *engaged in the business of* . . . selling or serving alcoholic beverages . . . ." *Fraternal Order of Eagles*, 58 Wash App at 246 (emphasis added); see also *McGriff*, 436 NW2d at 861. Thus, the exclusion focused on "the *specific conduct* for which liability is alleged, not on the general nature of the organization." *Fraternal Order of Eagles*, 58 Wash App at 250. In each case, the court held that the exclusion applied when the Eagles organization operated a bar on an ongoing basis

[6] Cf. *Cormier v Travelers Ins Co*, 618 So 2d 1185, 1187 (La App, 1993) (opining on an exception to a liquor-liability exclusion identically worded to that in the present case and stating that "[t]he obvious purpose of the phrase 'in the business of' is to describe the nature of the activity engaged in and has nothing to do with the specific purpose for which the activity is pursued or the nature of the person or entity engaged in the activity").

for a profit, which provided benefits to its members and supported its operations. *Id*. at 248-249; *McGriff*, 436 NW2d at 862-863.

But even in cases in which the liquor-liability exclusion applied when an organization was engaged in the business of selling or serving alcoholic beverages, courts have read the word "business" as limiting its application. One court noted that if the insurance company had "clearly intended to exclude coverage for any activity involving the sale or serving of liquor, clear language to that effect could have been employed, and any reference to 'business' would have been unnecessary." *Schenectady Co v Travelers Ins Co*, 48 AD2d 299, 302; 368 NYS2d 894 (1975). Hence, the word "business" limited the application of the exclusion. *Id*. The court determined that the exclusion would apply to regular activity for pecuniary gain, i.e., an ongoing venture of selling or serving alcohol, but that it would not apply when the sale of alcohol occurs infrequently and the risk of dramshop liability would accordingly be limited. *Id*. at 301-302. This reading of the exclusion is consistent with dictionary definitions and the wording of the exception to the liquor-liability exclusion at issue in this case.

Other courts interpreting the same language as that at issue in this case have similarly found pertinent whether the nonprofit group engaged in alcohol sales on a continuous, ongoing basis. So when a group regularly operates a bar selling alcohol to members and the public, courts have held that the exception to a liquor-liability exclusion did not apply because the insured was "in the business of . . . selling, serving or furnishing alcoholic beverages." In *Auto-Owners (Mut) Ins Co v Sugar Creek Mem Post 3976*, 123 SW3d 183, 189-190 (Mo App, 2003), citing dictionary definitions

and quoting *Sprangers v Greatway Ins Co*, 182 Wis 2d 521, 540; 514 NW2d 1 (1994), the court opined that the relevant inquiry was the nature of the insured's activities and that "a court must determine whether the insured 'consistently engages in an activity which creates a level of risk which the insurer has declared unacceptable.' " The Missouri court concluded that the VFW post that operated a bar open to the public "exposed its insurer to the same risks inherent in other drinking establishments operated by for-profit entities." *Id*. at 189. Similar cases finding a liquor-liability exclusion, with an exception worded exactly like that in the present case, applied on the basis of regular alcohol sales include *Nichols v Westfield Ins, Co*, 235 Ga App 239, 241-242; 509 SE2d 149 (1998) (holding that the exclusion applied when a veterans' group operated a bar that regularly sold alcohol to the public, which was a primary source of the group's income), and *US Fidelity & Guaranty Co v Country Club of Johnston Co, Inc*, 119 NC App 365, 372; 458 SE2d 734 (1995) (holding that the country club was "in the business of . . . selling, serving or furnishing alcoholic beverages" when it did so in "an ongoing operation rather than an occasional or infrequent event"). In general, these cases focused on the nature of the risk created by ongoing alcohol sales rather than the corporate nonprofit character of the organization. See *Nichols*, 235 Ga App at 241 (stating that the focus is on "the nature of risks resulting from the insured's *activities*, not from its fraternal *purposes*"); *Johnston Co Country Club*, 119 NC App at 372 (stating that "it is irrelevant whether the insured is a nonprofit organization" when the sale of alcoholic beverages is "a permanent, ongoing operation").

A case from another jurisdiction with facts most similar to the facts of the instant case, and that

construes the same policy language, is *Mut Serv Cas Ins Co v Wilson Twp*, 603 NW2d 151 (Minn App, 1999). In that case, the township and its fire department annually held a one-day fundraiser at which beer was sold under a temporary license. *Id*. at 152. A patron at the event became obviously intoxicated and later was in an automobile accident. At issue was whether the township's general-liability policy, with a liquor-liability exclusion identically worded to that in the instant case, provided coverage for the dramshop action filed by the injured party. *Id*. at 152-153. On the basis of dictionary definitions, the court found the phrase "in the business of" to be "commonly understood to refer to a commercial enterprise or activity." *Id*. at 153-154. The court held that the exclusion did not apply to the township's commercial general-liability policy because "the insured was a nonprofit organization that did not sell alcoholic beverages as part of a permanent and ongoing commercial venture . . . ." *Id*. at 155.

Because the insurance policy in this case was sold to a nonprofit group whose primary purpose and activities were charitable and civic but which also engaged in limited annual fundraising through alcohol sales permitted under a temporary license, we conclude that the trial court did not err by ruling that the FOPA was not "in the business of manufacturing, distributing, selling, serving or furnishing alcoholic beverages." Consequently, the trial court did not abuse its discretion by ruling that the exception to the liquor-liability exclusion applied and that the policy provided coverage for Seils's dramshop action. Our conclusion is buttressed by the principle that insurance policy exclusions must be strictly construed against the insurer and in favor of coverage. *Hunt*, 496 Mich at 373; *Czopek*, 440 Mich at 597. Finally, even if a fair reading

of the policy as a whole and applied to the facts and circumstances of this case could lead to opposite and reasonable conclusions regarding coverage, such a tie goes against the insurer and in favor of the insured. *Raska*, 412 Mich at 362.

We also conclude that the trial court properly rejected Auto-Owners' argument that the term "business" must be construed consistently throughout the contract. Rather, the word "business" must be construed in context and read in light of the contract as a whole. See *Churchman*, 440 Mich at 566; *Vushaj*, 284 Mich App at 515-516. A clearly different context surrounds the term "business" in the contractual-liability exclusion—the definition of "insured contract"—than in the exception to the liquor-liability exclusion. An "insured contract," by policy definition, is one "pertaining to your [the FOPA's] business." The word "pertain" broadly means "[t]o have reference; relate[.]" *Random House Webster's College Dictionary* (1992).

Thus, the trial court correctly ruled that the FOPA was not "in the business of" selling alcoholic beverages as stated in the exception to the liquor-liability exclusion. But at the same time, the concession agreement "pertained" or related to the FOPA's business because it related to the FOPA's fundraising activities for its "business" of civic and charitable activities. So, in this context, the word "business" can fairly be read as "occupation, profession, or trade," *Random House Webster's College Dictionary* (1992), or "specific occupation or pursuit," *The American Heritage Dictionary, Second College Edition* (1985). Fundraising was necessary for the FOPA's "business" or "pursuit" of charitable and civic activities, and the concession agreement clearly related to or pertained to the FOPA's "business" or "pursuit" of charitable and civic activities. Thus, the

trial court correctly ruled that the exception to the contractual-liability exclusion applied because the concession agreement "pertain[ed] to [the FOPA's] business."

Moreover, as with the liquor-liability exclusion, the contractual-liability exclusion must be strictly construed against the insurer and in favor of coverage. *Churchman*, 440 Mich at 567; *Czopek*, 440 Mich at 597. We therefore affirm the trial court's declaratory ruling regarding insurance coverage: both the liquor-liability exclusion and the contractual-liability exclusion do not apply on the facts of this case.

III. DOCKET NOS. 315901 AND 316511: PROXIMATE CAUSE

A. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). Under MCR 2.116(C)(10), the moving party must specifically identify the issues for which no factual dispute exists and must support this claim with evidence such as affidavits, depositions, admissions, or other documents. MCR 2.116(G)(4); *Coblentz v City of Novi*, 475 Mich 558, 569; 719 NW2d 73 (2006). If the moving party meets its initial burden, the opposing party then has the burden of showing with evidentiary materials the substance of which would be admissible that a genuine issue of disputed material fact exists. MCR 2.116(G)(4) and (6). "The adverse party may not rest upon mere allegations or denials of a pleading, but must, by affidavits or other appropriate means, set forth specific facts to show that there is a genuine issue for trial." *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994).

The trial court in deciding the motion must view the substantively admissible evidence submitted up to the time of the motion in a light most favorable to the party opposing the motion. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999). The trial court must consider the pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted in a light most favorable to the nonmoving party to decide whether a genuine issue of material fact exists. *Id*. at 120; MCR 2.116(G)(5). Summary disposition may be granted if there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law. *West*, 469 Mich at 183. A genuine issue of material fact exists if the record, viewed in a light most favorable to the nonmoving party, leaves open a matter on which reasonable minds could differ. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

B. ANALYSIS

For Seils to establish his dramshop action he must show that the FOPA violated MCL 436.1801(2) by selling, furnishing, or giving alcohol to Pink while he was visibly intoxicated and that this statutory violation was "a proximate cause of [Seils's] damage, injury, or death," MCL 436.1801(3). Because Seils points to no evidence from which the FOPA could have reasonably foreseen Pink's intentional criminal acts and because Pink's decision to commit premeditated, deliberate murder (and other assaults) was an intervening or superseding cause of Seils's damages, the trial court erred by not granting summary disposition to the FOPA and Olympia on the basis that no reasonable jury could find that the FOPA's alleged statutory violation was a proximate cause of the injury that Seils

alleged. See *Nichols v Dobler*, 253 Mich App 530, 532; 655 NW2d 787 (2002) ("Generally, proximate cause is a factual issue to be decided by the trier of fact. However, if reasonable minds could not differ regarding the proximate cause of the plaintiff's injury, the court should decide the issue as a matter of law.").

MCL 436.1801(3) "imposes liability on any licensee that, by the unlawful sale or furnishing of alcoholic liquor to a minor or visibly intoxicated person, has 'caused or contributed' to the intoxication that is a proximate cause of damage, injury, or death." *Hashem v Les Stanford Oldsmobile, Inc*, 266 Mich App 61, 74; 697 NW2d 558 (2005). Although a dramshop action may be premised on an AIP's assaultive criminal conduct, there still must be "sufficient evidence that furnishing the alcohol to the AIP is a proximate cause of the violent behavior." *Weiss*, 223 Mich App at 628-631.

In *Weiss*, this Court addressed the issue of whether a liquor licensee may be held liable in tort for an AIP's intentional physical attack on another patron, which occurred in the parking lot of the bar where the AIP had been served alcohol until 2:00 a.m. The jury found that the defendant's bartender furnished alcoholic liquor to the AIP while he was visibly intoxicated and that the furnishing of liquor to the AIP was a proximate cause of the plaintiff's injuries. On appeal, the defendant bar owner argued that while the statute contemplated liability for negligent torts, it did not create liability for intentional torts. *Id*. at 623-625. This Court analyzed the predecessor of MCL 436.1801, MCL 436.22, and noted that the statute required the sale of alcohol to be a proximate cause of the resulting injury, but did "not limit liability only to negligently inflicted injuries." *Id*. at 625-627. The *Weiss* Court

further discussed prior cases that supported this interpretation of former MCL 436.22(4). *Id*. at 628-633. The Court rejected the defendant's argument, holding that there was "clear precedent for predicating dramshop liability upon assaultive conduct of an AIP where there is sufficient evidence that furnishing the alcohol to the AIP is a proximate cause of the violent behavior." *Id*. at 630.

Proximate cause is " 'that which in a natural and continuous sequence, unbroken by any new, independent cause, produces the injury, without which such injury would not have occurred . . . .' " *McMillian v Vliet*, 422 Mich 570, 576; 374 NW2d 679 (1985) (citation omitted). Proof of proximate cause requires establishing two elements: (1) cause in fact and (2) legal cause or proximate cause. *Skinner v Square D Co*, 445 Mich 153, 162-163; 516 NW2d 475 (1994). "Cause in fact requires that the harmful result would not have come about but for the defendant's . . . conduct." *Haliw v Sterling Hts*, 464 Mich 297, 310; 627 NW2d 581 (2001). "A plaintiff must adequately establish cause in fact in order for legal cause or 'proximate cause' to become a relevant issue." *Skinner*, 445 Mich at 163. Whether proximate cause or legal cause is established normally requires examining the foreseeability of the consequences and whether the defendant should be held legally responsible for those consequences. *Haliw*, 464 Mich at 310; *Skinner*, 445 Mich at 163; *Nichols*, 253 Mich App at 532.

As noted in the *McMillian* definition of "proximate cause," the chain of causation between the defendant's conduct and the plaintiff's injuries may be broken by an intervening or a superseding cause. An "intervening cause" is " 'one which actively operates in producing harm to another after the actor's negligent act or

omission has been committed.' " *McMillian*, 422 Mich at 576 (citation omitted). "An intervening cause breaks the chain of causation and constitutes a superseding cause which relieves the original actor of liability, unless it is found that the intervening act was 'reasonably foreseeable.' " *Id*. Thus, the issue of proximate causation requires focusing on "whether the result of conduct that created a risk of harm and any intervening causes were foreseeable." *Jones v Detroit Med Ctr*, 490 Mich 960, 960 (2011).

The FOPA argues, citing *Graves v Warner Bros*, 253 Mich App 486, 493; 656 NW2d 195 (2002), that Pink's premeditated actions of killing and injuring the victims were by their nature unforeseeable. *Graves* concerned the infamous "Jenny Jones" case, in which Jonathan Schmitz was invited to appear on a talk show and the victim, Scott Amedure, confessed his crush on Schmitz; three days after the taping of the show, Schmitz murdered Amedure. Amedure's estate then brought a civil action against the producers of the talk show. This Court held that the "defendants owed no legally cognizable duty to protect plaintiffs' decedent from the homicidal acts of a third party." *Id*. at 488. The Court analyzed whether a duty of care existed under the standards discussed in *MacDonald v PKT, Inc*, 464 Mich 322; 628 NW2d 33 (2001), which addressed a merchant's duty to protect business invitees from the criminal acts of third parties. This Court held that invitors have "a duty to respond reasonably to situations occurring on their premises that pose a risk of imminent and foreseeable harm to identifiable invitees," but "no duty to otherwise anticipate and prevent the criminal acts of third parties." *Graves*, 253 Mich App at 495. In concluding that the show's producers did not owe Amedure a duty of care, the *Graves* Court determined that there had been no evidence putting

the defendants on notice that Schmitz posed a risk of violence to others. *Id*. at 499.

Graves is relevant to the instant case because both the question of duty and proximate cause " 'depend in part on foreseeability.' " *Babula v Robertson*, 212 Mich App 45, 53; 536 NW2d 834 (1995), quoting *Moning v Alfono*, 400 Mich 425, 439; 254 NW2d 759 (1977). "In fact, the question of proximate cause has been characterized as 'a policy question often indistinguishable from the duty question.' " *Babula*, 212 Mich App at 54, quoting *Moning*, 400 Mich at 438.

Babula, in which the defendant husband, Brian Robertson, molested the child of the defendant wife's sister while the defendant wife, Janice Robertson, was babysitting the child, is also instructive. *Babula*, 212 Mich App at 46-47. Brian was convicted of second-degree criminal sexual conduct. Later, the plaintiff brought a civil suit against Brian and added a count of negligence against Janice. *Id*. at 47. The trial court granted Janice's motion for summary disposition on the bases that "Janice owed no duty to the child and that alleged negligence attributable to Janice was not the proximate cause of the child's injury." *Id*. at 48. This Court determined that the injuries Brian inflicted "were wholly unforeseeable." *Id*. at 51. Relevant to the instant case was this Court's comment that "[t]he mere fact that Brian was allegedly intoxicated when Janice went to sleep was not sufficient to put her on notice that Brian might injure the child." *Id*. at 53. So, while the issue of proximate cause is ordinarily a question for the trier of fact, the Court determined "that reasonable minds could not differ with regard to whether alleged negligence attributable to Janice was a proximate cause of the child's injury." *Id*. at 54. The Court further held "that Brian's act of molesting the child was an

unforeseeable intervening cause of the child's injury" and affirmed the trial court's grant of summary disposition to Janice. *Id*.

On the other hand, Michigan has "long recognized that criminal acts by third parties can be foreseeable." *Dawe v Dr Reuven Bar-Levav & Assoc, PC (On Remand)*, 289 Mich App 380, 394; 808 NW2d 240 (2010). The *Dawe* case was a malpractice action arising out of injuries the plaintiff received in a murderous rampage perpetrated by a former patient (Joseph Brooks) at the defendants' psychiatric office where the plaintiff was being treated. Among the theories the plaintiff asserted was that the defendants had violated a "mental-health professional's common-law duty to warn or protect third parties from dangerous patients." *Id*. at 387. An issue on appeal was proximate cause and whether Brooks's criminal actions were reasonably foreseeable. The Court concluded that because the plaintiff presented evidence from which a reasonable jury could find that the "defendants knew or should have known that Brooks would form improper emotional attachments to persons in his group therapy and that he might seek out those persons long after the termination of his participation in the group," the issue of proximate cause was properly left for the jury to determine. *Id*. at 394-395 (quotation marks omitted).

Seils points to no evidence that would have put the FOPA, Olympia, or anyone else at the Hoedown on notice that Pink would later premeditate and deliberately commit the horrific crimes at issue in this case. Seils instead speaks only of generalities, that it is well known that drinking alcohol can lead to violent behavior. In particular, Seils cites dicta[7] from *Terpening v*

[7] "Obiter dicta are not binding precedent. Instead, they are statements that are unnecessary to determine the case at hand and, thus,

Gillimino, Inc, unpublished opinion per curiam of the Court of Appeals, issued January 12, 2001 (Docket No. 221275), pp 2-3: "It is foreseeable that furnishing alcohol to an already drunk individual will prompt that individual to display raucous and even violent behavior causing injury to himself and others." While an unpublished opinion of this Court is not precedentially binding under the principle of stare decisis, MCR 7.215(C)(1), it is ironic that the *Terpening* Court determined that the plaintiff in that case had not established proximate cause when "[i]t is not foreseeable that selling a minor a beer would result in plaintiff, a third party, being beaten up at his home later that evening." *Id*. at 2. At any rate, the *Terpening* Court in its dicta was referring to *Weiss*, a dramshop case in which a drunken brawl occurred outside a bar after closing. While an intoxication-fueled assault occurring at or near the dramshop, as in *Weiss*, or an auto accident caused by a drunken driver might be reasonably foreseeable results of "selling, giving, or furnishing of alcoholic liquor to [a] minor or visibly intoxicated person," MCL 436.1801(3), no evidence exists in this case that would have put the FOPA and Olympia on notice that violating the statute would lead Pink to deliberately, and with premeditation, commit the crimes at issue here. See, e.g., *Rogalski v Tavernier*, 208 Mich App 302, 306-307; 527 NW2d 73 (1995) (holding in the context of social-host liability that reasonable minds could not disagree that the criminal acts of the minors were not foreseeable consequences of serving alcohol to underage drinkers). Consequently, we conclude the alleged statutory violation in this case cannot be established as a proximate cause of Seils's

'lack the force of an adjudication.' " *People v Peltola*, 489 Mich 174, 190 n 32; 803 NW2d 140 (2011) (citation omitted).

damages. MCL 436.1801(3); *Graves*, 253 Mich App at 499-500; *Babula*, 212 Mich App at 53-54.

Our conclusion that Seils has failed to present evidence to establish proximate cause is supported by caselaw from other states that the FOPA and Olympia cite regarding whether a dramshop violation could be a proximate cause of the subsequent violent criminal act of an intoxicated person. See *Fast Eddie's v Hall*, 688 NE2d 1270, 1274-1275 (Ind App, 1997) (holding that the dramshop violation was not the proximate cause of a drunken bar patron's sexual assault and murder by another drunken bar patron because the series of events leading to the crimes were not reasonably foreseeable and the AIP's intentional criminal acts were an intervening cause), *Merchants Nat'l Bank v Simrell's Sports Bar & Grill, Inc*, 741 NE2d 383, 389 (Ind App, 2000) (holding that proximate cause was not established when one bar patron shot and killed another bar patron after leaving the bar, which was the "intervening criminal act that broke the causal chain"), *Boggs v Bottomless Pit Cooking Team*, 25 SW3d 818, 825 (Tex App, 2000) (holding that the dramshop violation was not a proximate cause of death when after a minor traffic accident the allegedly intoxicated passenger in one car stabbed and killed the driver of other car; the AIP's criminal actions were not foreseeable), *Reilly v Tiergarten Inc*, 430 Pa Super 10, 15; 633 A2d 208 (1993) (holding that the actions of a teen improperly served who attacked his father and whom police shot were not foreseeable or the natural and probable result of the dramshop violation), and *Skipper v United States*, 1 F3d 349, 353 (CA 5, 1993) (holding under Texas law that first-degree murder committed by an AIP was an unforeseeable, superseding cause extinguishing dramshop liability).

IV. OTHER ISSUES IN DOCKET NO. 316511

Although Olympia's remaining issues could be considered moot[8] given our resolution of the proximate cause issue, we briefly discuss them as an alternative basis for resolving Olympia's appeal. We conclude that both of Olympia's other arguments have merit and would alternatively warrant granting summary disposition to it on Seils's dramshop claim.

A. DRAMSHOP VICARIOUS LIABILITY

Olympia argues that the dramshop act is a remedial statute, requiring that it be strictly construed. The act imposes duties on a "retail licensee" who is the "person" subject to liability under the act. MCL 436.1801(2) and (3); *Guitar v Bieniek*, 402 Mich 152, 166; 262 NW2d 9 (1978). Olympia further argues that the Legislature did not intend "to expand the class of persons who may be vicariously liable" beyond "the narrow and restrictively drawn civil liability provisions" of the act. *Guitar*, 402 Mich at 166-167. Further, because there is no express provision for vicarious liability under the statute, it imposes liability only on the liquor licensee. We agree. This issue presents a question of statutory interpretation, which is reviewed de novo. *Niles Twp v Berrien Co Bd of Comm'rs*, 261 Mich App 308, 312; 683 NW2d 148 (2004).

In rejecting Olympia's argument on this issue, the trial court relied on *Kerry v Turnage*, 154 Mich App 275; 397 NW2d 543 (1986). *Kerry* is distinguishable and not binding precedent. MCR 7.215(J)(1). Moreover,

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[8] An issue is moot when a judgment, if entered, cannot have any practical legal effect on the existing controversy. *People v Richmond*, 486 Mich 29, 34-35; 782 NW2d 187 (2010), clarified on rehearing with respect to other issues 486 Mich 1041 (2010).

Kerry was overruled *sub silentio* by *McGuire v Sanders*, 474 Mich 1098 (2006), rev'g 268 Mich App 719; 708 NW2d 469 (2005). In *McGuire*, 474 Mich at 1098, our Supreme Court reversed this Court's holding in *McGuire*, 268 Mich App at 729, that one licensee (Hamilton Placement) could be found liable under the dramshop act for exerting control over the selling licensee (Leggs Lounge) "through shared managers or employees." Moreover, even it were good law, *Kerry* was decided on the basis that the licensee in that case, a group of athletic boosters, was an alter ego of the school district. In this case, the FOPA and Olympia are separate and distinct legal entities.

The dramshop act does not permit imposition of liability on a third party under a common-law theory of vicarious liability that the third party is the principal and the liquor licensee the agent. Under the dramshop act, the only vicarious liability that exists is for liability flowing upward to the "retail licensee" from its "clerk, agent, or servant" who actually sells, furnishes, or gives "alcoholic liquor to a person who is visibly intoxicated." MCL 436.1801(2). Nothing may be read into a clear statute that is not within the manifest intent of the Legislature as discerned from the language of the statute itself. See *People v Breidenbach*, 489 Mich 1, 10; 798 NW2d 738 (2011).

Moreover, statutes in derogation of the common law are narrowly construed. *Rusinek v Schultz, Snyder & Steele Lumber Co*, 411 Mich 502, 507-508; 309 NW2d 163 (1981). "The general rule at common law was that a tavern owner was not liable for furnishing alcoholic beverages to a customer who became intoxicated and who, as a result of his own intoxication, either injured himself or an innocent third person." *Jackson v PKM Corp*, 430 Mich 262, 266; 422 NW2d 657 (1988). The

Jackson Court opined that " 'the Legislature intended the dramshop act to be a complete and self-contained solution to a problem not adequately addressed at common law and the exclusive remedy for any action arising under "dramshop related facts." ' " *Id*. at 274-275, quoting *Millross v Plum Hollow Golf Club*, 429 Mich 178, 185-186; 413 NW2d 17 (1987). Further, the dramshop act provides that it is "the exclusive remedy for money damages against a licensee arising out of the selling, giving, or furnishing of alcoholic liquor to a minor or intoxicated person." MCL 436.1801(10). In sum, the dramshop act is in derogation of the common law, provides the exclusive remedy against a "retail licensee" regarding selling, furnishing, or giving alcoholic beverages to a minor or visibly intoxicated person, and may not be expanded beyond its plain terms by common-law legal theories to reach nonlicensees.

Consequently, we conclude that because Olympia was not the liquor licensee in this case, this argument provides an alternative basis for reversing the trial court and remanding for entry of an order granting summary disposition to Olympia regarding Seils's dramshop claim.

B. STATUTORY NOTICE

As a second alternative basis for reversing the trial court, Olympia argues that Seils failed to give Olympia timely written notice of its intent to seek damages under the dramshop act as required by MCL 436.1801(4). We agree. This issue also presents a question of statutory interpretation, which is reviewed de novo. *Niles Twp*, 261 Mich App at 312.

MCL 436.1801(4) provides:

> An action under this section shall be instituted within 2 years after the injury or death. A plaintiff seeking damages under this section *shall give written notice to* **all defendants** within 120 days after entering an attorney-client relationship for the purpose of pursuing a claim under this section. Failure to give written notice within the time specified *shall be grounds for dismissal of a claim as to* **any defendants** that did not receive that notice unless sufficient information for determining that a retail licensee might be liable under this section was not known and could not reasonably have been known within the 120 days. [Emphasis added.]

The pertinent facts underlying this argument are as follows. On April 11, 2011, Seils entered a contingent-fee agreement with attorney Peter J. Parks to pursue claims for damages against responsible parties concerning the events occurring on or about May 14, 2010. On May 25, 2011, Parks sent Freedom of Information Act requests to the Liquor Control Commission and the city of Detroit requesting information related to the alcoholic beverage concession at the 2010 Hoedown. Parks at some point obtained a copy of the concession agreement between Olympia and the FOPA that stated in its preamble that Olympia had been engaged by CBS Radio and Live Nation to manage food and beverage sales at the 2010 Hoedown at Hart Plaza and that Olympia desired to engage the FOPA to conduct the purchase and sale of alcoholic beverages.

On June 17, 2011, Parks sent a letter to Robert Estabrook of the FOPA, which stated that he intended to pursue a dramshop claim against the FOPA. The letter stated that it was Seils's position that Pink "was clearly visibly intoxicated prior to being furnished intoxicants (beer) by vendors operating under the temporary liquor license issued to the [FOPA] contrary to law." The letter asserted claims of liability under

MCL 436.1801 and stated that the letter was intended to afford the FOPA formal notice under the act of Seils's claims.

On August 9, 2011, Parks sent a letter to Robert Stefanski of Olympia that contained a "courtesy copy" of the letter Parks sent to the FOPA. Parks's letter to Stefanski stated that Parks had not received a reply from the FOPA or its insurance carrier; the letter did not assert a claim under MCL 436.1801 against Olympia. Also, on August 9, 2011, Parks sent to the Clinton Township Police Department and the Roseville Police Department letters identical in content to that sent to Olympia. The trial court ruled that the August 9, 2011 letter to Stefanski, which contained a "courtesy copy" of the notice sent to the FOPA, was sufficient notice to Olympia of Seils's dramshop claim against Olympia.

We conclude that the August 9, 2011 letter Parks sent to Stefanski was by its plain terms merely a "courtesy copy" notice of Seils's intent to pursue a dramshop claim against the FOPA. It cannot, by its plain terms, be read as a notice of a dramshop claim against Olympia. The statute clearly and unambiguously requires written notice to "all defendants," and "any defendants" not timely noticed may move for dismissal. MCL 436.1801(4). Because of this clear language, Seils's agency argument is without merit.

While the statute does not specify what the notice must contain, read in context with the first sentence regarding when "[a]n action" must be brought, it is patent that the written notice must, at a minimum, provide notice to the defendant of the plaintiff's intent to pursue "[a]n action" under the dramshop act against the notified defendant. Parks's August 9, 2011 letter did not do so with respect to Olympia. A plaintiff's "[f]ailure to give written notice within the time speci-

fied shall be grounds for dismissal of a claim as to any defendants that did not receive [the] notice" required by MCL 436.1801(4). To the extent the trial court relied on a finding that Olympia did not show that it had suffered any prejudice, we must conclude that the trial court also erred. See *Chambers v Midland Country Club*, 215 Mich App 573, 578; 546 NW2d 706 (1996); *Lautzenheiser v Jolly Bar & Grille, Inc*, 206 Mich App 67, 70; 520 NW2d 348 (1994).

We therefore conclude that Seils's failure to give Olympia the timely written notice required by MCL 436.1801(4) provides another alternative basis for reversing the trial court's denial of Olympia's motion for summary disposition, and we remand for entry of an order granting summary disposition to Olympia regarding Seils's dramshop claim.

V. CONCLUSION

For the reasons discussed in this opinion, we affirm the trial court in Docket No. 315891, but in Docket No. 315901 and Docket No. 316511 we reverse the trial court's denial of summary disposition to the defendants on Seils's dramshop complaint. We remand to the trial court for entry of orders in Docket Nos. 315901 and 316511 granting summary disposition to the defendants in those cases and for any further proceedings consistent with this opinion. We do not retain jurisdiction. Defendants, as the prevailing parties in these cases, may tax costs under MCR 7.219.

BOONSTRA, P.J., and MARKEY and K. F. KELLY, JJ., concurred.

FRANK v LINKNER

Docket No. 318751. Submitted March 4, 2015, at Detroit. Decided April 7, 2015, at 9:00 a.m. Leave to appeal sought.

Ivan Frank, Jeffrey Dwoskin, and others brought a shareholder-oppression action in the Oakland Circuit Court against Joshua Linkner, Brian Hermelin, and others, alleging that defendants had wrongfully distributed the proceeds from the sale of ePrize, LLC and ePrize Holdings, LLC, the limited liability companies in which the parties had varying interests, under an operating agreement that had been revised in March of 2009 to prioritize the payment of company proceeds to those members who had acquired "Series C" membership units by loaning ePrize money in 2007 and 2008. Plaintiffs had not been offered the opportunity to do so and, as a result, received nothing when ePrize was sold for $120 million in August of 2012. The 12-count complaint included claims alleging breach of fiduciary duty, breach of contract, and member oppression in violation of MCL 450.4515, a provision of the Limited Liability Company Act (LLCA), MCL 450.4101 *et seq*. Defendants moved for summary disposition on several grounds, including that the time periods set forth in MCL 450.4515 and MCL 450.4404 for bringing actions alleging breach of contract and breach of fiduciary duty were statutes of repose rather than statutes of limitations and, as such, barred plaintiffs' claims because none of the alleged wrongful acts occurred after the Series C units were issued in March 2009, more than three years before the complaint was filed. The court, Colleen A. O'Brien, J., agreed and granted defendants' motion under MCR 2.116(C)(7), dismissing all plaintiffs' claims as untimely under MCL 450.4404 and MCL 450.4515. Plaintiffs appealed.

The Court of Appeals *held*:

1. The trial court erred by applying MCL 450.4404 to plaintiffs' claim for breach of fiduciary duty. That provision requires managers of limited liability companies to discharge their fiduciary duties in the best interest of the company, not the individual members. Because plaintiffs alleged that defendants breached duties owed directly to them, MCL 440.4404 did not apply. However, the gravamen of plaintiffs' claims for breach of fiduciary

duty and breach of contract was that their interests as members were infringed when defendants obtained a huge return on investment by devaluing plaintiffs' shares in ePrize. Because the essence of these claims involved the alleged breach of duties imposed by the member-oppression section of the LLCA, MCL 450.1515 applied.

2. MCL 450.4515(1)(e) is a statute of limitations rather than a statute of repose. MCL 450.4515(1)(e) provides in relevant part that an action seeking an award of damages must be commenced within three years after the cause of action under this section has accrued or within two years after the member discovers or reasonably should have discovered the cause of action under this section, whichever occurred first. Other statutes of limitations contain similar language regarding accrual, whereas statutes of repose prevent claims from ever accruing if a lawsuit is not brought within a certain time after the injury is sustained. The three-year period in MCL 450.4515(1)(e) functions as a statute of limitations because it does not prevent a cause of action from accruing a certain time period after an event, but instead provides that the time limit begins to run once the claim for damages accrues. Defendants' reliance on *Baks v Moroun*, 227 Mich App 472 (1998), which described an analogous provision in the business corporation act as a statute of repose, was without merit because the *Baks* Court did not analyze that issue or intend to resolve it.

3. Plaintiffs' claims were timely because they accrued when ePrize was sold in August 2012. Under MCL 600.5827, a claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results. The term "wrong" refers to the date on which a plaintiff was harmed by a defendant's act, not the date on which the defendant acted. Accordingly, although defendants' alleged wrongdoing occurred in 2009, plaintiffs did not suffer harm until 2012, when ePrize's sale occurred and the proceeds were distributed. Plaintiffs' complaint was filed one year later, which was well within either the two- or three-year period provided in MCL 450.4515(1)(e).

Reversed and remanded for further proceedings.

1. ACTIONS — SHAREHOLDER OPPRESSION — LIMITED LIABILITY CORPORATION ACT — STATUTE OF LIMITATIONS.

An action seeking an award of damages for willfully unfair and oppressive conduct by a manager or member in control of a limited liability company under MCL 450.4515 must be commenced within three years after the cause of action has accrued or

within two years after the member discovers or reasonably should have discovered the cause of action, whichever occurs first; these time limits constitute a statute of limitations rather than a statute of repose (MCL 450.4515(1)(e)).

2. ACTIONS — SHAREHOLDER OPPRESSION — LIMITED LIABILITY CORPORATION ACT — ACCRUAL OF CLAIMS.

An action seeking an award of damages for willfully unfair and oppressive conduct by a manager or member in control of a limited liability company under MCL 450.4515 accrues when the wrong upon which the claim was based was done regardless of when damage resulted; the term "wrong" refers to the date on which a plaintiff was harmed by a defendant's act, not the date on which the defendant acted (MCL 450.4515(1)(e); MCL 600.5827).

Mantese Honigman Rossman and Williamson, PC (by *Gerard V. Mantese*, *Mark C. Rossman*, and *Kathryn Regan Eisenstein*), for plaintiffs.

Morganroth & Morganroth, PLLC (by *Jeffrey B. Morganroth*), for defendants Daniel Gilbert and Jay Farner.

Jaffe, Raitt, Heuer & Weiss, PC (by *Brian G. Shannon* and *R. Christopher Cataldo*), for all other defendants.

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

MURRAY, J. This is a limited liability company member-oppression case. Plaintiffs' 12-count complaint accuses defendants of member oppression, self-dealing, and related improper conduct with respect to the distribution of proceeds from the sale of plaintiffs' former employer, defendant ePrize, LLC. Plaintiffs also make several ancillary points, including challenges to ePrize's most recent operating agreement and allegations that the founder and former CEO of ePrize, defendant Joshua Linkner, promised not to dilute their interests in that company.

Plaintiffs appeal by right the trial court's order dismissing their claims as time-barred under MCL 450.4515(1)(e), arguing that the trial court erred in considering that statute to be one of repose, and that if the statute is one of limitation, their claims were timely because they did not incur damages until ePrize was sold in August 2012, a date well within the statute of limitations. Defendants counter that the applicable limitations period ran from the date when ePrize's operating agreement was amended in 2009, and that the applicable statute, as one of repose, bars all of plaintiffs' claims as untimely.

For the reasons set forth below, we hold that, based on the statute's plain language, the time limit contained in MCL 450.4515(1)(e) is one of limitations and not one of repose. We also hold that plaintiffs' claims accrued in August 2012, and their complaint was therefore timely. Accordingly, we reverse the trial court's order holding to the contrary, and remand for further proceedings consistent with this opinion, which shall include the trial court addressing defendants' alternative motions that were pending at the time the case was dismissed.

I. BACKGROUND

This case arises out of the sale of ePrize and the prioritized distribution of the sale's proceeds to defendants. As noted, ePrize (the predecessor to defendant Crackerjack, LLC) was founded by Linkner in 1999 as a Michigan limited liability company specializing in online sweepstakes and interactive promotions. It functioned until substantially all of its assets were sold in August 2012. All of the defendants were either members of ePrize or had interests in one of ePrize's corporate

members.[1] Plaintiffs are former ePrize employees, some of whom were also former minority members of ePrize. According to defendants, in 2005, those plaintiff-members' interests were consolidated into a holding company known as ePrize Holdings, LLC[2] (the predecessor to defendant Crackerjack Holdings, LLC).

A. 2007 INVESTMENT—SERIES B NOTES

In 2007, ePrize needed an infusion of cash to fund certain expansion projects and to survive the national economic downturn. To remedy this problem, ePrize sought loans from several of its defendant-members, among others. The loans, called "B Notes," were issued in four stages of that year—January (the "B1 Notes"), July (the "B2 Notes"), October (the "B3 Notes") and December (the "B4 Notes"). Another round of borrowing from a recently formed entity, ePrize Priority, LLC, followed in 2008. These "subordinated debentures" totaled over $28 million on the B Notes alone. Some were convertible to membership interests in ePrize. It is undisputed that neither plaintiffs nor ePrize Holdings were invited to participate in any of these investments.

B. 2009 INVESTMENT—SERIES C UNITS

By 2009, ePrize was unable to meet its loan obligations and commenced what defendants call a "corporate restructuring." As part of this plan, ePrize refinanced a $14.5 million loan with Charter One Bank, guaranteed by several individual defendants, and issued new "Series C Units" to raise an extra $4 million in cash. The Series C Units were offered to certain investors, includ-

[1] Defendants Daniel Gilbert and Jay Farner are alleged to control former ePrize member defendant Camelot-ePrize, LLC.

[2] Defendants refer to this company as "HoldCo."

ing the defendant-managers who had obtained B Notes. To participate, investors were required, among other things, to make a capital contribution, guarantee a pro rata share of the Charter One loan, and convert their Series B Notes into new membership units, known as "Series B Units." This arrangement was formally approved in ePrize's Fifth Operating Agreement, executed on March 1, 2009. Among other changes, the Fifth Operating Agreement set forth the new hierarchy of membership-interest payment priority. Under this "waterfall" provision, any distribution would be paid first to the new Series C Units, followed by ePrize Priority's shares and the Series B Units. Last in priority were the common units, which included those held by the plaintiff-members. The waterfall went on to provide that if the full capital commitment were called, the Series C Units would receive the first $68.25 million of any available distribution.

It is this arrangement that plaintiffs claim defendants used "to set themselves up for shockingly excessive returns on investment." With the exception of plaintiff Ivan Frank, plaintiffs claim they were unaware of the preference accorded to Series C Units. But even Frank, whose acquisition of Series C Units will be explained, claims he did not understand the transaction's consequences.

C. PLAINTIFF IVAN FRANK'S PARTICIPATION

Frank was a senior executive at ePrize from 2001 through 2010. During this time, he (and his company, plaintiff IJF Holdings, LLC) acquired both voting and nonvoting units in ePrize and ePrize Holdings amounting to about a one percent stake in ePrize. Frank claims Linkner promised that these shares would never be diluted by future investments.

In 2009, Frank was invited to buy Series C Units with eased investment requirements. Specifically, Frank was not required to participate in the Charter One loan or to guarantee a share of the debt. Frank opted in and invested about $4,200 in a number of Series C Units, bringing his total investment in ePrize to $9,200. Although Frank claims he never saw ePrize's Fifth Operating Agreement or other financial data, he signed all subscription agreements, which confirmed the "restructuring" and waterfall arrangement, as well as the counterpart signature page to the Fifth Operating Agreement. On January 29, 2010, Frank resigned from ePrize. On March 1, 2010, he signed a formal release in exchange for consideration of $111,000.

D. SALE OF EPRIZE

Having apparently "turned around" ePrize, its managers marketed the company and sold substantially all of its assets to a third party on August 20, 2012, for $120 million. The sale proceeds were then distributed (less expenses and deductions) in accordance with the § 3.1 waterfall provision; however, the available proceeds were sufficient only for distributions to the Series C Unit holders and a number of Series B Unit holders. In total, Series C investors received about $67 million, including the $89,034 Frank received for his share. All other investors received nothing, including Frank for the remainder of his shares, and the rest of plaintiffs, none of whom worked for ePrize anymore.

II. PROCEEDINGS

On April 19, 2013, plaintiffs initiated suit, alleging that defendants used the recapitalization and Series C Units "to expropriate economic value in the ePrize Companies from the minority members to themselves,

and to set themselves up for shockingly excessive returns on investment." Their complaint, as twice amended, sets forth 12 counts, including: member oppression in violation of MCL 450.4515 (Count I), breach of fiduciary duty (Count II), conversion (Count III), breach of contract (Count IV), tortious interference (Count V), civil conspiracy (Count VI), aiding and abetting (Count VII), fraudulent omission and silent fraud (Count VIII), negligent misrepresentation (Count IX), accounting (Count X), unjust enrichment (Count XI), and piercing the corporate veil (as to Camelot-ePrize) (Count XII). Defendants answered, and after discovery, filed three motions for summary disposition, the latter two set forth in the alternative.

First, defendants argued that the limitations periods of MCL 450.4515 and MCL 450.4404—as statutes of repose—barred all claims under MCR 2.116(C)(7) because none of the alleged wrongful acts occurred after the Series C units were issued in March 2009—a date more than three years before the complaint was filed. Contrary to plaintiffs' position, then, the August 2012 distribution of sales proceeds was merely a ministerial act dictated by the Fifth Operating Agreement and cannot be the date on which plaintiffs incurred harm. Second, defendants claimed that Frank's claims (and those of his company IJF Holdings) should be dismissed under MCR 2.116(C)(10) where Frank purchased Series C units, approved the Fifth Operating Agreement, executed a release, and never returned his $89,039 Series C distribution. Third, defendants maintained that the nonmember plaintiffs (i.e., Jeffrey Dwoskin, Phillip Jacokes, Roy Krauthamer, Matt Kovaleski, and James Brunk) lacked standing under MCR 2.116(C)(5), (7), and (10), because those plaintiffs only held interests in ePrize Holdings rather than ePrize.

To the first motion, plaintiffs responded that their claims did not accrue until they suffered damages which did not occur until ePrize was sold in August 2012 and therefore were not time-barred. Plaintiffs also argued that the Fifth Operating Agreement was not in effect and that Linkner had separately agreed not to dilute their interests. To the second motion, plaintiffs asserted primarily that defendants had breached the Fifth Operating Agreement and that a question of fact existed regarding whether Frank even executed that document. Finally, the nonmember plaintiffs claimed standing under MCL 450.4515 to sue for minority oppression and asserted that, regardless of their interest, their common law and fiduciary duty claims remained intact.

At the conclusion of argument, the trial court held that MCL 450.4404(6) and MCL 450.4515 barred all of plaintiffs' claims as untimely. As the court explained on the record:

> The Court agrees with defendants that plaintiffs were required to file their initial pleadings no later than February of 2012 in order to avoid the maximum three-year repose deadline under MCL 450.4515 and 450.4404, section 6. Here, plaintiffs' claims were filed in April of 2013 and, thus, are untimely.
>
> The Court rejects plaintiffs' arguments directed to the import of the date of August 12, 2012. Even assuming that an accrual analysis would actually apply here, plaintiffs' claims would still be untimely for the reason that the claims accrued no later than March or April of 2009.
>
> When more than the repose period has elapsed before an injury is sustained, the statute prevents a cause of action from ever accruing.

Accordingly, the court granted defendants summary disposition on this ground alone and dismissed all of plaintiffs' claims. This appeal followed.

III. ARE PLAINTIFFS' CLAIMS TIME-BARRED?

Plaintiffs challenge the trial court's ruling on several grounds, arguing that their claims accrued upon ePrize's sale, that the trial court applied the wrong limitations period, and that their fraudulent concealment claim otherwise tolled the limitations period.

This Court reviews de novo a trial court's ruling on a motion for summary disposition under MCR 2.116(C)(7). *Stoudemire v Stoudemire*, 248 Mich App 325, 332; 639 NW2d 274 (2001). Questions concerning the applicable limitations period, whether the statute was tolled, when the limitations period ended, and the statutory interpretation involved in resolving those questions present issues of law subject to this same standard. *Lear Corp v Dep't of Treasury*, 299 Mich App 533, 536; 831 NW2d 255 (2013); *Wickings v Arctic Enterprises, Inc*, 244 Mich App 125, 147; 624 NW2d 197 (2000). "In making a decision under MCR 2.116(C)(7), we consider all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict it." *Bryant v Oakpointe Villa Nursing Ctr*, 471 Mich 411, 419; 684 NW2d 864 (2004). Unless a relevant factual dispute exists, summary disposition is appropriate when a claim is time-barred as a matter of law. *Moraccini v Sterling Hts*, 296 Mich App 387, 391; 822 NW2d 799 (2012).

A. STATUTES OF REPOSE AND STATUTES OF LIMITATIONS

Critical to resolving whether plaintiffs' claims are time-barred is the determination of when the limitations period began to run. Defendants claim the signing of the Fifth Operating Agreement on March 1,

2009, triggered this period, while plaintiffs argue it was the sale of ePrize on August 12, 2012. The answer lies in whether the applicable period was one of repose (as defendants argue) or one of limitation (as plaintiffs argue).

While statutes of repose and statutes of limitations both create temporal barriers to a claim's viability, each functions differently. "A statute of repose prevents a cause of action from ever accruing when the injury is sustained after the designated statutory period has elapsed. A statute of limitation, however, prescribes the time limits in which a party may bring an action that has already accrued." *Sills v Oakland Gen Hosp*, 220 Mich App 303, 308; 559 NW2d 348 (1996) (citation omitted). Unlike a statute of limitations, then, a statute of repose "may bar a claim before an injury or damage occurs." *Ostroth v Warren Regency, GP, LLC*, 474 Mich 36, 42 n 7; 709 NW2d 589 (2006) (quotation marks and citation omitted). Of course whether a statute is one of repose or limitations (or both, *Sills*, 220 Mich App at 308) depends on the statute's plain language, *Ousley v McLaren*, 264 Mich App 486, 492; 691 NW2d 817 (2004). If the language is clear and unambiguous, no further construction is permitted. *Tryc v Mich Veterans' Facility*, 451 Mich 129, 135; 545 NW2d 642 (1996). In making this determination, this Court accords terms their ordinary and generally accepted meaning. *Oakland Co Bd of Co Rd Comm'rs v Mich Prop & Cas Guarantee Ass'n*, 456 Mich 590, 604; 575 NW2d 751 (1998). Dictionaries are particularly helpful in this regard if a statute leaves terms undefined. See *id*.

As noted, the trial court dismissed plaintiffs' claims as untimely under two provisions, MCL 450.4404 (breach of fiduciary duty) and MCL 450.4515 (member oppression). Both are contained in the Limited Liabil-

ity Company Act (LLCA), MCL 450.4101 *et seq*. However, because plaintiffs alleged a number of claims, both under the LLCA and, ostensibly, under the common law, we must first determine which claims the LLCA governs in order to apply the correct period of repose or limitations.

B. WHICH CLAIMS FALL UNDER THE LLCA?

Although the trial court dismissed all of plaintiffs' claims under the relevant time restrictions in the LLCA, plaintiffs cite only their claims for breach of fiduciary duty and breach of contract as falling outside that statute. Consequently, we need only address what statutory limitations period applies to those two claims.

Regarding breach of fiduciary duty, the trial court applied MCL 450.4404. But that provision requires limited liability company managers to discharge their fiduciary duties "in the best interests *of the limited liability company*." MCL 450.4404(1) (emphasis added). Thus, the duty is owed to the company, not to the individual members. See *Meyer & Anna Prentis Family Foundation, Inc v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 43; 698 NW2d 900 (2005) ("When a fiduciary relationship exists, the fiduciary has a duty to act for the benefit of the principal regarding matters within the scope of the relationship.") (citation omitted); cf. *Remora Investments, LLC v Orr*, 277 Va 316, 322; 673 SE2d 845 (2009) (Virginia statutory law containing similar "best interests of the limited liability company" provision did not provide a basis for a member to bring a claim for breach of fiduciary duty directly against another manager or member). The Second Amended Complaint

asserts that defendants owed fiduciary duties "directly to the Member Plaintiffs." MCL 440.4404 therefore does not apply here.

Plaintiffs are not in the clear, however. Indeed, in evaluating whether a claim is time-barred, this Court must look to the claim's substance, rather than its technical label. *Local 1064, RWDSU AFL-CIO v Ernst & Young*, 449 Mich 322, 327 n 10; 535 NW2d 187 (1995). On this score, plaintiffs' fiduciary duty claim specifically accuses defendants of dishonesty, "underhanded" self-dealing, profiteering, and the failure to disclose. Similarly, as described in plaintiffs' brief, their breach-of-contract claim amounts to Linkner's alleged misrepresentations concerning plaintiffs' return on investment. These do not materially differ from the allegations in plaintiffs' member-oppression claim, and fall squarely within the bounds of MCL 450.4515.

Specifically, that subsection permits members of limited liability companies to "bring an action . . . to establish that acts of the managers or members in control of the limited liability company are illegal, fraudulent, or constitute willfully unfair and oppressive conduct toward the limited liability company or the member." MCL 450.4515(1). "[W]illfully unfair and oppressive conduct" means, at least in part, "a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the member as a member." MCL 450.4515(2). This does not include conduct permitted by the articles of the organization, the operating agreement, or another agreement to which the member is a party, however. *Id*.

Here, the gravamen of plaintiffs' claims for breach of fiduciary duty and breach of contract is that their

interests *as members* were infringed when defendants obtained a huge return on investment by devaluing plaintiffs' shares in ePrize. The essence of these claims, then (which substantially mirror Count I) is the alleged breach of the duties imposed by the member-oppression section of the LLCA. MCL 450.4515 therefore applies.[3]

C. MCL 450.4515(1)(e)

MCL 450.4515(1)(e) specifically sets forth the time within which a member may bring an oppression claim for damages. That period is either three years after the cause of action accrues or two years after its discovery (or after it should have been discovered), whichever comes first. MCL 450.4515(1)(e) provides in relevant part:

> An action seeking an award of damages must be commenced within 3 years after the cause of action under this section has accrued or within 2 years after the member discovers or reasonably should have discovered the cause of action under this section, whichever occurs first.

Plaintiffs contend that this subsection is a statute of limitations and argue that because they sustained no

[3] Two ancillary points bear mention. First, in support of their claim for breach of fiduciary duty, plaintiffs cite caselaw holding that the proper course of action for certain wrongdoing is to assert a breach of the manager's fiduciary duty *to the corporation*. See *Campau v McMath*, 185 Mich App 724, 730; 463 NW2d 186 (1990). But plaintiffs assert harm to themselves as members. Second, as defendants note, the Fifth Operating Agreement contained an integration clause, conclusively demonstrating that it was the final and complete expression of the parties' agreement irrespective of any prior representations. *UAW-GM Human Res Ctr v KSL Recreation Corp*, 228 Mich App 486, 494-496, 502; 579 NW2d 411 (1998). These are not causes of action independent of the member-oppression claim.

damages until ePrize was sold in 2012, their claims did not accrue until that time. Defendants contend, however, that this subsection is a statute of repose, which cuts off all of plaintiffs' claims—not three years after damages were quantified in 2012, but three years after plaintiffs' shares were allegedly devalued in 2009. The statute's plain language supports plaintiffs' position.

1. MCL 450.4515(1)(e) IS A STATUTE OF LIMITATIONS

Statutes of limitations deal with a claim's accrual, *Sills*, 220 Mich App at 308, and it is this accrual language that triggers the three-year limitation period of MCL 450.4515(1)(e). Other statutes of limitation are no different. For example, MCL 600.5807 (limiting breach-of-contract actions) expressly provides that

> [n]o person may bring or maintain any action to recover damages or sums due for breach of contract, or to enforce the specific performance of any contract unless, *after the claim first accrued* to himself or to someone through whom he claims, he commences the action within the periods of time prescribed by this section. [Emphasis added.]

There is no doubt that this is a statute of limitations. *Miller-Davis Co v Ahrens Constr, Inc*, 489 Mich 355, 357; 802 NW2d 33 (2011). Statutes of limitations found throughout the Michigan Compiled Laws all contain similar "accrual" language. See, e.g., MCL 600.5829 (statute of limitations for "accrual" of claims regarding land); MCL 600.5831 (statute of limitations for "accru[al]" of the balance due upon a mutual and open account); MCL 600.5833 (actions for breach of warranty of quality or fitness "accrue" when the breach is discovered or should have been discovered); MCL 600.5834 (claims by and against common carriers regarding intrastate transportation "accrue" upon delivery or tender of the shipment and not afterwards);

MCL 600.5835 (claims on certain life insurance contracts "accrue" at the end of the seven-year presumption of death); MCL 600.5836 ("claims on an installment contract accrue as each installment falls due"); MCL 600.5837 ("claims for alimony payments accrue as each payment falls due").

In contrast, statutes of repose do not pertain to a claim's accrual; rather, they prevent a claim from ever accruing if a lawsuit is not brought within a certain time after the injury is sustained. The plain language of MCL 600.5839(1)—which our Supreme Court has called "the contractor statute of repose"[4]—clearly makes this point:

> A person shall not maintain an action to recover damages for injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective or unsafe condition of an improvement to real property, or an action for contribution or indemnity for damages sustained as a result of such injury, against any state licensed architect or professional engineer performing or furnishing the design or supervision of construction of the improvement, or against any contractor making the improvement, *unless the action is commenced within either of the following periods*:
>
> (a) Six years after the time of occupancy of the completed improvement, use, or acceptance of the improvement.
>
> (b) If the defect constitutes the proximate cause of the injury or damage for which the action is brought and is the result of gross negligence on the part of the contractor or licensed architect or professional engineer, 1 year after the defect is discovered or should have been discovered. However, *an action to which this subdivision applies shall not* be maintained more than 10 years after the time of

[4] *Miller-Davis*, 489 Mich at 358.

> occupancy of the completed improvement, use, or acceptance of the improvement. [Emphasis added.]

The statute of repose for medical malpractice is the same, clearly cutting off a claim within six years of the act or omission at issue, subject to certain exceptions that are not based on the claim's accrual:

> [A]n action involving a claim based on medical malpractice . . . *shall not be commenced later than 6 years after the date of the act or omission that is the basis for the claim*. . . . A medical malpractice action that is not commenced within the time prescribed by this subsection is barred. [MCL 600.5838a(2) (emphasis added).]

Again, this Court has expressly referred to this statute as one of repose. *Burton v Macha*, 303 Mich App 750, 757; 846 NW2d 419 (2014).

The temporal cutoff provided in the statutes of repose cited previously is not what the plain language of MCL 450.4515(1)(e) provides. Instead, it expressly allows for damages claims to be brought three years after they accrue, or two years after the plaintiff discovered or should have discovered them. Unlike a statute of repose, then, the three-year period of § 4515(1)(e) functions as a statute of limitations because it does not prevent a cause of action from accruing for a certain period after an event. Instead it provides that the time limit begins to run once the claim for damages accrues. In view of the established caselaw defining both statutes of repose and limitation, the plain language of § 4515(1)(e) can only be construed as a statute of limitations.[5]

In the face of § 4515(1)(e)'s plain language, defen-

[5] Because MCL 450.4515(1)(e) is a statute of limitations, plaintiffs' argument that their fraudulent concealment claim tolled the relevant deadline is moot. Similarly, while plaintiffs argue at length that their request for relief otherwise survives under MCL 450.4515(1)(d) (provid-

dants maintain that MCL 450.4515(1)(e) is a statute of repose. They stake their argument wholly on *Baks v Moroun*, 227 Mich App 472; 576 NW2d 413 (1998), overruled in part on other grounds by *Estes v Idea Engineering & Fabricating, Inc*, 250 Mich App 270; 649 NW2d 84 (2002), which described an analogous provision in the Business Corporation Act (BCA), MCL 450.1101 *et seq*., as a statute of repose. *Baks*, 227 Mich App at 486 (describing MCL 450.1541a(4), which pertains to a corporate officer's discharge of fiduciary duties, as a statute of repose).[6]

Baks did not *analyze* whether the plain language of the BCA's analogous provision was a statute of repose or limitation, however. That issue was simply not before the Court. Instead, the *Baks* majority simply called the analogous provision's limitations period a statute of repose before proceeding to resolve the central issue of that case, i.e., whether MCL 450.1489 created an independent cause of action for shareholder oppression claims. *Baks*, 227 Mich App at 476. The relevant time period—imported from a different section of the BCA—had nothing to do with this determination. It is for this reason that neither *Estes* (which overturned *Baks'*s central holding) nor the *Baks* dissent (which *Estes* adopted) even addressed whether the time period was one of repose or limitation. They simply refer to the time period as a statute of limitations. *Estes*, 250 Mich App at 272, 281; *Baks*, 227 Mich App at 500 (HOEKSTRA, J., dissenting). Again, the *Baks*

ing for the repurchase of their interests at fair market value), this point is irrelevant given that § 4515(1)(e) is a statute of limitations.

[6] It is well settled—and the parties all agree—that where the BCA and LLCA relate to common purposes, they should be interpreted in a consistent manner. *Duray Dev, LLC v Perrin*, 288 Mich App 143, 159; 792 NW2d 749 (2010).

majority offered nothing more, describing the relevant limiting language as a statute of repose only in conclusory fashion.

This is fatal to defendants' reliance on *Baks*, for it is well established that to decide a question of law, a court must specifically intend to lay down a legal rule governing future cases. *Foreman v Foreman*, 266 Mich App 132, 140-141; 701 NW2d 167 (2005), citing *Detroit v Mich Pub Utilities Comm*, 288 Mich 267, 301; 286 NW 368 (1939). To do this, the court must thoroughly consider the issue and directly intend to resolve it. *Foreman*, 266 Mich App at 140; *Detroit*, 288 Mich at 301. Considering this exact point, this Court recited our Supreme Court's application of this standard:

> In *Detroit*, *supra* at 301, our Supreme Court rejected the appellants' argument that a question of law was not decided in a previous case, explaining:
>
> > There is no question that the point was before the court; that the court intended to declare the rule of law for a guide in the future; that there was an application of the judicial mind to the proposition and a thorough consideration of the subject; and that the majority of the court [reached a conclusion] with the clear intent and expressed purpose of determining this issue.
>
> In such circumstances, the prior ruling constituted a binding resolution of the question of law. *Id*. [*Foreman*, 266 Mich App at 140 (alteration in original).]

Long before *Foreman*, our Supreme Court reiterated this point, noting that for a prior ruling to constitute a resolution of a question of law, it requires more than just "application of the judicial mind to the subject"; it instead must involve, among other things, an adequate "fullness of the discussion" of the issue. *McNally v*

Wayne Co Bd of Canvassers, 316 Mich 551, 557; 25 NW2d 613 (1947), citing *Detroit*, 288 Mich at 301.

Again, the *Baks* majority did not do this. Rather, it just described the relevant limiting language in conclusory fashion. This is a far cry from declaring a rule of law, let alone a turning of the judicial mind to the subject. For this reason, the *Baks* majority simply denoting the limitations period in an analogous statute as one of repose is incapable of definitively settling that issue. *Baks* does not aid defendants.[7]

2. WHEN DID PLAINTIFFS' CLAIM ACCRUE?

As noted previously, MCL 450.4515(1)(e) expressly requires an action seeking damages to be commenced within three years after the claim "has accrued," or two years after the plaintiff discovered or should have discovered it. Regarding the three-year limitation, § 4515 does not define when a claim accrues. Consequently, the general statute of limitations provision, MCL 600.5827, applies, *Moll v Abbott Laboratories*, 444 Mich 1, 12; 506 NW2d 816 (1993), and under that provision a claim accrues "at the time the wrong upon which the claim is based was done regardless of the time when damage results." The term "wrong" refers to

[7] It bears emphasis that at least two federal courts have expressly declined to apply *Baks* on the ground that the plain language creates a statute of limitations and not a statute of repose. Their holdings rest primarily on an analysis of MCL 450.4515(1)(e)'s plain language, which, again, *Baks* did not undertake. See *Techner v Greenberg*, 553 Fed Appx 495, 501-506 (CA 6, 2014); *Virginia M Damon Trust v Mackinaw Fin Corp*, unpublished opinion of the United States District Court for the Western District of Michigan, issued January 2, 2008 (Docket No. 2:03-cv-135); but see *Trident-Brambleton, LLC v PPR No 1, LLC*, unpublished opinion of the United States District Court for the Eastern District of Virginia, issued July 5, 2006 (Docket No. 1:05-cv-1423) (ruling that MCL 450.4515(1)(e) should be considered a statute of repose based on *Baks*).

the date on which the plaintiff was harmed by the defendant's act, not the date on which the defendant acted. *Moll*, 444 Mich at 12. Otherwise, a plaintiff's claim could be barred even before an injury was suffered. *Id*. "Accordingly, a cause of action for a tortious injury accrues when all the elements of the claim have occurred and can be alleged in a proper complaint." *Schaendorf v Consumers Energy Co*, 275 Mich App 507, 512; 739 NW2d 402 (2007).

This is consistent with Black's Law Dictionary's definition of "accrue," which means "[t]o come into existence as an enforceable claim or right; to arise . . . . 'The term "accrue" in the context of a cause of action means to arrive, to commence, to come into existence, or to become a present enforceable demand or right. . . .' " *Black's Law Dictionary* (7th ed), quoting 2 Ann Taylor Schwing, *California Affirmative Defenses* § 25:3, at 17-18 (2d ed 1996); cf. *Cooey v Strickland*, 479 F3d 412, 419 (CA 6, 2007) (" 'Under the traditional rule of accrual . . . the tort cause of action accrues, and the statute of limitations commences to run, when the wrongful act or omission results in damages. The cause of action accrues even though the full extent of the injury is not then known or predictable.' ") (citation omitted).

Here, it was impossible for plaintiffs to establish their claims for damages in 2009 because all that occurred in 2009, if anything, was an alleged breach of the duties set forth in MCL 450.4515(1). Plaintiffs did not suffer harm until 2012, when ePrize's sale occurred and the proceeds were distributed. In other words, although defendants' alleged wrongdoing occurred in 2009, plaintiffs had no claim for damages to enforce in 2009 since they had incurred none. At best, their damages were speculative at that time, and plaintiffs

cannot maintain claims for speculative damages. *Bonelli v Volkswagen of America, Inc*, 166 Mich App 483, 511; 421 NW2d 213 (1988) (although mathematical certainty is unnecessary, damages cannot be merely speculative or conjectural).

At least two additional points reinforce this conclusion. First, the Fifth Operating Agreement could have been amended yet again before the sale, in which case plaintiffs conceivably could have suffered no damages and, consequently, no harm. And second, had the defendants' plan failed and had ePrize's assets become worthless, plaintiffs would have had no damages to recover.

Plaintiffs therefore suffered no harm resulting in damages from defendants' alleged wrongdoing until the sale and distributions were made in 2012. It was then that their damages claim accrued. By the same token, plaintiffs could not have discovered their damages until they incurred them in 2012. Their complaint was filed one year later—a time well within either the two- *or* three-year period provided in MCL 450.4515(1)(e).

Before concluding, we acknowledge that defendants presented two alternate motions for summary disposition of plaintiffs' claims below. However, because the trial court did not address either one, the appropriate forum for their resolution in the first instance is before the trial court on remand. See *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005) ("Generally, an issue is not properly preserved if it is not raised before, addressed, or decided by the circuit court . . . .") (citations omitted); see also *Smith v Foerster-Bolser Constr, Inc*, 269 Mich App 424, 427; 711 NW2d 421 (2006) (it is only under exceptional circumstances that this Court engages in plenary review of

issues not decided below, such as when proper determination of the case requires it, the issue involves a question of law and the record contains the necessary facts, or the failure to review the issue would otherwise result in manifest injustice).

IV. CONCLUSION

Plaintiffs have presented a member-oppression claim under MCL 450.4515. Although the trial court held plaintiffs' claims time-barred based on *Baks*, that case's description of analogous language in a different statute was conclusory and as such does not constitute a binding resolution of the issue at hand. More importantly, the plain language of MCL 450.4515(1)(e) confirms that it functions as a statute of limitations. Plaintiffs' claims are therefore timely. Accordingly, we reverse the trial court's order and remand for the trial court to consider defendants' alternative motions and for any further proceedings consistent with his opinion.

We do not retain jurisdiction. No costs, neither party having prevailed in full.

MARKEY, P.J., and BORRELLO, J., concurred with MURRAY, J.

JONES v BOTSFORD CONTINUING CARE CORPORATION

Docket No. 317573. Submitted December 4, 2014, at Detroit. Decided April 7, 2015, at 9:05 a.m.

Mildred Jones, as the personal representative of the estate of Amos Jones, brought a medical malpractice action in the Oakland Circuit Court against Botsford Continuing Care Corporation, Dr. Thomas Selznick, and Livonia Family Physicians, PC. After being admitted to Botsford and while in an agitated state, Amos pulled out a percutaneous endoscopic gastronomy (PEG) tube that had been inserted through his abdominal wall to provide him nutrition. The tube was reinserted approximately eight hours later. Plaintiff alleged that the tube was improperly reinserted leading to an infection and Amos's death. Defendants moved for summary disposition under MCR 2.116(C)(10), asserting that plaintiff's affidavits of merit were defective. The trial court agreed and dismissed the case. Plaintiff appealed. Botsford cross-appealed, asserting that the dismissal should have been with prejudice.

The Court of Appeals *held*:

1. Under MCL 600.2912d, the plaintiff in an action alleging medical malpractice must file with the complaint an affidavit of merit signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under MCL 600.2169. The controlling question under MCL 600.2912d is whether the plaintiff's counsel has a reasonable belief that the affiant will qualify to testify regarding the standard of care under MCL 600.2169. In this case, Botsford asserted that plaintiff's affidavit of merit regarding nursing malpractice was defective because it was signed by a registered nurse (RN) instead of a licensed practical nurse (LPN). Botsford's argument rested on its assertion that the caregiver who reinserted the PEG tube was an LPN, but Botsford offered no evidence supporting that assertion. And, in any event, given the limited evidence available at the time the affidavit of merit was filed, it was reasonable for plaintiff's counsel to conclude that the relevant nurse was an RN. Notably, Botsford failed to respond to the notice of intent to file a claim that plaintiff had sent Botsford with a statement of the factual basis for Botsford's defense to the claim,

as required by MCL 600.2912b(7)(a), a statement that presumably would have identified whether the nurse was an RN or an LPN. In addition, plaintiff's counsel's legal conclusion that an RN may offer standard of care testimony against an LPN was reasonable given that the question has not been definitively addressed by the courts, and the statutory definitions for the practice of nursing as an RN and as an LPN set forth in MCL 333.17201(1) make clear that any work performed by an LPN may also be performed by an RN, and that RNs may direct and supervise LPNs in the performance of their duties. Accordingly, the trial court erred when it concluded that plaintiff's affidavit of merit regarding the alleged nursing malpractice was defective and when it dismissed the claims against Botsford that were based on the allegations of nursing malpractice. It was reasonable for plaintiff's counsel to believe that an RN could sign the affidavit of merit.

2. Under MCL 600.2169, in an action alleging malpractice, a person shall not give expert testimony on the appropriate standard of practice or care unless the person is licensed as a health professional and, if the party against whom the testimony is offered is a specialist, specializes at the time of the occurrence that is the basis for the action in the same specialty as the party against whom the testimony is offered. If the party against whom the testimony is offered is a specialist who is board certified, the expert witness must be a specialist who is board certified in that specialty. A certificate of special qualification is a board certification. In this case, plaintiff's affidavit of merit regarding physician malpractice was signed by Dr. Gregory Compton. The parties disputed whether plaintiff's counsel reasonably believed that Compton, who was board certified in internal medicine with a subspecialty certification in geriatrics, was qualified to testify regarding the standard of care for Selznick, who was board certified in family practice with a certificate of added qualification in geriatrics. Plaintiff's counsel's belief that Compton could testify regarding the appropriate standard of care was reasonable, both legally and factually, at the presuit stage of the proceedings. Selznick's own website stated that he was board certified in geriatrics, and he was the medical director of a nursing home—a position that one would reasonably conclude could not be obtained by physicians who do not specialize in geriatric medicine. And Selznick failed to respond, as required by MCL 600.2912b(7), to plaintiff's notice of intent, which expressed plaintiff's counsel's belief that Selznick was a geriatrics specialist practicing geriatrics at the time in question. Had Selznick complied with this mandate and had he actually asserted what he later claimed in

court, i.e., that he was not a geriatric medicine specialist, plaintiff's counsel would have filed an affidavit from a physician whose specialty qualifications matched those claimed by Selznick. Failure to have provided the mandatory response, while not an active assertion of agreement with plaintiff's understanding of the relevant expertise, provided an additional reason for plaintiff's counsel to have reasonably concluded that Selznick was a specialist in geriatric medicine. Further, a certificate of special qualification in geriatric medicine is a board certification in geriatric medicine. Because board certification in geriatric medicine is available to physicians with the necessary training and experience, geriatric medicine is a specialty. If Selznick, who was board certified in both family medicine and geriatric medicine, was practicing geriatric medicine at the time this case arose, then the one most relevant specialty was geriatric medicine, and both Selznick and Compton were board certified in the one most relevant specialty. Under the circumstances, plaintiff's affidavit of merit regarding Selznick satisfied MCL 600.2912d, and the trial court erred when it granted summary disposition in favor of defendants regarding the claims of physician malpractice.

Reversed and remanded.

DONOFRIO, P.J., concurring in part and dissenting in part, concurred with the result reached by the majority with respect to reversing the grant of summary disposition on plaintiff's nursing malpractice claim, but disagreed that plaintiff's counsel could have held a reasonable belief that Compton was qualified to give standard of care testimony regarding Selznick and would have affirmed the trial court's grant of summary disposition on the physician malpractice claims. With regard to the nursing malpractice, Botsford failed to support its motion for summary disposition with documentary evidence. Looking at the nursing notes in the light most favorable to plaintiff, there was a question of fact regarding whether an RN or an LPN reinserted the PEG tube. Summary disposition, therefore, was not appropriate. Judge DONOFRIO did not join, however, the majority's discussion related to whether an RN may offer standard of care testimony concerning an LPN, because the discussion was not necessary to resolve the issue presented in this case. Regarding the claims of physician malpractice, although Compton's and Selznick's board certifications in their subspecialties shared the common word "geriatrics," their certifications were not equivalent. Compton's board certification of geriatrics in the field of internal medicine was not the same as Selznick's board certification of geriatrics in the field of family medicine. As a result, under MCL 600.2169(1)(a), Compton was not

> qualified to testify to the standard of care at trial against Selznick. And plaintiff's counsel's belief that Compton was qualified was not reasonable because looking at Selznick's website as a whole, it should have been apparent that plaintiff's counsel needed an expert who was board certified in geriatrics in the field of family medicine. Regarding plaintiff's assertion that she should have been permitted to amend any defective affidavit of merit, the trial court's failure to reach the issue was reasonable because plaintiff never actually pursued that remedy.

Bendure & Thomas (by *Mark R. Bendure*) and *McKeen & Associates, PC* (by *Andrew F. Kay*), for Mildred Jones.

Riley & Hurley, PC (by *Robert F. Riley* and *Allison M. Ensch*), for Thomas Selznick and Livonia Family Physicians, PC.

Tanoury, Nauts, McKinney & Garbarino, PLLC (by *Linda M. Garbarino* and *David R. Nauts*), for Botsford Continuing Care Corporation.

Before: DONOFRIO, P.J., and FORT HOOD and SHAPIRO, JJ.

FORD HOOD, J. Plaintiff, Mildred Jones, as the personal representative of the estate of her husband, Amos Jones, appeals from the trial court order granting summary disposition in favor of defendants, Botsford Continuing Care Corporation, Dr. Thomas Selznick, and Livonia Family Physicians, PC, in this medical malpractice and wrongful-death lawsuit. For the reasons set forth in this opinion, we reverse and remand.

I. FACTS

Amos Jones, an elderly man, was admitted to Botsford Continuing Care (BCC), an extended care facility, for care following hospitalization for a stroke. As a

result of the stroke, Jones had difficulty swallowing and so during his hospitalization, a percutaneous endoscopic gastrostomy (PEG) tube was surgically inserted through his abdominal wall and into his stomach in order to provide nutrition. When Jones was admitted to BCC on November 12, 2007, the PEG tube was in place. According to the hospital nursing progress notes, during his stay and while in an agitated state, Jones pulled out the PEG tube. The PEG tube was reinserted approximately eight hours later. Plaintiff's complaint alleged that the PEG tube was improperly reinserted and that as a result, gastric contents and nutritional material were released outside Jones's stomach and into his abdominal space, causing a massive infection that killed him.

Before filing suit, in accordance with MCL 600.2912b(1), plaintiff mailed a notice of her intent to file claim to the individuals and entities later named as defendants. The notice satisfied the requirements of MCL 600.2912b(4).

Pursuant to MCL 600.2912b(7), each recipient of the notice was required to "furnish to the claimant . . . a written response . . . ." The statute requires that a potential defendant's written response contain a statement regarding four items, including "[t]he factual basis for the defense to the claim." MCL 600.2912b(7)(a). However, defendants each failed to send a written response, thus violating this statutory mandate.

When plaintiff filed the complaint initiating this lawsuit, her attorney attached two affidavits of merit as required by MCL 600.2912d. One of the affidavits attested to physician malpractice and was signed by Dr. Gregory Compton, who in his affidavit stated that at the relevant time he "was a licensed and practicing

INTERNAL MEDICINE and GERIATRIC MEDICINE Doctor . . . .” The other affidavit attested to nursing malpractice and was signed by Amy Ostrolenk, who averred that she was an “R.N.” and “was . . . licensed and practicing nursing.”

As required by MCL 600.2912e, defendants filed affidavits of meritorious defense. Two affidavits were filed in response to the claim of physician malpractice. The one submitted by BCC (which plaintiff alleged was liable for any negligence by Dr. Selznick under an agency theory) was signed by Dr. Alan Neiberg, who averred that during the relevant period he was “board certified in the specialty of internal medicine, and . . . devoted a majority of [his] professional time to the active clinical practice of my profession of internal medicine.” The affidavit submitted on behalf of Dr. Selznick personally was signed by Dr. Selznick himself and averred that he is “certified by the American Board of Family Practice and ha[s] a Certificate of Added Qualification in Geriatrics.”

BCC’s affidavit of meritorious defense filed in response to the claim of nursing malpractice was signed by Marguerite Debello, who averred that she was “a registered nurse” and during the relevant period “devoted a majority of my professional time to the active clinical practice of my profession of nursing.”

MCL 600.2912d(1) and MCL 600.2912e(1) respectively require that the affidavits of merit and meritorious defense be “signed by a health professional who the [party]’s attorney reasonably believes meets the requirements for an expert witness under section 2169.” Accordingly, per the requirements for an expert witness under MCL 600.2169(1)(a), each party’s attorney must have had a reasonable belief that their respective affiant “specialize[d] at the time of the

occurrence that is the basis for the action in the same specialty as the party against whom or on whose behalf the testimony is offered."[1] MCL 600.2169(1)(a), which refers to specialists, does not apply to nurses, see *Cox v Flint Bd of Hosp Managers*, 467 Mich 1, 18, 22; 651 NW2d 356 (2002) (addressing MCL 600.2912a, which sets forth the standard of care in medical malpractice cases), but MCL 600.2169(1)(b) does, because it applies to all health professionals. This provision requires that during the year preceding the incident, the testimonial expert have devoted a majority of his or her professional time to "[t]he active clinical practice of the same health profession in which the [defendant] . . . is licensed . . . ." MCL 600.2169(1)(b)(*i*).

Defendants moved for summary disposition under MCR 2.116(C)(10), asserting that the affidavits filed by plaintiff's counsel did not satisfy MCL 600.2912d because the affiants did not meet the requirements of MCL 600.2169(1)(a) and (b), respectively, and that plaintiff's counsel could not have had a reasonable belief that they did. BCC asserted that plaintiff's affidavit of merit alleging nursing malpractice should have been signed by a licensed practical nurse (LPN) and that plaintiff's counsel could not have reasonably believed that a registered nurse (RN) could offer standard of care testimony. Both BCC and Dr. Selznick asserted that plaintiff's affidavit of merit alleging physician malpractice should have been signed by a family practitioner and that plaintiff's counsel could not have had a reasonable belief that Dr. Compton had the proper qualifications.

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[1] This requirement may also be met if the proffered expert has spent the relevant period instructing students in the relevant field at a health professional school or accredited residency or clinical research program. MCL 600.2169(1)(b)(*ii*). This aspect of the statute is not relevant to the issues in this case.

The trial court ruled that the affiants did not satisfy the requirements of MCL 600.2169(1) and, on this basis, dismissed the case. The court did not, however, address plaintiff's argument that her counsel had a reasonable belief that the affiants met the testimonial requirements.[2] Plaintiff appeals from that ruling and BCC cross-appeals on the grounds that the dismissal should have been with prejudice.[3]

II. STANDARD OF REVIEW

A trial court's ruling on a motion for summary disposition presents a question of law reviewed de novo. *Titan Ins Co v Hyten*, 491 Mich 547, 553; 817 NW2d 562 (2012). Questions of statutory interpretation are also reviewed de novo including the statutory requirements for affidavits of merit. *Lucas v Awaad*, 299 Mich App 345, 377; 830 NW2d 141 (2013). "Our goal when interpreting and applying statutes or court rules is to give effect to the plain meaning of the text." *Ligons v Crittenton Hosp*, 490 Mich 61, 70; 803 NW2d 271 (2011).

III. ANALYSIS

Whether an expert may provide standard of care testimony at trial is governed by MCL 600.2169. However, whether an affidavit of merit signed by an expert

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[2] In fact, the trial court indicated that it believed plaintiff's selection of Dr. Compton as his standard of care expert was reasonable, but it did not address the significance of that finding.

[3] Before the case was appealed in this Court, plaintiff resubmitted her respective affidavits, this time signed by a family practitioner and an LPN. The parties dispute whether these constituted amended affidavits for purposes of MCR 2.112(L)(2)(b). While we do not subscribe to the dissent's cursory treatment of this question, we need not address it ourselves given our conclusion that the originally filed affidavits were sufficient.

is adequate is governed by MCL 600.2912d. This provision requires that plaintiff's counsel "reasonably believes" that the affiant "meets the requirements" of MCL 600.2169, not that the affiant actually meet those requirements for purposes of trial testimony. "The Legislature's rationale for this disparity is, without doubt, traceable to the fact that until a civil action is underway, no discovery is available. See MCR 2.302(A)(1)." *Grossman v Brown*, 470 Mich 593, 599; 685 NW2d 198 (2004).

Both this Court and the Supreme Court have been careful to distinguish these standards and to recognize that "at trial the standard is more demanding because the statute states that a witness '*shall not* give expert testimony' *unless* the expert 'meets the [listed] criteria' in MCL 600.2169(1)." *Id*. (emphasis added; alteration in original). By contrast, the issue for purposes of MCL 600.2912d is not whether the expert signing the affidavit of merit may ultimately testify at trial. The controlling question under MCL 600.2912d is whether plaintiff's counsel had a reasonable belief that the affiant would qualify. The fact that the Legislature used the language "reasonably believes" demonstrates that there will be cases in which counsel had such a reasonable belief even though the expert is ultimately shown not to meet the criteria of MCL 600.2169(1).

In *Brown v Hayes*, 477 Mich 966 (2006), the Supreme Court reiterated this point. It concluded that even when the expert in question did not qualify to testify under MCL 600.2169, the affidavit should not be stricken when counsel had a reasonable belief that the expert did qualify. *Id*. Indeed, in *Hayes*, the attorney had not made an error of fact (as in *Grossman*), but had incorrectly, but reasonably, construed the statutory requirements. *Id*.

This Court has similarly noted the differing tests for whether an expert may testify at trial on the standard of care and for whether a health professional may sign an affidavit of merit. In *McElhaney v Harper-Hutzel Hosp*, 269 Mich App 488, 497-498; 711 NW2d 795 (2006), we held that the plaintiff's experts did not qualify, under MCL 600.2169, to testify regarding the standard of care. However, regarding the propriety of the affidavit of merit signed by one of those experts as to alleged malpractice by a nurse midwife, we concluded that "plaintiff's attorney's belief that an obstetrician/gynecologist met the requirements for an expert witness under § 2169 was reasonable." *Id*. at 495-496. Therefore, the issue is not whether the attorney's judgment proves to be incorrect, but rather whether the attorney's belief, though erroneous in hindsight, was reasonable at the time.

In light of these principles, we now review the trial court's conclusion that the affidavits of merit filed with plaintiff's complaint did not comply with MCL 600.2912d. We will address separately the nursing affidavit of merit and the physician affidavit of merit. Plaintiff's claims against BCC are based on the actions of two separate agents, i.e., the relevant nurse(s) and its staff physician, Dr. Selznick. Plaintiff's claims against Dr. Selznick and his practice are based solely on his individual actions.

A. NURSING MALPRACTICE

Regarding the claims of nursing malpractice, we conclude that the trial court erred because it was not unreasonable for plaintiff's counsel to obtain an affidavit of merit from an RN.

BCC's argument that the case must be dismissed rests first and foremost on its assertions that the

caregiver who reinserted the PEG tube was an LPN and that this information was available in the medical records. However, defendant has offered no *evidence* that this assertion is true. Indeed, a review of the medical records makes clear that the relevant caregiver is not identified as an LPN or by name.

The sole basis for BCC's assertion is a single page of handwritten nursing notes dated November 15, 2007, much of which is illegible. There is a note timed at 12:00 a.m. that appears to have been signed by an LPN, albeit with an illegible signature. BCC claims in its brief that this nurse reinserted the PEG tube. However, this assertion is simply not supported by the nursing notes, insofar as they can be deciphered, or by any other proofs or affidavits. Significantly, the 12:00 a.m. note does not say that the nurse on duty then reinserted the tube. Rather, reinsertion of the PEG tube is first referred to in a nursing note written eight hours later, at 8:00 a.m., in which a different author writes, "peg tube replaced[.]" The 8:00 a.m. note is signed, but the signature is illegible and the 8:00 a.m. note does not indicate whether the person making the entry was an LPN or RN. It is also readily apparent upon observation of the 8:00 a.m. note that it was not written by the same individual who wrote the 12:00 a.m. note.[4]

Even if we were to accept as true BCC's unsupported assertion regarding the identity of the relevant caregiver, a proposition wholly inconsistent with our stan-

[4] The next nursing note was written at 2:15 p.m. on the same day. The signature of the note's author is again illegible and again no medical title appears. It states that the patient's family visited and found the patient short of breath. The author of the 2:15 p.m. note wrote that he or she then placed a call to a physician assistant, who did not answer. He or she then advised the nursing supervisor on the unit who directed that Jones be transferred to the hospital emergency department. According to the note, at that time, Jones was "no[t] really responding."

dard of review, it would not alter the outcome of this appeal because plaintiff's attorney had a reasonable belief that the affiant could testify.

First, given the limited evidence available at the time the affidavit of merit was filed, it would have been reasonable for plaintiff's counsel to have concluded that the relevant nurse was an RN. As stated by our Supreme Court in *Grossman*, 470 Mich at 599-601, when determining the reasonableness of an attorney's belief at the affidavit of merit stage, we look to the resources available to that attorney at the time the affidavit was prepared. As just noted, the medical records did not provide the relevant information. Moreover, BCC never complied with its statutory duty to respond to plaintiff's notice of intent to file a claim with a written statement providing "[t]he factual basis for the defense to the claim" in which it presumably would have identified the caregiver who reinserted the PEG tube and his or her qualifications. MCL 600.2912b(7)(a). Indeed, the reasonableness of the belief that an RN could properly sign the affidavit of merit in this case is demonstrated by the fact that BCC's affidavit of meritorious defense was signed by an RN, not an LPN. Given that BCC's attorneys, who (unlike plaintiff's counsel) had full access to hospital staffing records and the relevant caregivers, concluded that an RN was the proper affiant, it would certainly seem that the same judgment, when made earlier by plaintiff's counsel with far less information, was a reasonable one.

Second, we find reasonable plaintiff's counsel's legal conclusion that an RN may offer standard of care testimony against an LPN. Whether an RN may ultimately offer such testimony at trial is not before us and we do not decide that issue, but plaintiff's counsel's conclusion that an RN was a proper affiant, even if the

relevant actor was an LPN, would not have been unreasonable given the fact that the issue has not been definitively addressed and there is law that supports his conclusion.

Indeed, the statutory definitions of LPN and RN support this conclusion, as does the relevant caselaw. Both RNs and LPNs are licensed in the "practice of nursing." MCL 333.17201(1)(a), which defines this practice, provides:

> "Practice of nursing" means the systematic application of substantial specialized knowledge and skill, derived from the biological, physical, and behavioral sciences to the care, treatment, counsel, and health teaching of individuals who are experiencing changes in the normal health processes or who require assistance in the maintenance of health and the prevention or management of illness, injury or disability.

The same section goes on to define the practice of nursing as an LPN and as an RN:

> (b) "Practice of nursing as a licensed practical nurse" or "l.p.n." means that practice of nursing based on less comprehensive knowledge and skill than that required of a registered professional nurse and performed under the supervision of a registered professional nurse, physician or dentist.
>
> (c) "Registered professional nurse" or "r.n." means an individual licensed under this article to engage in the practice of nursing which scope of practice includes the teaching, direction, and supervision of less skilled personnel in the performance of delegated nursing activities. [MCL 333.17201(1).]

Consistently with these definitions, MCL 333.17208 provides that "[t]he practice of nursing as a licensed practical nurse is a health profession subfield of the practice of nursing."

These statutory definitions make clear that any work that may be performed by LPNs may also be performed by RNs. Indeed, RNs can direct and supervise LPNs in the performance of their duties. Each is wholly engaged in the "practice of nursing" and neither has any specialty training.[5] The only difference is the extent of their general training and authority. The situation appears analogous to that of a physician specialist as to a resident physician in specialty training. In *Bahr v Harper-Grace Hosps*, 448 Mich 135; 528 NW2d 170 (1995), the Supreme Court held that a physician who is a fully qualified specialist may testify regarding the standard of care applicable to a resident physician training in that specialty. See also *Gonzalez v St John Hosp & Med Ctr (On Reconsideration)*, 275 Mich App 290; 739 NW2d 392 (2007).

In sum, we conclude that the trial court erred by dismissing the claims against BCC that are based on allegations of nursing malpractice. We reach this conclusion for each of the following reasons: (a) there is a question of fact whether the nurse in question was an LPN or an RN, (b) given BCC's failure to respond to the notice of intent and identify whether the nurse in question was an LPN or RN, that information was not reasonably available to plaintiff's counsel when the complaint and affidavits of merit were filed and (c) it would have been reasonable for plaintiff's counsel to conclude that an RN could offer testimony regarding the standard of care for an LPN.

B. PHYSICIAN MALPRACTICE

The claims of physician malpractice apply directly to Dr. Selznick, and to his practice and BCC through agency.

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[5] Unlike a nurse midwife or a nurse practitioner, neither an RN nor an LPN is within a "health profession specialty field." MCL 333.16105(3).

As discussed earlier, the question before us is not whether Dr. Compton may offer standard of care testimony at trial. The sole question is whether at the time he prepared the affidavit of merit, plaintiff's counsel reasonably believed that Dr. Compton met the requirements of MCL 600.2169(1)(a). Similar to our conclusions with regard to the nursing issue, we conclude that counsel's belief was reasonable and we find that there were both factual and legal grounds for that belief.

Factually, plaintiff's expert affiant attested that at the relevant time, he was a specialist in two areas of medicine, one of which was geriatric medicine, and that more than 50% of his practice was in that specialty. Plaintiff's counsel believed that at the relevant time, Dr. Selznick was also a specialist in geriatric medicine. Dr. Selznick now asserts that his only specialty is in family medicine and that he is not a specialist in geriatric medicine. We conclude, however, that plaintiff's counsel's conclusion that Selznick was a geriatric specialist was a reasonable one, at least at the presuit stage.

First, Dr. Selznick's professional biography on his own website affirmatively states that he is "Board Certified in . . . Geriatrics." We find it difficult to accept that a doctor may publicly advertise himself as having a particular specialty and then claim that no one could have reasonably believed that his assertion was true.

Second, given that plaintiff was an elderly man in a nursing home, it would be reasonable for plaintiff's counsel to have concluded that the one most relevant specialty was geriatric medicine. Indeed, Dr. Selznick was the medical director of the nursing home, a position which one would reasonably conclude could not be obtained by physicians who do not specialize in geriatric medicine.

Third, plaintiff's notice of intent made absolutely clear that plaintiff's counsel believed that Dr. Selznick was a specialist in geriatric medicine and that geriatric medicine was the specialty that he was practicing at the time in question. The notice further asserted that the relevant standard of care was the one applicable to geriatric medicine specialists. Upon receipt of the notice of intent, Dr. Selznick had a statutory duty to respond with "a written response that contains a statement of" (a) the factual basis for the defense to the claim and (b) the standard of practice or care that he claimed applied to the action. MCL 600.2912b(7). Had Dr. Selznick complied with this mandate and had he actually asserted what he now claims, i.e., that he is not a geriatric medicine specialist, plaintiff's counsel would have filed an affidavit from a physician whose specialty qualifications matched those claimed by Dr. Selznick. Failure to have provided the mandatory response, while not an active assertion of agreement with plaintiff's understanding of the relevant expertise and, therefore, not a formal admission, surely provides an additional reason (along with Dr. Selznick's website claims and his position as medical director of a geriatric nursing home) for plaintiff's counsel to have reasonably concluded that Dr. Selznick is a specialist in geriatric medicine.[6]

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[6] The dissent suggests that Dr. Selznick did file a "response" to plaintiff's notice of intent. The document to which the dissent refers is a one-paragraph letter denying that Dr. Selznick bears any responsibility for Jones's death and is signed by an untitled employee of "the Third party Administrator for the Freedom Specialty Insurance Company." This letter is clearly not a response within the meaning of MCL 600.2912b(7), which specifically provides that a written response must comply with the requirements of MCL 600.2912b(7)(a) through (d), which this letter does not even attempt to do. The letter is not a response to plaintiff's notice of intent any more than a letter of accusation from a decedent's family, without the content required by MCL 600.2912b(4), is

Dr. Selznick does not dispute that he has special training and experience in geriatric medicine. He also does not dispute that he has a certificate of added qualification in geriatric medicine. Nevertheless, he asserts that this is not the equivalent of a board certification. Indeed, he appears to assert that there is no such thing as a specialty in geriatric medicine and that any conclusion that there is such a specialty is unreasonable. We disagree.

In the decade following the passage of 1993 PA 78, many issues arose concerning the exact nature of the requirements it adopted in medical malpractice cases. Many of these difficulties arose from questions about expert qualifications, particularly the issue of "matching" specialties. Most of these issues were resolved by our Supreme Court in *Woodard v Custer*, 476 Mich 545; 719 NW2d 842 (2006). However, some issues escaped conclusive treatment in *Woodard*. One of these remaining issues is what constitutes an expert "match" when a physician has a board certification, but also carries a certificate of added qualification. This is particularly true when, at the time of the occurrence that is the basis of the medical malpractice action, the physician was practicing in the specialty defined by the certificate of added qualification.

Defendants rely on *Halloran v Bhan*, 470 Mich 572, 575-580; 683 NW2d 129 (2004), in which the Supreme Court held that the plaintiff's medical expert should not be permitted to testify at trial[7] because, as a board-certified specialist in anesthesiology, he did not

a "notice of intent." Indeed, the letter is wholly silent regarding what specialty Dr. Selznick asserts he practices when treating infirm patients in the nursing home he directs.

[7] There was no challenge to the affidavit of merit and so the issue of counsel's reasonable belief was not addressed in *Halloran*.

"match" the qualifications of the defendant, who was a board-certified specialist in internal medicine, even though they each possessed certificates of additional qualification in critical care. However, *Halloran* was decided two years before *Woodard* and the decision was circumscribed by the fact that all parties to the case agreed that a certificate of added qualification did not constitute a board certification. Thus, in *Halloran*, the legal import of a certificate of added qualification was not an issue in dispute. See *id*. at 575 ("The parties do not dispute that the subspecialty certification [of added qualification] is not 'board certification' for the purpose of [MCL 600.2169]."). The plaintiff argued that his expert, who by the parties' agreement was only board certified in anesthesiology, should be permitted to testify against an internal medicine specialist simply because the case arose in a hospital's critical care unit and the parties shared a "subspecialty" by virtue of their matching certificates of added qualifications. *Id*. at 575-576. All three Court of Appeals judges concluded as a matter of law that "critical care medicine" cannot be considered a specialty because, as the parties agreed, there is no board certification available in it.[8] *Halloran v Bhan*, unpublished opinion per curiam of the Court of Appeals, issued March 8, 2002 (Docket No. 224548), unpub op at p 2; *id*. at 1-2 (HOEKSTRA, J., dissenting). The majority concluded that "[b]ecause there is no board certification for critical care medicine, the last sentence of § 2169(1)(a) does not apply to the present case." *Id*. (opinion of the Court) at 4. The majority therefore held that the requirement for specialized expert testimony

[8] While this Court and the Supreme Court have often used the term "subspecialty," it is worth noting that the term is never used in the statute, and it may be that the use of this nonstatutory term underlies some of the analytical challenges.

did not apply at all. The dissent agreed that critical care medicine is a not a specialty, but concluded that the defendant's internal medicine board certification meant that witnesses for or against him had to be board certified in internal medicine. *Id*. at 1 (HOEKSTRA, J., dissenting). The Supreme Court essentially adopted the analysis of the dissenting Court of Appeals judge, noting that "[t]he parties do not dispute that the subspecialty certification is not 'board certification' for the purpose of the statute." *Halloran*, 470 Mich at 575. Accordingly, *Halloran* concluded that the defendant's only specialty was internal medicine and that the plaintiff's expert, whose only specialty was anesthesiology, could not testify at trial regarding the standard of care.

Had *Halloran* been the last word on the question, we would agree with defendants that plaintiff's counsel could not have concluded that geriatric medicine is a specialty and that both defendants' and plaintiff's affiants are board-certified specialists in that field. However, *Halloran* was not the last word. In 2006, the Supreme Court decided *Woodard* along with its companion case, *Hamilton v Kuligowski*.

Woodard substantially changed the landscape in terms of what constitutes a specialty for purposes of MCL 600.2169(1)(a) and the way in which certificates of added qualification are to be construed.

First, *Woodard* held that "a certificate of special qualifications . . . constitutes a board certificate." *Woodard*, 476 Mich at 565. Thus, contrary to the parties' agreement in *Halloran*, a certificate of special or added qualification constitutes a "board certification."

Second, *Woodard* held that "a 'specialist' is somebody who can potentially become board certified. . . . Accordingly, if the defendant physician practices a

particular branch of medicine or surgery in which one can potentially become board certified, the plaintiff's expert must practice or teach the same particular branch of medicine or surgery." *Id*. at 561-562. Therefore, if a defendant has the training and experience necessary to qualify for a certificate of special qualification, the defendant is a specialist in that field. Putting it more directly, the Court held that "[a] subspecialty, although a more particularized specialty, is nevertheless a specialty." *Id*. at 562.

Third, *Woodard* held that when a defendant has multiple specialties, a testifying expert must only "match the one most relevant standard of practice or care—the specialty engaged in by the defendant physician during the course of the alleged malpractice, and, if the defendant physician is board certified in that specialty, the plaintiff's expert must also be board certified in that specialty." *Id*. at 560.

To put it in the form of a syllogism, *Woodard* tells us that:

(a) A certificate of special qualification is a board certification.

(b) Therefore, a certificate of special qualification in geriatric medicine is a board certification in geriatric medicine.

(c) Because board certification in geriatric medicine is available to physicians with the necessary training and experience, geriatric medicine is a specialty.

(d) If Dr. Selznick, who is board certified in both family medicine and geriatric medicine, was practicing geriatric medicine at the time this case arose, then the "one most relevant specialty" is geriatric medicine and it is that one specialty that plaintiff's expert must match.

(e) Both Dr. Selznick and plaintiff's expert affiant are board certified in the one most relevant specialty, i.e., geriatric medicine.

Having laid out this reasoning, we still decline to reach the question whether Dr. Compton may testify at trial regarding standard of care. *Halloran* has not been explicitly overruled, and we leave it to the Supreme Court to determine whether and to what extent *Woodard* did so.[9]

Moreover, *Woodard* presents a somewhat different factual situation from that in the present case. In that case, the Court concluded that a physician who is board certified in pediatrics may not testify regarding a physician who is board certified in pediatrics and also has a certificate of added qualification in pediatric critical care when the action arises in the context of care in a pediatric special care unit. *Id*. at 575-577. In the companion case, *Hamilton*, the Court held that an expert who was board certified in internal medicine and had a certificate of special qualifications in infectious disease (and spent more than 50% of his time treating infectious diseases) could not testify against a physician who was also board certified in internal medicine when the action arose in the context of "ordinary" internal medicine. *Id*. at 577-578. Neither of those cases involved the precise circumstances we are presented with here—where both doctors are board certified in geriatrics and the relevant area of practice is geriatrics, but their geriatric certifications were issued by different boards.[10]

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[9] The *Woodard* majority made little reference to *Halloran*, citing it only twice—once in reference to the de novo standard of review for statutory interpretation questions, and once for the principle that if the defendant is board certified in the relevant specialty, the expert must also be board certified in it. *Woodard*, 476 Mich at 557, 562-563.

[10] The problem is further complicated by the fact that another recognized certifying body, the American Board of Physician Specialties,

We conclude that plaintiff's affidavit of merit regarding Dr. Selznick satisfied MCL 600.2912d. Our holding is limited, however, to that statute and the sufficiency of the affidavit of merit. We do not reach the question whether this expert may ultimately offer standard of care testimony at trial under MCL 600.2169 and respectfully suggest that the Supreme Court address this broader and more significant issue in an appropriate case.

For the same reason, we also deny BCC's motion to dismiss the claims against it based on allegations of physician malpractice. Indeed, the outcome is even more clear with regard to BCC, given that BCC's relevant affidavit of meritorious defense was signed by a physician who possessed only an internal medicine board certification, and no certification in either geriatric or family medicine. While plaintiff cannot have relied on this subsequently filed affidavit, the fact that BCC's counsel, who had access to greater information, concluded that a family medicine specialist was not required suggests that plaintiff's counsel's belief that Dr. Compton was a qualified affiant was reasonable.

IV. CONCLUSION

For the reasons discussed herein, the affidavits of merit filed by plaintiff's counsel complied with MCL 600.2912d. Accordingly, we reverse and remand for

certifies doctors in geriatric medicine directly rather than as a certificate of additional qualification. Geriatrics is recognized as a specialty by several certifying entities. The American Board of Physician Specialties lists geriatric medicine as a fully separate specialty. See American Board of Physician Specialties, *Geriatric Medicine* <http://www.abpsus.org/geriatric-medicine> (accessed March 23, 2015) [http://perma.cc/DE3N-WHEJ]. And, as the Supreme Court noted in *Woodard*, 476 Mich at 565, "nothing in § 2169(1)(a) limits the meaning of board certificate to certificates . . . recognized by the American Board of Medical Specialties or . . . the American Osteopathic Association." The statute contains no requirement that the physician-certifying organizations be identical.

further proceedings consistent with this opinion. We do not retain jurisdiction.

SHAPIRO, J., concurred with FORT HOOD, J.

DONOFRIO, P.J. (*concurring in part and dissenting in part*). I concur with the result reached by the majority with respect to the reversal of the grant of summary disposition on plaintiff's nursing malpractice claim. But because plaintiff's attorney could not have held a reasonable belief that his expert matched the necessary qualifications to render testimony on the standard of care with respect to defendant Dr. Thomas Selznick, I would affirm the grant of summary disposition on the physician malpractice claims.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Allen v Bloomfield Hills Sch Dist*, 281 Mich App 49, 52; 760 NW2d 811 (2008). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Weisman v U S Blades, Inc*, 217 Mich App 565, 566; 552 NW2d 484 (1996). When deciding a motion for summary disposition under this subrule, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence then filed in the action or submitted by the parties in a light most favorable to the nonmoving party. MCR 2.116(G)(5); *Wilson v Alpena Co Rd Comm*, 474 Mich 161, 166; 713 NW2d 717 (2006). The motion is properly granted if the evidence fails to establish a genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Michalski v Bar-Levav*, 463 Mich 723, 730; 625 NW2d 754 (2001).

Additionally, questions of statutory interpretation and court rule interpretation also are reviewed de novo. *Ligons v Crittenton Hosp*, 490 Mich 61, 70; 803 NW2d

271 (2011). Further, whether a plaintiff's affidavit of merit complied with the requirements of MCL 600.2912d is reviewed de novo as a question of law. *Lucas v Awaad*, 299 Mich App 345, 377; 830 NW2d 141 (2013).

I. NURSING MALPRACTICE CLAIM

I concur with the majority that the trial court erred by granting summary disposition with respect to the nursing malpractice claim. But because this issue can be decided solely on the basis of defendant Botsford Continuing Care (BCC) not supporting its motion for summary disposition with documentary evidence, I do not join in the majority's discussion related to whether plaintiff's counsel held a reasonable belief that a registered nurse can provide testimony on the standard of care for a licensed practical nurse.

When moving for summary disposition under MCR 2.116(C)(10), " '[t]he moving party must support its position with affidavits, depositions, admissions, or other documentary evidence.' " *Karaus v Bank of New York Mellon*, 300 Mich App 9, 17; 831 NW2d 897 (2013), quoting *St Clair Med, PC v Borgiel*, 270 Mich App 260, 264; 715 NW2d 914 (2006). As described by the majority, BCC's sole piece of evidence on who reinserted the PEG tube was a largely indecipherable nursing log. The "LPN" notation in the nursing notes, which BCC relies on, was not written where the log states that the PEG tube was replaced. And the signature after the notation "peg tube replaced", in fact, did not have an "LPN" notation.[1] Looking at these notes in a light most favorable to the nonmoving

[1] Plus, the signature does not resemble the signature earlier where the "LPN" notation is located.

party, *Wilson*, 474 Mich at 166, there is a question of fact regarding whether an RN or an LPN reinserted the PEG tube, and summary disposition was not appropriate.

Moreover, with the sheer lack of information available to plaintiff's counsel when the affidavit was prepared, one cannot conclude that counsel acted unreasonably in thinking that an RN was the one who replaced the PEG tube. This is true especially when considering that the person who signed the notation, "peg tube replaced," was not the same person who signed earlier with the "LPN" designation.

Consequently, the trial court erred by granting BCC's motion to dismiss this claim. Because the issue is resolved on the two bases I describe, I do not join the discussion that the majority engages in related to whether plaintiff's attorney's legal conclusion that an RN may offer testimony on the standard of care for an LPN was reasonable. See *Dessart v Burak*, 252 Mich App 490, 496 n 5; 652 NW2d 669 (2002) (stating that obiter dictum is a judicial comment that is not necessary to the decision and is not precedential).

II. PHYSICIAN MALPRACTICE CLAIMS

Because I do not believe that plaintiff's attorney's belief was reasonable with respect to Dr. Gregory A. Compton possessing the relevant board certifications, I respectfully disagree with the majority's holding regarding the sufficiency of that affidavit. Accordingly, I would affirm the trial court's grant of summary disposition on the physician malpractice claims.

"MCL 600.2912d(1) provides that the plaintiff in a medical malpractice action must file with the complaint 'an affidavit of merit signed by a health professional who the plaintiff's attorney reasonably believes

meets the requirements of an expert witness under [MCL 600.2169].' " *Lucas*, 299 Mich App at 377 (alteration in original). MCL 600.2169(1), in turn, provides the following:

> In an action alleging medical malpractice, a person shall not give expert testimony on the appropriate standard of practice or care unless the person is licensed as a health professional in this state or another state and meets the following criteria:
>
> (a) If the party against whom or on whose behalf the testimony is offered is a specialist, specializes at the time of the occurrence that is the basis for the action in the same specialty as the party against whom or on whose behalf the testimony is offered. However, if the party against whom or on whose behalf the testimony is offered is a specialist who is board certified, the expert witness must be a specialist who is board certified in that specialty.

Our Supreme Court's holdings in *Halloran v Bhan*, 470 Mich 572; 683 NW2d 129 (2004), and *Woodard v Custer*, 476 Mich 545; 719 NW2d 842 (2006), require an expert witness testifying regarding the standard of care to possess the same one relevant specialty as possessed by the defendant. In *Halloran*, the facts were very similar to the facts in the present case. In *Halloran*, the question was whether a physician who was board certified in anesthesiology and had a certificate of added qualification in critical care medicine could testify against the defendant, who was board certified in internal medicine and had a certificate of added qualification in critical care medicine. Hence, at first blush, as in our case, the two physicians in *Halloran* shared subspecialties but not specialties.[2] The Supreme Court held that the proposed witness

[2] As discussed later in this opinion, however, in fact the physicians at issue in this case do not even share the same subspecialties.

could not testify regarding the standard of care. *Halloran*, 470 Mich at 578-579. The Court reasoned that because the physicians did not share the same board certification, the expert could not testify at trial with respect to the standard of care. *Id*. at 579.

Two years later, the Supreme Court decided *Woodard*. In *Woodard*, the Supreme Court held that the plaintiff's proposed witness, who was board certified in pediatrics, could not testify on the standard of care against the defendant, who was board certified in pediatrics but also possessed a certificate of special qualification in pediatric critical care medicine. *Woodard*, 476 Mich at 554, 577. The Court explained that "a subspecialty is a specialty within the meaning of § 2169(1)(a)." *Id*. at 566 n 12. This is the first time this legal conclusion was enunciated because in *Halloran*, 470 Mich at 575, the Court apparently accepted the parties' position that a subspecialty certification did not qualify as a "board certification" under the statute. Therefore, contrary to *Halloran*, "if a defendant physician has received a certificate of special qualifications, the plaintiff's expert witness must have obtained *the same* certificate of special qualifications in order to be qualified to testify under § 2169(1)(a)." *Woodard*, 476 Mich at 565 (emphasis added).

By ruling that Dr. Compton and Dr. Selznick were both "board certified in the one most relevant specialty, i.e., geriatric medicine," the majority is making an error. Dr. Compton was board certified in internal medicine and possessed a certificate of added qualification in geriatrics. Dr. Selznick was board certified in family medicine and had a certificate of added qualification in geriatrics. But just because their board certifications in their subspecialties shared the common word "geriat-

rics," it does not mean that those certifications are equivalent.[3]

As the Supreme Court in *Woodard* explained, "[A] 'subspecialty' is a particular branch of medicine or surgery in which one can potentially become board certified that *falls under a specialty or within the hierarchy of that specialty*. A subspecialty, although *a more particularized specialty*, is nevertheless a specialty." *Id*. at 562 (emphasis added). Thus, because subspecialties "fall[] under" a particular specialty or are "within the hierarchy" of a particular specialty, it is clear that subspecialties cannot be divorced from their parent specialties. In other words, it is technically inaccurate to simply state that a doctor possesses a subspecialty board certification in "geriatrics." Instead, that doctor possesses a subspecialty board certification in "geriatrics in the field of family medicine." Hence, Dr. Compton's board certification of "geriatrics in the field of internal medicine" is not the same as Dr. Selznick's board certification of "geriatrics in the field of family medicine."[4] As a result, under

[3] The majority claims that "Dr. Selznick now asserts that his only specialty is in family medicine and that he is not a specialist in geriatric medicine." The basis for this claim is unknown because Dr. Selznick clearly states in his brief on appeal, as he does on his web page, that he is board certified in family medicine with an "added qualification in Geriatrics." Likewise, Dr. Selznick never asserted that his certificate of added qualification in geriatrics was not the equivalent of a board certification. Indeed, he admits that the certificate of added qualification was issued by the American Osteopathic Board of Family Medicine, i.e., it was a board certification.

[4] If the majority's view were correct, then, regardless of how dissimilar the parent specialties were, a doctor could testify against a defendant as long as their subspecialties shared the same name or label. Hypothetically speaking, if the American Board of Dermatology created a subspecialty of "Geriatrics" (it does not currently exist), then a dermatologist who was certified in that subspecialty could testify against defendant because the subspecialties are the "same." I do not

MCL 600.2169(1)(a), Dr. Compton was not qualified to testify to the standard of care at trial against Dr. Selznick. See *id*. at 565.

However, that is not the end of the analysis because MCL 600.2912d(1) only requires that a plaintiff's attorney "reasonably believes" that an expert who writes an affidavit of merit meets the requirements for an expert witness. *Grossman v Brown*, 470 Mich 593, 598-599; 685 NW2d 198 (2004). This is a lesser standard than is required to have that expert testify at trial. *Id*. at 599. In determining the reasonableness of plaintiff's attorney's belief, a court must look to the resources available to the attorney at the time the affidavit of merit was prepared. See *id*. at 599-600.

In his response to defendant's motion for summary disposition, plaintiff's counsel argued that his belief was reasonable based on a review of Dr. Selznick's employer's website. As the majority notes, the preamble or introductory text on the web page states in general terms that Dr. Selznick was "Board Certified in Family Practice, Geriatrics and Medical Directorship of Long Term Care Facilities." However, lower on that same web page, it provides a heading in bold type, called "Board Certifications," and under that heading is a list of the specific board certifications Dr. Selznick possessed and the years he acquired them. Relevant to this discussion, it lists "AOBFP: 1991" and "AOBFP — CAQ Geriatrics: 1992." Thus, while the general text on the web page did not make it clear that the geriatrics certification was actually a subspecialty of family medicine, the notation "CAQ", which stands for "cer-

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believe that is what the statute permits. Although the discrepancy in the instant case (family medicine versus internal medicine) is not as stark as the difference in the dermatologist example, the difference is still fatal because the statute requires that there be no difference. See *Woodard*, 476 Mich at 562.

tificate of added qualification," makes clear that this certification was in relation to a narrower *subspecialty*.[5] See *Woodard*, 476 Mich at 562. Therefore, with AOBFP standing for the American Osteopathic Board of Family Physicians, it is clear that Dr. Selznick's board certification was in family medicine and that he also possessed a certification in the *subspecialty* of geriatrics *in the field of family medicine*. Accordingly, I would conclude that, looking at the website as a whole, it is apparent that plaintiff's attorney needed an expert who was board certified in geriatrics in the field of family medicine. As a result, I do not believe that plaintiff's counsel held a reasonable belief that Dr. Compton, who was known to be board certified in geriatrics in the field of internal medicine, matched Dr. Selznick's relevant board certification of geriatrics in the field of family medicine. Therefore, although the trial court never addressed the "reasonably believes" aspect of this issue, I would conclude that the trial court's ruling was correct, albeit with an incomplete analysis. See *Gleason v Dep't of Transp*, 256 Mich App 1, 3; 662 NW2d 822 (2003) ("A trial court's ruling may be upheld on appeal where the right result issued, albeit for the wrong reason.").

To the extent that plaintiff and the majority rely on the fact that defendants similarly provided the wrong expert when they later supplied their affidavit of meritorious defense, this fact is irrelevant. Defense counsel's later unreasonableness cannot transform plaintiff's counsel's prior unreasonableness into being reasonable. In more familiar terms, "Two wrongs do not make a right." And more importantly, plaintiff's counsel did not have access to defendants' affidavit of

[5] At oral argument, plaintiff even conceded that a certificate of added qualification is synonymous with a *sub*specialty.

meritorious defense at the time the affidavit of merit was filed, so any reliance on that later-issued affidavit is misplaced. See *Grossman*, 470 Mich at 599-600.[6]

III. AMENDMENT OF AFFIDAVITS

Plaintiff also contends that, even if any affidavit of merit were defective, she should be allowed to "amend" it by submitting a new one signed by the appropriately credentialed professional. The majority did not need to address this issue because it was moot given their resolution of the case. However, because I would conclude that Dr. Compton's affidavit of merit was deficient, I will briefly address the issue.

MCR 2.112(L)(2)(b) provides that "[a]n affidavit of merit . . . may be amended in accordance with the terms and conditions set forth in MCR 2.118 and MCL 600.2301." MCR 2.118(A)(2) provides that "a party may amend a pleading *only by leave of the court* or by written consent of the adverse party." (Emphasis added.) While an affidavit of merit is not a "pleading" under MCR 2.110(A), MCR 2.112(L)(2)(b), taken together with MCR 2.118(D), allows an affidavit of merit to be amended, and that amendment relates back to the date of the original filing of the affidavit.

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[6] I also note that the majority's reliance on the supposed lack of any responses to plaintiff's notice of intent is not persuasive. First, because the notice of intent and the responses are all conducted before a complaint is filed, they are not filed in the lower court, and without any affidavits on this topic, it is impossible to discern exactly what was sent and received. Second, to the extent that the majority asserts that plaintiff received *nothing* in response to her notice of intent, this is not entirely accurate. A letter was issued in direct response to the notice of intent that stated that Dr. Selznick could not be liable because he "did not provide care to Mr. Jones." Even assuming arguendo that the response may not have met all of the statutory requirements of MCL 600.2912b(7)(a) through (d), it was nonetheless a communication received in response to the notice of intent.

Plaintiff alleges that the trial court erred by failing to even address this issue. However, any failure by the trial court to address amendment was reasonable because it appears that plaintiff never took the trial court up on its offer to pursue that remedy. A review of the lower court record reveals no motion by plaintiff to amend the affidavit. At best, in her response to defendants' motions for summary disposition, plaintiff cited the law that allows affidavits of merit to be amended, but she *never actually moved the trial court to permit amendment*. At the hearing on defendants' motions for summary disposition, the following exchange illustrates how the trial court allowed plaintiff to take any further action she deemed prudent:

> *The Court*: Okay. So the Court is going to grant defendant's motion for Summary Disposition pursuant to [MCR 2.116(C)(10)] as to all claims against Defendant Selznick, Livonia Family Physicians, and Botsford Continuing Care Corporation.
>
> The affidavit of merit was signed by a doctor who does not have the same general board certification as Doctor Selznick, which is contrary to statute. The affidavit of merit regarding the licensed practical nurse was signed by a registered nurse and is also inappropriate. Therefore, based upon the defective affidavits of merit, the motion is granted.
>
> I'm gonna decline to accept [defendants'] oral amendment to include [MCR 2.116(C)(7)] on this matter, so *I'm not gonna grant you a final judgment.*[7] [*Plaintiff's counsel*] *says he has further plans and I'm gonna allow him to pursue those.*

* * *

[7] While the court intended to not issue a "final judgment," this is precisely what it did when it dismissed all the claims. MCR 7.202(6)(a)(i). It appears that the trial court really was attempting to dismiss the claims without prejudice.

[*Plaintiff's Counsel*]: So, I mean, do we — can we still amend then, do we still —

The Court: You're the lawyer.

[*Plaintiff's Counsel*]: Okay.

The Court: Okay.

[*Plaintiff's Counsel*]: All right.

The Court: You know. *I'm not gonna tell you what you should or shouldn't do and I don't know the merits of what you have planned, but I've left it open for you to do so.* [Emphasis added.]

Even after the trial court left the door "open" for plaintiff to take further action, no motion to amend was ever filed with the court. All the record shows is that plaintiff moved for reconsideration and after that motion was denied, she eventually filed a new complaint (presumably with the proper affidavits attached). With the trial court never precluding plaintiff from seeking to amend the affidavits in the original action, I perceive no error for this Court to correct.

Moreover, I openly question whether plaintiff's current desire to *substitute* the prior affidavits of merit with entirely new ones signed by different affiants qualifies as *amending* the prior affidavits. "Amendment" is defined in relevant part as "a change made by correction, addition, or deletion." *Random House Webster's College Dictionary* (2001). Here, there are no "changes" being made to the prior affidavits, let alone any "corrections," "additions," or "deletions." Instead, plaintiff's goal is to entirely replace the prior affidavits with new ones signed by new affiants. On the other hand, if an "amended" affidavit was signed by the same affiant with only changes to what the affiant was averring, then it would properly be considered an "amendment." Therefore, even if plaintiff had moved to

amend, I do not believe that this type of wholesale substitution would qualify as an "amendment" under the applicable court rules.

IV. CONCLUSION

Accordingly, I agree that the trial court erred by dismissing the nursing malpractice claim, but I would affirm the trial court's dismissal related to the physician malpractice claim because plaintiff's attorney did not possess a reasonable belief that Dr. Compton met the requirements for an expert witness, rendering detective the affidavit of merit related to physician malpractice.

WEINGARTZ SUPPLY COMPANY v SALSCO INC

Docket No. 317758. Submitted January 14, 2015, at Detroit. Decided April 9, 2015, at 9:00 a.m.

Weingartz Supply Company, a retailer that sells grounds-maintenance equipment, brought an action in the Oakland Circuit Court against Salsco Inc., a manufacturer of grounds-maintenance equipment. Weingartz sold Salsco equipment in its stores from 2006 to 2011. In the summer of 2011, Weingartz informed Salsco by telephone that it would no longer sell Salsco products and that it wanted to return its Salsco inventory. Weingartz e-mailed Salsco a list documenting the remaining inventory in its possession on August 26, 2011. Salsco responded by e-mail, informing Weingartz that it would not accept the return of the inventory. On September 12, 2012, Weingartz sent Salsco a notarized letter that listed the undamaged inventory and parts still possessed by Weingartz, invited Salsco to inspect the listed items, and notified Salsco that Weingartz had appointed a title agency to serve as an escrow agent for funds related to the exchange of the inventory. Weingartz filed its complaint in November 2012, alleging that Salsco had violated the Farm and Utility Equipment Act (FUEA), MCL 445.1451 *et seq*., by refusing to repurchase the unsold inventory. Both parties moved for summary disposition. The court, Leo Bowman, J., initially denied those motions, but it granted Salsco's subsequent motion for reconsideration and dismissed the case against Salsco. The court ruled that Weingartz was not entitled to rely on the FUEA because it had failed to send its notice of termination to Salsco by certified mail. Weingartz appealed.

The Court of Appeals *held*:

The FUEA governs the repurchase of farm and utility tractors and equipment. The law attempts to balance the bargaining power of equipment dealers and manufacturers by regulating certain terms of the contracts between dealers and manufacturers. To this end, the FUEA provides dealers of equipment with certain rights and remedies against the suppliers of that equipment. Under MCL 445.1453, if a dealer enters into an agree-

ment with a supplier and the agreement is later terminated, the supplier must repurchase any inventory of the dealer as provided in the act. MCL 445.1454(5) specifies that with or without the prior consent or authorization of a supplier, a dealer may ship all inventory suitable for repurchase to the supplier, not less than 60 days after the supplier has notified the dealer, or the dealer has notified the supplier by certified mail, that the agreement between them has been terminated. In this case, Weingartz terminated its agreement with Salsco by phone and e-mail. It did not send any documents to Salsco by certified mail. Accordingly, Weingartz failed to comply with the plain language of MCL 445.1454(5), because it did not terminate its agreement with Salsco by certified mail. Its failure to do so meant that it could not invoke any of the rights and remedies contained in the FUEA, which may only be invoked after termination of an agreement has occurred in the manner specified by the act. The trial court correctly granted summary disposition in favor of Salsco.

Affirmed.

ACTIONS — FARM AND UTILITY EQUIPMENT ACT — NOTICE OF TERMINATION — CERTIFIED MAIL.

MCL 445.1454(5) of the Farm and Utility Equipment Act specifies that with or without the prior consent or authorization of a supplier, a dealer may ship all inventory suitable for repurchase to the supplier, not less than 60 days after the supplier has notified the dealer, or the dealer has notified the supplier by certified mail, that the agreement between them has been terminated; if a party fails to terminate the agreement by certified mail, it may not invoke any of the rights and remedies contained in the act, which may only be invoked after termination of the agreement has occurred in the manner specified by the act.

The Troy Law Firm (by *Daniel E. Chapman* and *Kimberly A. Cochrane*) for Weingartz Supply Company.

Balberman & Associates (by *Nick Balberman* and *Grant Munson*) for Salsco Inc.

Before: MURRAY, P.J., and SAAD and K. F. KELLY, JJ.

SAAD, J. Plaintiff appeals the trial court's order that granted defendant summary disposition under MCR 2.116(C)(10).[1] For the reasons stated below, we affirm.

I. INTRODUCTION

This case requires us to interpret a section of an act that has not been fully interpreted in a published Michigan decision. The act involved, the Farm and Utility Equipment Act (FUEA), MCL 445.1451 *et seq*., regulates interactions between manufacturers and wholesalers (which the act labels "suppliers") that sell farm and utility equipment to other businesses, and businesses (which the act labels "dealers") that sell farm and utility equipment directly to consumers. The FUEA is designed to assist dealers of farm and utility equipment, and it provides certain rights and remedies dealers may invoke and use against suppliers. However, a dealer cannot invoke the rights and remedies provided by the FUEA unless its contractual relationship with its supplier has been terminated. Accordingly, this threshold matter—whether an agreement has been terminated—determines whether a dealer can seek a remedy against a supplier under the FUEA.

The question presented in this case relates to the *method* by which a dealer may terminate an agreement with a supplier, before it seeks a remedy under the FUEA: namely, whether the dealer must terminate its agreement with a supplier via certified mail. Plaintiff, a dealer of utility equipment, claims that the FUEA makes termination by certified mail optional, and that

[1] More precisely, the trial court granted defendant's motion for reconsideration on the court's earlier denial of defendant's motion for summary disposition—which had the effect of granting defendant summary disposition.

a dealer is able to terminate the agreement with its supplier in other ways and still invoke the remedies listed in the statute. Defendant, a supplier of utility equipment, argues that the FUEA requires a dealer to terminate an agreement by certified mail before it seeks a remedy under the FUEA.

Because the plain language of the FUEA explicitly mandates that a dealer must terminate its agreement with a supplier via certified mail before it can seek a remedy under the act, we reject plaintiff's argument and affirm the trial court's grant of summary disposition to defendant.

II. FACTS AND PROCEDURAL HISTORY

A. FACTUAL BACKGROUND

Plaintiff, Weingartz Supply Company (Weingartz), is a retail company that sells and services grounds-maintenance equipment. Defendant, Salsco, Inc. (Salsco), is a manufacturer that makes lawn rollers used to smooth and level terrain on golf courses.[2] In 2006, Weingartz contacted Salsco and ordered a number of rollers for its stores. The parties did business for the next five years, and Weingartz ordered a total of twenty rollers during the course of the relationship. Weingartz sold twelve of these rollers, and kept replacement parts for Salsco's rollers on hand for maintenance purposes.

However, the golf-products industry began to decline during the financial crisis, and Weingartz stopped selling golf-related equipment as a result. In the summer of 2011, one of Weingartz's major shareholders and employees called an employee of Salsco to inform

[2] Each roller costs approximately $10,000.

her that Weingartz would no longer sell Salsco's products, and that it wanted to return the inventory of those products it still possessed. The Salsco employee asked Weingartz to send her a copy of its inventory, which at the time included eight rollers (worth approximately $80,000) and replacement parts for the rollers (worth approximately $4,000 to $5,000).

Weingartz sent Salsco a list of this remaining inventory via e-mail on August 26, 2011. However, Salsco's president did not want to retake the inventory because he believed the products were outdated. Salsco told Weingartz it would refuse to accept return of the inventory in an e-mail dated August 29, 2011. After this exchange, Weingartz continued to hold the inventory, and unsuccessfully attempted to sell it to golf courses until the end of the golfing season in October 2011. At no time did Weingartz attempt to return the equipment to Salsco.

Over a year later, on September 12, 2012, Weingartz sent Salsco a notarized letter, which contained a number of very specific provisions. It listed the undamaged inventory and parts still possessed by Weingartz, invited Salsco to inspect the listed items, and noted that Weingartz purchased the products in the 30 months before August 26, 2011, when Weingartz terminated its business relationship with Salsco. The letter also notified Salsco that Weingartz had appointed a title agency to serve as an escrow agent for funds related to the exchange of the inventory, and included an escrow agreement to that effect. It is unclear if Salsco responded to Weingartz's letter, but Salsco did not take any further action to receive or retake the inventory, nor did Weingartz attempt to send the inventory to Salsco to transfer possession.

B. PROCEDURAL HISTORY

This action, which Weingartz initiated in November 2012, has a convoluted procedural history, and much of it is not relevant to this appeal. In its initial complaint, Weingartz alleged that Salsco violated the FUEA in August 2011, when Salsco refused to repurchase the unsold inventory of its products held by Weingartz.

Both parties eventually moved for summary disposition under MCR 2.116(C)(10). In its motion, Salsco asserted that Weingartz did not have a cause of action under the FUEA, because as a "dealer" of utility equipment that wished to terminate its contractual relationship with a "supplier" of utility equipment, the FUEA required Weingartz to send Salsco a termination notice via certified mail. Salsco observed that Weingartz admitted it had never sent Salsco any documents via certified mail, and argued that as a result of its noncompliance with the mandatory provisions of the FUEA, Weingartz's claim lacked merit. Weingartz disputed Salsco's reading of the FUEA and claimed that (1) the act permits, but does not require, a dealer to terminate a business relationship with a supplier via certified mail and (2) its September 2012 letter to Salsco followed the mandates of the FUEA and successfully invoked its rights under the act, which Salsco violated when it refused to repurchase the remaining inventory of rollers and spare parts.

In August 2013, the trial court held that Weingartz failed to follow the mandates of the FUEA because it did not send Salsco a termination notice via certified mail. Accordingly, the court granted Salsco's motion for summary disposition. On appeal, Weingartz asks us to reverse the trial court's order and grant summary

disposition,[3] and it makes the same arguments in favor of summary disposition as it did in the trial court.

III. STANDARD OF REVIEW

A trial court's decision to grant or deny summary disposition is reviewed de novo. *MEEMIC Ins Co v DTE Energy Co*, 292 Mich App 278, 280; 807 NW2d 407 (2011). "A summary disposition 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." *Id*. When it decides whether to grant a summary disposition motion, "a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence in the light most favorable to the opposing party." *Id*.

IV. ANALYSIS

A. STANDARDS OF STATUTORY INTERPRETATION

When it interprets a statute, a court's goal "is to give effect to the Legislature's intent" through focus "on the statute's plain language." *Madugula v Taub*, 496 Mich 685, 696; 853 NW2d 75 (2014) (quotation marks and citation omitted). The court must "examine the statute as a whole, reading individual words and phrases in the context of the entire legislative scheme." *Id*. If the language of a statute is unambiguous, it must be enforced as written. *Fellows v Mich Comm for the Blind*, 305 Mich App 289, 297; 854 NW2d 482 (2014). It must be assumed that the Legislature had full knowledge of the provisions it enacted, and a court has no right to enter the legislative field and, upon assumption

[3] See note 1 of this opinion.

of unintentional omission, supply what it may think might well have been incorporated. *Johnson v Recca*, 492 Mich 169, 187; 821 NW2d 520 (2012).

B. THE FARM UTILITY AND EQUIPMENT ACT

The Legislature enacted the FUEA in 1984 to govern "the repurchase of farm tractors and equipment and utility tractors and equipment . . . ." 1984 PA 341, title. Though the Legislature did not explain its rationale for enacting the FUEA in the act itself, the law "appears to be an attempt to balance the bargaining power of farm equipment dealers, usually small businesses, against that of manufacturers, typically large corporations, by regulating the terms of contracts between dealers and manufacturers." *Cloverdale Equip Co v Manitowoc Engineering Co*, unpublished opinion of the United States Court of Appeals for the Sixth Circuit, issued July 1, 1998 (Docket No. 97-1664), p 4; 149 F3d 1182 (Table).[4] To this end, the FUEA provides "dealers"[5] of "equipment"[6] with certain rights and remedies against

[4] Although a decision of a lower federal court that interprets Michigan law is not binding, such a decision may be persuasive. *Adams v Adams (On Reconsideration)*, 276 Mich App 704, 715-716; 742 NW2d 399 (2007).

[5] MCL 445.1452(c) defines "dealer" to mean "a person engaged in the business of the retail sale of farm tractors and equipment, utility tractors and equipment, or the attachments to or repair parts for that equipment. Dealer includes retail dealers, wholesalers, and distributors that obtain inventory from another person for resale." In turn, MCL 445.1452(h) defines "person" as "a sole proprietorship, partnership, corporation, or any other form of business organization."

[6] MCL 445.1452(d) defines "equipment" as "motorized machines designed for or adapted and used for agriculture, horticulture, livestock raising, forestry, grounds maintenance, lawn and garden, construction, materials handling, and earth moving." The rollers at issue are "motorized machines designed for or adapted and used for . . . grounds maintenance," which makes them "equipment" under the FUEA.

the "suppliers"[7] of that equipment, including (1) the right to have excess "inventory"[8] repurchased by the supplier (MCL 445.1453); (2) the ability to use the FUEA as a set of baseline terms in contract negotiations with suppliers (MCL 445.1455); and (3) the right to seek a remedy against a supplier who does not comply with the terms of the broader FUEA (MCL 445.1457).

The key substantive right contained in the FUEA—the right of a dealer to have its inventory repurchased by its supplier under the conditions enumerated in the statute—begins with MCL 445.1453, which provides:

> If a dealer enters into an agreement[9] with a supplier and the agreement is subsequently terminated, the supplier shall repurchase any inventory of the dealer as provided in this act. The dealer may choose to keep the inventory if there exists a contractual right to do so.

Accordingly, for a supplier to be required to repurchase inventory under the FUEA, the business agreement between the dealer and the supplier must be

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[7] A "supplier" is "a manufacturer, wholesaler, or distributor of farm and utility tractors and farm and utility equipment, or the attachments to or repair parts for that equipment." MCL 445.1452(i).

[8] "Inventory" means "farm tractors, utility tractors, equipment, and accessories for attachments to and repair parts for those tractors and that equipment." MCL 445.1452(f). The lawn rollers at issue are included in the definition of "inventory" by virtue of the fact that they are "equipment" under MCL 445.1452(d). See note 6 of this opinion.

[9] MCL 445.1452(e) defines "agreement" to mean "a written, oral, or implied contract, sales agreement, security agreement, or franchise agreement between a supplier and a dealer by which the dealer is authorized to engage in the business of the retail sale and service, wholesale sale and service, or the distribution of tractors and equipment as an authorized outlet of the supplier or in accordance with methods and procedures provided for or prescribed by the supplier." Here, the parties had an "agreement" for the sale and purchase of lawn rollers, which Weingartz terminated in August 2011.

terminated. The FUEA mandates that termination of an agreement must be effected by one of the methods specified in MCL 445.1454 (if the termination is effected by a dealer) or MCL 445.1457a (if the termination is effected by a supplier). In relevant part, MCL 445.1454 states:

> With or without the prior consent or authorization of a supplier, a dealer may ship all inventory suitable for repurchase to the supplier, not less than 60 days after the supplier has notified the dealer, *or the dealer has notified the supplier by certified mail*, that the agreement between them has been terminated. The supplier shall inspect a dealer's inventory within 30 days of termination of the agreement and designate portions of that inventory to be not returnable under this act. However, such a designation received by the dealer more than 30 days after the termination is not effective. [MCL 445.1454(5) (emphasis added).]

The plain language of the FUEA thus requires a dealer to terminate an agreement with a supplier in a single, specified way: a notice sent by "certified mail."[10] If such a termination occurs, MCL 445.1454 goes on to describe what sort of inventory the supplier is required to repurchase and the process by which a supplier must repurchase inventory. Regardless of which party terminates the contract, termination triggers the beginning of a 60-day holding period, after which a dealer may return the inventory to the supplier for inspection and possible repurchase. MCL 445.1454(5).

In the event that a supplier refuses to accept the returned inventory, MCL 445.1454(7) and (8) provide contingency actions the dealer may take to ensure that

[10] This is not to say that the FUEA prohibits a dealer from terminating a contract in any way the dealer chooses—it simply means that if a dealer wishes to invoke its rights or seek remedies under the FUEA, the dealer must terminate its agreement with a supplier by certified mail.

inventory valid for repurchase under the FUEA is actually repurchased by the supplier. If the supplier refuses to comply with any of the mandates described above, or if it categorically refuses to repurchase the equipment, MCL 445.1457 enables a dealer to bring suit against the supplier.

C. APPLICATION

Here, it is uncontested that, for purposes of the FUEA (1) Weingartz is a "dealer" of utility equipment, (2) Salsco is a "supplier" of utility equipment, (3) the lawn rollers are "equipment", and (4) Weingartz and Salsco had an "agreement" for Weingartz to purchase equipment from Salsco from 2006 to 2011. It is also undisputed that Weingartz terminated the agreement with Salsco by phone and e-mail, and that Weingartz never sent any documents to Salsco via certified mail.

Accordingly, Weingartz failed to comply with the plain language of MCL 445.1454(5), because it did not terminate its agreement with Salsco via certified mail.[11] Its failure to do so means that it may not invoke

[11] Weingartz unconvincingly attempts to avoid the consequences of its failure to properly terminate its agreement with Salsco, by asserting that its September 2012 notarized letter to Salsco complied with MCL 445.1454(8) and thus enables it to demand remedies under the FUEA. As noted, MCL 445.1454(8) provides a contingency plan for dealers who have already attempted to return inventory to a supplier. It is only applicable after an agreement has been properly terminated—which, if the dealer terminates the agreement, must be accomplished by certified mail. MCL 445.1454(8) also states that, if a dealer chooses to use the contingency option it describes, the dealer must send the documents listed therein via certified mail ("[i]nstead of the return of the inventory to the supplier under the terms of [MCL 445.1454(7)], a dealer may notify a supplier by certified mail that the dealer has inventory that the dealer intends to return"). By its own admission, Weingartz never attempted to return inventory to Salsco, failed to terminate its agreement with Salsco by certified mail, and sent its September 2012

any of the rights and remedies contained in the FUEA, which may only be invoked after termination of an agreement has occurred in the manner specified by the act.[12]

Weingartz's protestations that such a result ignores the "broader purpose" of the FUEA—which, again, purportedly seeks "to balance the bargaining power of farm equipment dealers . . . against that of manufacturers"[13]—are irrelevant. Indeed, at the time this dispute arose, Weingartz may have had other remedies as options against Salsco that were unrelated to the FUEA.[14] But if it desired the very specific and attractive benefits afforded by the FUEA, Weingartz had to comply with the mandates of the statute, and it did not do so. The plain language of the FUEA states that the rights and remedies it provides can only be exercised upon termination of an agreement between a dealer and a supplier, and it explicitly mandates that a dealer must terminate the agreement by certified mail. Weingartz did not comply with this required procedure, and accordingly, its claim must fail.

The trial court therefore correctly granted summary disposition to Salsco under MCR 2.116(C)(10), and its order is affirmed.

MURRAY, P.J., and K. F. KELLY, J., concurred with SAAD, J.

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notarized letter to Salsco by regular, not certified mail. MCL 445.1454(8) is, therefore, completely inapplicable to the present case.

[12] We note that the FUEA, interestingly, contains no time limitation on when a dealer may terminate an agreement and seek to invoke its rights under the statute.

[13] *Cloverdale Equip*, unpub op at 4.

[14] We of course do not address such hypothetical contingencies.

GALIEN TOWNSHIP SCHOOL DISTRICT v DEPARTMENT OF EDUCATION (ON REMAND)

Docket No. 317739. Submitted February 27, 2015, at Lansing. Decided April 14, 2015, at 9:00 a.m.

The Galien Township School District appealed a final decision by the Department of Education and the Superintendent of Public Instruction to reduce the amount of state aid plaintiff received after an audit was unable to verify the enrollment of numerous students that plaintiff claimed had attended its alternative education program between 2008 and 2011. The audit was conducted after an anonymous source informed the department that plaintiff had overstated its pupil membership counts. After the department conducted a first review of the audit results at plaintiff's request, it reinstated some full-time equated students (FTEs) for purposes of calculating school aid, but after an additional level of review by the superintendent resulted in a final order denying plaintiff's request to restore most of the contested FTEs, plaintiff appealed in the Ingham Circuit Court. The court, Rosemarie E. Aquilina, J., granted plaintiff a declaratory judgment, ruling that defendants did not have the authority to audit plaintiff retroactively, overruling the superintendent's final decision, and ordering defendants to reinstate the wrongfully deducted FTEs and return the corresponding state aid. Defendants appealed. The Court of Appeals, SAAD, P.J., and OWENS and K. F. KELLY, JJ., vacated the order and remanded the matter for reinstatement of the superintendent's final decision. 306 Mich App 410 (2014). Plaintiffs sought leave to appeal in the Supreme Court, which, in lieu of granting leave to appeal, vacated the Court of Appeals' instruction to remand the case and remanded the case to the Court of Appeals to address plaintiff's alternative arguments for overturning the superintendent's decision. 497 Mich 951 (2015).

On remand, the Court of Appeals *held*:

1. Plaintiff was not denied its constitutional right to the due process of law by defendants' reduction of state aid. Plaintiff did have a property interest in receiving state aid by submitting certified attendance data for the years in issue; however, plaintiff

had notice and an opportunity to be heard before the aid amount was reduced. Although plaintiff was not aware of the specifics of the anonymous tip that gave rise to the audit, plaintiff had notice of the audit, the auditor did not accept the allegations in the tip as true, and plaintiff did not have a right to confront the source of the tip given that the proceeding was civil rather than criminal. Further, plaintiff did not establish that the auditor was biased. Any alleged deficiencies occurring during the first level of review would have been cured on appeal to the superintendent, where plaintiff was fully apprised of the details of the anonymous tip and the nature of the challenges to its claimed pupil membership counts and was given an ample opportunity to present its arguments and supporting documentation.

2. The superintendent's refusal to consider electronic attendance records did not violate the requirement of MCL 388.1614 that the department use the best evidence available to determine the facts on which the amount of a district's aid apportionment depend if the district's data are determined to be defective or incomplete. The electronic records proffered by plaintiff were not authenticated and were not contemporaneous with the events they purported to evidence, which called their reliability into question. Further, the superintendent's refusal to consider the electronic records did not preclude plaintiff from substantiating its claimed pupil membership counts. Plaintiff was able to provide other documentation, including disciplinary records, report cards, scholastic records, food service records, course work, course records, and transcripts, and the superintendent concluded that the verifiability of these records and the contemporaneous nature of their creation rendered them the best evidence available. In light of the questionable nature of the electronic records, plaintiff did not demonstrate that the proffered electronic records were the best evidence available or that the alternative records submitted by plaintiff were not an appropriate substitute.

Remanded to the circuit court for reinstatement of the superintendent's final decision.

SCHOOLS — STATE SCHOOL AID — CONSTITUTIONAL LAW — DUE PROCESS.

A school district creates a property interest in receiving an apportionment of state aid by submitting certified and audited attendance data in accordance with MCL 388.1701 (US Const, Am XIV; Const 1963, art 1, § 17).

Thrun Law Firm, PC (by *Margaret M. Hackett* and *Jennifer K. Johnston*), for plaintiff.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Travis Comstock*, Assistant Attorney General, for defendants.

ON REMAND

Before: SAAD, P.J., and OWENS and K. F. KELLY, JJ.

PER CURIAM. In lieu of granting leave to appeal our decision in *Galien Twp Sch Dist v Dep't of Ed*, 306 Mich App 410; 857 NW2d 659 (2014), the Supreme Court vacated our remand of the case to the Ingham Circuit Court for reinstatement of the Superintendent of Public Instruction's March 14, 2013 final decision and remanded the case for us "to expressly address plaintiff Galien Township School District's alternative arguments for overturning the Superintendent's decision," which we did not address during our initial review of the case. *Galien Twp Sch Dist v Dep't of Ed*, 497 Mich 951 (2015). Our Supreme Court denied leave to appeal in all other respects. *Id*. For the reasons discussed in this opinion, we reject Galien's alternative arguments for overturning the superintendent's decision, and we remand this matter to the circuit court for reinstatement of the superintendent's March 14, 2013 final decision.

Initially, we take this opportunity to correct a factual error in our previous opinion, in which we stated, "After plaintiffs admitted teacher misconduct in reporting student attendance, defendants claimed authority under the State School Aid Act (SSAA), MCL 388.1601 *et seq*., and audited prior years' attendance records." *Galien Twp Sch Dist*, 306 Mich App at 414. While plaintiff Delton-Kellogg Schools admitted staff misconduct in altering pupil membership counts, which led to its audit, Galien was audited following an

anonymous tip to the Michigan Department of Education (MDE) alleging that Galien intentionally overstated its pupil membership counts of alternative education students for September 2010 and February 2011. Galien did not acknowledge teacher misconduct in its reporting. Contrary to Galien's assertion, however, this factual error had no bearing on our analysis of the MDE's statutory authority to conduct a retroactive audit.

We now turn to Galien's alternative arguments for overturning the superintendent's decision. First, Galien asserts due process violations, arguing that Kathleen Weller, in her capacity as the director of the MDE's Office of Audits, failed to provide Galien with notice and an opportunity to be heard before deducting state aid, and was not an unbiased decision-maker.

Procedural due process requirements have been extended to administrative decisions. See, e.g., *Bundo v Walled Lake*, 395 Mich 679, 688, 695-696; 238 NW2d 154 (1976); *Hinky Dinky Supermarket, Inc v Dep't of Community Health*, 261 Mich App 604, 605-606; 683 NW2d 759 (2004). As this Court discussed in *Hinky Dinky Supermarket*,

> The United States and Michigan constitutions preclude the government from depriving a person of life, liberty, or property without due process of law. US Const, Am XIV; Const 1963, art 1, § 17. "A procedural due process analysis requires a dual inquiry: (1) whether a liberty or property interest exists which the state has interfered with, and (2) whether the procedures attendant upon the deprivation were constitutionally sufficient." *Jordan v Jarvis*, 200 Mich App 445, 448; 505 NW2d 279 (1993). [*Hinky Dinky Supermarket*, 261 Mich App at 605-606.]

Thus, procedural due process requirements apply only if there is a liberty or property interest at stake.

Id. at 606. See also *Livonia v Dep't of Social Servs*, 423 Mich 466, 507; 378 NW2d 402 (1985). MCL 388.1613 directs the MDE to pay school districts the apportioned state aid upon submission of certified and audited attendance data in accordance with MCL 388.1701. Although state aid is conditioned upon these eligibility requirements, a school district can reasonably assume that once the requirements are met, there is a great likelihood that they will receive the apportioned state aid each year, thereby creating a property interest. See *Bundo*, 395 Mich at 693, 695 (finding that "[a] holder of a liquor license in Michigan can reasonably assume . . . that there was a great likelihood that his license would be renewed" each year, thereby creating a property interest and entitling the license holder to procedural due process protections). Indeed, history would seem to indicate that, upon submission of certified and audited attendance data, school districts legitimately rely on the apportioned state aid in determining their yearly budgets. See *id*. at 690, 693 (discussing *Perry v Sindermann*, 408 US 593; 92 S Ct 2694; 33 L Ed 570 (1972), and noting that the United States Supreme Court found that the teachers in *Sindermann* had a property interest in reemployment because a quasi-tenure system had been created in practice on which the teachers had legitimately relied).

In this case, the parties stipulated certain facts, which included the fact that Galien had submitted certified attendance data for the years in issue, and following an audit by the Berrien Regional Education Service Agency (Berrien RESA), the MDE appropriated funds to Galien. Therefore, because Galien met the eligibility requirements for the years in issue and received the apportioned state aid, it is reasonable to assume that it legitimately relied on this state aid, thereby creating a property interest. Thus, the ques-

tion turns on whether Galien received constitutionally sufficient procedures. Galien contends it did not.

What constitutes "constitutionally sufficient" procedures has been defined by this Court as "notice of the nature of the proceedings, an opportunity to be heard in a meaningful time and manner, and an impartial decisionmaker. The opportunity to be heard does not mean a full trial-like proceeding, but it does require a hearing to allow a party the chance to know and respond to the evidence." *Cummings v Wayne Co*, 210 Mich App 249, 253; 533 NW2d 13 (1995) (citation omitted). See also *Hinky Dinky Supermarket*, 261 Mich App at 606. Galien specifically contends that it did not receive notice of the charges brought against it by the anonymous source and that Weller accepted those charges as true in deducting Galien's state aid without first providing Galien an opportunity to rebut those charges.

First, as the superintendent determined, there were no "charges" in this case. Rather, the MDE took "reasonable action" and ordered the Berrien RESA to conduct a field audit after it received a seemingly reliable anonymous tip alleging that Galien had intentionally overstated its pupil membership counts. The anonymous tip appeared to be premised on firsthand knowledge as it specifically identified students that should not have been included in Galien's September 2010 and February 2011 pupil membership counts. Galien was unable to provide the auditor with contemporaneously signed attendance records to support its claimed pupil membership counts for those periods, which led to additional audits for the 2008 to 2009 and 2009 to 2010 pupil membership counts and to the subsequent deductions in full-time equated students (FTEs).

Further, Galien's contention that Weller accepted the allegations in the anonymous tip as true in deducting state aid is refuted by the fact that Weller first ordered a field audit. Had Weller simply accepted the allegations as true, she could have forgone the initial field audit and deducted the FTEs. The FTE deductions did not result from the allegations of the anonymous source but rather from Galien's inability to provide contemporaneously signed attendance records to support its claimed pupil membership counts. Although Galien might not have been aware initially of the specifics of the anonymous tip, there is no indication that it lacked notice of the audits.

Galien also asserts, as part of its due process argument, that it was never permitted to confront the anonymous source, who it claims was an adverse material witness. However, this argument is without merit, as "[t]he Confrontation Clause does not apply to civil proceedings." *Hinky Dinky Supermarket*, 261 Mich App at 607, citing *In re Brock*, 442 Mich 101, 108; 499 NW2d 752 (1993).

Galien further contends that it was denied procedural due process because Weller was not an unbiased decision-maker. Due process requires an impartial decision-maker. *Hinky Dinky Supermarket*, 261 Mich App at 606; *Cummings*, 210 Mich App at 253. However, a showing of actual bias is not required to establish a due process violation. *Livonia*, 423 Mich at 509. Rather, "[i]f the situation is one in which 'experience teaches that the probability of actual bias on the part of a decisionmaker is too high to be constitutionally tolerable,' the decisionmaker must be disqualified." *Id*., quoting *Withrow v Larkin*, 421 US 35, 47; 95 S Ct 1456; 43 L Ed 2d 712 (1975). Although Galien does not expand on its argument, it appears to assert that

Weller was biased because she served as the investigator and decision-maker. Our Supreme Court has recognized that a risk of bias may be presented when the decision-maker "might have prejudged the case because of prior participation as an accuser, investigator, fact finder or initial decisionmaker." *Crampton v Dep't of State*, 395 Mich 347, 351; 235 NW2d 352 (1975). See also *Livonia*, 423 Mich at 509.

Weller was not the initial investigator or fact-finder, as she did not personally conduct the audits. Rather, it was Sonya Schultz with the Berrien RESA. Weller acted on a seemingly reliable tip when ordering Schultz to conduct the initial field audit for the September 2010 and February 2011 pupil membership counts. When Galien could not produce the contemporaneously signed attendance records for those counts, Weller ordered Schultz to conduct an audit of the 2008 to 2009 and 2009 to 2010 pupil membership counts. During her audits, Schultz determined that a significant number of FTEs should be deducted. However, in her first-level review, Weller actually reinstated some of the FTEs deducted by Schultz. Additionally, Weller did not preside as the fact-finder or decision-maker during the review hearing with the superintendent.

In sum, we conclude that Galien was not denied procedural due process. Any alleged deficiencies occurring during the first level of review would have been cured on appeal to the superintendent, where Galien was fully apprised of the details of the anonymous tip and the nature of the challenges to its claimed pupil membership counts and was given an ample opportunity to present its arguments and supporting documentation. See *Livonia*, 423 Mich at 505 (noting that "this Court must determine whether the parties had ad-

equate notice, opportunity to be heard, and review of an adverse decision").

Galien alternatively argues that the superintendent's refusal to consider electronic attendance records violated the best-evidence requirement of MCL 388.1614. We review a decision of an administrative agency to determine " 'whether the decision was contrary to law, was supported by competent, material, and substantial evidence on the whole record, was arbitrary or capricious, was clearly an abuse of discretion, or was otherwise affected by a substantial and material error of law.' " *Mackey v Dep't of Human Servs*, 289 Mich App 688, 697; 808 NW2d 484 (2010), quoting *Dignan v Mich Pub Sch Employees Retirement Bd*, 253 Mich App 571, 576; 659 NW2d 629 (2002). MCL 388.1614 provides:

> If the data from an intermediate district or district upon which a statement of the amount to be disbursed or paid are determined to be defective or incomplete, making it impracticable to ascertain the apportionment to be disbursed or paid, the department shall withhold the amount of the apportionment that cannot be ascertained until the department is able to ascertain by the best evidence available the facts upon which the ratio and amount of the apportionment depend, and then shall make the apportionment accordingly.

The Berrien RESA produced the proffered electronic records at the end of each school year. The superintendent noted that "[t]he records were not created on the attendance days in question, they were not signed by the teachers, and the data upon which they were based was not proven and could have been altered between the attendance dates in question and their creation." Acknowledging that electronic records could be considered if they were "sufficiently reliable," the superintendent determined that the proffered electronic records

"were inherently unreliable" because of the "delay in creation . . . and the opportunities for alteration of data at the district level prior to their creation at Berrien RESA[.]" Therefore, the superintendent concluded that the lack of reliability precluded the proffered electronic records from being considered the best evidence available.

We conclude that the superintendent did not err by determining that the electronic attendance records provided by Galien were not the best evidence available. Our Supreme Court has recognized that the common purpose of exclusionary rules, such as the best-evidence rule, is " 'the elucidation of the truth, a purpose which these rules seek to effect by operating to exclude evidence which is unreliable or which is calculated to prejudice or mislead.' " *Howe v Detroit Free Press, Inc*, 440 Mich 203, 210; 487 NW2d 374 (1992), quoting McCormick, Evidence (3d ed), § 72, pp 170-171.

In this case, the electronic records proffered by Galien were not authenticated and were not contemporaneous with the events they purported to evidence, which calls into question their reliability. Further, the superintendent's refusal to consider the proffered electronic records did not preclude Galien from substantiating its claimed pupil membership counts. Galien was able to provide other documentation, including disciplinary records, report cards, scholastic records, food service records, course work, course records, and transcripts. The superintendent concluded that the verifiability of these records and the contemporaneous nature of their creation rendered them the best evidence available. In light of the questionable nature of the electronic records, Galien has not demonstrated that the proffered electronic records were the best evidence

available or that the alternative records submitted by Galien were not an appropriate substitute.

Accordingly, we reject Galien's alternative arguments for overturning the superintendent's decision, and we remand this matter to the circuit court for reinstatement of the superintendent's March 14, 2013 final decision.

SAAD, P.J., and OWENS and K. F. KELLY, JJ., concurred.

PEOPLE v GREEN

Docket No. 321823. Submitted November 4, 2014, at Lansing. Decided February 26, 2015. Approved for publication April 14, 2015, at 9:05 a.m.

Gregory Grinius Green was charged in the Livingston Circuit Court with operating a motor vehicle while intoxicated causing another person serious impairment of a body function, MCL 257.625(5), and carrying a concealed weapon while having a blood alcohol content of .08 or more but less than .10 grams of alcohol per 100 milliliters of blood, MCL 28.425k(2)(b). Defendant moved to have the original sample of his blood retested by the same laboratory analyst at the Michigan State Police (MSP) Forensic Laboratory. The court, Michael P. Hatty, J., ordered the prosecution to retest defendant's original blood sample using the same analyst at the MSP laboratory. The prosecution appealed.

The Court of Appeals *held*:

The trial court abused its discretion when it ordered the prosecution to comply with defendant's request that the same MSP laboratory analyst who conducted the initial two chemical tests on defendant's blood retest the same sample of defendant's blood. Neither MCL 257.625a(6) nor MCR 6.201(A)(6) supports defendant's assertion that because he is entitled to have a person of his own choosing conduct an independent chemical test of his blood, he must be permitted to have the same analyst at the MSP laboratory retest the same sample of his blood that the analyst had already tested twice. The trial court was without authority to order the prosecution to conduct the retest; the court could only order that defendant be given a reasonable opportunity to have an independent test of his blood conducted. In addition, had the same MSP analyst conducted a third test of the same sample of defendant's blood, the test could hardly be considered an independent test.

Reversed and remanded.

MOTOR VEHICLES — OPERATING WHILE INTOXICATED — DEFENDANT'S RIGHT TO INDEPENDENT TEST OF BLOOD SAMPLE.

The prosecution may not be ordered to comply with a defendant's request that his or her previously tested blood sample be retested

at the Michigan State Police (MSP) Forensic Laboratory by the same analyst who conducted two earlier chemical tests of the blood; MCL 257.625a(6) grants a defendant a reasonable opportunity to have a person of his or her own choosing administer an independent chemical test of his or her blood sample, but a defendant's choice of person does not include an analyst at the MSP laboratory; a defendant's right to due process does not require the prosecution to test evidence as long as the prosecution does not operate in bad faith, suppress evidence, or engage in intentional misconduct; the prosecution does not have an affirmative duty to search for evidence to assist with a defendant's case; the prosecution is obligated only to disclose evidence that has been developed—it is not obligated to develop evidence at a defendant's behest.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *William J. Vailliencourt, Jr.*, Prosecuting Attorney, and *William M. Worden* and *Daniel W. Rose*, Assistant Prosecuting Attorneys, for the people.

Nichols Law Firm (by *Michael J. Nichols*), *Paul L. DeCocq*, and *Abood Law Firm* (by *Andrew P. Abood*), for defendant.

Before: OWENS, P.J., and MARKEY and SERVITTO, JJ.

PER CURIAM. The prosecution appeals by leave granted the trial court's order granting defendant's motion to retest a blood sample given by him following a traffic accident. The order required the Michigan State Police (MSP) Forensic Laboratory to retest the same vial of blood that had been previously tested, using the same lab analyst. Because there is no basis in MCL 257.625a for retesting the blood sample, and because MCR 6.201 provides the trial court with only the authority to order that defendant be given the opportunity to test the vial of blood, we reverse and remand for proceedings not otherwise inconsistent with this opinion.

In the early morning hours of July 13, 2013, defendant was operating a motorcycle on East Grand River Avenue in Howell, Michigan, when he allegedly struck and seriously injured a pedestrian. The police arrived on the scene and learned that defendant was coming from a bar where he had earlier consumed alcohol. The police suspected that defendant was under the influence of alcohol, they arrested him, and he consented to a blood test. The police transported defendant to the hospital, where emergency room personnel drew two vials of his blood. Two tests conducted by the MSP on one of the vials resulted in readings of .092 grams of alcohol per 100 milliliters of blood. Defendant was charged with operating a motor vehicle while intoxicated causing another person serious impairment of a body function, MCL 257.625(5), and carrying a concealed weapon while having a blood alcohol content of .08 or more but less than .10 grams of alcohol per 100 milliliters of blood, MCL 28.425k(2)(b).

Defendant moved to have the original sample of his blood retested at the MSP laboratory by the same analyst who conducted the initial tests, arguing that there was no foundation to establish that the blood draw was the product of reliable principles and methods, that he would have to pay for an independent test of the second vial of blood, and that a test of the second vial of blood, rather than of the first vial, would not be a similar sample. The trial court granted defendant's motion, opining that ordering a retest was not a great imposition on the People. The trial court denied the prosecution's motion for reconsideration. The trial court explained that defendant was entitled to a retest of the first vial of blood under the general rules of discovery in order to support his challenge to the previous guidelines for measuring blood-alcohol content and his challenge regarding the irregularity

of the blood draw. The trial court noted that defendant's challenges to the previous blood tests were based on guidelines that were in place at the time of the tests but had since been changed. The court further explained that due to the irregularity of the blood draw, a test of the second vial would not adequately address defendant's challenge to the validity of the result that was initially reported.

On appeal, the prosecution first contends that the trial court's order does not comply with the terms of MCL 257.625a. We agree.

A trial court's interpretation of statutes and court rules is reviewed de novo. *People v Lee*, 489 Mich 289, 295; 803 NW2d 165 (2011). A trial court's decision regarding discovery is reviewed for an abuse of discretion. *People v Phillips*, 468 Mich 583, 587; 663 NW2d 463 (2003). A trial court abuses its discretion when its decision falls " 'outside the range of principled outcomes.' " *People v Feezel*, 486 Mich 184, 192; 783 NW2d 67 (2010) (opinion by CAVANAGH, J.) (citation omitted).

MCL 257.625a(6) states, in part, the following:[1]

> The following provisions apply with respect to chemical tests and analysis of a person's blood, urine, or breath, other than preliminary chemical breath analysis:
>
> (a) The amount of alcohol or presence of a controlled substance or both in a driver's blood or urine or the amount of alcohol in a person's breath at the time alleged as shown by chemical analysis of the person's blood, urine, or breath is admissible into evidence in any civil or criminal proceeding and is presumed to be the same as at the time the person operated the vehicle.

[1] The quoted version of MCL 257.625a(6) was in effect at the time of defendant's alleged offense. See 2013 PA 23, effective May 9, 2013. It has since been amended. See 2014 PA 315, effective January 12, 2015.

(b) A person arrested for a crime described in [MCL 257.625c(1)][2] shall be advised of all of the following:

(*i*) If he or she takes a chemical test of his or her blood, urine, or breath administered at the request of a peace officer, he or she has the right to demand that a person of his or her own choosing administer 1 of the chemical tests.

(*ii*) The results of the test are admissible in a judicial proceeding as provided under this act and will be considered with other admissible evidence in determining the defendant's innocence or guilt.

(*iii*) He or she is responsible for obtaining a chemical analysis of a test sample obtained at his or her own request.

* * *

(d) A chemical test described in this subsection shall be administered at the request of a peace officer having reasonable grounds to believe the person has committed a crime described in [MCL 257.625c(1)]. A person who takes a chemical test administered at a peace officer's request as provided in this section shall be given a reasonable opportunity to have a person of his or her own choosing administer 1 of the chemical tests described in this subsection within a reasonable time after his or her detention. The test results are admissible and shall be considered with other admissible evidence in determining the defendant's innocence or guilt. If the person charged is administered a chemical test by a person of his or her own choosing, the person charged is responsible for obtaining a chemical analysis of the test sample.

(e) If, after an accident, the driver of a vehicle involved in the accident is transported to a medical facility and a sample of the driver's blood is withdrawn at that time for medical treatment, the results of a chemical analysis of that sample are admissible in any civil or criminal pro-

[2] MCL 257.625c is the implied consent statute. It applies to defendant, who was arrested and charged with violating MCL 257.625(5). See MCL 257.625c(1)(a).

> ceeding to show the amount of alcohol or presence of a controlled substance or both in the person's blood at the time alleged, regardless of whether the person had been offered or had refused a chemical test. The medical facility or person performing the chemical analysis shall disclose the results of the analysis to a prosecuting attorney who requests the results for use in a criminal prosecution as provided in this subdivision. A medical facility or person disclosing information in compliance with this subsection is not civilly or criminally liable for making the disclosure.

"[T]he goal of statutory interpretation is to ascertain and give effect to the intent of the Legislature. The touchstone of legislative intent is the statute's language. If the statute's language is clear and unambiguous, we assume that the Legislature intended its plain meaning and we enforce the statute as written." *People v Harris*, 495 Mich 120, 126-127; 845 NW2d 477 (2014) (quotation marks and citations omitted). "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." *People v Phillips*, 469 Mich 390, 395; 666 NW2d 657 (2003) (quotation marks and citation omitted).

MCL 257.625a "must be read in its entirety to determine legislative intent." *Collins v Secretary of State*, 19 Mich App 498, 502; 172 NW2d 879 (1969). This Court has acknowledged that MCL 257.625a "governs the admissibility of chemical tests in drinking and driving cases." *People v Campbell*, 236 Mich App 490, 494; 601 NW2d 114 (1999). "[T]he Legislature enacted the implied consent statute to enable the state to obtain convictions without being unduly burdened in the proof of the crime." *Id*. at 498.

MCL 257.625a(6) clearly grants a defendant a reasonable opportunity to have a person of his or her own choosing administer a chemical test of his or her blood

sample. MCL 257.625a(6)(d). The statute further states that a defendant is responsible for obtaining a chemical analysis of the test sample. Defendant argues that "[b]y definition, that includes a forensic scientist at the Michigan State Police laboratory." However, there is no indication that the MSP laboratory, an investigating agency of the Michigan State Police, offers chemical testing services to private individuals or is able to bill for such services. Though defendant may want to "choose" a specific analyst at the MSP lab, the trial court lacks authority to compel a state agency to perform services it does not offer.

Further, both the Michigan Supreme Court and this Court have consistently acknowledged that MCL 257.625a(6) grants a defendant the right to obtain an *independent* chemical test. See *People v Anstey*, 476 Mich 436, 441; 719 NW2d 579 (2006); *People v Reid (On Remand)*, 292 Mich App 508, 510; 810 NW2d 391 (2011). Requiring the same lab analyst at the same lab to retest the same vial of blood is not independent of the first test.

In addition, "[a]bsent a showing of suppression of evidence, intentional misconduct, or bad faith, the prosecutor and the police are not required to test evidence to accord a defendant due process." *People v Coy*, 258 Mich App 1, 21; 669 NW2d 831 (2003). "Although the prosecution bears the burden of proving guilt beyond a reasonable doubt in a criminal trial, it need not negate every theory consistent with defendant's innocence, nor exhaust all scientific means at its disposal." *Id*. (citations omitted). "[N]either the prosecution nor the defense has an affirmative duty to search for evidence to aid in the other's case." *Id*.

In this case, the trial court's order requires the prosecution and the police to do exactly what *Coy*

expressly states the prosecution and the police are not required to do. Not only does the trial court's order require the MSP lab to test evidence at defendant's mere request, but it requires the MSP lab to do the exact same test at the same lab using the same analyst. This improperly requires the police to test evidence that may aid defendant's case.

In *People v Stephens*, 58 Mich App 701, 705; 228 NW2d 527 (1975), the defendant argued that the police department's failure to test a weapon for fingerprints was equivalent to the suppression of evidence "since exculpatory evidence that might have been developed through that testing procedure was lost." This Court recognized that there is a "crucial distinction . . . between failing to disclose evidence that has been developed and failing to develop evidence . . . ." *Id*. This Court concluded that deciding not to test for fingerprints "is a legitimate police investigative decision." *Id*. at 706. Application of the "crucial distinction" in *Stephens* to the facts of this case could not be clearer. Although the prosecution is required to disclose evidence that has been developed, it is not required to develop evidence, including testing a blood sample for a third time, that defendant hopes will provide him with a defense.

Defendant nevertheless argues that the trial court has the authority to order retesting of his blood sample under MCR 6.201 and "longstanding Michigan case law." In denying the prosecution's motion for reconsideration, the trial court cited MCR 6.201(A)(6), which states, in part, that "[o]n good cause shown, the court may order that a party be given the opportunity to test without destruction any tangible physical evidence." The relevant language in this rule is "a party be given the opportunity to test." MCR 6.201(A)(6) does not

provide the trial court with the authority to order the MSP to retest its own evidence. Rather, it merely provides the court with the authority to provide *defendant* with the opportunity to test any tangible physical evidence. This reading is also consistent with MCL 257.625a(6). Thus, the trial court may order only that defendant be given the opportunity to retest the first vial of blood. It abused its discretion in ordering otherwise. As with any other evidence, any potential discrepancies in the results obtained are subject to argument by the parties.

Given our conclusion, we need not address the prosecution's remaining arguments on appeal.

We reverse the trial court's order that the same MSP lab analyst retest the same vial of defendant's blood that had already been twice tested by the analyst, and we remand for proceedings not inconsistent with this opinion. We do not retain jurisdiction.

OWENS, P.J., and MARKEY and SERVITTO, JJ., concurred.

LECH v HUNTMORE ESTATES CONDOMINIUM ASSOCIATION

Docket No. 320028. Submitted April 10, 2015, at Lansing. Decided April 16, 2015, at 9:00 a.m. Leave to appeal sought.

Plaintiff Ronald W. Lech, II filed a complaint in the Livingston Circuit Court against defendants Huntmore Estates Condominium Association, Jacobson Ore Creek Land Development, LLC, and Scott R. Jacobson, doing business as S.R. Jacobson Land Development, LLC, for slander of title, violation of the Michigan condominium act, and tortious interference with a business relationship. After two appeals in the Court of Appeals and one appeal in the Michigan Supreme Court, the case was remanded to the trial court for recalculation of the sanctions imposed on plaintiff for his rejection of defendants' offer of judgment. On remand, the court, David J. Reader, J., ruled that defendants were entitled to judgment interest on their trial court costs, but that defendants were not entitled to appellate fees and costs. Defendants appealed the trial court's denial of their request for appellate costs, and plaintiff appealed the trial court's award of judgment interest on defendants' trial court costs.

The Court of Appeals *held*:

1. The trial court properly denied defendants' request for appellate costs and fees because MCR 2.405 does not authorize the award of appellate costs for cases involving a party's rejection of an offer of judgment. MCR 2.405 is a "trial-oriented" rule because it concerns actual costs incurred at trial or as a result of a ruling on a motion after rejection of an offer of judgment. MCR 2.405 defines actual costs as costs and fees taxable in a civil action and a reasonable attorney fee. Actual costs are those costs incurred in the prosecution or defense of a civil action after a party has rejected an offer of judgment and are recoverable if the verdict issued favors the party seeking actual costs. A party must request an award of fees and costs within 28 days of the verdict in trial court—generally before a party has incurred the majority of its appellate fees and costs. Importantly, the definition of "verdict" in MCR 2.405 does not refer to appellate proceedings. Moreover, a decision to appeal does not have the necessary causal

nexus to a party's rejection of the offer of judgment and the appellate expenses incurred as a result of the rejection.

2. The trial court erred by awarding judgment interest to defendants on the costs they incurred at trial due to plaintiff's rejection of the offer of judgment. Even though sanctions often require the payment of money, sanctions are not the equivalent of a money judgment obtained in a civil action because a party requests fees and costs in a postjudgment proceeding—after any money judgment has been entered. Rather than an order directing payment of a sum of money, a sanction is an order directing that an act be done—that a party pay the opposing party's fees and costs—and the applicable statute, MCL 600.6013, does not authorize judgment interest on sanctions.

Affirmed in part and reversed in part.

Kemp Klein Law Firm (by *Richard D. Bisio* and *James P. Davey*) for plaintiff.

The Meisner Law Group, PC (by *Robert M. Meisner* and *Daniel P. Feinberg*), for defendants.

Before: O'CONNELL, P.J., and FORT HOOD and GADOLA, JJ.

O'CONNELL, P.J. Defendants, Jacobson Ore Creek Land Development, LLC, and Scott R. Jacobson (collectively "the developers"), appeal as of right the trial court's order denying the developers' request for appellate costs and attorney fees. Plaintiff, Ronald W. Lech II, cross-appeals as of right the trial court's order granting judgment interest on the developers' costs in the trial court. We affirm the trial court's decision to exclude appellate attorney fees and costs from its offer of judgment sanctions under MCR 2.405 because such costs are not incurred as a result of a party's decision to reject an offer of judgment, but we reverse the trial court's decision to award the developers judgment interest under MCL 600.6013.

I. BACKGROUND FACTS AND PROCEDURAL HISTORY

In December 2008, Lech filed a complaint against the developers and Huntmore Estates Condominium Association in which he alleged claims of slander of title, violation of the Michigan Condominium Act, MCL 559.101 *et seq*., and tortious interference with a business relationship. On June 10, 2009, the developers filed an offer of judgment for $5000. Lech effectively rejected the offer by failing to respond to it within 21 days. See MCR 2.405(C)(2)(b).

The trial court later granted summary disposition to the developers and awarded them attorney fees under MCR 2.405 because of Lech's refusal of the offer of judgment. After Lech appealed, a panel of this Court reversed the trial court's grant of summary disposition on some of Lech's claims. *Lech v Huntmore Estates Condo Ass'n*, unpublished opinion per curiam of the Court of Appeals, issued October 6, 2011 (Docket Nos. 296489 and 297196). The developers appealed in the Michigan Supreme Court, and the Supreme Court reversed this Court's decision, reinstated the trial court's grant of summary disposition, and remanded for this Court to consider Lech's sanctions issue. *Lech v Huntmore Estates Condo Ass'n*, 491 Mich 937, modified on reconsideration 493 Mich 921 (2012). On remand, this Court determined that the trial court calculated the offer of judgment sanctions from an incorrect date and remanded to the trial court for a new calculation. *Lech v Huntmore Estates Condo Ass'n (On Remand)*, unpublished opinion per curiam of the Court of Appeals, issued August 6, 2013 (Docket No. 297196), p 5.

On remand, the parties stipulated to reduce the trial court's sanctions award to $36,337.90, but disputed whether the developers were entitled to judgment

interest or attorney fees that the developers incurred as a result of the appeals. The trial court relied on *Haliw v Sterling Hts*, 471 Mich 700, 711; 691 NW2d 753 (2005), in which the Michigan Supreme Court held that actual costs for case evaluation sanctions under MCR 2.403 do not include appellate attorney fees, and the trial court determined that the developers were not entitled to appellate attorney fees under MCR 2.405. But the trial court determined that the developers were entitled to statutory judgment interest under MCL 600.6013, and it awarded the developers $5,230.16 in interest.

II. STANDARDS OF REVIEW

This Court reviews de novo the interpretation and application of statutes. *McCormick v Carrier*, 487 Mich 180, 188; 795 NW2d 517 (2010). We also review de novo the interpretation and application of our court rules. *In re McCarrick/Lamoreaux*, 307 Mich App 436, 445; 861 NW2d 303 (2014). We use the same rules of interpretation to interpret statutes and court rules. *Id*. at 446. We give the words of rules and statutes their plain and ordinary meanings. *Id*. See also *McCormick*, 487 Mich at 192. We construe legal terms according to their legal meanings. See *Feyz v Mercy Mem Hosp*, 475 Mich 663, 673; 719 NW2d 1 (2006). We determine the intent of the court rule "from an examination of the court rule itself and its place within the structure of the Michigan Court Rules as a whole." *Haliw*, 471 Mich at 706.

III. APPELLATE COSTS

The developers contend that the trial court erred when it determined that MCR 2.405 sanctions do not include appellate costs and fees because the opposing party makes such costs and fees necessary when the

party rejects an offer of judgment. Lech contends that actual costs for the purposes of MCR 2.405 do not include appellate attorney fees. We agree with Lech.

When a party rejects an offer of judgment, "[i]f the adjusted verdict is more favorable to the offeror than the average offer, the offeree must pay to the offeror the offeror's actual costs incurred in the prosecution or defense of the action." MCR 2.405(D)(1). "Verdicts" include judgments following jury or nonjury trials, or judgments resulting from "a ruling on a motion after rejection of the offer of judgment." MCR 2.405(A)(4)(a) to (c). "Actual costs" are "the costs and fees taxable in a civil action and a reasonable attorney fee for services necessitated by the failure to stipulate to the entry of judgment." MCR 2.405(A)(6).

In *Haliw*, the Michigan Supreme Court considered whether appellate costs were actual costs for the purposes of MCR 2.403. *Haliw*, 471 Mich at 704. MCR 2.403(O)(6) provides that actual costs include "a reasonable attorney fee . . . for services necessitated by the rejection of the case evaluation." The *Haliw* Court concluded that a party could not recover appellate attorney fees and costs as case evaluation sanctions. *Haliw*, 471 Mich at 706.

The Michigan Supreme Court gave several reasons for its decision. First, the second chapter of the Michigan Court Rules addresses trial court procedure, while the seventh chapter addresses appellate procedure, including appellate fees and costs. *Id*. at 706. Second, MCR 2.403(O) is "trial-oriented" because its definition of verdict does not refer to the appellate process. *Haliw*, 471 Mich at 708. Third, the Supreme Court noted that a party must request sanctions within 28 days of the verdict, generally before a party has incurred the majority of its appellate fees and costs. *Id*. at 711 n 8. Finally,

our Supreme Court also noted that the phrase "necessitated by" requires "a causal nexus between rejection and incurred expenses," and a decision to bring an appeal does not have the necessary causal nexus. *Id*.

We discern no basis on which to differ from the Michigan Supreme Court's analysis of actual costs under MCR 2.403 when interpreting actual costs under MCR 2.405. Located in the second chapter of the Michigan Court Rules, MCR 2.405 also concerns trial court procedure. Like MCR 2.403, nothing in the definition of verdict in MCR 2.405 mentions the appellate process. Also like MCR 2.403, under MCR 2.405, a party must request fees and costs within 28 days of entry of the judgment. MCR 2.405(D)(6). And a party's decision to bring an appeal after rejecting an offer of judgment lacks the same causal nexus as does a party's decision to bring an appeal after rejecting a case evaluation.

Any minor differences between the definitions of actual costs in MCR 2.403 and MCR 2.405 do not warrant engaging in a different analysis and certainly do not compel a different result. The difference between the definitions in these two court rules is primarily a difference in formatting.[1] We conclude that the trial court did not err when it determined that a party may not recover appellate fees and costs as actual costs under MCR 2.405.

IV. INTEREST

Lech contends that the trial court erred by applying the judgment-interest statute to the sanctions award

[1] MCR 2.403(O)(6)(b) indicates that a reasonable attorney fee is "based on a reasonable hourly or daily rate as determined by the trial judge"; MCR 2.405(A)(6) does not contain that language.

in this case because a sanction award is not a money judgment in a civil case. We agree.

The developers requested judgment interest under MCL 600.6013. MCL 600.6013(1) provides that "[i]nterest is allowed on a money judgment recovered in a civil action, as provided in this section." A money judgment in a civil action is a judgment "that orders the payment of a sum of money, as distinguished from an order directing an act to be done or property to be restored or transferred." *In re Forfeiture of $176,598*, 465 Mich 382, 386; 633 NW2d 367 (2001). There are several types of civil awards that are not money judgments in a civil action, including the return of seized currency in drug forfeitures, money awards in divorce judgments, awards of back pay for wrongful discharge from public employment, and awards reflecting payment of a forced share in an estate. *Id*. at 388.

We conclude that a sanctions award is properly characterized as an order directing that an act be done instead of a money judgment in a civil action. A party's attempt to collect attorney fees and costs is a postjudgment proceeding. See *Fraser Trebilcock Davis & Dunlap, PC v Boyce Trust 2350*, 304 Mich App 174, 219; 850 NW2d 537 (2014). A party files and serves its request for costs *after* entry of the judgment. MCR 2.405(D)(6). Such proceedings, by their very nature, occur after any money judgment is entered. Accordingly, a sanctions award is not a money judgment in a civil action. Rather, it is an order of the court directing a party to do an act—specifically, to pay the other party's attorney fees and costs.[2]

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[2] This Court has also concluded in unpublished opinions that MCL 600.6013 does not apply in cases of motions for sanctions. See *Nartron Corp v Gen Motors Corp*, unpublished opinion per curiam of the Court of Appeals, issued January 6, 2005 (Docket No. 245942) (discovery sanc-

In this case, the trial court applied MCL 600.6013 to award the developers $5,230.16 in interest. Because this case concerned a postjudgment proceeding to collect sanctions, we conclude that its decision was improper. We therefore reverse the trial court's interest award.

We affirm in part and reverse in part. No costs, neither party having prevailed in full. MCR 7.219.

FORT HOOD and GADOLA, JJ., concurred with O'CONNELL, P.J.

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tions); *Juarez v Holbrook*, unpublished opinion per curiam of the Court of Appeals, issued July 1, 2008 (Docket Nos. 275040 and 276312) (case evaluation sanctions awarded to a defendant); *Wrobbel v Hydaker-Wheatlake Co*, unpublished opinion per curiam of the Court of Appeals, issued January 28, 2014 (Docket Nos. 305535 and 312766) (case evaluation sanctions). While unpublished opinions are not binding on this Court, we may consider them for their persuasive value. *Paris Meadows LLC v Kentwood*, 287 Mich App 136, 145 n 3; 783 NW2d 133 (2010); MCR 7.215(C)(1). We find it persuasive that this Court has repeatedly reached the same conclusion regarding other types of sanctions in unpublished opinions.

In re KEYES ESTATE

Docket No. 320420. Submitted April 10, 2015, at Lansing. Decided April 16, 2015, at 9:05 a.m. Leave to appeal sought.

The Department of Community Health brought an action in the Bay County Probate Court for estate recovery under the Medicaid estate recovery program, MCL 400.112g *et seq*., against the estate of Esther Keyes. Esther was admitted to a nursing home in 2010 and enrolled in Medicaid. In May 2012, her son Robert Keyes filled out a Medicaid application form for patients of nursing facilities on Esther's behalf. The form contained a notice provision concerning estate recovery, which Robert acknowledged by signing the application. Esther died in 2013. The department sought recovery of approximately $110,000 from the estate. The estate moved for summary disposition, contending that the department had not given Esther proper notice of the possibility of estate recovery when she enrolled in Medicaid. The court, Karen A. Tighe, J., agreed, concluding that the notice failure violated Esther's right to due process, and granted summary disposition in favor of the estate. The department appealed.

The Court of Appeals *held*:

MCL 400.112g(3)(e) states that the department must seek approval from the federal Centers for Medicare and Medicaid Services regarding under what circumstances the estate of a medical assistance recipient will be exempt from recovery because of a hardship, and notes that at the time an individual enrolls in Medicaid for long-term care services, the department must provide written materials explaining the process for applying for a waiver from estate recovery because of hardship. Subsection (3)(e) only requires the department to seek approval from the federal government regarding estate recovery notice. MCL 400.112g(7), on the other hand, requires that the department provide notice describing the provisions of the estate recovery program to individuals who are seeking Medicaid eligibility for long-term care services. In this case, the distinction between enrolling in Medicaid and seeking Medicaid eligibility was determinative. Robert sought Medicaid benefits on Esther's behalf in 2012, after the department provided him with proper

notice regarding estate recovery. MCL 400.112g(3)(e) did not require the department to provide this notice when Esther previously enrolled in Medicaid. Further, the fundamental requirements of due process are notice and an opportunity to be heard. The trial court determined that allowing estate recovery would violate Esther's right to due process because she did not receive notice of estate recovery at the time she enrolled in Medicaid. But the program does not require notice at the time of enrollment, it only requires notice when an individual is seeking Medicaid eligibility, and the court improperly conflated statutory notice issues with the notice issues involved in due process. In this case, the estate was personally apprised of the department's action seeking estate recovery, and it had the opportunity to contest the possible deprivation of its property in the probate court. It received both notice and a hearing, which is what due process required.

Reversed and remanded.

STATUTES — MEDICAID ESTATE RECOVERY PROGRAM — NOTICE PROVISIONS.

MCL 400.112g(3)(e) states that the Department of Community Health must seek approval from the federal Centers for Medicare and Medicaid Services regarding under what circumstances the estate of a medical assistance recipient will be exempt from recovery because of a hardship, and notes that at the time an individual enrolls in Medicaid for long-term care services, the department must provide written materials explaining the process for applying for a waiver from estate recovery because of hardship; Subsection (3)(e) only requires the department to seek approval from the federal government regarding estate recovery notice; it does not require the department to provide notice regarding estate recovery when an individual enrolls in Medicaid; MCL 400.112g(7), on the other hand, requires that the department provide written notice describing the provisions of the Michigan Medicaid estate recovery program to individuals who are seeking Medicaid eligibility for long-term care services.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Geraldine A. Brown*, Assistant Attorney General, for the Department of Community Health.

Smith & Brooker, PC (by *Charles T. Hewitt* and *George B. Mullison*), for the Keyes Estate.

Before: O'CONNELL, P.J., and FORT HOOD and GADOLA, JJ.

O'CONNELL, P.J. The Department of Community Health (the Department) appeals as of right the trial court's order granting summary disposition in favor of the estate of Esther Keyes under MCR 2.116(C)(10). The Department sought estate recovery under Michigan's Medicaid estate recovery program, MCL 400.112g *et seq*. (the Act). The trial court ruled that the estate did not receive sufficient statutory notice under the Act and estate recovery would violate the estate's due process rights. Because we conclude that the Department provided the estate with timely notice when the estate sought Medicaid benefits in May 2012, we reverse and remand.

I. FACTS AND PROCEDURAL HISTORY

In 2007, our Legislature amended the Social Welfare Act, MCL 400.1 *et seq*. 2007 PA 74. This amendment required the Department to establish a Medicaid estate recovery program, which would not be implemented until approved by the federal government. See MCL 400.112g(2) and (5). The federal government did not approve Michigan's program until July 2011.

Esther was admitted to a nursing home in April 2010 and began receiving Medicaid[1] benefits. In May 2012, Robert Keyes, her son, filled out a Medicaid application form and acknowledged that the estate was subject to Medicaid recovery:

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[1] Medicaid is a federal program that provides medical assistance to low-income individuals. See 42 USC 1396 *et seq*.

> I understand that upon my death the Michigan Department of Community Health has the legal right to seek recovery from my estate for services paid by Medicaid. MDCH will not make a claim against the estate while there is a legal surviving spouse or a legal surviving child who is under the age of 21, blind, or disabled living in the home. An estate consists of real and personal property. Estate Recovery only applies to certain Medicaid recipients who received Medicaid services after the implementation date of the program.

Esther died in January 2013 and the Department sought recovery against her estate. When the estate disallowed the expense, the Department filed suit against the estate, seeking to recover about $110,000.

The estate moved for summary disposition under MCR 2.116(C)(10), contending that the Department could not recover because the Department did not notify Esther of the possibility of estate recovery when she enrolled in Medicaid. The trial court determined that the Department had failed to notify recipients "at the time of enrollment," as the Act required.[2] It also determined that this failure violated the estate's due process rights. It therefore granted summary disposition in favor of the estate.

II. STANDARDS OF REVIEW

This Court reviews de novo issues of due process and the trial court's decision on a motion for summary disposition. *Elba Twp v Gratiot Co Drain Comm'r*, 493 Mich 265, 277; 831 NW2d 204 (2013). A party is entitled to summary disposition under MCR 2.116(C)(10) when "there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law."

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[2] Emphasis omitted.

This Court reviews de novo issues of statutory interpretation. *Michigan ex rel Gurganus v CVS Caremark Corp*, 496 Mich 45, 57; 852 NW2d 103 (2014). "The goal of statutory interpretation is to give effect to the Legislature's intent, focusing first on the statute's plain language." *Id*. at 59 (quotation marks and citation omitted). This Court examines statutes as a whole. *Id*. When interpreting a word or phrase, we consider its context and purpose in the statutory scheme. *Id*. at 61.

III. TIMING OF THE STATUTORY NOTICE

The Act only applies to Medicaid recipients who began receiving benefits after September 30, 2007. MCL 400.112k. It contains two provisions concerning notice, and their context and interaction is particularly pertinent to the resolution of this case:

> (3) The department of community health shall seek appropriate changes to the Michigan medicaid state plan and shall apply for any necessary waivers and approvals from the federal centers for medicare and medicaid services to implement the Michigan medicaid estate recovery program. The department of community health shall seek approval from the federal centers for medicare and medicaid regarding all of the following:
>
> (a) Which medical services are subject to estate recovery under section 1917(b)(1)(B)(*i*) and (*ii*) of title XIX.
>
> (b) Which recipients of medical assistance are subject to estate recovery under section 1917(a) and (b) of title XIX.
>
> (c) Under what circumstances the program shall pursue recovery from the estates of spouses of recipients of medical assistance who are subject to estate recovery under section 1917(b)(2) of title XIX.
>
> (d) What actions may be taken to obtain funds from the estates of recipients subject to recovery under section 1917 of title XIX, including notice and hearing procedures that

may be pursued to contest actions taken under the Michigan medicaid estate recovery program.

(e) Under what circumstances the estates of medical assistance recipients will be exempt from the Michigan medicaid estate recovery program because of a hardship. *At the time an individual enrolls in medicaid for long-term care services, the department of community health shall provide to the individual written materials explaining the process for applying for a waiver from estate recovery due to hardship*. The department of community health shall develop a definition of hardship . . . .

* * *

(f) The circumstances under which the department of community health may review requests for exemptions and provide exemptions from the Michigan medicaid estate recovery program for cases that do not meet the definition of hardship developed by the department of community health.

(g) Implementing the provisions of section 1396p(b)(3) of title XIX to ensure that the heirs of persons subject to the Michigan medicaid estate recovery program will not be unreasonably harmed by the provisions of this program.

* * *

(7) The department of community health *shall provide written information to individuals seeking medicaid eligibility for long-term care services describing the provisions of the Michigan medicaid estate recovery program*, including, but not limited to, a statement that some or all of their estate may be recovered. [MCL 400.112g (emphasis added).]

The estate contends that MCL 400.112g(3)(e) requires the Department to provide an estate recovery notice to individuals when they enroll in Medicaid for long-term care. The Department contends that this

language is part of a subsection that requires it to seek guidance from the federal government and, because MCL 400.112g(7) does not mirror this language, the Act did not require it to notify Esther about estate recovery when she enrolled in Medicaid. After reviewing these provisions in context, we agree with the Department.

We conclude that the timing provision of MCL 400.112g(3)(e) does not apply in this case. MCL 400.112g(3)(e) provides that "[a]t the time an individual enrolls in medicaid for long-term care services, the department of community health shall provide to the individual written materials explaining the process for applying for a waiver from estate recovery due to hardship." Read in isolation, this provision appears to support the estate's position. But we may not read this provision in isolation. See *Gurganus*, 496 Mich at 61.

Subsection (3)(e) is part of the larger Subsection (3), which requires the Department to seek approval from the federal government regarding the items listed in the subdivisions. In this case, the estate does not assert that the Department failed to seek approval from the federal government concerning the estate recovery notice. Rather, the estate asserts that it did not personally receive a timely notice.

The Act contains a second provision concerning notice, and this provision has different language. MCL 400.112g(7) provides that "[t]he department of community health shall provide written information to individuals seeking medicaid eligibility for long-term care services describing the provisions of the Michigan medicaid estate recovery program . . . ." When the Legislature includes language in one part of a statute that it omits in another, this Court presumes that the omission was intentional. *Polkton Charter Twp v Pel-*

legrom, 265 Mich App 88, 103; 693 NW2d 170 (2005). Subsection (7) applies to the estate's case because the estate alleges that Esther did not receive sufficient notice of estate recovery. The language of Subsection (7) is similar to that in Subsection (3)(e), but there is one major difference—timing. Subsection (3)(e) states that notice should be given "[a]t the time an individual enrolls in medicaid," while Subsection (7) states that the Department must provide a notice when an individual "seek[s] medicaid eligibility[.]" We presume the Legislature's decision not to use the word "enrollment" in Subsection (7) was intentional.

In this case, the distinction between enrolling in Medicaid and seeking Medicaid eligibility is determinative. Esther enrolled in Medicaid in April 2010, which was after September 30, 2007. She did not receive notice of estate recovery because the federal government had not approved the Department's notice in accordance with Subsection (3)(e). In May 2012, Robert filled out, on Esther's behalf, a Medicaid application form for patients of nursing facilities. This form included a notice about estate recovery. Her previous enrollment did not change the fact that Robert sought medicaid eligibility on her behalf by filling out an application in 2012. And, as part of that application, the Department did provide written materials explaining and describing estate recovery and warning that some of Esther's estate could be subject to estate recovery.

We conclude that the trial court erred because the Department sufficiently notified Esther that her estate could be subject to estate recovery. MCL 400.112g(7) allows the Department to engage in estate recovery when the individual has *sought* Medicaid benefits after being provided with a notice regarding estate recovery.

In this case, Robert sought Medicaid benefits on Esther's behalf in 2012, after the Department provided him with a proper notice regarding estate recovery. MCL 400.112g(3)(e) did not require the Department to provide this notice when Esther enrolled in Medicaid.

IV. DUE PROCESS

The Department contends that the trial court erred when it determined that allowing estate recovery in this case would violate the estate's due process rights. We agree.

The Fourteenth Amendment of the United States Constitution and Article 1, § 17 of Michigan's 1963 Constitution provide that the state shall not deprive a person of life, liberty, or property without due process of law. *Elba Twp*, 493 Mich at 288. When a protected property interest is at stake, due process generally requires notice and an opportunity to be heard. *Hinky Dinky Supermarket, Inc v Dep't of Community Health*, 261 Mich App 604, 606; 683 NW2d 759 (2004). Due process is a flexible concept and different situations may demand different procedural protections. *Mathews v Eldridge*, 424 US 319, 334; 96 S Ct 893; 47 L Ed 2d 18 (1976). The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Id*. at 333 (quotation marks and citation omitted). The question is whether the government provided "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *In re Petition by Wayne Co Treasurer*, 478 Mich 1, 9; 732 NW2d 458 (2007) (quotation marks and citations omitted).

In this case, the trial court determined that allowing estate recovery under the Act would violate Esther's right to due process because she did not receive notice of estate recovery at the time that she enrolled, as required by MCL 400.112g. However, we have already determined that MCL 400.112g does not require notice at the time of enrollment. Further, the trial court's decision improperly conflated statutory notice issues with the notice issues involved in due process. In this case, the estate was personally apprised of the Department's action seeking estate recovery, and it had the opportunity to contest the possible deprivation of its property in the probate court. It received both notice and a hearing, which is what due process requires. See *Hinky Dinky Supermarket, Inc*, 261 Mich App at 606.

We reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction. Because the appeal involved an issue of public concern, no costs. MCR 7.219.

FORT HOOD and GADOLA, JJ., concurred with O'CONNELL, P.J.

PEOPLE v DAVIS

Docket No. 319436. Submitted March 4, 2015, at Detroit. Decided April 21, 2015, at 9:00 a.m.

Demond Earl Davis was bound over to the Wayne Circuit Court on charges of unarmed robbery and assault with intent to commit great bodily harm less than murder. The court, Bruce U. Morrow, J., questioned whether defendant was competent to stand trial and ordered him to undergo an examination at the Center for Forensic Psychiatry (CFP). Following her examination of defendant at the CFP, licensed psychologist Cathie Zmachinski opined that defendant was not competent to stand trial given his limited cognitive abilities, but that there was a substantial probability that defendant could gain the knowledge required to be of assistance to his counsel with the provision of appropriate therapeutic intervention. In accordance with the CFP's recommendation, the court ordered that defendant be treated at the Kalamazoo Psychiatric Hospital. Defendant was taken into custody and sent to the Wayne County Jail to await transport to the hospital. The court's next scheduled hearing in the case occurred approximately two months later. Defense counsel informed the court that defendant had remained in jail since the court's last hearing because no beds were available at the hospital, and it appeared that a bed would not be available for another six to eight weeks. In light of the delay in treatment, the court ruled that there was no longer a substantial probability that defendant would obtain competency within the period prescribed by law and dismissed the action without prejudice. The prosecution appealed.

The Court of Appeals *held*:

A defendant who is determined incompetent to stand trial shall not be proceeded against while incompetent. Under MCL 330.2030, if a defendant is determined incompetent to stand trial, the court must determine whether there is a substantial probability that the defendant will obtain competence to stand trial within 15 months or 1/3 of the maximum sentence the defendant could receive if convicted, whichever is less. In this case, the 15-month period applied. The court had the authority to hold the second hearing at which it determined there was no longer a

substantial likelihood that defendant would attain competency, but the court erred when it denied the prosecution the opportunity to present additional evidence at that hearing. Moreover, dismissal was not the proper remedy in these circumstances. MCL 330.2044(1) provides only two circumstances in which the trial court may dismiss the criminal action: (a) upon notification by the prosecution of its intent to drop the charges, and (b) if the defendant remains incompetent to stand trial 15 months after the original incompetency ruling. Neither of these situations existed in this case. Given the lack of a proper hearing and the short duration of the delay, the court was not permitted to dismiss the charges over the prosecution's objection. Moreover, the delay in beginning defendant's treatment was an insufficient basis to support that defendant was unlikely to attain competence. The circuit court's focus must be whether, if provided a course of treatment, a substantial probability exists that a defendant found to be incompetent will attain competence within the time limit established by law. Once the circuit court initially determined that defendant could attain competence, the Kalamazoo Psychiatric Hospital had a full 15 months within which to treat defendant. The hospital notified the court that it would be unable to treat defendant for another six to eight weeks, amounting to an approximately four-month delay between being adjudged incompetent to stand trial and beginning treatment. Though such a delay is not preferable and should be avoided if at all possible, it was mere speculation that defendant would remain incompetent for the entire 15 months provided by statute.

Order dismissing the charges reversed, and case remanded for further proceedings.

CRIMINAL LAW — COMPETENCY TO STAND TRIAL — DISMISSAL OF CHARGES AFTER A DETERMINATION OF INCOMPETENCY.

A defendant who is determined incompetent to stand trial shall not be proceeded against while incompetent; under MCL 330.2030, if a defendant is determined incompetent to stand trial, the court must determine whether there is a substantial probability that the defendant will obtain competence to stand trial within 15 months or 1/3 of the maximum sentence the defendant could receive if convicted, whichever is less; MCL 330.2044 provides only two circumstances in which the charges against a defendant determined incompetent to stand trial shall be dismissed: (a) upon notification by the prosecution of its intent to drop the charges and (b) if the defendant remains incompetent to stand trial 15 months after the original incompetency ruling.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Timothy A. Baughman*, Chief of Research, Training, and Appeals, and *David A. McCreedy*, Lead Appellate Attorney, for the people.

Gerald Ferry for defendant.

Before: GLEICHER, P.J., and CAVANAGH and FORT HOOD, JJ.

GLEICHER, P.J. Defendant is a cognitively impaired young adult. After the district court bound defendant over on unarmed robbery and assault charges, the circuit court questioned whether defendant was competent to stand trial. Initial examination supported defendant's current incompetency but revealed that defendant potentially could be rendered competent to stand trial within 15 months if provided appropriate treatment. For the next two months, defendant remained in county jail because no vacancies opened at an appropriate psychiatric facility. The circuit court then determined that the delay in treatment made it impossible to have defendant ready for trial within the statutory period and dismissed the charges against defendant without prejudice. Because the circuit court lacked statutory authority to dismiss the case over the prosecution's objections, we reverse.

I. BACKGROUND

On the afternoon of April 15, 2013, then 17-year-old defendant, along with six other young men, "jumped" a 16-year-old autistic boy and stole his portable gaming system. Detroit police arrested defendant three days later. Defendant waived his rights and admitted, but minimized, his role in the attack. Following prelimi-

nary examination, the district court bound defendant over for trial on charges of unarmed robbery and assault with intent to commit great bodily harm less than murder.

On June 6, 2013, the circuit court ordered that defendant undergo an examination to determine whether he was competent to stand trial. Defendant was released on bond until his examination at the Center for Forensic Psychiatry (CFP). On July 27, 2013, family members transported defendant to the center, where he met with a licensed psychologist, Cathie Zmachinski. In the report detailing her clinical observations, Zmachinski noted that defendant's mother had given her records indicating that defendant was " '[m]oderately impaired.' " Zmachinski went on to state:

> [Defendant] showed limited comprehension of questions. So, I simplified my questions and comments which facilitated his understanding. His responses were relevant but brief, usually only three to four words long. His thoughts were coherent. He required direct questioning in order to obtain related information. . . . [Defendant] demonstrated other cognitive difficulties. He showed limited abstract reasoning. He showed limited understanding of the world around him. He showed limitations in expressing himself. He demonstrated immature interests. . . . He also showed a tendency to agree without regard to the specific content of some questions. Based on his clinical presentation and understanding of his world, [defendant] appeared to be functioning in the mild mentally retarded range. Additionally, he gave the indication that he was able to process more information than indicated by his verbal responses.

Zmachinski described defendant's memory deficits. In addition, she opined, "Besides his limited insight into his cognitive abilities he showed limited insight into his affective life."

Zmachinski also interviewed defendant's mother, Tiffany Davis. Davis reported that defendant had received special education services since kindergarten, was restless and had difficulty staying on task at home. Davis indicated that defendant had been incarcerated for two months before being released on bond. During that time, the other inmates took advantage of defendant and "beat [him] up."

In relation to defendant's competency to stand trial, Zmachinski opined:

> It is my opinion that [defendant] has a limited understanding of the nature and object of the proceedings against him. He was asked some questions about the criminal justice system and in particular about his legal case. He demonstrated the following. He said he could not remember the charges against him. But he could acknowledge them. He was aware of the circumstances from which those charges arose. When asked specifically, he claimed not to know what happens were he to be found guilty or the maximum penalty given his charges. He could recall his attorney "Came to my house–asked about my job–same as you." [Defendant] further indicated his mother was with him while talking to his attorney, "She does a lot of talking." He said he did not know the jobs of the prosecutor or judge. He could not give an explanation of a plea bargain or the essence of a trial. He did however say if you believe the witness was lying, he would tell his attorney. Due to his limited expressive knowledge about the legal system, he was given the CAST-MR. This measure is designed for those with mental retardation. Individuals are asked questions about the criminal justice system in a multiple choice format. Also they are asked questions about various scenarios regarding the legal process. On this measure, [defendant] could correctly identify the basic job of the witness, judge but not the jury, his attorney and the prosecutor. He could identify such words as "Sentence, crime, penitentiary, felony, misdemeanor, and time served." He knew that if found guilty, it would mean the prosecutor proved he did it. He could not identify plea

bargaining. Thus, he demonstrated greater knowledge about the system than when asked more open ended questions. But he continued to show some limited knowledge. [Defendant] also was given various problematic scenarios related to legal charges and arrest. He showed in his answers that he was capable of being protective of himself in the jail and with the prosecutor. But he showed some problems with situations requiring more than a black and white reasoning. His overall performance suggested he knows more about the process than he was able to express. Yet his knowledge was, in my opinion, still considered limited.

In regards to his ability to assist defense counsel in a rational manner, again it is my opinion that this would be limited. To his favor, [defendant] provided a rendition of the incident in question, one similar to that in the police account. He could answer some questions but not others, including his understanding of his behaviors at that time. He was aware of some important elements about his case. For example, he kept repeating important aspects of the assaulted boy's testimony. Although he could not elaborate why this was important, he seemed aware on a basic level that this testimony suggested he had minimal involvement in the crime. [Defendant] also showed an ability to control his behavior within the interview. He also did not demonstrate emotional difficulties. [Defendant] showed limitations in problem-solving and decision-making. He did better when he was given simple choices and the problem was spelled out for him. [Defendant] was quite passive. Given his cognitive abilities and limited knowledge of the legal process, it is my opinion [defendant] would not communicate his concerns sufficiently to his attorney. He would not understand what has been said if more than simple language was used. Given his limited knowledge of the process, this would further limit his comprehension of the process as well as communications with his attorney. It is my opinion were he more knowledgeable about the process he may be less passive and might express some of his concerns. But nonetheless at the current time, it is my opinion that [defendant], due to

> his cognitive limitations as well as passivity would have significant difficulty assisting his attorney to resolve the current charges.
>
> In summary, due to limited cognitive abilities although [defendant] showed some knowledge about the criminal justice system, in my opinion it was insufficient to be considered him [sic] capable of understanding the nature and object of the proceedings against him. Additionally, again due to this limited knowledge and limited cognitive abilities, it is my opinion that he would have problems assisting defense counsel in a rational manner. Therefore, it is my opinion that [defendant] was incompetent to stand trial.
>
> The next question becomes whether there is a substantial probability that [defendant] could be expected to regain his competency within [the] time period provided by statute and if he were provided with a structured, inpatient, hospital setting with the provision of appropriate therapeutic intervention. It is my opinion [defendant] has some skills which he can draw upon to learn more about the legal process. So with education and treatment, he may acquire a greater knowledge of the process. Additionally given his cognitive skills as being measured in the moderately impaired range, I anticipate that his will take some time. But, it is my opinion that he would be able to gain the knowledge required. With that knowledge, it is my opinion he would likely be able, in a basic way, to work with his attorney to resolve the current charges.

This report was submitted to the circuit court on August 8, 2013. An August 9, 2013 letter from the CFP director recommended that defendant be treated at the Kalamazoo Psychiatric Hospital.

At an August 22, 2013 hearing on the matter, the circuit court followed the CFP's recommendation. However, the court noted: "I'm not completely sold on their conclusion about his ability to . . . attain . . . [c]omptency. And my opinion is based on the fact that they have not received his school records and they have

not received the Wayne County Jail information that they have requested." The court directed, "I'm going to have him placed there," meaning the psychiatric hospital. The court then stated its intent to schedule a hearing "within the time period prescribed by law" to determine if defendant had attained competency. Defendant was returned to court custody that day and was transported back to the Wayne County Jail to await transport to the Kalamazoo Psychiatric Hospital. The court's subsequent order provided:

> Commitment is necessary for the effective administration of the course of treatment and therefore the defendant is committed to the custody of the State Department of Mental Health and placed at the facility recommended by the [CFP].

The court's next scheduled hearing occurred on October 29, 2013. Defense counsel informed the court that defendant had remained in jail since the August 22 hearing because the Kalamazoo Psychiatric Hospital did not "anticipate a bed being available for [his] client between six to eight weeks from today's date." Counsel argued that the administrative delay had interfered with defendant's right to be free on bond pending trial. Counsel did not request the dismissal of the charges, only that defendant be released to his mother's care pending treatment. The prosecutor objected to defendant's release on bond as the underlying offense was assaultive in nature and out of fear that defendant might "fall through the cracks if he is not there and waiting for the bed when it becomes available."

The court expressed displeasure at the course of events, noting defendant "has gone untreated, basically, for five months." The court continued:

I think that when a person who has been determined to not be competent is kept in jail and not treated, it kind of gets to cruel and unusual punishment.

I mean, we have a place for people that are not competent. And it is in a state facility to help them restore them to competence. I don't want to be a part of a system that jails incompetent people, that incarcerates people who don't have the capacity to stay in the criminal justice system.

To me, that's not the way that you deal with, you know, mental health challenges, to jail them and not treat them. And that's exactly where [defendant] is. He has been found not to be competent. And we have incarcerated a person that is not competent, would not have known that he was on a wait list. . . .

* * *

. . . But somebody believes that it's all right to incarcerate incompetent people. And I don't.

Originally, this Court made a finding that, based on the report, that it was likely that he would regain competence through treatment. There has been no treatment. They're projecting out that he still won't be treated for another two months.

I'm going to, based on the new information that I have, find that he would not be restored to competence in the allotted time that they have to treat him based on the fact that he is not being treated. And, therefore, I will leave the People to their other remedy of trying to process [defendant] through the civil branch. . . .

* * *

. . . I can disagree with the findings that the [CFP] had said. They thought that, based on what they saw, that they would be able to restore him. I have the ability to accept their recommendations and their findings or say, you know, I don't think that that's true. I disagree with the

> report. And so, I can find that he is incompetent to stand trial and that there is not a substantial probability that competency will be attained within the time established by law.

The prosecutor objected, "But doesn't the Court need to have a hearing and have another individual who would concur with that opinion[?]" The court disagreed with this approach:

> No. No. It's . . . a judicial decision. It's not a, you know, here's one psychiatrist that says this. This is one psychiatrist that says that. It's a judicial determination whether I want to accept their findings or to reject their findings. It's not -- We've already -- You all have stipulated to the report, which is fine.
>
> But I'm finding that that report now doesn't provide this Court with the information that I believe it needs in order to now look back and say: Oh. Okay. Well, I still agree that there's a probability that the defendant, if provided a course of treatment, will attain competence to stand trial within the time limits established. I don't believe that that's true now.

Upon the prosecutor's reiterated objection, the court continued:

> An objection already for the first thing, that he shouldn't be released. And I don't think this is a release thing. I think this is the Court can make a finding that, based on the inaccuracies now, that the initial report that the Court received back on August the 22nd, that incarcerating an incompetent person, first of all, isn't what the Department of Corrections wants to be involved in. I don't think justice says that we incarcerate people who are incompetent. There is a guess as to when [defendant] will be treated, based on the letter that we all received.
>
> And that's not sufficient for this Court then to say that there is a substantial probability that competence will be attained within the time limits established. So, I am changing my findings, based on the new information, and

> will leave the People to try to civilly commit [defendant], since they're concerned about his mental health, as we all are. And if he returns to competence through the civil division, then certainly the People should, and I encourage them then, to refile this and let a competent person proceed through the criminal justice system.

The circuit court subsequently entered an order dismissing the action without prejudice on the following ground: "The court determines defendant is incompetent and likely will not achieve competency within the prescribed time period. Prosecutor will proceed in civil court." The court also entered a "finding and order on competency" repeating its directives.

The prosecution appealed the circuit court's dismissal of the charges against defendant. In its appellate brief, the prosecution contends that the circuit court "erred in at least two respects . . . ." First, the court improperly "determined without holding a hearing that defendant could not attain competence within 15 months[.]" While the court was permitted to change its mind, the prosecution posits that a hearing at which the prosecution could present " 'additional facts germane to the findings' " was necessary. (Citation omitted.) Second, the prosecution asserts, the court "dismissed the case before the expiration of 15 months from the initial finding that defendant was incompetent."

II. STANDARD OF REVIEW

The circuit court's dismissal of the charges against defendant was based on its interpretation of the competency-hearing statutes. We review de novo issues of statutory interpretation. *People v Plunkett*, 485 Mich 50, 58; 780 NW2d 280 (2010).

> The primary goal of statutory interpretation is to ascertain and give effect to the Legislature's intent. The first step in ascertaining the Legislature's intent is to review the specific language of the statute. The Legislature is presumed to have intended the meaning it plainly expressed and, therefore, clear statutory language must be enforced as written. [*People v Szabo*, 303 Mich App 737, 741; 846 NW2d 412 (2014) (citations omitted).]

This case also presents constitutional issues for both sides. On the one hand, the prosecution of a case is an executive act, and a "trial court's authority over the discharge of the prosecutor's duties is limited" to situations in which a prosecutor's actions "are unconstitutional, illegal, or ultra vires." *People v Morrow*, 214 Mich App 158, 161; 542 NW2d 324 (1995). See also *People v Sierb*, 456 Mich 519, 533; 581 NW2d 219 (1998) ("[A]bsent a violation of the constitution or specific statutory authority, we are not persuaded that we have the authority or the wisdom to monitor the performance of the elected prosecutor."). Though a trial court "may veto the prosecutor's decision not to prosecute further," the opposite is not true; a trial court generally may not dismiss charges sua sponte over a prosecutor's objection. *Morrow*, 214 Mich App at 162. On the other side of the coin lies a criminal defendant's constitutional liberty interest. In this vein, the United States Supreme Court has held that a state may not hold a defendant indefinitely "simply on account of his incompetency to stand trial on the charges filed against him." *Jackson v Indiana*, 406 US 715, 720; 92 S Ct 1845; 32 L Ed 2d 435 (1972). Such indefinite commitment amounts to a due process violation. *Id*. at 731. We review de novo such constitutional considerations. See *People v Harper*, 479 Mich 599, 610; 739 NW2d 523 (2007).

III. STATUTORY RUBRIC

In Michigan, the competence of criminal defendants to stand trial is governed by provisions of the Mental Health Code, MCL 330.2020 *et seq*. As a general rule, a criminal defendant is "presumed competent to stand trial." MCL 330.2020(1). A criminal defendant "shall be determined incompetent to stand trial only if he is incapable because of his mental condition of understanding the nature and object of the proceedings against him or of assisting in his defense in a rational manner." *Id*. The statute places this determination in the court's hands. *Id*. ("The court shall determine the capacity of a defendant . . . .").

The prosecution, defense counsel, and the trial court all hold the power to raise the issue of a defendant's competency. MCL 330.2024. When the issue arises, the court must order the defendant's examination by the CFP or other qualified facility. MCL 330.2026(1). The defendant may remain in jail pending and even during the examination. MCL 330.2026(2). However, a report regarding the defendant's competence must be presented to the court within 60 days. MCL 330.2028(1).

"A defendant who is determined incompetent to stand trial shall not be proceeded against while he is incompetent." MCL 330.2022(1). Once a defendant becomes competent, the prosecution may go forward. Whether the CFP opines that the defendant is competent or incompetent, the court must conduct a hearing within five days of receiving its report. MCL 330.2030(1).

> On the basis of the evidence admitted at the hearing, the court shall determine the issue of the incompetence of the defendant to stand trial. If the defendant is determined incompetent to stand trial, the court shall also determine whether there is a substantial probability that the defendant, if provided a course of treatment, will attain compe-

> tence to stand trial within the time limit established by [MCL 330.2034]. [MCL 330.2030(2).]

The time limit established under MCL 330.2034(1) is "15 months or 1/3 of the maximum sentence the defendant could receive" if convicted as charged, "whichever is lesser[.]" Defendant's charges come with 10- and 15-year maximum sentences. See MCL 750.84(1); MCL 750.530(1). Accordingly, the 15-month period is applicable in the current case.

In the event the court determines that the defendant cannot be rendered competent to stand trial within 15 months, MCL 330.2031 permits the court to direct the prosecution to pursue civil commitment procedures:

> [T]he court may direct a prosecuting attorney to file a petition asserting that the defendant is a person requiring treatment as defined by [MCL 330.1401][1] or meets the criteria for judicial admission as defined by [MCL 330.1515][2] with the probate court of the defendant's county of residence.

If the court finds a substantial probability that the defendant could be rendered competent to stand trial within 15 months, MCL 330.2032 governs the provision of treatment:

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[1] A "person requiring treatment," as defined by MCL 330.1401(1), encompasses individuals with mental illness, not cognitive impairments.

[2] MCL 330.1515 provides:

> A court may order the admission of an individual 18 years of age or older who meets both of the following requirements:
>
> (a) Has been diagnosed as an individual with an intellectual disability.
>
> (b) Can be reasonably expected within the near future to intentionally or unintentionally seriously physically injure himself or herself or another person, and has overtly acted in a manner substantially supportive of that expectation.

(1) If the defendant is determined incompetent to stand trial, and if the court determines that there is a substantial probability that, if provided a course of treatment, he will attain competence to stand trial within the time limit established by [MCL 330.2034], the court shall order him to undergo treatment to render him competent to stand trial.

(2) The court shall appoint a medical supervisor of the course of treatment. The supervisor may be any person or agency willing to supervise the course of treatment, or the department of mental health.

(3) The court may commit the defendant to the custody of the department of mental health, or to the custody of any other inpatient mental health facility if it agrees, only if commitment is necessary for the effective administration of the course of treatment. If the defendant, absent commitment to the department of mental health or other inpatient facility, would otherwise be held in a jail or similar place of detention pending trial, the court may enter an order restricting the defendant in his movements to the buildings and grounds of the facility at which he is to be treated.

MCL 330.2034, as discussed, creates a 15-month time limit for the provision of treatment:

(1) No order or combination of orders issued under [MCL 330.2032 or MCL 330.2040], or both, shall have force and effect for a total period in excess of 15 months or 1/3 of the maximum sentence the defendant could receive if convicted of the charges against him, whichever is lesser; nor after the charges against the defendant are dismissed.

(2) The court shall provide for notification of defense counsel, the prosecution, and the medical supervisor of treatment whenever the charges against the defendant are dismissed and whenever an order whose stated time period has not elapsed is voided by the court.

(3) If the defendant is to be discharged or released because of the expiration of an order or orders under [MCL 330.2032 or MCL 330.2040], the supervisor of treatment prior to the discharge or release may file a petition asserting that the defendant is a person requiring treat-

> ment as defined by [MCL 330.1401] or meets the criteria for judicial admission as defined by [MCL 330.1515] with the probate court of the defendant's county of residence.[3]

When a defendant has been deemed incompetent to stand trial, the medical supervisor of treatment is required to periodically supplement his or her report to the court "[a]t least once every 90 days . . . ." MCL 330.2038(1)(a). Reports are also required in the following situations:

> (b) Whenever he is of the opinion that the defendant is no longer incompetent to stand trial.
>
> (c) Whenever he is of the opinion that there is not a substantial probability that the defendant, with treatment, will attain competence to stand trial within the time limit established by [MCL 330.2034]. [MCL 330.2038(1).]

MCL 330.2040 governs the determination of a defendant's continued incompetency to stand trial:

> (1) The court shall forthwith hear and redetermine the issue of the incompetence of the defendant to stand trial and, if the defendant is redetermined incompetent to stand trial, shall hear and determine whether the defendant has made progress toward attaining competence to stand trial during his course of treatment, whenever the court receives a report from the supervisor of treatment, unless the defense waives the hearing, or whenever deemed appropriate by the court.
>
> (2) [MCL 330.2030] shall govern hearings held pursuant to this section.
>
> (3) If the defendant is not redetermined incompetent to stand trial at a hearing held pursuant to this section, trial shall commence as soon as practicable. If the defendant is redetermined incompetent to stand trial, and if the court determines that the defendant has made progress toward

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[3] Put differently, under MCL 330.2034(3), the treatment supervisor may petition for civil commitment for the defendant.

> attaining competence to stand trial, the court may modify or continue any orders it previously issued under [MCL 330.2032].

The defendant's time spent incarcerated or institutionalized because of orders issued under MCL 330.2026, MCL 330.2032, or MCL 330.2040 is not simply wasted time; it may be credited against the defendant's eventual sentence. MCL 330.2042.

The dismissal of charges is governed by MCL 330.2044, which provides:

> (1) The charges against a defendant determined incompetent to stand trial shall be dismissed:
>
> (a) When the prosecutor notifies the court of his intention not to prosecute the case; or
>
> (b) Fifteen months after the date on which the defendant was originally determined incompetent to stand trial.
>
> (2) When charges are dismissed pursuant to subsection (1), the same charges, or other charges arising from the transaction which gave rise to the dismissed charges, shall not subsequently be filed against the defendant, except as provided in this section.
>
> * * *
>
> (4) The court shall grant permission to again file charges if after a hearing it determines that the defendant is competent to stand trial. Prior to the hearing, the court may order the defendant to be examined by personnel of the [CFP] or other qualified person as an outpatient, but may not commit the defendant to the center or any other facility for the examination.

IV. ANALYSIS

The prosecution correctly contends that the circuit court was not permitted to dismiss the charges under the circumstances presented.

A. PREREQUISITE HEARING

It is within the power of the circuit court to "determine the capacity of a defendant . . . ." MCL 330.2020(1). That decision, as with any judicial decision, must be based in fact. See *Demosthenes v Baal*, 495 US 731, 735; 110 S Ct 2223; 109 L Ed 2d 762 (1990). The judgment of a defendant's competence and "whether there is a substantial probability that the defendant" could attain competence must be based on "the evidence admitted at the hearing . . . ." MCL 330.2030(2). The circuit court conducted such a hearing on August 22, 2013. The only evidence at the hearing was the CFP report, which indicated that defendant's cognitive impairment rendered him currently incompetent to stand trial, a point with which the court agreed. The report also included the evaluator's opinion that education regarding the legal process could allow defendant "in a basic way, to work with his attorney," allowing him to potentially attain competence within 15 months. Although the court was "not completely sold" on this conclusion, it accepted the report and held defendant for treatment geared toward preparing him for trial.

The lack of treatment in the interim prompted the court to change its mind at the October 29 hearing. The only evidence at the hearing was that the Kalamazoo Psychiatric Hospital would not have an open bed for another six to eight weeks. From this fact alone, the circuit court jumped to the conclusion that defendant would not be able to attain the requisite level of competency to stand trial within the statutory 15-month period. More is required by the Mental Health Code, however.

MCL 330.2030(2) demands that a competency determination be made "[o]n the basis of the evidence

admitted at the hearing" following the presentation of the CFP report. MCL 330.2040 similarly demands a hearing before a "redetermin[ation]" of competency is made. If the defendant remains incompetent, MCL 330.2040(1) mandates that the court "hear and determine whether the defendant has made progress toward attaining competence . . . ." Such a hearing must be held each time the CFP provides a supplemental report (unless waived by the defendant), or at other times "deemed appropriate by the court." *Id*. And any hearing conducted pursuant to MCL 330.2040(1) must comport with MCL 330.2030. MCL 330.2040(2).

Here, there was no subsequent report from the CFP. Accordingly, the October 29 hearing was scheduled based on the circuit court's discretionary power under MCL 330.2040(1). The October 29 hearing had to be conducted consistently with the procedures of MCL 330.2030. MCL 330.2030(3) provides, "The defense, prosecution, and the court on its own motion may present additional evidence relevant to the issues to be determined at the hearing." The court denied the prosecution the opportunity to present additional evidence, ruling that competency is "a judicial decision" and would be made solely on the stipulated CFP report. While the CFP report was admissible, MCL 330.2030(3), this was not to the exclusion of other evidence the prosecution may have wanted to present. Absent a hearing at which the prosecution could present evidence regarding defendant's ability to attain competence, the court improperly rendered any decision regarding defendant's continued incompetence.

B. REMEDY OF DISMISSAL

Moreover, with or without a hearing, dismissal of the charges against defendant was not the proper

remedy. MCL 330.2044 "is the procedural vehicle for enforcing a defendant's right not to be confined solely because of incompetency." *People v Miller*, 440 Mich 631, 636; 489 NW2d 60 (1992). MCL 330.2044(1) provides only two circumstances meriting a trial court's dismissal of the criminal action: (a) upon notification by the prosecution of its intent to drop the charges and (b) if the defendant remains incompetent to stand trial 15 months after the original incompetency ruling. Neither of these situations existed in this case. The prosecution repeatedly expressed its desire to pursue the pending charges. And at the time of the October 29, 2013 hearing, 15 months had not elapsed since the original incompetency determination. Accordingly, the circuit court lacked statutory authority simply to dismiss the matter.

In *Jackson*, 406 US at 717, the defendant was a deaf, mute, severely mentally impaired man who could only communicate through rudimentary sign language. On two separate occasions, the defendant stole property from women with a total value of $9. *Id*. Evidence at a pretrial competency hearing revealed that no level of treatment could render the defendant competent to stand trial. *Id*. at 718-719, 725. Even so, the trial court ordered the defendant's commitment "until such time as [the Indiana Department of Mental Health] should certify to the court that 'the defendant is sane.' " *Id*. at 719. The defendant's appeal traveled all the way to the Supreme Court because his commitment amounted to an indefinite commitment despite that he had never been convicted of a criminal offense. *Id*.

The Indiana statutes governing "pretrial commitment of incompetent criminal defendants," like those in Michigan, grant the authority to render the incompetency decision to the trial court alone. *Id*. at 720. The

Indiana statutes, however, authorized the court to detain the criminal defendant indefinitely in the treatment facility until " '[w]henever the defendant shall become sane . . . .' " *Id*. (citation omitted; alteration in original). Moreover, the Indiana scheme did not provide for periodic court review of the criminal defendant's mental condition. *Id*. The defendant in *Jackson* contended that the court should have proceeded under the state's civil commitment procedures to protect the defendant's rights. *Id*. at 721. Under the civil procedure, a "feeble-minded" person may be released from confinement upon such time that the supervising agency deems that " 'the mental and physical condition of the patient justifies it.' " *Id*. (citation omitted).

Relevant to the current appeal, the United States Supreme Court held that "Indiana's indefinite commitment of a criminal defendant solely on account of his incompetency to stand trial does not square with the Fourteenth Amendment's guarantee of due process." *Id*. at 731. The indefiniteness of the commitment period arises because the statutes take no account of the defendant's likelihood of improvement, requiring institutionalization until the defendant attains sanity. *Id*. at 725, 727.

The Court pointed to the federal procedures for managing incompetent criminal defendants as a contrast. Under 18 USC 4246, a criminal defendant could be held before trial " 'until the accused shall be mentally competent to stand trial . . . .' " Federal courts had applied the subsequent statutory provision, 18 USC 4247, to such pretrial commitments even though it facially applied only to convicted defendants deemed incompetent while serving their sentences. *Jackson*, 406 US at 731-732. Section 4247 permitted commitment of a prisoner, rather than release at the natural

end of his sentence, if deemed " 'insane or mentally incompetent' " and a danger to himself or others. *Jackson*, 406 US at 732. Under this rubric, the prisoner must be released once he is no longer a danger. *Id*. The federal courts applied this statute to create "a 'rule of reasonableness' " for pretrial detention. *Id*. at 733. Specifically, if a defendant is deemed incompetent to stand trial, he "can be held only for a 'reasonable period of time' necessary to determine whether there is a substantial chance of his attaining the capacity to stand trial in the foreseeable future. If the chances are slight, or if the defendant does not in fact improve, then he must be released" or granted a hearing to consider whether he poses a danger. *Id*.

Later that same year, the United States Supreme Court considered the detention of incompetent individuals beyond the expiration of their criminal sentence. In *McNeil v Director, Patuxent Institution*, 407 US 245, 246; 92 S Ct 2083; 32 L Ed 2d 719 (1972), the defendant was convicted of assault and sentenced to five years' imprisonment. The sentencing court ordered the defendant's transport to the Patuxent Institution, rather than prison, "to determine whether he should be committed to that institution for an indeterminate term" as a defective delinquent. *Id*. The defendant remained institutionalized after the expiration of his sentence, the institution alleged, because he refused to cooperate so that a valid assessment could be made. *Id*. The defendant's challenge was not to the "criteria and procedures" governing Maryland defective-delinquency hearings; no such hearing had yet been conducted. *Id*. at 248. Rather, the defendant's challenge was that "[h]is confinement rest[ed] wholly on the order committing him for examination, in preparation for such a commitment hearing." *Id*. "That order was made, not on the basis of an adversary hearing,

but on the basis of an *ex parte* judicial determination that there was 'reasonable cause to believe that the Defendant may be a Defective Delinquent,' " the Court continued. *Id*. (citation omitted).

The institution in *McNeil* raised two grounds to support its indefinite commitment of the defendant: "that a commitment for observation need not be surrounded by the procedural safeguards (such as an adversary hearing) that are appropriate for a final determination of defective delinquency," *id*. at 249, and that the defendant's commitment was akin to a civil contempt because his obstreperous behavior prevented examination, *id*. at 250. The Supreme Court rejected both contentions. In relation to the first, the Court held, "A confinement that is in fact indeterminate cannot rest on procedures designed to authorize a brief period of observation." *Id*. at 249. Quoting *Jackson*, 406 US at 738, the *McNeil* Court further held:

> If the commitment is properly regarded as a short-term confinement with a limited purpose, as the respondent suggests, then lesser safeguards may be appropriate, but by the same token, the duration of the confinement must be strictly limited. "[D]ue process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." Just as that principle limits the permissible length of a commitment on account of incompetence to stand trial, so it also limits the permissible length of a commitment "for observation." [*McNeil*, 407 US at 249-250.]

The Court declined to "set a precise time limit," but noted that the Maryland statute actually included a six-month observation period. *Id*. at 250. The state had violated the intention of this protection by permitting repeated extensions. *Id*.

In relation to the second ground, the Court noted, "if confinement is to rest on a theory of civil contempt,

then due process requires a hearing to determine whether petitioner has in fact behaved in a manner that amounts to contempt." *Id*. at 251. The hearing would permit the trial court to determine whether the defendant's contemptuous conduct was actually caused by mental illness, or whether it was a willful violation of court orders. *Id*. In *McNeil*, the defendant had essentially been confined on the basis of contempt "potentially for life, although he ha[d] never been determined to be in contempt by a procedure that comport[ed] with due process." *Id*. The meat of *McNeil* is that a defendant is entitled to a hearing and resolution of the question of his competency within a reasonable time to ensure he is not held without just cause.

As required by *McNeil*, in Michigan, a criminal defendant may not be held indefinitely. The statutes provide a 15-month period in which the defendant must be rendered competent to stand trial. If the defendant cannot be so rendered, the prosecution must pursue civil commitment measures to maintain the defendant in care. This Court has upheld detainment in the face of this statutorily designated reasonable-delay period.

In *People v Davis*, 123 Mich App 553, 557; 332 NW2d 606 (1983), a two-year delay separated "the original order for commitment for forensic examination and the administration of the examination . . . ." During that time, the defendant had been the subject of a civil commitment and had absconded for approximately seven months from the psychiatric institution. *Id*. at 556. The defendant contended that the circuit court was required to dismiss the charges against him pursuant to MCL 330.2044(1)(b) because 15 months had elapsed since the original order for commitment for examination and he had yet to attain competency to

stand trial. *Davis*, 123 Mich App at 557. This Court disagreed with the defendant's calculation of the statutory period, stating the period begins to run following the initial competency determination, not after the commitment for examination. *Id*. Citing *Jackson* and *McNeil*, this Court held "that an individual may not be committed to a psychiatric institution for an extended period except after a due process hearing." *Id*. at 558. Ultimately, however, the Court ruled that the defendant was correctly held in the psychiatric facility as a result of his guilty plea, not his commitment, so that no due process violation occurred. *Id*.[4]

In *People v Bowman*, 141 Mich App 390, 392-397; 367 NW2d 867 (1985), the defendant was repeatedly found incompetent to stand trial in both state court and a previous federal court prosecution. He eventually stood trial in state court when the administration of psychotropic medications rendered him competent to understand the proceedings. *Id*. at 397. The question in *Bowman* was the start date of the 15-month period for purposes of MCL 330.2044. *Id*. at 398. The *Bowman* Court's analysis bears relevance to this appeal. The *Bowman* Court noted that "procedures for determining a criminal defendant's competence to stand trial are ultimately rooted in principles of due process." *Id*. at 399. The statutes therefore must "be interpreted in a manner that protects incompetent defendants from indefinite denials of liberty." *Id*. Construing various provisions together, this Court held that the Department of Mental Health had only 15 months to treat the defendant so that he could attain competency. *Id*. at

[4] Although the *Davis* Court rejected the defendant's argument that he was entitled to a reversal of his conviction because of the delay between the order for commitment for examination and the administration of the examination, the Court remanded for further consideration of the defendant's speedy trial claim. *Id*. at 560.

399-400. MCL 330.2044 protects a defendant from an indefinite wait after being found incompetent to stand trial, this Court adjudged. "In order to protect defendants from an indefinite suspension of their right to trial, as opposed to an indefinite suspension of their right to liberty, [MCL 330.2044] requires that charges be dismissed 15 months after the determination of incompetency." *Id*. at 400.

The circuit court exaggerated the delay that arguably could be attributed to the prosecution in this case. Defendant was released on bond two months after his arrest, and remained free until the August 22 hearing. He was held in the Wayne County Jail from August 22 through October 29, a period of two months and one week. The waiting list for the Kalamazoo Psychiatric Hospital would have extended defendant's jail confinement for approximately four months total after the issue of competency had been raised, but defendant had in fact been detained for only two months at the relevant time. This delay bears no similarity to the indefinite confinements at issue in *Jackson*, 406 US 715, and *McNeil*, 407 US 245. Moreover, neither statutory nor constitutional grounds supported dismissal of the charges based on the delay. We do not suggest that the circuit court's concern for incarcerating a cognitively impaired 17-year-old boy was misplaced, only that the court chose an impermissible remedy. Ordering defendant's segregation in the jail or releasing defendant to his family's care on house arrest would have served the same purpose without violating the statutory provisions.

Given the lack of a proper hearing and the short duration of the delay, the court was not permitted to dismiss the charges over the prosecution's objection. We must therefore reverse.

C. ALTERNATIVE GROUNDS FOR AFFIRMANCE

Defendant characterizes the legal arguments placed before this Court differently, and we will consider them as alternative grounds for affirming the circuit court's decision. Defendant asserts that the circuit court actually dismissed the charges because "the court ordered examination regarding Defendant's competency to stand trial did not take place within the statutorily mandated 60 days." In this regard, defendant relies upon MCL 330.2028(1), which directs that when a court orders a forensic examination of a defendant's competency to stand trial under MCL 330.2026, the initial CFP report must be submitted within 60 days. This deadline was not relevant at the October 29 hearing. The court ordered defendant's examination on June 6, and the CFP had 60 days from that date to submit its initial report. The CFP submitted its report to the court on August 8 without objection. After the August 22 hearing, the examining authority had 90 days to submit a follow-up treatment report. MCL 330.2038(1)(a). Less than 90 days elapsed between the August and October hearings and defendant raises no challenge based on MCL 330.2038.

Defendant also claims that any error in dismissing the charges was harmless because the court's order was entered without prejudice. In this regard, defendant cites *Miller*, 440 Mich 631, for the proposition that "failure to adhere to the statutory requirements regarding dismissal, which allow for the refiling of charges, is merely a procedural error resulting in harmless error and does not require reversal." *Miller* is inapposite.

In *Miller*, 440 Mich at 634-635, the defendant was found incompetent to stand trial, attained competency through treatment, but then regressed. The defendant

was deemed incompetent to stand trial for a total period greater than 15 months. Further treatment returned the defendant to competency, he stood trial, and was convicted of first-degree criminal sexual conduct. *Id*. Once the total period of the defendant's incompetency to stand trial spanned 15 months, the defendant repeatedly sought dismissal of the charges against him under MCL 330.2044, but the trial court rejected his attempts. *Id*. at 635. This Court reversed the defendant's conviction, holding that dismissal was required because the defendant was incompetent at the time he filed his motion and more than 15 months had elapsed since he was first adjudged incompetent to stand trial. *Id*.

The Supreme Court reversed this Court's opinion and reinstated the defendant's convictions. The Court cited MCL 330.2044(3) and (4), which permit the prosecution to refile charges against a defendant once he regains competency. Because the charges could be refiled, the failure to dismiss the charges during the period of incompetency was harmless:

> A violation of [MCL 330.2044(1)(b)] predicated solely on the erroneous denial of a motion to dismiss constitutes a ground for reversal only where it is claimed that the failure to dismiss denied defendant a substantive right, to wit: the barring of the charge or prejudice caused by the delay resulting from a violation of [MCL 330.2044(1)(b)]. Failure to dismiss after expiration of a total period of fifteen months is not error on which reversal can be predicated. [*Id*. at 636.]

The Court continued:

> Although hardly a model of clarity, the structure of the act and the legislative history suggest that [MCL 330.2044(3) and (4)] are limitation provisions and that reversal of a conviction would be warranted in respect to nonlife offenses only where the time lapse from initial

> adjudication of incompetence exceeds one third of the maximum sentence or causes prejudice to the defendant's substantive rights. [*Id*. at 637.]

Unlike in *Miller*, the circuit court in this case dismissed the charges against defendant because he had yet to begin treatment geared toward attaining competency, and treatment would likely be delayed another two months. The court did not dismiss the charges because the 15-month statutory period had expired. Indeed, defendant's period of incompetency had lasted nowhere near this limitation period. Based on the delay, the circuit court reversed its initial determination and found that defendant would not likely attain competence within the 15-month statutory period. However, the delay in beginning defendant's treatment was an insufficient basis to support that defendant was unlikely to attain competence. The circuit court's focus must be "whether, *if provided a course of treatment*, a substantial probability exists that a defendant found to be incompetent will attain competence within the time limit established . . . ." *Id*. at 638 (emphasis added). Once the circuit court initially determined that defendant could attain competence, the Kalamazoo Psychiatric Hospital had a full "15 months within which to treat defendant." *Bowman*, 141 Mich App at 400. The hospital notified the court that it would be unable to treat defendant for another six to eight weeks, amounting to a total four-month delay between being adjudged incompetent to stand trial and beginning treatment. Though such a delay is not preferable and should be avoided if at all possible, it is mere speculation that defendant would remain incompetent for the entire 15 months provided by statute. MCL 330.2034(1). Therefore, the circuit court lacked statutory authority to dismiss the charges and its error was not harmless under *Miller*.

We reverse and remand for proceedings consistent with this opinion. We do not retain jurisdiction.

CAVANAGH and FORT HOOD, JJ., concurred with GLEICHER, P.J.

PEOPLE v JUNTIKKA

Docket No. 318300. Submitted April 10, 2015, at Lansing. Decided April 21, 2015, at 9:05 a.m.

Jason Juntikka pleaded guilty in the Houghton Circuit Court to one count of failing to register as a sex offender. The court, Charles R. Goodman, J., sentenced defendant to 5 years of probation and 12 months of confinement in the county jail. The court also ordered defendant to pay a $100 probation enhancement fee. Following the court's denial of his motion for resentencing, defendant filed an application for leave to appeal in the Court of Appeals. It was denied. Defendant then filed for leave to appeal in the Supreme Court. In lieu of granting leave to appeal, the Supreme Court remanded the case to the Court of Appeals for consideration as on leave granted in light of the Supreme Court's decision in *People v Cunningham*, 496 Mich 145 (2014).

The Court of Appeals *held*:

1. The trial court improperly ordered defendant to pay a probation enhancement fee. MCL 771.3(2)(d) does not provide trial courts with the independent authority to impose any assessment as a condition of probation. To interpret MCL 771.3(2)(d) as authorizing the imposition of any assessment would negate the specific provision in MCL 771.3(1)(d) requiring courts to order a probationer to pay a supervision fee. Consonant with the Supreme Court's decision in *Cunningham*, which determined that MCL 769.1k(1)(b)(*ii*) did not authorize a trial court to impose any cost not otherwise authorized in a separate statutory provision, MCL 771.3(2)(d) also limits a trial court to imposing only those assessments specifically authorized in another statutory provision. No other statutory provision authorizes the imposition of a probation enhancement fee and therefore, the trial court was without authority to impose the fee on defendant.

2. The probation enhancement fee imposed by the trial court was not authorized by the language in MCL 771.3(5) because it was not a cost specifically incurred in prosecuting defendant, providing him with legal assistance, or supervising him during

his probation. The probation enhancement fee imposed on defendant accounted for general operating costs incurred by the probation department—the cost of gloves and cell phones—and was not specific to the factors involved in defendant's case.

Reversed and remanded.

O'CONNELL, J., dissenting, concluded that MCL 771.3(2)(c), MCL 771.3(2)(d), and MCL 771.3(5) provide a trial court with the necessary separate authority to impose on defendant a probation enhancement fee. Judge O'CONNELL noted that MCL 771.3(2)(c) authorizes the court to impose costs under MCL 771.3(5), and MCL 771.3(5) limits those costs to expenses specifically incurred to supervise the probationer. Judge O'CONNELL further noted that the probation enhancement fee imposed on defendant contributes to equipment that assists probation agents to perform their jobs. In this case, the probation enhancement fee would contribute to the costs involved in supervising defendant during his probation and in the additional monitoring defendant would require under the Sex Offenders Registration Act. According to Judge O'CONNELL, if a trial court was limited to imposing only the costs required by MCL 771.3(1)(d)—the supervision fee described in MCL 771.3c—the statutory provisions in MCL 771.3(2)(c), MCL 771.3(2)(d), and MCL 771.3(5) would be rendered surplusage.

SENTENCING — PROBATION — IMPOSITION OF COSTS AND ASSESSMENTS — PROBATION ENHANCEMENT FEE.

A trial court does not have authority to impose a probation enhancement fee on a probationer because no separate statutory provision authorizes such a fee; to interpret MCL 771.3(2)(d) as authorizing the imposition of any assessment would negate the specific language of MCL 771.3(1)(d), which requires the court to impose a supervision fee on a probationer; any costs imposed under MCL 771.3(2)(c) and MCL 771.3(5) must represent expenses specifically incurred in prosecuting a defendant, providing a defendant with legal assistance, or supervising a defendant during probation.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, and *Michael E. Makinen*, Prosecuting Attorney, for the people.

State Appellate Defender (by *Jessica L. Zimbelman*) for defendant.

Before: O'CONNELL, P.J., and FORT HOOD and GADOLA, JJ.

GADOLA, J. At issue in this case is whether a trial court properly imposed a $100 probation enhancement fee on defendant under MCL 771.3. Because we conclude that MCL 771.3(2)(d) does not independently authorize trial courts to impose any assessment, and because we conclude that the probation enhancement fee was not statutorily authorized as a cost specifically incurred in defendant's case, we vacate the portion of the court's order imposing the probation enhancement fee and remand for further proceedings.

I. BACKGROUND

On January 23, 2013, defendant pleaded guilty to one count of failing to register as a sex offender, MCL 28.729. The trial court sentenced defendant to a five-year probationary term and 12 months in the county jail. The court additionally ordered defendant to pay several monetary charges, including a $100 probation enhancement fee.

On August 6, 2013, defendant filed a motion for resentencing, contending, among other things, that the $100 probation enhancement fee was improper because it was an unauthorized assessment. The court denied defendant's motion, explaining that the probation enhancement fee covered items including "gloves so that the probation agents may test bodily fluids more safely" and "cell phones so that [agents] can quickly respond to issues that may arise." The trial court concluded that because defendant was on probation, the fee afforded him a potential benefit and so fell within the ambit of MCL 771.3(2)(d).

Following the denial of his motion, defendant filed an application for leave to appeal to this Court, which was denied. *People v Juntikka*, unpublished order of the Court of Appeals, entered December 6, 2013 (Docket No. 318300). Defendant then filed an application for leave to appeal in the Michigan Supreme Court. In lieu of granting leave to appeal, the Supreme Court remanded the case to this Court for consideration as on leave granted in light of its decision in *People v Cunningham*, 496 Mich 145; 852 NW2d 118 (2014). *People v Juntikka*, 497 Mich 852 (2014). Accordingly, we now consider whether the trial court exceeded its statutory authority by imposing a $100 probation enhancement fee on defendant.

II. STANDARD OF REVIEW

We review issues of statutory interpretation de novo. *People v Akins*, 259 Mich App 545, 551; 675 NW2d 863 (2003).

III. PRINCIPLES OF STATUTORY INTERPRETATION

When interpreting a statute, the primary goal is to discern and give effect to the intent of the Legislature. *Koontz v Ameritech Servs, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002). In giving meaning to a statutory provision, we consider the provision within the context of the whole statute and "give effect to every word, phrase, and clause . . . [to] avoid an interpretation that would render any part of the statute surplusage or nugatory." *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146; 644 NW2d 715 (2002). When statutory terms are undefined, we interpret the terms according to their plain and ordinary meaning, and may consult dictionary definitions to accomplish this task. *Koontz*, 466 Mich at 312.

IV. ANALYSIS

Courts may only impose costs in a criminal case when such costs are authorized by statute. *Cunningham*, 496 Mich at 149; *People v Dilworth*, 291 Mich App 399, 400; 804 NW2d 788 (2011). MCL 771.3 governs the conditions a trial court may impose during a term of probation, and provides in pertinent part the following:

> (2) As a condition of probation, the court may require the probationer to do 1 or more of the following:
>
> * * *
>
> (c) Pay costs pursuant to subsection (5).
>
> (d) Pay any assessment ordered by the court other than an assessment described in subsection (1)(f) [the crime victim's rights assessment].
>
> * * *
>
> (5) If the court requires the probationer to pay costs under subsection (2), the costs shall be limited to expenses specifically incurred in prosecuting the defendant or providing legal assistance to the defendant and supervision of the probationer.

Defendant first argues that the probation enhancement fee was not authorized by MCL 771.3(2)(d). To determine whether MCL 771.3(2)(d) applies to the fee at issue, we must first address whether the fee constituted an "assessment" under the statute. In *People v Earl*, 495 Mich 33; 845 NW2d 721 (2014), our Supreme Court addressed the scope of the term "assessment" under the Crime Victim's Rights Act, MCL 780.751 *et seq*., and stated the following: " 'Assessment' is defined as 'the action or instance of assessing,' and 'assess' is defined as 'to impose according to an established rate.' " *Id*. at 40,

quoting *Merriam-Webster's Collegiate Dictionary* (8th ed). The Court concluded that, in contrast to criminal fines that are "generally responsive to the conduct which they intend to punish, . . . assessments are imposed in accordance with a predetermined flat rate." *Id*.

In this case, the probation enhancement fee falls within the defined scope of the term "assessment" relied on by our Supreme Court in *Earl*. At the hearing on defendant's motion for resentencing, the trial court explained that "[t]he probation enhancement fee has been assessed by this court long before this individual assumed the bench." Moreover, the probation enhancement fee was a flat fee of $100. Therefore, the probation enhancement fee is properly classified as an assessment because it was imposed in accordance with a predetermined flat rate.

The question, then, is whether the court was authorized to impose the probation enhancement fee under MCL 771.3(2)(d). In *Cunningham*, 496 Mich at 147, our Supreme Court addressed whether former MCL 769.1k(1)(b)(*ii*)[1] provided trial courts with the independent authority to impose costs on a criminal defendant. The Court reasoned that if the Legislature intended former MCL 769.1k(1)(b)(*ii*) to give courts independent authority to impose any cost, it would not have specifically authorized certain costs in other subsections of MCL 769.1k. *Cunningham*, 496 Mich at 154-155. The Court also noted that numerous other penal statutes authorizing the imposition of specific costs for certain offenses would be rendered nugatory if courts could impose any cost "regardless of whether the Legislature

[1] At the time, MCL 769.1k(1)(b)(*ii*) stated that a court may impose "[a]ny cost in addition to the minimum state cost set forth in subdivision (a)." MCL 769.1k(1)(b)(*ii*), as amended by 2006 PA 655.

had particularly provided courts with the authority to impose specific costs for the relevant offense." *Id*. at 156. Thus, the Court held that former MCL 769.1k(1)(b)(*ii*) "provides courts with the authority to impose only those costs that the Legislature has separately authorized by statute." *Cunningham*, 496 Mich at 154.

Although former MCL 769.1k and MCL 771.3 are not identical, they are marked by distinct parallels. For instance, both statutes contain general and specific provisions referring to the imposition of costs and assessments. While MCL 771.3(2)(d) states that a court may require the payment of "any assessment ordered by the court" as a condition of probation, MCL 771.3(1)(d) authorizes a specific supervision assessment, which requires a probationer who was sentenced in the circuit court to "pay a probation supervision fee as prescribed in [MCL 771.3c]."[2] Further, other penal statutes authorize specific assessments that are not addressed under MCL 771.3.[3] Interpreting MCL 771.3(2)(d) as granting courts the independent authority to impose any assessment would effectively render the specific assessment provisions of both MCL 771.3

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[2] MCL 771.3c(1) states the following:

> The circuit court shall include in each order of probation for a defendant convicted of a crime that the department of corrections shall collect a probation supervision fee of not more than $135.00 multiplied by the number of months of probation ordered, but not more than 60 months. . . . The court shall use [a table] of projected monthly income in determining the amount of the fee to be ordered[.]

[3] See, e.g., MCL 257.732a(1) (providing that an individual must pay a specific driver responsibility fee after accumulating seven or more points on his or her driving record within a two-year period), MCL 117.4q(13) (authorizing a $10 "justice system assessment" for each city blight violation), and MCL 801.4b(1) (permitting a $12 jail entry fee for persons incarcerated in the county jail).

and other penal statutes nugatory, as trial courts could impose any assessment as a condition of probation regardless of whether the Legislature specifically authorized certain assessments for particular offenses. When interpreting statutes, our goal is to harmonize and reconcile related statutes, and to avoid nullifying any statutory provision by the overly broad interpretation of another. *Koenig v South Haven*, 460 Mich 667, 677; 597 NW2d 99 (1999) (opinion by TAYLOR, J.). Therefore, we conclude that MCL 771.3(2)(d) does not provide trial courts with the independent authority to impose any assessment as a condition of probation, but rather permits courts to impose only those assessments that are separately authorized by statute.

Even if the trial court was not authorized to impose any assessment against defendant under MCL 771.3(2)(d), the prosecutor contends that the probation enhancement fee was separately authorized by MCL 771.3(5) because it represented a cost specific to defendant's case. Again, MCL 771.3(5) states, "If the court requires the probationer to pay costs under subsection (2), the costs shall be limited to expenses specifically incurred in prosecuting the defendant or providing legal assistance to the defendant and supervision of the probationer."[4] Defendant argues that the specific

[4] Prior versions of MCL 771.3 granted courts significantly broader authority to impose costs on a probationer. MCL 771.3(3) previously stated the following:

> [If a court] requires the probationer to pay any costs it shall not be confined to or governed by the laws or rules governing the taxation of costs in ordinary criminal procedure, but may summarily tax and determine such costs without regard to the items ordinarily included in taxing costs in criminal cases and may include therein all such expenses, direct and indirect, as the public has been or may be put to in connection with the apprehension, examination, trial, and probationary oversight of the

factors present in his case do not support the imposition of the $100 probation enhancement fee and that the fee may not be imposed on the basis of his probationary status alone.

In *People v Teasdale*, 335 Mich 1, 6; 55 NW2d 149 (1952), our Supreme Court held that an order of costs against a convicted defendant "excludes expenditures in connection with the maintenance and functioning of governmental agencies that must be borne by the public . . . ." Likewise, in *People v Newton*, 257 Mich App 61, 69-70; 665 NW2d 504 (2003), this Court affirmed that "[t]he payment of salaries and overtime pay to the investigators, the purchase of surveillance equipment, the purchase and maintenance of vehicles, and other similar expenditures" could not be imposed on a defendant in a restitution order because such expenditures were general costs of investigation. *Id*. at 69 (quotation marks and citation omitted). This Court further explained that costs are general in nature if they "would have been incurred without regard to whether [the] defendant was found to have engaged in criminal activity." *Id*.

In this case, the probation enhancement fee was not specific to defendant, but instead accounted for general operating costs incurred by the probation department.

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probationer. [MCL 771.3(3), as amended by 1925 PA 203.]

The language in 1925 PA 203 was minimally altered by 1978 PA 77. In 1980, the Legislature amended the language granting broad discretionary authority to courts to impose costs on probationers, and enacted the following language in its place:

> If the court requires the probationer to pay costs, it shall be limited to expenses specifically incurred in prosecuting the defendant or providing legal assistance to the defendant and probationary oversight of the probationer. [MCL 771.3(4), as amended by 1980 PA 514.]

The trial court explained that the probation enhancement fee was used to fund the purchase of equipment, such as gloves and cell phones, that enabled probation officers to perform their duties more efficiently. The trial court erred by imposing the probation enhancement fee on defendant because the court was not independently authorized to impose any assessment under MCL 771.3(2)(d), the $100 probation enhancement fee was not separately authorized by statute, and the fee imposed was not a cost "specifically incurred" in defendant's case under MCL 771.3(5).

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

FORT HOOD, J., concurred with GADOLA, J.

O'CONNELL, P.J., (*dissenting*). I respectfully dissent.

Defendant is a probation violator. On January 23, 2013, defendant pleaded guilty to one count of failing to register as a sex offender, MCL 28.729. The trial court sentenced defendant to serve a five-year probationary term and 12 months in the county jail. The court ordered defendant to pay a $100 cost for probation supervision—the equivalent of $1.67 a month—to cover such things as cell phones and gloves for probation agents.[1] The trial court labeled this cost a "proba-

[1] There are several plausible reasons why this specific probation violator may require additional supervision. In this case, the probation department must spend additional time and resources monitoring defendant for any potential violations of the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq*. In my opinion, $1.67 a month to monitor a probationer for SORA violations is not unreasonable. For instance, $1.67 a month may simply cover phone calls to ascertain defendant's compliance with SORA's check-in requirements under MCL 28.725.

tion enhancement fee" and indicated that MCL 771.3 authorized it to impose this cost.

It is necessary to discuss what this case is not about before addressing what this case is about. First and foremost, this case is not similar to *People v Cunningham*, 496 Mich 145; 852 NW2d 118 (2014). In *Cunningham*, our Supreme Court addressed whether former MCL 769.1k(1)(b)(*ii*) provided trial courts with the independent authority to impose costs on a criminal defendant. Former MCL 769.1k(1)(b)(*ii*) gave trial courts authority to impose "[a]ny cost in addition to the minimum state cost . . . ." Our Supreme Court held that former MCL 769.1k(1)(b)(*ii*) did not allow a trial court to assess *any* cost, but rather "provides courts with the authority to impose only those costs that the Legislature has separately authorized by statute." *Cunningham*, 496 Mich at 154.

In the present case, a different statute with different language is at issue. Our statute does not concern "any cost" but rather allows "costs" to be imposed on "the probationer." MCL 771.3(2)(c) provides that a trial court may, under MCL 771.3(5), require the probationer to pay costs as a condition of probation. In turn, MCL 771.3(5) provides that "the costs shall be limited to expenses specifically incurred in . . . supervision of the probationer." Accordingly, costs in this case are specifically authorized by statute. See *Cunningham*, 496 Mich at 149.

We cannot read statutory sections in isolation, *People v Conley*, 270 Mich App 301, 316-317; 715 NW2d 377 (2006), and should avoid constructions that render portions of a statute surplusage, *People v Ward*, 211 Mich App 489, 492; 536 NW2d 270 (1995). MCL 771.3(1)(d) requires payment of a probation-specific supervision fee, and it cross-references MCL 771.3c,

which establishes the amount of the fee based on the probationer's income and the number of months of probation that the trial court orders. I cannot conclude that the Legislature meant to restrict costs or fees to this specific dollar amount when it independently authorized additional costs and fees under MCL 771.3(2)(c) and (d). If a trial court may only order the specific assessment provided in MCL 771.3(1)(d), it renders these portions of the statute surplusage.

The trial court imposed specifically authorized costs in this case.[2] As the trial court noted, the probation enhancement fee it assessed defendant contributes to equipment that assists probation agents to perform their jobs. The probation enhancement fee is a cost incurred in supervising the probationer, who is subject to additional monitoring under SORA.

The $100 cost imposed by the trial court was a reasonable and specific fee authorized by MCL 771.3, and therefore it was not under the umbrella of disallowed costs set forth in the *Cunningham* opinion. Since MCL 771.3 specifically allows a trial court to assess costs for the supervision of probationers, I would affirm the learned trial court's well-reasoned opinion.

I would affirm.

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[2] The majority places great weight on the fact that the term "probation enhancement fee" does not appear in MCL 771.3. In my opinion, this places form over substance and leads the majority astray. As this Court has stated, "[W]e do not reverse where the trial court reaches the right result for a wrong reason." *People v Ramsdell*, 230 Mich App 386, 406; 585 NW2d 1 (1998). I do not think that any flat fee becomes an assessment. I prefer to read the specific statute to determine whether it authorizes a specific cost.

PILGRIM'S REST BAPTIST CHURCH v PEARSON

PILGRIM REST MISSIONARY BAPTIST CHURCH v MAYFIELD

Docket Nos. 318797 and 319571. Submitted April 15, 2015, at Grand Rapids. Decided April 23, 2015, at 9:00 a.m. Leave to appeal sought in Docket No. 318797.

In Docket No. 318797, Pilgrim's Rest Baptist Church, also known as Pilgrim Rest Missionary Baptist Church; Nathan Mayfield, and Stephon Blackwell brought an action in the Kent Circuit Court against Arthur Pearson, Sr. (the pastor of Pilgrim's Rest), seeking monetary damages related to Pearson's use of church funds. Pearson counterclaimed with numerous counts, including various contract claims, fraud, civil conspiracy, and intentional infliction of emotional distress. While the civil case proceeded, Pearson pleaded *nolo contendere* to a charge of embezzling more than $50,000 but less than $100,000 and was ordered to pay restitution. Rifts and frictions developed within the church concerning Pearson's actions and whether his employment should be terminated. In Docket No. 319571, Pilgrim Rest Missionary Baptist Church, Jesse Osby, and others (all members who supported Pearson) brought a separate action in the Kent Circuit Court against Mayfield, Blackwell, and others who opposed Pearson. The court, Dennis B. Leiber, J., dismissed all the claims and counterclaims in both actions, concluding that they were not justiciable under the ecclesiastical abstention doctrine.

The Court of Appeals *held*:

1. On appeal, the parties addressed the merits of the claims and counterclaims. To the extent that the claims are nonjusticiable, however, argument on the merits was irrelevant. To the extent that the claims are justiciable, the trial court should be the first to address the merits of the claims. Therefore, the only issue necessary to address on appeal was whether the claims are justiciable.

2. The First and Fourteenth Amendments and Article 1, § 4 of the Michigan Constitution severely circumscribe courts in their resolution of disputes between a church and its members. A court's jurisdiction is limited to property rights that can be

resolved by application of civil law. A court loses jurisdiction whenever it must stray into questions of religious doctrine or ecclesiastical polity. Religious doctrine refers to ritual, liturgy of worship, and tenets of the faith. Polity refers to the organization and form of government of the church. Under the ecclesiastical abstention doctrine, civil courts may not redetermine the correctness of an interpretation of canonical text or some decision relating to government of the religious polity.

3. The trial court properly dismissed Pearson's counterclaims. As pleaded, they referred to the employment contract between Pearson and the church. When a claim involves the provision of the very services for which the organization enjoys First Amendment protection, any contract for those services likely involves the organization's ecclesiastical policies and is outside the purview of civil law. Determining whether the board of trustees had the authority to suspend and eventually terminate Pearson would require determinations of religious polity, over which civil courts do not have jurisdiction. Additionally, Pearson's counterclaims involve the provision of his services as pastor to the church, which is the essence of the church's constitutionally protected function.

4. The claim against Pearson in Docket No. 318797 is justiciable. While the plaintiffs in that case did not expressly plead a tort, their pleadings for money damages imply conversion as the underlying tort. A conversion claim against an individual facially does not cause the court to stray into questions of religious doctrine or ecclesiastical polity and thereby lose jurisdiction. Because the claim would likely not require the trial court to determine the issue on the basis of religious doctrine or ecclesiastical polity, the claim is likely not barred by the ecclesiastical abstention doctrine. Additionally, Pearson failed to raise an affirmative defense that would necessarily entail an excursion into ecclesiastical polity. While Pearson claimed that the conversion action was barred under MCR 2.116(C)(7) because of a prior judgment, a restitution order as a condition of probation in a criminal case does not act as a bar to the recovery of damages in a civil action arising out of the same incident.

5. The claims of Pearson's supporters involved church membership, property rights of the members, and issues of control of the church. The state has an obvious and legitimate interest in the peaceful resolution of property disputes and providing a civil forum in which the ownership of church property can be determined conclusively. The First Amendment prohibits civil courts from resolving church property disputes on the basis of religious

doctrine and practice. Because Pilgrim's Rest is a strictly congregational or independent organization, governed solely within itself, the dispute is governed by the ordinary principles that govern voluntary associations. Therefore, unless the determination under the ordinary principles of voluntary associations would require interpretation of religious doctrine and polity, the trial court has jurisdiction to hear the claims brought by the pastor's supporters. However, if a defense to one of the claims would lead the court into questions of religious doctrine or ecclesiastical polity, the court will lose jurisdiction.

6. The claim of conversion brought by the pastor's opponents against the pastor's supporters in Docket No. 319571 was justiciable. The claim was for collecting funds in the name of the church, opening a bank account in the name of the church, and using those funds. In essence, the dispute is between two parties, each of which claims that it is the sole owner of the donations deposited into a bank account opened by the pastor's supporters. Because the claim would not require the trial court to determine the issue on the basis of religious doctrine or ecclesiastical polity, the claim is not barred by the ecclesiastical abstention doctrine. The trial court could easily resolve this question because it is a matter of determining to which donee the donor of the money intended to make the donation. This determination sounds entirely in property law and does not delve into questions of religious doctrine or ecclesiastical polity.

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

Bernard C. Schaefer for Pilgrim's Rest Baptist Church, Nathan Mayfield, and Stephon Blackwell in Docket No. 318797.

Jerry L. Ashford for Arthur Pearson, Sr., in Docket No. 318797.

Schenk, Boncher & Rypma (by *Frederick J. Boncher* and *Brent W. Boncher*) for Pilgrim Rest Missionary Baptist Church, Jessie Osby, and others in Docket No. 319571.

Bernard C. Schaefer for Nathan Mayfield, Mary Anne Beattie, Stephon Blackwell, and others in Docket No. 319571.

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

PER CURIAM. In Docket No. 318797, defendant/counterplaintiff-appellant/cross-appellee Arthur Pearson, Sr. (defendant Pearson) appeals the trial court's October 7, 2013 order dismissing his counterclaims under MCR 2.116(C)(8) for being nonjusticiable. Plaintiffs/counterdefendants-appellees/cross-appellants Pilgrim's Rest Baptist Church, Nathan Mayfield, and Stephon Blackfield (plaintiffs) cross-appeal the same order, which also dismissed their claims under MCR 2.116(C)(8) for being nonjusticiable. In consolidated case Docket No. 319571, plaintiffs/counterdefendants-appellants/cross-appellees and plaintiffs-appellants/cross-appellees (collectively referred to as "pastor's supporters") appeal the trial court's November 21, 2013 order that dismissed their claims under MCR 2.116(C)(8). The defendants-appellees/cross-appellants and defendants/counterplaintiffs-appellees/cross-appellants in the consolidated case (collectively referred to as "pastor's opponents") cross-appeal the same order. We affirm in part, reverse in part, and remand for further proceedings.

Plaintiff Pilgrim's Rest Baptist Church is an ecclesiastical corporation. In 2011, defendant Pearson was the pastor and president of Pilgrim's Rest. In April 2011, the board of trustees and board of deacons became aware of defendant Pearson's authorizing a raise for himself. Between July 6, 2011, and October 13, 2011, defendant Pearson admitted that on numerous occasions he gave himself raises, used church credit cards for nonchurch purposes, and paid himself monetary honorariums, all without either board's approval or authorization.

After the October 13, 2011 meeting, plaintiffs Blackwell and Mayfield hired Plante Moran to analyze the

church finances. On Sunday, October 31, 2011, the board of trustees and the board of deacons gave public notice to the congregation of Pilgrim's Rest of the status of the investigation of defendant Pearson and of a November 13, 2011 vote to terminate his employment. At this vote, members had voted to retain defendant Pearson as pastor. When the accusations against defendant Pearson arose, the church members began to take sides and formed a pro-defendant Pearson faction and an anti-defendant Pearson faction.

On December 23, 2011, Plante Moran issued a preliminary finding report that demonstrated that, between 2008 and 2010, more than $237,000 had been removed from Pilgrim's Rest Baptist Church's bank accounts through questionable transactions. The majority of these transactions were for the benefit of defendant Pearson, his wife, and a former church secretary. On December 27, 2011, the board of trustees, allegedly exercising its right as board of directors, voted to suspend defendant Pearson with pay. On December 30, 2011, the Kent County Prosecutor's office authorized an arrest warrant for defendant Pearson on one count of embezzlement. Defendant Pearson later pleaded *nolo contendere* to a charge of embezzling more than $50,000 but less than $100,000 and was ordered to pay restitution.

On January 1, 2012, the pastor's supporters held a board of directors meeting, at which they claim the pastor's opponents maliciously tried to break up the vote for a board of directors. The pastor's opponents question the legitimacy of the board of directors that was voted in by the pastor's supporters. After this meeting, two boards of directors each began asserting that it was the legitimate board of directors.

The trial court concluded that all the claims from both cases were nonjusticiable under MCR 2.116(C)(8) because of the ecclesiastical abstention doctrine. On appeal, the parties address the merits of the claims. To the extent that the claims are nonjusticiable, the arguments on the merits are irrelevant. To the extent that the claims are justiciable, it is proper that the merits of those claims be addressed first by the trial court, and not this Court. Therefore, this Court will only address whether the claims are justiciable, and we will not address the merits of the claims.

"Whether subject-matter jurisdiction exists is a question of law for the court." *Dep't of Natural Resources v Holloway Constr Co*, 191 Mich App 704, 705; 478 NW2d 677 (1991). "Accordingly, the issue is reviewed de novo." *Id*.

"It is well settled that courts, both federal and state, are severely circumscribed by the First and Fourteenth Amendments to the United States Constitution and art 1, § 4 of the Michigan Constitution of 1963 in resolution of disputes between a church and its members." *Maciejewski v Breitenbeck*, 162 Mich App 410, 413-414; 413 NW2d 65 (1987). "Such jurisdiction is limited to property rights which can be resolved by application of civil law." *Id*. at 414. "Whenever the court must stray into questions of religious doctrine or ecclesiastical polity the court loses jurisdiction." *Id*. "Religious doctrine refers to ritual, liturgy of worship and tenets of the faith." *Id*. "Polity refers to organization and form of government of the church." *Id*. "Under the ecclesiastical abstention doctrine, apparently derived from both First Amendment religion clauses, 'civil courts may not redetermine the correctness of an interpretation of canonical text or some decision relating to government of the religious polity.' " *Smith v*

Calvary Christian Church, 462 Mich 679, 684; 614 NW2d 590 (2000), quoting *Paul v Watchtower Bible & Tract Society of New York, Inc*, 819 F2d 875, 878 n 1 (CA 9, 1987).

Defendant Pearson's counterclaims include breach of contract, promissory estoppel and unjust enrichment, fraud, tortious interference with a contract, intentional infliction of emotional distress, and civil conspiracy. But all of defendant Pearson's claims as pleaded refer to the employment contract between defendant Pearson and the church. We affirm the trial court's summary disposition of these claims. "When the claim involves the provision of the very services . . . for which the organization enjoys First Amendment protection, then any claimed contract for such services likely involves its ecclesiastical policies, outside the purview of civil law." *Dlaikan v Roodbeen*, 206 Mich App 591, 593; 522 NW2d 719 (1994).

Defendant Pearson relies on *Vincent v Raglin*, 114 Mich App 242; 318 NW2d 629 (1982), for the proposition that if it was not the "action of the church" at issue, the ministerial exception and ecclesiastical abstention doctrine are inapplicable. Defendant Pearson's reliance on *Vincent* is misplaced because the Court in *Vincent* simply determined whether the church had taken a certain course of action, and here the determination would be whether the church exceeded its authority in acting, which is nonjusticiable because it would require the court to determine if the church violated its own policy.

Therefore, because determining whether the board of trustees had the authority to suspend and eventually terminate defendant Pearson would require determinations of religious polity, the civil courts do not have jurisdiction. Additionally, the claims brought by

defendant Pearson involve the provision of his services as pastor to the church, which is the essence of the church's constitutionally protected function, and "any claimed contract for such services likely involves its ecclesiastical policies, outside the purview of civil law." *Dlaikan*, 206 Mich App at 593. The trial court's grant of summary disposition is affirmed in regard to defendant Pearson's counterclaims.

Plaintiffs plead no express tort, but the pleadings for money damages seem to imply conversion as the underlying tort by which plaintiffs request money damages. A claim of conversion against an individual facially does not cause the court to "stray into questions of religious doctrine or ecclesiastical polity," which is where the court would lose jurisdiction. *Maciejewski*, 162 Mich App at 414. Because the claim likely does not require the trial court to determine the issue on the basis of religious doctrine or ecclesiastical polity, the claim is likely not barred by the ecclesiastical abstention doctrine. Additionally, defendant Pearson has failed to raise an affirmative defense that "necessarily entails an excursion into ecclesiastical polity." *Dlaikan*, 206 Mich App at 594. Therefore, plaintiffs' claim for conversion is justiciable.

Additionally, defendant Pearson's claim that plaintiffs' civil action is barred by a prior judgment is an incorrect statement of law. "A restitution order as a condition of probation pursuant to MCL 771.3(2)(d); MSA 28.1133(2)(d) in a criminal case does not act as a bar to the recovery of damages in a civil action arising out of the same incident." *Aetna Cas & Surety Co v Collins*, 143 Mich App 661, 663; 373 NW2d 177 (1985). Therefore, summary disposition would not be proper on the ground of a prior judgment, MCR 2.116(C)(7),

because an order of restitution does not prohibit plaintiffs from filing a civil action.

The claims of the pastor's supporters involve membership, property rights of the members, and issues of control of the church. "The State has an obvious and legitimate interest in the peaceful resolution of property disputes, and in providing a civil forum where the ownership of church property can be determined conclusively." *Jones v Wolf*, 443 US 595, 602; 99 S Ct 3020; 61 L Ed 2d 775 (1979). "[T]he First Amendment prohibits civil courts from resolving church property disputes on the basis of religious doctrine and practice." *Id*. Pilgrim's Rest is a "strictly congregational or independent organization, governed solely within itself . . . ." *Watson v Jones*, 80 US (13 Wall) 679, 724; 20 L Ed 666 (1871). Since it is a congregational or independent organization, "the dispute is governed ' "by the ordinary principles which govern voluntary associations[.]" ' " *Chabad-Lubavitch of Mich v Schuchman*, 305 Mich App 337, 351; 853 NW2d 390 (2014), quoting *Bennison v Sharp*, 121 Mich App 705, 714; 329 NW2d 466 (1982), quoting *Watson*, 80 US at 725 (alteration in original). "In such cases where there is a schism which leads to a separation into distinct and conflicting bodies, the rights of such bodies to the use of the property must be determined by the ordinary principles which govern voluntary associations." *Watson*, 80 US at 725.

Therefore, unless the determination under the ordinary principles of voluntary associations would require interpretation of religious doctrine and religious polity, the court has jurisdiction to hear the claims brought by the pastor's supporters. However, if a defense to one of the claims leads the court to "stray into questions of

religious doctrine or ecclesiastical polity," the court loses jurisdiction. *Maciejewski*, 162 Mich App at 414.

The pastor's opponents brought a claim of conversion against the pastor's supporters for collecting funds in the name of the church, opening a bank account in the name of the church, and using those funds. In essence, this is a claim between two parties, each of which claims that it is the sole owner of approximately $14,623.46 worth of donations that have been deposited into a bank account opened by the pastor's supporters. Because the claim does not require the trial court to determine the issue on the basis of religious doctrine or ecclesiastical polity, the claim is not barred by the ecclesiastical abstention doctrine. The trial court could easily resolve this question because it is a matter of determining to which donee the donor of the money intended to make the donation. This determination sounds entirely in property law and does not delve into questions of religious doctrine or ecclesiastical polity, and therefore, the claim is justiciable.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. In Docket No. 318797, plaintiffs may tax costs. In Docket No. 319571, no costs, no party having prevailed in full.

METER, P.J., and SAWYER and BOONSTRA, JJ., concurred.

PEOPLE v ALLEN

Docket No. 318560. Submitted February 11, 2015, at Grand Rapids. Decided April 30, 2015, at 9:00 a.m. Leave to appeal granted 498 Mich ___.

Floyd Phillip Allen was convicted by a jury in the Ionia Circuit Court of failing to comply with the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq*. The conviction was his second for that offense. Rather than sentence defendant under MCL 28.729(1)(b) to the term of imprisonment prescribed for a second conviction of failing to comply with SORA, the court, David A. Hoort, J., sentenced defendant under MCL 769.10(1)(a) as a second-offense habitual offender to 2 years' to 126 months' imprisonment. Defendant appealed.

The Court of Appeals *held*:

1. The trial court did not abuse its discretion when it initially excluded a witness's testimony because she violated the court's sequestration order and was present during opening statements. Excluding an offending witness's testimony is a permissible, but extreme, sanction for violating a court's sequestration order, and it should be used sparingly. In this case, the trial court initially excluded the witness's testimony not only because the witness violated the sequestration order, but also because defendant failed to provide notice of the witness to the prosecution before trial. Therefore, the trial court's initial decision to exclude the witness's testimony was within the realm of reasonable and principled outcomes.

2. Defense counsel's failure to file a witness list constituted ineffective assistance of counsel, but defendant failed to show any prejudice to him as a result. Defendant claimed that counsel's failure to file a witness list placed him in the position of having to negotiate with the prosecution so that defendant's witness was allowed to testify. The prosecution suggested that it be allowed to introduce the testimony of an unlisted rebuttal witness if defendant was permitted to introduce the testimony of his witness. Defendant argued that had counsel filed a witness list, the defendant would not have been forced to accept the prosecution's compromise, and the trial court would not have permitted the prosecution to call defendant's wife as a rebuttal witness. How-

ever, defendant could not show that in the absence of the compromise, the trial court would have refused to allow the prosecution to add a rebuttal witness. Statutory law allows the prosecution to add a witness to its list at any time on leave of the court for good cause shown. However, even without the prosecution witness's rebuttal testimony, the evidence against defendant was overwhelming, and defendant could not show that counsel's failure to file a witness list affected the outcome of his trial.

3. Defense counsel's failure to request a *Walker* hearing to determine the voluntariness of statements he made to the police did not constitute ineffective assistance of counsel. No evidence indicated that the police engaged in any conduct that would have overborne defendant and compelled him to make involuntary statements. Defendant was not in custody at the time he talked to the police, and therefore, *Miranda* warnings were not necessary. In addition, the police talked to defendant at his wife's residence where a reasonable person in his position would have felt free to leave.

4. The trial court did not err by not informing defendant's spouse of her spousal privilege before she testified at defendant's trial. Nor did the court err by assuming that defendant's wife waived her spousal privilege when she failed to assert it at trial. There is no precedent requiring a trial court to advise a witness of his or her right to invoke the spousal privilege when called to testify against a defendant-spouse. When a witness-spouse testifies against his or her defendant-spouse, he or she implicitly waives the spousal privilege. A defendant-spouse cannot invoke the privilege on behalf of the witness-spouse, and a defendant-spouse does not have standing to appeal the trial court's determination that the witness-spouse did not assert the privilege. The Court noted that it would be ideal if a trial court informed a witness-spouse of his or her testimonial privilege before the witness-spouse testified, and that counsel for a defendant-spouse could object to the witness-spouse's testimony to ensure that the witness-spouse is aware that he or she cannot be compelled to testify against his or her spouse.

5. The trial court did not abuse its discretion when it allowed the late endorsement of defendant's spouse as a prosecution witness, particularly when defendant knew before trial that his wife could possibly be called to testify.

6. The trial court erred by sentencing defendant to an enhanced sentence under the general habitual offender statute addressing second felony offenses rather than under the more specific provision for repeat offenders found in the statute penalizing noncompliance with the requirements of SORA. The maxi-

mum possible sentence under the SORA-specific statute for a defendant convicted of twice violating SORA is different from the maximum possible sentence under the general habitual offender statute for second felony offenses. Because there is an irreconcilable conflict between the maximum possible sentence under each statute, the specific sentence enhancement statute prevails to the exclusion of the general sentence enhancement statute. In this case, defendant's maximum possible prison term was 7 years according to the SORA-specific statute, and not 1½ times the maximum sentence for a first conviction of the offense as indicated by the general habitual offender statute.

Conviction affirmed; case remanded for resentencing.

SEX OFFENDERS REGISTRATION ACT (SORA) — SENTENCING — SECOND OFFENSE.

The maximum term of imprisonment found in MCL 28.729(1)(b) for a second violation of SORA controls over a maximum term of imprisonment calculated under the habitual offender statute for a second felony offense, MCL 769.10(1)(a); when two sentencing statutes irreconcilably conflict, the more specific statute prevails to the exclusion of the general statute; MCL 28.729(1)(b) specifically prescribes the maximum term of imprisonment for a second violation of SORA, while MCL 769.10(1)(a) addresses the maximum terms of imprisonment for second felony offenses in general.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Ronald J. Schafer*, Prosecuting Attorney, and *Anica Letica* and *Cheri L. Bruinsma*, Assistant Attorneys General, for the people.

John W. Ujlaky for defendant.

Before: BECKERING, P.J., and BORRELLO and GLEICHER, JJ.

PER CURIAM. Defendant was convicted by jury of failing to comply with the Sex Offenders Registration Act (SORA), second offense, MCL 28.729(1)(b). Defendant was sentenced as a second-offense habitual offender, MCL 769.10(1)(a), to 2 years' to 126 months' imprisonment. Defendant appeals as of right. For the

reasons set forth in this opinion, we affirm defendant's conviction, vacate his sentence, and remand for resentencing.

I. FACTS AND PROCEDURAL HISTORY

Following a conviction of fourth-degree criminal sexual conduct in 2007, defendant was required to register under SORA. On April 30, 2012, defendant registered with the address of 6123 Clarksville Road. As required by SORA, defendant verified that address on January 9, 2013.

On March 17, 2013, Officer James Yeager received an anonymous tip that suggested defendant was not in compliance with SORA. Yeager testified that the tipster stated that someone should investigate where defendant was living and provided an address of 211 West Riverside Drive. Yeager and his partner began investigating the anonymous tip. Yeager testified that the Clarksville Road address was a trailer home that appeared to be uninhabitable. The residence was unlit and appeared to be vacant or unoccupied. Yeager testified that there was snow on the ground, but he observed no tire tracks in the driveway or footprints leading up to the front porch or around the back of the trailer. Additionally, part of the skirting was missing from the trailer, exposing pipes underneath. Yeager explained that it did not appear as if the trailer was heated because with the freezing weather, the pipes could freeze up. Yeager testified that he and his partner established that nobody was at defendant's registered address on March 17, 2013.

Yeager and his partner returned to the Clarksville Road address three days later, on March 20, 2013. Yeager testified that as they approached the residence, he observed that his tire tracks from March 17 were the only visible tire tracks. He additionally observed

that there were no footprints in the snow leading up to the residence. Yeager testified that it was again obvious no one was at the residence.

On March 26, 2013, Yeager returned a third time to defendant's Clarksville Road address. He testified that he walked around the residence and observed only his and his partner's footprints from their previous visits. Likewise, he observed no new tire tracks and once more concluded no one was at the residence.

After his third visit to 6123 Clarksville Road, Yeager visited the address given in the anonymous tip, 211 West Riverside Drive. He visited this address around 10:00 p.m. on March 26, 2013. Yeager testified that Lisa Allen, defendant's wife,[1] answered the door when he knocked. Yeager asked Lisa for defendant. After initially denying that defendant was present, Lisa went inside the residence and defendant appeared at the front door shortly thereafter. Yeager asked defendant where he had been staying. Defendant responded with the Clarksville Road address and indicated that he had stayed there the previous night. Yeager told defendant that he had been monitoring that residence for a period of time and knew defendant was not staying there. Defendant then explained that he worked on Parmeter Road at a carnival-type operation run by Michael Clark. He stated that he stayed at 901 West Parmeter Road for a couple of weeks. Defendant told Yeager that he stopped by Lisa's residence after he finished working on Parmeter Road that day, but he planned to get a ride to his address on Clarksville Road to spend the night there. Defendant admitted to Yeager that it had been a couple of weeks since he had been to

[1] The trial court took judicial notice that "defendant's order of probation precluded him from having any verbal, written, electronic or physical contact with . . . Lisa Allen."

the Clarksville Road address, but he insisted it was inhabitable and heated. After this discussion, Yeager arrested defendant for failing to comply with SORA's registration requirements.

Yeager testified that after he arrested defendant, he attempted to locate 901 West Parmeter Road. Yeager could not locate 901, but he found 909 West Parmeter Road. At that address, Yeager came in contact with Lucinda Pilot. Pilot was familiar with defendant and was able to answer Yeager's questions regarding defendant's residency status. Pilot testified that, at the time she spoke to Yeager, defendant was not living with her or on the Parmeter Road property where he worked.

Pilot had previously lived at 6123 Clarksville Road from May 2012 until October 12, 2012. Pilot testified that defendant was supposed to be living there as well. However, Pilot could only recall two nights from May 2012 to October 2012 that defendant slept there. Defendant slept there once in May 2012 when Pilot first moved into the trailer. The second time defendant slept there was on a night near the end of summer before his probation officer came out to see him. Regarding where defendant slept on other nights, Pilot testified that on one occasion, she dropped defendant off at Lisa's house at night and picked him up the next morning. She testified that when she moved to Parmeter Road in October 2012, defendant was not living at the Clarksville Road address, and she did not know if he went back there.

Before the prosecutor rested her case-in-chief, defendant indicated that he wanted to call Kathryn Perry, Lisa's sister, as a defense witness. Initially, the trial court precluded Perry's testimony for two reasons: first, Perry had sat in the courtroom during opening statements contrary to the trial court's sequestration order

and, second, defendant failed to notify the prosecutor of the witness before trial. In discussing Perry's testimony, the prosecutor asked the trial court for a compromise. The prosecutor suggested that if the trial court allowed Perry to testify, then she would call Lisa as a rebuttal witness. Defense counsel initially objected, citing spousal privilege. Defense counsel stated:

> I don't know that she's been advised that she holds the spousal privilege and is in a position to waive it. She may have made an incriminating statement to Trooper Yeager at the time he came to her house. . . . I would request that she be advised on her spousal privilege and also her Fifth Amendment protection.

The trial court responded, "I'm going to need some authority from you before I do that."

Following the prosecution's case-in-chief, defense counsel stated:

> I'd like to resolve the witness issue. My office tells me that the wife has to claim but she can't if she's a victim. I don't believe she's a victim in this case so the wife would have to claim the privilege. Whether she waives it or not would be up to her. We would ask that you order the compromise. Ms. Kathryn Perry can testify during our presentation and Ms. – Mrs. Allen can testify on rebuttal.

The trial court accepted the parties' compromise and permitted Perry and Lisa to testify. The issues of spousal immunity and the Fifth Amendment were not revisited.

Perry testified that she owned the trailer on 6123 Clarksville Road. She testified that she and defendant had an agreement that he was to make sure no one broke into the trailer. Defendant did not pay rent to live there. Perry testified that she visited once a month to check on the residence and make sure it was being maintained. Perry visited the trailer on March 15,

2013, for this purpose. Perry testified that she did not expect defendant to be there when she visited because "[m]ost of the time he wasn't there." On March 15, it did not appear to Perry that defendant had vacated the property. She testified that the temperature was normal; she and defendant agreed that he would turn down the heat to 55 degrees any time he left the trailer. Perry further testified that defendant did not have many personal belongings, but the belongings he did have were there when she visited.

After Perry's testimony, the prosecutor called Lisa as a rebuttal witness. Lisa testified that she lived at 211 West Riverside Drive. When Yeager came to her house in March 2013, defendant "was staying there. He wasn't living there." Lisa testified that defendant had been there for about six months. Defendant kept some clothes at her house and slept on a mattress on the living room floor. Lisa testified that defendant did not stay there every day; he was there approximately five days a week. Finally, Lisa testified that for the previous six months, defendant spent more time at her address than he did at the trailer on Clarksville Road.

As previously noted, defendant was convicted of failure to comply with SORA, second offense, and was sentenced as set forth above. He appeals as of right his conviction and sentence.

II. ANALYSIS

A. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that defense counsel was ineffective for failing to file a witness list. "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

Generally, a trial court's findings of fact, if any, are reviewed for clear error, and questions of constitutional law are reviewed de novo. *Id*. However, because this issue is unpreserved, our review is limited to mistakes apparent in the lower court record. *People v Fike*, 228 Mich App 178, 181; 577 NW2d 903 (1998).

For a claim of ineffective assistance of counsel, a defendant must first establish that counsel's representation was deficient by an objective standard of reasonableness. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Second, a defendant " 'must show that the deficient performance prejudiced the defense' " by establishing "the existence of a reasonable probability that but for counsel's error, the result of the proceeding would have been different." *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001), quoting *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 US at 694.

Defense counsel's failure to file a witness list fell below an objective standard of reasonableness. The prosecutor made a request for discovery under MCR 6.201. Following the prosecutor's request, the trial court issued a pretrial order, signed by defense counsel, indicating that defendant was required to produce, within 14 days of trial, all names and addresses of witnesses he intended to call. Failure to follow the trial court's pretrial order cannot be considered sound trial strategy, and such a failure clearly fell below an objective standard of reasonableness. See *Toma*, 462 Mich at 302.

Although defense counsel's performance was deficient, defendant has failed to establish prejudice in this case. See *Carbin*, 463 Mich at 600. The trial court

permitted defendant to call Perry despite defense counsel's failure to provide a witness list. Defendant argues that he was prejudiced due to the parties' compromise. Specifically, he argues that the prosecutor would not have been permitted to call Lisa as a rebuttal witness had defense counsel filed a witness list. However, defendant cannot show that the trial court would have excluded Lisa's testimony had defense counsel properly filed a witness list and called Perry at trial. See MCL 767.40a(4) (allowing the prosecution to add witnesses to its list at any time on leave of the trial court and a showing of good cause). The prosecutor indicated at trial that it could address the substance of Perry's testimony through Lisa. Thus, had defense counsel notified the prosecutor of his intent to call Perry, it is probable that the prosecutor would have sought to add Lisa to the prosecution's witness list to address the substance of Perry's testimony either in the prosecution's case-in-chief or on rebuttal.

Moreover, even without Lisa's testimony, the evidence against defendant was overwhelming, and defendant cannot show that defense counsel's failure to file a witness list affected the outcome of the proceeding. See *Carbin*, 463 Mich at 600. The trial court instructed the jury that to sustain a guilty verdict in this case, the prosecution was required to prove beyond a reasonable doubt that (1) defendant was required to register under SORA,[2] (2) defendant either "changed or vacated his residence or intended to temporarily reside at any place other than his residence for more than seven days," and (3) defendant "failed to report in person and notify the registering authority . . . of his

[2] The parties stipulated that defendant was required to register under SORA.

new address within three business days after changing or vacating his residence or intending to temporarily reside at any place other than his residence for more than seven days." See MCL 28.725(1)(a) and (e). The court also instructed the jury that for purposes of SORA registration, "residence" is defined as

> the place at which a person habitually sleeps, keeps his or her personal effects, and has a regular place of lodging. If a person has more than one residence, or if a wife has a residence separate from that of the husband, that place at which the person resides the greater part of the time shall be his or her official residence . . . . [See MCL 28.722(p).]

In this case, there was substantial evidence to support the allegation that defendant changed or vacated his registered residence, or intended to reside at a place other than his residence for more than seven days, and that he failed to appear in person before the registering authority to report his new address. Yeager testified that the trailer at defendant's registered address appeared uninhabitable between March 17, 2013, and March 26, 2013. On March 26, 2013, Yeager found defendant at Lisa's house. When confronted about his address, defendant told Yeager that he had been staying at Parmeter Road for the previous two weeks. Defendant admitted that it had been a couple of weeks since he stayed at the Clarksville Road address, but he insisted it was inhabitable and heated. Thus, the jury heard incriminating statements from defendant that he was not staying at his registered address. Moreover, Pilot testified that when she resided at the trailer on Clarksville Road, defendant was also supposed to be living there. However, she testified that defendant only slept at the residence two times between May 2012 and October 2012. She further testified about one occasion when defendant stayed at

Lisa's residence. Finally, Perry's testimony supported the allegation that defendant did not reside at the trailer. Although Perry testified that she saw defendant's few personal items at the trailer when she checked on the residence, Perry explained that defendant was not at the trailer "most of the time" when she checked the residence. She explained that she and defendant had an agreement that he was to ensure that no one broke into the trailer. She testified that he did not pay rent to stay there. On this record, defendant cannot show there is a reasonable probability that but for counsel's error, the outcome of the trial would have been different, and his claim of ineffective assistance of counsel fails. *Carbin*, 463 Mich at 600.

Next, defendant argues that defense counsel was ineffective for failing to move the trial court for a *Walker*[3] hearing to determine the admissibility of statements he made to the police. Defendant contends that his statements were involuntary because he was never advised of his *Miranda*[4] rights. When a defendant challenges his statements as involuntary, the trial court must hold a *Walker* hearing outside the presence of the jury to determine the issue of voluntariness. *People v Manning*, 243 Mich App 615, 624-625; 624 NW2d 746 (2000). A defendant must file a motion to suppress in advance of trial. *Id*. at 625.

In this case, defendant was not in custody when Yeager asked him questions about where he was staying. Defendant was questioned at his wife's house where a reasonable person in defendant's position would have believed he was free to leave. See *People v Vaughn*, 291 Mich App 183, 189; 804 NW2d 764 (2010), aff'd on alternative grounds, vacated in part on other

[3] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

[4] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

grounds 491 Mich 642 (2012). "[N]oncustodial interrogation might possibly in some situations, by virtue of some special circumstances, be characterized as one where the behavior of . . . law enforcement officials was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined . . . ." *Beckwith v United States*, 425 US 341, 347-348; 96 S Ct 1612; 48 L Ed 2d 1 (1976) (quotation marks and citation omitted). In determining voluntariness, this Court applies an objective standard and examines the totality of the circumstances. *Fike*, 228 Mich App at 181. Factors used to determine voluntariness include "the age, education, intelligence level, and experience of the defendant, the duration of the defendant's detention and questioning, the defendant's mental and physical state, and whether the defendant was threatened or abused." *Id*. at 181-182.

The record indicates that at the time Yeager questioned defendant at Lisa's residence, there were no special circumstances present that overbore defendant and compelled him to offer involuntary statements. *Beckwith*, 425 US at 348. As noted, defendant was not in custody at the time of questioning, and the record supports that the questioning was brief. Furthermore, defendant had experience with the police related to his prior conviction and his SORA registration. To the extent that defendant argues his statements were involuntary because the police did not read him his *Miranda* rights, there is no evidence to support that defendant's freedom was restricted in such a manner that rendered him "in custody" at the time of questioning, and therefore, Yeager was not obligated to provide defendant with *Miranda* warnings. See *People v Mendez*, 225 Mich App 381, 384; 571 NW2d 528 (1997) (" 'Miranda warnings are required only where there has been such a restriction on a person's freedom as to

render him "in custody". ' ") (citation omitted). In conclusion, there was no evidence to support defendant's contention that he was in custody at the time of questioning or that he made involuntary statements to police. Therefore, defense counsel was not ineffective for failing to request a *Walker* hearing. *Fike*, 228 Mich App at 182 ("[T]rial counsel cannot be faulted for failing to raise an objection or motion that would have been futile.").

B. ADMISSIBILITY OF EVIDENCE

Next, defendant claims several errors with respect to Lisa's testimony on rebuttal. He contends that the trial court was obligated to inform Lisa of her spousal privilege and Fifth Amendment privilege. He also argues that the prosecutor intended to "sandbag" the defense by calling Lisa as a rebuttal witness because she was not endorsed as a res gestae witness. Finally, defendant argues that the trial court erred in admitting Lisa's testimony. He claims that the trial court improperly ruled that Perry could not testify because she violated a sequestration order and that ruling caused defendant to bargain for Perry's testimony.

We review a trial court's evidentiary rulings for an abuse of discretion, while questions of law surrounding the admissibility of evidence are reviewed de novo. *People v Duncan*, 494 Mich 713, 722-723; 835 NW2d 399 (2013). "[I]t is an abuse of discretion to admit evidence that is inadmissible as a matter of law." *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

Defendant argues that the trial court was obligated to inform Lisa that she could invoke her spousal privilege and refuse to testify against defendant. MCL 600.2162(2) provides in relevant part that "[i]n a

criminal prosecution, a husband shall not be examined as a witness for or against his wife *without his consent* or a wife for or against her husband *without her consent*," unless a statutory exception applies. (Emphasis added.) The holder of the privilege is the witness-spouse as opposed to the defendant-spouse, which means a witness-spouse "has the legal right not to be compelled to testify in certain criminal prosecutions against a defendant-spouse . . . ." *People v Szabo*, 303 Mich App 737, 746-747; 846 NW2d 412 (2014). In other words, "the witness-spouse must consent to testify." *Id*. at 747.

We are unaware of any published caselaw in Michigan addressing whether a trial court must expressly inform a testifying spouse about his or her testimonial privilege before the spouse testifies or whether a nontestifying spouse has standing to challenge a court's failure to do so. The United States Court of Appeals for the Seventh Circuit,[5] however, has addressed a similar issue in the context of the federal spousal testimonial privilege. As with Michigan's spousal privilege, the testifying spouse is also the holder of the privilege for purposes of the federal spousal testimonial privilege. See, e.g., *Trammel v United States*, 445 US 40, 53; 100 S Ct 906; 63 L Ed 2d 186 (1980). Specifically, in *United States v Brock*, 724 F3d 817, 823 (CA 7, 2013), the defendant's wife testified at a pretrial detention hearing. During the defendant's subsequent criminal trial, the district court determined that the wife waived her testimonial privilege by testifying at the detention hearing. *Id*. On appeal, the defendant argued that the district court

[5] "Though not binding on this Court, federal precedent is generally considered highly persuasive when it addresses analogous issues." *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 360 n 5; 597 NW2d 250 (1999).

erred by determining that his wife waived her privilege. *Id*. The Seventh Circuit held that the defendant did not have standing to challenge the district court's finding because he was not the holder of the privilege. *Id*. The court explained, "because the defendant-spouse could not invoke the privilege, he also could not appeal a rejection of the privilege." *Id*. See *United States v Lofton*, 957 F2d 476, 477 n 1 (CA 7, 1992), relying on *Trammel*, 445 US at 53.

The holding in *Brock* aligns with precedent from other jurisdictions. For example, in *Smith v United States*, 947 A2d 1131, 1135 (DC, 2008), the Court of Appeals for the District of Columbia applied the District of Columbia's testimonial privilege, which mirrors the federal privilege, and noted that "it is a 'settled rule' that 'a defendant ordinarily does not have standing to complain of an erroneous ruling on a witness's claim of privilege.' " (Citation omitted.) Moreover, *Brock* aligns with precedent involving waiver of other privileges such as the Fifth Amendment privilege against self-incrimination. See *Paramount Pictures Corp v Miskinis*, 418 Mich 708, 715; 344 NW2d 788 (1984) (noting that "[t]he Fifth Amendment privilege against self-incrimination is a personal privilege and cannot be asserted on behalf of another"); *People v Wood*, 447 Mich 80, 90; 523 NW2d 477 (1994) (noting that a criminal defendant "lacked standing to either claim the privilege against self-incrimination for a witness or to complain about an error on the part of the trial judge in overruling the witness's attempt to assert it") (quotation marks and citation omitted).

In this case, the trial court did not expressly determine that Lisa waived her testimonial privilege before she willingly testified without objection. By

allowing her to testify, the trial court implicitly concluded that Lisa did not assert her testimonial privilege. As discussed below, while it would have been ideal for the trial court to have informed Lisa on the record of her privilege and to have inquired whether she understood and waived her privilege, defendant could not invoke Lisa's testimonial privilege, and he has no standing to appeal the court's determination that Lisa did not assert the privilege. *Brock*, 724 F3d at 823.

Although defendant does not have standing to raise the issue on appeal, like the Seventh Circuit, we recognize "several consequences of this rule" and note that "[n]othing should stop counsel for the defendant-spouse from raising an objection to the witness-spouse's testimony to ensure that she knows she cannot be required to testify against the defendant-spouse." *Id*. Additionally,

> [g]iven the importance of the spousal testimonial privilege, it would . . . be entirely appropriate and often prudent for the [trial] court, even in the absence of an objection, to make sure that the testifying spouse understands that she cannot be required to testify against her spouse, especially if she does not have her own counsel. [*Id*.]

Indeed, in order to give effect to the testimonial privilege enumerated in MCL 600.2162(2), "outside the presence of the jury, the trial judge should tell one who is called to testify for or against his spouse that his testimony cannot be compelled but may be received if volunteered." *Smith*, 947 A2d at 1135 (quotation marks and citations omitted).

Next, defendant appears to argue that the trial court erred when it did not inform Lisa of her Fifth Amendment right against self-incrimination. However, as

noted above, defendant lacks standing to assert a Fifth Amendment privilege for a witness, *Paramount Pictures Corp*, 418 Mich at 715; *Wood*, 447 Mich at 90, and his argument therefore fails.[6]

Defendant also contends that the trial court erred by allowing the late endorsement of Lisa as a witness. This Court has held that a trial court did not abuse its discretion by allowing the late endorsement of a prosecution witness when the witness was known to the defense beforehand. *People v Callon*, 256 Mich App 312, 326; 662 NW2d 501 (2003). In this case, defendant knew that Lisa was a potential witness. The police first contacted Lisa at her residence when they were attempting to locate defendant, and defendant also subpoenaed her in case her testimony was needed at trial. Thus, we conclude that defendant is not entitled to relief because no unfair prejudice resulted from Lisa's late endorsement, and defendant was already aware of the possibility that she might testify at trial.

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[6] We note that in cases involving "a potential witness who is intimately connected with the criminal episode at issue, protective measures must be taken." *People v Poma*, 96 Mich App 726, 732; 294 NW2d 221 (1980). Specifically, our Supreme Court has explained that in these circumstances, "the judge must hold a hearing outside the jury's presence to determine if the witness' [Fifth Amendment] privilege is valid, explaining the privilege to the witness." *People v Gearns*, 457 Mich 170, 202; 577 NW2d 422 (1998) (opinion by BRICKLEY, J.), overruled on other grounds *People v Lukity*, 460 Mich 484, 494 (1999). In the event that a witness has a valid Fifth Amendment privilege and intends to assert that privilege, the witness must be excused. *People v Paasche*, 207 Mich App 698, 709; 525 NW2d 914 (1994). In this case, however, the evidence does not support that Lisa was "intimately connected with the criminal episode at issue." Here, the police simply located defendant at Lisa's home. Although Lisa initially denied defendant's presence, defendant eventually appeared at the door. There was no other evidence that showed Lisa was closely associated with defendant's failure to register under SORA.

Defendant also appears to assert that the prosecutor failed to provide notice that Lisa would be called as a witness in an attempt at "subterfuge" and to "sandbag" the defense. To the extent that defendant asserts a claim of prosecutorial misconduct, defendant fails to provide any supporting authority and fails to otherwise develop his argument. The issue is therefore abandoned and we need not review it. See *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998) ("[A defendant] may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority."). Nevertheless, having considered the merit of defendant's argument, we conclude that nothing in the record supports defendant's assertion that the prosecutor committed misconduct in this case.

Next, defendant argues that the trial court erred by initially excluding Perry's testimony on the grounds that she violated the court's sequestration order.

MRE 615 permits a trial court to sequester witnesses on the request of a party or sua sponte. Trial courts have discretion when witnesses violate a sequestration order to exclude or permit the offending witness's testimony. *People v Roberts*, 292 Mich App 492, 502; 808 NW2d 290 (2011). Three sanctions are available to a trial court to remedy a witness's violation of a sequestration order: "(1) holding the offending witness in contempt; (2) permitting cross-examination concerning the violation; and (3) precluding the witness from testifying." *People v Meconi*, 277 Mich App 651, 654; 746 NW2d 881 (2008) (quotation marks and citations omitted). However, "courts have routinely held that exclusion of a witness's testimony is an extreme remedy that should be

sparingly used." *Id*. Our Supreme Court has stated that in cases involving defense violations of sequestration orders, a trial court "may preclude the witnesses involved from testifying if their testimony was tainted by the lack of sequestration." *People v Hayes*, 421 Mich 271, 282; 364 NW2d 635 (1984) (quotation marks and citation omitted). Because the purpose of MRE 615 is to prevent witnesses from hearing the testimony of other witnesses, the fact that a witness only heard brief opening statements is a significant factor to consider in determining whether the trial court properly excluded the witness's testimony. *Meconi*, 277 Mich App at 654-655.

In this case, the trial court sequestered all witnesses and potential witnesses before trial. The trial court and the attorneys discovered in the middle of defense counsel's opening statement that Perry, a potential defense witness, was in the courtroom. The trial court later stated that it would not allow Perry to testify. The trial court's reasoning for excluding Perry's testimony was twofold. The trial court stated that it was precluding Perry from testifying because (1) she violated the sequestration order and (2) defense counsel failed to provide notice of the witness. The trial court did not abuse its discretion by making this ruling. Although exclusion of a witness's testimony for violating a sequestration order is an extreme remedy, the trial court's decision was not based solely on violation of the order. The trial court also based its decision on defense counsel's failure to provide notice of the witness to the prosecution before trial, which violated the trial court's scheduling order. Accordingly, exclusion of Perry's testimony was a permissible remedy that did not fall outside the realm of reasonable and principled outcomes. *Roberts*, 292 Mich App at 502-503.

C. SENTENCING

Defendant argues that he is entitled to be resentenced because the trial court erred when it enhanced his sentence under both the general habitual offender provision in MCL 769.10(1)(a), and SORA, MCL 28.729(1)(b).

The resolution of this issue requires that we interpret the habitual offender statute and the sentencing enhancement provisions of SORA. We review questions of statutory interpretation de novo. *Klooster v City of Charlevoix*, 488 Mich 289, 295; 795 NW2d 578 (2011). "The primary goal of statutory interpretation is to give effect to the Legislature's intent, focusing first on the statute's plain language." *Id*. at 296. When the statutory language is clear and unambiguous, judicial construction is not permitted and we will enforce the statute as written. *People v Gardner*, 482 Mich 41, 50; 753 NW2d 78 (2008).

Defendant was convicted under MCL 28.729, which provides in relevant part:

> (1) Except as provided in subsections (2), (3), and (4),[7] an individual required to be registered under this act who willfully violates this act is guilty of a felony punishable as follows:
>
> (a) If the individual has no prior convictions for a violation of this act, by imprisonment for not more than 4 years or a fine of not more than $2,000.00, or both.
>
> (b) *If the individual has 1 prior conviction for a violation of this act, by imprisonment for not more than 7 years* or a fine of not more than $5,000.00, or both.
>
> (c) If the individual has 2 or more prior convictions for violations of this act, by imprisonment for not more than 10 years or a fine of not more than $10,000.00, or both. [Emphasis added.]

[7] The exceptions listed in MCL 28.729 (2), (3), and (4) are not relevant to our analysis.

Defendant does not dispute that he had one prior conviction, in 2010, for violating MCL 28.729. Thus, following his second conviction in this case, defendant was subject to a maximum of 7 years' imprisonment under MCL 28.729(1)(b). However, the trial court applied MCL 769.10 and sentenced defendant to a maximum term of 126 months (10 years and 6 months). MCL 769.10 provides:

> (1) If a person has been convicted of a felony or an attempt to commit a felony . . . and that person commits a subsequent felony . . . , the person shall be punished upon conviction of the subsequent felony and sentencing under [MCL 769.13] as follows:
>
> (a) If the subsequent felony is punishable upon a first conviction by imprisonment for a term less than life, the court . . . may . . . sentence the person *to imprisonment for a maximum term that is not more than 1½ times the longest term prescribed for a first conviction of that offense* or for a lesser term.
>
> * * *
>
> (3) A conviction shall not be used to enhance a sentence under this section if that conviction is used to enhance a sentence under a statute that prohibits use of the conviction for further enhancement under this section. [Emphasis added.]

The trial court sentenced defendant to a maximum term that was 1½ times the longest term (7 years) prescribed in MCL 28.729(1)(b). The trial court erred as a matter of law by doing so. To the extent that a first conviction is punishable by a term less than life, as in this case, the plain language of MCL 769.10(1)(a) directs a sentencing court to sentence the offender for a subsequent offense to a maximum term "that is not more than 1½ times the longest term prescribed *for a first conviction* of that offense . . . ." (Emphasis added.)

In this case, defendant was convicted of a subsequent offense under MCL 28.729(1). The maximum term prescribed for a first conviction of that offense is 4 years' imprisonment. MCL 28.729(1)(a). Thus, under MCL 769.10(1)(a) defendant would be subject to no more than 6 years' imprisonment—1½ times 4 years is 6 years. The trial court erred by basing defendant's sentence on 1½ times the maximum prison sentence (7 years) provided under MCL 28.729(1)(b) because that provision sets forth the punishment for a *second* conviction of failure to comply with SORA. The plain language of MCL 769.10(1)(a) clearly directs a court to enhance a sentence by increasing the longest term prescribed for a first conviction of the subsequent offense, not the longest term prescribed for a second conviction. See *Mich Ed Ass'n v Sec of State (On Rehearing)*, 489 Mich 194, 218; 801 NW2d 35 (2011) ("[N]othing may be read into a statute that is not within the manifest intent of the Legislature as derived from the act itself.") (quotation marks and citations omitted).

Although defendant was subject to not more than a 6-year prison sentence under MCL 769.10(1)(a), SORA's recidivist provision provides that defendant is subject to a 7-year maximum prison sentence. Specifically, MCL 28.729(1)(a) through (c) set forth the penalties for failing to comply with the requirements of SORA. The relevant provision in this case, MCL 28.729(1)(b), provides the following penalty for a second offense: "If the individual has 1 prior conviction for a violation of this act, [the defendant is punishable] by imprisonment for not more than 7 years or a fine of not more than $5,000.00, or both." Defendant had one prior conviction of failure to comply with SORA requirements. Therefore, under MCL 28.729(1)(b), he was subject to a maximum prison sentence of 7 years. Given that the maximum prison sentence prescribed

under MCL 28.729(1)(b) is different from the maximum prison sentence prescribed under MCL 769.10(1)(a), the two statutes irreconcilably conflict. "Where there is a conflict [between sentencing schemes], the specific enhancement statute will prevail to the exclusion of the general one." *People v Brown*, 186 Mich App 350, 356; 463 NW2d 491 (1990). Because MCL 28.729(1)(b) is the more specific statute—i.e., it applies specifically to subsequent SORA convictions whereas MCL 769.10(1)(a) applies to subsequent felony convictions in general—MCL 28.729(1)(b) is controlling and defendant's maximum prison sentence should not have exceeded 7 years.

The prosecution argues that defendant's sentence should be enhanced under MCL 769.10 because there is no language in MCL 28.729 that prohibits use of defendant's prior conviction for further enhancement under MCL 769.10. This argument is based on MCL 769.10(3), which provides: "A conviction shall not be used to enhance a sentence under this section if that conviction is used to enhance a sentence under a statute *that prohibits use of the conviction for further enhancement under this section*." (Emphasis added.)

We agree with the prosecution that there is no language in MCL 28.729 that expressly prohibits use of a prior conviction for further enhancement under MCL 769.10(1)(a). However, as previously stated, when two sentencing statutes irreconcilably conflict, we are bound to follow the more specific sentencing statute. *Brown*, 182 Mich App at 356. Thus, because MCL 28.729 is more specific, its sentencing scheme is controlling in this case and MCL 769.10(1)(a) is inapplicable.

Next, defendant contends that the trial court erred by assessing 10 points for Prior Record Variable (PRV) 7.

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

PRV 7 governs a defendant's subsequent or concurrent felony convictions. MCL 777.57. PRV 7 should be scored at 10 points when "[t]he offender has 1 subsequent or concurrent conviction[.]" MCL 777.57(1)(b). In this case, the prosecution concedes in its brief on appeal that defendant was not convicted of multiple felonies or convicted of a subsequent felony. Thus, the trial court erred by assessing 10 points for PRV 7. And, because the court erred in enhancing defendant's sentence under MCL 769.10, defendant is entitled to resentencing.

The trial court calculated defendant's minimum recommended sentence range at 5 to 28 months. This amounted to error. MCL 28.729(1)(b) is a Class D offense. MCL 777.11b. Defendant was assessed 10 points for PRV 7 for a total PRV score of 35 points, which is PRV Level D; defendant's offense variable (OV) score was 10 points, which is OV Level II. MCL 777.65. Even when reducing defendant's total PRV score by 10 points down to 25 points, defendant's PRV score remains at Level D. See MCL 777.65 (a total PRV score of 25 to 49 points is PRV Level D). However, because the trial court erred by enhancing defendant's sentence under the general habitual offender provisions, defendant's recommended minimum sentencing range should have been 5 to 23 months, not 5 to 28

months.[8] MCL 777.65. Accordingly, defendant is entitled to resentencing.[9] See *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006).

For the foregoing reasons, we conclude that defendant's sentence should not have been enhanced under MCL 769.10(1)(a) because that statute directly conflicts with the sentencing enhancement provision contained in MCL 28.729(1)(b). Because MCL 28.729(1)(b) is more specific than MCL 769.10(1)(a), it is controlling and defendant's maximum prison sentence should not have exceeded 7 years. Finally, the trial court erred in scoring PRV 7 and calculating defendant's recommended minimum sentence range. Remand for resentencing is therefore appropriate.

We affirm defendant's conviction, vacate his sentence, and remand for resentencing consistent with this opinion. We do not retain jurisdiction.

BECKERING, P.J., and BORRELLO and GLEICHER, JJ., concurred.

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[8] The upper limit of a recommended minimum sentence may be increased by 25% when a defendant is sentenced as a second-offense habitual offender under MCL 769.10(1)(a). See MCL 777.21(3)(a).

[9] Given our resolution of this issue, we decline to address defendant's argument that trial counsel was deficient for failing to object to the scoring of PRV 7.

PEOPLE v McCHESTER

Docket No. 318145. Submitted April 14, 2015, at Detroit. Decided May 5, 2015, at 9:00 a.m. Leave to appeal sought.

Kristopher K. McChester pleaded *nolo contendere* in the Genesee Circuit Court to a charge of unarmed robbery, MCL 750.530, for having entered a gas station, approached the cashier, and demanded merchandise and cash while making a gesture that suggested he had a gun in his pocket. The court, Archie L. Hayman, J., sentenced defendant as a second-offense habitual offender, MCL 769.10, to 87 months to 22½ years in prison. The Court of Appeals denied defendant's delayed application for leave to appeal, but the Supreme Court, in lieu of granting leave to appeal, remanded the case to the Court of Appeals for consideration, as on leave granted, of whether defendant was entitled to resentencing on the ground that the trial court had erred by assessing 10 points for Offense Variable (OV) 4, MCL 777.34(1)(a), for having caused the victim a serious psychological injury. 497 Mich 865 (2014).

The Court of Appeals *held*:

The trial court erred by assessing 10 points for OV 4 because there was not a preponderance of evidence to establish that the victim had suffered a serious psychological injury. While the victim might have suffered such an injury, the only information or evidence in the record regarding the victim's psychological state was a reference in the presentence investigation report to her being "visibly shaken." The victim did not present an oral or written statement at sentencing, nor did she testify in any meaningful way at the preliminary examination in regard to her psychological state. Because the correct score of zero for OV 4 altered the applicable minimum sentence range, reversal was required.

Reversed and remanded for resentencing.

Judge GLEICHER, concurring, agreed that insufficient record evidence supported defendant's 10-point score for OV 4, but wrote separately to address how OV 4 should be interpreted and applied. She stated that to justify a 10-point score, a preponderance of record evidence must substantiate that the victim sustained a psychological injury—beyond the initial emotional

> trauma precipitated by the crime—that is both so serious and of such duration that the victim would likely require psychological treatment. A lesser showing would not comport with the unambiguous statutory requirements.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *David S. Leyton*, Prosecuting Attorney, and *Christopher D. Larobardiere*, Assistant Prosecuting Attorney, for the people.

Gary L. Kohut for defendant.

Kristopher K. McChester *in propria persona*.

Before: TALBOT, C.J., and MURPHY and GLEICHER, JJ.

MURPHY, J. Defendant Kristopher K. McChester pleaded *nolo contendere* to unarmed robbery, MCL 750.530, for which he was sentenced as a second-offense habitual offender, MCL 769.10, to a prison term of 87 months to 22½ years. This Court denied defendant's delayed application for leave to appeal. *People v McChester*, unpublished order of the Court of Appeals, entered January 2, 2014 (Docket No. 318145). Our Supreme Court, however, in lieu of granting leave to appeal, remanded the case to this Court "for consideration, as on leave granted, of whether the defendant is entitled to resentencing based on a misscoring of Offense Variable (OV) 4 (psychological injury to victim), MCL 777.34." *People v McChester*, 497 Mich 865 (2014). We hold that the trial court erred by assessing 10 points for OV 4, considering that the record failed to adequately support a finding that the victim suffered a serious psychological injury. Accordingly, we reverse and remand for resentencing.

Defendant's conviction arose out of a robbery of a gas station. Defendant entered the store, approached the

cashier, asked for cigarettes, and then ordered the cashier to give him everything in the cash drawer. When defendant made the demand, his right hand was in one of his pockets, and he made a furtive gesture suggesting to the cashier that he had a gun in the pocket. The cashier testified at the preliminary examination that defendant had threatened her by stating, "I really don't wanna pull this trigger on you so empty the register and give me everything." The cashier complied, and defendant proceeded to flee with stolen cigarettes and money from the till. According to the presentence investigation report (PSIR), the police observed that the cashier was "visibly shaken" when they arrived at the scene. Aside from this observation, our review of the entire record, including the preliminary examination, sentencing, plea transcripts, and PSIR, fails to disclose any other information or evidence regarding or touching on the cashier's psychological state as a result of the robbery.

Offense Variable 4 concerns psychological injury to a victim and directs a sentencing court to assess 10 points if "[s]erious psychological injury requiring professional treatment occurred to a victim[.]" MCL 777.34(1)(a). Subsection (2) of the statute requires a court to "[s]core 10 points if the serious psychological injury may require professional treatment," with the admonition that "[i]n making this determination, the fact that treatment has not been sought is not conclusive." The only other option under OV 4 is to assess zero points when "[n]o serious psychological injury requiring professional treatment occurred to a victim[.]" MCL 777.34(1)(b). The trial court here assessed 10 points for OV 4. If the correct score for OV 4 is zero instead of 10 points, it would result in altering the applicable minimum sentence range from 50 to 125 months to 43 to 107 months, thereby requiring reversal. MCL 777.64; MCL 777.21(3)(a); *People v Francisco*, 474 Mich 82, 89-91; 711 NW2d 44 (2006).

On appeal, defendant argues that the trial court committed plain error by assessing 10 points for OV 4 instead of zero points and that defense counsel provided ineffective assistance by failing to object to the scoring. At the sentencing hearing, the trial court initially inquired whether there were any "[a]dditions or corrections" to be made to the PSIR, which included a scoring of the sentencing guidelines variables, and the prosecutor and defense counsel both responded, "No, your Honor." There was no other discussion with respect to the scoring of the variables, and under this Court's decision in *People v Hershey*, 303 Mich App 330, 351-353; 844 NW2d 127 (2013), such circumstances would merely constitute forfeiture and not waiver of alleged scoring errors. Moreover, while defendant here did not challenge the scoring of OV 4 at sentencing or in a motion for resentencing, he did raise the argument in two motions to remand. This included a motion that was filed shortly after appellate counsel was appointed by the trial court pursuant to our Supreme Court's remand order that had directed the trial court to determine defendant's indigency status and the Court of Appeals to appoint appellate counsel if defendant was indeed indigent. *McChester*, 497 Mich at 865. Accordingly, defendant has adequately preserved the issue concerning OV 4. MCL 769.34(10) ("A party shall not raise on appeal an issue challenging the scoring of the sentencing guidelines or challenging the accuracy of information relied upon in determining a sentence that is within the appropriate guidelines sentence range unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals.").[1]

[1] Had defendant failed to preserve the matter in a motion to remand, and given our ultimate conclusion that the *appropriate* guidelines

We now turn to the substance of the issue and whether the trial court erred by assessing 10 points for OV 4. Under the sentencing guidelines, the trial court's findings of fact are reviewed for clear error and must be supported by a preponderance of the evidence. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013); *People v Rhodes (On Remand)*, 305 Mich App 85, 88; 849 NW2d 417 (2014). " 'Clear error is present when the reviewing court is left with a definite and firm conviction that an error occurred.' " *People v Fawaz*, 299 Mich App 55, 60; 829 NW2d 259 (2012) (citation omitted). On the other hand, we review de novo "[w]hether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute . . . ." *Hardy*, 494 Mich at 438; see also *Rhodes*, 305 Mich App at 88. When calculating the sentencing guidelines, a court may consider all record evidence, including the contents of a PSIR, plea admissions, and testimony presented at a preliminary examination. *People v Johnson*, 298 Mich App 128, 131; 826 NW2d 170 (2012).

While the victim in this case may very well have suffered a serious psychological injury requiring professional treatment or that may have required professional treatment, considering that defendant convinc-

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sentence range is 43 to 107 months with an assessment of zero points for OV 4, our review would have been limited to an examination of the issue solely through the lens of the claim for ineffective assistance of counsel, considering that the 87-month minimum sentence imposed by the court falls within the appropriate guidelines range. *Francisco*, 474 Mich at 90 n 8 ("Finally, if the defendant failed to raise the scoring error at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the Court of Appeals, and the defendant's sentence is within the appropriate guidelines range, the defendant cannot raise the error on appeal except where otherwise appropriate, as in a claim of ineffective assistance of counsel."); *People v Kimble*, 470 Mich 305, 310-312; 684 NW2d 669 (2004).

ingly acted as if he had a gun and threatened to shoot her, the only information or evidence in the record regarding the victim's psychological state was the PSIR's reference to her being "visibly shaken." The victim's impact statement in the PSIR revealed that "[a]ll attempts to contact the victim ha[d] been unsuccessful." The victim did not present an oral or written statement at sentencing, nor did she testify in any meaningful way at the preliminary examination in regard to her psychological state, which is to be expected given that the focus of the hearing was on the elements of the crime and defendant's involvement. There simply was not a preponderance of evidence establishing that the victim suffered a *serious* psychological injury.

Contrary to the prosecution's argument, this Court's opinion in *People v Apgar*, 264 Mich App 321; 690 NW2d 312 (2004), does not demand a different conclusion. In *Apgar*, the 13-year-old victim specifically testified to being fearful during a particularly brutal and horrific rape. Here, we do not have any indication from the victim herself regarding her psychological state, and the only information on the issue comes from a cursory, vague, and preliminary observation by police who arrived at the scene. Again, we would not be surprised if the victim had indeed suffered a serious psychological injury; however, the record is essentially barren on the issue and speculation cannot form the basis to affirm a 10-point score for OV 4. Other published opinions by this Court affirming 10-point scores for OV 4 all referred to abundant supporting evidence that simply does not exist in the case at bar. See *People v Armstrong*, 305 Mich App 230, 247; 851 NW2d 856 (2014) (victim expressed feelings of confusion, emotional turmoil, guilt, an inability to trust others, and anger, and she suffered from emotional difficulties);

People v Earl, 297 Mich App 104, 109-110; 822 NW2d 271 (2012) (victim impact statement and letter from the victim reflected that the victim suffered from sleeplessness for weeks, relived the robbery every time she closed her eyes, and constantly feared being robbed by customers); *People v Ericksen*, 288 Mich App 192, 203; 793 NW2d 120 (2010) (PSIR indicated that the victim suffered from depression and that his personality changed as a result of poor health following an assault that required leg amputations); *People v Davenport (After Remand)*, 286 Mich App 191, 200; 779 NW2d 257 (2009) (child victim of sexual abuse had undergone two series of counseling sessions to deal with abuse). In sum, given the record, reversal is required.[2]

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

TALBOT, C.J., concurred with MURPHY, J.

GLEICHER, J. (*concurring*). I concur with the majority's holding that insufficient record evidence supported defendant's 10-point score under Offense Variable 4. I write separately because the majority's analysis stops short of comprehensively addressing the threshold question: How should OV 4 be interpreted and applied?

I believe that to justify a 10-point score, a preponderance of record evidence must substantiate that the victim sustained a psychological injury—beyond the initial emotional trauma precipitated by the crime—that is both so serious and of such duration that the

[2] In light of our ruling, it is unnecessary to reach defendant's associated claim of ineffective assistance of counsel. To the extent that defendant raises additional issues, they exceed the scope of the Supreme Court's remand order and cannot be considered. *People v Russell*, 297 Mich App 707, 714; 825 NW2d 623 (2012).

victim likely requires psychological treatment. A lesser showing does not comport with the unambiguous statutory requirements.

The Legislature adopted the offense variables to facilitate proportionate sentences, *People v Babcock*, 469 Mich 247, 263-264; 666 NW2d 231 (2003), and to promote sentencing uniformity, *People v Smith*, 482 Mich 292, 312; 754 NW2d 284 (2008). Accurate scoring of the variables depends on objective judicial findings grounded in a preponderance of record evidence. *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008). Sentencing judges are not free to disregard the precise parameters of the guidelines as articulated by the Legislature. See *id*. at 110-111. Doing so risks disproportionate and widely divergent sentences.

OV 4 authorizes the sentencing court to enhance a defendant's sentence based on a victim's "serious psychological injury." While most of the offense variables relate directly to the circumstances surrounding the crime, OV 4 considers the emotional impact of the crime on the victim. In MCL 777.34, the Legislature instructed that when scoring OV 4, the sentencing court has two options:

> (1) Offense variable 4 is psychological injury to a victim. Score offense variable 4 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:
>
> (a) Serious psychological injury requiring professional treatment occurred to a victim ..... 10 points
>
> (b) No serious psychological injury requiring professional treatment occurred to a victim ..... 0 points
>
> (2) Score 10 points if the serious psychological injury may require professional treatment. In making this determination, the fact that treatment has not been sought is not conclusive.

This language unambiguously reserves a 10-point score for circumstances in which the victim's psychological injuries qualify as "serious" and enduring. In my view, the injuries must transcend those that occur *during* a criminal act.

MCL 777.34 omits any definition of the term "serious psychological injury requiring professional treatment." When construing this language, a court "must ascertain and give effect to the Legislature's intent." *People v Blunt*, 282 Mich App 81, 83; 761 NW2d 427 (2009). "The first step in that determination is to review the language of the statute itself." *People v Pasha*, 466 Mich 378, 382; 645 NW2d 275 (2002) (quotation marks and citation omitted). "In discerning legislative intent, this Court gives effect to every word, phrase, and clause in the statute." *People v Williams*, 268 Mich App 416, 425; 707 NW2d 624 (2005). Often, a statutory word or phrase "is given meaning by its context or setting[.]" *G C Timmis & Co v Guardian Alarm Co*, 468 Mich 416, 420; 662 NW2d 710 (2003) (quotation marks omitted). Our interpretation of the statutory language is also appropriately informed by dictionary definitions. *People v Hill*, 486 Mich 658, 668; 786 NW2d 601 (2010). "[W]hat a court should do in construing a term in a criminal statute for which there are a variety of potential definitions is to determine from among those definitions which the Legislature most reasonably intended by the specific context in which the term is found." *Id*. at 669.

I first consider the term "psychological injury." The word "psychological" refers to a person's mental or emotional state. *New Oxford American Dictionary* (3d ed, 2010), p 1409. The word "injury" describes "an instance of being injured," which in turn encompasses being "harmed, damaged, or impaired." *Id*. at 895.

Thus, "psychological injury" denotes harm, damage, or impairment of an individual's feelings, emotions, behaviors, or sense of personal dignity. Anger, fear, anxiety, depression, preoccupation, nightmares, and sleeplessness manifest a person's troubled psychological state, and qualify as apt descriptors of psychological injury.

Surely only an exceedingly rare victim remains emotionally detached during and after the commission of a crime. Whether the offense entails a larcenous theft of one's favorite watch or staring into the barrel of a loaded automatic weapon, "psychological injury" of some degree is expected. Indirectly, the sentencing guidelines capture the gradations of psychological injury associated with crime by incrementally increasing the punishments for offenses likely to cause more lasting emotional harm. For example, armed robbery is a terrifying and powerfully personal crime. Accordingly, armed robbery carries a more severe sentence than larceny from the person, despite that the immediate psychological reactions of the victims may be equally intense. Similarly, first-degree home invasion, MCL 750.110a(2) and (5), merits a longer minimum sentence than burglary, MCL 750.110a(3) and (6).

Indisputably, all crime victims experience mental trauma. Just as no two crimes are exactly the same, different victims react in different ways. Some can put a ghastly event behind them and carry on with their lives. Others suffer more severe emotional trauma than would have been reasonably foreseen given the nature or circumstances of the crime. OV 4 enhances a defendant's sentence based on a victim's emotional response to a crime, foreseeable or not. However, the plain language of this variable limits its breadth. Ten points may be scored only when the psychological

injury qualifies as "serious," and only when that serious injury disrupts a victim's life or functioning such that psychological treatment "is required." Had the Legislature intended that a sentence enhancement would automatically attach to every crime causing any psychological injury, it would not have included the terms "serious" and "requiring professional treatment" in OV 4.

Furthermore, scoring based on psychological injury is an all-or-nothing proposition. Either 10 points are assessed because "[s]erious psychological injury requiring professional treatment occurred to a victim," MCL 777.34(1)(a), or zero points are assessed, signaling that "[n]o serious psychological injury requiring professional treatment occurred to a victim," MCL 777.34(1)(b). I doubt that the Legislature intended the zero-points option to mean that some victims emerge from a crime utterly emotionally unscathed. Many crimes, including robbery, carjacking, stalking, and assault, include fear as an element. Other crimes, including home invasion and criminal sexual conduct, naturally and inevitably cause psychological injury. Despite that crime and psychological injury usually go hand in hand, the Legislature placed the threshold for sentence enhancement on a "serious" injury that "requires professional treatment." This plain language shifts the focus from the emotional reaction experienced by a victim while the crime is in progress to the longer-term psychological consequences of a criminal act.

The *New Oxford American Dictionary* (3d ed, 2010), p 1595, characterizes "serious injury" as "significant or worrying because of possible danger or risk; not slight or negligible." *Id*., def 3. Synonyms for the word "serious" include "grave," "weighty," and "not . . . trifling." *Webster's New World College Dictionary* (5th ed, 2014),

p 1326. I believe that by using the word "serious" to modify "psychological injury," the Legislature intended to distinguish between baseline psychological injuries, and psychological injuries that are of a degree or magnitude greater than that baseline. Our Supreme Court's opinion in *People v Hardy*, 494 Mich 430, 440; 835 NW2d 340 (2013), buttresses my conclusion.

The defendant in *Hardy* challenged the scoring of 50 points under OV 7, which in that case pertained to whether the perpetrator had engaged in " 'conduct designed to substantially increase the fear and anxiety a victim suffered during the offense.' " *Id*. at 434, quoting MCL 777.37(1)(a). The Court began by reviewing the definitions of the relevant statutory terms. "Designed," the Court explained, "means 'to intend for a definite purpose.' " *Id*. at 440 (citation omitted). The Court next considered the term "substantially increase." Citing a dictionary, the Court described the word "substantial" as designating an " 'ample or considerable amount, quantity, size, etc.' " *Id*. (citation omitted). "To 'increase,' " the Court continued, "means 'to make greater, as in number, size, strength, or quality; augment.' " *Id*. at 440-441 (citation omitted). With these definitions in hand, the Supreme Court summarized: "[I]t is proper to assess points under OV 7 for conduct that was intended to make a victim's fear or anxiety *greater by a considerable amount*." *Id*. at 441 (emphasis added).

In *Hardy*, the Supreme Court specifically advised: "[A]bsent an express prohibition, courts may consider conduct inherent in a crime when scoring offense variables." *Id*. at 442. Further, and directly relevant to my analysis of OV 4, the Court elucidated:

> [W]e agree with the Court of Appeals that "[a]ll . . . crimes against a person involve the infliction of a certain

> amount of fear and anxiety." Since the "conduct designed" category only applies when a defendant's conduct was designed to substantially *increase* fear, to assess points for OV 7 under this category, a court must first determine a baseline for the amount of fear and anxiety experienced by a victim of the type of crime or crimes at issue. To make this determination, a court should consider the severity of the crime, the elements of the offense, and the different ways in which those elements can be satisfied. Then the court should determine, to the extent practicable, the fear or anxiety associated with the minimum conduct necessary to commit the offense. . . . [A]ll relevant evidence should be closely examined to determine whether the defendant engaged in conduct beyond the minimum necessary to commit the crime, and whether it is more probable than not that such conduct was intended to make the victim's fear or anxiety increase by a considerable amount. [*Id*. at 442-443 (second and third alterations in original).]

Applying this analytical framework to OV 4, I believe that a court considering whether a victim has sustained "serious psychological injury" must first acknowledge that every crime victim suffers emotional trauma. That trauma, however, merely sets the stage for a deeper evaluation of the victim's enduring mental state. The Legislature aided courts engaged in this endeavor by designating only a particular subsection of emotional injuries that merit scoring: those involving "[s]erious psychological injury requiring professional treatment." MCL 777.34(1)(a). The victim's failure to actually seek treatment does not prevent scoring 10 points for this offense variable. MCL 777.34(2). That treatment remains unrequested, however, does not eliminate the requirement that the injury be grave or weighty enough to warrant professional intervention.

Why did the Legislature add the "professional treatment" qualifier? This language signals the Legisla-

ture's intent to reserve a 10-point score for cases in which a victim's serious psychological injury produces a consequent need, whether fulfilled or not, for professional care. In other words, the Legislature sought to punish more severely when a defendant's crime disrupts a victim's ongoing emotional life. In reaching this conclusion, I have taken careful note of the word "requiring," which may not be ignored in coming to an understanding of this offense variable. To require is to "cause to be necessary." *New Oxford American Dictionary* (3d ed, 2010), p 1483. As an adjective, "required" means "officially compulsory, or otherwise considered essential; indispensable[.]" *Id*. I glean from the Legislature's conjoining of the words "requiring" and "professional treatment" that to merit a 10-point score under OV 4, a victim must have sustained mental or emotional harm that was grave enough to warrant professional care.

Whether the mental and emotional trauma experienced by a victim meets this standard depends on the existence of evidence supporting a psychological injury other than the emotional upset accompanying the crime. To warrant a 10-point score, the level or degree of psychological injury must be serious enough to require treatment, even if no treatment has been sought. Given our Supreme Court's command in *Hardy*, a preponderance of record evidence must justify a court's finding in this regard. When calculating the sentencing guidelines, a court may consider all record evidence, including the presentence investigation report, the defendant's admissions at a plea proceeding, and evidence introduced during a preliminary examination or trial. *People v Johnson*, 298 Mich App 128, 131; 826 NW2d 170 (2012). A victim's impact statement, affidavits, therapy records, or the victim's testimony at sentencing (or that of a family member)

also would suffice. See *People v Earl*, 297 Mich App 104, 109-110; 822 NW2d 271 (2012).

Like the majority, in considering the interpretation of the term "serious psychological injury requiring professional treatment," I have borne in mind the prosecution's citation of *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004): "Because the victim testified that she was fearful during the encounter with defendant, we find that the evidence presented was sufficient to support the trial court's decision to score OV 4 at ten points." In the past decade, many of this Court's unpublished decisions have taken this single sentence out of context and inflated its meaning. *Apgar* does not stand for the proposition that normal fear amounts to a serious psychological injury. Rather, *Apgar* involved a horrific, terrifying kidnapping and forcible sexual assault of a 13-year-old girl by a group of men. *Id*. at 324. The victim in *Apgar* suffered a severe psychological trauma grave enough to require professional care, without regard to whether her parents actually secured such treatment.

The evidence in this case amply demonstrated that the victim was shocked and fearful during and after the robbery, as would be expected under the circumstances. The officer's documentation that the victim appeared "visibly shaken" when the police arrived confirms that she sustained a psychological injury at that time. No record evidence suggests, however, that the victim's psychological injury was lasting, serious, or endured beyond the day of the robbery. Not only does the record fail to support that she needed or sought professional treatment, evidence of the victim's long-term psychological state is nonexistent.

The majority correctly holds that because the record evidence failed to demonstrate that the victim sus-

tained a serious psychological injury, zero points should have been assessed for OV 4. I respectfully posit that the inquiry mandated under this variable is far more detailed than the majority opinion would suggest. Absent an evidentiary foundation that a victim's psychological injury is truly "serious" and life-affecting, OV 4 must be scored at zero points.

ARABO v MICHIGAN GAMING CONTROL BOARD

Docket No. 318623. Submitted January 14, 2015, at Detroit. Decided May 5, 2015, at 9:05 a.m.

Peter Arabo brought an action in the Oakland Circuit Court against the Michigan Gaming Control Board, alleging that the board had violated the Freedom of Information Act (FOIA), MCL 15.231 *et seq*. Arabo sought public records from the board concerning (1) countermeasures approved by the board to prevent card counters from profiting at blackjack at the Detroit casinos and (2) board rules that allowed the Detroit casinos to exclude skillful players. The board responded, stating that it was granting Arabo's request with regard to any existing, nonexempt information, that there were approximately 6,206 pages of information that might be relevant to his request, that it would take approximately 103 hours to examine the records and redact exempt information, and that the total fee for this processing would be $4,303.34. Relying on MCL 15.234(2), the board asked Arabo to make a good-faith deposit of $2,151.67. Arabo requested a waiver of the fee, which the board denied. Arabo brought suit, claiming that the board had wrongfully denied his request for public records and that the board had imposed excessive fees to process the request. The board moved for summary disposition. The court, Colleen A. O'Brien, J., granted summary disposition in favor of the board. Arabo appealed.

The Court of Appeals *held*:

1. Under FOIA, a person has the right to inspect, copy, or receive public records upon providing a written request to the FOIA coordinator of the public body. In this case, Arabo, noting that the board's response only specifically referred to his request for records concerning the countermeasures approved by the board, claimed that the board had failed to respond to the portion of his request concerning rules allowing the casinos to exclude skillful players. There is no requirement, however, that a public body's response must specify or restate the information sought by the requester, and although the board's response only quoted the countermeasures portion of Arabo's request, it was clear that the response related to the entirety of his records request. However,

contrary to the board's claim, it did not grant Arabo's request in its entirety. Rather, the response indicated, at least preliminarily, a partial grant and partial denial of Arabo's request when it noted the possibility that some information sought by Arabo would not be given to him because it was exempt from disclosure. Therefore, the trial court erred when it granted summary disposition in favor of the board on Count I of Arabo's complaint on the basis that the board had granted his request for disclosure.

2. Section 4 of FOIA, MCL 15.234, grants the public body the authority to charge a fee to the requester for the record search, the copying of the record for inspection, or for providing a copy of the record. The fee is limited to actual mailing costs and the actual incremental cost of duplication or publication, including labor, the cost of search, examination, review, and the deletion and separation of exempt from nonexempt information. A public body may require at the time the request is made a good-faith deposit from the requester not to exceed ½ of the total fee. A public body's obligation to respond with its final determination regarding a record request only arises after the requester has paid the required deposit. Because Arabo did not pay the deposit, the board was not obligated to make a final determination regarding his record request, and Arabo's commencement of a cause of action to compel disclosure under § 10 of FOIA, MCL 15.240, was premature. Therefore, albeit for the wrong reason, the trial court reached the correct result when it granted summary disposition in favor of the board on Count I of Arabo's complaint, which sought to compel disclosure of the records.

3. A public body is not at liberty to choose how much it will charge for public records under FOIA; it must comply with the method for determining the fee to be charged set forth in § 4 of the act. In Count II of his complaint, Arabo asserted that the fee charged by the board violated § 4 in that the procedure to be used by the board needlessly increased the cost of fulfillment of his FOIA request and was designed to prevent disclosure through the imposition of unreasonable and unnecessary charges. Under § 10 of FOIA, the Legislature explicitly permitted a cause of action against a public body that refuses to disclose or delays disclosing a public record; and the Legislature provided for the recovery of damages by the plaintiff, including attorney fees, costs, and punitive damages for actions commenced under § 10. The Court of Appeals has implicitly recognized that a cause of action may be brought under § 4 to challenge the fee assessed by a public body to process a FOIA request, but the Legislature's failure to explicitly provide for a private cause of action under § 4 indicates

that the Legislature did not intend to create a private cause of action for damages for violations of § 4. Injunctive and declaratory relief are, however, available for violations of § 4. In this case, Arabo requested that the trial court order the board to fulfill his request with simple responsive documents without the time and expense of examining more than 6,000 document pages, and he requested all other relief that the court deemed equitable and just. This was sufficient to constitute a request for injunctive or declaratory relief. Thus, Arabo alleged a viable claim under § 4, effectively seeking a declaration that the fees charged by the board violated § 4 and an injunctive order prohibiting the fee assessment. The trial court's award of summary disposition in favor of the board on Count II of Arabo's complaint was, therefore, erroneous.

4. Michigan has a broad discovery policy that permits the discovery of any matter that is not privileged and that is relevant to the pending case, but a party or a person from whom discovery is sought may move for a protective order under MCR 2.302(C). The movant must demonstrate good cause for the issuance of a protective order. In this case, Arabo sought (1) an index of the records the board claimed that it needed to examine to fulfill his request, (2) to inspect the process the board took to identify the records or in the alternative to inspect the records himself, and (3) to depose the individual who determined that more than 6,000 pages of records fell within the scope of his FOIA request. The trial court granted the board's request for a protective order regarding these discovery requests. With regard to the index, FOIA generally does not require a public body to create a new public record to satisfy a disclosure request, and by creating an index, the board would essentially be conducting the document review for which the board was entitled to the payment of the deposit. Accordingly, the creation of the index would be an undue burden and expense, and the trial court did not abuse its discretion by precluding the discovery. With respect to inspection of the records or the process used to identify the records, the trial court did not abuse its discretion by conditioning the right to inspection on the payment of the required fee given that the board would be required to review the records and redact material exempt from public disclosure in order to comply with the discovery request. With regard to the deposition of the staff person, the deposition would likely lead to the discovery of admissible evidence relevant to Arabo's § 4 claim. The trial court abused its discretion by precluding the deposition, which would not place an undue burden or expense on the board.

Trial court's dismissal of Count I of Arabo's complaint affirmed; trial court's dismissal of Count II of Arabo's complaint reversed; that portion of the trial court's protective order pertaining to the requested deposition reversed; case remanded for further proceedings.

JANSEN, J., concurring in part and dissenting in part, concurred with the majority's determination that the board did not actually grant Arabo's request, concluding that the board's response operated as a constructive denial, and concurred with the majority that plaintiff sufficiently pleaded a claim for injunctive or declaratory relief with respect to whether the fees charged by the board violated § 4. Judge JANSEN, however, disagreed with the majority that Count I of plaintiff's complaint was properly dismissed because Arabo failed to pay the deposit. Until the trial court ruled on Arabo's claim challenging the fee under § 4, how could it be said that plaintiff was required to pay the deposit specified by the board? Because Arabo's request was limited to present and past board rules, policies, interpretative statements, meeting minutes, and similar records that should have been easy to identify, locate, and reproduce, it was likely that the fee charged by the board was excessive, meaning that it was likely that the deposit requested by the board was also excessive. Judge JANSEN would have reversed the trial court's dismissal of Count I of Arabo's complaint and remanded for a determination of a reasonable deposit. Only after making that determination could the trial court reach the merits of Arabo's claim under § 10 of the FOIA.

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

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *James J. Kelly*, Assistant Attorney General, for the Michigan Gaming Control Board.

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

BOONSTRA, J. Plaintiff, Peter Arabo, appeals by right the trial court's August 28, 2013 order granting summary disposition in favor of defendant, the Michigan Gaming Control Board (the Board), and dismissing

plaintiff's claims under the Freedom of Information Act (FOIA), MCL 15.231 *et seq*.[1] We affirm in part, reverse in part, and remand for further proceedings.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

This appeal arises out of plaintiff's request to the Board for public records under the FOIA. On February 15, 2013, plaintiff sent a letter by e-mail to the Board's FOIA coordinator, Latasha Cohen, making a formal request for information under the FOIA. Plaintiff's request sought information, writings, documents, or other public records regarding (1) "[w]hich of the following countermeasures have ever been in effect, or were in effect since 01/01/1996 to 02/15/2013, that authorized or authorizes MGM Grand Detroit, Greektown Casino & Hotel, and the Motorcity Casino to prevent card counters from profiting at the game of blackjack, and that is or was also approved by the Michigan [G]aming Control Board"[2] and (2) "any

[1] The FOIA was recently amended. See 2014 PA 563. The amended act provides a procedure for challenging the fees charged by a public body responding to a FOIA request and provides for monetary damages and punitive damages, in certain situations, to be paid both to the public treasury and the requester. See MCL 15.240a. The amendatory act will take effect on July 1, 2015. Nothing about the amendatory act leads us to believe the Legislature intended the amendments to operate retroactively. We presume a statute operates prospectively unless the Legislature clearly intended retroactive application; this is "especially true if retroactive application of a statute would . . . attach a disability with respect to past transactions." *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 583; 624 NW2d 180 (2001). We therefore consider plaintiff's appeal under the previous (and in fact, still in effect) version of the FOIA. Further, the enactment of 2014 PA 563 does not alter our conclusion that a cause of action exists for declaratory and injunctive relief, but not monetary damages, for a violation of § 4 of the FOIA, MCL 15.234, as it existed before the enactment, as discussed in Part II(C) of this opinion.

[2] Emphasis omitted.

rule(s) or law(s) by the Michigan Gaming Control Board that allows MGM Grand Detroit, Greektown Casino & Hotel, and the Motorcity Casino to exclude skillful players at the game of blackjack or any other game that has ever been in effect since 01/01/1996 to 02/15/2013."[3] The Board received plaintiff's FOIA request on February 19, 2013.

On February 25, 2013, Cohen responded by letter to plaintiff, stating in relevant part:

> You have requested information you describe as follows:
>
> ". . . [I] request to view/copy, or upon further request receive certified copies of the requested documentation, as prescribed in M.C.L. 15.233 Sections 3(1)(2)(5) of the FOIA.
>
> It is hereby requested that you disclose the following information, writing(s), document(s), or other public record(s), as indicated below according to Title 5 U.S.C. Sections 552(a)(3); M.C.L. 15.232(c)(e), and M.C.L. 15.269:
>
> 1. Which of the following countermeasures have ever been in effect, or were in effect since 01/01/1996 to 02/15/2013, that authorized or authorizes MGM Grand Detroit, Greektown Casino & Hotel, and the Motorcity Casino to prevent card counters from profiting at the game of blackjack, and that is or was also approved by the Michigan [G]aming Control Board: . . ."
>
> [The Board] grants your request for existing, non-exempt information in our possession that is relevant to your request.
>
> Section 4(1) of the FOIA permits a public body to charge a fee for the necessary copying of documents and for the cost of search, retrieval, examination, review, and the deletion of exempt information, if any.

[3] Emphasis omitted.

Due to the substantial volume of records that may be responsive to your request, the numerous hours required to process this request; and the unreasonably high cost to [the Board] in the absence of charging a fee in this particular instance, [the Board] has determined that it must seek reimbursement.

There are approximately 6,206 pages of information which might be relevant to your request. It will take approximately 103 hours to search, retrieve, examine, review, and redact exempt from non-exempt information from records described in your request. The following is a breakdown of the cost based on the respective hourly rate of the lowest paid [Board] employee capable of performing the tasks necessary to commence the processing of your request:

6,206 pages	103 hours
Department Analyst,	103 hours @ 41.78
Records Section	= $4,303.34
	TOTAL $4,303.34

This estimate does not include the actual copying and mailing costs. [The Board] would determine necessary postage fees upon completion of your request.

If you wish to narrow or modify your request, notify us in writing. In the alternative, feel free to contact us by mail or telephone if you wish to discuss the scope of your current request.

Section 4(2) of the FOIA permits a public body to require a good faith deposit at the time a request is made which in this instance is **$2,151.67**. Payments are submitted in the form of a check or money order . . . .

* * *

Upon completion of processing the request, you will be notified in writing of the balance payable before records are disclosed. Additionally, you will be informed of exempt records, if any, with the specific statutory basis for the exemptions explained at that time.

On March 2, 2013, and in response to the Board's February 25, 2013 letter, plaintiff again sent a letter by e-mail to Cohen, as well as to Richard S. Kalm, the executive director of the Board, requesting that the Board waive the fees to process his request. Plaintiff cited numerous reasons for his fee-waiver request, including that disclosure of the information would further the public interest and likely contribute to public understanding, that he planned to make the documents available to the public at the Michigan State University Law Library, that he intended to use the information for litigation, and that he was working on a campaign to ban casinos in Michigan.

On March 18, 2013, Karen Finch, the Board's administrative services manager, notified plaintiff that the Board had denied his request for a waiver of the fees. Finch's letter stated in part:

> The FOIA does not require the taxpayers to subsidize a requesting person's FOIA processing costs. The Board recognizes that the purpose of the FOIA is to promote access to government records in the most efficient and economical way possible. The Board's response to the instant FOIA request is entirely consistent with those purposes. The fees included for the processing of your request are the actual costs to the Board. The costs incurred include fees for the search, examination, review and the deletion and separation of exempt from nonexempt material because a member of the Board's staff will be taken away from his/her normal duties for a significant period of time in order to process your request.
>
> Further, section 4(3) of the FOIA, MCL 15.234(3), mandates that "[f]ees shall be uniform and not dependent on the identity of the requesting person." In this instance, we are charging you the same fees we would charge another requestor making the same FOIA request. In the FOIA, the Legislature has balanced the public's important right to be informed about the workings of government

> with a public body's legitimate need to safeguard the taxpayer's resources it is entrusted to conserve.
>
> Therefore, the Board denies your request for a waiver of the fees. The denial is based upon Section 4(1)(2)(3) of the Michigan Freedom of Information Act, MCL 15.243(1)(2)(3).

Plaintiff did not respond to the Board's written notice denying plaintiff's request for a fee waiver and did not pay the required deposit. According to Cohen's affidavit submitted with the Board's summary disposition motion, the Board "has been and remains ready to complete the processing of [plaintiff's] FOIA request upon receipt of the deposit, as it has been since issuing written notice granting [plaintiff's] FOIA request."

On April 25, 2013, plaintiff filed a two-count complaint, alleging that the Board had violated the FOIA, MCL 15.231 *et seq*. In Count I, plaintiff claimed that the Board had wrongfully denied his records request. In Count II, plaintiff claimed that the Board had imposed excessive fees to process the request. On May 16, 2013, in lieu of answering plaintiff's complaint, the Board filed a motion for summary disposition under MCR 2.116(C)(8) (failure to state a claim upon which relief can be granted) and (10) (no genuine issue of material fact). The Board argued that summary disposition on Count I was appropriate under MCR 2.116(C)(10) because there was no genuine issue of material fact that the Board had "granted" plaintiff's request; plaintiff, therefore, did not have a cause of action under § 10 of the FOIA, which allows a requester to commence a cause of action to compel disclosure of the requested records upon the public body's final determination denying the request. MCL 15.240(1)(b). The Board also argued that summary disposition on Count II was appropriate under MCR 2.116(C)(8). Specifically, the

Board contended that § 4 of the FOIA, MCL 15.234, does not authorize a cause of action and that the FOIA's remedial provisions, MCL 15.240, do not apply to a fee dispute brought under § 4.

Following a hearing on plaintiff's motion, the trial court granted summary disposition in favor of the Board, stating:

> On April 25th, 2013, Plaintiff filed a two count complaint. Count one is entitled violation of Freedom inf--of Information Act by wrongful denial of request for records under FOIA. Count two's entitled violation of the Freedom of Information Act for imposing cost in excess of FOIA requirements. Defendant moves to dismiss Plaintiff's complaint under MCR [2.116(C)(8)], failure to state a claim and MCR [2.116(C)(10)], no genuine issue of material fact and for an award of its costs, expenses and attorney fees under MCR [2.114(D)] through [(F)].
>
> The Court concludes that summary disposition as to count one of the complaint is appropriate for the reason there is no genuine issue of material fact that contrary to Plaintiff's arguments, Plaintiff's FOIA was granted. Here Plaintiff's FOIA request was granted as set forth in Defendant's response to Plaintiff's February 15th, 2013, FOIA request in a letter dated February 25, 2013, wherein it granted Plaintiff's request. Plaintiff's arguments cannot overcome this evidence. Moreover, Plaintiff responded to the February 15th, 2013, letter with a March 2nd, 2013, email stating I appreciate you granting my request; under MRE 801[(d)(2)], this email constitutes a party admission. Furthermore, nothing has been presented to refute the affidavit of the Defendant Board's FOIA Coordinator, therefore, count one of Plaintiff's complaint is dismissed.
>
> Furthermore the Court grants summary disposition in favor of Defendant as to count two of the complaint, for the reason that Plaintiff has failed to state a claim. Count two concerns the imposition of fees by Defendant, however FOIA[']s remedial provisions do not apply to a dispute over fees charged under Section Four of FOIA,

> MCL 15.234, see [*Detroit Free Press v Attorney General*,] 271 Mich App 418[; 722 NW2d 277 (2006)], therefore count two of the complaint is dismissed.

The trial court then entered an order granting the Board's motion. This appeal followed.

II. SUMMARY DISPOSITION

A. BACKGROUND OF THE FOIA

"The Freedom of Information Act declares that it is the public policy of this state to entitle all persons to complete information regarding governmental affairs so that they may participate fully in the democratic process." *Grebner v Clinton Charter Twp*, 216 Mich App 736, 740; 550 NW2d 265 (1996); see also *Bitterman v Village of Oakley*, 309 Mich App 53, 60; 868 NW2d 642 (2015). "[A] public body must disclose all public records that are not specifically exempt under the act." *King v Mich State Police Dep't*, 303 Mich App 162, 176; 841 NW2d 914 (2013) (citation and quotation marks omitted); see also MCL 15.233(1). " 'The FOIA provides that "a person" has a right to inspect, copy, or receive public records upon providing a written request to the FOIA coordinator of the public body.' " *King*, 303 Mich App at 175-176, quoting *Detroit Free Press, Inc v Southfield*, 269 Mich App 275, 290; 713 NW2d 28 (2005). See also MCL 15.233(1); MCL 15.235(1). "[O]nce a request under the FOIA has been made, a public body has a duty to provide access to the records sought or to release copies of those records unless the records are exempted from disclosure." *Pennington v Washtenaw Co Sheriff*, 125 Mich App 556, 564; 336 NW2d 828 (1983), citing MCL 15.233(2). Under § 5(2) of the FOIA, MCL 15.235(2), "a public body shall respond to a request for a public record within 5 business days" by either

granting the request, issuing a written notice to the requesting person denying the request, granting the request in part and issuing a written notice denying the request in part, or issuing a notice extending the response time by 10 days. See also *King*, 303 Mich App at 188. "A public body's failure to timely respond to a request under the FOIA constitutes a final determination to deny the request." *King*, 303 Mich App at 188-189, citing MCL 15.235(3); *Scharret v City of Berkley*, 249 Mich App 405, 411-412; 642 NW2d 685 (2002).

Section 4 of the FOIA, MCL 15.234, grants the public body the authority to charge a fee to the requester for a public record search, for the necessary copying of a public record for inspection, or for providing a copy of a public record, which fee is limited to "actual mailing costs, and to the actual incremental cost of duplication or publication including labor, the cost of search, examination, review, and the deletion and separation of exempt from nonexempt information . . . ." MCL 15.234(1). A public body may also require a deposit at the time a FOIA request is made equal to ½ of the total fee. MCL 15.234(2).

If a public body makes a final determination to deny a FOIA request, a party may commence an action in circuit court to compel disclosure under § 10 of the FOIA. MCL 15.235(7); MCL 15.240(1)(b). A public body's failure to timely respond to a FOIA request constitutes a final determination to deny the request. MCL 15.235(3); *King*, 303 Mich App at 188-189.

B. PLAINTIFF'S CLAIM TO COMPEL DISCLOSURE UNDER MCL 15.240

Plaintiff argues that the trial court erred by granting summary disposition in favor of the Board on Count I, plaintiff's claim to compel disclosure of the

requested records under § 10 of the FOIA. In light of recent caselaw decided after the trial court's grant of summary disposition in this case, we agree with plaintiff that the trial court erred by basing its ruling on the Board's having granted plaintiff's FOIA request. However, summary disposition on this claim was nonetheless proper in light of uncontroverted evidence that plaintiff had not tendered the requested deposit, as a result of which the Board's obligation to make a final determination concerning plaintiff's request was not triggered.

> This Court's review of a trial court's grant or denial of summary disposition is de novo in order to determine whether the moving party was entitled to judgment as a matter of law. In reviewing an MCR 2.116(C)(10) motion, we are to consider all the documentary evidence in the light most favorable to the nonmoving party. A motion for summary disposition under MCR 2.116(C)(10) may properly be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. [*Scharret*, 249 Mich App at 410 (citations omitted).]

Further, statutory interpretation of the FOIA presents a question of law that is subject to review de novo. *Thomas v New Baltimore*, 254 Mich App 196, 201; 657 NW2d 530 (2002).

In this case, the Board received plaintiff's FOIA request on February 19, 2013. The request sought disclosure of information related to (1) which "countermeasures have ever been in effect, or were in effect since 01/01/1996 to 02/15/2013, that authorized or authorizes MGM Grand Detroit, Greektown Casino & Hotel, and the Motorcity Casino to prevent card counters from profiting at the game of blackjack, and that is or was also approved by the Michigan [G]aming Control Board" (which plaintiff refers to as his "countermeasures request") and (2) "any rule(s) or law(s) by

the Michigan Gaming Control Board that allows MGM Grand Detroit, Greektown Casino & Hotel, and the Motorcity Casino to exclude skillful players at the game of blackjack or any other game that has ever been in effect since 01/01/1996 to 02/15/2013" (which plaintiff refers to as his "rules request").[4] The Board responded within five business days, as required by the FOIA, stating that it "grants your request for existing, non-exempt information in our possession that is relevant to your request." The Board also indicated that it was assessing a fee to process the request under the FOIA, and was requiring that plaintiff pay a deposit equal to 1/2 of the assessed fee, as authorized by MCL 15.234(2).

Plaintiff argues that the Board failed to respond to what he terms the "rules request" portion of his request. We disagree. There is no requirement under the FOIA that the public body, in responding to a request, must restate the request, in whole or in part, or specify the information sought by the requester. Our review of the Board's response convinces us that it related to the entirety of plaintiff's request, including the "rules request," and was not limited to the "countermeasures request." Although plaintiff posits on appeal that he made two "requests," plaintiff in fact denominated his "request," although comprised of two parts, in the singular, and the Board responded in the same fashion. Further, while the Board's response opted to quote, in part, plaintiff's request in describing the information sought, its use of ellipses within the quotation indicates that the response was referring to the entirety of plaintiff's request, including both the "countermeasures request" and the "rules request." Finally, Cohen's unrefuted affidavit indicated that she granted plain-

[4] Emphasis omitted.

tiff's request, which she generally described "as all records regarding certain policies that are or have been in effect at the three casinos in the City of Detroit over the last 17 years regarding card counters and players skillful at the game of blackjack." Consequently, the Board did not fail to timely respond to the "rules request."

However, in light of this Court's recent decision in *King*, 303 Mich App at 189-191, we agree with plaintiff's argument on appeal that the trial court erred by dismissing plaintiff's claim on the basis that the Board had "granted" plaintiff's FOIA request. In *King*, the plaintiffs submitted a FOIA request to the Michigan State Police (MSP). *Id*. at 167. The MSP responded using language almost identical to that of the Board's response in the instant case, including language indicating that the request was granted as to " 'existing, non-exempt records' " and assessing a fee and deposit based in part on estimated labor costs for " 'separating exempt and nonexempt material.' " *Id*. at 167-168, 189-190. This Court held, contrary to the MSP's position, that the response effectively constituted a partial denial of the plaintiffs' request, stating:

> Defendant contends that it *granted* plaintiffs' FOIA requests and that this lawsuit was thus filed prematurely because a circuit court action may not be filed on the basis of a public body's grant of a FOIA request. We disagree with defendant's premise that it granted the FOIA requests in their entirety. A party's choice of labels is not binding on this Court. See, generally, *Norris v Lincoln Park Police Officers*, 292 Mich App 574, 582; 808 NW2d 578 (2011). In responding to Barry King's January 6, 2010, FOIA request, defendant's response letter stated: "Your request is granted *as to* existing, *non-exempt* records in the possession of the Michigan State Police that fall within the scope of the request." (Emphasis added.) The

letter also requested a deposit based in part on estimated labor costs for "separating exempt and nonexempt material." The letter further indicated that upon receipt of the requested deposit, defendant would process the request and notify Barry King [the requester] of the statutory basis for the exemption of any records or portions of records. Defendant included similar language in its letter responding to Christopher King's FOIA request. Thus, although defendant contends that it granted the requests, its response letters reflect that the requests were effectively granted in part and denied in part, as the letters contemplated the separation of exempt material and thereby implicitly denied the requests with respect to such material.

It could be argued that defendant's responses did not expressly deny any portion of the requests but merely asserted the possibility that an exemption would later be asserted. In that event, however, defendant must be deemed to have failed to timely respond to the FOIA requests in their entirety by granting, denying, or granting in part and denying in part the requests. In other words, defendant granted the requests in part but failed to respond with respect to all the requested documents because the response suggested some material might be withheld as exempt but failed to state conclusively whether the response was granted or denied with respect to those potentially exempt items. A public body's failure to timely respond to a request as required by the FOIA constitutes a final determination to deny the request. MCL 15.235(3); *Scharret*, 249 Mich App at 411-412.

In either event, then, defendant's responses are deemed to reflect a partial denial of the FOIA requests. Therefore, plaintiffs' FOIA claims did not rest on contingent future events. *Huntington Woods* [*v Detroit*, 279 Mich App 603, 615-616; 761 NW2d 127 (2008)]. Rather, the claims were filed after defendant had effectively denied the FOIA requests with respect to potentially exempt materials. Thus, plaintiffs did not file this action prematurely. [*King*, 303 Mich App at 189-191.]

In accordance with *King*, the Board's response in this case similarly did not constitute a "grant" of plaintiff's FOIA request, but rather is indicative, at least preliminarily, of a partial grant and partial denial. However, we hold that the dismissal of plaintiff's claim was nonetheless proper, because the Board was not then required to make a final determination to deny all or part of plaintiff's request.

Section 4 of the FOIA, MCL 15.234, authorizes a public body to charge a fee for processing a FOIA request and delineates the nature of that authority, including that the public body may require, at the time a request is made, a good faith deposit equal to one-half of the authorized fee. See *Grebner*, 216 Mich App at 740-741. Section 4 does not explicitly address the public body's obligation to respond under the FOIA when a requester, as in this case, makes a request for which the public body requires a deposit before processing the request. And, read in isolation, the language of § 5(2) of the FOIA, MCL 15.235(2) states, without addressing the impact of any deposits paid or owing, that the public body must grant, deny, or grant or deny in part a FOIA request within five days of receiving it.

However, this Court "must construe the FOIA as a whole, harmonizing its provisions." *Prins v Mich State Police*, 291 Mich App 586, 590; 805 NW2d 619 (2011). The plain and unambiguous language of § 4(2) of the FOIA, MCL 15.234(2), provides that "[a] public body may require *at the time a request is made* a good faith deposit" from the requester equal to ½ of the total fee authorized under § 4. (Emphasis added.) Obviously, a request must be made *before* the public body can issue a response to the request. It logically follows that the public body's obligation to respond

pursuant to MCL 15.235(2) would only arise once the requester had paid the deposit required. This would enable the public body to recover a portion of its costs before processing the request, as is clearly contemplated by the language of § 4(2) of the FOIA.

Thus, the Legislature's authorization for a public body to require a deposit, i.e., a down payment, equal to ½ of the authorized fee, "at the time a request is made" under § 4(2) of the FOIA, MCL 15.234(2), clearly contemplates that the public body may recover part of its costs up front *before* processing the request. The deposit required "at the time the request is made" must therefore be made before the public body becomes obligated to process the request to enable it to formally respond with a final determination.[5] Accordingly, reading §§ 4 and 5 of the FOIA together to produce a "harmonious and consistent enactment as a whole," *Prins*, 291 Mich App at 590 (citation and quotation marks omitted), the statutory scheme can be reasonably construed so as to obligate the public body to respond with its final determination in accordance with § 5(2) and (4) of the FOIA once the requester has paid the required deposit authorized under § 4(2) of the FOIA. Any other interpretation would effectively render nugatory the language "at the time the request is made" contained in § 4(2) of the FOIA, MCL 15.234(2). We must avoid such a construction. See *Badeen v Par, Inc*, 496 Mich 75, 81; 853 NW2d 303 (2014).[6]

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[5] As defendant points out on appeal, practically speaking, a public body could not make a final determination regarding a FOIA request, as required under MCL 15.235(2) and (4), before incurring the costs for which it is statutorily authorized to require a deposit, i.e., searching, examining, reviewing, and deleting and separating exempt from nonexempt information.

[6] We note that the federal FOIA, 5 USC 552, also authorizes agencies to collect processing fees to "offset the cost of fulfilling document

Accordingly, we hold that a final determination by the Board is a prerequisite to plaintiff's commencement of a cause of action to compel disclosure of the requested records (and to recover attorney fees and punitive damages) under § 10 of the FOIA, MCL 15.240(1)(b), (6), and (7), but a final determination is not required until plaintiff has paid the deposit required by the Board.

King does not compel a different result. In *King*, one of the plaintiffs brought his cause of action *after* he paid the deposit required by the MSP, and after the MSP then failed to timely respond to his request. Once the requester in *King* paid the required deposit, the public body was clearly obligated under the statutory scheme to process and respond to his request as provided under the FOIA, and the failure to do so constituted an actionable claim. *King*, 303 Mich App at 168, 190; MCL 15.235(3); MCL 15.240(1)(b). Because the plaintiff in *King* paid the deposit required as authorized by § 4(2) of the FOIA, the plaintiff's claim in *King* seeking a response to the FOIA request did not rest on a "contingent future event[]," i.e., the payment of the required deposit. *Id*. at 191. In this case, by contrast, plaintiff never paid the deposit and the Board's obligation to make a final determination never arose; plaintiff's

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requests . . . ." *Coleman v Drug Enforcement Admin*, 714 F3d 816, 819 (CA 4, 2013), citing 5 USC 552(a)(4). The federal fee provisions allow an agency to require advance payment of the fee before beginning to process a request if the agency determines that the fee will exceed $250. *Coleman*, 714 F3d at 819, citing 5 USC 552(a)(4)(A)(v). Notably, if the requester refuses to prepay the fees, " 'the request shall not be considered received and further work will not be done on it until the required payment is received.' " *Coleman*, 714 F3d at 819, quoting 28 CFR 16.11(i)(4). Although the federal fee provisions differ from the fee provisions of Michigan's FOIA, "federal law is generally instructive in FOIA cases." *Mager v Dep't of State Police*, 460 Mich 134, 144; 595 NW2d 142 (1999).

claim accordingly rested on a contingent future event. It is undisputed that the Board stood ready to process plaintiff's request upon payment of the required deposit authorized under § 4(2). We therefore find, albeit for different reasons, that the trial court correctly granted summary disposition to the Board on Count I of plaintiff's complaint. See *Messenger v Ingham Co Prosecutor*, 232 Mich App 633, 643; 591 NW2d 393 (1998) ("When this Court concludes that a trial court has reached the correct result, this Court will affirm even if it does so under alternative reasoning.").[7]

C. PLAINTIFF'S CLAIM THAT THE FEE CHARGED BY THE BOARD UNDER MCL 15.234 WAS EXCESSIVE

Plaintiff further argues that the trial court erred by summarily dismissing Count II of his complaint, challenging the Board's assessment of fees to process his FOIA request as excessive. We agree in part.

This Court reviews de novo the trial court's ruling on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). "A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint." *Id*. at 119. In deciding a motion under MCR 2.116(C)(8), a trial court may only consider the pleadings, and "[a]ll well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Id*. Summary disposition is

[7] Plaintiff further argues for the first time in his reply brief that the Board could not charge plaintiff costs to fulfill his request because the Board has not established and published procedures and guidelines to implement the FOIA's cost provision as required by § 4(3), MCL 15.234(3). This argument was not raised before the trial court, and the record lacks sufficient factual development for this Court to disregard the preservation guidelines; we therefore decline to address it. See *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999); *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008).

appropriate if the claims are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Wade v Dep't of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992). Further, interpretation of the FOIA is a question of law that is also subject to review de novo. *Thomas*, 254 Mich App at 200.

"The FOIA provides that 'a person' has a right to inspect, copy, or receive public records upon providing a written request to the FOIA coordinator of the public body," and "a public body must disclose all public records that are not specifically exempt under the act." *King*, 303 Mich App at 175-176 (citations and quotation marks omitted). See also MCL 15.233(1). As previously discussed, the public body may charge the requester a fee for this service as set forth in § 4 of the FOIA, MCL 15.234. *Grebner*, 216 Mich App at 740-741. "The FOIA clearly provides a method for determining the charge for records. It is incumbent on a public body, if it chooses to exercise its legislatively granted right to charge a fee for providing a copy of a public record, to comply with the legislative directive on how to charge. The statute contemplates only a reimbursement to the public body for the cost incurred in honoring a given request—nothing more, nothing less." *Tallman v Cheboygan Area Sch*, 183 Mich App 123, 130; 454 NW2d 171 (1990). "A public body is not at liberty to simply 'choose' how much it will charge for records." *Id*.

In this case, the Board exercised its statutory right under § 4 of the FOIA and assessed a fee to process plaintiff's FOIA request. In Count II of his complaint, plaintiff alleged that the Board's response to his request violated § 4(3), MCL 15.234(3), of the FOIA. Specifically, he claimed that the Board's proposed "reviewing procedure of examining more than 6,000 pages

of records was utilized to needlessly increase the cost of fulfillment of the FOIA request," the procedure "was explicitly or implicitly designed to block or otherwise prevent the disclosure of simple responsive documents that would fulfill Plaintiff's request through the imposition of unlawful and unreasonable charges and costs," the request could be fulfilled by a simpler and more effective method, and the examination of 6,000 plus pages of documents was not required to fulfill the request. Plaintiff requested that the court require that the Board fulfill his FOIA request "with simple responsive documents without the time and expense of reviewing more than 6,000 pages of irrelevant documents" and award him reasonable attorney fees, costs, disbursements, and punitive damages.

The Board moved for summary disposition of this claim under MCR 2.116(C)(8) (failure to state a claim upon which relief can be granted), arguing that the FOIA's remedial provisions under § 10, MCL 15.240, do not apply to a dispute over fees charged under § 4 of the FOIA, MCL 15.234. To support its argument, the Board relied on this Court's decision in *Detroit Free Press*, 271 Mich App at 423. The trial court, also in reliance on *Detroit Free Press*, agreed and summarily dismissed plaintiff's § 4 claim, concluding that the "FOIA[']s remedial provisions do not apply to a dispute over fees charged under Section Four of FOIA . . . ."

Contrary to the Board's argument on appeal, *Detroit Free Press* did not hold that a requester cannot prevail in a claim brought under § 4, MCL 15.234. Instead, *Detroit Free Press* implicitly recognized that a requester may prevail on a claim brought under § 4, MCL 15.234 (and that the plaintiff in that case had in fact done so). But, in reversing an award of attorney

fees and costs, the Court held that a requester can only recover an award of fees and costs when the requester prevailed on a claim brought under § 10 of the FOIA, MCL 15.240(1)(b), (6), and (7). *Detroit Free Press*, 271 Mich App at 423. The question squarely before us in this case is initially one assumed in *Detroit Free Press* to be answerable in the affirmative, i.e., whether a FOIA requester may prevail on a claim under § 4, MCL 15.234, and then, in that event, what relief might be obtained, even if other than an award of attorney fees and costs.

The statutory language of § 4 of the FOIA, MCL 15.234, does not explicitly provide for a private right of action. However, as noted, this Court has implicitly recognized a cause of action under § 4 to permit challenges to the fee assessed by the public body to process a FOIA request. See *Detroit Free Press*, 271 Mich App at 423; *Grebner*, 216 Mich App at 738. In *Grebner*, the plaintiff brought a cause of action challenging the manner in which the public body had calculated the fee charged to produce the records, allegedly in violation of the cost provisions in § 4. *Grebner*, 216 Mich App at 738-739. The plaintiff claimed that the public body could charge only the incremental cost of producing copies of public records. *Id*. at 739. The trial court granted summary disposition in favor of the plaintiff, ordered the public body to refund the excess fee charged, and issued a permanent injunction forbidding the defendants from charging more than incremental costs in the future. *Id*. This Court affirmed, holding that the public body was in violation of the FOIA, and remanded the case to the trial court to determine the amount of the refund, which "would turn on defendants' incremental cost in complying with plaintiff's requests . . . ." *Id*. at 745.

Although § 4 of the FOIA, MCL 15.234, does not explicitly recognize a right of action, and although this Court in deciding *Grebner* and *Detroit Free Press* does not appear to have been directly presented with the issue whether a cause of action under § 4 exists, we cannot ignore the fact that we are not writing on a blank slate. Clearly, *Grebner* and *Detroit Free Press* implicitly recognized such a right of action, and we are therefore not inclined to hold otherwise. See *Dana Corp v Dep't of Treasury*, 267 Mich App 690, 698; 706 NW2d 204 (2005). However, in following those cases, we emphasize the limited nature of the right of action that they implicitly recognized.

This Court may not speculate regarding the intent of the Legislature "beyond those words expressed in the statute." *Lash v Traverse City*, 479 Mich 180, 194; 735 NW2d 628 (2007). "[T]he relief that plaintiff seeks must be provided by the Legislature." *Id*. at 197. Under § 10, the Legislature has explicitly permitted a cause of action against a public body that refuses to disclose or delays disclosing a public record; and the Legislature has provided for the recovery of damages by the plaintiff, including attorney fees, costs, and punitive damages, for actions commenced under § 10. MCL 15.240(1)(b), (6), and (7). Yet the Legislature has provided for no such cause of action under § 4 of the FOIA, MCL 15.234. This distinction provides "persuasive evidence that the Legislature did not intend to create a private cause of action" for damages for violations of § 4 of the FOIA, MCL 15.234. *Lash*, 479 Mich at 196. We therefore hold that, because the FOIA does not explicitly provide for money damages or confer a remedy based on a violation of the § 4 fee provisions, as contrasted with § 10, plaintiff does not have a valid cause of action for damages under § 4. See *id*. at 195-197. See also *Myers v Portage*, 304 Mich App 637,

643; 848 NW2d 200 (2014) ("Michigan caselaw holds that no cause of action can be inferred against a governmental defendant.").[8]

However, although a cause of action cannot be inferred against a governmental defendant when a statute, like the FOIA, does not explicitly provide for a cause of action for money damages or confer a remedy based on a statutory violation, injunctive or declaratory relief may still be available. *Lash*, 479 Mich at 196.

MCR 2.605(A)(1) allows the court to grant declaratory relief, and provides:

> In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted.

MCR 3.310(A) allows for the grant of a preliminary injunction "where [a] plaintiff can make a particularized showing of irreparable harm that will occur before the merits of the claim are considered." *Lash*, 479 Mich at 196.

In this case, plaintiff did not expressly request entry of an injunction or a declaratory order. However, plaintiff did challenge the amount of the fee charged and the process of document evaluation by which the fee was

[8] By definition, the Board is a "governmental agency." MCL 432.204(1) states that "[t]he Michigan gaming control board is created within the department of treasury." A "governmental agency" is defined, for purposes of the government tort liability act (GTLA), MCL 691.1401 *et seq*., as "this state or a political subdivision." MCL 691.1401(a). "State" is defined in the GTLA as "this state and its agencies, departments, commissions, courts, boards, councils, and statutorily created task forces." MCL 691.1401(g). Thus, the Board is a governmental entity for purposes of the GTLA.

computed. Plaintiff claimed that the Board's fees were excessive given the nature of his request, and that the Board's determination that the scope and nature of his request required the identification of a substantial number of potentially relevant documents (more than 6,000 pages) in need of retrieval was erroneous. Thus, plaintiff essentially challenged the reasonableness of the Board's assessed fee in light of the nature of his request, which he claims should not encompass the examination of more than 6,000 pages and could be fulfilled by a simpler and more effective method. Plaintiff requested in part that the trial court order the Board to fulfill his request "with simple responsive documents without the time and expense of reviewing more than 6,000 pages of irrelevant documents[.]" Plaintiff further requested "all other relief that [the] Court deems equitable and just." We deem this sufficient to constitute a request, though not explicit, for injunctive or declaratory relief. See *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 221; 761 NW2d 293 (2008) (stating that declaratory relief is an equitable remedy, not a claim); *Mich AFSCME Council 25 v Woodhaven-Brownstown Sch Dist*, 293 Mich App 143, 145; 809 NW2d 444 (2011) (stating that injunctive relief is an equitable remedy); see also MCR 2.601(A) (stating that a trial court may grant relief other than that explicitly demanded in pleadings).

Accepting plaintiff's allegations as true and construing them in the light most favorable to plaintiff, *Maiden*, 461 Mich at 119, we hold that plaintiff alleged a viable claim for declaratory or injunctive relief, effectively seeking a declaration that the fees assessed violated § 4 of the FOIA, and an injunctive order prohibiting such a fee assessment. Plaintiff set forth an actual controversy by challenging the assessment of fees by the Board as violative of § 4 of the FOIA. *Lash*,

479 Mich at 196 ("[A]n 'actual controversy' exists for the purposes of a declaratory judgment where a plaintiff pleads and proves facts demonstrating an adverse interest necessitating a judgment to preserve the plaintiff's legal rights."). Plaintiff's claim for declaratory or injunctive relief is not "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Wade*, 439 Mich at 163. The trial court's award of summary disposition to defendant, under MCR 2.116(C)(8), on Count II of plaintiff's complaint was therefore erroneous.

III. ENTRY OF PROTECTIVE ORDER

After commencing this case, plaintiff made three discovery requests that are at issue on appeal. First, plaintiff requested that the Board provide an index of records. Second, plaintiff requested, under MCR 2.310, to inspect "the process which identified these records or alternatively an inspection these +6,000 records." Third, plaintiff requested to depose the Board's "staffer" who determined that more than 6,000 pages of records fell within the scope of his FOIA request and needed to be examined to fulfill the request.

The Board filed a motion for a protective order under MCR 2.302(C), asserting that the discovery should be precluded. The Board generally asserted that plaintiff was using discovery to evade paying the fee authorized and assessed under § 4 of the FOIA, MCL 15.234, to process his FOIA request, and also that the requested discovery was unnecessary and unduly burdensome because plaintiff did not have viable cause of action. Plaintiff argued in response that a claim under § 4 of the FOIA challenging the assessment of fees to the requester is a recognized cause of action and that the requested discovery was necessary to ascertain how

the Board identified the records that allegedly needed to be examined to fulfill plaintiff's FOIA request and what those documents were. According to plaintiff, the Board's refusal to create an index, to permit inspection, or to permit a deposition of the custodian of the records, effectively precluded plaintiff from obtaining information needed to prosecute his § 4 claim challenging the fees assessed by the Board. After conducting a hearing, the trial court granted the Board's protective order, finding that allowing the requested discovery would be "circumventing the FOIA act." The court therefore ordered that the Board was not required to respond to plaintiff's request to create an index of records; that the Board was not required to respond to plaintiff's request for an inspection of records, unless plaintiff were to pay the fee for processing his FOIA request; and that plaintiff was not allowed take the requested deposition. Plaintiff moved for reconsideration, seeking to allow plaintiff's counsel access to the documents in accordance with *Evening News Ass'n v City of Troy*, 417 Mich 481; 339 NW2d 421 (1983). The trial court denied the motion for reconsideration.

Plaintiff argues that the trial court abused its discretion by precluding the requested discovery. We agree to the extent that the trial court precluded the requested deposition, but disagree in all other respects.

" 'This Court reviews a trial court's decision to grant or deny discovery for an abuse of discretion.' " *King*, 303 Mich App at 175, quoting *Shinkle v Shinkle (On Rehearing)*, 255 Mich App 221, 224; 663 NW2d 481 (2003). Further, this Court reviews for an abuse of discretion a trial court's decision on a motion for a protective order. *Alberto v Toyota Motor Corp*, 289 Mich App 328, 340; 796 NW2d 490 (2010). "A trial court abuses its discretion when its decision falls outside the

range of principled outcomes." *King*, 303 Mich App at 175. The interpretation and application of court rules is a question of law reviewed de novo on appeal. *Kernen v Homestead Dev Co*, 252 Mich App 689, 692; 653 NW2d 634 (2002).

"Michigan has a broad discovery policy that permits the discovery of any matter that is not privileged and that is relevant to the pending case." *Alberto*, 289 Mich App at 336. MCR 2.302(B)(1) provides, in relevant part:

> 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, 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.

"However, Michigan's court rules acknowledge the wisdom of placing reasonable limits on discovery." *Alberto*, 289 Mich App at 336. To that end, the court rules allow a party or a person from whom discovery is sought to move for a protective order. See MCR 2.302(C). The movant must demonstrate good cause for the issuance of a protective order. *Id*. We address each of plaintiff's three discovery requests in turn.

A. INDEX OF RECORDS

Plaintiff first requested that the Board compile an index to identify the nature of the more than 6,000

pages of records the Board claims it must examine to fulfill his FOIA request. We conclude that good cause existed to preclude this request. Section 3(1), MCL 15.233(1), of the FOIA provides that a person has a right to inspect, copy, or receive copies of the requested public record upon providing a written request sufficiently describing the record to enable the public body to find the public record. However, the FOIA plainly "does not require a public body to create a new public record" in order to satisfy a disclosure request, except "to the extent required by this act for the furnishing or copies, or edited copies . . . of an already existing public record." MCL 15.233(5). Therefore, "[i]n response to an FOIA request, . . . the public body is not generally required to make a compilation, summary, or report of information, nor is it generally required to create a new public record." *Southfield*, 269 Mich App at 281.

In this case, plaintiff's request that the Board create an index of the records it identified as requiring examination in order to fulfill plaintiff's FOIA request would effectively require the Board to make a compilation or summary or effectively create a new public record. Further, the Board explained that the creation of an index would require an extensive amount of time and labor because the Board's FOIA coordinator would need to retrieve all the records, review them, assign descriptive titles, summarize their contents, and identify and separate exempt information. Essentially, in seeking an index of all responsive documents, plaintiff would cause the Board to conduct the very document review for which the Board was entitled to require an up-front deposit, without plaintiff first making that required payment. This would effectively render nugatory the FOIA provision that permits a public body to require that a

requester make a deposit, as well as our holding that a public body is not required to make a final determination regarding a FOIA request until the deposit is paid. See *Apsey v Mem Hosp*, 477 Mich 120, 127, 131; 730 NW2d 695 (2007). For these reasons, and because the FOIA does not obligate the Board to compile or summarize or make a new public record to fulfill a FOIA request, MCL 15.233(5); *Southfield*, 269 Mich App at 281, the creation of an index would be an undue burden and expense on the Board. Accordingly, the trial court's decision precluding the Board from having to create an index of records fell within the range of principled outcomes, and the trial court did not abuse its discretion by precluding the discovery. See *King*, 303 Mich App at 175.

B. INSPECTION OF RECORDS OR THE PROCESS USED TO IDENTIFY RECORDS

Plaintiff also made a discovery request under MCR 2.310 to inspect the process by which the Board identified the records it identified as responsive to his FOIA request or, in the alternative, to inspect the records themselves. The Board asserted in its motion for a protective order that an inspection would place an unnecessary and undue burden and expense on the Board because it again would effectively require the Board to review the responsive records and redact material exempt from public disclosure without requiring the plaintiff to pay the processing fee authorized under § 4 of the FOIA, MCL 15.234. As part of its protective order, the trial court limited the requested discovery via inspection by ordering that the Board was not required to respond to plaintiff's request for an inspection of records, unless plaintiff paid the fee for processing his record request.

The trial court did not specifically respond to plaintiff's request "to inspect the process" used by the Board. Nor did plaintiff explain what it would mean to "inspect the process." However, we read the protective order's conditioning of a right to inspect the records on the payment of the required fee to also apply to plaintiff's request to "inspect the process." Further, we conclude that the trial court did not err by so limiting plaintiff's request.

MCR 2.310 allows a party to request another party to "permit entry on land." MCR 2.310(B)(1)(b). "Entry on land" is defined by court rule as "entry upon designated land or other property in the possession or control of the person on whom the request is served for the purpose of inspecting, measuring, surveying, photographing, testing, or sampling the property or a designated object or operation on the property, within the scope of MCR 2.302(B)." MCR 2.310(A)(2). Accordingly, under MCR 2.310, plaintiff could request to inspect an "operation on the property" and arguably seek to inspect the process of identifying the pages of records potentially responsive to his FOIA request to ascertain how the Board identified records needing to be searched. Even assuming this to be the nature of plaintiff's request, however, to fulfill this request, the Board would be required to review the responsive records and redact material exempt from public disclosure without requiring plaintiff to pay the processing fee authorized under §4 of the FOIA. Accordingly, it is not outside of the range of principled outcomes to preclude plaintiff from seeking to inspect the process used by the Board to identify the records without first requiring payment of the required deposit authorized under § 4(2) of the FOIA, and the trial court did not err by granting the Board's request for a protective order limiting discovery.

Plaintiff's alternative discovery request to inspect the records would likely lead to the discovery of evidence relevant to plaintiff's claim under § 4 of the FOIA (challenging the amount of the fees assessed by the Board to process his FOIA request as resulting from an excessive number of documents identified by the Board as needing to be searched to fulfill that request). See *Alberto*, 289 Mich App at 336. Under MCR 2.310(B)(1)(a)(i), a party may request that an opposing party produce and permit the requesting party, or someone acting for the requesting party, to inspect designated documents. Further, MCR 2.310(C)(6) provides, "[u]nless otherwise ordered by the court for good cause, the party producing the items for inspection shall bear the cost of assembling them and the party requesting the items shall bear any copying costs."

There was good cause, however, to limit plaintiff's request to inspect the identified records by requiring plaintiff to pay for the cost of processing the discovery request. See MCR 2.310(C)(6). In the first instance, merely granting a right to inspect all of the records would carry the risk of divulging exempt materials and thus circumvent the very aim of the FOIA to balance the public's right to disclosure of public records with the right to shield some " 'affairs of government from public view.' " *King*, 303 Mich App at 175-176, quoting *Herald Co, Inc v Eastern Mich Univ Bd of Regents*, 475 Mich 463, 472-473; 719 NW2d 19 (2006).

This risk could be obviated if the Board first searched the records and redacted exempt information. However, as previously stated, the FOIA allows the Board to charge the costs of these services to a requester and to require a good-faith deposit. MCL 15.234. If plaintiff were not required to pay the fee

assessed under § 4 of the FOIA to process plaintiff's FOIA request, the Board would experience "undue burden or expense," MCR 2.302(C), by plaintiff's inspection of the records identified as responsive to his FOIA request because the Board would effectively be required to process the FOIA request, i.e., search, retrieve, examine, review, and separate exempt from nonexempt information, without reimbursement of the cost from the requester as statutorily authorized under the FOIA. Therefore, to protect the Board from undue burden and expense, justice requires the court's limitation on discovery: making the inspection contingent on the payment of fees assessed by the Board as authorized under § 4 of the FOIA. See MCR 2.302(C)(2) (stating that the court may order "that the discovery may be had only on specified terms and conditions"); *Alberto*, 289 Mich App at 336. Accordingly, under these circumstances, the trial court acted within its discretion by issuing an order making plaintiff's request to inspect the records contingent on the payment of the assessed fee. See *King*, 303 Mich App at 175.

C. DEPOSITION OF FOIA COORDINATOR

Finally, plaintiff sought to depose the "staffer" who determined the "global document set" that the Board indicated it needs to review to fulfill plaintiff's FOIA request. The Board argued that a request for deposition of the FOIA coordinator, who processed plaintiff's request, places an unnecessary and undue burden and expense on the Board because there is no dispute that plaintiff does not have a claim upon which relief can be granted. The trial court ordered that plaintiff not be allowed to take the requested deposition.

As noted in Part II(C) of this opinion, however, plaintiff has an actionable claim for declaratory or injunctive relief under § 4 of the FOIA, MCL 15.234, challenging the Board's assessment of fees to process his request as excessive because of the scope of the records identified by the Board as needing to be examined. Accordingly, conducting a deposition, in accordance with MCR 2.306, of the person who made the determination in question, about the process or methodology used to determine the document set responsive to plaintiff's FOIA request, would likely lead to the discovery of admissible evidence on a matter that is relevant to plaintiff's § 4 claim. See MCR 2.302(B)(1). Further, a deposition would provide a means of ascertaining how the Board identified the more than 6,000 pages of responsive records and, in general, what those records were composed of, without causing the Board to incur the undue burden associated with effectively having to process plaintiff's FOIA request without reimbursement of the processing costs. It cannot be said that the deposition alone would place an undue burden or expense on the Board. See MCR 2.302(C). Under these circumstances, the trial court abused its discretion by precluding plaintiff from deposing the FOIA Coordinator or staffer who identified the scope of the records that need to be searched to fulfill plaintiff's FOIA request. See *King*, 303 Mich App at 175.

D. IN CAMERA REVIEW

In his motion for reconsideration of the trial court's protective order precluding discovery, plaintiff requested that his counsel be allowed to inspect the requested records in camera in accordance with *Evening News*. This issue is not properly preserved for review. See *King v Oakland Co Prosecutor*, 303 Mich App 222,

239; 842 NW2d 403 (2013) ("Where an issue is first presented in a motion for reconsideration, it is not properly preserved.") (quotation marks and citation omitted). Regardless, we do not find an in camera inspection by plaintiff's counsel to be warranted.

Evening News is not applicable to this case. *Evening News* concerned the assertion of a FOIA exemption and the resulting "procedural difficulties that inhere in determining whether a FOIA exemption applies in light of the asserted confidentiality of the information contained in the requested documents." *King*, 303 Mich App at 228, citing *Evening News*, 417 Mich at 514. By contrast, the issue in this case concerns the scope of the records that the Board identified as responsive, which identification resulted in allegedly excessive fees to process plaintiff's FOIA request. Therefore, the procedure set forth in *Evening News*, of allowing the plaintiff's counsel to view information in camera in order to challenge the assertion of an exemption, is not applicable here. Moreover, allowing plaintiff's counsel to view the responsive documents in camera would again require the Board to effectively process plaintiff's FOIA request, i.e., by retrieving and examining the information, without receipt of the required fee assessed under § 4 of the FOIA (which as previously discussed would result in undue burden and expense for the Board), and would either cause exempt materials to be divulged or cause the Board to incur the additional expense of ascertaining and redacting exempt materials without the required payment.

IV. APPELLATE ATTORNEY FEES

Finally, plaintiff argues that he is entitled to recover appellate attorney fees under § 10(6) of the

FOIA, MCL 15.240(6), if he prevails on remand and that this Court should order the trial court to award all attorney fees and costs incurred in this appeal in that event. We disagree. The proper interpretation of the FOIA is a question of law that is subject to review de novo. *Thomas*, 254 Mich App at 201.

In support of his argument, plaintiff cites *Rataj v Romulus*, 306 Mich App 735; 858 NW2d 116 (2014). In *Rataj*, this Court determined that the public body had wrongfully denied the plaintiff's FOIA request, in part, and held that the trial court had erred by declining to order the disclosure of certain requested records. *Id*. at 753-754. Concluding that the legal action, and particularly the appeal to this Court, was necessary in that case to compel disclosure of the requested information, and that the plaintiff had prevailed in part, this Court held that the plaintiff was entitled to reasonable attorney fees, costs, and disbursements incurred by the plaintiff, "including those attorney fees and costs necessitated by [the] appeal . . . ." *Id*. at 756. Therefore, as plaintiff argues on appeal in this case, a requester may recover attorney fees related to an appeal if he or she prevails in an action commenced under § 10 of the FOIA, MCL 15.240(6). *Id*.

In this case, however, plaintiff did not prevail on his claim under § 10 of the FOIA, because the trial court's dismissal of Count I of his complaint was appropriate given his failure to pay the required deposit authorized under § 4(2) of the FOIA. In light of plaintiff's nonpayment, a lawsuit was not reasonably necessary to compel the disclosure of the required documents, and, therefore, plaintiff could not maintain an action for damages under § 10 of the FOIA. Accordingly, and

consistently with *Rataj*, we decline to award attorney fees under § 10(6) of the FOIA.

V. CONCLUSION

We affirm the trial court's dismissal of Count I of plaintiff's complaint, but reverse the dismissal of Count II of plaintiff's complaint insofar as it seeks declaratory or injunctive relief. We reverse that portion of the trial court's protective order that pertains to the requested deposition, and otherwise affirm that order. We decline to order the trial court to award appellate attorney fees if plaintiff is successful on remand, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

BECKERING, P.J., concurred with BOONSTRA, J.

JANSEN, J. (*concurring in part and dissenting in part*). I concur with the majority's determination that defendant Michigan Gaming Control Board (MGCB) did not actually grant plaintiff's request under the Freedom of Information Act (FOIA), MCL 15.231 *et seq*., when it informed plaintiff that it was "grant[ing] your request for existing, non-exempt information in our possession that is relevant to your request." See *King v Mich State Police Dep't*, 303 Mich App 162, 189-191; 841 NW2d 914 (2013). Indeed, I conclude that the MGCB's letter to plaintiff operated as a constructive denial of his FOIA request. Accordingly, the circuit court erred by dismissing plaintiff's claim on the ground that the MGCB had granted the request.

I also concur with the majority that plaintiff sufficiently pleaded a claim for injunctive or declaratory relief with respect to whether the fees charged by the MGCB were excessive and violative of § 4 of FOIA,

MCL 15.234. See *Lash v Traverse City*, 479 Mich 180, 196; 735 NW2d 628 (2007). As the majority correctly points out, this Court has implicitly recognized such a claim to challenge a fee under § 4 of FOIA in the past. See *Detroit Free Press, Inc v Dep't of Attorney Gen*, 271 Mich App 418, 423; 722 NW2d 277 (2006).[1]

Contrary to the majority, however, I cannot conclude that Count I of plaintiff's complaint was properly dismissed for the alternative reason that plaintiff failed to pay the requested deposit under MCL 15.234(2). Plaintiff challenged the fee charged by the MGCB, including the amount of the requested deposit. The majority reasons that plaintiff had a right to challenge the amount of the fee by way of a request for injunctive or declaratory relief, but nevertheless concludes that plaintiff's claim was properly dismissed because he did not pay the challenged deposit. In my opinion, this reasoning is illogical. Until the circuit court rules on plaintiff's claim challenging the overall fee under § 4, how can it possibly be said that plaintiff was required to pay the requested deposit of $2,151.67?

MCL 15.234(2) provides that "[a] public body may require at the time a request is made a good faith deposit from the person requesting the public record or series of public records, if the fee authorized under this section exceeds $50.00. The deposit shall not exceed ½ of the total fee." The MGCB claims that responding to plaintiff's FOIA request would require it to pay an employee $41.78 per hour, for an estimated 103 hours, or a total of $4,303.34. The MGCB requested that plaintiff pay a deposit of ½ of this amount, or $2,151.67.

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[1] I further concur with the majority regarding the disposition of the discovery issues raised in this case.

Plaintiff requested two sets of information from the MGCB: (1) a list of countermeasures "approved by the Michigan [G]aming Control Board" that were then or previously in effect authorizing the casinos to prevent card counters from profiting at the game of blackjack and (2) a list of MGCB rules allowing the casinos to exclude skillful blackjack players or skillful players of other games. In other words, plaintiff's FOIA request was limited to present and past MGCB rules, policies, interpretative statements, meeting minutes, and similar records that should have been easy to identify, locate, and reproduce. Surely, the MGCB is aware of its own rules, policies, interpretative statements, meeting minutes, and other similar records. Such documents are readily available to the agency, and it would take minimal time to review and compile them.

I am at pains to understand the MGCB's assertion that plaintiff's straightforward FOIA request would require 103 hours of labor at an hourly rate of $41.78. Nor do I understand why the MGCB would be required to review 6,206 pages of documents to comply with plaintiff's request. The MGCB's letter informing plaintiff that he was required to pay for 103 hours of labor at a rate of $41.78 per hour, and make a good-faith deposit of $2,151.67, was clearly designed to discourage plaintiff and frustrate his attempt to obtain disclosable public records. Such deceptive action by a public agency violates the purpose and spirit of FOIA, undermines faith in our state government, and cannot be tolerated.

Until it is determined whether the MGCB charged a proper fee under MCL 15.234(1) and (3), this Court cannot possibly determine whether plaintiff was required to pay the requested deposit of $2,151.67 under MCL 15.234(2). If the overall fee of $4,303.34 is found

to be excessive (as I believe it likely is), the amount of the good-faith deposit permitted by MCL 15.234(2) will necessarily decrease. These are questions for the circuit court on remand.

I would reverse the circuit court's dismissal of Count I of plaintiff's complaint and remand for a determination of a reasonable deposit under MCL 15.234(2). Only after making such a determination can the circuit court reach the merits of plaintiff's claim under § 10 of FOIA, MCL 15.240. I would also grant reasonable appellate attorney fees and costs under MCL 15.240(6) and the reasoning of *Rataj v Romulus*, 306 Mich App 735, 756; 858 NW2d 116 (2014).

DIALLO v LaROCHELLE

Docket No. 319680. Submitted April 15, 2015, at Grand Rapids. Decided May 5, 2015, at 9:10 a.m.

Mahmoud Diallo, a Georgia resident, brought an action in the Allegan Circuit Court against the estate of Kenneth Wrozek and State Farm Mutual Automobile Insurance Company, seeking benefits under the no-fault act, MCL 500.3101 *et seq*. Joseph Carrington was driving a truck owned by plaintiff that Wrozek struck head on while driving in the wrong lane and with a blood alcohol level of 0.20% and morphine in his blood. State Farm was Wrozek's insurer. After the estate was opened, Kelly LaRochelle was named personal representative and joined the case in the estate's place. State Farm had denied plaintiff's claim under MCL 500.3135(3)(d) for economic losses, asserting that it was barred under MCL 500.3135(3)(e), which limited plaintiff's claim to the $500 that State Farm had already paid. Plaintiff, however, argued that because he was not seeking personal protection insurance benefits but was instead suing for economic damages, MCL 500.3135(3)(d) did apply. The court, Margaret Zuzich Bakker, J., granted State Farm summary disposition, and plaintiff appealed.

The Court of Appeals *held*:

The trial court did not err by granting State Farm's motion for summary disposition. MCL 500.3135(3)(d) contains an exception to the no-fault act's abolition of tort liability for motor vehicle accidents, providing that a tort action may be pursued for damages for economic loss by a nonresident in excess of the personal protection insurance benefits provided under MCL 500.3163(4). MCL 500.3163(4), in turn, states that if an insurer of an out-of-state resident is required to provide personal protection insurance benefits to that out-of-state resident for an accident in which the out-of-state resident was not an occupant of a motor vehicle registered in Michigan, the insurer is only liable for the amount of ultimate loss sustained up to $500,000. Interpreting the plain language of the applicable no-fault statutes, and applying the last-antecedent rule of statutory construction and the legal maxim *expressio unius est exclusio alterius*, it was apparent

that the Legislature intended the phrase "damages for economic loss" in MCL 500.3135(3)(d) to refer only to economic losses in excess of losses paid for through personal protection insurance benefits under MCL 500.3163(4) and that no other type of economic damages may be pursued under MCL 500.3135(3)(d). Because plaintiff was never provided personal protection insurance benefits under MCL 500.3163(4), he cannot be entitled to pursue economic damages in excess of those benefits.

Affirmed.

Visser and Associates, PLLC (by *Donald R. Visser*), for Mahmoud Diallo.

Rhoades McKee PC (by *Gregory G. Timmer* and *Martin W. Buschle*) for Kelly LaRochelle.

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

PER CURIAM. In this no-fault insurance action, plaintiff (a Georgia resident) appeals the trial court's December 4, 2013 order, granting State Farm Mutual Automobile Insurance Company's motion for summary disposition under MCR 2.116(C)(8). We affirm.

On April 16, 2011, at approximately 2:45 a.m., Joseph Carrington was driving a truck south in the southbound lane of US-131 in Dorr Township, Allegan County, Michigan. Plaintiff was the owner of the truck that Carrington was driving. Kenneth Wrozek was driving his vehicle north in the southbound lane of US-131. Wrozek's vehicle struck plaintiff's truck head on. Plaintiff alleged that at the time of the collision, Wrozek's blood alcohol level was 0.20% and he had morphine in his blood. Plaintiff alleged that Wrozek was a Michigan resident and that State Farm was Wrozek's insurer.

Plaintiff notified State Farm by letter that he had made a claim to State Farm for damages resulting from losses arising from the collision. In this letter,

plaintiff acknowledged that State Farm had denied this claim and that State Farm had cited MCL 500.3135(3)(e) to support its position that the maximum amount payable to plaintiff under the no-fault act, MCL 500.3101 *et seq*., was $500.[1] However, plaintiff argued in this letter that State Farm was obligated to pay plaintiff's claim for economic loss pursuant to MCL 500.3135(3)(d). State Farm responded to plaintiff, stating that MCL 500.3135(3)(d) did not apply to plaintiff's claim. In response, plaintiff sent State Farm another letter, again stating that plaintiff's claim was valid under MCL 500.3135(3)(d).

Ultimately, plaintiff filed a complaint in the trial court against State Farm and the estate of Wrozek.[2] In his complaint, plaintiff alleged that Wrozek's driving at the time of the collision breached his duty of care to plaintiff, that this breach caused harm to plaintiff, and that State Farm—as Wrozek's insurer—was obligated to pay the damages resulting from this harm. Plaintiff alleged that his damages included the complete loss of his vehicle and loss of income resulting from plaintiff's inability to lease the vehicle. Plaintiff argued that he was entitled to these damages under

[1] 2012 PA 158 raised this amount to $1,000 effective October 1, 2012.

[2] Kelly LaRochelle, the personal representative of the estate, was not named as a party in the complaint because the estate did not exist at the time plaintiff filed the complaint. As a result, State Farm raised an affirmative defense to the complaint, stating that direct actions against insurers are prohibited pursuant to MCL 500.3030. However, instead of asking the trial court to dismiss State Farm from the complaint, making plaintiff open an estate, and waiting for the estate to give notice to State Farm, the parties ultimately stipulated that the trial court's ruling would act as a declaratory judgment regarding State Farm's liability to the deceased driver rather than a direct judgment against State Farm, resolving any procedural issues under MCL 500.3030. After the estate was opened, LaRochelle was named as the personal representative and joined this case as the defendant-appellee.

MCL 500.3135(3)(d). State Farm admitted that it had insured Wrozek, but argued that plaintiff was not entitled to benefits under MCL 500.3135(3)(d) because that statute did not pertain to collision damage to a motor vehicle or to lost income resulting from such damage. State Farm asserted that plaintiff's claim was barred pursuant to MCL 500.3135(3)(e), which limited plaintiff's claim to $500, and because State Farm had already paid plaintiff $500 in damages, State Farm alleged that plaintiff had no claim for further damages. Plaintiff subsequently filed a motion for summary disposition under MCR 2.116(C)(9) and (10). State Farm responded with its own motion for summary disposition under MCR 2.116(C)(8) and (10),[3] which the trial court granted pursuant to MCR 2.116(C)(8). This appeal followed.

Plaintiff argues that because he is not seeking personal protection insurance benefits and instead is suing for economic damages, MCL 500.3135(3)(d), which provides an exception to the no-fault act's abolition of tort liability, applies in this case. We disagree.

This Court reviews de novo a trial court's decision regarding a motion for summary disposition. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). "A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a complaint." *Gillie v Genesee Co Treasurer*, 277 Mich App 333, 344; 745 NW2d 137 (2007). "The motion should be granted if no factual development could possibly justify recovery." *Beaudrie v Henderson*, 465 Mich 124, 130; 631 NW2d 308 (2001). In addition, questions of statutory

[3] It is noted that the motion stated that State Farm was moving pursuant to MCR 2.116(I)(2); however, given its arguments, it is clear that State Farm actually moved for summary disposition pursuant to MCR 2.116(C)(8) and (10).

interpretation and application are questions of law that this Court reviews de novo. *Farmers Ins Exch v AAA of Mich*, 256 Mich App 691, 694; 671 NW2d 89 (2003).

"A party injured through the ownership, operation, maintenance, or use of a motor vehicle must seek recovery within the strictures of the no-fault act." *Gunsell v Ryan*, 236 Mich App 204, 209; 599 NW2d 767 (1999), overruled in part *sub silentio* on other grounds by *Frazier v Allstate Ins Co*, 490 Mich 381; 808 NW2d 450 (2011), as recognized by *LeFevers v State Farm Mut Auto Ins Co*, 493 Mich 960 (2013). "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 500.3101. With few exceptions, under the no-fault act "tort liability arising from the ownership, maintenance, or use within this state of a motor vehicle with respect to which the security required by [MCL 500.3101] was in effect is abolished . . . ." MCL 500.3135(3); see also *American Alternative Ins Co, Inc v York*, 470 Mich 28, 30; 679 NW2d 306 (2004) ("As part of the automobile no-fault insurance system enacted in 1972, our Legislature at MCL 500.3135 abolished tort liability for harm caused while owning, maintaining, or using a motor vehicle in Michigan.") (citation omitted).

In this case, it is not disputed that plaintiff's alleged injuries (loss of his truck) arose through Wrozek's "ownership, operation, maintenance, or use of a motor vehicle . . . ." *Gunsell*, 236 Mich at 209. Therefore, plaintiff "must seek recovery within the strictures of the no-fault act." *Id*. It is also not disputed that the security required by MCL 500.3101 was in effect when

plaintiff sustained his alleged injuries. Therefore, according to the strictures of the no-fault act, defendants are immune from tort liability unless an exception applies. See *American Alternative*, 470 Mich at 30. The only issue in this case is whether an exception applies, allowing plaintiff to sue defendant-appellee in tort for his economic damages. The exception at issue in this case is set forth in MCL 500.3135(3)(d), which states as follows:

> Notwithstanding any other provision of law, tort liability arising from the ownership, maintenance, or use within this state of a motor vehicle with respect to which the security required by [MCL 500.3101] was in effect is abolished except as to:
>
> * * *
>
> (d) Damages for economic loss by a nonresident in excess of the personal protection insurance benefits provided under [MCL 500.3163(4)]. Damages under this subdivision are not recoverable to the extent that benefits covering the same loss are available from other sources, regardless of the nature or number of benefit sources available and regardless of the nature or form of the benefits.

MCL 500.3163(4) states as follows:

> If an insurer of an out-of-state resident is required to provide benefits under subsections (1) to (3)[4] to that out-of-state resident for accidental bodily injury for an accident in which the out-of-state resident was not an

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[4] Subsections (1) to (3), MCL 500.3163(1) to (3), provide as follows:

> (1) An insurer authorized to transact automobile liability insurance and personal and property protection insurance in this state shall file and maintain a written certification that any accidental bodily injury or property damage occurring in this state arising from the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle by an out-of-state resident

> occupant of a motor vehicle registered in this state, the insurer is only liable for the amount of ultimate loss sustained up to $500,000.00. Benefits under this subsection are not recoverable to the extent that benefits covering the same loss are available from other sources, regardless of the nature or number of benefit sources available and regardless of the nature or form of the benefits.

To resolve the issue whether MCL 500.3135(3)(d) provides plaintiff an exception to the no-fault act's abolition of tort liability, MCL 500.3135(3)(d) and MCL 500.3163(4) must be interpreted. The primary goal of statutory construction is to determine the intent of the Legislature by reasonably considering the purpose and goal of the statute. *Frankenmuth Mut Ins Co v Marlette Homes, Inc*, 456 Mich 511, 515; 573 NW2d 611 (1998). To determine the Legislature's intent, this Court looks at the specific language of the statute. *Gauntlett v Auto-Owners Ins Co*, 242 Mich App 172, 177; 617 NW2d 735 (2000). Construction of a statute is appropriate where reasonable minds could differ regarding the statute's meaning. *Id*. If the language of the statute is unambiguous, however, then no further construction is required and "the statute must be

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> who is insured under its automobile liability insurance policies, is subject to the personal and property protection insurance system under this act.
>
> (2) A nonadmitted insurer may voluntarily file the certification described in subsection (1).
>
> (3) Except as otherwise provided in subsection (4), if a certification filed under subsection (1) or (2) applies to accidental bodily injury or property damage, the insurer and its insureds with respect to that injury or damage have the rights and immunities under this act for personal and property protection insureds, and claimants have the rights and benefits of personal and property protection insurance claimants, including the right to receive benefits from the electing insurer as if it were an insurer of personal and property protection insurance applicable to the accidental bodily injury or property damage.

enforced as written." *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). "A statute is not ambiguous merely because a term it contains is undefined . . . ." *Cadillac Mayor v Blackburn*, 306 Mich App 512, 516; 857 NW2d 529 (2014).

This Court "presume[s] that every word of a statute has some meaning and must avoid any interpretation that would render any part of the statute surplusage or nugatory." *Mich Farm Bureau v Dep't of Environmental Quality*, 292 Mich App 106, 132; 807 NW2d 866 (2011). "As far as possible, effect should be given to every sentence, phrase, clause, and word." *Id*. When the Legislature "incorporates by reference a provision of an existing statute," that provision becomes part of the statute. *Jager v Rostagno Trucking Co, Inc*, 272 Mich App 419, 423; 728 NW2d 467 (2006). This Court may consult a dictionary to define terms that are undefined in the statute. *Koontz v Ameritech Servs, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002). Further, "[t]erms contained in the no-fault act are read in light of its legislative history and in the context of the no-fault act as a whole." *Proudfoot v State Farm Mut Ins Co*, 254 Mich App 702, 708; 658 NW2d 838 (2003), aff'd in part, rev'd in part, and vacated on other grounds 469 Mich 476 (2003) (quotation marks and citations omitted). Courts should not abandon common sense when construing a statute. *Proudfoot*, 254 Mich App at 708.

First, personal protection insurance benefits are described in MCL 500.3107. See *Amy v MIC Gen Ins Corp*, 258 Mich App 94, 98 & n 2; 670 NW2d 228 (2003), rev'd in part on other grounds sub nom *Stewart v Michigan*, 471 Mich 692 (2004). Therefore, the phrase "personal protection insurance benefits" needs no interpretation. *Haynes v Neshewat*, 477 Mich 29, 35; 729

NW2d 488 (2007) ("When a statute specifically defines a given term, that definition alone controls."). Specifically, personal protection insurance benefits are for expenses such as those incurred for an injured person's care, lost income from work that an injured person would have performed within three years after the accident, and expenses for services in lieu of the services the injured person would have performed if not for the injury. MCL 500.3107(1). This Court has interpreted the term "nonresident" under the no-fault act to refer to a person who is a resident of a state other than Michigan. See *McGhee v Helsel*, 262 Mich 221, 222; 686 NW2d 6 (2004). The no-fault act does not define the term "economic loss"; therefore, a dictionary may be used. *Koontz*, 466 Mich at 312. Economic loss is "[a] monetary loss such as lost wages or lost profits." *Black's Law Dictionary* (10th ed).

Next, under the specific language of MCL 500.3135(3)(d), *Gauntlett*, 242 Mich App at 177, tort liability is abolished except for "[d]amages for economic loss by a nonresident in excess of the personal protection insurance benefits provided under [MCL 500.3163(4)]." MCL 500.3135(3)(d). This provision must be examined as a whole to avoid rendering any part of it surplusage or nugatory. *Mich Farm Bureau*, 292 Mich App at 132. When read as a whole, it is clear that the provision contains the restrictive clauses "by a nonresident" and "in excess of the personal protection insurance benefits provided under [MCL 500.3163(4)]." MCL 500.3135(3)(d). According to the last antecedent rule of statutory construction, "a modifying or restrictive word or clause contained in a statute is confined solely to the immediately preceding clause or last antecedent, unless something in the statute requires a different interpretation." *Greater Bethesda Healing Springs Ministry v Evangel Builders & Constr Manag-*

ers, LLC, 282 Mich App 410, 414; 766 NW2d 874 (2009). For example, in *Greater Bethesda*, this Court interpreted the meaning of MCR 3.602(I), which stated that "[a]n arbitration award filed with the clerk of the court designated in the agreement or statute within one year after the award was rendered may be confirmed by the court . . . ." *Id*. at 412. Pursuant to the last antecedent rule, this Court concluded that the phrase "within one year after the award was rendered" applied to the immediately preceding reference to the filing of the award with the court clerk. *Id*. at 414. It did not apply to the subsequent reference to confirmation by the court, so as to require that the confirmation (rather than filing) occur within the one-year period. *Id*.

In MCL 500.3135(3)(d), the phrase "[d]amages for economic loss" is the last antecedent before the phrases "by a nonresident" and "in excess of the personal protection insurance benefits provided under [MCL 500.3163(4)]." MCL 500.3135(3)(d). Under the last antecedent rule, the phrases "by a nonresident" and "in excess of the personal protection insurance benefits provided under [MCL 500.3163(4)]" apply to the phrase "[d]amages for economic loss." *Greater Bethesda*, 282 Mich App at 414. Therefore, the phrase "[d]amages for economic loss" refers to damages for economic loss "by a nonresident in excess of the personal protection insurance benefits provided under [MCL 500.3163(4)]." *Id*. So plaintiff, as a nonresident, could only recover for economic damage in excess of the benefits provided under MCL 500.3163(4).

This conclusion is supported under the legal maxim *expressio unius est exclusio alterius*. *Hoerstman Gen Contracting, Inc v Hahn*, 474 Mich 66, 74; 711 NW2d 340 (2006). This maxim means "the expression of one

thing is the exclusion of another." *Id*. at 74 n 8. For example, in *Gray v Chrostowski*, 298 Mich App 769, 771; 828 NW2d 435 (2012), the plaintiff alleged that the defendant intentionally caused her harm by purposefully colliding with her vehicle. The plaintiff did not maintain insurance on her vehicle and attempted to bring suit against the defendant under MCL 500.3135(3)(a), which is an exception to the no-fault act's abolition of tort liability and applies in cases of "[i]ntentionally caused harm to persons or property." *Id*. at 773, quoting MCL 500.3135(3)(a). The defendant argued that the plaintiff's claim was barred under MCL 500.3135(2)(c), which stated in relevant part as follows: "For a cause of action for damages pursuant to [MCL 500.3135(1),] . . . [d]amages shall not be assessed in favor of a party who was operating his or her own vehicle" without insurance as required under MCL 500.3101. *Gray*, 298 Mich App at 773. However, citing the maxim *expressio unius est exclusio alterius*, this Court held that because MCL 500.3135(2)(c) exclusively referred to causes of action under MCL 500.3135(1), this indicated that the Legislature intended to limit the application of MCL 500.3135(2)(c) solely to claims arising under MCL 500.3135(1). *Id*. at 777. This Court noted as follows: "Indeed, had the Legislature intended to limit an uninsured motorist's ability to recover damages arising from intentionally caused harm, it could have included language in [MCL 500.3135(2)] indicating as much." *Id*. Therefore, this Court held that MCL 500.3135(2)(c) did not bar a cause of action under MCL 500.3135(3)(a). *Id*. at 779.

In this case, the Legislature mentioned "damages for economic loss" and then in the same sentence stated "in excess of the personal protection insurance benefits provided under [MCL 500.3163(4)]." MCL 500.3135(3)(d). Under *expressio unius est exclusio*

alterius, this indicates that the Legislature intended the phrase "damages for economic loss" to refer only to economic losses in excess of losses paid for through personal protection insurance benefits under MCL 500.3163(4) and that no other economic damages may be pursued under MCL 500.3135(3)(d). See *Gray*, 298 Mich App at 777. The term "excess" is defined as "[t]he amount or degree by which something is greater than another." *Black's Law Dictionary* (10th ed). The verb "provide" means "to make available" or "to supply or equip[.]" *Random House Webster's College Dictionary* (1991). If the Legislature had intended MCL 500.3135(3)(d) to permit a cause of action in tort for economic loss separate from consideration of the personal protection insurance benefits provided under MCL 500.3163(4), it could have used language indicating as much. *Gray*, 298 Mich App at 777. The fact that the Legislature did not use such language indicates that the Legislature intended the phrase "damages for economic loss" to refer only to those damages greater than those supplied under MCL 500.3163(4). *Id*.

In addition, interpreting MCL 500.3135(3)(d) to allow a nonresident to sue for economic damages of a type other than the personal protection insurance benefits provided under MCL 500.3163(4) would be to abandon common sense, and common sense should not be abandoned in statutory construction. *Proudfoot*, 254 Mich App at 708. Specifically, under MCL 500.3135, residents of Michigan cannot sue for such economic damages; therefore, it would lack common sense to construe MCL 500.3135(3)(d) as allowing nonresidents to sue for such economic damages. *Id*. And such an interpretation would contravene one of the purposes of the no-fault act, which is to reduce the number of personal injury tort suits related to motor vehicles. *Id*.

at 707. Interpreting MCL 500.3135(3)(d) in such a way as to contravene this purpose would violate the rule that "[t]erms contained in the no-fault act are read in light of its legislative history and in the context of the no-fault act as a whole." *Id*. at 708 (quotation marks and citations omitted).

Next, because MCL 500.3163(4) is incorporated by reference into MCL 500.3135(3)(d), this Court must interpret MCL 500.3163(4) to fully understand the Legislature's intent in MCL 500.3135(3)(d). See *Jager*, 272 Mich App at 423. In other words, MCL 500.3135(3)(d) only applies to damages for economic loss exceeding the personal protection insurance benefits provided under MCL 500.3163(4); therefore, to determine precisely what damages for economic loss MCL 500.3135(3)(d) refers to, this Court must determine what personal protection insurance benefits are provided under MCL 500.3163(4). *Id*. MCL 500.3163(4) states in relevant part as follows:

> If an insurer of an out-of-state resident is required to provide benefits under [MCL 500.3163(1)] to (3) to that out-of-state resident for accidental bodily injury for an accident in which the out-of-state resident was not an occupant of a motor vehicle registered in this state, the insurer is only liable for the amount of ultimate loss sustained up to $500,000.00.

Because MCL 500.3163(1) and (3) are referred to in MCL 500.3163(4), this Court must ascertain their meanings to interpret the meaning of MCL 500.3163(4). See *Jager*, 272 Mich App at 423. The Michigan Supreme Court has interpreted MCL 500.3163(1) to require that insurers licensed to transact automobile liability insurance in Michigan file a certificate. See *Mills v Auto-Owners Ins, Inc*, 413 Mich 567, 569; 321 NW2d 651 (1982). This certificate certi-

fies that accidental bodily injury or property damage occurring in Michigan resulting from the use of a motor vehicle by a nonresident whom the insurer insures will be subject to the no-fault act. MCL 500.3163(1). This Court has interpreted MCL 500.3163(1) to subject such an insurer to " 'the rights and immunities under the no-fault act for personal and property protection . . . .' " *Tienda v Integon Nat'l Ins Co*, 300 Mich App 605, 613; 834 NW2d 908 (2013), quoting *Tevis v Amex Assurance Co*, 283 Mich App 76, 85; 770 NW2d 16 (2009). Likewise, this Court has interpreted MCL 500.3163(3) to mean that, when an insurer files a certificate pursuant to MCL 500.3163(1), not only is that insurer subject to the rights and benefits of the no-fault act, but that insurer's insured and its claimants also have those benefits. *Tevis*, 283 Mich App at 84-85. Thus, the Legislature intended under MCL 500.3163(4) that when an insurer is required to provide benefits under the no-fault act pursuant to MCL 500.3163(1) and (3) "for an accident in which the out-of-state resident was not an occupant of a motor vehicle registered in this state, the insurer is only liable for the amount of ultimate loss sustained up to $500,000.00." MCL 500.3163(4).

To summarize, if an insurer of a nonresident is required to provide benefits under the no-fault act pursuant to MCL 500.3163(1) and (3), then the insurer is liable for an amount no greater than $500,000. MCL 500.3163(4). If an insured person or a claimant has economic losses that would have been paid under MCL 500.3163(4) as personal protection insurance benefits but for the $500,000 limit, that person may bring an action in tort under MCL 500.3135(3)(d) for the amount of economic loss above the $500,000 limit unless the damages are recoverable from other

sources. MCL 500.3135(3)(d); see also *Greater Bethesda*, 282 Mich App at 414; *Gray*, 298 Mich App at 777.

In this case, it is clear that MCL 500.3135(3)(d) does not provide plaintiff a cause of action. Because plaintiff was never provided personal protection insurance benefits under MCL 500.3163(4), it is impossible for plaintiff to be entitled to pursue economic damages in excess of those provided under MCL 500.3163(4). As discussed, MCL 500.3135(3)(d) provides an exception to the no-fault act's abolition of tort liability only to the extent a plaintiff is suing for economic loss that exceeds benefits already provided for under MCL 500.3163(4). See *Greater Bethesda*, 282 Mich App at 414; *Gray*, 298 Mich App at 777. Because plaintiff is not attempting to bring suit for economic loss in excess of benefits already provided for under MCL 500.3163(4), MCL 500.3135(3)(d) does not apply and plaintiff has no cause of action under that statute. See *Greater Bethesda*, 282 Mich App at 414; *Gray*, 298 Mich App at 777. Therefore, there is "no factual development [that] could possibly justify recovery" and the trial court did not err by granting State Farm's motion for summary disposition under MCR 2.116(C)(8). *Beaudrie*, 465 Mich at 130.

Affirmed. Defendant-appellee may tax costs.

METER, P.J., and SAWYER and BOONSTRA, JJ., concurred.

In re GONZALES/MARTINEZ MINORS

Docket No. 324168. Submitted April 7, 2015, at Detroit. Decided May 5, 2015, at 9:15 a.m.

The Department of Human Services filed a petition in the Macomb Circuit Court, Family Division, to terminate respondent's parental rights to her two children, MG and HM. The children were removed from respondent's custody after they were sexually assaulted by respondent's boyfriend. When informed of the assault, respondent reportedly slapped one child and called the other a liar. Respondent was emotionally unstable, had assaulted an elderly woman, was using drugs, and had criminal charges for retail fraud pending against her. In addition, respondent had continued having contact with her boyfriend and even voiced a desire to start a family with him. At the hearing on the petition for termination, the referee concluded that the Department had proved by clear and convincing evidence that termination of respondent's parental rights was appropriate on three grounds: MCL 712A.19b(3)(b)(*ii*), (g), and (j). The referee also found that a preponderance of the evidence showed that termination was in the children's best interests. The court, Tracey A. Yokich, J., adopted the referee's findings and entered an order terminating respondent's parental rights to MG and HM. Respondent appealed.

The Court of Appeals *held*:

1. The trial court did not clearly err by terminating respondent's parental rights on the basis of MCL 712A.19b(3)(b)(*ii*), which permits termination when the parent has an opportunity to prevent physical injury to, or sexual abuse of, his or her child and fails to do so, and there is a reasonable likelihood that injury or abuse will occur in the foreseeable future if the child is placed in the parent's home. In this case, respondent disbelieved her children's report of the abuse and failed to stop the abuse once she became aware of it. Respondent's argument that further abuse was unlikely because her boyfriend was in jail and facing deportation missed the purpose of MCL 712A.19b(3)(b)(*ii*). The statute addresses the harm occasioned by a parent who is unwilling or unable to protect his or her children from abuse; the statute does

not require that the children be at risk of harm from the same abuser. The evidence was clear and convincing that respondent failed to protect her children from abuse and that she was likely to continue placing her personal desires above the needs of her children.

2. The trial court did not clearly err by terminating respondent's parental rights on the basis of MCL 712A.19b(3)(g), which permits termination when, without regard to intent, a parent fails to provide proper care or custody for a child and is not reasonably expected to be able to provide proper care or custody within a reasonable time considering the child's age. In this case, respondent failed to comply with the terms of her parent-agency agreement, she did not regularly attend counseling and treatment sessions, she was unemployed and had limited monthly income from her social security disability benefits, and she did not adequately address her mental health issues. The evidence was clear and convincing that respondent was unable or unwilling to change her behavior and provide her children with a stable home.

3. The trial court did not err by terminating respondent's parental rights on the basis of MCL 712A.19b(3)(j), which authorizes the termination of parental rights when there exists a reasonable likelihood, based on the conduct or capability of a parent, that the parent's child will be harmed if returned to the parent's home. In this case, evidence showed that respondent had difficulty controlling her emotional instability and her aggression. There was testimony suggesting that respondent had violently assaulted an elderly woman. Respondent slapped HM when she told respondent of the abuse, and MG thought respondent would kill him if he was returned to her care. The evidence was clear and convincing that it was reasonably likely that the children would be harmed if returned to respondent's care or custody.

4. The trial court did not clearly err by determining that termination of respondent's parental rights was in the children's best interests. A preponderance of the evidence showed that the children were excelling in the placement with their aunt and uncle and that respondent was not motivated to make the necessary changes to address her substance abuse and mental health issues.

Affirmed.

Eric J. Smith, Prosecuting Attorney, and *Molly Zappitell*, Assistant Prosecuting Attorney, for the petitioner.

Derik R. Girdwood for respondent.

Before: M. J. KELLY, P.J., and WILDER and K. F. KELLY, JJ.

PER CURIAM. Respondent appeals by right the order terminating her parental rights to her two children, MG and HM, under MCL 712A.19b(3)(b)(*ii*), MCL 712A.19b(3)(g), and MCL 712A.19b(3)(j). Because we conclude there were no errors warranting relief, we affirm.

I. BASIC FACTS

MG and HM were removed from respondent's care and placed with relatives—their aunt and uncle—after it was discovered that respondent's boyfriend had sexually assaulted both children. The children told a worker from the Department of Human Services (Department) that when they first told their mother of the abuse, she slapped HM and called MG a liar. Respondent was allowed supervised parenting time with the children, but the Department expressed concern about the visits after a worker observed respondent "coaching" MG about the sexual assault case. A mental health professional who evaluated respondent recommended suspending respondent's parenting time and the court agreed.

The Department initially sought immediate termination of respondent's parental rights, but it withdrew the petition and offered respondent a parent-agency agreement. During a later hearing, it was revealed that respondent had remained in contact with her boyfriend after his arrest. Respondent also missed several drug screens and tested positive for cocaine.

Because of these events, the Department again petitioned for termination of respondent's parental rights.

At a hearing on the petition, respondent admitted that she continued to have contact with her boyfriend. Two police officers also testified about an incident that occurred before the Department offered respondent parent-agency agreement; respondent had assaulted an elderly woman with whom she lived. There was also a psychological report in which the author wrote that respondent had difficulty with the part of her brain that controls emotional stability and aggression. It was also revealed that respondent had criminal charges pending against her. Elizabeth Heath, a foster-care specialist working for the Department, submitted evidence that respondent had hallucinations, had been inconsistent with seeking treatment, and refused to engage in in-patient treatment. Respondent also had positive drug tests for cocaine from May through July, and she had twice been hospitalized for overdosing.

At the time of the hearing, respondent was living with an 83-year-old man, and he indicated that they were sexually involved. On one occasion when Heath went to the residence to deliver a subpoena, she found respondent passed out on the couch. Respondent's elderly roommate told Heath that he had seen respondent drinking and had given her pills. Respondent was unemployed throughout the proceedings, but did receive social security disability benefits. Heath testified that both children were doing well in their current placement with their aunt and uncle. Heath discussed a possible guardianship with the children's aunt and uncle, but they were afraid that respondent might continue to have contact with them, and they did not feel safe around her.

The hearing referee found that the Department had established by clear and convincing evidence grounds for termination under MCL 712A.19b(3)(b)(*ii*), (g), and (j). Regarding § 19b(3)(b)(*ii*), the referee noted respondent's refusal to believe her children's allegations of sexual abuse and respondent's continued relationship with her children's alleged abuser. The referee also believed that respondent's continued problems with drug use, her lack of appropriate housing, her ongoing mental health issues, the number of appointments she had missed, her failure to enter an in-patient treatment program, and the criminal charges she was facing implicated § 19b(3)(g). As for § 19b(3)(j), the referee referred to respondent's lack of stability, her ongoing drug problems, and her criminal activity. However, the referee found that there were not adequate grounds for terminating respondent's parental rights under MCL 712A.19b(3)(c)(*i*) and (*ii*).

The referee further found that termination was in the children's best interests. The referee stated that the children needed permanency and safety, which respondent could not provide. The referee also found it noteworthy that the children had been traumatized while in respondent's care and were scared of her. The referee stated that the children needed finality beyond a mere guardianship. The trial court adopted the referee's findings and entered an order of termination.

Respondent now appeals in this Court.

II. TERMINATION OF PARENTAL RIGHTS

A. STANDARDS OF REVIEW

This Court reviews for clear error a trial court's factual findings following a termination hearing. MCR 3.977(K). A finding is clearly erroneous if "the review-

ing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." *In re JK*, 468 Mich 202, 209-210; 661 NW2d 216 (2003). However, "[t]his Court . . . reviews de novo whether the trial court properly selected, interpreted, and applied a statute." *IME v DBS*, 306 Mich App 426, 433; 857 NW2d 667 (2014).

B. GROUNDS FOR TERMINATION

The Department had the burden to establish by clear and convincing evidence the existence of a ground for termination. *In re JK*, 468 Mich at 210. However, only one statutory ground need be proved to support the termination of a parent's parental rights. *In re Powers Minors*, 244 Mich App 111, 118; 624 NW2d 472 (2000). In reviewing a trial court's findings, this Court must give regard to the trial court's "special opportunity . . . to judge the credibility of the witnesses who appeared before it." *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989).

A trial court may terminate a parent's parental rights under MCL 712A.19b(3)(b)(*ii*) if there is clear and convincing evidence that "[t]he child or a sibling of the child has suffered physical injury or physical or sexual abuse" and the parent "had the opportunity to prevent the physical injury or physical or sexual abuse [and] failed to do so and the court finds that there is a reasonable likelihood that the child will suffer injury or abuse in the foreseeable future if placed in the parent's home."

There was testimony and evidence that established that respondent's boyfriend had sexually abused the children. There was also evidence that respondent did not believe her children's revelations about the abuse, including evidence that she called MG a liar. And

Heath testified that HM reported that respondent "did nothing to stop" the abuse after the child told respondent about it. This was clear and convincing evidence that respondent had the opportunity to prevent the abuse, but failed to do so.

Respondent contends that the record does not support termination on this ground because the children's abuser is currently in jail and is going to be deported. Even assuming this to be true, the trial court was still justified in finding that termination was warranted on this ground. The Legislature did not require that there be clear and convincing evidence that the children were at risk of harm from the same abuser. Rather, MCL 712A.19b(3)(b)(*ii*) addresses the harm occasioned by a parent who is unwilling or unable to protect his or her children from abuse. The evidence established that respondent placed her desire to be with her boyfriend—despite his abuse—over the needs of her children, and there was evidence that she would likely continue to place her personal desires over her children's welfare.

The trial court did not clearly err when it found that the Department had established by clear and convincing evidence that termination was warranted under MCL 712A.19b(3)(b)(*ii*). See *In re JK*, 468 Mich at 209-210.

Termination is appropriate under MCL 712A.19b(3)(g), if "[t]he parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age."

There was evidence that respondent failed to comply with the terms of her parent-agency agreement. See *In re JK*, 468 Mich at 214 (stating that a parent's failure

to comply with the parent-agency agreement is evidence of the parent's failure to provide proper care and custody). Respondent had tested positive for cocaine, had called MG a liar with respect to the allegations of sexual abuse, and had been charged with retail fraud. She was found passed out after consuming alcohol and pills in the home of the 83-year-old man with whom she was living. This was plainly not a stable housing situation. Additionally, there was evidence that respondent was not consistent in attending counseling and treatment sessions, was unemployed and only received a small amount of monthly income from her social security disability benefits, and failed to adequately address her mental health issues. Therefore, even though the time between the imposition of the parent-agency agreement and termination was only 13 weeks, respondent's actions demonstrated that she was unable to alter her behavior and provide a stable home.

The trial court did not clearly err when it found that the Department had shown by clear and convincing evidence that MCL 712A.19b(3)(g) justified termination. See *In re JK*, 468 Mich at 209-210.

Finally, the trial court may terminate a parent's parental rights under MCL 712A.19b(3)(j) when "[t]here is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent."

There was ample evidence to suggest that the children would be subject to harm if returned to respondent's care. There was evidence that respondent had difficulty controlling her emotional stability and aggression, and evidence from two officers suggested that respondent had violently assaulted an elderly woman.

Heath testified that respondent slapped HM when the child told respondent of the sexual abuse. And the children's aunt and uncle do not feel that respondent is safe. There was also testimony that MG specifically thinks that respondent will kill him if he is returned to her.

The trial court did not clearly err by concluding that there was a reasonable likelihood that the children would be harmed if returned to respondent. See *In re JK*, 468 Mich at 209-210.

C. BEST INTERESTS

Even if the trial court finds that the Department has established a ground for termination by clear and convincing evidence, it cannot terminate the parent's parental rights unless it also finds by a preponderance of the evidence that termination is in the best interests of the children. MCL 712A.19b(5); *In re Moss*, 301 Mich App 76, 90; 836 NW2d 182 (2013) (holding that the petitioner must prove by a preponderance of the evidence, rather than by clear and convincing evidence, that termination is in the child's best interests). "[T]he child's bond to the parent, the parent's parenting ability, the child's need for permanency, stability, and finality, and the advantages of a foster home over the parent's home" are all factors for the court to consider when deciding whether termination is in the best interests of the child. *In re White*, 303 Mich App 701, 713; 846 NW2d 61 (2014). A child's placement with relatives is a factor that the trial court is required to consider. *In re Mason*, 486 Mich 142, 164; 782 NW2d 747 (2010). See MCL 712A.19a(6)(a). Generally, "a child's placement with relatives weighs against termination . . . ." *In re Olive/Metts Minors*, 297 Mich App 35, 43; 823 NW2d 144 (2012) (quotation marks and citation omitted).

In the present case, the children were placed with relatives—their aunt and uncle. However, a guardianship had been considered and rejected because the children's aunt and uncle did not feel safe around respondent and did not want to have contact with her. Given the facts, fear of the respondent is understandable. There was evidence that respondent had violently attacked an elderly woman, had not successfully addressed her substance abuse and mental health issues, and was not motivated to make the necessary changes to address those issues. Respondent also continued to have contact with the children's abuser, even going so far as to indicate her desire to start a family with him.

The children's aunt and uncle were willing to adopt them, and both children were excelling in their new environment. The trial court's finding that termination was in the best interests of the children was not clearly erroneous. See *In re JK*, 468 Mich at 209-210.

There were no errors warranting relief.

Affirmed.

M. J. KELLY, P.J., and WILDER and K. F. KELLY, JJ., concurred.

GREEN v ZIEGELMAN

Docket No. 318989. Submitted April 7, 2015, at Detroit. Decided May 7, 2015, at 9:00 a.m. Leave to appeal sought.

Plaintiffs Sanford Green, Jack R. Henderson and others sued Norman H. Ziegelman and Norman H. Ziegelman Architects, Inc., asking the Oakland Circuit Court to disregard the separate existence of defendants Ziegelman and Ziegelman Architects and to hold Ziegelman personally liable for a 2006 judgment in plaintiffs' favor. Defendants filed a motion for summary disposition asserting that plaintiffs' suit was barred by the doctrine of res judicata. The court, Denise Langford Morris, J., concluded that res judicata did not bar plaintiffs' suit because the issue of Ziegelman Architects' separate existence was not included in the agreement establishing the arbitration proceeding that resulted in the 2006 judgment. After a bench trial, the court ordered that the corporate veil between Ziegelman and Ziegelman Architects be pierced because evidence showed that Ziegelman used Ziegelman Architects as a mere instrumentality, and that in order to avoid paying the 2006 judgment, Ziegelman ceased operating Ziegelman Architects, formed a new entity, and fraudulently transferred assets to the newly formed corporation. The court held that Ziegelman's misuse of the corporate form resulted in a wrong to plaintiffs and caused them an unjust loss. Therefore, the court ordered that defendants be jointly and severally liable for the 2006 judgment. Defendants appealed.

The Court of Appeals *held*:

1. The trial court properly denied defendants' motion for summary disposition, but it did so for the wrong reason. The court concluded that res judicata did not bar plaintiffs' suit because the issue of disregarding the separate existence of Ziegelman and Ziegelman Architects had not been included in the arbitration agreement from which the 2006 judgment arose. However, res judicata did not bar plaintiffs' suit because plaintiffs' claim could not have been litigated in 2006. Res judicata bars a claim that a party should have raised at a previous proceeding if the party could have done so with the exercise of reasonable diligence. In this case and at that time, plaintiffs had no reason to believe Ziegelman Architects was a mere instrumentality or alter ego of

Ziegelman, or that Ziegelman would dissolve the company in order to avoid personal liability for the 2006 judgment. Ziegelman misrepresented Ziegelman Architects as a functioning and successful business engaged in multiple projects even though he knew the company had no independent source of income and had not undertaken any projects since 1989, with the exception of one project for a family member. Plaintiffs had no reason to question Ziegelman Architects' financial condition or its ability to meet its obligations under the parties' architectural agreement.

2. The trial court properly disregarded the separate existence of Ziegelman Architects because failing to do so would consummate the wrong initiated by Ziegelman's misuse of Ziegelman Architects. The evidence supported the court's conclusion that Ziegelman Architects was Ziegelman's alter ego, that Ziegelman exercised his control over Ziegelman Architects in a manner that defrauded and wronged plaintiffs, and that the manner in which Ziegelman used the corporate form ultimately caused plaintiffs an unjust loss. Evidence showed that Ziegelman failed to observe corporate formalities and that he operated Ziegelman Architects as a sham entity with the sole purpose of meeting his personal needs.

Affirmed.

Stephen M. Ryan, PLLC (by *Stephen M. Ryan*), for plaintiffs.

Mark Granzotto, PC (by *Mark Granzotto*), for defendants.

Before: M. J. KELLY, P.J., and WILDER and K. F. KELLY, JJ.

M. J. KELLY, P.J. In this dispute over the separate existence of a corporate entity, defendants, Norman H. Ziegelman and Norman H. Ziegelman Architects, Inc., appeal by right the trial court's judgment ordering them to pay more than $156,000 to plaintiffs, Sanford Green, Jack R. Hendrickson, Thomas Esper, and Libwag, LLC. On appeal, Ziegelman and Ziegelman Architects contend that the trial court erred when it denied their motion for summary disposition premised on the

doctrine of res judicata and when it disregarded Ziegelman Architects' separate existence from its owner, Ziegelman, and held Ziegelman personally liable for an earlier judgment against Ziegelman Architects. Because we conclude there were no errors warranting relief, we affirm.

I. BASIC FACTS

This is the second time these parties have appeared before this Court on a matter arising from the underlying events. This Court previously considered an appeal by Ziegelman and Ziegelman Architects from a judgment entered after arbitration in 2006. In the parties' first appearance in this Court, this Court concluded, in relevant part, that the trial court erred when it used a postjudgment proceeding to disregard Ziegelman Architects' separate existence. See *Green v Ziegelman*, 282 Mich App 292, 299, 303-304; 767 NW2d 660 (2009). This Court declined to consider whether Green, Hendrickson, and Esper could file an independent action asking the trial court to disregard the separate existence of Ziegelman Architects or whether such a claim would be barred by the compulsory joinder rule or res judicata. *Id*. at 305 n 7.

In 2010, Green, Hendrickson, Esper, and Libwag sued Ziegelman and Ziegelman Architects; they asked the trial court to disregard the separate existence of Ziegelman Architects and hold Ziegelman personally liable for the 2006 judgment. Ziegelman and Ziegelman Architects moved for summary disposition on the grounds that the claims by Green, Hendrickson, Esper, and Libwag were barred by res judicata and should have been joined in the prior suit as required by MCR 2.203(A), but the trial court denied the motion. The parties later agreed to dismiss the 2010 case without prejudice.

In February 2012, Green, Hendrickson, Esper, and Libwag reinstated their suit against Ziegelman and Ziegelman Architects. They alleged that Ziegelman operated his corporation as his alter ego. Because Ziegelman misused the corporate form, they asked the court to disregard Ziegelman Architects' separate existence and hold Ziegelman personally liable for the 2006 judgment. They also alleged that transfers of Ziegelman Architects' property violated the Uniform Fraudulent Transfer Act, MCL 566.31 *et seq*., and the Business Corporation Act, MCL 450.1101 *et seq*.

The trial court later entered a stipulated order involving the 2010 case. In part, the parties stipulated that all actions taken in the 2010 case would be treated as though they occurred in the 2012 case, including all discovery, witness lists, case evaluations, and motions and their corresponding orders. The parties also waived their right to have a jury hear the claims.

The trial court held a bench trial in July 2013. Green testified that Hendrickson originally formed Libwag along with John Domiko. Green later purchased Domiko's interest and by early 2003, Esper had also acquired a membership. Green said that he, Hendrickson, and Esper intended to use Libwag to develop 13 acres of land on the corner of Liberty and Wagner in Scio Township, Michigan, for technology or light industrial office space.

In 2003, Green and his partners were looking for a prospective member who might serve as an architect and construction manager. They met with Ziegelman to discuss bringing him in as a member, using Ziegelman Architects as the architectural firm, and using Ziegelman's construction firm, Continental Construction Company, to build the project. Green said that Ziegelman told him that Ziegelman Architects was a

"successful architectural firm that had undertaken numerous large-scale office and apartment projects" and was "an ongoing, successful enterprise." Green relied on Ziegelman's representations about Ziegelman Architects, and ultimately, Libwag contracted with Ziegelman Architects to design and supervise the project. The architectural agreement between Libwag and Ziegelman Architects included a fee of approximately $1.4 or $1.45 million, assuming the project would cost around $19.5 million.

After Libwag entered into the agreement with Ziegelman Architects and Ziegelman acquired his membership interest in Libwag, Ziegelman attempted to meet with the other members of Libwag individually. When Ziegelman met with Green, Ziegelman stated his belief that the project was not going in the right direction and "disparaged" Hendrickson and Esper. Ziegelman said Green should join his interest with Ziegelman's interest to "carry the day and proceed in the direction that [Ziegelman wanted]." Green said that none of Libwag's members joined with Ziegelman.

After his unsuccessful attempt to seize control of the project, Ziegelman stopped meeting the required capital calls for Libwag, and he caused Ziegelman Architects to stop performing under its agreement with Libwag. The situation eventually resulted in multiple lawsuits, but the members agreed to submit all of their claims, including the dispute with Ziegelman Architects, to arbitration. The arbitrators ultimately rejected Ziegelman's claims, reduced his membership interest in Libwag to 7%, and directed Ziegelman Architects to pay Libwag and the three other members $156,313. A judgment to that effect entered in May 2006.

Green, Hendrickson, and Esper compelled Ziegelman to appear for a creditor's examination in October 2006. Green attended the examination and learned that Ziegelman Architects had no assets and only $400 in accounts receivable. Ziegelman even stated that, with the exception of a small project for a relative, he could not remember how many years it had been since Ziegelman Architects had done any architectural work. Green said he would not have agreed to let Libwag enter into the agreement with Ziegelman Architects for architectural services had he known about Ziegelman Architects' actual status and history.

Ziegelman testified that he was Ziegelman Architects' sole shareholder, director, and officer. The last project that Ziegelman Architects performed was completed in 1989. Ziegelman Architects had been a tenant in a building owned by one of Ziegelman's other entities for at least 20 years, but had no written lease and never paid rent. The entity that owned the building lent approximately $242,000 to Ziegelman Architects over the years. There were, however, no loan agreements, repayment schedules, or notes to evidence these loans, and Ziegelman Architects never repaid the loans. Ziegelman also personally lent an additional $391,000 to Ziegelman Architects, but again there was no evidence of a promissory note or repayment of the loan. Ziegelman Architects paid Ziegelman's automobile lease, his auto insurance premiums, and his cell phone and travel expenses. Ziegelman agreed that he claimed losses to his personal income for the expenses incurred by Ziegelman Architects; during a three-year span, he deducted $151,000.

Ziegelman formed a new architectural entity 10 days after the judgment against Ziegelman Architects, and Ziegelman Architects ceased to exist as an operat-

ing business. Ziegelman admitted that shortly before the creditor's examination, he purchased all of Ziegelman Architects' assets—filing cabinets, drafting boards, tables and other office equipment—for $3,900. The equipment, he stated, was properly valued despite the fact that it was valued at $89,690 on a tax return two years earlier. Ziegelman admitted that one of the reasons he formed the new entity was to "get out from under this judgment." The new entity leased the same space that Ziegelman Architects leased, but again without paying rent. Because the new entity also had no business, it too survived on loans that Ziegelman made to it. The new entity paid Ziegelman's car lease, insurance, travel, and cell phone expenses as well.

Green, Hendrickson, Esper, and Libwag argued before the trial court that the evidence established that Ziegelman Architects was a sham corporation that existed solely to meet Ziegelman's personal needs and shield him from liability. For that reason, they maintained, the trial court should disregard Ziegelman Architects' separate existence and hold Ziegelman personally liable for the 2006 judgment. Ziegelman and Ziegelman Architects responded that the trial court could not disregard Ziegelman Architects' separate existence because there was no evidence that Ziegelman used the corporate form to cause an unjust injury.

In August 2013, the trial court entered its opinion and judgment. The court stated that Ziegelman Architects was "grossly undercapitalized" when it entered into the contract whose breach gave rise to the 2006 judgment. It found that Ziegelman abused the corporate form by using Ziegelman Architects "as a mere instrumentality or as his alter ego." Ziegelman did not observe the "required corporate formalities," and in order to avoid paying on the judgment, Ziegelman

created a new entity and fraudulently transferred assets to it. The court further found that Ziegelman used Ziegelman Architects to "commit a fraud or illegality" that resulted in an unjust loss. The court concluded that its findings warranted disregarding the separate existence of Ziegelman Architects and that the transfer of property from Ziegelman Architects to the new entity amounted to a fraudulent transfer and a violation of the Business Corporation Act. See MCL 566.31 *et seq*. and MCL 450.1101 *et seq*. Accordingly, it held Ziegelman and Ziegelman Architects jointly and severally liable for the 2006 judgment of $156,313.

In September 2013, Ziegelman and Ziegelman Architects moved for relief from judgment, which the trial court denied.

Ziegelman and Ziegelman Architects now appeal in this Court.

II. SUMMARY DISPOSITION

A. STANDARDS OF REVIEW

Ziegelman and Ziegelman Architects first argue that Green, Hendrickson, Esper, and Libwag could have—and should have—brought the claims premised on Ziegelman's misuse of the corporate form in the original lawsuit that led to the arbitration award that was reduced to a judgment in 2006. For that reason, Ziegelman and Ziegelman Architects maintain that the trial court erred when it denied their motion for summary disposition, which asserted that the doctrine of res judicata barred the claims against them. This Court reviews de novo a trial court's decision on a motion for summary disposition. *Yono v Dep't of Transportation (On Remand)*, 306 Mich App 671, 676; 858 NW2d 128 (2014). This Court also reviews de novo the

trial court's application of legal doctrines, such as the doctrine of res judicata. *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 417; 733 NW2d 755 (2007).

B. RES JUDICATA

The judiciary created the doctrine of res judicata to "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 380; 596 NW2d 153 (1999) (quotation marks and citations omitted). To that end, a second action will be barred under res judicata "when (1) the first action was decided on the merits, (2) the matter contested in the second action was or could have been resolved in the first, and (3) both actions involve the same parties or their privies." *Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999).

In the present case, there is no dispute that the same parties or their privies were involved in the 2006 litigation. It is also undisputed that the claims actually litigated in 2006 did not involve whether Ziegelman misused the corporate form. Rather, as discussed in the arbitration award, the parties disputed the breach of various agreements—Libwag's operating agreement, the architectural agreement between Libwag and Ziegelman Architects, and the construction agreement between Libwag and Continental Construction—and Ziegelman Architects' claim of copyright infringement. See *Green*, 282 Mich App at 295-296. Hence, the issue on appeal is whether Green, Hendrickson, Esper, and Libwag could have submitted for resolution in the 2006 litigation the claims at issue in the present litigation.

Michigan courts have broadly applied res judicata to bar "not only claims already litigated, but every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not." *Dart*, 460 Mich at 586. This Court will not, however, use res judicata to "lighten the loads of the state court by precluding suits whenever possible"—we employ it "to promote fairness." *Pierson Sand & Gravel*, 460 Mich at 383. Accordingly, this Court applies the same-transaction test "pragmatically, by considering whether the facts are related in time, space, origin or motivation, and whether they form a convenient trial unit." *Adair v Michigan*, 470 Mich 105, 125; 680 NW2d 386 (2004) (quotation marks, citation, emphasis, and alterations omitted). If the new claim or claims arise from the same group of operative facts as the previously litigated claim or claims, even if there are variations in the evidence needed to support the theories of recovery, we will treat the claims as the same and res judicata will apply. *Id*. at 124-125.

In order to prevail on their motion for summary disposition, Ziegelman and Ziegelman Architects had the initial burden of demonstrating that Green, Hendrickson, Esper, and Libwag could have brought their claim concerning Ziegelman's misuse of Ziegelman Architects in the 2006 litigation. See *Kincaid v Cardwell*, 300 Mich App 513, 522; 834 NW2d 122 (2013); *Richards v Tibaldi*, 272 Mich App 522, 531; 726 NW2d 770 (2006). Because it was not evident on the face of the complaint that the doctrine of res judicata applied, Ziegelman and Ziegelman Architects had to present evidence to support their motion. See *Yono*, 306 Mich App at 679-680.

In their brief in support of the motion, Ziegelman and Ziegelman Architects cited one exhibit—the judg-

ment from the 2006 litigation—and concluded: "The piercing theory which the plaintiffs would now present in their newly filed case could certainly have been litigated in that case." They did not discuss evidence concerning whether Green, Hendrickson, Esper, or Libwag knew or should have known that Ziegelman was using Ziegelman Architects as a mere instrumentality or whether they had any other basis for concluding that Ziegelman could be held personally liable for the claim against Ziegelman Architects. Further, Ziegelman and Ziegelman Architects did not raise any other evidence at the hearing on the motion. Because Ziegelman and Ziegelman Architects did not present evidence that if left unrebutted would warrant application of the doctrine of res judicata, the trial court properly denied the motion. See *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 370, 380-381; 775 NW2d 618 (2009); *Yono*, 306 Mich App at 696-697. Moreover, even considering the additional arguments and evidence discussed in their brief on appeal, Ziegelman and Ziegelman Architects have not shown that res judicata bars the claim at issue.

In denying the motion for summary disposition predicated on res judicata, the trial court stated that res judicata did not apply because piercing the corporate veil "was not and could not have been arbitrated in the prior lawsuit because it was not included in the Arbitration Agreement." As Ziegelman and Ziegelman Architects aptly argue on appeal, the fact that the parties chose not to include that issue in their agreement to arbitrate does not settle whether that issue *could* have been raised in the 2006 litigation. Rather, whether a claim could have been litigated is subject to a reasonable-person standard: whether a party "exercising reasonable diligence" could have raised the

claim, even if the actual party or parties neglected to do so. *Dart*, 460 Mich at 586. Consequently, it is irrelevant that the parties did not provide for the arbitration of Ziegelman's personal liability for Ziegelman Architects' breach of the architectural agreement; the sole question is whether Green, Hendrickson, Esper, and Libwag could have raised the issue in 2006 with the exercise of reasonable diligence.

In the 2006 litigation, the operative facts involved the parties' performance of various contractual obligations. The evidence from that litigation shows that Green, Hendrickson, and Esper knew that Ziegelman was the sole shareholder of Ziegelman Architects and understood that he would perform the architectural services involved in the agreement between Libwag and Ziegelman Architects. They knew that Ziegelman Architects would primarily act through its agent, Ziegelman, and that any acts or omissions in the performance of Ziegelman Architects' obligations would likely be acts or omissions committed through Ziegelman. There is also evidence that they so identified Ziegelman with his entities that they occasionally failed to distinguish between acts that Ziegelman took on his own behalf and acts that he took on behalf of Ziegelman Architects. But, contrary to Ziegelman and Ziegelman Architects' contention on appeal, the evidence that Green, Hendrickson, and Esper occasionally equated Ziegelman with Ziegelman Architects and apparently understood that Ziegelman's acts or omissions were the acts and omissions of Ziegelman Architects does not, by itself, warrant disregarding the separate existence of Ziegelman Architects.

Under Michigan law, Green, Hendrickson, Esper, and Libwag had an obligation to respect Ziegelman Architects' separate existence. *Wells v Firestone Tire*

& Rubber Co, 421 Mich 641, 650; 364 NW2d 670 (1984). The fact that Ziegelman's acts or omission might have amounted to a breach of the architectural agreement between Libwag and Ziegelman Architects did not necessarily render Ziegelman personally liable for that breach. See *Bailey v Schaaf (On Remand)*, 304 Mich App 324, 347-350; 852 NW2d 180 (2014) (explaining that a third party cannot hold an agent personally liable for the acts or omissions that the agent took on behalf of his or her principal unless the third party demonstrates that the agent's acts or omissions also amounted to breach of a duty that the agent separately owed to the third party), vacated in part on other grounds 497 Mich 927 (2014). Accordingly, in the absence of evidence that Ziegelman breached a separate and distinct duty owed to Green, Hendrickson, Esper, or Libwag while acting on Ziegelman Architects' behalf or so misused Ziegelman Architects that a court would be justified in disregarding its separate existence, any claim that Ziegelman should be held personally liable for Ziegelman Architects' failure to perform under the architectural agreement would have been frivolous. See MCR 2.114(D) and (F); MCR 2.625(A)(2); MCL 600.2591.

The 2006 litigation primarily concerned whether the individuals and entities involved in this matter breached their contractual obligations. Because the operative facts involved the parties' performance under the agreements, Green, Hendrickson, Esper, and Libwag had no reason to question Ziegelman's historical operation of Ziegelman Architects. The undisputed evidence showed that, from all outward appearances, Ziegelman Architects had an ongoing business with significant assets and an independent source of revenue. It was not until after the 2006 litigation ended in a judgment against Ziegelman Architects that Green,

Hendrickson, Esper, and Libwag had any basis for concluding that Ziegelman misused Ziegelman Architects in such a way as to warrant disregarding its separate existence.

In addition, Ziegelman did not abandon Ziegelman Architects until after the trial court entered its judgment in the 2006 litigation. The evidence showed that Ziegelman created a new entity, which covered the expenses previously paid by Ziegelman Architects. He even moved its one employee to the payroll of another entity. As long as Ziegelman continued to use Ziegelman Architects to pay his auto lease and insurance, to pay his assistant, and to cover various expenses, he would have had to infuse capital into Ziegelman Architects because Ziegelman Architects had no revenue and insufficient assets to independently cover all of Ziegelman's expenses. If, after the 2006 judgment, Ziegelman were to pay cash into Ziegelman Architects to cover Ziegelman Architects' expenses, Green, Hendrickson, Esper, and Libwag could have executed against the payments to satisfy the judgment. But as Ziegelman admitted, he created a new entity to avoid that possibility. By establishing a new entity to cover the expenses previously paid by Ziegelman Architects, Ziegelman was able to abandon Ziegelman Architects and evade its creditors without losing any of the benefits provided by Ziegelman Architects.

Considering the operative facts from the transactions involved in the 2006 litigation, Green, Hendrickson, Esper, and Libwag had no reason to believe that the court could pierce the corporate veil between Ziegelman and Ziegelman Architects. Therefore, the present request to pierce the corporate veil was not part of the 2006 transaction and res judicata does not apply. Although the trial court erred to the extent that it based

its decision on the parties' failure to include the claim in their arbitration agreement, the trial court nevertheless came to the correct result. See *Fisher v Blankenship*, 286 Mich App 54, 70; 777 NW2d 469 (2009).

III. SUFFICIENCY OF THE EVIDENCE

A. STANDARDS OF REVIEW

Ziegelman and Ziegelman Architects next argue that the trial court erred when it determined that Green, Hendrickson, Esper, and Libwag established grounds for disregarding Ziegelman Architects' separate existence. Ziegelman and Ziegelman Architects maintain that the trial court erred when it made Ziegelman personally liable for the 2006 judgment, because Green, Hendrickson, Esper, and Libwag failed to establish separate grounds for holding Ziegelman personally liable for the judgment. This Court reviews de novo the trial court's application of equity to disregard the separate existence of an artificial entity. *Blackhawk Dev Corp v Village of Dexter*, 473 Mich 33, 40; 700 NW2d 364 (2005). This Court, however, reviews for clear error the factual findings underlying a trial court's application of equity. See *Johnson v Johnson*, 363 Mich 354, 357; 109 NW2d 813 (1961). This Court reviews de novo whether the trial court properly selected, interpreted, and applied the relevant statutory provisions. *Huntington Nat'l Bank v Daniel J Aronoff Living Trust*, 305 Mich App 496, 507; 853 NW2d 481 (2014).

B. PIERCING THE CORPORATE VEIL

1. THE LAW

A corporation—or other artificial entity—is a legal fiction. *Bruun v Cook*, 280 Mich 484, 495; 273 NW 774

(1937). It is " 'an artificial being, invisible, intangible, and existing only in contemplation of law.' " *Id*., quoting *Dartmouth College Trustees v Woodward*, 17 US (4 Wheat) 518, 636; 4 L Ed 629 (1819). "[A]bsent some abuse of corporate form," courts honor this fiction by indulging a presumption—often referred to as the corporate veil—that the entity is separate and distinct from its owner or owners. See *Seasword v Hilti, Inc (After Remand)*, 449 Mich 542, 547-548; 537 NW2d 221 (1995). Courts will honor this presumption even when a single individual owns and operates the entity. *Bourne v Muskegon Circuit Judge*, 327 Mich 175, 191; 41 NW2d 515 (1950). "However, the fiction of a distinct corporate entity separate from the stockholders is a convenience introduced in the law to subserve the ends of justice. When this fiction is invoked to subvert justice, it is ignored by the courts." *Wells*, 421 Mich at 650, citing *Paul v Univ Motor Sales Co*, 283 Mich 587, 602; 278 NW 714 (1938) ("[W]hen the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons."). As such, a court sitting in equity "may look through the veil of corporate structure"—that is, pierce the corporate veil—"to avoid fraud or injustice." *Kline v Kline*, 104 Mich App 700, 702; 305 NW2d 297 (1981).

Relying on *Rymal v Baergen*, 262 Mich App 274, 293-294; 686 NW2d 241 (2004), Ziegelman and Ziegelman Architects argue that Green, Hendrickson, Esper, and Libwag had to prove that Ziegelman abused Ziegelman Architects' separate existence to commit a wrong, which caused them an unjust injury or loss. Because Green, Hendrickson, Esper, and Libwag failed to present such evidence, Ziegelman and Ziegelman Architects contend that the trial court erred when it determined that Green, Hendrickson, Esper, and Lib-

wag established grounds for disregarding Ziegelman Architects' separate existence. Ziegelman and Ziegelman Architects' reading of the elements suggests that a court would not be justified in disregarding the separate existence of an entity unless there is evidence that the owner caused the entity itself to commit a particular wrong; however, that interpretation does not accurately reflect the law.

In an early case, our Supreme Court stated that it would disregard an artificial entity's separate existence when it "is so organized and controlled and its affairs so conducted as to make it a mere instrumentality or agent or adjunct of another" person or entity. See *People ex rel Attorney General v Mich Bell Tel Co*, 246 Mich 198, 204; 224 NW 438 (1929). But even when an entity is operated as a mere instrumentality by its owner, courts will only intervene to prevent an injustice: "When a corporation exists as a device to evade legal obligations, the courts, without regard to actual fraud, will disregard the entity theory." *Id*. Because the evidence in *Mich Bell* showed that American Telephone and Telegraph operated Michigan Bell as a mere instrumentality and did so "to avoid full investigation and control by the public utilities commission of the State to the injury of the public," the Court disregarded the separate existence of Michigan Bell and voided the contract between Michigan Bell and American Telephone and Telegraph. *Id*. at 204-205. It was unnecessary to show that the owners used the entity *directly* to commit a fraud or other wrong; it was sufficient to show that the continued recognition of the entity's separate existence under the circumstances would amount to a wrong or be contrary to public policy. See *id*.

Similarly, in *Old Ben Coal Co v Universal Coal Co*, 248 Mich 486, 489, 492; 227 NW 794 (1929), our

Supreme Court disregarded the separate existence of Universal Coal, which was operated as a mere instrumentality of its parent, Price Hill Colliery Company. The Court did not require proof that Price Hill used Universal Coal to commit a particular fraud or wrong, but rather stated that a court could "ignore a mere colorable corporate entity to the end that the rights of third parties shall be protected[.]" *Id*. at 492 (quotation marks and citation omitted). Because the evidence showed that Price Hill operated Universal Coal as a mere instrumentality to sell its coal and evade liability to its buyers should it choose to do so, it was appropriate to disregard its separate existence and hold it liable for Universal Coal's obligations. *Id*. at 489, 492.

The Supreme Court returned to the requirements for piercing the corporate veil in *Gledhill v Fisher & Co*, 272 Mich 353; 262 NW 371 (1935). In that case, George Gledhill and his wife sought to have the court disregard the separate existence of an entity that had purchased land from them on land contract and hold that entity's parent corporation liable on the land contract. *Id*. at 356. Justice BUSHNELL, writing for the majority, stated that courts would not disregard the separate existence of an entity unless three criteria were established:

> Before the corporate entity may be properly disregarded and the parent corporation held liable for the acts of its subsidiary, I believe it must be shown not only that undue domination and control was exercised by the parent corporation over the subsidiary, but also that this control was exercised in such a manner as to defraud and wrong the complainant, and that unjust loss or injury will be suffered by the complainant as the result of such domination unless the parent corporation be held liable. The rule is correctly stated . . . as follows:

> But to justify treating the sole stockholder or holding company as responsible it is not enough that the subsidiary is so organized and controlled as to make it "merely an instrumentality, conduit or adjunct" of its stockholders. It must further appear that to recognize their separate entities would aid in the consummation of a wrong.

[*Id*. at 357-358 (quotation marks and citation omitted).]

Under this formulation of the test, the complainant must establish that (1) the entity was the mere instrumentality of the owner, (2) the owner exercised his or her control in such a manner as to defraud or wrong the complainant in some way, and (3) the complainant would suffer an unjust loss or injury unless the court disregards the existence of the entity as separate from its owner. *Id*. Justice BUSHNELL further stated that this test was consistent with the decisions in *Mich Bell* and *Old Ben Coal*. *Id*. at 356-357. In *Mich Bell*, he explained, the Court disregarded the separate existence of Bell Telephone because the parent corporation dominated Bell Telephone and used it to justify rates that were not based on the real costs of the public utility—that is, Bell Telephone was an instrumentality and the continued recognition of its separate existence would amount to a public wrong by allowing the utility to evade regulation of its prices. *Id*. at 357. Similarly, in *Old Ben Coal*, the parent corporation used the subsidiary for the fraudulent purpose of defeating the satisfaction of a judgment against the subsidiary. *Id*.

Turning to the facts of the *Gledhill* case, Justice BUSHNELL determined that the evidence did not warrant disregarding the separate existence of the entity that entered into the land contract with Gledhill and his wife. *Id*. at 358-359. He explained that Gledhill and his wife were fully aware that they were dealing with an entity. Moreover, that entity's capital was initially

adequate and it paid a significant sum on the land contract. *Id*. at 359. Further, Gledhill and his wife would have been adequately secured against loss were it not for the depreciation in land values caused by the Depression, which could not have been foreseen. *Id*. at 359, 361. Because there was no evidence that the parent corporation operated the entity as a tool or agent or that it was not organized in good faith to purchase the property, the lower court erred when it disregarded its separate existence. *Id*. at 364.

After the decision in *Gledhill*, our Supreme Court issued opinions in which it reiterated that courts might disregard the separate existence of an entity when the owner's improper domination of the entity resulted in an inequity to an innocent third party that could only be rectified by disregarding the separate existence of the entity. See *Acton Plumbing & Heating Co v Jared Builders, Inc*, 368 Mich 626; 118 NW2d 956 (1962); *Cinderella Theatre Co, Inc v United Detroit Theatres Corp*, 367 Mich 424; 116 NW2d 825 (1962); *Herman v Mobile Homes Corp*, 317 Mich 233; 26 NW2d 757 (1947); *Paul*, 283 Mich at 602-603. Adopting Justice BUSHNELL's formulation from *Gledhill*, this Court later stated that three elements must be met before a court will be justified in disregarding the entity's separate existence. The party requesting relief from recognition of the entity's separate existence must prove "(1) control by the parent to such a degree that the subsidiary has become its mere instrumentality; (2) fraud or wrong by the parent through its subsidiary; and (3) unjust loss or injury to the claimant." *Maki v Copper Range Co*, 121 Mich App 518, 524-525; 328 NW2d 430 (1982), citing *Gledhill*, 272 Mich at 357-358.

Relying on the test first stated in *Maki*, this Court has since repeatedly stated that a complainant must

show that the entity was the mere instrumentality of the owner and that the owner used the entity to commit a fraud or wrong resulting in an unjust loss or injury. See, e.g., *Rymal*, 262 Mich App at 293-294, citing *Foodland Distrib v Al-Naimi*, 220 Mich App 453, 457; 559 NW2d 379 (1996), quoting *SCD Chem Distrib, Inc v Medley*, 203 Mich App 374, 381; 512 NW2d 86 (1994), which itself had quoted *Nogueras v Maisel & Assoc of Mich*, 142 Mich App 71, 86; 369 NW2d 492 (1985), which cited *Maki*, 121 Mich App at 524-525. Our Supreme Court, however, has never held that a complainant must prove that the owner of an entity used the entity to commit a specific fraud or wrong. While causing an entity directly to commit a fraud or wrong would likely meet the test as originally stated in *Gledhill*, courts can disregard the separate existence of an entity if the owner's exercise of dominion over the entity was "*in such a manner* as to defraud and wrong the complainant." *Gledhill*, 272 Mich at 358 (emphasis added). Consistent with its discussion of the decisions in *Mich Bell* and *Old Ben Coal*, the Supreme Court required proof that the owner exercised its control over the entity in a *manner* amounting to a fraud or wrong under such circumstances that a court "would aid in the consummation of a wrong" if it were to honor the separate existence of the entity. *Id*. (quotation marks and citation omitted).

In *Maki*, this Court paraphrased the fraud or wrong element as requiring proof that there was a fraud or wrong by the parent *through* the subsidiary, which was consistent with the formulation stated in *Gledhill*. *Maki*, 121 Mich App at 525. But in subsequent recitations, this Court restated the element from *Maki* as one involving proof that the owner " 'used [the entity] to commit a fraud or wrong.' " *Foodland*, 220 Mich App at 457, quoting *SCD Chem*, 203 Mich App at 381.

Although the distinctions are subtle, the difference between the formulation in *Rymal* and the one in *Gledhill* could be that *Rymal* requires a more onerous proof than required under our Supreme Court's precedents; namely, *Rymal* requires proof that the owner deliberately caused the entity to commit a particular fraud or wrong. However, we do not agree that the Court in *Rymal* intended to alter the test first stated in *Gledhill*, which remains binding on this Court.[1] See *Tyra v Organ Procurement Agency of Mich*, 302 Mich App 208, 223; 850 NW2d 667 (2013). The test stated in *Gledhill* is also consistent with our Supreme Court's admonition that there is no mechanical test for determining when the existence of a separate entity must be disregarded and the Court's statement that whether to disregard the separate existence of an entity depends on the totality of circumstances. See *Klager v Robert Meyer Co*, 415 Mich 402, 411-412; 329 NW2d 721 (1982) (warning that the test is not to be applied in a "mechanistic fashion" and stating that "[t]he entire spectrum of relevant fact forms the background for such an inquiry, and the facts are to be assessed in light of the corporation's economic justification to determine if the corporate form has been abused"); see also *Brown Bros Equip Co v State Hwy Comm*, 51 Mich App 448, 452; 215 NW2d 591 (1974) ("In ascertaining whether the separate corporate entity should be disregarded each case is *sui generis* and must be decided in accordance with its own underlying facts.").

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[1] Some justices have expressed interest in granting leave to consider the proper scope of the test for piercing the corporate veil. See *L & R Homes, Inc v Jack Christenson Rochester, Inc*, 475 Mich 853, 853-854 (2006) (CORRIGAN, J., dissenting); *Daymon v Fuhrman*, 474 Mich 920, 920 (2005) (TAYLOR, C.J., dissenting); *Daymon*, 474 Mich at 920-921 (CORRIGAN, J., dissenting). But until our Supreme Court does grant leave to consider the issue, we must apply *Gledhill* and its progeny.

Using the test stated in *Gledhill* as the foundation, when considering whether to disregard the separate existence of an artificial entity, a court must first examine the totality of the evidence surrounding the owner's use of an artificial entity and, in particular, the manner in which the entity was employed in the matter at issue. *Klager*, 415 Mich at 411-412; *Rymal*, 262 Mich App at 294; *Brown Bros*, 51 Mich App at 452. From this evidence, the trial court must determine whether the evidence establishes that the owner operated the entity as his or her alter ego—that is, as a sham or mere agent or instrumentality of his or her will. See *Seasword*, 449 Mich at 548; *Gottlieb v Arrow Door Co*, 364 Mich 450, 452; 110 NW2d 767 (1961) (noting that there were no "proofs of fraud, sham, or other improper use of the corporate form" to justify disregarding the separate existence of the entity at issue); *Mich Bell*, 246 Mich at 204.

The court then must determine whether the manner of use effected a fraud or wrong on the complainant. *Gledhill*, 272 Mich at 358. In considering this element, it is not necessary to prove that the owner caused the entity to directly harm the complainant; it is sufficient that the owner exercised his or her control over the entity in such a manner as to wrong the complainant. *Id*.; see also *Foodland*, 220 Mich App at 459-460 (agreeing that there was evidence of fraud, but noting that courts may disregard the separate existence of an entity when the owner manipulated his or her ownership for his or her own purposes and interests to the prejudice of an innocent third party even in the absence of fraud); *Soloman v Western Hills Dev Co (After Remand)*, 110 Mich App 257, 264; 312 NW2d 428 (1981) ("Although it is clear that the corporate form may be disregarded to prevent injustice and to reach an equitable result, we believe that the injustice

sought to be prevented must in some manner relate to a misuse of the corporate form short of fraud or illegality."). But it bears repeating that establishing an entity for the purpose of avoiding personal responsibility is not by itself a wrong that would warrant disregarding the entity's separate existence. *Gledhill*, 272 Mich at 359-362.

Finally, the trial court must determine whether the wrong would cause the complainant to suffer an unjust loss. *Id*. at 359; *Foodland*, 220 Mich App at 460. If disregarding the separate existence would harm innocent third parties, it may be just to allocate the loss to the complainant, notwithstanding the wrong. See *Kline*, 104 Mich App at 704. Similarly, a loss is not unjust if the complainant had full knowledge of the circumstances surrounding the owner's use of the entity and agreed to proceed despite that knowledge. *Klager*, 415 Mich at 415 n 6 ("[A] plaintiff may not seek to disregard the corporate entity when he is fully aware of the character of the corporation with which he deals . . . ."). If, considering the totality of the equities, the trial court would be consummating a wrong by honoring an entity's separate existence, the court may disregard the entity's separate existence. *Gledhill*, 272 Mich at 358.

2. APPLYING THE LAW

The evidence adduced at trial amply supported the trial court's determination that Ziegelman used Ziegelman Architects as his alter ego or as a mere instrumentality of his will. *Seasword*, 449 Mich at 548. There was a very close correspondence of identity between Ziegelman and Ziegelman Architects; Ziegelman was the sole owner, director, and officer of Ziegelman Architects. He was also its sole architect. There was

another employee who might have served as a receptionist, but the evidence showed that Ziegelman was Ziegelman Architects' primary agent. As such, when the entity acted, it acted through Ziegelman. Ziegelman Architects was ostensibly in the business of providing architectural services to the public, but with the exception of a minor project for one of Ziegelman's relatives, Ziegelman Architects had not undertaken a single project since the completion of its last project in 1989.

Because it had no revenue from operations, Ziegelman Architects was entirely dependent on Ziegelman for cash to pay its expenses. And the evidence showed that over the years Ziegelman—in his personal capacity or through another entity—lent more than $630,000 to Ziegelman Architects to cover its expenses. Despite loaning hundreds of thousands of dollars to Ziegelman Architects, Ziegelman Architects never executed a note or repaid any of the funds. Similarly, another entity leased space to Ziegelman Architects for approximately 20 years, but Ziegelman Architects did not have a written lease and did not pay rent. The fact that Ziegelman Architects was entirely dependent on Ziegelman's support to continue its operations—such as they were—also strongly suggests, when considered in light of Ziegelman Architects' expenses, that Ziegelman Architects existed merely to serve as Ziegelman's alter ego.

There was evidence to support an inference that Ziegelman used Ziegelman Architects to cover his personal expenses, notwithstanding his testimony that the expenses were all related to his (unsuccessful) efforts to find business for the firm during the past decade. He used Ziegelman Architects to pay his automobile lease and insurance, cell phone bills, and travel

expenses, and to purchase thousands of dollars of supplies for his sculpting hobby. Ziegelman claimed that he intended to sell the sculptures on behalf of his architectural firm, but he admitted that he had not sold any sculptures. The evidence showed that Ziegelman Architects reported losses every year and Ziegelman claimed those losses on his personal tax return. He admitted that in one three-year span he claimed more than $150,000 in losses from Ziegelman Architects.

There was also evidence that Ziegelman had not properly maintained Ziegelman Architects' corporate formalities over the years. He did not keep minutes for any meetings of shareholders, directors, or officers. Although he caused another of his entities to loan money to Ziegelman Architects and personally lent money to it, Ziegelman never formalized those transactions and never caused Ziegelman Architects to repay the loans. Ziegelman also had one of his other entities lease space to Ziegelman Architects, but again he did not formalize the relationship and Ziegelman Architects never paid rent. The lack of formality in Ziegelman's dealings with Ziegelman Architects suggests that Ziegelman himself disregarded Ziegelman Architects' separate existence whenever it was convenient or suited his needs, but asserted its separate existence when it benefited him personally, such as for tax purposes.

The totality of the evidence supported the trial court's determination that Ziegelman operated Ziegelman Architects as his alter ego or as a mere instrumentality. *Gledhill*, 272 Mich at 358.

The record evidence also supports the conclusion that Ziegelman exercised his control over Ziegelman Architects in a manner that caused a fraud or wrong.

There was testimony and evidence that Green, Hendrickson, and Esper approached Ziegelman in his individual capacity to join Libwag because they needed someone with significant financial resources and a background in architecture and construction. However, before Ziegelman would agree to purchase an interest in Libwag, he insisted on having extra control over the development project and insisted that Libwag hire the architectural services of Ziegelman Architects. Green testified that during these preliminary negotiations Ziegelman led Green, Hendrickson, and Esper to believe that Ziegelman Architects was a going concern with numerous successful projects. Green stated that he got a favorable impression from the visit to Ziegelman Architects' office because the office had drawings and scale models which suggested that the firm was currently engaged in business. And when he expressed concern that the firm appeared to have only one additional employee, Ziegelman told him that he used independent contractors.

Although Ziegelman denied having made any misrepresentations about Ziegelman Architects to Green, Hendrickson, or Esper, the evidence tended to support Green's version of events, and the trial court was free to believe Green and disregard Ziegelman's explanations as incredible. MCR 2.613(C). Green and his partners were planning a development that was estimated to cost more than $19 million and would include approximately $1.4 million in architectural fees, yet Ziegelman testified that they never inquired about Ziegelman Architects' financial condition, its current projects, or its ability to meet its obligations under the architectural agreement that Ziegelman insisted Libwag execute with Ziegelman Architects. Because of his close identity with Ziegelman Architects, the trial court was free to infer that Ziegelman

did in fact misrepresent Ziegelman Architects' financial condition and that he did so in both his individual capacity and as the sole owner, director, officer, and architect for Ziegelman Architects. Green also testified that were it not for these misrepresentations, he would not have agreed to allow Libwag to engage Ziegelman Architects' architectural services. Thus, the trial court could find that Ziegelman used his control over Ziegelman Architects to mislead Libwag's members into entering into an architectural agreement with Ziegelman Architects at a time when Ziegelman Architects' ability to perform and meet its financial obligations was entirely subject to Ziegelman's whim. If Ziegelman elected not to perform under the architectural agreement, Ziegelman Architects would not perform. If Ziegelman elected not to fund Ziegelman Architects, Ziegelman Architects would cease paying its ongoing expenses, and its creditors would be left to suffer whatever loss might be occasioned by Ziegelman Architects' failure to perform. The evidence shows that this is precisely what happened in this case.

The record evidence showed that after Ziegelman began to have disputes with the other members of Libwag, he used his membership to hinder the other members' efforts to proceed with the project and caused Ziegelman Architects to cease performing under the terms of its architectural agreement with Libwag. These disputes eventually led to the arbitration in the 2006 litigation, and the arbitrators determined that Ziegelman Architects breached its architectural agreement with Libwag, which resulted in more than $156,000 in losses. After Green, Hendrickson, Esper, and Libwag reduced the arbitration award to a judgment, Ziegelman abandoned Ziegelman Architects. Because Ziegelman Architects depended on cash

infusions from Ziegelman to pay its expenses, Ziegelman could no longer operate it to pay his professional and sculpting expenses and avail himself of the tax benefits without risking the possibility that his new cash infusions would be seized to pay the judgment. As he candidly admitted at trial, he formed a new limited liability company to avoid that possibility. Ziegelman formed the new entity to pay his personal expenses, transferred its one employee to the new entity and later to another entity, and purchased all the furniture and other personal property owned by Ziegelman Architects. The new entity performed every function that Ziegelman Architects had previously performed, occupied the same space, and even used the same personal property. Ziegelman then refused to fund Ziegelman Architects as he had done in the past, which left it uncollectible.

The evidence supported a finding that Ziegelman exercised his control over Ziegelman Architects in a manner that wronged Green, Hendrickson, Esper, and Libwag. *Gledhill*, 272 Mich at 358. He misled them into believing that Ziegelman Architects was a viable business when he knew that Ziegelman Architects had no independent source of income with which to pay contingent liabilities. He then caused Ziegelman Architects to breach its agreement with Libwag after he began to quarrel with the other members of Libwag, and he did so with full knowledge that he could render Ziegelman Architects uncollectible. He also caused Ziegelman Architects to sue Libwag over an alleged copyright infringement, again with the knowledge that he could abandon Ziegelman Architects at any moment and thereby render any judgment against it worthless. The evidence supported the trial court's determination that Ziegelman mis-

used Ziegelman Architects and that his misuse constituted a fraud or wrong. *Id*.

Finally, there was evidence to support the trial court's determination that Green, Hendrickson, Esper, and Libwag suffered a loss as a result of the wrong caused by Ziegelman's exercise of control over Ziegelman Architects. The arbitrators determined that Ziegelman Architects breached the architectural agreement with Libwag and caused more than $150,000 in losses to Libwag and its members. The evidence showed that Ziegelman—acting on behalf of Ziegelman Architects—actually caused those damages and made Ziegelman Architects uncollectible. From the evidence of Ziegelman's operation of Ziegelman Architects, the trial court could reasonably conclude that Ziegelman himself regarded Ziegelman Architects as a sham entity that existed only to suit his personal needs and could be discarded with impunity. A reasonable trial court examining these equities could conclude that it would be unjust to allow the loss to stand because, by failing to disregard Ziegelman Architects' separate existence from Ziegelman, the trial court would consummate the wrong that Ziegelman perpetrated through his control of Ziegelman Architects. *Id*.

The trial court did not err when it disregarded Ziegelman Architects' separate existence and made Ziegelman personally liable for the judgment against Ziegelman Architects. Because the trial court did not err when it disregarded Ziegelman Architects' separate existence and held Ziegelman personally liable for the 2006 judgment, we need not address whether the trial court erred when it determined that Ziegelman could also be liable for violating the Uniform Fraudulent Transfer Act, MCL 566.31 *et seq*., or the Business

Corporation Act, MCL 450.1101 *et seq*.

IV. CONCLUSION

The trial court did not err when it denied the motion for summary disposition by Ziegelman and Ziegelman Architects, which they had premised on the doctrine of res judicata. The trial court also did not err when it elected to exercise its equitable power to disregard the separate existence of Ziegelman Architects from its owner, Ziegelman, and held Ziegelman personally liable for the 2006 judgment.

Affirmed. As the prevailing parties, Green, Hendrickson, Esper, and Libwag may tax their costs. MCR 7.219(A).

WILDER and K. F. KELLY, JJ., concurred with M. J. KELLY, P.J.

PEOPLE v URIBE

Docket No. 321012. Submitted February 3, 2015, at Lansing. Decided May 12, 2015, at 9:00 a.m. Leave to appeal sought.

Ernesto Uribe was charged in the Eaton Circuit Court with five counts of first-degree criminal sexual conduct for acts involving the anal penetration of a minor. Before trial, the prosecution notified defendant, in accordance with MCL 768.27a, that it intended to introduce evidence that he had also attempted to engage in sexual contact with a different minor. Defendant objected and moved to suppress the other-acts evidence. The court, Janice K. Cunningham, J., granted defendant's motion to suppress the evidence. The prosecution sought interlocutory leave to appeal, which the Court of Appeals granted.

The Court of Appeals *held*:

Under MCL 768.27a, in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant. A "listed offense" is a Tier I, II, or III offense as defined in MCL 28.722 of the Sex Offenders Registration Act. Because MCL 768.27a permits the introduction of other-acts evidence to show that a defendant has the propensity to commit sex crimes against minors, it conflicts with and supersedes MRE 404(b), which otherwise bars evidence of other acts if that evidence is used solely to show propensity. Evidence admissible under MCL 768.27a may, however, be excluded under MRE 403 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. To assess whether the probative value of the evidence is substantially outweighed by unfair prejudice, a court must consider several factors including the time required to present the evidence and the possibility of delay, whether the evidence is needlessly cumulative, how directly the evidence tends to prove the fact for which it is offered, how essential the fact sought to be proved is to the case, the potential for confusing

or misleading the jury, and whether the fact can be proved in another manner without as many harmful collateral effects. A trial court must weigh the propensity inference in favor of the probative value of the evidence rather than its prejudicial effect. In this case, the trial court erred by (1) basing its decision on its evaluation of the credibility of the other-acts witness, (2) incorrectly concluding that the attempted sexual contact described by the witness was not an attempt to commit a listed offense, and (3) ruling that the evidence was inadmissible because the acts described by the witness were not similar enough to the charged offenses. When evidence of an act is admissible under MCL 768.27a, it does not matter for purposes of admissibility under MRE 403 whether the act is similar or dissimilar to the charged offense. MRE 403 only concerns whether otherwise relevant evidence is overly sensational or needlessly cumulative. The trial court never explained how the probative value of the other-acts evidence would be outweighed by unfair prejudice. In fact, the evidence was not likely to delay defendant's trial or take a great amount of time to present, it was not needlessly cumulative, it tended to prove that defendant committed the crime charged because it showed his propensity to engage in sexual acts with minors, it was important to the prosecution's argument, it was not likely to confuse or mislead the jury, and the attempted sexual contact with the other-acts witness could not be proved in another manner. Accordingly, the trial court erred when it suppressed the evidence.

Reversed and remanded.

CRIMINAL LAW — EVIDENCE — CRIMINAL SEXUAL CONDUCT AGAINST MINORS — OTHER-ACTS EVIDENCE.

Under MCL 768.27a, in a criminal case in which the defendant is accused of committing certain sexual offenses against a minor, evidence that the defendant committed another sexual offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant; MCL 768.27a supersedes MRE 404(b), which otherwise bars evidence of other acts if that evidence is used solely to show propensity; propensity evidence admissible under MCL 768.27a may, however, be excluded under MRE 403 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; when evidence of an act is admissible under MCL 768.27a, it does not matter for purposes of admissibility under MRE 403 whether the act is similar or dissimilar to the charged offense; MRE 403

> only concerns whether otherwise relevant evidence is overly sensational or needlessly cumulative.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Douglas R. Lloyd*, Prosecuting Attorney, and *Brent E. Morton*, Assistant Prosecuting Attorney, for the people.

Ann M. Prater for defendant.

Before: SAAD, P.J., and OWENS and K. F. KELLY, JJ.

SAAD, P.J. The prosecution appeals the trial court's order that suppressed evidence the prosecution sought to admit under MCL 768.27a. For the reasons stated below, we reverse the trial court's decision, and remand for entry of an order that permits the admission of the proffered evidence.

I. NATURE OF THE CASE

MCL 768.27a is an evidentiary statute that applies to cases in which a defendant is charged with a sexual offense against a minor. The statute provides that the prosecution may present *any* evidence that the defendant committed *other* sex crimes against children, and that evidence may be considered for its bearing on any relevant matter, including the defendant's propensity to commit sexual crimes against children. This statutory mandate is contrary to MRE 404(b), which generally provides that evidence of other acts may not be used at criminal trials to show propensity.[1]

[1] MRE 404(b)(1) states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, prepara-

By enacting MCL 768.27a, the Legislature made an important public-policy choice to *limit* the procedural rights of criminal defendants contained in MRE 404(b), by mandating the admissibility of this specific type of propensity evidence, to better protect the rights of children from sexual predators.[2] Accordingly, under the

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> tion, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

The prohibition on the use of other-acts evidence to show criminal propensity stems from a belief that the

> use of [other-acts] evidence may be unfairly prejudicial: it is too easy for the factfinder to conclude that if the defendant did it once, he or she likely did it again, without regard to the other evidence presented in the case. [1 Robinson & Longhofer, Michigan Court Rules Practice: Evidence (3d ed), § 404.6, p 449.]

See also *People v Gilbert*, 101 Mich App 459, 471; 300 NW2d 604 (1980) ("Generally, evidence of a distinct unrelated criminal activity is not admissible at the trial of a defendant charged with commission of a different criminal offense, because such evidence tends to be used to convict a defendant for being a bad man and not for his actual conduct regarding the offense charged."); and *People v Johnigan*, 265 Mich App 463, 465; 696 NW2d 724 (2005) ("Use of other acts as evidence of character is generally excluded to avoid the danger of conviction based on a defendant's history of misconduct.").

[2] MCL 768.27a is modeled on its federal "counterpart," FRE 414. *People v Watkins*, 491 Mich 450, 471; 818 NW2d 296 (2012). In "a criminal case in which a defendant is accused of child molestation," FRE 414 permits the admission of "evidence that the defendant committed any other child molestation." FRE 414. Congress enacted FRE 414 as part of the Violent Crime Control and Law Enforcement Act of 1994. PL 103-322, § 320935; 108 Stat 2135. In her discussion of FRE 414, Representative Susan Molinari explained why Congress considered it important, in criminal cases involving the sexual abuse of children, to allow the admission of a defendant's other acts of child molestation to show the defendant's propensity to sexually abuse children:

> The proposed reform is critical to the protection of the public from rapists and child molesters, and is justified by the distinc-

plain meaning of the statute, if evidence that a defendant committed other sex crimes against a child is admissible under MCL 768.27a, a court *must* admit the evidence without reference to or consideration of the standard propensity rule set forth in MRE 404(b)(1). *People v Watkins*, 491 Mich 450, 471; 818 NW2d 296 (2012).

The Michigan Supreme Court rejected a constitutional challenge to MCL 768.27a in *Watkins* and upheld the statute's categorical mandate that requires the admission of propensity evidence in cases involving sex crimes against children. *Id*. at 476-477. In so doing, *Watkins* carved out a very limited role for the judiciary in making admissibility determinations under MCL 768.27a, by using the safety valve of MRE 403.[3] *Id*. at 481.

> tive characteristics of the cases it will affect. In child molestation cases, for example, a history of similar acts tends to be exceptionally probative because it shows an unusual disposition of the defendant—a sexual or sado-sexual interest in children—that simply does not exist in ordinary people. Moreover, such cases require reliance on child victims whose credibility can readily be attacked in the absence of substantial corroboration. In such cases, there is a compelling public interest in admitting all significant evidence that will illumine the credibility of the charge and any denial by the defense. [140 Cong Rec, part 17 (August 21, 1994), p 23603.]

Likewise, the Legislature enacted MCL 768.27a "to address a substantive concern about the protection of children and the prosecution of persons who perpetrate certain enumerated crimes against children and are more likely than others to reoffend." *Watkins*, 491 Mich at 476. See also House Legislative Analysis, HB 4934, HB 4936, HB 4937, HB 4958, SB 606, SB 607, and SB 615, August 22, 2006, p 10 (stating that MCL 768.27a was enacted as part of a package of bills intended to "increase the safety of children" and "keep[] known offenders away from children").

[3] In full, MRE 403 reads:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair preju-

Historically, MRE 403 has been used sparingly by trial courts[4] to exclude otherwise admissible evidence because the evidence is either overly sensational or needlessly cumulative.[5] In *Watkins*, the Michigan Su-

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dice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Of course, evidence submitted under MCL 768.27a is also subject to constitutional limitations. For instance, the prosecution could not submit evidence under the statute that violated a defendant's constitutional right to confront the witnesses who testify against him. See *People v Fackelman*, 489 Mich 515, 524-528; 802 NW2d 552 (2011), and *People v Nunley*, 491 Mich 686, 697-705; 821 NW2d 642 (2012), for discussions of this right set forth in the Sixth Amendment of the United States Constitution, and Article 1, § 20 of the 1963 Michigan Constitution. We do not address this issue here because (1) defendant has not raised it, and (2) the evidence the prosecution seeks to introduce is witness testimony, which, by definition, permits defendant to confront the witness providing the testimony.

[4] See, for example, *United States v Flanders*, 752 F3d 1317, 1335 (CA 11, 2014) ("Although Federal Rule of Evidence 403 permits the district court to exclude otherwise relevant evidence 'if its probative value is substantially outweighed by the danger of unfair prejudice,' Fed. R.Evid. 403, it is 'an extraordinary remedy' that should be used sparingly[.]") (citation omitted); *United States v Smalls*, 752 F3d 1227, 1238 n 4 (CA 10, 2014) ("Exclusion of otherwise admissible evidence under Rule 403 'is an extraordinary remedy and should be used sparingly.' ") (citation omitted). Because "MRE 403 is identical with Rule 403 of the Federal Rules of Evidence," it is appropriate to look to federal cases that interpret the federal rule to assist in interpretation of the Michigan rule. MRE 403 Committee Note, 402 Mich xcv (1978). See also *People v Barrett*, 480 Mich 125, 130; 747 NW2d 797 (2008) (stating that the Michigan Rules of Evidence "were closely patterned after the Federal Rules of Evidence").

[5] "The rationale of Rule 403 . . . is that, even though relevant, certain evidence should nonetheless be excluded if the other significant considerations enumerated in the rule substantially outweigh its probative value." Robinson & Longhofer, § 403.1, p 381. As the Michigan Supreme Court explained:

"[I]t is only unfair prejudice, substantially outweighing probative value, which permits exclusion of relevant matter under

preme Court held that the exclusionary power of MRE 403 should be used *even more* sparingly in the context of evidentiary determinations made pursuant to MCL 768.27a. *Watkins*, 491 Mich at 487. This is because MCL 768.27a represents a clear public-policy choice to admit specific evidence to protect children from sexual predators.

Because MCL 768.27a mandates the admission of propensity evidence, which for many years had generally and routinely been excluded by the judiciary, in *Watkins* our Supreme Court expressed concern that trial courts might misapply MRE 403, and *exclude* the evidence by reverting to the traditional propensity analysis used under MRE 404(b). *Id*. at 486. The Court therefore held that the usual propensity analysis under MRE 404(b) has no applicability to evidentiary determinations made under MCL 768.27a. *Id*. at 471.

In sum, when the prosecution seeks to admit evidence under MCL 768.27a, a court determines the admissibility of the evidence in three steps. First, the court ascertains whether the proffered evidence is

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> Rule 403 . . . . [Rule 403's] major function is limited to excluding matter of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect. . . . It is not designed to permit the court to 'even out' the weight of the evidence, to mitigate a crime, or to make a contest where there is little or none." [*Waknin v Chamberlain*, 467 Mich 329, 334; 653 NW2d 176 (2002), quoting *People v Mills*, 450 Mich 61, 75-76; 537 NW2d 909 (1995), quoting *United States v McRae*, 593 F2d 700, 707 (CA 5, 1979).]

See also FRE 403 Committee Note (1973), 28 USC Appendix ("[C]ertain circumstances call for the exclusion of evidence which is of unquestioned relevance. These circumstances entail risks which range all the way from inducing decision on a purely emotional basis, at one extreme, to nothing more harmful than merely wasting time, at the other extreme.").

relevant to the case at hand. Second, the court determines whether the proposed evidence constitutes a "listed offense" under MCL 768.27a. Finally, the court analyzes, under MRE 403, whether the probative value of the evidence is substantially outweighed by its prejudicial effect. When it makes this analysis under MRE 403, the court must weigh the probative value of the evidence—i.e., its tendency to show defendant's propensity to commit sex crimes against children—in *favor* of admission. If the trial court finds that evidence submitted under MCL 768.27a is (1) relevant, (2) constitutes evidence of a "listed offense" under the statute, and (3) has probative value that is not substantially outweighed by unfair prejudice under MRE 403, the evidence must be admitted.

Here, the trial court suppressed evidence, submitted by the prosecution under MCL 768.27a, that defendant committed *other* sex crimes against his daughter that are separate from the charged offense. The prosecution says this ruling is erroneous, because the trial court misapplied MCL 768.27a and *Watkins* in two significant and dispositive ways when it held that the proffered evidence: (1) was not evidence of the occurrence of a "listed offense" under MCL 768.27a, and (2) was more prejudicial than probative under MRE 403.

We hold that the trial court misapplied MCL 768.27a when it suppressed the evidence at issue. In so doing, it appears the court did precisely what the Michigan Supreme Court feared and warned against in *Watkins*. Under the rubric of conducting an MRE 403 balancing test, the trial court improperly analyzed the admissibility of the evidence by using the traditional propensity analysis. Because the proffered evidence is admissible, we remand for entry of an order that admits the evidence.

II. FACTS AND PROCEDURAL HISTORY

Defendant lost his parental rights to his two daughters, JU and MU, in late 2013 because he sexually abused VG, JU's half sister.[6] In January 2014, the prosecution charged defendant with five counts of criminal sexual conduct (CSC) for his molestation of VG. As part of its case, the prosecution sought to introduce evidence under MCL 768.27a that defendant had also molested JU. The prosecution filed a notice of intent indicating that it planned to use JU's testimony regarding defendant's abuse at trial and attached a Michigan State Police (MSP) report that summarized her anticipated testimony.[7]

In the report, which recounted a trooper's interview with JU, JU stated that sometime during summer 2011,[8] she fell asleep with her father in the same bed.[9] She woke up when she felt her father insert his fingers into her underwear.[10] Defendant also attempted to

[6] VG and JU share the same mother. Defendant's parental rights were terminated under MCL 712A.19b(3)(b), which permits termination when:

> The child or a sibling of the child has suffered physical injury or physical or sexual abuse under 1 or more of the following circumstances:
>
> (*i*) The parent's act caused the physical injury or physical or sexual abuse and the court finds that there is a reasonable likelihood that the child will suffer from injury or abuse in the foreseeable future if placed in the parent's home.

[7] The trooper interviewed JU on October 27, 2013.

[8] JU was nine years old at the time.

[9] JU told the trooper that other children were asleep in the room and that defendant's girlfriend was also in the bed, on the other side of defendant.

[10] When the trooper asked for clarification on where defendant had touched JU, she stated that he did not "touch her where she pees, but stopped before the crease of her groin."

place her hand on his penis on multiple occasions, but JU never actually touched her father because she repeatedly moved her body away from him each time he tried to make her touch his penis. Defendant never spoke to JU about the episode, apart from laughing after JU told him that she had seen his "private" during the night. JU noted that she did not want to tell anyone about the molestation, because she did not want her father to get in trouble.

Defendant objected to and moved to suppress the admission of JU's testimony. After a hearing,[11] the trial court granted the motion and explained its reasoning in a holding from the bench. The trial court questioned the credibility of JU's testimony, because she had initially denied her father abused her during the proceedings for termination of parental rights,[12] and her subsequent "statements . . . [were] all over the place." The court also doubted whether JU's accusations against defendant constituted a listed offense under MCL 768.27a, and stated: "[I]t's more clear that if anything happened she's been consistent that [defendant's] hand was on the belly and [his] fingers maybe dropped below the belly button."

Despite its concerns over the veracity of JU's statements and belief that defendant did not commit a listed offense under MCL 768.27a, the trial court "[gave] the prosecutor the benefit of the doubt" that defendant's alleged actions constituted a listed offense under MCL 768.27a. Nonetheless, the court held that JU's testimony would still be barred under

[11] The motion hearing took place on March 21, 2014.

[12] Although it is not relevant to our determination of this case, we note that JU's initial nondisclosure of her father's sexual abuse is not unusual. Child molestation victims are sometimes reluctant to publicly admit that their own parent has sexually assaulted them.

MRE 403,[13] because the sexual abuse she detailed was "dissimilar" to the sexual abuse against VG alleged by the prosecution, which involved anal penetration. The former molestation also purportedly occurred while others were present, whereas the latter molestation did not.[14] The trial court finally noted that defendant allegedly molested VG multiple times, while JU's molestation occurred once. The court closed its holding from the bench by opining that "the purpose of [MCL 768.27a] honestly is to allow in other allegations that are *more similar* in nature to show a propensity; see, this is what the defendant does, this is what the defendant does." (Emphasis added.)

III. STANDARD OF REVIEW

Issues that involve statutory interpretation or the interpretation of court rules "are questions of law," and are reviewed de novo. *In re Bail Bond Forfeiture*, 496 Mich 320, 325; 852 NW2d 747 (2014). When it interprets a statute, a court must examine the statute's "plain language, which provides the most reliable evidence of [legislative] intent. If the statutory language is unambiguous, no further judicial construction is required or permitted." *People v McKinley*, 496 Mich 410, 415; 852 NW2d 770 (2014) (citations and quotation marks omitted). The principles that govern statutory interpretation also govern the interpretation of court rules. *Watkins*, 491 Mich at 468.

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[13] Though the trial court did not explicitly specify that it found JU's testimony to be inadmissible under MRE 403, the prosecution framed its argument for admissibility—which the trial court rejected—under that rule.

[14] The prosecution disputes the trial court's characterization of VG's rape, and states that it is unclear whether any other persons were in the home when defendant assaulted her.

IV. ANALYSIS

A. LEGAL STANDARDS

1. MCL 768.27a

In full, MCL 768.27a reads:

> (1) Notwithstanding [MCL 768.27], in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant. If the prosecuting attorney intends to offer evidence under this section, the prosecuting attorney shall disclose the evidence to the defendant at least 15 days before the scheduled date of trial or at a later time as allowed by the court for good cause shown, including the statements of witnesses or a summary of the substance of any testimony that is expected to be offered.
>
> (2) As used in this section:
>
> (a) "Listed offense" means that term as defined in section 2 of the sex offenders registration act, 1994 PA 295, MCL 28.722.[15]

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[15] MCL 28.722(j) defines "listed offense" to mean "a tier I, tier II, or tier III offense." MCL 28.722(w)(*v*) defines "tier III offense" to include "[a] violation of [MCL 750.520c] . . . of the Michigan penal code . . . committed against an individual less than 13 years of age." MCL 750.520c(1) provides:

> A person is guilty of criminal sexual conduct in the second degree if the person engages in sexual contact with another person and if any one of the following circumstances exists:
>
> (a) That other person is under 13 years of age.

MCL 750.520a(q) defines "sexual contact," as it is used in MCL 750.520c, to include

> the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional

> (b) "Minor" means an individual less than 18 years of age.

Accordingly, MCL 768.27a permits the prosecution to introduce *any* "evidence"[16] that a criminal defendant committed "another listed offense against a minor" for *any* relevant purpose.[17] See *People v Duenaz*, 306 Mich App 85, 101; 854 NW2d 531 (2014). Accordingly, MCL 768.27a permits the introduction of other-acts evidence that shows a defendant has a propensity to commit sex crimes against minors. See *Watkins*, 491 Mich at 471.

As we noted above, for this reason MCL 768.27a

> touching can be reasonably construed as being for the purpose of sexual arousal or gratification, [or] done for a sexual purpose . . . .

MCL 750.520a(f) defines "intimate parts" to include "the primary genital area, groin, inner thigh, buttock, or breast of a human being."

[16] The term "evidence," as used in MCL 768.27a, is quite broad: it encompasses *any* evidence "that the defendant committed a listed offense against a minor . . . ." For example, no conviction is required—mere evidence of "a listed offense against a minor" is sufficient. See *Watkins*, 491 Mich at 489 ("MCL 768.27a *permits* the introduction of other-acts evidence that did not result in a conviction . . . ."). Under the statute, courts have admitted a two-decades-old police report that detailed a victim's accusations of child molestation against a defendant, *id*. at 464, and witness testimony on child sexual abuse that allegedly occurred a decade before the charged offense and apparently was never reported to the police, *People v Brown*, 294 Mich App 377, 381; 811 NW2d 531 (2011).

This judicial interpretation is more expansive than the description of MCL 768.27a found in the statute's legislative history, which states:

> [MCL 768.27a] would allow *prior convictions* for listed sex offenses committed against a minor to be admissible as evidence in a current criminal case involving a charge of a listed offense committed against a minor. [House Legislative Analysis, HB 4934, HB 4936, HB 4937, HB 4958, SB 606, SB 607, and SB 615, August 22, 2006, p 10 (emphasis added).]

[17] Evidence that is relevant tends to "make a material fact at issue more probable or less probable than it would be without the evidence." *People v Crawford*, 458 Mich 376, 387; 582 NW2d 785 (1998).

conflicts with and "supersedes" MRE 404(b), *Watkins*, 491 Mich at 476-477, which bars evidence of a defendant's other criminal acts if that evidence is used solely to show that defendant has a propensity to commit the crime with which he is charged.[18] MCL 768.27a specifically intends to bar the applicability of MRE 404(b) in cases that involve sexual crimes against children, as the statute aims to address "a substantive concern about the protection of children and the prosecution of persons who perpetrate certain enumerated crimes against children and are more likely than others to reoffend." *Watkins*, 491 Mich at 476. In other words, MRE 404(b) has no applicability to evidence that is admitted pursuant to MCL 768.27a.[19]

To repeat: MCL 768.27a permits the admission of relevant evidence that tends to show a defendant committed a "listed offense" under the statute. If evidence of the defendant's other acts of child sexual abuse are admissible under the mandates of MCL 768.27a, a court *must* admit the evidence without reference to or consideration of MRE 404(b). *Watkins*, 491 Mich at 471.

2. MRE 403

If relevant evidence is admissible under MCL 768.27a, it may nonetheless be excluded under MRE 403. *Watkins*, 491 Mich at 481. Under MRE 403, such

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[18] See *Watkins*, 491 Mich at 471.

[19] See *Watkins*, 491 Mich at 471:

> Parsed out, MCL 768.27a can be rephrased as follows: In spite of the statute limiting the admissibility of other-acts evidence to consideration for noncharacter purposes, other-acts evidence in a case charging the defendant with sexual misconduct against a minor is admissible and may be considered for its bearing on any matter to which it is relevant.

evidence will be excluded only 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." MRE 403 (emphasis added). And, as noted, it is "only in unusual circumstances that [a] court should exclude relevant evidence under Rule 403." Robinson & Longhofer, § 403.2, p 382.[20]

To assess whether the probative value of the evidence is substantially outweighed by unfair prejudice under MRE 403, a court must perform a balancing test that looks to several factors, including

> the time required to present the evidence and the possibility of delay, whether the evidence is needlessly cumulative, how directly the evidence tends to prove the fact for which it is offered, how essential the fact sought to be proved is to the case, the potential for confusing or misleading the jury, and whether the fact can be proved in another manner without as many harmful collateral effects. [*People v Blackston*, 481 Mich 451, 462; 751 NW2d 408 (2008).]

Again, evidence may only be excluded under MRE 403 when the prejudice the defendant would suffer from admission is *unfair*, which means

> more than simply damage to the [defendant's] cause. A party's case is always damaged by evidence that the facts are contrary to his contentions, but that cannot be grounds for exclusion. What is meant [by MRE 403] is an undue tendency to move the tribunal to decide on an improper basis, commonly, though not always, an emotional one. [*People v Vasher*, 449 Mich 494, 501; 537 NW2d 168 (1995).]

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[20] See notes 4 and 5 of this opinion.

The prosecution is not required to use the least prejudicial evidence to make its case, *People v Fisher*, 449 Mich 441, 452; 537 NW2d 577 (1995), nor is the fact that the prejudicial evidence involves acts of depravity necessarily grounds for exclusion, see *People v Starr*, 457 Mich 490, 499-500; 577 NW2d 673 (1998) ("[W]hile . . . the acts described in the proffered testimony are certainly 'depraved' and of 'monstrous repugnance,' such characteristics were inherent in the underlying crime of which defendant stood accused."). Indeed, the nature of the charged offense and the nature of the evidence that the defendant committed another listed offense converge with the mandate in MCL 768.27a—to admit that evidence even to show propensity—to practically eliminate any consideration of the depravity factor.

In the specific context of evidence submitted under MCL 768.27a, "[t]he *Watkins* Court provided guidance to trial courts in applying . . . the balancing test of MRE 403." *Duenaz*, 306 Mich App at 99. Because the purpose of MCL 768.27a is to permit the admission of evidence showing that defendant committed other sex crimes against children apart from the charged offense, *Watkins* held that a trial court *must* "weigh the propensity inference in favor of the evidence's probative value rather than its prejudicial effect. That is, other-acts evidence admissible under MCL 768.27a may not be excluded under MRE 403 as overly prejudicial merely because it allows a jury to draw a propensity inference." *Watkins*, 491 Mich at 487. Specifically, the *Watkins* court stated that

> [p]ropensity evidence is prejudicial by nature, and it is precisely the danger of prejudice that underlies the ban on propensity evidence in MRE 404(b). Yet were a court to apply MRE 403 in such a way that other-acts evidence in cases involving sexual misconduct against a minor was

> considered on the prejudicial side of the scale, this would gut the intended effect of MCL 768.27a, which is to allow juries to consider evidence of other acts the defendant committed to show the defendant's character and propensity to commit the charged crime. To weigh the propensity inference derived from other-acts evidence in cases involving sexual misconduct against a minor on the prejudicial side of the balancing test would be to resurrect MRE 404(b), which the Legislature rejected in MCL 768.27a. [*Id*. at 486.]

B. APPLICATION

Here, the trial court made three errors when it assessed the admissibility of JU's testimony under MCL 768.27a. First, the record reveals that the trial court had serious doubts about the witness's credibility. The record further reveals that the trial court suppressed the proffered evidence, in part, because it doubted JU's credibility. And though it is routine for a trial court to make preliminary factual determinations in making evidentiary rulings,[21] it is inappropriate for a trial court to exclude a witness from testifying simply because the court disbelieves the witness. Such an action goes well beyond routine and permissible foundational rulings on matters of fact, and wrongly intrudes upon the role of the jury to make credibility determinations. Accordingly, the trial court impermissibly allowed its opinion of JU's credibility to influence its evidentiary ruling under MCL 768.27a and MRE 403.

Second, the trial court wrongly expressed doubt that the offense JU intended to describe in her testimony

[21] See, for example, *People v Jones*, 301 Mich App 566, 574; 837 NW2d 7 (2013) (describing the specific instances in which "Michigan criminal law clearly places the fact-finding function with the trial court judge").

constituted a "listed offense" under MCL 768.27a. Again, MCL 768.27a(1) specifies:

> Notwithstanding [MCL 768.27], in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant.

Here, JU told the Michigan State Police that, when she was under 13 years old, defendant put his fingers in her underwear and repeatedly attempted to make her touch his penis. Both statements provide ample evidence that defendant committed a "listed offense" under MCL 768.27a because, if true, they demonstrate that defendant engaged in "sexual contact" under MCL 750.520a(q)—given that they involve "the intentional touching of the victim's . . . intimate parts or the intentional touching of the clothing covering the immediate area of the victim's . . . intimate parts . . . ."[22] The fact that JU never touched defendant's penis is inconsequential, because her statement indicates that defendant *attempted* to commit a "listed offense" under MCL 768.27a—"the intentional touching of the . . . actor's intimate parts . . . ." MCL 750.520a(q).[23]

JU's proposed testimony thus details a "listed offense" under MCL 768.27a, and that testimony is relevant evidence that defendant committed the

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[22] Again, MCL 750.520a(f) defines "intimate parts" to mean "the primary genital area, groin, inner thigh, buttock, or breast of a human being."

[23] See *People v Frost*, 148 Mich App 773, 776; 384 NW2d 790 (1985) (holding that "[t]he essential elements of an attempt are: (1) an *intent* to do an act or bring about certain consequences which in law would amount to a crime, and (2) an act in furtherance of that intent which goes beyond mere preparation").

charged offense.[24] The trial court's statement that JU's proposed testimony did not contain evidence of a listed offense was thus simply inaccurate as a matter of law, and the testimony is admissible pursuant to the mandates of MCL 768.27a.

Finally, the trial court committed another error of law when it assessed the admissibility of JU's testimony under MRE 403. Though the trial court said it analyzed the evidence under the traditional MRE 403 balancing test—to determine whether the probative value of JU's testimony was outweighed by the risk of unfair prejudice the testimony posed to defendant—the court actually analyzed JU's testimony by using the now inapplicable propensity test.

The court held the testimony to be inadmissible because it believed the molestation described by JU to be too "dissimilar" to the acts described by VG.[25]

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[24] JU's testimony is relevant because it contains details of defendant's alleged molestation of JU, which tends to make the "material fact at issue" in the charged offense—whether defendant sexually abused VG—"more probable" than it would be without JU's testimony. *Crawford*, 458 Mich at 387.

[25] As noted, in its analysis of JU's testimony under MRE 403, the trial court reasoned that JU's allegations were too "dissimilar" to VG's allegations because (1) JU said defendant inappropriately touched her vaginal area, whereas VG said defendant anally raped her; (2) JU's molestation took place in the presence of others, while the assault against VG occurred when VG and defendant were alone; and (3) defendant abused JU only once, as opposed to the multiple occasions on which he abused VG. The court closed its ruling from the bench by opining that "the purpose of [MCL 768.27a] honestly is to allow in other allegations that are more similar in nature to show a propensity; see, this is what the defendant does, this is what the defendant does."

We note that the trial court's analysis is not necessarily accurate on its own terms, because there are actually a number of similarities between JU's allegations and the prosecution's allegations regarding the charged offense. Specifically, both episodes involved the abuse of young girls over whom defendant exercised paternal authority. See

Similarity, or lack thereof, between another criminal act and the charged crime, is a comparison courts frequently make to assess whether evidence of the other criminal act is admissible to show something other than a defendant's criminal propensity under MRE 404(b). Whether an act is similar or dissimilar to a charged offense does not matter for the purposes of MRE 403, which, as noted, looks to whether otherwise relevant evidence is overly sensational or needlessly cumulative. *Blackston*, 481 Mich at 461-462. More importantly, MCL 768.27a clearly mandates the admissibility of *any evidence* of a "listed offense," regardless of similarity. Indeed, any required level of similarity is presumed in the mandate to admit evidence of another listed offense against a minor when a defendant is charged with a listed offence against a minor.

Furthermore, the trial court never considered or explained how the probative value of JU's testimony would be outweighed by unfair prejudice under MRE 403. This is likely because JU's testimony is *not* unfairly prejudicial to defendant. To the contrary, the clearly stated public policy of this state—to protect children from sexual predators—requires that this precise evidence be admitted.[26]

Watkins 491 Mich at 487-488 (discussing the considerations that might lead a court to exclude evidence under MRE 403). The charged and uncharged acts allegedly occurred close in time to one another. *Id*. And JU's testimony is important to the prosecution's case because it tends to demonstrate that VG is telling the truth about her molestation, which defendant questions. *Id*.

[26] Specifically, the evidence contained in JU's testimony is (1) not likely to delay defendant's trial or take a great amount of time to present; (2) not "needlessly cumulative"; (3) "tends to prove the fact" that defendant molested VG; (4) important to the prosecution's argument; (5) not likely to confuse or mislead the jury; and (6) cannot be "proved in another manner without as many harmful collateral effects." *Blackston*, 481 Mich at 462.

The trial court therefore erred when it granted defendant's motion to suppress. In so doing, it did exactly what our Supreme Court cautioned against in *Watkins*, by reverting to the traditional propensity analysis used under MRE 404(b). Accordingly, we reverse the holding of the trial court, and remand for entry of an order permitting the admission of JU's testimony. We do not retain jurisdiction.

Reversed and remanded.

OWENS and K. F. KELLY, JJ., concurred with SAAD, P.J.

HOWARD v HOWARD

Docket No. 323124. Submitted May 5, 2015, at Detroit. Decided May 19, 2015, at 9:00 a.m.

Tyronna Howard and Mark Howard (defendant) were divorced in the Wayne Circuit Court in 2006. The divorce judgment granted them joint legal custody of their children, but gave Tyronna primary physical custody, with extensive parenting time to defendant. In April 2013, Tyronna and the children moved in with her brother, Antonio Blackburn. Tyronna died in August 2013. Defendant then filed an emergency ex parte motion to enforce the divorce judgment and have the children returned to him. The court, Charlene Elder, J., set the matter for an expedited hearing on the motion and ordered Blackburn to appear. Defendant had brain tumors and multiple sclerosis and lived in a one-bedroom apartment in an assisted living facility. At various hearings on the motion, he had difficulty answering questions. Defendant's counsel, however, repeatedly argued that Blackburn lacked standing and should not participate in the proceeding. At the evidentiary hearing on the child custody best-interest factors, defendant did not call witnesses, arguing that the parental presumption was in his favor and that there was no third party with standing who could rebut that presumption by clear and convincing evidence. Blackburn testified, and defendant's counsel cross-examined him. No other witnesses were presented, and defendant did not testify on his own behalf. The court concluded that most of the best-interest factors in MCL 722.23 (part of the Child Custody Act, MCL 722.21 *et seq*.) favored Blackburn and that none favored defendant. The court expressed concerns that defendant would be unable to provide for the care, safety, and welfare of his children and concluded that Blackburn had established by clear and convincing evidence that awarding him custody was in the children's best interests. Defendant appealed.

The Court of Appeals *held*:

1. While defendant argued that the trial court should not have allowed Blackburn to participate in the proceedings, whether Blackburn had standing was not an issue. Blackburn did not initiate this child custody dispute by filing a petition for

custody of the minor children. Rather, defendant initiated this proceeding when he filed his motion seeking judicial intervention after his ex-wife died. As the natural parent, defendant was entitled to a parental presumption over Blackburn in this dispute, even though the children had been living with Blackburn. MCL 722.25(1) provides that if a custody dispute is between a parent and a third person, the court must presume that the best interests of the child are served by awarding custody to the parent unless the contrary is established by clear and convincing evidence. Therefore, once a natural parent initiates a custody dispute with a third-party custodian, the third party has the right to present evidence to support his or her claim that the child's best interests are served by the continued placement of the child with that third party instead of the natural parent. In any custodial dispute, the child's best interests, described in MCL 722.23, must prevail.

2. Defendant also argued that the trial court erred by ignoring the parental presumption and conducting a best-interest hearing. It was clear, however, that the trial court gave proper weight to the presumption favoring defendant as the preferred custodian of the children. Because that presumption may be rebutted by clear and convincing evidence that custody with defendant was not in the best interests of his children, the trial court properly conducted a best-interest hearing. To the extent that defendant on appeal challenged the trial court's obvious concerns regarding defendant's fitness, his challenge was without merit. A natural parent's fitness is an intrinsic component of a trial court's evaluation of the best-interest factors in MCL 722.23, and concerns about parental fitness are of paramount importance in custody determinations. The trial court noted defendant's obvious mental and physical deficits, as well as the fact that it was defendant's sister who was speaking for defendant during the proceedings on defendant's motion and was in fact the one pursuing the matter, rather than defendant. The children's guardian ad litem indicated that defendant did not know the name of the school his children attended, where they lived, or what day of the week they visited him. Further, when asked how he would care for the children, defendant told the guardian ad litem that the children were big and could take care of themselves. The trial court's consideration of this and other evidence bearing on defendant's fitness was a properly focused inquiry on the best interests of the children, and the court did not err by awarding custody to Blackburn.

Affirmed.

CHILD CUSTODY — AWARD TO THIRD PARTY — PRESUMPTION IN FAVOR OF NATURAL PARENT — BEST INTERESTS OF CHILD.

The Child Custody Act, MCL 722.21 *et seq*., does not authorize a nonparent to create a child custody dispute by filing a complaint in the circuit court alleging that giving custody to the third party is in the best interests of the child; if a natural parent initiates a custody dispute with a third-party custodian, MCL 722.25(1) provides that the court must presume that the best interests of the child are served by awarding custody to the parent unless the contrary is established by clear and convincing evidence; the third party has the right to present evidence to support his or her claim that the child's best interests are served by the child's continued placement with that third party instead of the natural parent, but in any custodial dispute, the child's best interests, as described in MCL 722.23, must prevail.

Helm Miller & Miller (by *Beth Anne Miller*) for Antonio Blackburn.

Joshua B. Kay and Sara J. Ginsberg (under MCR 8.120(D)(3)) for Mark Howard.

Before: TALBOT, C.J., and CAVANAGH and METER, JJ.

PER CURIAM. Defendant appeals as of right an order granting custody of his minor children to Antonio Blackburn, the brother of his deceased ex-wife. We affirm.

Defendant and Tyronna Howard divorced on November 13, 2006. They had three children, but only the custody of two is at issue here. The divorce judgment granted Tyronna and defendant joint legal custody, but Tyronna primary physical custody of the children with extensive parenting time to defendant. Tyronna fell ill and passed away on August 31, 2013. Before her death in April 2013, Tyronna and her children moved in with Blackburn.

On September 24, 2013, defendant filed an emergency ex parte motion to enforce the divorce judgment

and have the children returned to him. Defendant alleged that he had attempted to bring his children home after Tyronna's death, but Blackburn refused to return them. The trial court set the matter for an expedited hearing on defendant's motion, ordered defendant to serve Blackburn, and ordered Blackburn to appear.

On October 1, 2013, Blackburn responded to defendant's motion, indicating that defendant suffered from brain tumors and multiple sclerosis and lived in a one-bedroom apartment in an assisted living facility. Consequently, when she fell ill, Tyronna entrusted the care and custody of her children to her brother, Blackburn. Blackburn alleged that on September 18, 2013, he filed petitions for guardianship and conservatorship for each of the children, and he requested that the trial court "maintain the status quo and allow the minor children to remain with him until the probate court makes a decision on his petitions."[1]

On October 4, 2013, the trial court held a hearing on defendant's motion. At the hearing, the trial court learned that defendant's sister, LaDawne Malone, had power of attorney for defendant, and she admitted that she had "requested an exparte motion." At that hearing, Malone stated that defendant "wants his custodial rights restored and the children returned to his house." When the trial court questioned Malone about why defendant was not addressing the court himself, Malone indicated: "[H]e can't cognitively speak. He has multiple sclerosis. He is not deemed unfit. He is deemed disabled which there's a big difference." At that hearing, the trial court placed defendant under oath and asked him if he wanted his children to live

[1] The record does not reflect whether Blackburn's petitions for guardianship and conservatorship were ever heard by the probate court.

with him. Defendant stated: "I want my children. I really do. I love my children. I do." However, when the trial court asked defendant if he was living in a one-bedroom assisted living facility, he could not answer, but instead looked to Malone for help. Malone requested that the trial court adjourn the matter until she could retain an attorney, and the matter was adjourned.

After defendant retained an attorney, the trial court appointed a guardian ad litem (GAL) for the children. Michelle Mack, the GAL, eventually gave her findings on the record, and both Blackburn's and defendant's attorneys questioned Mack, but she was not sworn in as a witness. Mack had interviewed each of the children alone, observed them at home and at school, and observed them visiting with defendant. Mack explained that the children love defendant, but they do not want to live with him because they felt that, due to defendant's medical conditions, they would be taking care of defendant rather than defendant taking care of them. When Mack questioned defendant, he was unable to tell her where the children went to school or where they lived. When Mack asked defendant how he would care for the children, he told her that the children "were big, they could take care of themselves."

Defendant's counsel repeatedly argued that it was inappropriate for Blackburn to participate in the proceedings at all because Blackburn did not have standing in the matter. While the trial court agreed that Blackburn did not have standing, it refused defendant's requests for a directed verdict or mistrial and overruled his objections on this ground. The trial court noted that it was authorized by the Child Custody Act, MCL 722.21 *et seq*., to grant custody of the children to

a third party, even one without standing, as long as it found that this was in the children's best interests.

At the evidentiary hearing on the best-interest factors, defendant refused to call witnesses, arguing that the parental presumption was in his favor and that there was no third party with standing who could rebut the presumption by clear and convincing evidence. The trial court then allowed Blackburn to testify in the proceedings, and he was subject to cross-examination by defendant's counsel. No other witnesses were presented in this matter, and defendant did not testify on his own behalf.

After this hearing, the trial court engaged in a lengthy analysis under the best-interest factors.[2] The trial court found that Factors (a), (b), (c), (d), (e), (g), (h), (j), and (*l*)[3] favored Blackburn. It found that Factors (f) and (k)[4] favored neither party. It found no factors in favor of defendant. With respect to Factor (*l*),[5] the catchall factor, the trial court detailed that the "most influential factor considered by this court to be relevant to this matter is fitness." The trial court noted that because defendant had not taken the stand or presented any witnesses to testify on his behalf, the trial court was left with its observations, which included that defendant was in a wheelchair, that defendant raised his hand when his name was mentioned in court, and that defendant did not know his own address. The court stated, "Defendant's counsel rested on the notion that Defendant is their Dad and the kids

[2] Because defendant has not argued that the trial court's findings under the best-interest factors were against the great weight of the evidence, we will not detail the trial court's findings.

[3] MCL 722.23(a), (b), (c), (d), (e), (g), (h), (j), and (*l*).

[4] MCL 722.23(f) and (k).

[5] MCL 722.23(*l*).

must be automatically returned or given to him." The court further stated, "It is by no means this Court's intention to deprive Defendant of his children, however it is this Court[']s grave concern that Defendant is unable to provide for the care, safety, and welfare of his children." The court concluded that Blackburn had established by clear and convincing evidence that awarding him custody was in the best interests of the children. This appeal followed.

Defendant first argues that the trial court impermissibly allowed Blackburn to participate in the proceedings and rebut the parental presumption owed to natural parents under MCL 722.25(1) because Blackburn did not have standing. After reviewing this question of law, we disagree. See *Heltzel v Heltzel*, 248 Mich App 1, 28; 638 NW2d 123 (2001).

As our Supreme Court explained in *Ruppel v Lesner*, 421 Mich 559, 565-566; 364 NW2d 665 (1984):

> The Child Custody Act does not create substantive rights of entitlement to custody of a child. Rather, it creates presumptions and standards by which competing claims to the right of custody are to be judged, sets forth procedures to be followed in litigation regarding such claims, and authorizes the forms of relief available in the circuit court. While custody may be awarded to grandparents or other third parties according to the best interests of the child in an appropriate case (typically involving divorce), nothing in the Child Custody Act, nor in any other authority of which we are aware, authorizes a nonparent to create a child custody "dispute" by simply filing a complaint in circuit court alleging that giving custody to the third party is in the "best interests of the child." [Citations omitted.]

Similarly, in *Bowie v Arder*, 441 Mich 23, 41; 490 NW2d 568 (1992), the Court noted that the Child Custody Act may not be interpreted "as a statutory

means by which any interested person has standing to request the circuit court to make a determination of a child's best interests with respect to the custody of that child."

Defendant, however, initiated this proceeding. Thus, contrary to defendant's repeated claims, whether Blackburn had standing was not an issue. Unlike in the cases defendant relies on to support his arguments, Blackburn did not initiate this child custody dispute by petitioning for custody of the minor children.[6] See *Bowie*, 441 Mich at 48-49; *Heltzel*, 248 Mich App at 30. Rather, defendant filed this motion seeking judicial intervention after his ex-wife died, requesting that the court return his children, who had been living at Blackburn's house. And defendant persistently argued that Blackburn could not participate in this proceeding and could present no evidence to contest defendant's request for physical custody of his children.

It is true that, as the natural parent, defendant was entitled to a parental presumption over Blackburn in this dispute, even though the children had been living with Blackburn. See *Hunter v Hunter*, 484 Mich 247, 264-265; 771 NW2d 694 (2009). That is, the presumption in favor of an established custodial environment set forth in MCL 722.27(1)(c) yields to the parental presumption set forth in MCL 722.25(1). But it does not follow that Blackburn was precluded from contesting the return of the children to defendant; the parental presumption may be rebutted. See *id*. at 265. Once defendant filed this action, a "child custody

[6] The term "child custody dispute" is used broadly throughout the Child Custody Act, and its meaning includes any action or situation involving the placement of a child. *Sirovey v Campbell*, 223 Mich App 59, 68; 565 NW2d 857 (1997).

dispute" arose because Blackburn had physical custody of the minor children. And the court had the right to award Blackburn custody of the children if certain circumstances existed. See, e.g., MCL 722.27(1)(a); *Hunter*, 484 Mich at 279; *In re Anjoski*, 283 Mich App 41, 62-63; 770 NW2d 1 (2009); *Bowie v Arder*, 190 Mich App 571, 573; 476 NW2d 649 (1991), aff'd 441 Mich 23 (1992); *Hastings v Hastings*, 154 Mich App 96, 100-101; 397 NW2d 232 (1986).

Under MCL 722.25(1), if a custody dispute is between a parent and a third person, "the court shall presume that the best interests of the child are served by awarding custody to the parent or parents, *unless* the contrary is established by clear and convincing evidence." (Emphasis added.) By the plain language of the statute, a third party is entitled to present evidence for the purpose of contesting the parent's claim that the best interests of the child are served by awarding custody to the parent. Further, in *Heltzel*, 248 Mich App at 27, we held:

> [C]ustody of a child should be awarded to a third-party custodian instead of the child's natural parent only when the third person proves that all relevant factors, including the existence of an established custodial environment and all legislatively mandated best interest concerns within [MCL 722.23], taken together clearly and convincingly demonstrate that the child's best interests require placement with the third person.

Thus, again, it is clear that once a natural parent initiates a custody dispute with a third-party custodian, the third party has the right to—and indeed must—present evidence in support of that party's claim that the child's best interests are served by the continued placement of the child with that third party

instead of the natural parent.[7] "[I]n any custodial dispute the child's best interests, described within MCL 722.23, must prevail." *Id*. Accordingly, defendant's argument that the trial court erred when it allowed Blackburn to participate in this proceeding and present evidence in support of his claim that defendant should not have custody of the children is without merit.

Defendant also argues that the trial court erred when it ignored the parental presumption and conducted a best-interest hearing. We disagree that the trial court ignored the parental presumption. It is clear that the trial court gave proper weight to the presumption favoring defendant as the preferred custodian of the children; however, that presumption may be rebutted by clear and convincing evidence that custody with defendant was not in the best interests of the children. See *Hunter*, 484 Mich at 265. As our Supreme Court explained in *Bowie*, 441 Mich at 52, "the Legislature standardized the criteria for resolving child custody disputes by requiring the circuit court to evaluate eleven factors in making its determination of the best interests of a child." See also MCL 722.23. In this case, Blackburn had been entrusted with physical custody of the children and contested defendant's request for custody on the ground that placement with defendant was not in the best interests of the children. To resolve the competing claims of Blackburn and defendant in this custody dispute, the trial court properly conducted a best-interest hearing. See *Frowner v Smith*, 296 Mich App 374, 386; 820 NW2d 235 (2012).

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[7] We note and reject defendant's claim in his brief on appeal that "under the court's logic, virtually any third party who has a parent's children under his roof can sustain a claim for custody over a parent's objection." This statement is a mischaracterization of the third party's burden. See *Heltzel*, 248 Mich App at 27.

Defendant also argues that the trial court erred "when it failed to apply the parental presumption and forced him to carry the burden of persuasion throughout the proceedings against him." We disagree with defendant's characterization. As already discussed, a best-interest hearing was properly conducted and Blackburn was properly permitted to present evidence in an attempt to rebut the presumption that the children's best interests required physical custody with defendant. To the extent that defendant challenges the trial court's obvious concerns regarding defendant's fitness, that challenge is without merit. As noted in *Hunter*, 484 Mich App at 270, "a natural parent's fitness is an intrinsic component of a trial court's evaluation of the best interest factors in MCL 722.23." And "concerns about parental fitness are of paramount importance in custody determinations." *Id*. at 271. In this case, the court noted defendant's obvious mental and physical deficits, as well as the fact that it was defendant's sister who was speaking for him and pursuing this matter rather than defendant. The GAL also indicated that defendant did not know the name of the school that his children attended, where they lived, or the day of the week that they came to visit him. Further, when asked how he would care for the children, defendant told the GAL that the children "were big, they could take care of themselves." The trial court's consideration of this and other evidence bearing on defendant's fitness was a properly focused inquiry on the best interests of the children. See *id*.

Affirmed.

TALBOT, C.J., and CAVANAGH and METER, JJ., concurred.

BOWDEN v GANNAWAY

Docket No. 319047. Submitted March 11, 2015, at Lansing. Decided March 24, 2015. Approved for publication May 19, 2015, at 9:05 a.m.

Janell and Gary Bowden brought an attorney-malpractice claim in the Ingham Circuit Court against Charles P. Gannaway, Steven J. Pollok, and Rappaport Pollok Farrell & Waldron, PC, seeking economic and noneconomic damages resulting from Gannaway's failure to timely appeal the denial by the Office of Retirement Services (ORS) of non-duty-related disability retirement benefits for Janell Bowden. She had worked for the state of Michigan for many years and, following problems related to spinal surgeries, moved to a job created to accommodate the physical restrictions her physicians recommended. When the ORS denied her application for retirement benefits, she engaged Gannaway to represent her on appeal. After missing the deadline, Gannaway asked for an appeal hearing anyway, acknowledging that the request was untimely. The ORS denied the request, and Gannaway filed a petition in the circuit court, asking it to reverse the ORS's denial and award Janell Bowden the benefits. After the petition was unsuccessful, plaintiffs filed their malpractice action. Defendants moved for summary disposition, citing *Polania v State Employees' Retirement Sys*, 299 Mich App 322 (2013), and arguing that even if her appeal of the denial of benefits had been timely, Janell Bowden would have been unsuccessful because no medical advisor had certified in writing that she was totally and permanently disabled. Plaintiffs argued that *Polania* should not be applied retroactively and that before *Polania*, the hearing officer would have looked beyond the medical advisor's disability statement and considered all the evidence, including assessments by Bowden's physicians stating that she was disabled. The court, James S. Jamo, J., concluded that *Polania* had not established new law but simply determined the Legislature's intent from the language of the disability statute, which had remained the same since 2002. The court granted defendants' motion, concluding that because Janell Bowden did not meet the requirements of the disability statute, she would not have prevailed on her underlying

disability claim, and therefore plaintiffs could not prevail on their legal malpractice claim. Plaintiffs appealed.

The Court of Appeals *held*:

1. To prevail on an attorney-malpractice action, a plaintiff must prove (1) the existence of an attorney-client relationship, (2) negligence in the legal representation of the plaintiff, (3) that the negligence was a proximate cause of an injury, and (4) the fact and extent of the injury alleged. To prove proximate cause, a plaintiff must show that but for the attorney's alleged malpractice, he or she would have been successful in the underlying suit. This suit-within-a-suit concept applies when the alleged negligent conduct involves the failure of an attorney to properly pursue an appeal. The plaintiff must prove that the attorney's negligence caused the loss or unfavorable result of the appeal and that the loss or unfavorable result in turn caused a loss or unfavorable result in the underlying litigation.

2. The trial court did not err by dismissing plaintiffs' claim. *Polania* did not establish a new rule or principle; rather, it discerned the Legislature's intent from language in MCL 38.24 that had been in effect for five years before Janell Bowden should have appealed the ORS's denial of her application. MCL 38.24(1)(b) provides that a medical advisor must certify an applicant as totally and likely permanently disabled for the applicant to be eligible to receive non-duty-related disability retirement benefits. Because the medical advisor had not certified Janell Bowden as totally and permanently disabled, she was ineligible for benefits and could not establish that she would have prevailed had she timely appealed the initial denial of her application. Therefore, plaintiffs could not show that defendants' negligence was a proximate cause of their damages.

Affirmed.

Blaske & Blaske, PLC (by *Thomas H. Blaske*), for plaintiffs.

Garan Lucow Miller, PC (by *David M. Shafer* and *Mark E. Shreve*), for defendants.

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

PER CURIAM. In this attorney-malpractice claim, plaintiffs appeal as of right an order of the trial court

granting defendants' motion for summary disposition. The court found as a matter of law that defendants' alleged professional negligence was not a proximate cause of plaintiffs' alleged injuries. We affirm.

Plaintiff Janell Bowden worked for the state of Michigan from 1980 until 2007. For most of that time she worked in the motor pool, cleaning and preparing vehicles for use by state employees. She began to have problems with her upper torso in the 1990s, especially her right shoulder, arm, and hand, and underwent several surgeries to fuse her spine and remove bone spurs. In 2001, she began working at the state motor pool as a "storekeeper," signing cars in and out of the motor pool, preparing paperwork to terminate leased cars, and preparing work orders. The job was created for her in order to accommodate the physical restrictions recommended by her physicians.

In May 2008, Janell Bowden filed an application with Michigan's Office of Retirement Services (ORS) for non-duty-related disability retirement benefits, alleging that constant cervical pain resulting from these surgeries had limited her ability to use her right arm and hand. The physician designated by the state to examine her application and medical records, including numerous assessments by her physicians stating that she was disabled, concluded that she was not totally and permanently disabled and that she "should be able to return to her past job . . . ." In a letter dated August 1, 2008, the ORS denied her application and informed her that she had 60 days from the date of the letter to appeal the decision. She engaged attorney Charles Gannaway (a defendant in this case) to represent her on appeal. However, the appeal was not filed timely.

In a November 2008 request to the ORS, Gannaway asked for an appeal hearing, explaining that his request was untimely because of a misfiling of the ORS's decision, but stating that he was making the request anyway "due to just cause." On December 1, 2008, the ORS denied the untimely request for a hearing. Gannaway then filed an unsuccessful petition with the circuit court, asking it to reverse the denial and award Janell Bowden non-duty-related disability retirement benefits. In March 2009, he informed Bowden by letter that he had missed the deadline for filing the appeal, that the ORS had denied his request for a hearing, and that he had filed a petition with the circuit court.

Plaintiffs filed a professional negligence suit against defendants in which they sued for both economic and noneconomic damages.[1] The claim was based on the failure to file a timely appeal of the ORS denial of the non-duty-related retirement benefits. Defendants moved for summary disposition under MCR 2.116(C)(8) and (10). They argued that the failure to file the appeal with the ORS was not a proximate cause of any damage to plaintiffs. They cited *Polania v State Employees' Retirement Sys*, 299 Mich App 322; 830 NW2d 773 (2013), to support their argument that even if the appeal had been filed in a timely manner, Janell Bowden would have been unsuccessful because no medical advisor had certified in writing that she was totally and permanently disabled. Plaintiffs argued that a retroactive application of *Polania* was erroneous, contending that before *Polania*, the hearing officer would have looked beyond a medical advisor's

[1] Plaintiffs' claim against defendant Steven Pollok arose from his handling of Janell Bowden's workers' compensation claim. Their claim against defendant Rapaport Pollok Farrell & Waldron, P.C., was based on a theory of respondeat superior. Plaintiffs stipulated the dismissal of those claims with prejudice.

disability statement and considered all the evidence, including assessments offered by Janell Bowden's physicians stating that she was disabled.

The trial court concluded that *Polania* did not establish new law; rather, it discerned the intent of the Legislature through analysis of the plain language of the disability statute, which had remained the same since its 2002 enactment. Because Janell Bowden did not meet the requirements of the disability statute, the court concluded, she would not have prevailed on her underlying claim and, therefore, plaintiffs could not prevail on their legal malpractice claim. The trial court granted defendants' motion, and plaintiffs argue the court erred by doing so. We review de novo a trial court's decision on a motion for summary disposition. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2002).

The elements of a legal malpractice action are as follows:

> "(1) the existence of an attorney-client relationship;
>
> "(2) negligence in the legal representation of the plaintiff;
>
> "(3) that the negligence was a proximate cause of an injury; and
>
> "(4) the fact and extent of the injury alleged." [*Charles Reinhart Co v Winiemko*, 444 Mich 579, 585-586; 513 NW2d 773 (1994) (citation omitted).]

To prove proximate cause, a plaintiff "must show that *but for* the attorney's alleged malpractice, he would have been successful in the underlying suit." *Id*. at 586 (quotation marks and citation omitted). This "suit within a suit" concept applies when "the alleged negligent conduct involves the failure of an attorney to properly pursue an appeal." *Id*. at 587. In those cases,

the plaintiff must prove that "the attorney's negligence caused the loss or unfavorable result of the appeal" and that "the loss or unfavorable result of the appeal in turn caused a loss or unfavorable result in the underlying litigation." *Id*. at 588. Whether a plaintiff would have prevailed in the underlying appeal is a question of law. *Id*. at 589.

In order to prevail in their legal malpractice claim, plaintiffs had to show that, but for the failure to timely appeal the denial of Janell Bowden's application for non-duty-related disability retirement benefits, she would have been awarded the benefits. MCL 38.24 governs the award of those benefits to qualifying state employees. MCL 38.24(1) states:

> [A] member who becomes totally incapacitated for duty because of a personal injury or disease that is not the natural and proximate result of the member's performance of duty may be retired if all of the following apply:
>
> (a) The member . . . files an application . . . with the retirement board no later than 1 year after termination of the member's state employment.
>
> (b) A medical advisor conducts a medical examination of the member and certifies in writing that the member is mentally or physically totally incapacitated for further performance of duty, that the incapacitation is likely to be permanent, and that the member should be retired.
>
> (c) The member has been a state employee for at least 10 years.

Plaintiffs argue that before *Polania*, an appeal of the ORS's denial of Janell Bowden's application would have been governed by *Gordon v Bloomfield Hills*, 207 Mich App 231, 232; 523 NW2d 806 (1994), which required a reviewing court to "consider all the evidence on the record, not just that supporting the agency's decision." Had Gannaway filed a timely appeal, plain-

tiffs argue, a review of the "whole record" would have resulted in reversal of the denial because assessments from several independent physicians clearly established the disability.

Contrary to plaintiffs' insistence, this matter does not involve the question of the retroactive application of a new rule or principle. We would note preliminarily that the statute that the *Polania* Court interpreted was a statute in effect at the time of the decision. The 2002 amendments of MCL 38.24 used the unambiguous word "all" when setting forth what conditions must be met before the retirement board may consider a member for non-duty-related disability retirement. 2002 PA 93. As the trial court noted, *Polania* did not establish a new rule or principle. Rather, it discerned the Legislature's intent from the plain language of MCL 38.24, which had been in effect for five years before the time Janell Bowden should have appealed the ORS denial of her disability application. From the time of its amendment in 2002, MCL 38.24 has meant that for an applicant to be eligible to receive a non-duty-related disability retirement, a medical advisor had to certify the applicant as totally and likely permanently disabled. MCL 38.24(1)(b). *Polania* clarified, not introduced, this requirement.

It is undisputed that the medical advisor had not certified Janell Bowden as totally and permanently disabled and that without the certification she was ineligible for benefits under the plain language of MCL 38.24(1)(b). Therefore, because plaintiffs cannot establish that Janell Bowden would have prevailed had Gannaway filed a timely appeal of the initial denial of her application for benefits, plaintiffs cannot show that Gannaway's negligence was a proximate cause of their

alleged damages, and, consequently, the trial court did not err by dismissing their claim.

Affirmed.

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

LEE v SMITH

Docket No. 320123. Submitted May 12, 2015, at Detroit. Decided May 19, 2015, at 9:10 a.m.

Marlo A. Lee brought an action in the Family Division of the Genesee Circuit Court seeking child support from David A. Smith for their 18-year-old son. The court, Duncan M. Beagle, J., ordered defendant to pay plaintiff $580 a month under MCL 552.605b(2), a provision of the Support and Parenting Time Enforcement Act, MCL 552.601 *et seq*., which authorizes a court to order child support for a child who has reached the age of 18 and is attending high school full-time. Defendant appealed, arguing that MCL 552.605b(5) precluded the award because the parties did not have an agreement for postmajority child support.

The Court of Appeals *held*:

The trial court did not err by ordering defendant to pay child support under MCL 552.605b(2). This provision constituted a continuation of the Legislature's initial response to *Smith v Smith*, 433 Mich 606 (1989), which held that a court had no jurisdiction to order postmajority child support absent an agreement by the parties, by establishing a court's limited ability to order such support. MCL 552.605b(5) did not affect the authority granted in MCL 552.605b(2); rather, it independently set forth requirements for enforcing agreements for postmajority child support in a judgment or order, regardless of whether the agreement concerned a child who satisfied the requirements for support in MCL 552.605b(2). Viewing MCL 552.605b(5) as a limitation on MCL 552.605b(2) would prohibit courts from ordering any support for a child beyond the age of 18 absent the agreement of the parties, which would render MCL 552.605b(2) nugatory. Moreover, MCL 552.605b(2) and MCL 552.605b(5) have distinct and independent purposes. MCL 552.605b(2) permits courts, with certain conditions, to order support until a child reaches 19 years and 6 months of age, while MCL 552.605b(5) allows for orders extending beyond 19 years and 6 months. Defendant's proposed interpretation would have contravened the Legislature's clearly expressed intent to authorize courts to order support for a child

between 18 and 19½ years of age who was still attending high school as provided in MCL 552.605b(2). Because defendant did not challenge the trial court's determination that the requirements for postmajority child support in MCL 552.605b(2) were satisfied, the order was affirmed.

Affirmed.

PARENT AND CHILD — CHILD SUPPORT — POSTMAJORITY CHILD SUPPORT — AGREEMENTS.

A court may order a party to pay child support for a child who has reached the age of 18 and is regularly attending high school on a full-time basis as provided in MCL 552.605b(2) even if the parties have no agreement for postmajority child support as addressed in MCL 552.605b(5).

Charles D. Riley for plaintiff.

D. Craig Henry for defendant.

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

GADOLA, J. Defendant, David A. Smith, appeals as of right from the trial court's order requiring him to pay child support of $580 a month to plaintiff, Marlo A. Lee, from August 7, 2013, to May 31, 2014, while the parties' son, who had attained the age of majority, attended high school. We affirm.

The parties' child was 18 years old when plaintiff filed this action for child support. He was enrolled as a full-time student at an accredited high school, and was taking sufficient credits to graduate. Defendant argues that the trial court was not authorized to enter an order of child support after the child was 18 years old without an agreement by the parties. He argues that the trial court erred by finding that MCL 552.605b(2), which is part of the Support and Parenting Time Enforcement Act (SPTEA), MCL 552.601 *et seq*., authorized the award of child support.

The interpretation of a statute is reviewed de novo, as a question of law. *Driver v Naini*, 490 Mich 239, 246; 802 NW2d 311 (2011). A court's primary goal when interpreting a statute is to discern legislative intent first by examining the plain language of the statute. *Id*. at 246-247. Courts construe the words in a statute in light of their ordinary meaning and their context within the statute as a whole. *Johnson v Recca*, 492 Mich 169, 177; 821 NW2d 520 (2012). 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. *Id*. Statutory provisions must also be read in the context of the entire act. *Driver*, 490 Mich at 247. It is presumed that the Legislature was aware of judicial interpretations of the existing law when passing legislation. *People v Likine*, 492 Mich 367, 398 n 61; 823 NW2d 50 (2012). When statutory language is clear and unambiguous, courts enforce the language as written. *Lafarge Midwest, Inc v Detroit*, 290 Mich App 240, 246-247; 801 NW2d 629 (2010). A statutory provision is ambiguous only when it irreconcilably conflicts with another provision or is equally susceptible to more than one meaning. *Id*. at 247.

MCL 552.605b was added to the SPTEA by 2001 PA 106, effective September 30, 2001. Orders of child support issued pursuant to a judgment of divorce had previously been governed by MCL 552.16. In *Smith v Smith*, 433 Mich 606; 447 NW2d 715 (1989), our Supreme Court had interpreted multiple provisions of Michigan's divorce laws, MCL 552.1 *et seq*., including MCL 552.16, and the Age of Majority Act, MCL 722.51 *et seq*. The Court held that Michigan law did not authorize courts to order postmajority child support for a child over the age of 18. *Id*. at 632-633. Although the Supreme Court's decision in *Smith* prevented courts from inde-

pendently ordering postmajority child support, the decision did not preclude courts from enforcing an agreement by the parties to pay such support. *Holmes v Holmes*, 281 Mich App 575, 590-592; 760 NW2d 300 (2008); *Aussie v Aussie*, 182 Mich App 454, 464; 452 NW2d 859 (1990).

In response to the Supreme Court's decision in *Smith*, in 1990 the Legislature enacted MCL 552.16a. *Rowley v Garvin*, 221 Mich App 699, 706; 562 NW2d 262 (1997). MCL 552.16a, as enacted by 1990 PA 243, provided the following:

> (2) Beginning on the effective date of this section, the court may order support for the time a child is regularly attending high school on a full-time basis with a reasonable expectation of completing sufficient credits to graduate from high school while residing on a full-time basis with the payee of support or at an institution, but in no case after the child reaches 19 years and 6 months of age. A complaint or motion requesting support as provided in this section may be filed at any time before the child reaches 19 years and 6 months of age.
>
> * * *
>
> (4) Notwithstanding subsection (2), a provision contained in a judgment or an order entered under this act before, on, and after the effective date of this section that provides for the support of a child after the child reaches 18 years of age is valid and enforceable if 1 or more of the following apply:
>
> (a) The provision is contained in the judgment or order by agreement of the parties as stated in the judgment or order.
>
> (b) The provision is contained in the judgment or order by agreement of the parties as evidenced by the approval of the substance of the judgment or order by the parties or their attorneys.

> (c) The provision is contained in the judgment or order by written agreement signed by the parties.
>
> (d) The provision is contained in the judgment or order by oral agreement of the parties as stated on the record by the parties or their attorneys.

In 2001, the Legislature added MCL 552.605b to the SPTEA by enacting 2001 PA 106, effective September 30, 2001. The Legislature also enacted 2001 PA 107, effective September 30, 2001, which amended MCL 552.16 and repealed MCL 552.16a.[1] MCL 552.16(1) now provides, "Subject to section 5b of the [SPTEA], the court may also order support as provided in this subsection for the parties' children who are not minor children." Likewise, MCL 552.16(2) currently states that "[a]n order concerning the support of a child of the parties is governed by and is enforceable as provided in the [SPTEA], MCL 552.601 to 552.650."

As originally added to the SPTEA in 2001, MCL 552.605b was consistent with former MCL 552.16a with respect to both a court's authority to order postmajority child support and the enforceability of a judgment or order based on an agreement by the parents to provide postmajority child support.[2] MCL 552.605b provides, in pertinent part:

> (1) A court that orders child support may order support for a child after the child reaches 18 years of age as provided in this section.

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[1] A similar provision, MCL 722.717a, was added to the Paternity Act, MCL 722.711 *et seq*., by 1990 PA 244, and was repealed by 2001 PA 109, effective September 30, 2001. The Paternity Act now provides that "[s]ubject to section 5b of the [SPTEA], MCL 522.605b, the court may also order support for a child after he or she reaches 18 years of age." MCL 722.717(2).

[2] MCL 552.605b was minimally altered by 2009 PA 193.

(2) The court may order child support for the time a child is regularly attending high school on a full-time basis with a reasonable expectation of completing sufficient credits to graduate from high school while residing on a full-time basis with the recipient of support or at an institution, but in no case after the child reaches 19 years and 6 months of age. A complaint or motion requesting support as provided in this section may be filed at any time before the child reaches 19 years and 6 months of age.

* * *

(5) A provision contained in a judgment or an order entered under this act before, on, or after September 30, 2001 that provides for the support of a child after the child reaches 18 years of age is valid and enforceable if 1 or more of the following apply:

(a) The provision is contained in the judgment or order by agreement of the parties as stated in the judgment or order.

(b) The provision is contained in the judgment or order by agreement of the parties as evidenced by the approval of the substance of the judgment or order by the parties or their attorneys.

(c) The provision is contained in the judgment or order by written agreement signed by the parties.

(d) The provision is contained in the judgment or order by oral agreement of the parties as stated on the record by the parties or their attorneys.

Defendant argues that Subsection (5) applies to, or otherwise precludes a court from imposing, a child support obligation under Subsection (2) unless the parties have an agreement for postmajority child support. We reject this reading of the statute. Subsection (2) constitutes a continuation of the Legislature's initial response to our Supreme Court's decision in *Smith*, 433 Mich at 632-633, which held that a court

has no jurisdiction to order postmajority child support absent an agreement by the parties, by establishing a court's limited authority to order such support. Subsection (5) does not affect the authority granted in Subsection (2), but rather independently sets forth requirements for enforcing agreements for postmajority child support in a judgment or order, regardless of whether the agreement concerns a child who satisfies the requirements for support in Subsection (2).

Viewing Subsection (5) as a limitation on Subsection (2) would prohibit courts from ordering any support for a child beyond the age of 18 absent the agreement of the parties. Such a reading would render Subsection (2) nugatory. Moreover, Subsections (2) and (5) have distinct and independent purposes. Subsection (2) permits courts, with certain conditions, to order support until a child reaches 19 years and 6 months of age, while Subsection (5) allows for orders extending beyond 19 years and 6 months, covering, for example, agreements to provide for college expenses. Examining MCL 552.605b as a whole, we conclude that defendant's proposed interpretation would contravene the Legislature's clearly expressed intent to authorize courts to order support for a child between 18 and 19½ years of age who is still attending high school as provided in Subsection (2). Because Subsection (5) is not applicable to the circumstances of this case, and defendant has not challenged the trial court's determination that the requirements for postmajority child support in Subsection (2) were satisfied, we affirm the trial court's support order.[3]

[3] Defendant also argues in his brief on appeal that before a court may grant child support beyond the age of 18, "the provision must be present in an existing order or judgment," and that "[i]n the present case, no prior [order] or judgment exists." Defendant provides no

Affirmed.

MURPHY, P.J., and STEPHENS, J., concurred with GADOLA, J.

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explanation or authority for this argument. Accordingly, we consider it abandoned on appeal. *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

PEOPLE v LYON

Docket No. 319242. Submitted May 14, 2015, at Traverse City. Decided May 19, 2015, at 9:15 a.m.

William S. Lyon was bound over for trial in the Grand Traverse Circuit Court on charges of operating a vehicle while intoxicated, third offense, MCL 257.625(1) and (9)(c), and possessing an open container of alcohol in a vehicle, MCL 257.624a, for driving his four-wheeled electric scooter on a public highway while intoxicated and drinking a can of beer. The court, Philip E. Rodgers, Jr., J., dismissed the charges on the ground that defendant's scooter, which he uses in lieu of a wheelchair, was an electric personal assistive mobility device and therefore, under MCL 257.33, not a motor vehicle for purposes of the Michigan Vehicle Code, MCL 257.1 *et seq*. The Court of Appeals granted the prosecution's application for leave to appeal.

The Court of Appeals *held*:

The circuit court abused its discretion by dismissing the charges against defendant and also clearly erred by characterizing defendant's four-wheeled scooter as an electric personal assistive mobility device, which MCL 257.13c defines as having two wheels. Regardless of whether defendant's device could have been characterized as a low-speed vehicle under MCL 257.25b or a moped under MCL 257.32b, his conduct was not exempt from prosecution because, under MCL 257.657, he was subject to all of the duties applicable to the driver of a vehicle, a term defined more inclusively than "motor vehicle" for purposes of the provisions under which defendant was charged. Under MCL 257.79, the term "vehicle" included defendant's scooter, which was a device upon which a person was transported upon a highway. The fact that defendant used the scooter as a wheelchair did not exempt him from operating it within the confines of the law while proceeding along the roadway.

Reversed and remanded for further proceedings.

INTOXICATING LIQUORS — MICHIGAN VEHICLE CODE — OPERATING WHILE INTOXICATED — FOUR-WHEELED ELECTRIC SCOOTERS.

A person operating a four-wheeled electric scooter on a public

> highway may be charged with operating a vehicle while intoxicated or possessing an open container of alcohol in a vehicle, regardless of whether the scooter is being used as a wheelchair (MCL 257.625(1); MCL 257.624a).

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Robert A. Cooney*, Prosecuting Attorney, and *Christopher D. Tholen*, Assistant Prosecuting Attorney, for the people.

David J. Clark for defendant.

Before: GLEICHER, P.J., and K. F. KELLY and SERVITTO, JJ.

PER CURIAM. The district court bound defendant over for trial on charges of operating a vehicle while intoxicated, third offense (OWI), MCL 257.625(1) and (9)(c), and possessing an open container of alcohol in a vehicle, MCL 257.624a, for driving his personal electric scooter on a public highway while intoxicated and drinking a can of beer. The circuit court subsequently dismissed the charges, rejecting the proposition that the scooter was a "vehicle" under the Michigan Vehicle Code (MVC), MCL 257.1 *et seq*. Because defendant was using the scooter as a vehicle on a public highway and was thereby subject to the rules of the road, we reverse.

I. BACKGROUND

Defendant is disabled. In lieu of a wheelchair, defendant uses a slow-moving, electric four-wheeled scooter to get around. On the day in question, Traverse City police officers observed defendant traveling along the paved portion of the "curb lane" along Garfield Avenue on his scooter. Defendant was weaving into the traffic lane, causing a backup. When the officers effectuated a

traffic stop, defendant was holding an open can of beer. Defendant failed field sobriety tests and admitted that he was intoxicated.

II. ANALYSIS

We review for an abuse of discretion a circuit court's decision to dismiss the charges levied against a defendant. *People v Lewis*, 302 Mich App 338, 341; 839 NW2d 37 (2013). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *Id*. "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).

The propriety of the charges against defendant depends on the definition of "vehicle" as contained in the charges against him. "[T]he interpretation and application of a statute . . . is a question of law" that we review de novo. *People v Zajaczkowski*, 493 Mich 6, 12; 825 NW2d 554 (2012). The foremost rule of statutory construction is to discern and give effect to the intent of the Legislature. *People v Cole*, 491 Mich 325, 330; 817 NW2d 497 (2012). In doing so, we focus on the plain language of the statute and, if the statute is unambiguous, "must conclude that the Legislature 'intended the meaning clearly expressed[.]' " *Id*. (citation omitted). Although we generally interpret terms in a statute according to their ordinary meanings, we must accept and apply the definitions of terms specifically provided in a statutory scheme. *McAuley v Gen Motors Corp*, 457 Mich 513, 518; 578 NW2d 282 (1998).

The circuit court dismissed charges brought against defendant under MCL 257.625(1) and MCL 257.624a. Pursuant to MCL 257.624a(1), the operator "of a vehicle upon a highway" may not "transport or possess"

alcohol in an "open or uncapped" container. MCL 257.625(1) precludes the operation of "a vehicle upon a highway" by an individual who is under the influence of alcohol or has a blood alcohol content of at least 0.08 grams per 100 milliliters of blood. Defendant does not challenge that he was intoxicated and in possession of an open container of alcohol. He does not contest that he was traveling "upon the highway." Rather, defendant argued below, and convinced the circuit court, that his scooter did not qualify as a "vehicle."

Pursuant to MCL 257.1, when applying the provisions of the MVC, courts must employ definitions provided in the act. MCL 257.33 of the MVC defines a "motor vehicle" as

> every vehicle that is self-propelled . . . . Motor vehicle does not include an electric patrol vehicle being operated in compliance with the electric patrol vehicle act . . . . Motor vehicle does not include an electric personal assistive mobility device. Motor vehicle does not include an electric carriage.

A "vehicle," in turn, is defined as

> every device in, upon, or by which any person or property is or may be transported or drawn upon a highway, except devices exclusively moved by human power or used exclusively upon stationary rails or tracks . . . . [MCL 257.79.]

The circuit court found that defendant's scooter was "an electric personal assistive mobility device" as exempted from the definition of "motor vehicle." MCL 257.13c defines an "electric personal assistive mobility device" as "a self-balancing nontandem 2-wheeled device, designed to transport only 1 person at a time . . . ." As noted by the prosecutor, such devices are generally called "Segways." The circuit court clearly erred by characterizing defendant's scooter under this

definition. The scooter at issue in this case is a four-wheeled device.

In the alternative, defendant contended that his scooter is a "low-speed vehicle," subject to different rules of operation. MCL 257.25b defines "low-speed vehicle" as "a self-propelled motor vehicle" that fits within the definition and standards of 49 CFR 571.3(b) and 49 CFR 571.500. Pursuant to 49 CFR 571.3, a "low-speed vehicle" has four wheels and can travel between 20 and 25 miles an hour. Defendant's scooter does not fit this definition because its top speed is only four miles an hour. Defendant also attempted to qualify his scooter as a "moped," which is defined by MCL 257.32b as "a 2- or 3-wheeled vehicle" with a motor 100cc or smaller that "cannot propel the vehicle at a speed greater than 30 miles per hour on a level surface" and does not require gear shifts. The number of wheels on defendant's scooter again renders this definition inapplicable.

What defendant and the circuit court failed to appreciate is that even if defendant's scooter qualified as an electric personal assistive mobility device, low-speed vehicle, or moped, his conduct would not be exempt from prosecution. An operator of such a device "upon a roadway has all of the rights and is subject to all of the duties applicable to the driver of a vehicle" under the "traffic laws" chapter of the MVC. MCL 257.657. The charges brought against defendant fall within that chapter. See MCL 257.601 *et seq*. Moreover, the definition of "vehicle," the term actually used in MCL 257.624a and MCL 257.625, is much more inclusive than the definition of "motor vehicle," including "every device in, upon, or by which any person or property is or may be transported or drawn upon a

highway[.]" MCL 257.79. Defendant's scooter was a device upon which a person was transported upon a highway.

In *People v Rogers*, 438 Mich 602; 475 NW2d 717 (1991), the Supreme Court clarified that a person using a device that does not fit within the usual definition of a "motor vehicle" may be prosecuted for operating a "vehicle" under the influence of alcohol if the device is operated upon a highway. The defendant in *Rogers* operated his snowmobile on the shoulder of a highway while intoxicated. *Id*. at 605. The Court emphasized that statutes generally prohibited riders from operating a snowmobile on the highway. *Id*. at 606. Despite this proscription, the Court continued, a snowmobile is a motorized device that is capable of being used on the highway and therefore falls within the definition of a "vehicle" when it is so operated. *Id*. at 605-606. The defendant contended that he should have been charged under a statute prohibiting the operation of a snowmobile while intoxicated, an offense that carried a lesser penalty. *Id*. at 607. The Supreme Court disagreed: "The OUIL provision of the Vehicle Code proscribes operation of any vehicle upon a highway while intoxicated. In addition, because snowmobiles, albeit under limited circumstances, may be operated on highways, it can be said that the snowmobile act proscribes operating a snowmobile on a highway while intoxicated." *Id*. at 607-608 (citations omitted). Just as the MVC applied to the *Rogers* defendant's snowmobile when used as a "vehicle" "upon a highway," the MVC governed the current defendant's conduct when he used his scooter as a vehicle upon a highway.

That defendant's electric scooter substituted as a wheelchair also does not exempt defendant from prosecution. The MVC recognizes that disabled persons

may be unable to walk, requiring reliance on a wheelchair "or other device." MCL 257.19a(c)(*ii*). This definition of disabled persons, however, does not exempt those persons from operating vehicles within the confines of the law. Beyond requiring motorists to use extra caution when approaching a disabled person using an assistive device in a crosswalk, the MVC does not make special exceptions for the use of such assistive devices while proceeding along the traveled portion of the highway. See MCL 257.612. By placing his scooter in the roadway, defendant undertook the duties of a vehicle driver, which include refraining from driving while intoxicated or with an open container. Accordingly, the circuit court committed clear legal error and abused its discretion by dismissing the charges in this case.[1]

We reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

GLEICHER, P.J., and K. F. KELLY and SERVITTO, JJ., concurred.

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[1] Defendant argues that *Bertrand v Mackinac Island*, 256 Mich App 13; 662 NW2d 77 (2003), establishes precedent that his scooter is not a vehicle. That case dealt primarily with the equal enjoyment of a public service by a disabled person, which is not at issue here. Further, that case involved a specialized tricycle which had regular bicycle pedals and "an electric assist that can be engaged and disengaged." *Id*. at 16. That device is distinct from defendant's device, which cannot be used with human power and relies upon its electric motor. Most significantly, the Mackinac Island ordinance at issue provided its own definition of "motor vehicle," which specifically excluded mechanized wheelchairs and 3-wheeled scooters. *Id*. at 15-16, 25. The MVC does not contain a similar exclusion. Therefore, *Bertrand*'s conclusion was that the tricycle at issue was "not a 'motor vehicle' as the term is commonly understood" and not as that term is defined in the MVC. *Id*. at 31.

AGNONE v HOME-OWNERS INSURANCE COMPANY

Docket No. 320196. Submitted May 12, 2015, at Detroit. Decided May 19, 2015, at 9:20 a.m.

John Agnone brought an action in the Wayne Circuit Court against Home-Owners Insurance Company, alleging that defendant had breached the parties' insurance contract by failing to pay certain personal protection insurance benefits after plaintiff was injured in a car crash. Specifically, plaintiff claimed that defendant should pay him a work-loss benefit equal to the difference between his average annual income in the years preceding the accident and his actual annual income in the years after the accident, which he claimed amounted to approximately $100,000. Defendant moved for partial summary disposition under MCR 2.116(C)(10) on the ground that plaintiff's income exceeded the monthly limit set forth in MCL 500.3107(1)(b). Plaintiff responded that this limit applied to the difference between the income that he would have earned and his actual income, and that defendant was therefore responsible for all his lost income. The court, Daniel P. Ryan, J., denied the motion and also denied defendant's motion for reconsideration. The Court of Appeals granted defendant's application for leave to appeal.

The Court of Appeals *held*:

The trial court erred when it construed MCL 500.3107(1)(b) as a limit on the total amount of work loss that is compensable, rather than as a limit on the combined work-loss benefit and income earned in the same period as the work-loss benefit. Because plaintiff continued to earn more than the applicable statutory maximum, the trial court should have determined that he was not entitled to any work-loss benefit under MCL 500.3107(1)(b) and should have granted defendant's motion for partial summary disposition on that basis.

Reversed and remanded for entry of an order granting Home-Owners' motion for partial summary disposition.

INSURANCE — NO-FAULT — PERSONAL PROTECTION INSURANCE — WORK-LOSS BENEFITS — STATUTORY MONTHLY MAXIMUM.

The statutory limit on the amount of personal protection insurance

> benefits payable for work loss sustained in a single 30-day period and the income earned by an injured person for work during the same period together set forth in MCL 500.3107(1)(b) is a limit on the combined work-loss benefit and income earned in the same period as the work-loss benefit, not a limit on the total amount of work loss that is compensable.

Mark Granzotto, PC (by *Mark Granzotto*), and *Thomas, Garvey & Garvey* (by *Robert F. Garvey* and *James McKenna*) for plaintiff.

Garan Lucow Miller, PC (by *Caryn A. Ford* and *Nathan A. Dodson*), for defendant.

Before: WILDER, P.J., and OWENS and M. J. KELLY, JJ.

PER CURIAM. In this dispute over first-party benefits under Michigan's no-fault act, defendant, Home-Owners Insurance Company, appeals by leave granted the trial court's order denying its motion for partial summary disposition under MCR 2.116(C)(10). On appeal, Home-Owners argues that the trial court erred when it determined that plaintiff, John Agnone, was entitled to work-loss benefits under the no-fault act even though the undisputed evidence showed that his income after the accident exceeded the statutory maximum. We conclude that the trial court erred when it determined that the statutory maximum applied to the difference between Agnone's income before the accident and his income after the accident. In MCL 500.3107(1)(b), the Legislature provided that the maximum applies to the loss of income incurred in a single 30-day period plus the income that the injured person earned in that same period. Because the undisputed evidence showed that Agnone earned more than the applicable maximum, he was not entitled to any work-loss benefit under MCL 500.3107(1)(b), and the trial

court should have granted Home-Owners' motion. Accordingly, we reverse and remand for entry of an order granting Home-Owners' motion for partial summary disposition.

I. BASIC FACTS

Agnone testified at his deposition that he and his wife went out to purchase a Christmas tree in December 2009. On their way home, he stopped before merging onto another road and another driver drove into the rear of Agnone's car. Referring to a previous accident that he had in 2005, Agnone said he immediately knew that his neck and back had been hurt again.

Agnone owns and operates his own insurance agency. Before the 2009 accident, Agnone earned between $183,000 and $200,000 a year in gross income, which amounted to an average of more than $196,000 a year in gross income. Agnone admitted that his income increased to more than $222,000 in 2010, but explained that the increase arose from work he had performed before the accident. Although he continued to work after the accident, Agnone said he was no longer able "to put forth the effort to continue to go to the extra appointment." As a result of the reduced client contact, he was unable to generate as many sales and suffered a wage loss in the following years. His gross income dropped to around $140,000 in 2011, and to around $135,000 in 2012.

In January 2012, Agnone sued Home-Owners for breach of the motor vehicle insurance policy that it had issued to him.[1] Agnone alleged that Home-Owners breached the agreement by refusing to pay

[1] Agnone originally sued in district court, but the district court transferred it to circuit court.

certain personal protection insurance benefits. He later asserted that Home-Owners should pay him a work-loss benefit equal to the difference between his average annual income in the preceding years and his actual annual income in the years after the accident. He claimed approximately $48,000 in lost income for 2011 and approximately $52,000 in lost income for 2012.

In October 2013, Home-Owners moved for partial summary disposition under MCR 2.116(C)(10). Home-Owners presented evidence that Agnone made substantially more than the $4,878 monthly limit provided under MCL 500.3107(1)(b). Because his actual income exceeded the limit, Home-Owners further maintained, Agnone's lost income was not compensable under the policy. Home-Owners asked the trial court to dismiss Agnone's claim to the extent that it included a request for wage-loss benefits.

In response, Agnone argued that the limit stated under MCL 500.3107(1)(b) applied to the difference between the income that he would have earned and his actual income. Because his wage loss for each of the 30-day periods at issue was less than the applicable maximum of $4,878, he argued Home-Owners was responsible for all his lost income.

The trial court agreed with Agnone's interpretation of the limit on work-loss benefits and denied Home-Owners' motion for partial summary disposition.

After the trial court denied Home-Owners' motion for reconsideration, it applied for leave to appeal in this Court. This Court granted leave to appeal in March 2014.[2]

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[2] See *Agnone v Home-Owners Ins Co*, unpublished order of the Court of Appeals, entered March 21, 2014 (Docket No. 320196).

II. SUMMARY DISPOSITION

A. STANDARDS OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). This Court also reviews de novo the proper interpretation of the no-fault act. *In re Carroll (On Remand)*, 300 Mich App 152, 159; 832 NW2d 276 (2013).

B. WORK-LOSS BENEFIT

Because he was injured in a motor vehicle accident, Agnone was entitled to a variety of personal protection insurance benefits—commonly called PIP benefits—from his no-fault insurer, *id*., which in this case was Home-Owners. "The statutory PIP benefits include 'four general categories of expenses and losses: survivor's loss, allowable expenses, work loss, and replacement services.' " *Id*., quoting *Johnson v Recca*, 492 Mich 169, 173; 821 NW2d 520 (2012). In its motion for partial summary disposition, Home-Owners challenged Agnone's right to recover work-loss benefits.

A no-fault insurer must pay an injured insured for work loss "consisting of loss of income from work [the] injured person would have performed during the first 3 years after the date of the accident if he or she had not been injured." MCL 500.3107(1)(b). This provision was intended to "compensate the injured person for income he would have received but for the accident." *MacDonald v State Farm Mut Ins Co*, 419 Mich 146, 152; 350 NW2d 233 (1984); see also *Popma v Auto Club Ins Ass'n*, 446 Mich 460, 472; 521 NW2d 831 (1994) ("Work-loss benefits are meant primarily to provide claimants with simple income insurance and are in-

tended to compensate claimants approximately dollar for dollar for the amount of wages lost because of the injury or disability."). Although the Legislature required no-fault insurers to compensate injured persons for their work loss occasioned by a motor vehicle accident, it also limited the extent of work-loss benefits that the no-fault insurer might be obligated to pay: "the benefits payable for work loss sustained in a single 30-day period and the income earned by an injured person for work during the same period together shall not exceed [$4,878],[3] which maximum shall apply pro rata to any lesser period of work loss." MCL 500.3107(1)(b). At issue on appeal is whether the insurer must pay a work-loss benefit equal to the difference between the income that the injured person would have earned from work and his or her actual income from work during the same period, but not more than the statutory maximum, or whether the insurer is obligated to pay the work-loss benefit, but only to the extent that the injured person's income from work after the accident plus his or her work-loss benefit does not exceed the statutory maximum.

MCL 500.3107(1)(b) provides a benefit for the "loss of income from work an injured person would have performed . . . if he or she had not been injured" without reference to the injured person's income from work that he or she performs after the accident.[4] The Legislature first mentioned the injured person's income from work that he or she performs after the

[3] The maximum work-loss benefit is adjusted annually to reflect changes in the cost of living. See MCL 500.3107(1)(b); Mich Admin Code, R 500.811. The parties agree that the applicable amount on the date of the accident at issue was $4,878 per month.

[4] The Legislature provided that the work-loss benefit must normally be reduced by 15% to correct for the fact that work-loss benefits are not taxed. See MCL 500.3107(1)(b).

accident in the provision limiting the work-loss benefit: "the benefits payable for work loss sustained in a single 30-day period *and* the income earned by an injured person for work during the same period *together* shall not exceed" the applicable maximum. MCL 500.3107(1)(b) (emphasis added). By stating that the "benefits payable" and "the income earned" for the same period "together" shall not exceed the maximum, the Legislature unambiguously provided that a no-fault insurer was obligated to compensate the injured person for the loss of income for work that he or she would have performed were it not for the accident, but only to the extent that the work-loss benefit, when added to the injured person's income from work performed after the accident during the same period, does not exceed the statutory maximum. Stated another way, if the income from work that the injured person would have performed plus the income from work that he or she actually earned during the same period exceeds the statutory maximum, the work-loss benefit must be reduced until the benefit plus the income earned is equal to the maximum. If the income that the injured person actually earned for work performed during the relevant period exceeds the statutory maximum, as is the situation in this case, the work-loss benefit is reduced to zero because the "benefits payable for work loss . . . *and* the income earned . . . for work during the same period *together*" cannot exceed the applicable maximum, MCL 500.3107(1)(b) (emphasis added). This is so even though the injured person is able to show that he or she has suffered a loss of income from work that he or she would have performed but for the accident. When the limitation on the work-loss benefit is analyzed in its proper context, it is evident that the Legislature intended to allow a dollar-for-dollar work-loss benefit up to a specified income

level—not up to a specified income loss—and this Court must enforce the Legislature's decision to limit the benefit in this way. See *Pohutski v City of Allen Park*, 465 Mich 675, 683; 641 NW2d 219 (2002).

The undisputed evidence showed that Agnone earned more income from work after his accident than the statutory maximum applicable to the work-loss benefit. Accordingly, he is not entitled to any work-loss benefit and the trial court should have granted Home-Owners' motion for partial summary disposition on that basis. Moreover, contrary to Agnone's contention on appeal, this construction is consistent with this Court's historical application of the statutory limit.

This Court addressed the proper construction of this same statutory limitation in *Snellenberger v Celina Mut Ins Co*, 167 Mich App 83; 421 NW2d 579 (1988).[5] In that case, Lewis Snellenberger's employer moved him to a job with lighter duties after he was injured in a motor vehicle accident. *Id*. at 84. The new job paid significantly less than the job Snellenberger performed before he was injured. When his insurer, Celina Mutual Insurance Company, stopped paying work-loss benefits, Snellenberger sued Celina Mutual. The trial court thereafter entered a judgment in favor of Snellenberger, and Celina Mutual appealed in this Court. *Id*. at 84-85. Celina Mutual argued on appeal that the trial court erred when it failed to deduct the monthly wages that Snellenberger earned in "his postinjury job and the monthly workers' compensation benefits he received" from the maximum applicable to the work-loss benefit. *Id*. at 85.

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[5] At the time, the work-loss benefit was codified at MCL 500.3107(b). The Legislature inserted the subsection numbering in 1991. See 1991 PA 191.

In examining the issue, this Court stated that Snellenberger would normally be "entitled to receive the loss of income from work he would have performed . . . minus fifteen percent." *Id*. at 86. That benefit, the Court recognized, was nevertheless subject to a statutory limit: "His work-loss benefits during any thirty-day period, however, when added to income earned during that same period, cannot exceed $2,252."[6] *Id*. To calculate the proper work-loss benefit, this Court first determined the total monthly income that Snellenberger earned at the time of his injury—and would presumably have continued to earn had he not been injured—and adjusted it downward by the required 15 percent to arrive at a figure of $2,807.18. It then compared Snellenberger's adjusted monthly income from before the accident, $2,807.18, to the maximum work-loss benefit applicable at the time, which was $2,252. Because Snellenberger's monthly income prior to the accident was higher than the statutory maximum, the Court concluded that it must use the lower amount as the starting point for calculating the work-loss benefit. *Id*.

Then, in order to give effect to the limit that the Legislature provided for work-loss benefits, the Court stated, it had to reduce the applicable maximum by the amount of income from work that Snellenberger performed after his accident:

> Section 3107(b) specifies that "[t]he benefits payable for work loss sustained in a single 30-day period *and* the income earned by an injured person for work during the same period *together* shall not exceed [$2,252]." (Emphasis added.) Accordingly, the income earned by an injured person for work performed during a thirty-day work-loss

[6] The Court used $2,252 because that was the then applicable statutory maximum. See *id*. at 86 n 1.

> benefits period must be deducted from the statutory maximum before benefits are paid. In the present case, [Snellenberger], since April 6, 1985, worked in a less strenuous and lower-paying position than that of his pre-injury employment, earning $1,157 per month. Thus, the amount of [his] work-loss benefits payable after April 6, 1985, as calculated under [MCL 500.3107(b)], would be $1,095 per month: $2,252 (the monthly statutory maximum) minus $1,157 (the monthly income earned by [Snellenberger]).
>
> In making this calculation, we follow statutory dictates by deducting the amount of [Snellenberger's] wages from the applicable statutory maximum of $2,252 and not from [his] actual work loss of $3,302.56 per month. [*Id*. at 86-87 (second and third alterations in original).]

Agnone argued before the trial court, and the trial court agreed, that the decision in *Snellenberger* supported his claim because the Court in that case awarded Snellenberger a work-loss benefit on the basis of a wage differential. That is, he argues that *Snellenberger* stands for the proposition that an injured person is entitled to a work-loss benefit equal to *all* of the injured person's lost income, as long as the monthly total does not exceed the statutory maximum. But that is not how the Court in *Snellenberger* actually applied the law. The difference between Snellenberger's unadjusted income before the accident ($3,302.56) and his income after the accident ($1,157) was $2,145.56, which amount was less than the applicable maximum for work-loss benefit ($2,252). See *id*. Accordingly, had the Court used a true wage differential, it would have awarded Snellenberger the full $2,252, which it did not do. The Court in *Snellenberger* obviously did not apply the maximum to the differential between the income that Snellenberger would have earned from work, but for the accident, and his actual income. Instead, the Court devised a formula for calculating the work-loss

benefit in a manner that gave effect to the Legislature's explicit requirement that the work-loss benefit plus the injured person's actual income in the same 30-day period not exceed the statutory maximum. It started by deriving a base wage-loss benefit equal to the lesser of the applicable statutory maximum or the injured person's *total* monthly income from the work that he or she *used* to perform before the accident. It then subtracted from the base wage-loss benefit the injured person's actual income from work performed in the same 30-day period to derive the compensable work-loss benefit.[7] See *id*.

Using the method applied in *Snellenberger* to calculate Agnone's work-loss benefit, we arrive at the same result. In the years before the 2009 accident, Agnone made substantially more each month than the applicable statutory maximum of $4,878. Therefore, under the formulation from *Snellenberger*, we would use the statutory maximum as his base potential benefit. *Id*. at 86. We would then subtract from that base wage-loss benefit the income that he earned in the same 30-day period to derive his compensable work-loss benefit for that period. *Id*. at 86-87. Because he continues to make more than $4,878 in every 30-day period even after his injury, his work-loss benefit is zero.

Although reasonable people might disagree about the wisdom of providing a work-loss benefit up to a specified income level, as opposed to a work-loss benefit up to a specified amount of lost income, it is for the Legislature to balance the costs and benefits of the available options. And, as Michigan courts have recognized, the Legislature has determined that the bal-

[7] The Court in *Snellenberger* also stated that the benefit had to be adjusted by subtracting other benefits, such as workers' compensation, from the work-loss benefit. *Snellenberger*, 167 Mich App at 88-89.

ance favors limiting the benefit to work losses below a specified income level. See *Marquis v Hartford Accident & Indemnity (After Remand)*, 444 Mich 638, 654-655; 513 NW2d 799 (1994) (noting that the limit stated in MCL 500.3107(1)(b) applies to the total of the work-loss benefit and income earned, and concluding that this statutory language implicitly recognizes that injured workers should mitigate their work losses by returning to work); *Bak v Citizens Ins Co of America*, 199 Mich App 730, 733; 503 NW2d 94 (1993) (opinion by CORRIGAN, J.) ("When a work-loss plaintiff *has* earned income from another job, no-fault benefits are correspondingly reduced."); *Snellenberger*, 167 Mich App at 86-87; *Argenta v Shahan*, 135 Mich App 477, 485; 354 NW2d 796 (1984) (noting that the work-loss benefit is subject to an "adjustable, monthly cap on the sum of benefits paid and the allowable income earned by an injured person for work during the same period" and stating that the plaintiff had "no hope of obtaining work-loss benefits from his own carrier" because he continued to make "well in excess" of the monthly cap even after his injury), rev'd on other grounds sub nom *Ouellette v Kenealy*, 424 Mich 83; 378 NW2d 470 (1985); *Featherly v AAA Ins Co*, 119 Mich App 132, 137; 326 NW2d 390 (1982) ("[T]he Legislature intended that the statutory maximum be a ceiling from which deductions are to be made, and not a maximum to be used when considering the difference between a claimant's actual work loss minus deductions and the statutory limit."). Notably, while the Legislature has determined that high income earners are not entitled to a work-loss benefit in excess of the adjusted minimum income level, the Legislature has not left injured persons with high income without a remedy for their work losses beyond the statutory maximum; those persons may sue an at-fault driver to recover their

work losses in excess of the limits provided by MCL 500.3107(1)(b). See MCL 500.3135(3)(c); *Hannay v Dep't of Transp*, 497 Mich 45, 76; 860 NW2d 67 (2014); *Ouellette*, 424 Mich at 85-86. Consequently, Agnone may be able to recover his work losses, just not as a PIP benefit.

III. CONCLUSION

The trial court erred when it construed MCL 500.3107(1)(b) as a limit on the total amount of work loss that is compensable, rather than as a limit on the combined work-loss benefit and income earned in the same period as the work-loss benefit. Because Agnone continues to earn more than the applicable statutory maximum, the trial court should have determined that he was not entitled to any work-loss benefit under MCL 500.3107(1)(b) and should have granted Home-Owners' motion for partial summary disposition on that basis.[8]

Reversed and remanded for entry of an order granting Home-Owners' motion for partial summary disposition. We do not retain jurisdiction. As the prevailing party, Home-Owners may tax its costs. MCR 7.219(A).

WILDER, P.J., and OWENS and M. J. KELLY, JJ., concurred.

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[8] Given our resolution of this issue, we need not address Home-Owners' remaining claim of error.

FETTE v PETERS CONSTRUCTION CO

Docket No. 320803. Submitted May 12, 2015, at Grand Rapids. Decided May 21, 2015, at 9:00 a.m.

Daniel Fette (the Berrien County Community Development Director) and the Berrien County Board of Public Works brought an action in the Berrien Circuit Court against Peters Construction Co. Plaintiffs and defendant had entered into a construction contract in which defendant agreed to install a water main. Defendant claimed during the construction that it encountered unforeseen subsurface conditions that required extra expense in completing the project. Plaintiffs refused to pay this extra amount, and defendant filed a claim for arbitration. The arbitrator ultimately awarded defendant $45,301.12. In plaintiffs' subsequent circuit court action, plaintiffs sought to vacate the arbitration award, arguing that defendant had presented no evidence in support of its claim because defendant had not submitted its exhibits at the arbitration hearing. Defendant filed a counterclaim, seeking to confirm the arbitration award and seeking sanctions against plaintiffs for filing a frivolous action. The court, John E. Dewane, J., confirmed the arbitration award, but denied defendant's request for sanctions. Plaintiffs appealed and defendant cross-appealed.

The Court of Appeals *held*:

1. Because defendant filed its claim for arbitration before the effective date of the Uniform Arbitration Act, the earlier Michigan arbitration act (MAA), former MCL 600.5001 *et seq*., governed the case. The MAA mandated that arbitration be conducted in accordance with the Michigan Court Rules. Plaintiffs claimed that the trial court was required to vacate the arbitration award under MCR 3.602(J)(2) because the arbitrator exceeded his powers and conducted the hearing in a manner that prejudiced their rights by failing to adhere to the construction-industry arbitration rules of the American Arbitration Association when he allegedly considered evidence that was not presented at the hearing. Plaintiffs, however, failed to appreciate that there was properly submitted evidence that the arbitrator could have considered in making his award in favor of defendant. Moreover,

plaintiffs failed to establish that there was a violation of the construction-industry arbitration rules. Because plaintiffs failed to establish a procedural error at the arbitration hearing, the trial court properly denied plaintiffs' motion to vacate the arbitration award.

2. Under MCR 2.302(C), on motion by a party or by a person from whom discovery is sought, and on reasonable notice and for good cause shown, the court in which an 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, including an order that the discovery not be had. In this case, plaintiffs had sought the deposition of Douglas Needham, an employee of a construction trade association who had attended the arbitration hearing. Defendant moved to quash the subpoena, and the trial court granted the motion. The trial court did not clearly err by finding that Needham did not have anything to add, given that the parties were already aware of what transpired at the arbitration hearing. Accordingly, the trial court did not abuse its discretion by quashing the subpoena.

3. Sanctions are warranted under MCR 2.114 when a plaintiff asserts claims without any reasonable basis in law or fact for those claims, or when the claims are asserted for an improper purpose. In declining to award sanctions in favor of defendant, the trial court found that plaintiffs' claim to vacate the arbitration award was founded on a good-faith argument for clarification of the law because there was no clear appellate law on the scope of review of procedural issues arising in arbitration cases. The trial court did not clearly err when it determined that plaintiffs' claim was not frivolous. A lack of clear appellate law can be a basis to bring a claim in good faith, and the type of procedural abnormality alleged by plaintiffs was not adequately addressed in prior appellate caselaw.

4. Under MCL 600.2591, if a court finds that a civil action was frivolous, the court that conducts the civil action must award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney. Contrary to defendant's assertion on appeal, MCL 600.2591 does not allow for an award of appellate costs and attorney fees. The plain language of the statute makes clear that it only applies to civil actions. An appeal from the circuit court to the Court of Appeals is not a civil action. While MCR 7.216(C)(1) does allow for the Court of Appeals to award actual and punitive damages when it determines that an appeal or any of the proceedings in an appeal was vexatious,

the court rule requires that a party seeking these damages file a motion under MCR 7.211(C)(8). Because defendant made its request for damages in its brief on appeal and not in a separate motion, the request was ineffectual.

Affirmed.

Dettman & Fette Law Office (by *John A. Campbell*) for plaintiffs.

Butzel Long, PC (by *Eric J. Flessland*, *Frederick A. Berg*, and *Brian E. McGinty*), for defendant.

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

PER CURIAM. In this contract dispute, plaintiffs, Daniel Fette and the Berrien County Board of Public Works, appeal as of right from the trial court's order confirming an arbitrator's award of approximately $45,300 in favor of defendant. Defendant, Peters Construction Co., cross-appeals from that same order. We affirm.

I. BASIC FACTS

Defendant and plaintiffs entered into a contract for a construction project, which included installing a water main under railroad tracks. During the project, defendant encountered some "unforeseen subsurface conditions" that, according to it, were not anticipated in the agreement and required extra expense in completing the job. Defendant tried to get plaintiffs to agree to pay this extra amount, but plaintiffs declined. Citing the arbitration clause in the contract,[1] defen-

[1] The arbitration clause stated as follows:

All claims, disputes and other matters in question arising out of, or relating to, the CONTRACT DOCUMENTS or the breach thereof, except for claims which have been waived by the making

dant filed a claim for arbitration.[2]

On February 12, 2013, the arbitrator issued a scheduling order, which provided that the parties would exchange witness lists and proposed exhibits by March 8, 2013. On March 8, 2013, defendant (the claimant) submitted electronic copies of its 19 exhibits to the arbitrator and to plaintiffs. On that same day, plaintiffs (respondents) also submitted electronic copies of their exhibits to the arbitrator and to defendant. Plaintiffs submitted 19 exhibits as well, and while most of the exhibits matched those submitted by defendant, a few were different.

The arbitration hearing eventually was held on August 12, 2013. At the hearing, defendant did not formally offer into evidence its previously submitted exhibits. Instead, defendant called two witnesses, one of whom was disallowed by the arbitrator for lack of personal knowledge. Plaintiffs then took testimony from their witnesses and formally submitted their previously disclosed exhibits to the arbitrator.

The parties did not request a reasoned award; therefore, as is not unusual in arbitrations, the arbitrator made no findings of fact or conclusions of law in the award. See *Saveski v Tiseo Architects, Inc*, 261 Mich App 553, 555; 682 NW2d 542 (2004), citing *DAIIE v Gavin*, 416 Mich 407, 428; 331 NW2d 418 (1982). Instead, the award, in pertinent part, simply provided

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> and acceptance of final payment as provided by Section 20 shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association. This agreement to arbitrate shall be specifically enforceable under the prevailing arbitration law. The award rendered by the arbitrators shall be final, and judgment may be entered upon it in any court having jurisdiction thereof.

[2] At the arbitration proceeding, defendant prosecuted its claim pro se, which is common in the construction industry.

that "Respondents shall pay to Claimant Forty Five Thousand Three Hundred One Dollar[s] and Twelve Cents ($45,301.12)."

On October 11, 2013, plaintiffs filed the instant lawsuit in circuit court, seeking to vacate the arbitration award. On November 12, 2013, defendant filed a counterclaim, seeking to confirm the award. On November 25, 2013, plaintiffs filed an amended complaint, and on December 4, 2013, defendant filed an amended counterclaim.

In their amended complaint, plaintiffs alleged that the award should be vacated because the arbitrator exceeded his authority and because the arbitrator conducted a hearing that substantially prejudiced their rights. The basis for both of these allegations was that while defendant identified its *proposed* exhibits in accordance with the arbitrator's scheduling order, it never actually *submitted those exhibits at the hearing*. Plaintiffs averred that as a result, with defendant presenting no evidence in support of its claim, the arbitrator could not as a matter of law find for defendant.

Defendant argued that there were no legal grounds to vacate the award and, as a result, sought sanctions for plaintiffs' alleged frivolous action.

The trial court denied plaintiffs' request to vacate the award and, instead, granted defendant's request to confirm the award. The trial court noted that defendant did supply evidence at the arbitration hearing in the form of testimony from its one witness and that the court was prohibited from evaluating the merits of the arbitrator's decision. The trial court also noted that the arbitrator is vested with discretion to direct the order of proofs at the hearing. Moreover, the trial court noted that plaintiffs' main argument—that the arbitrator

must have based the amount of damages on documents submitted outside the presence of the parties—failed because even if the court were not precluded from speculating on the reasons for the arbitrator's decision, the arbitrator *had* evidence of damages from the evidence submitted by plaintiffs. However, the court denied defendant's request for sanctions, finding that plaintiffs presented a good-faith argument.

After the amended complaint was filed, but before the trial court ruled on the disposition of the case, plaintiffs issued a subpoena for the deposition of Douglas Needham. Needham was employed by the Michigan Infrastructure and Transportation Association (MITA), a construction trade association, and was at the arbitration hearing in Berrien County assisting defendant. When questioned by defendant about what purpose deposing Needham would accomplish, plaintiffs responded, "We want to establish Mr. Needham's version of what occurred at the arbitration hearing."

Defendant moved to quash the subpoena on two grounds. Defendant first relied on MCR 2.305(C)(1), which provides that a person may be required to attend a deposition "in the county where the deponent resides, is employed, or transacts business in person, or at another convenient place specified by order of the court." Defendant explained that Needham did not reside in Berrien County and does not transact business in Berrien County "in person." Defendant also relied on MCR 2.305(A)(4) and MCR 2.302(C), which allow for a protective order to be issued if the deposition would result in "undue burden or expense." Defendant claimed that because Needham's version of what transpired at the arbitration hearing would have no bearing on the disposition of the case, it clearly would subject him to an undue burden or expense.

The trial court agreed with defendant and quashed the subpoena. The court explained, in part, that because there was no real dispute regarding the fact that defendant never submitted its exhibits at the arbitration hearing, Needham's testimony would not "add" anything to plaintiffs' defense against confirming the arbitration award.

II. PLAINTIFFS' APPEAL

A. ARBITRATION AWARD

While we review a trial court's decision to vacate or enforce an arbitration award de novo, judicial review of an arbitration award nonetheless is extremely limited. *Washington v Washington*, 283 Mich App 667, 671; 770 NW2d 908 (2009).

> "A court may not review an arbitrator's factual findings or decision on the merits. Rather, a court may only decide whether the arbitrator's award 'draws its essence' from the contract. If the arbitrator in granting the award did not disregard the terms of his employment and the scope of his authority as expressly circumscribed in the contract, judicial review effectively ceases." [*Police Officers Ass'n of Mich v Manistee Co*, 250 Mich App 339, 343; 645 NW2d 713 (2002) (citation omitted).]

The parties do not dispute that the arbitration here was statutory arbitration because the contract specified that "[t]he award rendered by the arbitrators shall be final, and judgment may be entered upon it in any court having jurisdiction thereof." See *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 495; 475 NW2d 704 (1991) (stating that when an arbitration agreement provides that judgment may be entered on the arbitration award, it falls within the definition of statutory arbitration).

The Michigan arbitration act (MAA), MCL 600.5001 *et seq*., was repealed by our Legislature pursuant to 2012 PA 370. It was replaced by the Uniform Arbitration Act (UAA), MCL 691.1681 *et seq*., which was enacted by 2012 PA 371. The repeal of the MAA and the enactment of the UAA became effective July 1, 2013. See 2012 PA 370 and 2012 PA 371. While the UAA provides that it "governs an agreement to arbitrate whenever made," MCL 691.1683(1), it also provides that "[t]his act does not affect an action or proceeding commenced . . . before this act takes effect," MCL 691.1713. Consequently, because defendant filed its claim for arbitration before July 1, 2013, the arbitration proceeding was commenced before July 1, 2013, and the UAA does not apply. Instead, the MAA continued to govern the proceeding.

Former MCL 600.5021 of the MAA provided that "arbitration shall be conducted in accordance with the rules of the supreme court." In turn, MCR 3.602(J)(2) provides the following:[3]

> On motion of a party, the court shall vacate an award if:
>
> (a) the award was procured by corruption, fraud, or other undue means;
>
> (b) there was evident partiality by an arbitrator appointed as a neutral, corruption of an arbitrator, or misconduct prejudicing a party's rights;
>
> (c) the arbitrator exceeded his or her powers; or
>
> (d) the arbitrator refused to postpone the hearing on a showing of sufficient cause, refused to hear evidence material to the controversy, or otherwise conducted the hearing to prejudice substantially a party's rights.

Plaintiffs moved to vacate the arbitration award citing MCR 3.602(J)(2)(c) and (d). Plaintiffs alleged that

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[3] Even though MCR 3.602 was amended in 2014, MCR 3.602(J)(2) was unaffected.

the arbitrator exceeded his powers by failing to adhere to the construction-industry arbitration rules of the American Arbitration Association (AAA), which the parties' contract specified would be followed at the arbitration proceeding. Specifically, plaintiffs claimed that the arbitrator violated the construction-industry rules of the AAA by considering evidence that was not presented at the hearing, which resulted in the hearing being conducted in a manner that prejudiced their rights.

Two rules, Rule 32 and Rule 33, of the AAA are implicated, and they provide the following, in pertinent part:

> R-32. Conduct of Proceedings
>
> **(a)** The claimant shall present evidence to support its claim. The respondent shall then present evidence supporting its defense. Witnesses for each party shall also submit to questions from the arbitrator and the adverse party. The arbitrator has the discretion to vary this procedure, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.
>
> **(b)** The arbitrator, exercising his or her discretion, shall conduct the proceedings with a view toward expediting the resolution of the dispute and may direct the order of proof, bifurcate proceedings, and direct the parties to focus their presentations on the issues the decision of which could dispose of all or part of the case.
>
> When deemed appropriate, the arbitrator may also allow for the presentation of evidence by alternative means including video conferencing, internet communication, telephonic conferences and means other than an in-person presentation. Such alternative means must still afford a full opportunity for all parties to present any evidence that the arbitrator deems material and relevant to the resolution of the dispute and when involving witnesses, provide that such witness submit to examination.
>
> * * *

R-33. Evidence

(a) The parties may offer such evidence as is relevant and material to the dispute and shall produce such evidence as the arbitrator may deem necessary to an understanding and determination of the dispute. Conformity to legal rules of evidence shall not be necessary.

(b) The arbitrator shall determine the admissibility, relevance, and materiality of the evidence offered. The arbitrator may request offers of proof and may reject evidence deemed by the arbitrator to be cumulative, unreliable, unnecessary, or of slight value compared to the time and expense involved. All evidence shall be taken in the presence of all of the arbitrators and all of the parties, except where: 1) any of the parties is absent, in default, or has waived the right to be present, or 2) the parties and the arbitrators agree otherwise.

Plaintiffs' claims must fail for several reasons. First, the record does not support plaintiffs' primary contention that the arbitrator considered the exhibits that defendant electronically shared before the hearing in making its award determination. Plaintiffs fail to appreciate that (1) the arbitrator could have relied on the testimony of defendant's sole witness at the hearing[4] and (2) the arbitrator could have relied on the evidentiary documents that plaintiffs submitted at the hearing. Plaintiffs do not dispute that most of the exhibits they submitted at the hearing were the same ones that defendant identified as its proposed exhibits. Thus, there was properly submitted evidence that the arbitrator could have considered in making his award in favor of defendant. We also note that even if the award was against the great weight of evidence or was not

[4] Of course, there is no transcript of the hearing, so the content of the testimony is unknown. Even if the testimony were known, we would be prohibited from questioning the sufficiency or reliability of the evidence. See *Washington*, 283 Mich App at 675.

supported by substantial evidence, this Court would be precluded from vacating the award. *Donegan v Mich Mut Ins Co*, 151 Mich App 540, 549; 391 NW2d 403 (1986); see also *Washington*, 283 Mich App at 675 ("It is simply outside the province of the courts to engage in a fact-intensive review of how an arbitrator calculated values, and whether the evidence he relied on was the most reliable or credible evidence presented.").

Second, assuming arguendo that the arbitrator did consider the exhibits that defendant presented before the hearing as evidence, plaintiffs cannot show how Rule 32 was violated. Rule 32 clearly affords the arbitrator discretion in allowing parties to present evidence "by alternative means," as long as the parties were still afforded "a full opportunity . . . to present any evidence that the arbitrator deems material and relevant to the resolution of the dispute." Accordingly, allowing the parties to electronically submit evidence before the hearing would be acceptable as long as the process did not adversely affect the parties' ability to present relevant evidence. In this case, allowing the parties to electronically submit evidence before the hearing did not affect plaintiffs' ability to present any evidence they desired. In fact, plaintiffs also submitted their exhibits this way, and plaintiffs also submitted evidence in the form of exhibits and witness testimony at the hearing itself.

Third, again assuming arguendo that the arbitrator considered defendant's exhibits as being admitted into evidence, plaintiffs cannot show how Rule 33 was violated. As already mentioned, Rule 32 expressly allows for the presentation of evidence "by alternative means." Rule 33 states in pertinent part that "[a]ll evidence shall be taken in the presence of all of the arbitrators and all of the parties." Therefore, while

Rule 32 permits the presentation of evidence by alternative means, that evidence also must be taken in the presence of all of the arbitrators and all of the parties. In this case, both sides provided copies of their prehearing evidentiary submissions to the opposing parties. Consequently, the arbitrator could have viewed these submissions as being "in the presence" of the other parties. Because arbitrators are " 'comparatively more expert about the meaning of their own rule[s],' " arbitrators, and not the courts, should resolve procedural matters. *Gregory J Schwartz & Co, Inc v Fagan*, 255 Mich App 229, 232; 660 NW2d 103 (2003), quoting *Howsam v Dean Witter Reynolds, Inc*, 537 US 79, 85; 123 S Ct 588; 154 L Ed 2d 491 (2002). Furthermore, the essence of this process already is approved in the rules, under Rule 34(b), which allows for the filing and transmitting of evidence after a hearing as long as the parties have an opportunity to examine and respond to that evidence. Although Rule 34 does not apply here because the evidence at issue was submitted before the hearing and not after it, Rule 34 demonstrates that the AAA considers the filing of exhibits electronically, i.e., outside the physical presence of the opposing party, as being fair and acceptable as long as the other party is aware of it.

In sum, because plaintiffs have failed to establish any procedural error at the arbitration hearing, they likewise have failed to demonstrate that the arbitrator exceeded his powers or that the hearing was conducted in a manner that substantially prejudiced their rights. See MCR 3.602(J)(2)(c) and (d). Therefore, the trial court properly denied plaintiffs' motion to vacate the arbitration award. We note that because plaintiffs failed to establish the presence of any procedural error, we express no opinion on whether plaintiffs would

have been entitled to the award being vacated if such a procedural error had existed at the arbitration hearing.

B. QUASHING OF SUBPOENA

Plaintiffs next argue that the trial court erred when it quashed their subpoena to have Needham deposed. We review a trial court's decision to quash a subpoena for an abuse of discretion. See *Castillon v Roy*, 412 Mich 873, 873 (1981); *Ghanam v Does*, 303 Mich App 522, 530; 845 NW2d 128 (2014); *Chastain v Gen Motors Corp (On Remand)*, 254 Mich App 576, 593; 657 NW2d 804 (2002). A trial court abuses its discretion when it chooses an outcome that falls outside the range of reasonable and principled outcomes. *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007). A trial court's findings of fact, however, are reviewed for clear error. *Hayford v Hayford*, 279 Mich App 324, 325; 760 NW2d 503 (2008).

"Michigan follows a policy of open and broad discovery." *Thomas M Cooley Law Sch v Doe 1*, 300 Mich App 245, 260; 833 NW2d 331 (2013). Parties are permitted discovery regarding "any matter, not privileged, that is relevant to the subject matter involved in the pending case." *Augustine v Allstate Ins Co*, 292 Mich App 408, 419; 807 NW2d 77 (2011) (quotation marks and citations omitted). Despite this broad discovery policy, courts are empowered to limit excessive, abusive, or irrelevant discovery requests. *Cooley Law Sch*, 300 Mich App at 260-261. Under MCR 2.302(C), a party may move the trial court for a protective order to disallow discovery:

> 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, including one or more of the following orders:
>
> (1) that the discovery not be had[.]

At the trial court, plaintiffs sought the deposition of Needham, who assisted defendant at the arbitration hearing. After hearing arguments from the parties, the trial court found that Needham did not have "anything to add to the defense of the motion to compel" and quashed the subpoena. The trial court did not clearly err by making this finding. The crux of plaintiffs' position was that defendant never submitted its exhibits at the arbitration hearing. Plaintiffs apparently wanted Needham to confirm this at this deposition. However, the parties never seriously disputed that this is what occurred.[5] Defendant admitted that it presented its exhibits before the hearing took place. As a result, while it is clear that Needham had relevant information related to how the evidence was admitted at the hearing, this information was already known by plaintiffs because they also were present at that very same hearing. We therefore conclude that, with plaintiffs already possessing first-hand knowledge of what transpired at the arbitration hearing, the court did not clearly err by finding that having Needham go through a deposition would have constituted "annoyance, embarrassment, oppression, or undue burden or expense"

[5] On appeal, plaintiffs note that defendant's answer to the amended complaint disavowed the allegation that it never submitted its exhibits at the hearing, but the trial court concluded that these responses were spurious and instead deemed the responses as admissions. As such, the allegations by plaintiffs were admitted, and defendant never appealed that determination. Regardless, the parties in presenting their arguments to the trial court and to this Court do not dispute that defendant never offered any exhibits into evidence at the arbitration hearing.

under MCR 2.302(C).[6] Consequently, the trial court did not abuse its discretion by quashing the subpoena.

III. DEFENDANT'S CROSS-APPEAL

Defendant argues in its cross-appeal that the trial court erred by failing to award it attorney fees and costs as sanctions pursuant to MCR 2.114 for those fees and costs incurred as a result of defending against plaintiffs' complaint to vacate the arbitration award.[7] We review a trial court's decision on a request for sanctions under MCR 2.114 for an abuse of discretion. *Sprenger v Bickle*, 307 Mich App 411, 422-423; 861 NW2d 52 (2014). But the trial court's factual findings are reviewed for clear error. *Id*. at 423. A finding is clearly erroneous if, after a review of the record, this Court is left with a definite and firm conviction that a mistake was made. *Univ Rehab Alliance, Inc v Farm Bureau Gen Ins Co of Mich*, 279 Mich App 691, 693; 760 NW2d 574 (2008).

"MCR 2.114 concerns the execution of court documents and applies to all pleadings, motions, affidavits, and other papers mandated by the court rules." *Sprenger*, 307 Mich App at 423. The rule provides, in pertinent part:

> (D) Effect of Signature. The signature of an attorney or party, whether or not the party is represented by an attorney, constitutes a certification by the signer that
>
> (1) he or she has read the document;

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[6] We note that the trial court never made this explicit finding, but we conclude that such a finding was implicitly made when the court stated that Needham did not have "anything to add" and granted defendant's motion to quash.

[7] At the trial court, defendant also had requested attorney fees under MCL 691.1705, but it does not rely on that statute on appeal. Therefore, only the issue with respect to MCR 2.114 is before us.

> (2) to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law; and
>
> (3) the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.
>
> (E) Sanctions of Violation. If a document is signed in violation of this rule, the court, on the motion of a party or on its own imitative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees. The court may not assess punitive damages.
>
> (F) Sanctions for Frivolous Claims and Defenses. In addition to sanctions under this rule, a party pleading a frivolous claim or defense is subject to costs as provided in MCR 2.625(A)(2). The court may not assess punitive damages. [MCR 2.114.]

As this Court has stated, "[s]anctions are warranted under MCR 2.114 where a plaintiff asserts claims without any reasonable basis in law or fact for those claims, or where the claims are asserted for an improper purpose." *Robert A Hansen Family Trust v FGH Indus, LLC*, 279 Mich App 468, 486; 760 NW2d 526 (2008); see also MCL 600.2591. In determining whether a claim was frivolous, courts look at the circumstances at the time the claim was asserted. *Jerico Constr, Inc v Quadrants, Inc*, 257 Mich App 22, 36; 666 NW2d 310 (2003).

In declining to award sanctions in favor of defendant, the trial court found that plaintiffs' claim to vacate the arbitration award was founded on "a good faith argument for clarification of the law where there

is no clear appellate law on the scope of review of procedural issues." We are not left with a definite and firm conviction that the trial court erred by determining that plaintiffs' claim was not frivolous. It is well established that a lack of clear appellate law can be a basis to bring a claim in good faith. *Schroeder v Terra Energy, Ltd*, 223 Mich App 176, 195; 565 NW2d 887 (1997). In this case, there is no question that the ramifications of the procedural abnormality that plaintiffs alleged to have taken place at the arbitration hearing were not adequately addressed in any prior caselaw. We note that even though plaintiffs' attempt to vacate the arbitration award ultimately was unsuccessful, that fact does not mean that plaintiffs' position was not based on good-faith argument. See *Kitchen v Kitchen*, 465 Mich 654, 662; 641 NW2d 245 (2002).

IV. DEFENDANT'S REQUEST FOR APPELLATE ATTORNEY FEES

Although not part of its cross-appeal, defendant requests to be awarded its costs and attorney fees that were incurred on appeal as sanctions.

Defendant first requests these costs and fees pursuant to MCL 600.2591, which provides in pertinent part as follows:

> (1) Upon motion of any party, if a court finds that a civil action or defense to a civil action was frivolous, the court that conducts the civil action shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney.
>
> (2) The amount of costs and fees awarded under this section shall include all reasonable costs actually incurred by the prevailing party and any costs allowed by law or by court rule, including court costs and reasonable attorney fees.

Contrary to defendant's assertion, this statute does not allow for an award of appellate costs and attorney fees. As this Court has already held, "it is inappropriate to expand the scope of . . . MCL 600.2591 . . . to cover costs, including attorney fees, incurred on appeal . . . ." *DeWald v Isola (After Remand)*, 188 Mich App 697, 703; 470 NW2d 505 (1991).

The *DeWald* Court's holding is supported by the plain language of MCL 600.2591, which makes it clear that it only applies to "civil actions." Because a "civil action" relates to the filing of a complaint, see MCR 2.101, an appeal from the circuit court to this Court is not a "civil action." In adopting the reasoning of the United States Supreme Court in the context of the Federal Rules of Civil Procedure, the *DeWald* Court agreed that provisions like MCL 600.2591 are " 'more sensibly understood as permitting an award only of those expenses directly caused by the filing, logically, *those at the trial level*.' " *Id*. at 701 (emphasis added), quoting *Cooter & Gell v Hartmarx Corp*, 496 US 384, 406; 110 S Ct 2447; 110 L Ed 2d 359 (1990). In other words, any expenses incurred on appeal cannot fairly be attributed to the filing of a frivolous complaint in the circuit court. *DeWald*, 188 Mich App at 703.

Defendant's reliance on *Edge v Edge*, 299 Mich App 121; 829 NW2d 276 (2012), as suggesting something different is misplaced. The Court in *Edge* never stated that MCL 600.2591 could be used to recover appellate attorney fees. First, the Court favorably cited *DeWald* for the proposition that the only provisions allowing recovery of appellate costs and attorney fees are MCR 7.219, MCR 7.216(C), and MCL 600.2445. *Id*. at 132, citing *DeWald*, 180 Mich App at 699-700. Second, the Court, in pointing out that MCL 600.2591 only permits "the court that conduct[ed] the civil action" to award

costs and fees, did not do so to indicate that a party could invoke this statute in the Court of Appeals. Instead, the *Edge* Court simply was pointing out that *in addition* to MCL 600.2591 not being applicable because appellate expenses were not incurred in response to the filing of a frivolous complaint, the statute clearly does not allow another court (in that case, the circuit court) to award costs that were incurred in the different court (the Court of Appeals). *Edge*, 299 Mich App at 134. Again, *Edge* did not state that a party could invoke MCL 600.2591 to claim costs and attorney fees on appeal as long as the request was made in this Court. In fact, the *Edge* Court went on to explain that sanctions for vexatious appeals "must be considered by this Court under MCR 7.216." *Id*. at 135.

Defendant next claims that it is entitled to these appellate costs and attorney fees and punitive damages under MCR 7.216(C). While MCR 7.216(C)(1) does allow for this Court to award "actual and punitive damages . . . when it determines that an appeal or any of the proceedings in an appeal was vexatious," the court rule requires that a party seeking these damages must file a motion under MCR 7.211(C)(8). And under MCR 7.211(C)(8),

> [a] party's request for damages or other disciplinary action under MCR 7.216(C) must be contained in a motion filed under this rule. A request that is contained in any other pleading, including a brief filed under MCR 7.212, will not constitute a motion under this rule.

Therefore, because defendant made its request for damages in its brief on appeal and not in a separate motion, the request is ineffectual. See *Barrow v Detroit Election Comm*, 305 Mich App 649, 684; 854 NW2d 489 (2014). However, MCR 7.211(C)(8) goes on to provide that a party may file such a motion "at any time within

21 days after the date of the order or opinion that disposes of the matter that is asserted to have been vexatious." Therefore, defendant's request is denied without prejudice.

Affirmed. Neither party having prevailed in full, no costs may be taxed. MCR 7.219.

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

PEOPLE v HALLAK

Docket No. 317863. Submitted May 6, 2015, at Lansing. Decided May 28, 2015, at 9:00 a.m. Leave to appeal sought.

Kassem Mahmoud Hallak, a medical doctor, was convicted in the Eaton Circuit Court of second-degree criminal sexual conduct (CSC-II), MCL 750.520c(1)(a) (sexual contact with a victim under 13 years of age); third-degree criminal sexual conduct (CSC-III), MCL 750.520d(1)(b) (sexual penetration by force or coercion); and six counts of fourth-degree criminal sexual conduct (CSC-IV), MCL 750.520e(1)(b) (sexual contact by force or coercion) involving several victims who were his patients. The court, Janice K. Cunningham, J., sentenced defendant to prison terms of 57 to 180 months for the CSC-II conviction; 85 to 180 months for the CSC-III conviction; and 16 to 24 months for each CSC-IV conviction. The court additionally ordered lifetime electronic monitoring as part of defendant's CSC-II sentence. Defendant appealed only his CSC-II conviction, arguing that his due-process rights were violated because there was insufficient evidence to support it; that his sentence to lifetime electronic monitoring violated his state constitutional right against cruel or unusual punishment, his federal constitutional right against cruel and unusual punishment, his right to be free of unreasonable searches, and his state and federal constitutional rights against double jeopardy; and that the court erred by using facts not found by the jury when scoring the sentencing guidelines.

The Court of Appeals *held*:

1. The Due Process Clauses of the Fourteenth Amendment and the Michigan Constitution, Const 1963, art 1, § 14, require that there be sufficient evidence beyond a reasonable doubt to convict a defendant. MCL 750.520c(1)(a) prohibits sexual contact with a person under 13 years of age. Under MCL 750.520a(q), sexual contact includes the intentional touching of the victim's or the defendant's intimate parts or the intentional touching of the clothing covering the immediate area of those intimate parts if that touching can reasonably be construed as being for the purpose of sexual arousal or gratification. While defendant argued that the evidence failed to establish that the touching was

intended for the purpose of sexual arousal or gratification, a jury may convict on the basis of the uncorroborated evidence of a victim of criminal sexual conduct. Moreover, because it can be difficult to prove a defendant's state of mind on issues such as knowledge and intent, minimal circumstantial evidence will suffice to establish that state of mind, which can be inferred from all the evidence presented. The evidence here was sufficient to allow the jury to conclude that defendant's touching of the victim's breast during a medical examination was for a sexual purpose. The victim testified that defendant cupped her breast with his hand, her mother witnessed the event, and an expert witness testified that it would not be medically ethical or acceptable to touch a patient's breast while examining the patient's throat. This was sufficient for the jury to conclude that the touching was not for a legitimate medical purpose, giving rise to an inference that it was for a sexual purpose, particularly in light of defendant's various explanations for the situation when confronted by the victim's mother.

2. The United States Supreme Court held in *Alleyne v United States*, 570 US ___; 133 S Ct 2151 (2013), that a court cannot use facts not found by the jury or admitted by the defendant when sentencing the defendant. *People v Herron*, 303 Mich App 392, 399 (2013), however, held that the *Alleyne* rule does not apply to the scoring of Michigan's sentencing guidelines, and *Herron* controlled that issue in this case. Accordingly, defendant's argument on this point was precluded by Court of Appeals precedent. (Following the decision in this case, however, the Michigan Supreme Court decided in *People v Lockridge*, 498 Mich 358 (2015), that *Alleyne* does apply to Michigan's sentencing guidelines, and it subsequently reversed the Court of Appeals' judgment in *Herron* in part. 498 Mich at 399.)

3. MCL 750.520c(2)(b) and MCL 750.520n(1) require that the sentence of a person convicted of CSC-II in a case in which the victim was under the age of 13 and the perpetrator was 17 years of age or older include lifetime electronic monitoring, which will track and record the defendant's movement and location by means of a global positioning system for the defendant's lifetime. A defendant claiming that a sentence is cruel or unusual under Const 1963, art 1, § 16 or cruel and unusual under the Eighth Amendment can (1) make an as-applied challenge to the sentence by asserting that that is disproportionate given all the circumstances in a particular case or (2) make a facial challenge by asserting that an entire class of sentences is disproportionate on the basis of the nature of the offense and the characteristics of the

offender. If the statute is valid under the facts applicable to the defendant, however, then it would likely be upheld against a facial challenge. Moreover, a statute upheld under the state constitutional prohibition necessarily passes muster under the federal Constitution. Under either provision, however, the preliminary question is whether lifetime electronic monitoring constitutes a punishment. A plain reading of the relevant statutory text indicated that the Legislature intended mandatory lifetime electronic monitoring to be an additional punishment and part of the sentence itself when required by the statutes governing first-degree criminal sexual conduct and CSC-II.

4. Defendant could not overcome the presumption that the lifetime electronic monitoring requirement is neither cruel nor unusual. In deciding if punishment is cruel or unusual, a court must examine the gravity of the offense and the harshness of the penalty, comparing the punishment to the penalty imposed for other crimes in this state, as well as the penalty imposed for the same crime in other states. The dominant test concerns proportionality, that is, whether the punishment is so excessive that it is completely unsuitable to the crime. The goal of rehabilitation is also a consideration. If the punishment thwarts the rehabilitative potential of the individual offender and does not contribute to society's efforts to deter others from engaging in similar prohibited behavior, it may be deemed excessive. However, the need to prevent the individual offender from causing further injury to society is an equally important consideration. A penalty that is unjustifiably disproportionate to the crime or unusually excessive should be struck down as cruel or unusual. Requiring lifetime electronic monitoring for certain defendants convicted of CSC-II against a victim less than 13 years old addresses the significant concerns of rehabilitation and recidivism. The risk of recidivism posed by sex offenders is high. The monitoring system has a deterrent effect on would-be reoffenders, and the ability to constantly monitor an offender's location allows law enforcement to ensure that the offender does not enter a school zone, playground, or similar prohibited locale. While defendant noted that lifetime electronic monitoring is not required for numerous, arguably graver crimes, the factors that would allow for the most pertinent comparison (a minor victim under the age of 13 with an offender 17 years of age or older) are missing from these other crimes. Moreover, many states have imposed the penalty of lifetime electronic monitoring for various criminal sexual conduct cases. For the same reasons, defendant could not succeed on his facial challenge under the state Constitution or his federal constitutional claim.

5. Under *Grady v North Carolina*, 575 US ___; 135 S Ct 1368 (2015), the placement of an electronic device to monitor a defendant's movement constitutes a search for purposes of the Fourth Amendment. The Fourth Amendment, however, only precludes unreasonable searches. The reasonableness of a search depends on all the circumstances surrounding the search and the nature of the search itself. The applicable test balances the need to search in the public interest for evidence of criminal activity against the invasion of the individual's privacy. With respect to the public interest, the Legislature sought to provide a means to both (1) punish and deter convicted child sex offenders and (2) protect society from a group with a high recidivism rate. A state's interests in reducing recidivism and thereby promoting reintegration and positive citizenship among probationers and parolees warrant privacy intrusions that would not otherwise be tolerated under the Fourth Amendment. With respect to the invasion of a defendant's privacy interest, parolees and probationers have a lower expectation of privacy, even in their homes, than the average law-abiding citizen. Monitoring does not prohibit defendants from traveling, working, or otherwise enjoying the ability to legally move about as they wish; rather, the monitoring device simply records where a defendant has traveled to ensure that he or she is complying with the terms of probation and state law. On balance the strong public interest in the benefit of monitoring certain individuals convicted of CSC-II against a victim under the age of 13 outweighs the minimal effect on a defendant's reduced privacy interest.

6. The punishment of lifetime electronic monitoring did not violate the Double Jeopardy Clauses of the Fifth Amendment and Const 1963, art 1, § 15. The double jeopardy prohibition (1) protects against a second prosecution for the same offense after acquittal, (2) protects against a second prosecution for the same offense after conviction, and (3) protects against multiple punishments for the same offense. However, the purpose of the protection against multiple punishments is to protect a defendant from receiving more punishment than the Legislature intended. Accordingly, the Double Jeopardy Clauses do not limit the Legislature's ability to define criminal offenses and establish punishments. Because the Legislature intended that both defendant's prison sentence and the requirement of lifetime monitoring be sanctions for his CSC-II conviction, there was no double jeopardy violation.

CSC-II conviction and sentence affirmed.

1. CRIMINAL SEXUAL CONDUCT — SUFFICIENCY OF THE EVIDENCE — TESTIMONY OF VICTIMS — CIRCUMSTANTIAL EVIDENCE — CORROBORATION.

A jury may convict on the basis of the uncorroborated evidence of a victim of criminal sexual conduct; because it can be difficult to prove a defendant's state of mind on issues such as knowledge and intent, minimal circumstantial evidence will suffice to establish the defendant's state of mind, which can be inferred from all the evidence presented.

2. CONSTITUTIONAL LAW — CRIMINAL SEXUAL CONDUCT — LIFETIME ELECTRONIC MONITORING — CRUEL OR UNUSUAL PUNISHMENT — UNREASONABLE SEARCHES — DOUBLE JEOPARDY.

MCL 750.520c(2)(b) and MCL 750.520n(1) require that the sentence of a person convicted of second-degree criminal sexual conduct in a case in which the victim was under the age of 13 and the perpetrator was 17 years of age or older include lifetime electronic monitoring, which tracks and records the defendant's movement and location by means of a global positioning system for the defendant's lifetime; while mandatory lifetime electronic monitoring is an additional punishment and part of the sentence itself when required for second-degree criminal sexual conduct, it does not constitute cruel or unusual punishment under Const 1963, art 1, § 16 or cruel and unusual punishment under the Eighth Amendment; moreover, while the placement of the electronic monitoring device constitutes a search for purposes of the Fourth Amendment, it is not an unreasonable search and accordingly does not violate the Fourth Amendment; the punishment of lifetime electronic monitoring also does not violate the Double Jeopardy Clauses of the Fifth Amendment and Const 1963, art 1, § 15.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Douglas R. Lloyd*, Prosecuting Attorney, and *Brent E. Morton*, Assistant Prosecuting Attorney, for the people.

Tieber Law Office (by *F. Martin Tieber* and *Kristoffer W. Tieber*) for defendant.

Before: BOONSTRA, P.J., and SAAD and MURRAY, JJ.

MURRAY, J. Defendant, a medical doctor, was convicted by a jury of his peers of second-degree criminal

sexual conduct (CSC-II), MCL 750.520c(1)(a) (sexual contact with victim under 13 years of age), third-degree criminal sexual conduct (CSC-III), MCL 750.520d(1)(b) (sexual penetration by force or coercion), and six counts of fourth-degree criminal sexual conduct (CSC-IV), MCL 750.520e(1)(b) (sexual contact by force or coercion). On appeal, defendant argues that the evidence was insufficient to support his CSC-II conviction, that his sentence to lifetime electronic monitoring violates his state and federal constitutional rights against cruel and/or unusual punishment, unreasonable searches, and double jeopardy, and that the trial court erred in utilizing facts not found by the jury in scoring the sentencing guidelines. For the reasons that follow, we reject each of defendant's arguments, and consequently affirm both his conviction and sentence.

I. MATERIAL FACTS AND PROCEEDINGS

Defendant's CSC-II conviction, the only conviction he challenges on appeal, is based on his improperly touching a 12-year-old patient, SB. As a result, we will only recount the material facts presented at trial that are relevant to that conviction.

On March 30, 2010, 12-year-old SB saw defendant for a medical exam. SB testified that while defendant was facing her with his back to the door and was either checking her throat with a tongue depressor, or was just holding the tongue depressor, he "cupped" her right breast for between 1 and 30 seconds with his left hand on the outside of her shirt. Defendant explained to SB that he was checking her breathing.

SB's mother, whom we will refer to as MB, testified that defendant's wife, Dr. Debbie Hallak, was SB's primary care doctor. Dr. Hallak's practice was on one

side of the office; the urgent care clinic operated by defendant was on the other side. MB testified that on March 30, 2010, SB, who had irritable bowel syndrome (among other conditions), saw defendant for stomach issues[1] at the urgent care clinic. MB explained that payment was always made before seeing a physician at this office but, on this day, there was a problem processing the insurance. As a result, MB dealt with the payment issue while a nurse obtained SB's height and weight before escorting her into an examination room. When MB finished with the insurance issue, she proceeded to the examination room, expecting to see Dr. Hallak with her daughter. When she walked in, MB saw defendant facing her daughter. His left hand held a stethoscope to SB's right side. However, his right hand was holding SB's left breast with the shirt and bra removed. According to MB, when she asked "what the hell he was doing," defendant left the room. When MB again asked defendant what he was doing, he asserted that MB was a bad mother because SB had not brushed her teeth. MB testified that defendant eventually said he had removed SB's bra because he could not hear her heart beat and that Dr. Hallak subsequently told her that was normal or that it would not be anything to worry about if he moved the bra because the wire got in the way.[2]

For his part, defendant denied ever deviating from his policy of having a parent or guardian in the examination room when seeing a child, and specifically denied being alone with SB. Defendant testified that when he was examining SB's throat, he would have

[1] The medical record indicated that SB presented with complaints of a sore throat, runny nose, cough, and vomiting.

[2] Dr. Hallak denied that MB had ever raised a concern with her regarding defendant's touching her daughter inappropriately.

had the tongue depressor in one hand and a flashlight in the other; he denied fondling her breast, and denied that MB yelled at him about fondling her daughter's breast. He also denied examining SB with a stethoscope that day.

Dr. Grant Greenberg testified as a prosecution expert witness in family practice and addressed ethical and acceptable practices. Relative to SB, he opined that while it might be appropriate for a parent to leave the examining room so a minor could discuss something in private with the doctor, this would only be done if the parent agreed. According to Dr. Greenberg, it would not be medically ethical or acceptable to touch a patient's breast while examining her throat. Dr. Greenberg additionally noted that touching a patient's breast during this type of examination would be counterproductive given the additional tissue in that area, and that touching the breast while examining the patient's chest with a stethoscope was equally unnecessary, problematic, and unethical.

Dr. Joseph Shufeldt testified as a defense expert in the area of urgent care, family practice in the urgent care setting, and ethical and acceptable medical practices. He agreed that there should be a chaperone with an 11- or 12-year-old minor unless the parent otherwise consents.

Along with this testimony that directly related to the touching of SB, the jury heard testimony from several witnesses who also claimed to have experienced similar treatment from defendant while under his care. Additionally, the jury heard the other victims testify in the cases consolidated with SB's.

After the jury's verdict, the trial court sentenced defendant to prison terms of 57 to 180 months for the CSC-II conviction, 85 to 180 months for the CSC-III

conviction involving another victim, and 16 to 24 months for each CSC-IV conviction also involving other victims. The court additionally ordered lifetime electronic monitoring as part of defendant's CSC-II sentence. We now turn to defendant's arguments.

II. ANALYSIS

A. SUFFICIENCY OF THE EVIDENCE

Defendant seeks to overturn his CSC-II conviction on the basis that his state and federal rights to due process of law[3] were violated because there was insufficient evidence on the intent element of the crime, i.e., that the touching of SB was for a sexual purpose. The most that was established, according to defendant, was that he had noticed (and mentioned to MB) during an earlier abdominal examination that SB had pubic hair and that he had touched her breast while checking her breathing or examining her heart with a stethoscope. Defendant maintains that touching of intimate body parts occurs often during such an examination and such intentional touching itself cannot establish a sexual purpose in this context. Because there were no other actions or communications that suggested the purpose was sexual, and any actions and communications relative to other victims did not establish a sexual purpose as to SB, defendant asserts that there was insufficient evidence upon which to convict him.

[3] The United States Supreme Court—and subsequently the Michigan Supreme Court—has determined that the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article 1, § 14 of the 1963 Constitution require that there be sufficient evidence beyond a reasonable doubt to convict a defendant. *Jackson v Virginia*, 443 US 307, 315; 99 S Ct 2781; 61 L Ed 2d 560 (1979); *In re Winship*, 397 US 358, 361-362; 90 S Ct 1068; 25 L Ed 2d 368 (1970); *People v Wolfe*, 440 Mich 508, 513-514; 489 NW2d 748 (1992).

According to defendant, upholding this conviction would put doctors in danger of CSC prosecutions for "virtually any physical examination."

In addressing this issue, our task is to determine whether any rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt. We resolve all conflicting evidence in favor of the prosecution, while acknowledging that circumstantial evidence and reasonable inferences may be sufficient to prove the elements of the crime. *People v Lockett*, 295 Mich App 165, 180; 814 NW2d 295 (2012).

MCL 750.520c(1)(a) establishes the crime of CSC-II and proscribes sexual contact with a person under 13 years of age. "Sexual contact" is statutorily defined to include "the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification," MCL 750.520a(q), among other reasons. Defendant does not contest the victim's age or that there was sufficient evidence of a touching. Instead, as noted above, he argues only that the evidence failed to establish that the touching was intended for the purpose of sexual arousal or gratification.

"It is a well-established rule that a jury may convict on the uncorroborated evidence of a CSC victim." *People v Lemmon*, 456 Mich 625, 642 n 22; 576 NW2d 129 (1998); see also MCL 750.520h. Moreover, "because it can be difficult to prove a defendant's state of mind on issues such as knowledge and intent, minimal circumstantial evidence will suffice to establish the defendant's state of mind, which can be inferred from

all the evidence presented." *People v Kanaan*, 278 Mich App 594, 622; 751 NW2d 57 (2008).

Upon our review of the record, we hold that the evidence was sufficient to allow a jury to conclude that defendant did more than just touch SB's breast during a medical examination, and that it was for a sexual purpose. SB's testimony that defendant "cupped" her breast, coupled with MB's witnessing of the event and Dr. Greenberg's testimony that it would not be medically ethical or acceptable to touch a patient's breast while examining her throat, was sufficient for the jury to conclude that the touching was not for a legitimate medical purpose. If not for a medical purpose, the "cupping" was sufficient to give rise to an inference that it was for a sexual purpose, particularly in light of defendant's various explanations for the situation when confronted by MB. Accordingly, there was sufficient evidence to convict defendant of CSC-II based on sexual contact with a person under the age of 13.

We likewise reject defendant's assertion that upholding his conviction could expose those in the medical field to unwarranted CSC prosecutions for any sort of conduct occurring during a physical examination. First, the facts presented to the jury in defendant's case were not that of a routine medical exam. Defendant did not have a third person present during the examination of a minor, and two witnesses testified as to his "cupping" the minor's breast, and an expert testified that there was no medical reason to do so. Second, we firmly believe that given the objective-screening charging procedures used by the prosecution, a trial court's ability to dismiss cases without factual support (see MCR 6.419), and a jury's keen ability to accurately determine the facts of a case, there are sufficient protections within the system to avoid the concerns raised by defendant.

B. JUDICIAL FACT-FINDING FOR SCORING PURPOSES

Defendant also argues that the scoring of the sentencing guidelines relative to his CSC-II conviction violated his constitutional right to a jury trial[4] because a court cannot engage in judicial fact-finding when scoring the guidelines. Although there is a current split of opinion amongst some members of this Court regarding whether the rule in *Alleyne v United States*, 570 US ___; 133 S Ct 2151; 186 L Ed 2d 314 (2013), applies to the scoring of the sentencing guidelines, see the opinions issued in *People v Lockridge*, 304 Mich App 278; 849 NW2d 388 (2014), lv gtd 496 Mich 852 (2014), our Court has repeatedly concluded that *People v Herron*, 303 Mich App 392, 399, 404; 845 NW2d 533 (2013),[5] controls this issue (and goes directly against defendant's position here) unless the Michigan Supreme Court says otherwise, and it has yet to do so. See, e.g., *People v Galloway*, 307 Mich App 151, 168; 858 NW2d 520 (2014) (following *Herron*), held in abeyance 861 NW2d 6 (Mich, 2015), and *People v Duenaz*, 306 Mich App 85, 113-114; 854 NW2d 531 (2014) (following *Herron*). As defendant acknowledges, his argument on this point is precluded by our precedent.

C. LIFETIME ELECTRONIC MONITORING

For someone convicted of CSC-II where the victim is under the age of 13 and the perpetrator is over the age of 17, lifetime electronic monitoring, which will track defendant's movement and location until his death, is

[4] US Const, Am VI.

[5] Our Supreme Court has held the defendant's application for leave to appeal in *Herron* in abeyance pending its decision in *People v Lockridge*, 496 Mich 852 (2014). See *People v Herron*, 846 NW2d 924 (Mich, 2014).

required by statute. MCL 750.520c(2)(b) and MCL 750.520n(1). According to defendant, this "punishment" is cruel or unusual, both facially and—given that he has no prior record—as applied. Preserved constitutional questions like this one are reviewed de novo. *People v Dipiazza*, 286 Mich App 137, 144; 778 NW2d 264 (2009).

"Statutes are presumed to be constitutional, and courts have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent." *Taylor v Gate Pharm*, 468 Mich 1, 6; 658 NW2d 127 (2003). For his facial challenge to MCL 750.520c(2)(b), defendant has the onerous burden to prove that there is no set of circumstances under which the statute is valid. *Bonner v City of Brighton*, 495 Mich 209, 223; 848 NW2d 380 (2014); *Keenan v Dawson*, 275 Mich App 671, 680; 739 NW2d 681 (2007). While the facial-challenge standard is extremely rigorous, an as-applied challenge is less stringent and requires a court to analyze the constitutionality of the statute against a backdrop of the facts developed in the particular case. *Keenan*, 275 Mich App at 680.

A claim based on the Eighth Amendment Cruel and Unusual Punishment Clause can also take two forms. Under an as-applied challenge, a defendant can seek to overturn a sentence that is disproportionate "given all the circumstances in a particular case." *Graham v Florida*, 560 US 48, 59; 130 S Ct 2011; 176 L Ed 2d 825 (2010). A defendant can also take a "categorical" approach by asserting that an entire class of sentences is disproportionate based upon the nature of the offense and the characteristics of the offender. *Id*. at 60.

MCL 750.520c(2) provides:

> Criminal sexual conduct in the second degree is a felony punishable as follows:

> (a) By imprisonment for not more than 15 years.
>
> (b) In addition to the penalty specified in subdivision (a), the court shall sentence the defendant to lifetime electronic monitoring under [MCL 750.520n] if the violation involved sexual contact committed by an individual 17 years of age or older against an individual less than 13 years of age.

Under MCL 750.520n(1), a "person convicted under [MCL 750.520b (first-degree criminal sexual conduct (CSC-I))] or [MCL 750.520c (CSC-II)] for criminal sexual conduct committed by an individual 17 years old or older against an individual less than 13 years of age shall be sentenced to lifetime electronic monitoring . . . ." Lifetime electronic monitoring involves "a device by which, through global positioning system satellite or other means, an individual's movement and location are tracked and recorded." MCL 791.285(3). The monitoring is to be in accordance with MCL 791.285, which provides that the lifetime electronic monitoring program is to be established by the Department of Corrections (DOC) and outlines what the program is to accomplish. Further, MCL 750.520n(2) makes it a felony, punishable by imprisonment for not more than 2 years or a fine of up to $2,000, or both, if a person being monitored

> (a) Intentionally removes, defaces, alters, destroys, or fails to maintain the electronic monitoring device in working order.
>
> (b) Fails to notify the department of corrections that the electronic monitoring device is damaged.
>
> (c) Fails to reimburse the department of corrections or its agent for the cost of the monitoring.

There is no provision in the statute for any kind of discretion with respect to, review of, or relief from the required monitoring.

1. CRUEL AND/OR UNUSUAL PUNISHMENT

Defendant first argues that lifetime electronic monitoring violates Const 1963, art 1, § 16, which prohibits "cruel *or* unusual punishment" and US Const, Am VIII, which prohibits "cruel *and* unusual punishments." (Emphasis added.) Because of its broader language the Michigan prohibition potentially covers a larger group of punishments. *People v Carp*, 496 Mich 440, 519; 852 NW2d 801 (2014). Under both provisions, however, the preliminary question is whether lifetime electronic monitoring constitutes a "punishment." *People v Costner*, 309 Mich App 220, 232; 870 NW2d 582 (2015), citing *In re Ayres*, 239 Mich App 8, 14; 608 NW2d 132 (1999).

We first address defendant's as-applied challenge, for if this statute is valid under the facts applicable to defendant then it is certainly capable of being upheld against a facial challenge. See *Bonner*, 495 Mich at 223 (recognizing that a facial challenge will fail if any state of facts reasonably can be conceived that would sustain the statute). We also first consider it under the state constitutional prohibition because a statute upheld under our state governing charter's Cruel or Unusual Punishment Clause "necessarily passes muster under the federal constitution." *People v Nunez*, 242 Mich App 610, 618 n 2; 619 NW2d 550 (2000); see also *People v Benton*, 294 Mich App 191, 204; 817 NW2d 599 (2011).

a. IS LIFETIME ELECTRONIC MONITORING A PUNISHMENT?

Defendant cites *People v Cole*, 491 Mich 325; 817 NW2d 497 (2012), for the proposition that lifetime electronic monitoring is punishment. There, the Court held that the defendant could withdraw his guilty plea

where he was not advised that lifetime electronic monitoring would be part of the sentence, because lifetime electronic monitoring was a direct as opposed to a collateral consequence of the plea. The Court reasoned that lifetime monitoring was intended to be a punishment, and thus part of the sentence itself:

> Our conclusion that mandatory lifetime electronic monitoring is part of the sentence itself rests on the plain text of the relevant statutes. First, we note that our Legislature chose to include the mandatory lifetime electronic monitoring requirement in the penalty sections of the CSC-I and CSC-II statutes, and that both statutes can be found in the Michigan Penal Code, which describes criminal offenses and prescribes penalties.
>
> Second, both electronic-monitoring provisions provide that "the court *shall sentence* the defendant to lifetime electronic monitoring . . . ." MCL 750.520b(2)(d) and MCL 750.520c(2)(b) (emphasis added). The use of the directive "shall sentence" indicates that the Legislature intended to make lifetime electronic monitoring part of the sentence itself. Third, the CSC-II statute provides that the sentence of lifetime electronic monitoring is "[i]n addition to the penalty specified in subdivision (a)," MCL 750.520c(2)(b), and the CSC-I statute provides similarly that lifetime electronic monitoring is "[i]n addition to any other penalty imposed under subdivision (a) or (b)," MCL 750.520b(2)(d). The language "in addition to" indicates that the Legislature intended that lifetime electronic monitoring would itself be a penalty, in addition to the term of imprisonment imposed by the court.
>
> Finally, *our conclusion that the Legislature intended to make lifetime electronic monitoring a punishment* and part of the sentence itself is reinforced by MCL 750.520n(1), which likewise includes the language "shall be sentenced," and MCL 791.285(1) and (2), which use the language "individuals . . . who are sentenced . . . to lifetime electronic monitoring" and "[a]n individual who is sentenced to lifetime electronic monitoring . . . ."

> Accordingly, a plain reading of the relevant statutory text compels our conclusion that *the Legislature intended mandatory lifetime electronic monitoring to be an additional punishment* and part of the sentence itself when required by the CSC-I or CSC-II statutes. [*Id*. at 335-336 (alterations in original; emphasis in third and fourth paragraphs added).]

The prosecution argues that the *Cole* Court's conclusion that mandatory lifetime monitoring is a punishment is obiter dictum because the Court could have reached the same result by simply noting that this was a regulatory scheme. But obiter dictum is a statement that is unnecessary to resolving a case, such as an extraneous statement made as an aside to the dispositive issue in an opinion. See *Auto-Owners Ins Co v All Star Lawn Specialists Plus, Inc*, 497 Mich 13, 21 n 15; 857 NW2d 520 (2014). That the Court *could have* relied on an alternative rationale does not make the Court's *chosen* rationale obiter dictum. Moreover, although the Court decided the question in the context of answering a different question, it nonetheless clearly concluded that lifetime electronic monitoring under this same statutory provision was intended by the Legislature to be a punishment. While it appears that the statute may have been primarily intended to help ensure that sex offenders would not encounter potential victims (a regulatory function), the *Cole* Court made it very clear that lifetime electronic monitoring is a punishment.

b. IS LIFETIME ELECTRONIC MONITORING A CRUEL OR UNUSUAL PUNISHMENT?

"In deciding if punishment is cruel or unusual, this Court looks to the gravity of the offense and the harshness of the penalty, comparing the punishment to the penalty imposed for other crimes in this state, as well as the penalty imposed for the same crime in other

states." *People v Brown*, 294 Mich App 377, 390; 811 NW2d 531 (2011); see also *People v Bosca*, 310 Mich App 1, 56; 871 NW2d 307 (2015). However, the "dominant test" is the proportionality question, which is "whether the punishment is so excessive that it is completely unsuitable to the crime." *People v Coles*, 417 Mich 523, 530; 339 NW2d 440 (1983),[6] citing *People v Lorentzen*, 387 Mich 167, 181; 194 NW2d 827 (1972) (holding that a mandatory minimum prison sentence of 20 years for nonviolent crime of selling marijuana with no individualized consideration was cruel or unusual).

The goal of rehabilitation is also a consideration. *Dipiazza*, 286 Mich App at 154, citing *People v Launsburry*, 217 Mich App 358, 363; 551 NW2d 460 (1996). If the punishment "thwarts the rehabilitative potential of the individual offender and does not contribute toward society's efforts to deter others from engaging in similar prohibited behavior," it may be deemed excessive. *Coles*, 417 Mich at 530, citing *Lorentzen*, 387 Mich at 180. However, the "need to prevent the individual offender from causing further injury to society" is an equally important consideration. *Lorentzen*, 387 Mich at 180. In the end, a penalty that is unjustifiably disproportionate to the crime or unusually excessive should be struck down as cruel or unusual. See *People v Bullock*, 440 Mich 15, 30; 485 NW2d 866 (1992).

Likewise, under a federal as-applied challenge, a limited proportionality comparison also comes into play, as the court must first compare "the gravity of the offense and the severity of the sentence." *Graham*, 560 US at 60. This "narrow proportionality principle" does

[6] Our Supreme Court overruled *Coles* in part on other grounds in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990).

not require strict proportionality, but only prohibits "extreme sentences that are grossly disproportionate to the crime." *Id*. at 59-60 (quotation marks and citation omitted). Because of that, and the significant deference given to legislative sentencing, it will be the rare case that meets this initial threshold test. See *United States v Young*, 766 F3d 621, 625 (CA 6, 2014); *United States v Cobler*, 748 F3d 570, 575 (CA 4, 2014); *United States v Reingold*, 731 F3d 204, 211 (CA 2, 2013). Indeed, the United States Supreme Court has only found one law that met this stringent test—a South Dakota law that provided for life in prison without parole for a recidivist defendant who passed bad checks. *Solem v Helm*, 463 US 277, 279-284; 103 S Ct 3001; 77 L Ed 2d 637 (1983). And if a case does not meet that initial, narrow proportionality test, we can go no further. See *Cobler*, 748 F3d at 575.

Turning now to the case before us, we first recognize that lifetime electronic monitoring for those convicted of CSC-II against a victim less than 13 years old[7] addresses the significant concerns of rehabilitation and recidivism. As the United States Supreme Court has repeatedly emphasized, "The risk of recidivism posed by sex offenders is 'frightening and high.' " *Smith v Doe*, 538 US 84, 103; 123 S Ct 1140; 155 L Ed 2d 164 (2003), quoting *McKune v Lile*, 536 US 24, 34; 122 S Ct 2017; 153 L Ed 2d 47 (2002); see also *McKune*, 536 US at 33 ("When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual

[7] Our Court previously pointed out that lifetime electronic monitoring only applies to persons convicted of CSC-I or CSC-II when the victim is less than 13 years old and the defendant is 17 years old or older and is placed on parole or released from prison. See *People v Kern*, 288 Mich App 513, 522-524; 794 NW2d 362 (2010), and *People v Brantley*, 296 Mich App 546, 558-559; 823 NW2d 290 (2012).

assault."), *United States v Gould*, 568 F3d 459, 472-473 (CA 4, 2009) ("Congress recognized that sex offenders constitute a unique class of criminal insofar as members of that class are considered to have higher rates of recidivism than other offenders."), and *State v Ferguson*, 120 Ohio St 3d 7, 13; 2008 Ohio 4824, ¶ 28; 896 NE2d 110 (2008). To combat these substantial recidivism risks, it has been recognized that "the monitoring system has a deterrent effect on would-be re-offenders" and "the ability to constantly monitor an offender's location allows law enforcement to ensure that the offender does not enter a school zone, playground, or similar prohibited locale." *Doe v Bredesen*, 507 F3d 998, 1007 (CA 6, 2007). It is against this backdrop that we look to the harshness of this punishment in light of other punishments and what other states have done. In so doing, we hold that defendant cannot overcome the presumption that his requirement of lifetime electronic monitoring is neither cruel nor unusual.

In looking at the harshness of the penalty, the first comparison is of punishments for other crimes in this state. Defendant points out that lifetime electronic monitoring applies to both CSC-I, which is punishable by life or any term of years, allows for consecutive sentencing, and has a 25-year mandatory minimum sentence in certain instances if a child under the age of 13 is involved and a mandatory sentence of life without parole if it is a second such offense, see MCL 750.520b(2), and CSC-II, which is only punishable by up to 15 years in prison, MCL 750.520c(2)(a). Further, he points out that the monitoring is not required for arguably more grave crimes, asserting that "one could kill another person, shoot them in the eye, hold them hostage, torture them, rob them with a weapon and forcibly penetrate an adult victim and not be subjected to lifetime electronic monitoring." (Citations omitted.)

All of this is true, but it also ignores the ancillary societal benefit of this lifelong monitoring: to ensure that certain sex offenders will not again be in a position to exploit their potential victims—children, some of the most vulnerable individuals in our society. See *Gould*, 568 F3d at 472-473. The high recidivism rate and vulnerability of the victims are the common elements that allow for lifetime electronic monitoring in CSC-II cases involving minor children, which distinguishes these crimes from those defendant highlights. In other words, the factors that would allow for the most pertinent comparison—a minor victim under the age of 13 with an offender 17 or older—are missing from these other crimes.[8]

Many states have imposed the penalty of lifetime electronic monitoring for various CSC cases. And while some of those states have imposed the requirement for a lesser amount of time, at least 11 (including Michigan) have mandated lifetime monitoring for defendants convicted of the most serious CSC offenses or CSC with a minor.[9] The "need to prevent the individual

[8] While the harshness of the penalty is the mainstay of defendant's argument, he also argues that the relative gravity of this offense does not warrant lifetime electronic monitoring. He notes that it "applies equally to the high school offender [17 years of age or older] who pats the behind of a young girl, and the recidivist adult offender engaged in a forced act of penetration." However, it would only apply in the first instance if the touching were for a sexual purpose and in all instances only if the touching was of a child under the age of 13. More importantly, sexual abuse of children under the age of 13 is a grave offense in all instances.

[9] See Cal Penal Code 3004(b) (providing that every inmate convicted of certain " 'registerable sex offense[s]' . . . shall be monitored by a global positioning system for life"); Ga Code Ann 42-1-14(e) (requiring "[a]ny sexually dangerous predator . . . to wear an electronic monitoring system" linked to a global positioning satellite system "for the remainder of his or her natural life"); Kan Stat Ann 21-6604(r) (requiring certain sexual offenders to "be electronically monitored upon release from

offender from causing further injury to society" is a valid consideration in designing a punishment, *Lorentzen*, 387 Mich at 180, and at least 10 states besides Michigan have determined that mandatory lifetime electronic monitoring is of value in ensuring such protection. Defendant suggests that this is the case only for more serious sexual offenses, but sexual offenses involving children under 13 years of age are grave offenses and, given the judicially recognized recidivism rate for these offenders, this level of protection is not clearly excessive or grossly disproportionate. It is certainly not unusual. And, it is not grossly disproportionate with respect to defendant. Although he had no prior record, there was evidence of improper sexual acts involving 13 women or children. Such

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imprisonment for the duration of the defendant's natural life"); La Rev Stat Ann 15:560.3(A)(3) and 15:560.4(A) (providing that a "sexually violent predator or a child sexual predator . . . shall be required to be electronically monitored" and that the predator must "[s]ubmit to electronic monitoring . . . for the duration of his natural life"); Md Code Ann, Crim Proc 11-723(3)(i) ("The conditions of lifetime sexual offender supervision may include . . . monitoring through global positioning satellite tracking or equivalent technology[.]"); Mo Rev Stat 217.735 ("A mandatory condition of lifetime supervision of [certain sexual offenders] . . . is that the offender be electronically monitored. Electronic monitoring shall be based on a global positioning system or other technology that identifies and records the offender's location at all times."); Neb Rev Stat 83-174.03(1) and (4)(g) (requiring that a sexual offender convicted of an enumerated offense be supervised "for the remainder of his or her life" through certain conditions, including those "designed to minimize the risk of recidivism, including, but not limited to, the use of electronic monitoring, which are not unduly restrictive"); NC Gen Stat 14-208.40A(c) ("If the court finds that the offender has been classified as a sexually violent predator [or] is a recidivist, . . . the court shall order the offender to enroll in a satellite-based monitoring system for life."); RI Gen Laws 11-37-8.2.1(b) (providing that certain sexual offenders "shall be electronically monitored via an active global positioning system for life"); Wis Stat 301.48(1)(d) and (2) (requiring "lifetime tracking" of certain sexual offenders through "global positioning system tracking that is required for a person for the remainder of the person's life").

evidence suggests that lifetime monitoring would help to protect potential victims from defendant, who in turn would likely be deterred from engaging in such acts if he were closely monitored. Accordingly, when employing an as-applied standard under the state Constitution, lifetime electronic monitoring is not cruel or unusual punishment.[10]

For these same reasons, defendant cannot succeed on his facial challenge under the state Constitution, *Bonner*, 495 Mich at 223, nor can he prevail on his federal constitutional claim, *Nunez*, 242 Mich App at 618 n 2. And even if defendant's federal claim were not essentially subsumed within the stricter state constitutional provision, our analysis reveals that lifetime electronic monitoring is not an "extreme sentence[]" that is "grossly disproportionate to the crime." *Graham*, 560 US at 60 (quotation marks and citation omitted). Lifetime electronic monitoring for an individual 17 or older who is convicted of CSC against an individual 13 or younger is not the least bit comparable to the only crime and punishment found to be unconstitutional by the Supreme Court under this test. That part of defendant's sentence therefore does not violate defendant's state or federal rights against cruel and/or unusual punishment.

2. FOURTH AMENDMENT

Defendant cites *United States v Jones*, 565 US ___; 132 S Ct 945; 181 L Ed 2d 911 (2012), for the proposi-

[10] Defendant mentions in passing that the mandatory statutory costs for the lifetime electronic monitoring also is cruel or unusual punishment. But defendant provides no argument in support of this particular position, so the pump has not been primed for the appellate well to flow. *People v Waclawski*, 286 Mich App 634, 679; 780 NW2d 321 (2009).

tion that electronic monitoring violates the Fourth Amendment to the United States Constitution. US Const, Am IV provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

In *Jones*, the police attached a global positioning system device to a vehicle belonging to the defendant's wife and tracked his movements for 28 days. According to the Court, whether placing the device on the defendant's car constituted a search did not turn on whether the defendant had a reasonable expectation of privacy in the underbelly of the vehicle or its location on public roads. *Id*. at ___; 132 S Ct at 950. Instead the Court held that because "[t]he Government physically occupied private property for the purpose of obtaining information," it had engaged in a search. *Id*. at ___; 132 S Ct at 949. The Court therefore did not reach the question whether the search violated defendant's reasonable expectation of privacy. *Id*. ___; 132 S Ct at 950; see also *People v Gingrich*, 307 Mich App 656, 664-665; 862 NW2d 432 (2014) (recognizing that there is no need to determine the reasonable expectation of privacy if the government physically intrudes on the defendant's property or person, as the intrusion for purposes of gathering information constitutes a search by itself).

Though neither party has brought the decision to our attention, whether placing the monitor on defendant constitutes a search for purposes of the Fourth Amendment was just recently resolved by the United

States Supreme Court in *Grady v North Carolina*, 575 US ___; 135 S Ct 1368; 191 L Ed 2d 459 (2015). There, the Court held that a Fourth Amendment search occurred through operation of a North Carolina law that required recidivist sex offenders to wear a satellite-based monitoring device. *Id*. at ___; 135 S Ct at 1369-1370. On the basis of *Grady*, we must hold that the placement of an electronic monitoring device to monitor defendant's movement constitutes a search for purposes of the Fourth Amendment. But, as the *Grady* Court also noted, that conclusion does not end the Fourth Amendment inquiry, as the Fourth Amendment only precludes *unreasonable* searches. *Id*. at ___; 135 S Ct at 1371. Whether a search is unreasonable is a question of law. *Sitz v Dep't of State Police*, 443 Mich 744, 765; 506 NW2d 209 (1993), citing *People v Case*, 220 Mich 379, 389; 190 NW 289 (1922). Accord *United States v Wagers*, 452 F3d 534, 537 (CA 6, 2006), and *United States v Taylor*, 592 F3d 1104, 1107 (CA 10, 2010). For the following reasons, we hold that lifetime electronic monitoring for a defendant 17 years or older convicted of CSC-II involving a minor under 13 is not unreasonable.

The reasonableness of a search "depends upon all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself." *United States v Montoya de Hernandez*, 473 US 531, 537; 105 S Ct 3304; 87 L Ed2d 381 (1985) (citation omitted). "'"The applicable test in determining the reasonableness of an intrusion is to balance the need to search, in the public interest, for evidence of criminal activity against invasion of the individual's privacy."'" *People v Chowdhury*, 285 Mich App 509, 516; 775 NW2d 845 (2009), quoting *People v Wilkens*, 267 Mich App 728, 733; 705 NW2d 728 (2005).

Turning first to the public interest, it is evident that in enacting this monitoring provision, the Legislature was seeking to provide a way in which to both punish and deter convicted child sex offenders and to protect society from a group known well for a high recidivism rate. As the Court pointed out in *Samson v California*, 547 US 843, 853; 126 S Ct 2193; 165 L Ed 2d 250 (2006), "this Court has repeatedly acknowledged that a State's interests in reducing recidivism and thereby promoting reintegration and positive citizenship among probationers and parolees warrant privacy intrusions that would not otherwise be tolerated under the Fourth Amendment." See also *Smith*, 538 US at 103. "This Court has acknowledged the grave safety concerns that attend recidivism," *Samson* continued, and that "the Fourth Amendment does not render the States powerless to address these concerns *effectively*." *Samson*, 547 US at 854. As the prosecution points out, electronic monitoring not only acts as a strong deterrent, but also assists law enforcement efforts to ensure that these individuals, who have committed " 'the most egregious and despicable of societal and criminal offenses,' " *United States v Mozie*, 752 F3d 1271, 1289 (CA 11, 2014), quoting *United States v Sarras*, 575 F3d 1191, 1220 (CA 11, 2009), do not frequent prohibited areas (elementary schools, etc.) and remain compliant with the Sex Offenders Registration Act, MCL 28.721 *et seq*., see *Doe*, 507 F3d at 1007. Consequently, when enacting this monitoring system and requiring it only for those 17 or older who commit CSC against children under the age of 13, the Legislature was addressing punishment, deterrence, and the protection of some of the most vulnerable in our society against some of the worst crimes known. As we earlier noted, the "need to prevent the individual offender from causing further

injury to society" is a valid consideration in designing a punishment. *Lorentzen*, 387 Mich at 180.

Having examined the public interest in this type of monitoring, we now balance that interest against the invasion of defendant's privacy interest. We begin by recognizing that parolees and probationers have a lower expectation of privacy, even in the comfort of their own homes, than does the average law-abiding citizen. *Samson*, 547 US at 848-852, citing *Hudson v Palmer*, 468 US 517, 530; 104 S Ct 3194; 82 L Ed 2d 393 (1984). The monitoring does not prohibit defendant from traveling, working, or otherwise enjoying the ability to legally move about as he wishes. Instead, the monitoring device simply records where he has traveled to ensure that he is complying with the terms of his probation and state law. MCL 791.285(1) and (3). And although this monitoring lasts a lifetime, the Legislature presumably provided shorter prison sentences for these CSC-II convictions because of the availability of lifetime monitoring. In that regard we also cannot forget that minor victims of CSC-II are often harmed for life. See *Mozie*, 752 F3d at 1289 ("Sexual crimes against minors cause substantial and long-lasting harm . . . ."), *Kennedy v Louisiana*, 554 US 407, 467-468; 128 S Ct 2641; 171 L Ed 2d 525 (2008) (Alito, J., dissenting) (discussing the longterm developmental problems sexually abused children can experience), and *People v Huddleston*, 212 Ill 2d 107, 135; 287 Ill Dec 560; 816 NE2d 322 (2004) ("The child's life may be forever altered by residual problems associated with the event."). Though it may certainly be that such monitoring of a law abiding citizen would be unreasonable, on balance the strong public interest in the benefit of monitoring those convicted of CSC-II against a child under the age of 13 outweighs any minimal impact on defendant's reduced privacy interest.

3. DOUBLE JEOPARDY

Finally, defendant argues that the punishment of lifetime electronic monitoring, and concomitant cost, violates the state and federal Double Jeopardy Clauses. Article 1, § 15 of our Constitution provides, in pertinent part, that "[n]o person shall be subject for the same offense to be twice put in jeopardy," Const 1963, art 1, § 15, whereas the Fifth Amendment to the United States Constitution provides, in pertinent part, that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb," US Const, Am V. The double jeopardy prohibition "(1) . . . protects against a second prosecution for the same offense after acquittal; (2) . . . protects against a second prosecution for the same offense after conviction; and (3) . . . protects against multiple punishments for the same offense." *People v Nutt*, 469 Mich 565, 574; 677 NW2d 1 (2004). However, with respect to multiple punishments, this Court stated in *People v Ford*, 262 Mich App 443, 447-448; 687 NW2d 119 (2004):

> [T]he purpose of the double jeopardy protection against multiple punishments for the same offense is to protect the defendant from having more punishment imposed than the Legislature intended. [*People v Sturgis*, 427 Mich 392, 399; 397 NW2d 783 (1986)]; [*People v*] *Calloway* [469 Mich 448, 451; 671 NW2d 733 (2003)]. "[T]he Double Jeopardy Clause acts as a restraint on the prosecutor and the courts, not the Legislature." [*People v*] *Robideau* [419 Mich 458, 469; 355 NW2d 592 (1984), overruled on other grounds by *People v Smith*, 478 Mich 292, 324; 733 NW2d 351 (2007)], citing *Brown v Ohio*, 432 US 161; 97 S Ct 2221; 53 L Ed 2d 187 (1977). Accordingly, the Double Jeopardy Clause does not limit the Legislature's ability to define criminal offenses and establish punishments, *Sturgis*, [427 Mich] at 400, and the "only interest of the defendant is in not having more punishment imposed than that intended by the Legislature." *Robideau*, [419 Mich] at 485.

See also *People v Dewald*, 267 Mich App 365, 385; 705 NW2d 167 (2005) (holding in the case of a defendant sentenced to prison and ordered to pay restitution that "MCL 780.766(2) requires a court to order restitution 'in addition to or in lieu of any other penalty authorized by law or in addition to any other penalty required by law' " and that the order of restitution did not violate double jeopardy), overruled in part on other grounds by *People v Melton*, 271 Mich App 590; 722 NW2d 698 (2005) (special panel to resolve conflict).

Because the Legislature intended that both defendant's prison sentence and the requirement of lifetime monitoring be sanctions for the crime, there was no double jeopardy violation.

Affirmed.

BOONSTRA, P.J., and SAAD, J., concurred with MURRAY, J.

MICHIGAN CHARITABLE GAMING ASSOCIATION v STATE OF MICHIGAN

Docket No. 323410. Submitted March 3, 2015, at Lansing. Decided May 28, 2015, at 9:05 a.m. Leave to appeal sought.

The Michigan Charitable Gaming Association and others brought an action in the Court of Claims against the state of Michigan and the Michigan Gaming Control Board and its executive director, alleging that the board had failed to comply with the Administrative Procedures Act (APA), MCL 24.201 *et seq*., when promulgating rules governing charitable poker games, also known as "millionaire parties" in accordance with MCL 432.103a(8). The board submitted the proposed rules to the Legislature's Joint Committee on Administrative Rules (JCAR). After holding a hearing on the proposed rules, the committee chair, Senator John Pappageorge, suggested that the rules be withdrawn so that changes could be made. After withdrawing the rules, the board made changes affecting 3 of the 50 proposed rules before resubmitting the rules to JCAR. JCAR did not take any further action regarding the rules, which were filed with the Secretary of State on May 14, 2014. Plaintiffs claimed that the board failed to hold a public hearing on the revised rules and failed to issue new regulatory and small business impact statements following the rule revision and sought a preliminary injunction enjoining enforcement of the rules. The court, PAT M. DONOFRIO, J., issued the injunction and subsequently granted summary disposition in favor of plaintiffs, holding that the rules were invalid and dismissing as moot the remainder of plaintiffs' claims. Defendants appealed.

The Court of Appeals *held*:

An agency's failure to follow the rulemaking process outlined in the APA renders a rule invalid. In this case, it is undisputed that the board sought and received Office of Regulatory Reinvention approval for rulemaking, produced a regulatory impact statement, held a public hearing, sought and received approval from the Legislative Service Bureau, and submitted the proposed rules to JCAR. The board then withdrew the rules from JCAR with permission in accordance with MCL 24.245a(7)(a). The question was whether the board could resubmit an amended version of the proposed rules to JCAR under MCL 24.245a(7). The

APA uses the terms "a rule," "the rule," "a proposed rule," and "the proposed rule" to refer to a rule as it moves through the rulemaking process. Given that these terms are used interchangeably throughout the act, the fact that MCL 24.245a(7) refers to withdrawing "the rule" and resubmitting "it" had no significance. The Legislature's use of the word "it" in MCL 24.245a(7) refers not only to the rule as originally submitted, but also, potentially, to an amended or altered rule. There is nothing in the plain language of the statute that would prohibit an agency from making changes to a rule before resubmission to JCAR. The fact that an agency has express authority, under MCL 24.245(2), to make changes to a proposed rule after the public hearing evidences the Legislature's intent that the rulemaking process be responsive. Given that the APA does not expressly preclude changes before resubmission to JCAR, there is no reason to temporally limit an agency's ability to make changes after a public hearing, as long as those changes are consistent with the impact statements that have already been submitted. Permitting an agency to withdraw a rule that has been submitted to JCAR, make changes, and then resubmit the rule to JCAR, was in line with the purposes of the act and the context of the statute at issue. The fact that the APA formerly expressly permitted an agency to resubmit a rule with changes was not controlling. Because the procedure used in this case was consistent with the rulemaking process outlined in the APA, was not expressly prohibited thereby, and was undertaken with the express blessing of JCAR, the process complied with the APA's rulemaking procedures.

Court of Claims' judgment reversed, injunction vacated, and case remanded for further proceedings.

METER, J., dissenting, concluded that the Legislature did not intend for a rule to be submitted to JCAR, withdrawn, altered, and resubmitted without having gone again through the rulemaking process and would have affirmed the judgment of the Court of Claims. The word "it" in MCL 24.245a(7) seems, logically and in a grammatical sense, to refer to "the rule" that had previously been submitted. Former MCL 24.245(11) shows that when the Legislature wanted to allow a rule to be withdrawn and resubmitted with changes, it included language making that intent clear. By eliminating that language the Legislature attempted to change the resubmission scheme by eliminating the ability to resubmit altered rules to JCAR. Accordingly, in this case, the rules in question were not properly promulgated.

ADMINISTRATIVE LAW — RULEMAKING PROCESS — SUBMISSION, WITHDRAWAL, AMENDMENT, AND RESUBMISSION OF RULES TO THE JOINT COMMITTEE ON ADMINISTRATIVE RULES.

Under MCL 24.245a(7), an agency may withdraw a proposed rule, alter it, and resubmit it to the Joint Committee on Administrative Rules as long as the changes are consistent with the impact statements that have already been submitted and do not infringe on the committee's limited role in the rulemaking process.

Foster, Swift, Collins & Smith, PC (by *Charles E. Barbieri* and *Zachary W. Behler*), for plaintiffs.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Mark G. Sands* and *Bethany L. Scheib*, Assistant Attorneys General, for defendants.

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

BECKERING, J. Defendants, the State of Michigan, the Gaming Control Board, and the Gaming Control Board Executive Director, appeal as of right the order of the Court of Claims granting summary disposition under MCR 2.116(C)(10) to plaintiffs, the Michigan Charitable Gaming Association et al., and enjoining enforcement of recently promulgated administrative rules governing "millionaire parties"—a form of casino-style charitable gambling. We reverse the ruling of the Court of Claims, vacate the injunction, and remand for further proceedings.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

This appeal concerns administrative rules that went into effect on May 14, 2014, and the process by which those rules were promulgated. After conducting an investigation into millionaire parties, Richard Kalm, the Gaming Control Board Executive Director, and the

Gaming Control Board (the agency), concluded that stricter regulations were necessary. In accordance with the Administrative Procedures Act, MCL 24.201 *et seq*. (APA), the agency filed a request for rulemaking authority with the Office of Regulatory Reinvention (ORR) under MCL 24.239 to promulgate new rules to govern millionaire parties. Upon ORR granting the request, the agency submitted a set of proposed rules, which ORR approved on September 20, 2013. Thereafter, the agency submitted a regulatory impact statement and a cost-benefit analysis, which were approved by ORR on October 8, 2013. The Legislative Service Bureau (LSB) returned the rules, with edits, on November 4, 2013, and the rules were resubmitted to ORR with a draft public-hearing notice. On November 22, 2013, a public hearing was held.

On the basis of comments made at the public hearing, the agency made several changes to the proposed rules that would lessen the regulatory burden on the industry. After certification from ORR and LSB, the agency submitted the rule set to the Legislature's Joint Committee on Administrative Rules (JCAR). JCAR held a hearing attended by the agency and members of the public. Following the hearing, JCAR Chair, Senator John Pappageorge, suggested that the rules be withdrawn so further changes could be made to address concerns raised by the public. Kalm and Pappageorge agreed that if the rules were withdrawn, amended, and resubmitted, JCAR would not object to the rules, and they would go into effect. After withdrawing the rules, the agency made the following changes that affected 3 of the 50 proposed rules:

1. The Executive Director was authorized to grant up to two millionaire party licenses per day per location instead of one.

2. All expenses had to be necessary and reasonable and could not exceed 45% of the gross profits from an event, instead of 35%.

3. The rule requiring a charity to conduct its millionaire party in its county or an adjacent county was eliminated.

According to defendants, these changes were based on public comment.

Thereafter, the agency resubmitted the 2 remaining altered rules and the 47 unaltered rules to JCAR, along with an amended agency report to reflect the changes. Once again, the rules were certified by LSB and ORR. After JCAR did not take action within the allowed period for doing so, the rules were submitted to the Secretary of State on May 14, 2014. ORR filed the rules with the Office of the Great Seal on that same day. The rules were subsequently published in the Michigan Register on June 1, 2014.

The withdrawal, changes, and resubmission process in the preceding paragraph are the subject of this lawsuit. Specifically, plaintiffs contend that pursuant to MCL 24.245a(7), the rules could not be amended after they were withdrawn from consideration by JCAR. Defendants contend that the APA provides for the very procedure used in this case.

On May 22, 2014, plaintiffs initiated the instant proceedings by filing a complaint in the Court of Claims. Pertinent to this appeal, they alleged that the agency failed to comply with §§ 41, 42, and 45, MCL 24.241, MCL 24.242, and MCL 24.245, of the APA with respect to the amended rules. They claimed that the agency failed to hold a public hearing on the new rules and that the agency failed to issue a new regulatory impact statement or small business impact statement. In addition to filing their complaint, plaintiffs moved

the Court of Claims for a preliminary injunction. On May 30, 2014, the Court of Claims issued a preliminary injunction enjoining the enforcement of the new rules, concluding, in pertinent part, that plaintiffs were likely to succeed on the merits of their challenge.

On July 10, 2014, plaintiffs filed a motion for summary disposition under MCR 2.116(C)(10). Defendants filed a cross-motion for partial summary disposition under MCR 2.116(C)(10), asserting that the rules were properly promulgated. Defendants contended that considering the text of the APA as a whole, the act does not require an agency to hold a second period of public comment or prepare a second regulatory impact statement before resubmitting amended rules to JCAR. Defendants argued that if the Legislature had intended to require an agency to hold a second public hearing or submit a second regulatory impact statement before resubmitting rules to JCAR, it would have included such language in the statute. Defendants argued that the only rational reason for the withdrawal-and-resubmission provision is to allow an agency to make changes in response to JCAR suggestions. As an alternative, defendants argued that even if plaintiffs were correct in their interpretation of the APA, only 3 of the proposed 50 rules had been amended, so the remaining 47 rules were properly promulgated and should be upheld.

On August 7, 2014, the Court of Claims granted plaintiffs' motion for summary disposition under MCR 2.116(C)(10), holding that the promulgated rules were invalid and dismissing as moot the remainder of plaintiffs' challenges. The court analyzed MCL 24.245a(7), which provides:

> An agency may withdraw a proposed rule under the following conditions:

(a) With permission of the committee chair and alternate chair, the agency may withdraw the rule and resubmit it. If permission to withdraw is granted, the 15-session-day time period described in subsection (1) is tolled until the rule is resubmitted, except that the committee shall have at least 6 session days after resubmission to consider the resubmitted rule.

(b) Without permission of the committee chair and alternate chair, the agency may withdraw the rule and resubmit it. If permission to withdraw is not granted, a new and untolled 15-session-day time period described in subsection (1) shall begin upon resubmission of the rule to the committee for consideration.

The court reasoned that the reference in MCL 24.245a(7)(a) to "it" with regard to the rule that is withdrawn and can be resubmitted, "grammatically refers to the proposed rule that the agency withdrew." This meant that a rule that was resubmitted under the statute had to be the same as the rule that had been originally submitted to JCAR. As it indicated in granting a preliminary injunction, the court explained that it was "not persuaded by defendants' argument that an agency may withdraw a rule, change it, and 'resubmit' the changed rule to JCAR under § 45a(7)." Reviewing the rulemaking process under the APA, the court agreed with defendants that the APA allows an agency to make changes in proposed rules during the proceeding, such as after the public hearing given that MCL 24.245(2) expressly refers to changes in the proposed rules made after the public hearing. However, the court opined, "that does not mean that the APA allows the changes to be made at any time that the agency wants."

In reaching its conclusion, the court examined the history of the APA provisions governing withdrawal and resubmission and concluded that the act's history

supported its holding. Before the enactment of 1999 PA 262, which added the provision at issue in this case, MCL 24.245(11) expressly permitted resubmission of a rule "*with changes following a committee meeting on the proposed rule or with minor modifications*." 1993 PA 141, § 45(11) (emphasis added). The former version of the statute also specified that "[a] resubmitted rule is a new filing and subject to this section but is not subject to further notice and hearing . . . ." *Id*. The court further noted that a legislative bill analysis explained that the 1999 amendment of the APA was designed to eliminate the former process for JCAR approval and replace it with an entirely new process. With this backdrop in mind, the court reasoned that the Legislature, in enacting 1999 PA 262, did not intend to allow an agency to withdraw, modify, and resubmit rules under MCL 24.245a(7). "Rather, the statute requires either a resubmission of 'it' (i.e., the same rules) or re-initiation of the processing method."

The court found unpersuasive affidavits from the manager of ORR and the deputy director for the Department of Licensing and Regulatory Affairs, which is the department in which ORR is housed. The affidavits indicated that, in past practice, ORR applied MCL 24.245a(7) in line with defendants' interpretation of the statute. The court stated that the opinions of the affiants were not helpful, because " '[t]he duty to interpret and apply the law has been allotted to the courts, not to the parties' expert witnesses,' " quoting *Hottman v Hottman*, 226 Mich App 171, 179; 572 NW2d 259 (1997), and because the affiants did not provide any legal authority or analysis to support their opinions.

The court also rejected defendants' argument that the 47 unchanged rules were properly promulgated,

stating, "There is no dispute the rules were processed as a set from the inception. Thus, the Gaming Control Board did not submit 50 regulatory impact statements and cost-benefit analyses; rather, a single one was prepared that addressed the rule set . . . ." The court rejected defendants' invitation to view the set as a single rule for purposes of compliance with the APA's rulemaking requirements such as a regulatory impact statement, and then view the rules individually when evaluating the ramifications of the set. The court was not persuaded that "the variable approach that defendants propose is compatible with the APA."

II. STANDARD OF REVIEW

We review de novo the Court of Claims' decision on a motion for summary disposition. *Commerce & Indus Ins Co v Dep't of Treasury*, 301 Mich App 256, 263; 836 NW2d 695 (2013). We also review de novo issues of statutory interpretation. *Id*. "The primary goal of statutory construction is to give effect to the Legislature's intent." *McCormick v Carrier*, 487 Mich 180, 191; 795 NW2d 517 (2010).

> In determining the intent of the Legislature, this Court must first look to the language of the statute. The Court must, first and foremost, interpret the language of a statute in a manner that is consistent with the intent of the Legislature. As far as possible, effect should be given to every phrase, clause, and word in the statute. The statutory language must be read and understood in its grammatical context, unless it is clear that something different was intended. Moreover, when considering the correct interpretation, the statute must be read as a whole. Individual words and phrases, while important, should be read in the context of the entire legislative scheme. While defining particular words in statutes, we must consider both the plain meaning of the critical word

> or phrase and its placement and purpose in the statutory scheme. 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. Moreover, courts must pay particular attention to statutory amendments, because a change in statutory language is presumed to reflect either a legislative change in the meaning of the statute itself or a desire to clarify the correct interpretation of the original statute. [*Bush v Shabahang*, 484 Mich 156, 166-167; 772 NW2d 272 (2009) (citations and quotation marks omitted).]

"[I]f the language is clear and unambiguous, it is presumed that the Legislature intended the meaning expressed in the statute. Judicial construction of an unambiguous statute is neither required nor permitted." *McCormick*, 487 Mich at 191-192 (citation omitted).

In addition, "[t]he construction of a statute by a state administrative agency charged with administering it is always entitled to the most respectful consideration and ought not to be overruled without cogent reasons." *Mich Farm Bureau v Dep't of Environmental Quality*, 292 Mich App 106, 129; 807 NW2d 866 (2011) (citations and quotation marks omitted). See also *Younkin v Zimmer*, 497 Mich 7, 10; 857 NW2d 244 (2014) (giving deference to the interpretation of agency officials who were acting in their official capacities at the time they gave meaning to the term at issue). However, an agency interpretation is not binding on the courts and cannot conflict with the intent of the Legislature as expressed in the plain language of the statute. *Mich Farm Bureau*, 292 Mich App at 130. "Thus, even a longstanding administrative interpretation cannot overcome the plain language of a statute." *Id*.

III. ANALYSIS

A. OVERVIEW OF THE RULEMAKING PROCESS

The APA governs the creation of "rules," including agency regulations. See MCL 24.207. An agency's failure to follow the process outlined in the APA renders a rule invalid. See *Faircloth v Family Independence Agency*, 232 Mich App 391, 402; 591 NW2d 314 (1998). See also MCL 24.243(1) (mandating "compliance with" the provisions of § 42, MCL 24.242, concerning public notice and "substantial compliance" with § 41, MCL 24.241, which concerns the content of the notice, transmission of copies of the notice to each person who requested advance notice, and certain procedures for public hearings). To give context to our analysis, we briefly review the rulemaking process set forth in the APA.

An agency wishing to create a rule must first make a request for rulemaking authority to ORR. MCL 24.239. After receiving rulemaking approval, the agency must submit a draft of the proposed rules to ORR, which gives approval to proceed with a public hearing. MCL 24.239a(1). If ORR grants approval for a public hearing, it "shall immediately provide a copy of the proposed rules to" JCAR. MCL 24.239a(2). Before adopting a rule, an agency or ORR must provide notice of a public hearing and offer "an opportunity to present data, views, questions, and arguments." MCL 24.241(1). In addition to providing notice to the public, the agency must give notice of the public hearing to "the committee,"[1] which may in turn "meet to consider the proposed rule, take testimony, and provide the agency with the committee's informal response to the rule." MCL 24.242(5). The agency must also send the

[1] As used in the APA, "the committee" refers to JCAR. MCL 24.203(4).

proposed rules to LSB for approval. MCL 24.245(1). At least 28 days before the public hearing, the agency must prepare a regulatory impact statement and small business impact statement and submit them to ORR and JCAR. MCL 24.245(3) and (4).

Following the public hearing and before the agency proposing the rule has formally adopted[2] the rule, the agency must prepare a report "containing a synopsis of the comments contained in the public hearing record, a copy of the request for rule-making, and the regulatory impact statement . . . ." MCL 24.245(2). The APA acknowledges that the agency may make changes to the rules following the public hearing. Specifically, MCL 24.245(2)[3] states that in the agency report, "the agency shall describe any changes in the proposed rules that were made by the agency after the public hearing."[4]

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[2] " 'Adoption of a rule' means that step in the processing of a rule consisting of the formal action of an agency establishing a rule before its promulgation." MCL 24.203(1).

[3] MCL 24.245(2) further provides, in pertinent part:

> The office of regulatory reinvention shall transmit by notice of transmittal to [JCAR] copies of the rule, the agency reports containing the request for rule-making, a copy of the regulatory impact statement, and certificates of approval from the legislative service bureau and the office of regulatory reinvention. The office of regulatory reinvention shall also electronically submit to [JCAR] a copy of the rule, any agency reports required under this subsection, any regulatory impact statements required under subsection (3), and any certificates of approval required under subsection (1). The agency shall electronically transmit to the committee the records described in this subsection within 1 year after the date of the last public hearing on the proposed rule unless the proposed rule is a resubmission under section 45a(7).

[4] The act does not contain an affirmative, express statement that the agency may make changes after the public hearing. However, by mandating that the agency, at this point, "shall describe any changes in the proposed rules that were made by the agency after the public

ORR is required to submit to JCAR, by notice of transmittal, copies of the rule, agency reports containing the request for rulemaking, a copy of regulatory impact statements, and certificates of approval from LSB and ORR. MCL 24.245(2). Further, ORR must electronically submit to JCAR the noted documents, plus any agency reports prepared in accordance with the statute. MCL 24.245(2). The agency, too, must electronically submit the records described within one year of the date of the last public hearing on the proposed rule "unless the proposed rule is a resubmission under section 45a(7).[5]"

After it receives the notice of transmittal specified in the preceding paragraph, JCAR is to take one of three actions within 15 session days. See MCL 24.245a(1) and (2). The first such option is to object to the rule. MCL 24.245a(1) provides, in pertinent part, "[e]xcept as otherwise provided in subsections (7) to (9),"[6] after JCAR receives the "notice of transmittal," it has 15 session days to consider the rule and to object to the rule by filing a notice of objection, which must be approved by a concurrent majority of committee members. MCL 24.245a(1). JCAR can only object to a rule if it determines that one or more statutorily enumerated conditions exist. MCL 24.245a(1)(a) through (g).[7] If JCAR objects within 15 session days, "the committee chair, the alternate chair, or any member of the com-

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hearing," the APA acknowledges that the agency has authority to make changes at this point in the process. MCL 24.245(2).

[5] Section 45a(7) refers to MCL 24.245a(7), the section of the statute at issue in this case.

[6] Section 45a(9), MCL 24.245a(9), requires an agency to withdraw "any rule pending before [JCAR] at the final adjournment of a regular session held in an even-numbered year and resubmit that rule. A new and untolled 15-session-day time period described in subsection (1) shall begin upon resubmission of the rule to the committee for consideration."

[7] MCL 24.245a(l) provides as follows:

mittee shall cause bills to be introduced in both houses of the legislature simultaneously. Each house shall place the bill or bills directly on its calendar." MCL 24.245a(3). The bills referred to in the statute must contain one or more of the following: (a) a rescission of the rule, (b) a repeal of the statutory provision under which the rule was authorized, or (c) a bill staying the effective date of the proposed rule for up to one year. MCL 24.245a(3)(a) through (c).

As to JCAR's remaining options, it can elect to waive, by concurrent majority, the 15 session days. MCL 24.245a(1). If JCAR does so, ORR may immediately file the rule with the Secretary of State, and the rule will take effect upon filing. MCL 24.245a(2). Alternatively, if JCAR does nothing within 15 session days, ORR may file the rule with the secretary of state, and the rule will go into effect. MCL 24.245a(2).

B. WITHDRAWAL UNDER § 45a(7)

As noted, an exception to MCL 24.245a(1) exists

The committee may only approve a notice of objection if the committee affirmatively determines by a concurrent majority that 1 or more of the following conditions exist:

(a) The agency lacks statutory authority for the rule.

(b) The agency is exceeding the statutory scope of its rule-making authority.

(c) There exists an emergency relating to the public health, safety, and welfare that would warrant disapproval of the rule.

(d) The rule conflicts with state law.

(e) A substantial change in circumstances has occurred since enactment of the law upon which the proposed rule is based.

(f) The rule is arbitrary or capricious.

(g) The rule is unduly burdensome to the public or to a licensee licensed by the rule.

when the agency elects to withdraw a submission under MCL 24.245a(7). This is the statutory provision at issue in the instant case. MCL 24.245a(7) provides:

> An agency may withdraw a proposed rule under the following conditions:
>
> (a) With permission of the committee chair and alternate chair, the agency may withdraw the rule and resubmit it. If permission to withdraw is granted, the 15-session-day time period described in subsection (1) is tolled until the rule is resubmitted, except that the committee shall have at least 6 session days after resubmission to consider the resubmitted rule.
>
> (b) Without permission of the committee chair and alternate chair, the agency may withdraw the rule and resubmit it. If permission to withdraw is not granted, a new and untolled 15-session-day time period described in subsection (1) shall begin upon resubmission of the rule to [JCAR] for consideration.

In this case, it is undisputed that the agency sought and received ORR approval, produced a regulatory impact statement, held a public hearing, sought and received approval from LSB, and submitted the proposed rules to JCAR. The agency withdrew the rules from JCAR with permission in accordance with MCL 24.245a(7)(a). The agency subsequently removed one of the rules in the rule set and amended two others before "resubmitting" the entire rule set to JCAR, along with an amended agency report. The only dispute is whether withdrawing a rule and resubmitting an amended version of that rule is permitted under § 45a(7).

C. WHETHER CHANGES ARE PERMITTED AFTER WITHDRAWAL

Upon our review of the plain language of the provision at issue and the rulemaking process as a whole,

we find that an agency may submit an amended version of a rule upon resubmission under § 45a(7). At the outset, we reject plaintiffs' contentions that the provision's use of the phrase, "the agency may withdraw *the rule* and resubmit *it*" supports their interpretation of the act. MCL 24.245a(7)(a). Plaintiffs make much of this phrase, contending that the use of the word "it" refers to "the rule" that was submitted, meaning that the resubmitted rule has to be "it," i.e., the rule that was originally submitted, and cannot include any changes to the rule. Reading the APA as a whole to provide context, we do not agree. Section 45a(7) states that "a proposed rule" may be withdrawn, and that if "the rule" is withdrawn, the agency may resubmit "it." The APA uses the words "a rule," "the rule," "a proposed rule" or "the proposed rule" to refer to a rule as it moves through the rulemaking process. Given that these terms are used interchangeably throughout the act, we do not ascribe significance to the fact that § 45a(7) speaks of withdrawing "the rule" and resubmitting "it." We note that in other contexts, the act uses the term "rule" and "proposed rule" to describe a rule both *before and after* it has been amended by the agency. Notably, MCL 24.245(2) provides that "before the agency proposing *the rule* has formally adopted *the rule*" it shall prepare an agency report containing, among other matters, "any changes in the *proposed rules* that were made by the agency after the public hearing." (Emphasis added.) The statute does not state that the agency proposing the rule shall, after making changes in response to comments received at the public hearing, prepare an agency report on the *amended* or *altered* rule. Similarly to § 45(2) and consistently with the overall tenor of the act, § 45a(7) indicates that "the rule" remains "the rule" or the "proposed rule" after resubmission. This

language does not foreclose changes by the agency. We find the interpretation proposed by plaintiffs to be over-literal and not in conformance with the context of the APA. Therefore, we hold that the Legislature's use of the word "it" in § 45a(7)(a) refers not only to "the rule" as originally submitted, but also, potentially, to an amended or altered rule, provided that the agency submitting the rule chooses to amend it in a manner in accordance with that described in this opinion. See *Bush*, 484 Mich at 167 (when construing a statute, a reviewing court is to read the language "in the context of the entire legislative scheme" and in such a manner as to "ensure[] that it works in harmony with the entire statutory scheme").

Moreover, we find nothing in the plain language of § 45a that would prohibit an agency from making changes to a rule before resubmission. While the APA mandates strict compliance or substantial compliance with certain requirements of the act—such as notice, see MCL 24.243—the act does not precisely describe the resubmission process. Indeed, § 45a(7) is silent on the issue of changes to the proposed rules upon resubmission. The purpose of § 45a(7) is to describe the manner in which a proposed rule may be withdrawn—with or without permission of JCAR—and, based on the manner selected, the time in which JCAR has to respond to the rule after it has been resubmitted. The subsection contains no limit on the authority of the agency. Contrastingly, and as discussed in more detail later in this opinion, the APA expressly recognizes the authority of an agency to make changes to proposed rules following a public hearing. See MCL 24.245(2). We decline to read into § 45a(7) a limitation that is not within the express language of the statute. See *Mich Ed Ass'n v Secretary of State (On Rehearing)*, 489 Mich 194, 218; 801 NW2d 35 (2011) ("[N]othing may be read

into a statute that is not within the manifest intent of the Legislature as derived from the act itself.") (citation and quotation marks omitted).

Similarly, the APA is silent on the issue of the procedure that is to be used in a case, such as this one, when an agency seeks to make changes to proposed rules after submission to JCAR. The act does not state that changes can only be accomplished by reinitiating the rulemaking process. And, even assuming that it did, the act gives no guidance with regard to the point in the process to which the proposed changes must return. If we were to adopt plaintiffs' position, should we read the APA as requiring a new request for rulemaking in the event an agency wants to make changes after a rule is submitted to JCAR then withdrawn? This hardly seems advisable, considering that ORR just approved a request for rulemaking on the very subject. Likewise, it does not seem prudent to require another public hearing, as the act expressly recognizes an agency's authority to make changes following the public hearing. In sum, because the APA is silent on the procedure that should occur in the event an agency seeks to make changes upon withdrawal of a rule from JCAR, we will not read into the act such a procedure. See *id*.

In contrast to the silence concerning resubmission, we note that the APA expressly recognizes an agency's authority to make changes after the public hearing. See MCL 24.245(2). This evidences the Legislature's intent that the rulemaking process is intended to be responsive to comments and suggestions offered at the public hearing. The changes made to the rule in this case upon resubmission were consistent with that intent, as they were responsive to public comments. The APA contemplates that rulemaking is a process

comprised of various stages. See MCL 24.205(8) (defining "processing of a rule" to mean "the action required or authorized by this act regarding a rule that is to be promulgated, including the rule's adoption, and ending with the rule's promulgation"). Given that the APA does not expressly preclude changes before resubmission to JCAR, we see no reason for placing a temporal limit on an agency's ability to make changes after a public hearing, so long as those changes are consistent with impact statements that have already been submitted, and so long as they do not infringe on JCAR's role in the rulemaking process. JCAR's role in the rulemaking process is, per the plain language of the APA, limited. At the time the rule is submitted or resubmitted to JCAR, § 45a requires an agency to give JCAR an opportunity to view and object to the proposed rules. JCAR can object to proposed rules by identifying one of the enumerated grounds for objection, but rulemaking authority is left to the agency. Where, as here, the agency submitted reports to JCAR describing the rules and proposed changes upon resubmission, JCAR was still permitted to exercise its function under the APA. That is, JCAR considered the rules and determined whether they were objectionable for one of the reasons listed in § 45a(1)(a) through (g). And, we note, JCAR gave its blessing to the very procedure used by defendants in this case. Because the procedure employed in this case was consistent with the rulemaking process outlined in the APA, was not expressly prohibited thereby, and was undertaken with the express blessing of JCAR, we decline to find that the process employed was in contravention of the APA's rulemaking procedures. In other words, given the nature of the rulemaking process and the agency's role in moving a rule through this process, we see no reason

to limit an agency's ability to make changes to a rule in the manner that occurred in this case.

In evaluating this issue, we note and assign significance to the context in which § 45a(7) appears in the rulemaking process. Upon the submission of a rule to JCAR, JCAR has authority to object to the proposed rule for one of seven enumerated reasons. MCL 24.245a(1)(a) through (g). It is within this context that the provision at issue, MCL 24.245a(7), comes into play, and gives an agency authority to withdraw and resubmit a rule. In this context, if the agency could not withdraw a rule, make changes, and resubmit the rule, § 45a(7) would have very little meaning. Indeed, if a rule were objectionable for one of the reasons listed in § 45a(1), the agency could withdraw the rule, but could take no action, other than resubmitting a rule that was bound to be rejected. In comparison, if an agency can make changes upon resubmission, it could attempt to avoid a notice of objection. Within the context of the potential threat of a notice of objection from JCAR, it makes little sense that an agency cannot withdraw a proposed rule, make requisite changes, so long as those changes are within the regulatory impact and small business impact statements, and resubmit the proposed rule. We decline to give § 45a(7) the near-trivial interpretation that plaintiffs propose. See *Reed v Breton*, 475 Mich 531, 540; 718 NW2d 770 (2006) (stating that a reviewing court is "precluded from construing" a statute "as having no meaning").

Indeed, if we were to adopt the view espoused by plaintiffs, we would see little practical use for § 45a(7). If an agency is required to resubmit the exact rule that was withdrawn, § 45a(7) would be, at best, a stall tactic for an agency to attempt to convince JCAR not to raise a notice of objection in response to the rule. If the

agency could not make any changes to the rule during that time, nothing could be done to improve the rule or make it less worthy of objection. Rather, a withdrawal would simply be initiated for the agency to attempt to convince JCAR not to file a notice of objection. This interpretation hardly seems compatible with the APA's goals of promoting public participation, preventing precipitous action, and preventing the adoption of rules that are illegal or beyond the intent of the Legislature. See *Mich State AFL-CIO v Secretary of State*, 230 Mich App 1, 21; 583 NW2d 701 (1998) (describing the purposes of the APA's rulemaking process). At worst, § 45a(7) would be but a hollow provision acting to either temporarily delay JCAR from objecting to the rule and initiating the process that ends in the rule's demise, or temporarily delaying a valid rule from taking effect. In either instance, § 45a(7) would have little meaning. We decline to interpret § 45a(7) in that manner. See *Reed*, 475 Mich at 540.

Contrarily, we believe that reading the statute so as to allow changes upon resubmission is consistent with the purpose of the APA. The Legislature's intent in enacting the "elaborate procedure for rule promulgation" was to "invite public participation in the rulemaking process, prevent precipitous action by the agency, prevent the adoption of rules that are illegal or that may be beyond the legislative intent, notify affected and interested persons of the existence of the rules and make the rules readily accessible after adoption." *Mich State AFL-CIO*, 230 Mich App at 21 (citations and quotation marks omitted). Prohibiting an agency from making changes upon resubmission could serve as a disincentive for an agency to act on public comment in order to avoid repeating the rulemaking process. On the other hand, permitting an

agency to withdraw a rule that has been submitted to JCAR, make changes, and then resubmit the rule to JCAR, is more in line with the purposes of the act. In this case, the agency made changes to the withdrawn rules after, and in response to, public comments and after input from JCAR. In other words, the resubmitted rules were the product of public participation in the rulemaking process. Further, the changes made by the agency are not immune from review, because § 45a(7) expressly provides that JCAR has additional time to review rules upon resubmission. See MCL 24.245a(7)(a) (giving JCAR a minimum of 6 days "after resubmission to consider the resubmitted rule") and (b) (starting "a new and untolled 15-session-day time period" when rules are withdrawn without permission).[8] The extra time afforded to JCAR ensures that resubmitted and amended rules will be subject to legislative scrutiny, because JCAR is permitted to exercise the same options set forth in § 45a(1) and (2) upon resubmission.

We caution, however, that the APA does not provide an agency with unfettered discretion to make *any* change it sees fit upon resubmission. As noted, an agency must prepare, before the public hearing is held, a regulatory impact statement and a small business impact statement for the proposed rule. See MCL 24.245(3). Were an agency to make such significant changes to the rule that it would be more burdensome than the proposed rule at the time the agency prepared the impact statements, it may lose its character as "the rule" or "the proposed rule" under the act. Indeed, it is

[8] The extra time afforded to JCAR after resubmission buttresses our conclusion that the agency is permitted to make changes to a proposed rule before resubmission. Had the Legislature intended for a resubmitted rule to be the same as it was before submission, it would make little sense to afford JCAR extra time to reconsider the rule.

conceivable that the changes proposed by an agency may be so drastic in character that they render irrelevant the requisite impact statements. In such a case, the rule could change drastically enough so as to deviate from the intended process under the APA. However, that is not what occurred in this case. Additionally, if an agency failed to inform JCAR of changes made to a rule or rules after resubmission, it could hinder JCAR's ability to perform its required functions under § 45a. Once again, that did not occur in the instant case. The agency made the changes that were less burdensome to the affected industries and that were in accordance with the regulatory impact statements and small business impact statements. The agency made the changes in response to public comments. In addition, the agency identified the changes and explained them to JCAR upon resubmission. This procedure was not novel or unique, because, as defendants bring to our attention through affidavits from two employees acting in their official capacities,[9] ORR has implemented the APA in this manner in the past. "Their interpretation is entitled to respectful consideration and, if persuasive, should not be overruled without cogent reasons." *Younkin*, 497 Mich at 10 (citation and quotation marks omitted). In this case, "[b]ecause [ORR's] interpretation does not conflict with the Legislature's intent as expressed in the language of the statute at issue, there are no such 'cogent reasons' to overrule it." *Id*. (citation and quotation marks omitted).

In reaching this conclusion, we are mindful that 1999 PA 262 amended the APA and, among other matters, eliminated § 45(11), which previously provided:

[9] Defendants presented affidavits from Elizabeth Smalley, ORR manager, and Mike Zimmer, chief deputy director of the Department of Licensing and Regulatory Affairs, the department in which ORR is housed.

> An agency may withdraw a proposed rule by leave of the committee. An agency may resubmit a rule so withdrawn or returned under subsection (9) with changes following a committee meeting on the proposed rule or with minor modifications. A resubmitted rule is a new filing and subject to this section, but is not subject to further notice and hearing as provided in sections 41 and 42. [MCL 24.245(11), as amended by 1993 PA 141.][10]

As noted by the Court of Claims, this section of the statute expressly permitted an agency to resubmit a rule "with changes following a committee meeting on the proposed rule or with minor modifications." Former MCL 24.245(11). We acknowledge that "[a] change in the statutory language is presumed to reflect a change in the meaning of the statute." *Edgewood Dev, Inc v Landskroener*, 262 Mich App 162, 167-168; 684 NW2d 387 (2004). However, changes in statutory language do not always reflect an attempt to change the meaning of a statutory provision. See *Ottawa Co v Police Officers Ass'n of Mich*, 281 Mich App 668, 673; 760 NW2d 845 (2008) (observing that statutory changes may reflect an attempt to clarify a statute rather than change it). When looking at the plain language of the statute at issue here, as well as the development of §§ 45 and 45a as a whole, we conclude that the amendment of § 45(11) by 1999 PA 262 is not dispositive of the issue at hand. Before its amendment by 1999 PA 262, § 45(2) did not recognize an agency's authority to make changes to a proposed rule after public hearing. Indeed, the previous version of § 45(2) was silent regarding an agency's ability to make changes to rules. In addition, JCAR had far more authority

[10] We note that this prior version of the APA expressly indicated that the resubmitted rule with changes, although it was dubbed a "new filing," was not subject to further notice or a public hearing.

under the previous statutory scheme. For instance, under the former versions of § 45(6), (9), and (10), JCAR had more time to consider rules, had to decide whether to "approve[] the proposed rule," as opposed to being limited to objecting to the rule for a specified reason, and could vote to give itself more time to consider proposed rules. See 1993 PA 141, § 45. Furthermore, under the former version of § 45(10), if JCAR took no action on a proposed rule, the rule was returned to the agency, and the JCAR chairperson and alternate chairperson were required to cause concurrent resolutions approving the rule to be introduced in both houses of the Legislature, simultaneously. This is in contrast to current statutory scheme, in which the promulgating agency has authority to make changes to proposed rules after public hearing under § 45(2), and in contrast to JCAR's limited role in either rejecting a rule for a limited list of reasons, or taking no action in regard to the rule, which essentially leads to promulgation of the rule. Given this development, we are not convinced that the Legislature's decision to eliminate language concerning an agency's authority to resubmit a proposed rule with changes is controlling. Indeed, we believe that the effect of the current versions of §§ 45 and 45a is to shift authority toward the agency and away from JCAR. Part of the authority given to the promulgating agency under § 45(2) is the authority to make changes to proposed rules after public hearing, as long as the agency "describe[s] any changes in the proposed rules that were made by the agency after the public hearing." If the agency has that authority under the plain language of the act, we do not see fit to hamstring the agency's authority to make changes before resubmission when that limitation is not apparent from the plain language of the act.

IV. REMAINING ISSUES

Because of our resolution of this issue, we need not consider the remaining claims on appeal. However, we note that plaintiffs argue, as an alternative basis for invalidating the rules enacted in this case, that the rules were invalid because the regulatory impact statement submitted by the agency failed to meet the requirements of MCL 24.245(3).[11] This issue was raised before, but not addressed by, the Court of Claims, as it invalidated the rules on other grounds. We do not decide this issue, but note that nothing prevents the Court of Claims from addressing this matter on remand.

Court of Claims judgment reversed, injunction vacated, and case remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

JANSEN, P.J., concurred with BECKERING, J.

METER, J. (*dissenting*). Because I conclude that the Legislature did not intend to allow for a rule to be submitted to the Joint Committee on Administrative Rules (JCAR), withdrawn, altered, and then resubmitted without its having gone again through the rulemaking process, I respectfully dissent.

MCL 24.245a(7) states:

> An agency may withdraw a proposed rule under the following conditions:
>
> (a) With permission of the committee chair and alternate chair, the agency may withdraw the rule and resub-

[11] We note that plaintiffs' challenge is to the adequacy of the information contained in the regulatory impact statement, not that the amended rules were incongruous with the impact statement as originally filed.

> mit it. If permission to withdraw is granted, the 15-session-day time period described in subsection (1) is tolled until the rule is resubmitted, except that the committee shall have at least 6 session days after resubmission to consider the resubmitted rule.
>
> (b) Without permission of the committee chair and alternate chair, the agency may withdraw the rule and resubmit it. If permission to withdraw is not granted, a new and untolled 15-session-day time period described in subsection (1) shall begin upon resubmission of the rule to the committee for consideration.

In interpreting this statute, I find two considerations of particular importance. First, the syntax employed by the Legislature lends itself to the conclusion that the Legislature did not intend for an altered rule to be resubmitted. The statute states that "the agency may withdraw *the rule* and resubmit *it*." (Emphasis added.) As noted in *Bush v Shabahang*, 484 Mich 156, 166-167; 772 NW2d 272 (2009), "[i]n determining the intent of the Legislature, this Court must first look to the language of the statute." "The statutory language must be read and understood in its grammatical context, unless it is clear that something different was intended." *Id*. at 167 (citations and quotation marks omitted). The word "it" in MCL 24.245a(7) seems, logically and in a grammatical sense, to refer to "the rule" that had previously been submitted.

Nevertheless, even if it could be said that the word "it," when read in the context of the entire statutory scheme, has an ambiguity and could possibly refer to an altered version of "the rule," the legislative history clearly leads to the conclusion that "it" refers to an unaltered version of the rule. In my opinion, the majority places far too little importance on the amendment of the Administrative Procedures Act,

MCL 24.201 *et seq*., by 1999 PA 262. The amendment eliminated former MCL 24.245(11), which stated:

> An agency may withdraw a proposed rule by leave of the committee. *An agency may resubmit a rule so withdrawn or returned under subsection (9) with changes following a committee meeting on the proposed rule or with minor modifications*. A resubmitted rule is a new filing and subject to this section, but is not subject to further notice and hearing as provided in sections 41 and 42. [1993 PA 141, § 45(11) (emphasis added).]

This former statute clearly shows that when the Legislature intended to allow an altered rule to be withdrawn and resubmitted *with changes*, it included language making this intent clear. The Legislature's conscious choice, when enacting MCL 24.245a(7),[1] to eliminate the language "with changes following a committee meeting on the proposed rule or with minor modifications" must not be disregarded. Indeed, "[a] change in the statutory language is presumed to reflect a change in the meaning of the statute." *Edgewood Dev, Inc v Landskroener*, 262 Mich App 162, 167-168; 684 NW2d 387 (2004). The majority cites *Ottawa Co v Police Officers Ass'n of Mich*, 281 Mich App 668, 673; 760 NW2d 845 (2008), for the proposition that changes in statutory language do not always reflect an attempt to change statutory provisions. However, what *Ottawa Co* states is that "such changes can . . . demonstrate an attempt to clarify the meaning of a provision rather than change it." *Id*. I find no "attempt to clarify the meaning" of the resubmission scheme through the enactment of 1999 PA 262; instead, I find a clear attempt to *change* the resubmission scheme by eliminating the ability to "resubmit" altered rules.

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[1] Although § 45a(7) has been amended since its initial enactment, the language pertinent to this appeal has remained unchanged.

The majority also states that interpreting the statute as the Court of Claims did and as I do would leave § 45a(7) with little meaning beyond providing state agencies the opportunity to "stall" the rulemaking process while the agency lobbies JCAR. However, under the Court of Claims' interpretation, § 45a(7) also gives the agency a chance to reconsider the timing of its attempt to promulgate a rule, for whatever reason the agency might have (such as, for example, the need to work on future enforcement procedures). Moreover, as aptly noted by the Court of Claims, "[t]he intended effect [of the change in the resubmission procedure] may have been to reduce JCAR's influence by eliminating its ability to demand that an agency make changes to the submitted rules with the threat of JCAR's disapproval." JCAR indeed can have *some* influence on the rulemaking procedure. See, e.g., MCL 24.242(5) ("After receipt of the notice of public hearing filed under subsection (3), the committee may meet to consider the proposed rule, take testimony, and provide the agency with the committee's informal response to the rule."). However, the current statutory scheme simply does not provide for a rule to be formally submitted to JCAR, altered, and then formally resubmitted without going through the rulemaking procedure once again. Accordingly, I conclude that, under the statutes as they currently exist, the rules in question were not properly promulgated.

In addition, I do not agree with defendants' argument that if § 45a(7) is interpreted in the manner I describe, only the withdrawn, altered, and resubmitted rules should be invalidated and the remaining submitted rules should be upheld. As noted by the Court of Claims, "[t]here is no dispute that the rules were processed as a set from inception," and a single regu-

latory impact statement was prepared. See MCL 24.245(3). Under these circumstances, defendants' argument is untenable.

I would affirm the judgment of the Court of Claims.

In re APPLICATION OF CONSUMERS ENERGY FOR RECONCILIATION OF 2010 COSTS

In re APPLICATION OF CONSUMERS ENERGY FOR RECONCILIATION OF 2011 COSTS

Docket Nos. 314361 and 316868. Submitted July 16, 2014, at Lansing. Decided May 28, 2015, at 9:10 a.m.

Consumers Energy Company applied for approval from the Public Service Commission (PSC) of its 2010 and 2011 power supply cost recovery (PSCR) reconciliation plans. Several parties intervened in the actions, including the Attorney General and T.E.S. Filer City Station Limited Partnership (TES), which operates a biomass electric generating plant in Filer City. In the 2010 case, the PSC approved Consumers' payments to biomass merchant plants (BMPs), including TES, for excess fuel and variable operation and maintenance costs, but denied TES's request for recovery of additional funds for nitrous oxide (NO_X) and sulfur dioxide (SO_2) allowances. TES appealed in Docket No. 314361. In the 2011 case, the PSC approved the application for a PSCR reconciliation, determining that the $1,000,000 monthly capped fuel and variable operation and maintenance costs payment to the BMPs should be adjusted annually by applying the United States consumer price index (CPI) rate to the $1,000,000, and that the request by TES for an additional recovery for NO_X and SO_2 allowances would be disallowed. TES and other BMPs appealed in Docket No. 316868. The Court of Appeals consolidated the cases.

The Court of Appeals *held*:

1. Under 2008 PA 286, BMPs may recover reasonably and prudently incurred actual fuel and variable operation and maintenance costs that exceed the amount that the merchant plant is paid for those costs under a contract with an electric utility. The total aggregate additional amount that an electric utility will have to pay is limited to $1,000,000 a month. The limit may be reviewed annually and adjusted, but the annual amount of the adjustments may not exceed a rate equal to the CPI. And the limit, as adjusted, does not apply with respect to actual fuel and variable operation and maintenance costs that

are incurred because of changes in federal or state environmental laws or regulations that are implemented after October 6, 2008, the effective date of the act. TES challenged the denial of its requests for recovery of costs for NO_X and SO_2 allowances, asserting that the costs were actual fuel and variable operation and maintenance costs incurred because of changes in federal or state environmental laws or regulations implemented after October 6, 2008. TES made the same argument with respect to NO_X allowances in *In re Application of Consumers Energy Co for Reconciliation of 2009 Costs*, 307 Mich App 32 (2014). That Court rejected TES's argument, and the same reasoning applies in this case. Because the phrase "that are implemented" modifies "changes in federal or state environmental laws or regulations," it refers to implementation of changes in the law or regulation, and not implementation of changes required by the law or regulation. The NO_X and SO_2 allowances were required by regulations implemented before October 6, 2008. Accordingly, TES was not entitled to recoup the costs of the allowances even though TES was not subject to the requirements of the regulations until after October 6, 2008.

2. As stated, under 2008 PA 286, BMPs may recover reasonably and prudently incurred actual fuel and variable operation and maintenance costs that exceed the amount that the merchant plant is paid for those costs under a contract with an electric utility. The total aggregate additional amount that an electric utility will have to pay is limited to $1,000,000 a month. The limit may be reviewed annually and adjusted, but the annual amount of the adjustments may not exceed a rate equal to the CPI. The statutory language is ambiguous with regard to how any adjustments should be calculated. The language of the statute does not provide guidance on whether the CPI to be used for the annual adjustments is the cumulative CPI or the CPI for a given year. Moreover, it does not address whether the cap that should be adjusted is the $1,000,000 cap or the $1,000,000 cap as adjusted in prior years. Nonetheless, by tying the adjustment to the CPI, it seems clear the Legislature's intent was to account for inflation. If the $1,000,000 cap were adjusted each year on the basis of the CPI for that year, the BMPs would receive the inflation-adjusted equivalent of less than $1,000,000 a month beginning in the 2011 calendar year. Therefore, upholding the PSC's construction of the statute would lead to a result at odds with the legislative intent. To give effect to the legislative intent, the statute must be construed to mean that annual adjustments to the $1,000,000 cap shall be calculated by applying the CPI

rate for the PSCR year at issue to the $1,000,000 cap as adjusted in prior years, or by applying the cumulative CPI rate from 2009 forward to the $1,000,000 cap.

PSC rulings disallowing TES's request for the recovery of additional funds for NO_X and SO_2 allowances affirmed; PSC ruling construing MCL 460.6a(8) reversed; cases remanded for further proceedings.

WILDER, J., concurring in part and dissenting in part, joined the majority's holding that MCL 460.6a(8) should be construed to mean that annual adjustments to the $1,000,000 cap shall be calculated by applying the CPI rate for the PSCR year at issue to the $1,000,000 cap as adjusted in prior years, or by applying the cumulative CPI rate from 2009 forward to the $1,000,000 cap. Judge WILDER dissented from the majority's analysis and the ultimate outcome reached with regard to TES's entitlement to cost recovery for NO_X and SO_2 allowances, agreeing instead with Judge WHITBECK's dissent in *In re Application of Consumers Energy Co for Reconciliation of 2009 Costs*, 307 Mich App at 55-56.

PUBLIC UTILITIES — BIOMASS PLANTS — RECOVERY OF FUEL, OPERATION, AND MAINTENANCE COSTS — CALCULATION OF ANNUAL ADJUSTMENTS TO THE MONTHLY CAP.

Under 2008 PA 286, biomass plants may recover reasonably and prudently incurred actual fuel and variable operation and maintenance costs that exceed the amount that the merchant plant is paid for those costs under a contract with an electric utility; the total aggregate additional amount that an electric utility will have to pay is limited to $1,000,000 a month; the limit may be reviewed annually and adjusted, but the annual amount of the adjustments may not exceed a rate equal to the United States consumer price index (CPI); annual adjustments to the $1,000,000 cap shall be calculated by applying the CPI rate for the power supply cost recovery year at issue to the $1,000,000 cap as adjusted in prior years, or by applying the cumulative CPI rate from 2009 forward to the $1,000,000 cap.

Docket No. 314361:

Fraser Trebilcock Davis & Dunlap, PC (by *David E. S. Marvin*), for T.E.S. Filer City Station Limited Partnership.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Donald E. Erickson*, Assistant Attorney General, for the Attorney General.

Bill Schuette, Attorney General, *B. Eric Restuccia*, Deputy Solicitor General, and *Steven D. Hughey* and *Anne M. Uitvlugt*, Assistant Attorneys General, for the Public Service Commission.

Docket No. 316868:

Fraser Trebilcock Davis & Dunlap, PC (by *David E. S. Marvin* and *Thomas J. Waters*), for Cadillac Renewable Energy, LLC, T.E.S. Filer City Station Limited Partnership, and others.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *B. Eric Restuccia*, Deputy Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Steven D. Hughey* and *Heather M. S. Durian*, Assistant Attorneys General, for the Public Service Commission.

Before: RONAYNE KRAUSE, P.J., and WILDER and STEPHENS, JJ.

STEPHENS, J. In Docket No. 314361, the Michigan Public Service Commission (PSC) issued an order approving the application of Consumers Energy Company (Consumers) for a power supply cost recovery (PSCR) reconciliation for the 2010 calendar year. Relevant to this appeal, it approved Consumers' payments to biomass merchant plants (BMPs) of $10,566,059 for capped excess fuel and variable operation and maintenance costs, but denied the request of T.E.S. Filer City Station Limited Partnership (TES Filer), a BMP, for

recovery of additional funds for nitrous oxide (NO_X) and sulfur dioxide (SO_2) allowances. TES Filer appeals as of right.

In Docket No. 316868, the PSC issued an order approving Consumers' application for a PSCR reconciliation for the 2011 calendar year. Relevant to this appeal, it determined that the $1,000,000 monthly capped fuel and variable operation and maintenance costs payment to the BMPs should be adjusted annually by applying the annual United States consumer price index rate to the $1,000,000, and that the request by TES Filer for an additional recovery of $102,799 for NO_X and SO_2 allowances would be disallowed. Appellants, TES Filer and others, appeal as of right.

These two appeals were consolidated. See *In re Application of Consumers Energy for Reconciliation of Costs*, unpublished order of the Court of Appeals, entered May 21, 2014 (Docket Nos. 314361 and 316868). We conclude that the PSC properly disallowed TES Filer's request for recovery of additional funds for NO_X and SO_2 allowances. However, we conclude that the PSC erred in adjusting the $1,000,000 monthly cap on the fuel and variable operation and maintenance costs payable to the BMPs.

I. STANDARD OF REVIEW

In *In re Application of Consumers Energy Company for Rate Increase*, 291 Mich App 106, 109-110; 804 NW2d 574 (2010), the applicable standard of review was set forth as follows:

> The standard of review for PSC orders is narrow and well defined. Pursuant to MCL 462.25, all rates, fares, charges, classification and joint rates, regulations, practices, and services prescribed by the PSC are presumed, prima facie, to be lawful and reasonable. See also *Mich*

> *Consol Gas Co v Pub Serv Comm*, 389 Mich 624, 635-636; 209 NW2d 210 (1973). A party aggrieved by an order of the PSC has the burden of proving by clear and convincing evidence that the order is unlawful or unreasonable. MCL 462.26(8). To establish that a PSC order is unlawful, the appellant must show that the PSC failed to follow a statutory requirement or abused its discretion in the exercise of its judgment. *In re MCI Telecom Complaint*, 460 Mich 396, 427; 596 NW2d 164 (1999). A reviewing court gives due deference to the PSC's administrative expertise, and should not substitute its judgment for that of the PSC. *Attorney General v Pub Serv Comm No 2*, 237 Mich App 82, 88; 602 NW2d 225 (1999).
>
> A final order of the PSC must be authorized by law and be supported by competent, material, and substantial evidence on the whole record. Const 1963, art 6, § 28; *In re Application of Consumers Energy Co*, 279 Mich App 180, 188; 756 NW2d 253 (2008). Whether the PSC exceeded the scope of its authority is a question of law that is reviewed de novo. *In re Complaint of Pelland Against Ameritech Mich*, 254 Mich App 675, 682; 658 NW2d 849 (2003).

The standard of review for an agency's interpretation of a statute was set forth in *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 103; 754 NW2d 259 (2008), quoting *Boyer-Campbell Co v Fry*, 271 Mich 282, 296-297; 260 NW 165 (1935):

> [T]he construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration and ought not to be overruled without cogent reasons. However, these are not binding on the courts, and [w]hile not controlling, the practical construction given to doubtful or obscure laws in their administration by public officers and departments with a duty to perform under them is taken note of by the courts as an aiding element to be given weight in construing such laws and is sometimes deferred to when not in conflict with the indicated spirit and purpose of the legislature.

> This standard requires "respectful consideration" and "cogent reasons" for overruling an agency's interpretation. Furthermore, when the law is "doubtful or obscure," the agency's interpretation is an aid for discerning the Legislature's intent. However, the agency's interpretation is not binding on the courts, and it cannot conflict with the Legislature's intent as expressed in the language of the statute at issue. [Second alteration in original.]

II. STATUTE AT ISSUE

With 2008 PA 286, the Legislature enacted statutes that allow a qualifying biomass merchant plant to recover, subject to the limitation set forth in MCL 460.6a(8), "reasonably and prudently incurred actual fuel and variable operation and maintenance costs [that] exceed the amount that the merchant plant is paid" for those costs under a contract with an electric utility. MCL 460.6a(7). Appellants are qualifying BMPs under this statute. The Subsection (8) limitation on recovery, in pertinent part, limits the total aggregate additional amounts that an electric utility will have to pay to merchant plants to $1,000,000 per month, but provides for annual review of this limit upon petition of a merchant plant and adjustment if each affected merchant plant files a petition and "the commission finds that the eligible merchant plants reasonably and prudently incurred actual fuel and variable operation and maintenance costs" that exceeded $1,000,000 per month. Subsection (8), in pertinent part, further provides:

> The annual amount of the adjustments shall not exceed a rate equal to the United States consumer price index. . . . As used in this subsection, "United States consumer price index" means the United States consumer price index for

> all urban consumers as defined and reported by the United States department of labor, bureau of labor statistics. [MCL 460.6a(8)].

Subsection (8) continues:

> The $1,000,000.00 limit specified in this subsection, as adjusted, shall not apply with respect to actual fuel and variable operation and maintenance costs that are incurred due to changes in federal or state environmental laws or regulations that are *implemented* after the effective date of the amendatory act that added this subsection. [Emphasis added.]

Thus, the BMPs are entitled to a collective capped amount of up to $1,000,000 per month, as adjusted, and an uncapped amount if the costs are incurred because of changes in federal or state environmental laws or regulations that are implemented after the effective date of 2008 PA 286, which was October 6, 2008.

III. TES FILER'S ENTITLEMENT TO RECOVER FOR NO_X AND SO_2 ALLOWANCES

TES Filer challenges the denial of its requests for recovery of costs for NO_X and SO_2 allowances, explaining that the allowances are limited authorizations to emit these substances. It established that these were "actual fuel and variable operation and maintenance costs." It asserts that they were "incurred due to changes in federal or state environmental laws or regulations" "implemented after" October 6, 2008, maintaining that "implementation" must refer to the date that some action is required by a law or regulation. The PSC interpreted MCL 460.6a(8) to mean that the term "implemented" refers to the date that a federal or state environmental law or regulation was enacted or promulgated. It further determined that

TES Filer was not entitled to recover the costs of the NO_X and SO_2 allowances incurred in the 2010 and 2011 calendar years because the laws or regulations requiring the allowances predated October 6, 2008. We find no cogent reason to overturn the PSC's interpretation.

The facts relevant to this issue are as follows:

May 12, 2005: The United States Environmental Protection Agency (EPA) promulgated the Clean Air Interstate Rule (CAIR), requiring changes to State Implementation Plans (SIPs) to include measures to reduce NO_X and SO_2 emissions. 70 Fed Reg 25162 *et seq*. (May 12, 2005).

August 24, 2005: In proposed rules, the EPA notes that the CAIR requires emission reduction implementation in two phases, with the first phase of NO_X reductions starting in 2009 and the first phase of SO_2 reductions starting in 2010. 70 Fed Reg 49721 (August 24, 2005).

June 25, 2007: The Michigan Department of Environmental Quality (MDEQ) promulgates rules on NO_X allowances, subjecting them to regulation commencing in 2009. See 2007 Mich Reg 12, pp 2-23 (indicating the rules were filed with the Secretary of State on June 25, 2007, and became effective immediately).

July 16, 2007: Michigan submits a CAIR SIP (the rules promulgated by the MDEQ on June 25, 2007) to the EPA. See 74 Fed Reg 41637-41641 (August 18, 2009).

December 20, 2007: The EPA conditionally approves Michigan's SIP if revisions are made by December 20, 2008. 72 Fed Reg 72256-72263 (December 20, 2007).

October 6, 2008: Effective date of MCL 460.6a(8).

May 28, 2009: The MDEQ promulgates new rules on NO_X allowances. 2009 Mich Reg 10, pp 16-40.

June 10, 2009: After missing the December 20, 2008 deadline, the MDEQ submits a new SIP to the EPA. See 74 Fed Reg 41637-41641 (August 18, 2009).

August 18, 2009: The EPA approves Michigan's SIP, effective October 19, 2009, and provides "notice that the December 20, 2007, conditional approval of July 16, 2007, submittal automatically converted to a disapproval." 74 Fed Reg 41637 (August 18, 2009). However, it concluded that the disapproval was inconsequential because it was "approving both the July 16, 2007 and the June 10, 2009, submittals, in combination, as meeting the CAIR requirements." 74 Fed Reg 41640 (August 18, 2009).

November 2009: TES Filer incurs NO_X allowance expenses for the first time.

July 2010: TES Filer incurs SO_2 expenses for the first time.

The statutory phrase "incurred due to changes in federal or state environmental laws or regulations that [were] implemented after" October 6, 2008, MCL 460.6a(8), could be read to mean that a BMP is entitled to recoup actual fuel and variable operation and maintenance costs if the *requirements* of the changes in the laws or regulations were implemented after the effective date or, alternatively, if the changes to the law or regulations were made (implemented) after the effective date. In *In re Application of Indiana Mich Power Co to Increase Rates*, 297 Mich App 332, 344-345; 824 NW2d 246 (2012), quoting *Mich Basic Prop Ins Ass'n v Office of Fin & Ins Regulation*, 288 Mich App 552, 559-560; 808 NW2d 456 (2010), the Court stated, in pertinent part:

> "A statutory provision is ambiguous if it irreconcilably conflicts with another provision or when it is equally susceptible to more than one meaning. A statutory provision should be viewed as ambiguous only after all other conventional means of interpretation have been applied and found wanting. If a statute is ambiguous, judicial construction is appropriate. 'Where the language of a statute is of doubtful meaning, a court must look to the object of the statute in light of the harm it is designed to remedy, and strive to apply a reasonable construction that will best accomplish the Legislature's purpose.' *Marquis v Hartford Accident & Indemnity (After Remand)*, 444 Mich 638, 644; 513 NW2d 799 (1994). . . .
>
> "When construing a statute, 'a court should not abandon the canons of common sense.' *Marquis*, 444 Mich at 644. 'We may not read into the law a requirement that the lawmaking body has seen fit to omit.' *In re Hurd-Marvin Drain*, 331 Mich 504, 509; 50 NW2d 143 (1951). When the Legislature fails to address a concern in the statute with a specific provision, the courts 'cannot insert a provision simply because it would have been wise of the Legislature to do so to effect the statute's purpose.' *Houghton Lake Area Tourism & Convention Bureau v Wood*, 255 Mich App 127, 142; 662 NW2d 758 (2003). Therefore, when necessary to interpret an ambiguous statute, the appellate courts must determine the reasonable construction that best effects the Legislature's intent." [Citations omitted.]

Both TES Filer and the Attorney General maintain that the statute is not ambiguous because the last-antecedent rule supports their opposing interpretations of the statute. This rule of statutory construction "provides that a modifying or restrictive word or clause contained in a statute is confined solely to the immediately preceding clause or last antecedent, unless something in the statute requires a different interpretation." *Stanton v Battle Creek*, 466 Mich 611, 616; 647 NW2d 508 (2002). In *Hardaway v Wayne Co*, 494 Mich

423, 429; 835 NW2d 336 (2013), the Court held that "the last antecedent rule does not mandate a construction based on the shortest antecedent that is grammatically feasible" and quoted 2A Singer & Singer, Sutherland Statutory Construction (7th ed), § 47.33, pp 487-489, for the proposition that "[r]eferential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent. The last antecedent is 'the last *word, phrase, or clause* that can be made an antecedent *without impairing the meaning of the sentence*.' " *Id*. at 429 n 10.

Again, the statute provides that the cap "shall not apply with respect to actual fuel and variable operation and maintenance costs that are incurred due to changes in federal or state environmental laws or regulations that are implemented after" October 6, 2008. The Attorney General argues that the phrase "that are implemented" refers to the antecedent clause "that are incurred due to changes in federal or state environmental laws or regulations." TES Filer argues that the phrase "that are implemented" refers to "changes in federal or state environmental laws or regulations." However, this does not clarify what "changes" are being referred to. We note that the last antecedent word or phrase before "that are implemented" is "federal or state environmental laws or regulations." If it is these laws or regulations "that are implemented," as opposed to "changes in" these "laws or regulations," then TES Filer would prevail with respect to its argument that implementation occurred when the laws or regulations were required to be carried out. However, this construction would render "changes in" mere surplusage. "Courts must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of

the statute surplusage or nugatory." *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146; 644 NW2d 715 (2002). Because the last-antecedent rule does not require a look at the shortest antecedent, and the antecedent that makes sense of all the terms is "changes in federal or state environmental laws or regulations," the phrase "that are implemented" should be viewed as referring to "changes in federal or state environmental laws or regulations."

This leaves open the question whether the "changes" implemented are those required by the law or regulation, or whether they are the changes to the law or regulation. TES Filer argues that "changes" are "implemented" when they are actually fulfilled, carried out, executed, or effectuated. With respect to NO_X allowances, TES Filer made the same argument in *In re Application of Consumers Energy Co for Reconciliation of 2009 Costs*, 307 Mich App 32, 43-46; 859 NW2d 216 (2014). We adopt the reasoning from that opinion:

> On appeal, TES Filer argues that the PSC erred by ignoring the significance of the word "implemented" in MCL 460.6a(8). TES Filer asserts that the common meaning of the word "implemented" is "to have fulfilled, carried out, or effectuated a plan." TES Filer notes that the rules promulgated by the DEQ in 2007 did not impose new regulations at that time, but were intended to do so in 2009; accordingly, the PSC should have concluded that the 2007 rules, even if in effect during the relevant period, were not implemented during that same period. Rather, according to TES Filer, the rules were implemented after MCL 460.6a(8) went into effect; therefore, TES Filer was entitled to recover its costs. We disagree.
>
> TES Filer ignores the context surrounding the word "implemented" in the statutory scheme. This Court does not read statutory provisions in isolation, but instead considers them in context. *Robinson v Lansing*, 486 Mich 1, 15; 782 NW2d 171 (2010). The NO_X emission rules that were applicable to TES Filer did not change after October 6,

> 2008, the date that MCL 460.6a(8) went into effect. At issue in this case is not the meaning of the term "implemented," but rather on what date TES Filer was affected by the NO_X emission rules. In context, MCL 460.6a(8) provides that the limit does not apply to specified costs "that are incurred due to changes in federal or state environmental laws or regulations that are implemented after the effective date of the amendatory act that added this subsection." MCL 460.6a(8) compares the effective date of the statute and the date of any changes in state or federal environmental rules. It is undisputed that MCL 460.6a(8) went into effect on October 6, 2008. The DEQ promulgated rules by filing them with the Secretary of State on June 25, 2007. MCL 24.246(1). The DEQ's rules became effective before October 6, 2008.
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> * * *
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> . . . [T]he rules were "implemented" in 2007. The fact that TES Filer only became subject to those rules in 2009 does not affect when the rules were implemented because no substantive change to the rules occurred at the time. The rules were therefore implemented before October 6, 2008.
>
> . . . We conclude that TES Filer was not entitled to recover its NO_X emission costs. [*Id*. at 43-46 (emphasis omitted).]

Since the phrase "that are implemented" modifies "changes in federal or state environmental laws or regulations," it refers to implementation of changes in the law or regulation, and not implementation of changes required by these laws or regulations. We note that the context of the statute indicates that the intent was to allow BMPs to recover for the costs of compliance with new requirements. However, if the requirements were in place before October 6, 2008, even if compliance was not yet required, the requirements were not new.

With respect to the NO_X requirements, TES Filer argues that the relevant changes in laws or regulations

did not occur before October 6, 2008. TES Filer acknowledges that, if enforceable, Mich Admin Code, R 336.1821 to R 336.1834 would have required the purchase of NO_X allowances in 2009. However, TES Filer points by way of example to R 336.1822(2), noting that it speaks of "CAIR NO_X allowances for the 2009 ozone season control period . . . ." It notes that under R 336.1803(3), "CAIR NO_X allowance" must be defined by referring to 40 CFR 97.102 (2014), which provides:

> *CAIR NO_X allowance* means a limited authorization issued by a permitting authority or the Administrator under subpart EE of this part or § 97.188, or under provisions of a State implementation plan that are approved under § 51.123(o)(1) or (2) or (p) of this chapter, to emit one ton of nitrogen oxides during a control period of the specified calendar year for which the authorization is allocated or of any calendar year thereafter under the CAIR NO_X Program. An authorization to emit nitrogen oxides that is not issued under subpart EE of this part, § 97.188, or provisions of a State implementation plan that are approved under § 51.123(o)(1) or (2) or (p) of this chapter shall not be a CAIR NO_X allowance.

Similarly, 40 CFR 97.302 defines "CAIR NO_X Ozone Season allowance" as

> a limited authorization issued by a permitting authority or the Administrator under subpart EEEE of this part, § 97.388, or provisions of a State implementation plan that are approved under § 51.123(aa)(1) or (2) (and (bb)(1)), (bb)(2), (dd), or (ee) of this chapter, to emit one ton of nitrogen oxides during a control period of the specified calendar year for which the authorization is allocated or of any calendar year thereafter under the CAIR NO_X Ozone Season Trading Program or a limited authorization issued by a permitting authority for a control period during 2003 through 2008 under the NO_X Budget Trading Program in accordance with § 51.121(p) of this chapter to emit one ton of nitrogen oxides during a control period, provided that

> the provision in § 51.121(b)(2)(ii)(E) of this chapter shall not be used in applying this definition and the limited authorization shall not have been used to meet the allowance-holding requirement under the NO_X Budget Trading Program. An authorization to emit nitrogen oxides that is not issued under subpart EEEE of this part, § 97.388, or provisions of a State implementation plan that are approved under § 51.123(aa)(1) or (2) (and (bb)(1)), (bb)(2), (dd), or (ee) of this chapter or under the NO_X Budget Trading Program as described in the prior sentence shall not be a CAIR NO_X Ozone Season allowance.

Since both of these regulations refer to state SIPs that have been approved, TES Filer concludes that references in Michigan's 2007 rules to CAIR NO_X allowances and CAIR NO_X ozone season allowances can only refer to allowances authorized by a state plan that has been approved by the EPA. Because Michigan's rules were not approved until 2009, TES Filer asserts that the 2007 rules were nonfunctional. Accordingly, it argues, TES Filer could not have incurred its 2009 NO_X allowance costs because of changes in regulations implemented before October 6, 2008, given that the 2007 regulations did not regulate NO_X allowances.

This is a compelling argument, especially since the EPA expressly disapproved Michigan's 2007 rules when it approved Michigan's 2009 rules. However, as a matter of state regulation, the 2007 rules required CAIR NO_X allowances for 2009. As stated already, the state regulations became effective on June 25, 2007, immediately upon filing with the Secretary of State. While CAIR NO_X allowances and CAIR NO_X ozone season allowances refer to allowances issued under a federally approved SIP, this would mean that the 2007 rules required these allowances at the point that the EPA approved the state SIP. The requirement existed in 2007 but did not mature into an obligation until

there was EPA approval. Given that the allowances were required by the 2007 state regulations, the costs of the allowances were incurred because of 2007 changes in state environmental regulations, and the changes in the regulations were implemented in 2007, before the October 6, 2008 effective date of MCL 460.6a(8). Accordingly, TES Filer was not entitled to recoup these costs.

Just as regulations requiring NO_X allowances were implemented before October 6, 2008, regulations requiring SO_2 allowances were implemented before October 6, 2008. Although it did not require that the SO_2 allowances be immediately purchased, it is undisputed that in 2005 the CAIR required the SO_2 allowances. Because this change in the law was implemented before October 6, 2008, regardless of the fact that TES Filer did not become subject to the law until 2010, TES Filer is not entitled to uncapped recovery of its SO_2 allowances costs.

IV. ADJUSTMENT METHODOLOGY

In Docket No. 316868, the BMPs challenge the method by which the PSC calculated the annual adjustment to the $1,000,000 monthly capped limit on the fuel and variable operation and maintenance costs payment that the utilities must make to BMPs. Again, MCL 460.6a(8) provides that the $1,000,000 per month capped limit "may be adjusted" if each affected BMP petitions, but "[t]he annual amount of the adjustments shall not exceed a rate equal to the United States consumer price index [CPI]." The BMPs posited that this should be interpreted to mean that the PSC should adjust the $1,000,000 monthly limit at a rate equal to the percentage increase in the annual average CPI between 2009, the year after MCL 460.6a(8) became

effective, and 2011, the PSCR year at issue. Alternatively, the BMPs proposed that the adjusted monthly limit from the prior year be multiplied by the annual CPI. The PSC, however, interpreted this provision to mean that the adjustment should be calculated each year by multiplying $1,000,000 by the annual CPI, rather than by a cumulative CPI.

We conclude that the statute is equally susceptible to more than one meaning with regard to this question and is therefore ambiguous. See *Indiana Mich Application*, 297 Mich App at 344. The BMPs argue that use of the plural, "adjustments," indicates that cumulative annual "adjustments" were intended. However, use of the term "adjustments" is not determinative. It could refer to the annual adjustments made each year without contemplating that they be cumulative. Moreover, if the Legislature had instead said "the annual amount of the adjustment[] shall not exceed a rate equal to the United States consumer price index," it would not have provided clarity regarding what sum is to be adjusted or regarding whether the term "rate equal to the United States consumer price index" was meant to reflect the yearly rate or a cumulative rate. However, the reasoning of the administrative law judge (ALJ), whose recommendation was adopted by the PSC, on the meaning of the pluralization is not logical. The ALJ posited that

> the statute contemplates multiple petitions: "An adjustment shall not be made by the commission unless each affected merchant plant files a petition with the commission." MCL 460.6a(8). Therefore, the use of the plural "adjustments" is logically related to the fact that the provision is not limited to one merchant plant, but can applied [sic] to any plant that satisfies the substantive requirements.

The statute allows for and requires petitions from all affected BMPs in order for there to be an adjustment, but the adjustment made is to the $1,000,000 cap. There is only one annual adjustment to the cap, not multiple adjustments reflecting the applications of the various BMPs. In sum, the pluralization of "adjustment" is inconclusive when trying to discern the meaning of the statute.

The PSC reasoned that although the statute did not prohibit a cumulative CPI calculation, it did not expressly provide for such a calculation, and the PSC could not read words into the statute. However, to conclude that the language of the statute means that the "rate equal to the United States consumer price index" means solely the rate corresponding to the year of the PSCR reconciliation would also require that language be added for clarification.

The language of the statute does not provide guidance on whether the CPI to be used for the annual adjustments is the cumulative CPI or the CPI for a given year. Moreover, it does not address whether the cap that should be adjusted is the $1,000,000 cap or the $1,000,000 cap as adjusted in prior years. However, by tying the adjustment to the CPI, it seems clear that the Legislature's intent was to account for inflation.[1] If the $1,000,000 cap were adjusted each year on the basis of

[1] We note that Appendix D to 31 CFR 356 (2014) provides:

> The Consumer Price Index ("CPI") for purposes of inflation-protected securities is the non-seasonally adjusted U.S. City Average All Items Consumer Price Index for All Urban Consumers. It is published monthly by the Bureau of Labor Statistics (BLS), a bureau within the Department of Labor. The CPI is a measure of the average change in consumer prices over time in a fixed market basket of goods and services. This market basket includes food, clothing, shelter, fuels, transportation, charges for doctors' and dentists' services, and drugs.

the CPI rate for that year, the BMPs would receive the inflation-adjusted equivalent of less than $1,000,000 per month beginning in the 2011 calendar year. Thus, upholding the PSC's construction of the statute would lead to a potentially absurd result seemingly at odds with legislative intent. Because the overriding goal of statutory construction is to give effect to the intent of the Legislature, *Indiana Mich Application*, 297 Mich App at 344-345, and this requires a construction that avoids absurd results when possible, see *Detroit Int'l Bridge Co v Commodities Export Co*, 279 Mich App 662, 674-675; 760 NW2d 565 (2008), we conclude that the PSC erred in construing MCL 460.6a(8). Further, we conclude that it should be construed to mean that annual adjustments to the $1,000,000 cap shall be calculated by applying the CPI rate for the PSCR year at issue to the $1,000,000 cap as adjusted in prior years, or by applying the cumulative CPI rate from 2009 forward to the $1,000,000 cap.

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

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

WILDER, J. (*concurring in part and dissenting in part*). I join with the majority in the analysis and result

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In calculating the index, price changes for the various items are averaged together with weights that represent their importance in the spending of urban households in the United States. The BLS periodically updates the contents of the market basket of goods and services, and the weights assigned to the various items, to take into account changes in consumer expenditure patterns.

We find no basis for disagreement that the CPI is intended to be a measure of inflation.

reached in Part IV of the majority opinion which holds that MCL 460.6a(8) "should be construed to mean that annual adjustments to the $1,000,000 cap shall be calculated by applying the CPI rate for the PSCR year at issue to the $1,000,000 cap as adjusted in prior years, or by applying the cumulative CPI rate from 2009 forward to the $1,000,000 cap." However, I respectfully disagree and dissent from the analysis and outcome reached in Part III of the majority opinion. Rather, I agree with Judge WHITBECK's dissent in *In re Application of Consumers Energy Co for Reconciliation of 2009 Costs*, 307 Mich App 32, 55-56; 859 NW2d 216 (2014), and also would hold that the "NO_X requirements were not implemented until 2009 because they were not effective until 2009," and that "[t]herefore, the exception in MCL 460.6a(8) applied to TES Filer."

JOHNSON v DEPARTMENT OF NATURAL RESOURCES

TINGSTAD v DEPARTMENT OF NATURAL RESOURCES

TURUNEN v DEPARTMENT OF NATURAL RESOURCES

Docket Nos. 321337, 321338, and 321339. Submitted May 12, 2015, at Marquette. Decided June 2, 2015, at 9:00 a.m.

Gregory Johnson (Docket No. 321337), Matthew Tingstad (Docket No. 321338), and Roger Turunen (Docket No. 321339) filed suits in Marquette Circuit Court, Gogebic Circuit Court, and Baraga Circuit Court, respectively, to contest the decision of the Department of Natural Resources (DNR) to designate wild boars as an invasive species. The DNR's invasive species order at issue prohibits the possession of wild boars, and specifically excepts from the list of prohibited swine the domestic pigs commonly associated with farms and barnyards. The order prohibits ownership of a list of animals collectively known as wild boars: "Wild boar, wild hog, wild swine, feral pig, feral hog, feral swine, Old world swine, razorback, Eurasian wild boar, Russian wild boar . . . ." Johnson owned a hunting ranch at which hunters could pay a fee to hunt wild boars. He purchased his stock of wild boars from Canada and from Turunen, who raised wild boars for sale to hunting ranches. Tingstad and third-party defendant Melissa Perez purchased two wild boars from Turunen, named them, and they became "members of [the] family." Johnson, Tingstad, and Turunen raised several constitutional challenges to the DNR's invasive species order. They claimed that the order violated their rights to equal protection and to due process and that the order was void for vagueness. Plaintiffs agreed to consolidate their cases in the Marquette Circuit Court, and the court, Thomas L. Solka, J., ruled that plaintiffs did not have standing to raise a void-for-vagueness challenge because they admitted to owning the type of pigs described in the DNR's order. However, the court agreed that the invasive species order violated plaintiffs' rights to equal protection and due process. The court also concluded that the boars possessed by plaintiffs were exempt from the DNR's order because the boars qualified as domestic pigs, and the court issued an injunction against dispossessing plaintiffs of their boars. The DNR appealed the court's ruling, and

plaintiffs cross-appealed. The Court of Appeals consolidated the cases.

The Court of Appeals *held*:

1. The trial court erred by ruling that the DNR's invasive species order violated plaintiffs' rights to equal protection. The DNR's invasive species order represented a proper exercise of the DNR's discretion to ban certain pigs and not others, and the distinction the DNR made between the banned pigs and the permitted pigs was not arbitrary or capricious. Rather, the DNR's classification of wild boars as an invasive species was rationally related to the government's legitimate objective of protecting natural and agricultural resources.

2. The trial court erred by ruling that the DNR's invasive species order violated plaintiffs' rights to substantive due process. The DNR presented evidence that unrestrained wild boars could decimate existing ecosystems, and therefore the decision to classify them as invasive species was not arbitrary or capricious, and it reasonably related to the government's legitimate purpose of protecting the farming industry and natural resources. Plaintiffs' contention that their boars were incapable of ravaging the environment because their boars were not wild was unavailing. The fact that domesticated pigs were exempt from the order did not impermissibly designate plaintiffs' wild boars as second-class swine because evidence showed that wild boars are masters of escaping a pen, that they threaten the health of the environment and the lives of small animals when on the loose, and that they contribute to illness and disease in humans and animals.

3. The trial court correctly ruled that plaintiffs' void-for-vagueness challenge failed but the court failed to properly articulate the basis for such a conclusion. The trial court reasoned that plaintiffs did not have standing to raise the void-for-vagueness issue because each owned a pig described in the invasive species order, and they did not deny that their pigs satisfied the description of wild boars. However, in its opinion on the parties' motions for summary disposition, the trial court appeared concerned about vagueness even though it did not directly address it. The DNR's invasive species order was not vague because it made a person of ordinary intelligence aware of what was prohibited, and it did not impermissibly delegate to police officers, judges, or juries the responsibility of resolving questions about the order on an *ad hoc* and subjective basis. Plaintiffs' conduct was proof that the DNR's order was not void for vagueness. Plaintiffs were well aware of the differences between their boars and pigs raised for agricultural purposes, and it was

their awareness that their boars were prohibited that prompted their fight against enforcement of the invasive species order. The distinctions made in the order between protected and prohibited pigs were neither elusive nor uncertain, and that the order provided fair notice to swine owners of ordinary intelligence which pigs were protected and which were prohibited.

4. The Court dissolved the injunction against enforcing the DNR's invasive species order against plaintiffs because enforcement of the order would not constitute an unconstitutional taking of plaintiffs' property.

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

1. NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION ACT — PROHIBITED SPECIES — WILD BOAR OWNERSHIP — EQUAL PROTECTION.

Designating wild boars as an invasive species and prohibiting their ownership does not violate an individual's right to equal protection; rather, the Department of Natural Resources properly exercised its discretion when it distinguished the wild boar from domesticated swine and designated the wild boar as an invasive species, the designation was not arbitrary or capricious, and the designation was rationally related to the government's legitimate objective of protecting natural and agricultural resources.

2. NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION ACT — PROHIBITED SPECIES — WILD BOAR OWNERSHIP — SUBSTANTIVE DUE PROCESS.

Enforcement of the prohibition against owning animals classified as invasive species is not an arbitrary exercise of government power; the invasive species prohibition is rationally related to the government's legitimate purpose of protecting the farming industry and natural resources, and the distinction between domesticated pigs and wild boar is soundly based on evidence of the wild boar's destructive and dangerous nature.

3. NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION ACT — PROHIBITED SPECIES — WILD BOAR OWNERSHIP — VOID FOR VAGUENESS.

The distinction between ownership of prohibited and permitted pigs is not vague or ambiguous; the guidelines for distinguishing between the two types of swine are easily understood by persons of ordinary intelligence and do not impermissibly delegate to police officers, judges, or juries the responsibility of resolving questions about the prohibition on an ad hoc and subjective basis.

Bensinger, Cotant & Menkes, PC (by *Glenn W. Smith*), and *O'Leary Law Office* (by *Joseph P. O'Leary*) for plaintiffs.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Danielle Allison-Yokom*, *Kelly M. Drake*, and *Pamela J. Stevenson*, Assistant Attorneys General, for defendants.

Amicus Curiae:

Varnum LLP (by *Stephen F. MacGuidwin* and *Aaron M. Phelps*) for Michigan Pork Producers Association, Michigan Agri-Business Association, Michigan Wildlife Conservancy, Michigan Audubon Society, Michigan United Conservation Clubs, Michigan Corn Growers Association, Michigan Allied Poultry Industries, Michigan Soybean Association, Greenstone Farm Credit Services, Inc., Michigan Milk Producers Association, Potato Growers of Michigan, Inc., and Michigan Farm Bureau.

Before: GLEICHER, P.J., and K. F. KELLY and SERVITTO, JJ.

GLEICHER, P.J. First published in 1905, *Pigs is Pigs*, by Ellis Parker Butler, tells the story of a railroad agent who insisted on charging the "livestock" rate for a shipment of two guinea pigs, rather than the lower rate applicable to domestic pets. Butler, *Pigs Is Pigs* (Colver Publishing House, 1905), pp 5-6. "Rules is rules," the agent announced, and "[t]h' nationality of the pig creates no differentiality in the rate . . . !" *Id*. at 4, 7. The man who had ordered the guinea pigs refused to be bullied by the bureaucratic agent. Rather than pay a rate he viewed as exorbitant (30 cents a guinea pig), the

buyer left the creatures at the station. *Id*. at 8-9. Within weeks, two guinea pigs became hundreds. The chastened agent announced, "Rules may be rules," but henceforth, "pigs is pets." *Id*. at 36.

This case presents a 21st century pig/rule problem. The Michigan Department of Natural Resources (DNR) has declared the wild Russian boar an invasive species subject to "dispossession." Plaintiffs own hundreds of Russian boars, which they breed on ranches and offer as targets for hunters. "Rules may be rules," the owners insist, but despite their pigs' "nationality," the targeted swine are domestic and not wild, and therefore are not an invasive species. Furthermore, plaintiffs argue, the DNR's order is void for vagueness and violates the Equal Protection and Due Process Clauses.

The circuit court rejected plaintiffs' vagueness challenge, but concluded that the DNR's order banning the boars ran afoul of the Equal Protection and Due Process Clauses because it lacked "the standards for a reasonable and rational classification" scheme. Plaintiffs' pigs, the circuit court further determined, are "hybrid" domestic swine rather than wild and invasive pests.

The rules governing our review of this dispute command us to afford great deference to the DNR's method of delineating a particular invasive species. The classification at issue may be imperfect, but it is neither unconstitutionally vague nor irrational. We reverse the circuit court's equal protection and due process rulings, dissolve the injunction it imposed, and affirm that the invasive species order possesses sufficient clarity to pass constitutional muster.

I. BACKGROUND FACTS AND PROCEEDINGS

Plaintiff Greg Johnson owns Bear Mountain, L.L.C., a hunting ranch where customers pay a fee to

"harvest" Russian boars and other animals. Russian boars are not native to Michigan. According to the DNR, the wild boars now roaming throughout the state (or their boar ancestors) escaped from hunting ranches. Johnson purchased his initial stock of boars from a seller in Canada. His importation permit, issued by the United States Department of Agriculture, specifically labeled the animals as "Wild Boar." Johnson has also obtained boars from plaintiff Roger Turunen, who raises "swine, primarily of the Russian boar breed for sale to game ranches throughout Michigan." Plaintiff Tingstad purchased two pigs from Turunen. He named them "Gretchen" and "Princess Goreya," and attested that he "developed a strong affection for these pigs," which he described as "members of my family." Sadly, both of Tingstad's pet boars are now deceased.

Unlike Gretchen and Princess Goreya, the majority of Russian boars are not lovable pets. Across the United States, large numbers have escaped from hunting ranches and entered the wild, leaving behind a trail of environmental destruction. According to the United States Department of Agriculture, "[t]he rooting and wallowing activities" of escaped boars and their multitudinous offspring "cause serious erosion to river banks and areas along streams. These destructive animals have been known to tear through livestock and game fences and consume animal feed, minerals, and protein supplements." Feral pigs "feast on field crops such as corn, milo, rice, watermelon, peanuts, hay, turf and wheat," and "will prey upon young livestock and other small animals." United States Department of Agriculture Animal and Plant Health Inspection Service, *Feral/Wild Pigs: Potential Problems for Farmers and Hunters*, Agriculture Information Bulletin No. 799, available at

<https://www.aphis.usda.gov/publications/wildlife_damage/content/printable_version/feral%20pigs.pdf> (accessed May 20, 2015) [http://perma.cc/F5QS-8QH7].

Michigan's DNR concurs. The page of its website discussing wild pigs recites that "[f]eral swine are a problem for two main reasons—they can host many parasites and diseases that threaten humans, domestic livestock and wildlife; and they can cause extensive damage to forests, agricultural lands and Michigan's water resources." Michigan Department of Natural Resources, *Feral Swine in Michigan — A Growing Problem*, available at <http://www.michigan.gov/dnr/0,1607, 7-153-10370_12145_55230-230062--,00.html> (accessed May 20, 2015) [http://perma.cc/JM8G-WC5A]. According to the DNR, "[b]y the end of 2011, more than 340 feral swine had been spotted in 72 of Michigan's 83 counties, and 286 [had] been reported killed. A sow can have two litters a year of four to six piglets. Based on their prolific breeding practices, it is estimated that feral swine in Michigan currently could number between 1,000 and 3,000." *Id*.

Michigan is not the only state plagued with wild pigs. "The 2.6 million pigs in Texas cause $500 million in damage each year—a liability of $200 per pig." Nordrum, *Can Wild Pigs Ravaging the U.S. be Stopped?*, Sci Am, October 21, 2014, available at <http://www.scientificamerican.com/article/can-wild-pigs-ravaging-the-u-s-be-stopped/> (accessed May 20, 2015) [http://perma.cc/S2R6-ZELQ]. Florida's feral hog population, estimated at between 500,000 and one million animals, is second only to that of Texas. *2012 Annual State Summary Report of the Wild Hog Working Group*, Southeastern Association of Fish and Wildlife Agencies (SEAFWA), p 24, available at

<http://www.agfc.com/species/documents/2012annualstatesummaryreporthog.pdf> (accessed May 20, 2015) [http://perma.cc/2QZB-UJ7X]. The SEAFWA Wild Hog Working Group characterizes feral swine as "highly mobile disease reservoirs" that "can carry at least 30 important viral and bacterial diseases, and a minimum of 37 parasites that affect people, pets, livestock, or wildlife." *Id*. at 51. In a video presentation posted on the Michigan DNR website titled, "A Pickup Load of Pigs: The Feral Swine Pandemic," Part 1, Dr. Michael Bodenchuk, Texas State Director of Wildlife Services, observes: "In Texas, we say that any fence that will hold water will hold hogs. Fences may be hog resistant but they are not hog proof and eventually hogs will be able to breach any fence." Available at <http://www.michigan.gov/dnr/0,1607,7-153-10370_12145_55230-251114--,00.html > (accessed May 20, 2015) [http://perma.cc/32BD-WKRD].

Closer to home, in 2002, Baraga County Prosecuting Attorney, Joseph P. O'Leary, implored Governor John Engler to motivate "appropriate state agencies" to take action against wild Russian boars that had escaped from a local "game preserve." According to O'Leary, the "strong, fast, intelligent, large (300+ pounds)" boars "will eat just about anything," and posed "a serious threat to humans." The letter closed:

> You should also be aware that I am advising property owners on the Point Abbaye Peninsula that they do not have to sit idly by while their property is destroyed and their lives or their children's lives are threatened. I have advised them that they have the right to defend themselves and their property from these dangerous animals, including shooting the animals if that is what it takes.

Within several years of O'Leary's letter, agricultural, environmental, and natural resource organizations joined forces to lobby Michigan's Legislature and

the DNR for a statewide solution to the wild boar problem. Their efforts culminated in two official acts: the Legislature's 2010 passage of a statute authorizing certain individuals to shoot on sight "swine running at large," MCL 433.14a, and the DNR's 2010 issuance of the Invasive Species Order Amendment No. 1, adding Russian wild boar and their hybrids to the list of Michigan's invasive species. The amended Invasive Species Order (ISO) provides in relevant part:

> Possession of the following live species, including a hybrid or genetic variant of the species, an egg or offspring of the species or of a hybrid or genetically engineered variant, is prohibited:
>
> * * *
>
> (b) Wild boar, wild hog, wild swine, feral pig, feral hog, feral swine, Old world swine, razorback, eurasian wild boar, Russian wild boar (*Sus scrofa Linnaeus*). This subsection does not and is not intended to affect *sus domestica* involved in domestic hog production. [§ 40.4(1)(b).]

The DNR issued the amended ISO in 2010 and again in August 2011, to be effective on October 8, 2011, and then delayed the effective date until April 1, 2012.

The ISO amendment was met with a firestorm of opposition from Russian boar owners. One owners group sued the DNR, alleging that it amounted to an unconstitutional taking of property and that the DNR's director lacked the legal authority to issue it. We rejected those challenges in *Mich Animal Farmers Ass'n v Dep't of Natural Resources & Environment*, unpublished opinion per curiam of the Court of Appeals, issued March 1, 2012 (Docket No. 305302).[1] On

[1] Plaintiffs in these consolidated cases have not challenged the authority of the DNR to issue an invasive species order.

another front, the Michigan Animal Farmers Association (MAFA) petitioned for a declaratory ruling from the DNR pursuant to MCL 24.263, seeking more information concerning the scope of the order and the manner in which it would be applied. MAFA queried, "Specifically, what kind of qualitative testing will the MDNR be conducting and what results will determine if a specific animal is a hybrid, genetic variant or offspring of the prohibited swine listed in the ISO?"

The DNR responded by issuing a declaratory ruling describing the nine "specific physical, biochemical, or behavioral characteristics" it would use to correctly identify *Sus scrofa*, the Linnaean name for the species deemed invasive by the ISO.[2] For example:

> • Bristle-tip coloration: *Sus scrofa* exhibit bristle tips that are lighter in color (e.g., white, cream, or buff) than the rest of the hair shaft. This expression is most frequently observed across the dorsal portion and sides of the snout/face, and on the back and sides of the animal's body.
>
> • Dark "point" coloration: *Sus scrofa* exhibit "points" (i.e., distal portions of the snout, ears, legs, and tail) that are dark brown to black in coloration, and lack light-colored tips on the bristles.
>
> * * *
>
> • Tail structure: *Sus scrofa* exhibit straight tails. They contain the muscular structure to curl their tails

[2] During the 18th century, Swedish botanist and zoologist Carl Linnaeus developed a system, which bears his name, for classifying organisms. According to that system, a wild boar is *Sus scrofa*—"*sus*" refers to the genus and "*scrofa*" refers to the species. The DNR maintains that *Sus domestica* properly names the species of pig we equate with barnyards and pork production. There are more than two species of pigs, but we need not concern ourselves with the rest of them. And lest there be any confusion, guinea pigs are actually a species of rodent: *Cavia porcellus*.

if needed, but the tails are typically held straight. Hybrids of *Sus scrofa* exhibit either curly or straight tail structure.

• Ear structure: *Sus scrofa* exhibit erect ear structure. Hybrids of *Sus scrofa* exhibit either erect or folded/floppy ear structure.

Rather than soothing the boar owners' hostility to the ISO, the declaratory ruling threw gasoline on the flames. Plaintiffs and others objected that many of the characteristics listed by the DNR applied to run-of-the-mill, barnyard pigs. Given that *all* pigs have erect or floppy ears and straight or curly tails, plaintiffs urged, the declaratory ruling confounded their ability to determine whether their pigs must go. Plaintiffs maintained that the DNR's categorization scheme lacked scientific validity and opened the door to their prosecution for possession of "domestic," penned, well-cared-for pigs bearing the same distinguishing characteristics as feral boars. These three lawsuits, filed in three different circuit courts, followed.[3] The parties agreed to consolidate the cases in the Marquette Circuit Court for resolution of their common legal issues.

Both sides moved for summary disposition under MCR 2.116(C)(10). The parties provided the court with voluminous evidence, including published scientific literature and testimony given by veterinarians and animal scientists. Plaintiffs did not take issue with the notion that free-ranging Russian boars present real and serious environmental danger. Rather, they insisted that their pigs were not "wild," and did not fall within the ambit of the ISO. Plaintiffs stressed that "all pigs, regardless of breed or nick-

[3] Two additional cases raising the same issues were filed in two additional counties, but these have been resolved or dismissed and we need not consider them.

name, are of one and the same species and all are descended from one and the same ancestor, the eurasian wild boar." Thus, they argued, the invasive species order as clarified by the declaratory ruling arbitrarily and capriciously selected only one type of pig—the wild Russian boar—for prohibition. Echoing Ellis Parker Butler, plaintiffs emphasized that "pigs are pigs," and even a barnyard hog will "transition" to a feral menace if given the opportunity.

Moreover, plaintiffs contended, the characteristics distinguishing Russian boars from their porcine cousins lacked practical utility, since domestic and wild pigs share many of the same traits as those listed in the declaratory ruling.[4] Plaintiffs highlighted a statement made by Dr. John J. Mayer, a scientist who consulted with the DNR in developing the amended ISO, that "the identification of completely reliable defining characteristics" for feral hogs, Eurasian wild boar, and hybrids between the two "has yet to be achieved." Mayer & Brisbin, *Texas Natural Wildlife, Distinguishing Feral Hogs from Introduced Wild Boar and Their Hybrids: A Review of Past and Present Efforts*, available at <http://agrilife.org/texnatwildlife/feral-hogs/distinguishing-feral-hogs-from-introduced-wild-boar/> (accessed May 20, 2015) [http://perma.cc/5GPH-GEKX].

The DNR countered that the ISO identified a prohibited *species*, as required by MCL 324.41302(3).[5]

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[4] The DNR admitted in response to a request for admission that "not every phenotype characteristic" listed in the declaratory ruling "is unique to *Sus scrofa Linnaeus*. Some of the characteristics in the list may be shared by some breeds of the species *Sus domestica*."

[5] In January 2015, the Legislature amended MCL 324.41301 *et seq*., generally called the invasive species act. The amendments took effect on April 15, 2015. Before the amendment, MCL 324.41302(3) provided in pertinent part:

Shannon J. Hanna, a wildlife biologist employed by the DNR, averred: The separation of *Sus scrofa* (wild boars) and *Sus domestica* (domestic pigs) into different species is a scientifically accepted method of classifying these animals. Scientific and taxonomic resources classify wild boars and domestic pigs as separate species rather than subspecies. For example, Corbet, & Hill, *The Mammals of the Indomalayan Region: A Systemic Review* (United Kingdom: Oxford University Press, 1922), which lists the scientific nomenclature of the region's mammals, classifies wild boars (*Sus scrofa*) and domestic pigs (*Sus domestica*) as separate species.

The commission of natural resources or the commission of agriculture, as applicable, shall list a species as a prohibited species or restricted species if the commission of natural resources or commission of agriculture, respectively, determines the following:

(a) For a prohibited species, all of the following requirements are met:

(*i*) The organism is not native to this state.

(*ii*) The organism is not naturalized in this state or, if naturalized, is not widely distributed in this state.

(*iii*) One or more of the following apply:

(A) The organism has the potential to harm human health or to severely harm natural, agricultural, or silvicultural resources.

(B) Effective management or control techniques for the organism are not available.

The amended version of this subsection now appears at MCL 324.41302(2). The Legislature added the word "nonaquatic" before the term "prohibited species" in former Subsection (3)(a), eliminated the words "to this state" from former Subsection (3)(a)(*ii*), and substitutes "relevant commission" for the previous phrase, "[t]he commission of natural resources or the commission of agriculture" in former Subsection (3). With respect to the control of mammalian species, the "relevant commission" is now defined as "the natural resources commission, department of natural resources, or the director of the department of natural resources, respectively." MCL 324.41301(1)(m).

Hanna, the DNR wildlife biologist, explained that "[i]f two animals cannot breed and create fertile offspring, then they are considered separate species." "However, the converse is not true," she elaborated. "[W]olves . . . and domestic dogs . . . are different species, but can breed and produce fertile offspring." So can *Sus scrofa* and *Sus domestica.* Nonetheless, Hanna asserted, they are separate species. In less scientifically sophisticated parlance, the DNR advocated: "A Russian boar inside a fence does not become a different species when it escapes or is released and becomes wild." Regardless that plaintiffs' boars reside in pens, the DNR contended, the ISO properly outlaws them.

Plaintiffs also sought a declaratory judgment that the ISO and declaratory ruling were void for vagueness, claiming that neither affords the DNR a reliable method of distinguishing between forbidden and permitted swine. Given that all pigs share the same ancestral lineage and many of the same physical features, plaintiffs urged, enforcement of the ISO would result in the "unfettered, unlimited discretion" of the DNR to eliminate whichever pigs it chooses. The DNR riposted that plaintiffs' admission to owning Russian boars dispensed with their vagueness claim.

The circuit court ruled that plaintiffs lacked standing to assert a vagueness challenge because they admitted to owning the animals identified in the ISO. However, the court sided with plaintiffs on their equal protection and due process claims. The circuit court also concluded that the animals under plaintiffs' control were exempt from the ISO because they qualified as domestic hogs. The court enjoined any enforcement of the ISO directed against plaintiffs' pigs.

In June 2014, after the court entered its order granting plaintiffs partial summary disposition, the

DNR rescinded the declaratory ruling.[6] The rescission notice is a public record, and we have taken judicial notice of it. MRE 201. The notice states that the species *Sus scrofa* Linnaeus, or Russian boar and their hybrids, remain prohibited under the invasive species order, but that *Sus domestica*, including "pigs like Mangalitsa, Duroc, Yorkshire, and Hampshire" are not illegal.[7] The DNR explained in the notice that it rescinded the declaratory ruling because "[m]any in the public have confused the Declaratory Ruling with the Invasive Species Order and misread it as interpreting the Invasive Species Order to apply to animals other than Russian boar and their hybrids."

The DNR now appeals on leave granted the circuit-court's order granting plaintiffs' summary disposition motion in part. Plaintiffs cross-appeal the circuit court's order dismissing their void-for-vagueness claim.

II. ANALYSIS

We review de novo the circuit court's summary disposition ruling. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). A court may grant summary disposition under Subrule (C)(10) if no genuine issue exists regarding any material fact and the moving party is entitled to judgment as a matter of law. *Id*. Whether a party has standing is a legal question subject to de novo review. *Manuel v Gill*, 481 Mich 637, 642; 753 NW2d 48 (2008). We also apply de novo review to constitutional questions. *Bonner v City of Brighton*, 495 Mich 209, 221; 848 NW2d 380 (2014).

[6] Available at <https://www.michigan.gov/documents/dnr/MDNR_DeclaratoryRulingRecission_6-16-14_459971_7.pdf> [http://perma.cc/6NE2-3G26].

[7] The names refer to breeds rather than to individual pigs.

We begin by narrowing the frame of debate. Because the DNR has rescinded the declaratory ruling, we need not consider the uncertainties and ambiguities created by that document. The remaining issues are whether the ISO is unconstitutional on due process or equal protection grounds, or void for vagueness. Furthermore, plaintiffs do not assert that the ISO is unconstitutionally arbitrary or capricious in all possible applications, and we do not understand plaintiffs to argue that the DNR improperly trained its sights on the Russian boars living in the wild. Rather, plaintiffs complain that if the ISO covers *their* swine, it violates constitutional standards.

Well-established principles guide our analysis. As a regulatory action that does not implicate fundamental rights, the ISO is subject to rational-basis review.[8] Therefore, it need only be rationally related to a legitimate government purpose to survive plaintiffs' challenge. *Wysocki v Felt*, 248 Mich App 346, 354; 639 NW2d 572 (2001). Rational-basis review is highly deferential. *Phillips v Mirac, Inc*, 470 Mich 415, 433; 685 NW2d 174 (2004). The limited scope of our inquiry "reflects the judiciary's awareness that it is up to legislatures, not courts, to decide on the wisdom and utility of legislation." *American States Ins Co v Dep't of*

[8] When the Legislature grants rulemaking authority to an agency such as the DNR, the validity of a rule or regulation hinges on whether the administrative action (1) falls "within the subject matter of the enabling statute," (2) "complies with the legislative intent underlying the enabling statute," and (3) is "arbitrary or capricious." *Mich Farm Bureau v Dep't of Environmental Quality*, 292 Mich App 106, 129; 807 NW2d 866 (2011). Plaintiffs have not challenged the first two conditions. The third, which proscribes upholding a challenged rule if it is arbitrary or capricious, equates with rational-basis analysis: "If a rule is rationally related to the purpose of the statute, it is neither arbitrary nor capricious." *Dykstra v Dep't of Natural Resources*, 198 Mich App 482, 491; 499 NW2d 367 (1993).

Treasury, 220 Mich App 586, 597; 560 NW2d 644 (1996) (quotation marks and citation omitted).

The ISO bears a presumption of constitutionality, "and the party challenging it bears a heavy burden of rebutting that presumption." *People v Idziak*, 484 Mich 549, 570; 773 NW2d 616 (2009) (quotation marks and citation omitted). "To prevail under this highly deferential standard of review, a challenger must show that the legislation is arbitrary and wholly unrelated in a rational way to the objective of the statute." *Id*. at 570-571 (quotation marks and citations omitted). "A rational basis exists for the legislation when any set of facts, either known or that can be reasonably conceived, justifies the discrimination." *Morales v Parole Bd*, 260 Mich App 29, 51; 676 NW2d 221 (2003). We must uphold the ISO if the DNR's decision to issue it is "supported by any set of facts, either known or which could reasonably be assumed, even if such facts may be debatable." *Crego v Coleman*, 463 Mich 248, 259-260; 615 NW2d 218 (2000). Thus, only in rare and exceptional cases will rational-basis review result in invalidating a law.

We now apply these principles to the arguments before us.

A. THE EQUAL PROTECTION CHALLENGE

The DNR first takes aim at the circuit court's ruling that the ISO contravenes the Equal Protection Clauses of the United States and Michigan Constitutions, which guarantee the right to equal protection of the law. US Const, Am XIV; Const 1963, art 1, § 2. The circuit court found that the ISO unreasonably and arbitrarily classifies the pigs "under the[] control and husbandry" of plaintiffs as an invasive species, while permitting unfettered ownership of swine "under the control and husbandry of other pig farmers." Both pig

varieties descended from a common ancestor and are genetically related, the circuit court observed. Because the favored pigs and the banned pigs share many characteristics, the court reasoned, the DNR irrationally, unreasonably, and arbitrarily classified them disparately.

The DNR counters that "[t]he feral swine problem in Michigan is a Russian boar problem," and the ISO's division of pig species into *Sus scrofa* and *Sus domestica* is justified by the evidence. In our view, the DNR has the better argument, as the classifications set forth in the ISO are reasonable and rationally related to the government's legitimate environmental objectives.

When applying the highly deferential review afforded to environmental regulations, courts must uphold a classification against an equal protection challenge "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *FCC v Beach Communications, Inc*, 508 US 307, 313; 113 S Ct 2096, 124 L Ed 2d 211 (1993).

> In general, the Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational. [*Nordlinger v Hahn*, 505 US 1, 11; 112 S Ct 2326; 120 L Ed 2d 1 (1992) (citations omitted).]

We look to reasons that the DNR promulgated the ISO, and whether those reasons logically justify the rule.

In prohibiting the possession of all pigs of the species *Sus scrofa* Linnaeus, the DNR reasoned that pigs of this species are environmental "bad actors." They escape, breed vigorously, spread disease, eat

crops, defecate in lakes, and generally cause ecological mayhem. Domestic pigs, *Sus domestica*, stay home. Michigan has not experienced an epidemic of escaping barnyard pigs. While one of plaintiffs' expert witnesses averred that traditionally farmed pigs eventually develop feral tendencies if loosed into the wild, no evidence substantiates that significant numbers of domesticated pigs actually get away and remain on the run. Domestic pigs simply do not cause the vexing environmental problems created by their boar cousins. The policy reasons for the distinction between *Sus scrofa* and *Sus domestica* qualify as plausible and evidence-based, and are directly related to the goal of eradicating Michigan's wild boar scourge.

While plaintiffs appear to be highly responsible Russian boar owners, the fact remains that all Russian boars now inhabiting the wilds of our state were once penned Russian boars, or are descended from such animals. The DNR's decision to ban "Russian wild boar (*sus scrofa Linnaeus*)" advances the DNR's legitimate objective of preventing any augmentation of the present wild pig population. We emphasize that "[a] classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality." *Heller v Doe*, 509 US 312, 321; 113 S Ct 2637; 125 L Ed 2d 257 (1993) (quotation marks and citations omitted). The United Supreme Court amplified this point in *Heller*: "The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific." *Id*. (quotation marks and citation omitted). As judges, we are not equipped to weigh the genetic or behavioral differences in hog species. The Legislature has consigned this task to the DNR.

Thus, the ISO easily survives plaintiffs' equal protection challenge. That the DNR has chosen to ban possession of certain pigs and not others embodies a reasonable exercise of discretion. Moreover, the DNR did not arbitrarily or capriciously classify wild Russian boars as an invasive species harboring the capacity to harm natural and agricultural resources. Although the ISO discriminates among pigs, the distinctions it draws are eminently rational, and thereby permissible. The circuit court erred by finding otherwise.

B. THE DUE PROCESS CHALLENGE

Next, we consider whether the ISO contravenes substantive due process principles contained within the United States and Michigan Constitutions. US Const, Am XIV; Const 1963, art 1, § 17. The circuit court found that the distinctions between pig species articulated by the ISO and the declaratory ruling lacked reasonably precise standards, and swept so broadly that they subjected plaintiffs to prosecution for owning "legal" pigs. On appeal, plaintiffs add that the ISO "lacks any standards whatsoever," thereby making "every pig in Michigan a prohibited species[.]" The ISO "is so lacking in standards," they claim, that it bans their pigs despite that the targeted boars are not wild and do not create the problems the ISO seeks to prevent.[9] Further, plaintiffs assert, the ISO lacks any substantial relationship to the health, safety, morals, or general welfare, as "any pig not properly controlled" and managed by humans can cause the same environmental ruin as feral pigs.

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[9] Plaintiffs' due process arguments overlap with their void-for-vagueness claims. We address the latter in Part II(C).

"While the touchstone of due process, generally, 'is protection of the individual against arbitrary action of government,' the substantive component protects against the arbitrary exercise of governmental power . . . ." *Bonner*, 495 Mich at 224 (citations omitted). To satisfy due process standards, the ISO must reasonably relate to a legitimate governmental purpose. *Id*. at 230. The ISO easily passes this test.

The evidence advanced by the DNR supports that the pigs identified in the ISO, "[w]ild boar, wild hog, wild swine, feral pig, feral hog, feral swine, Old world swine, razorback, eurasian wild boar, Russian wild boar (*Sus scrofa Linnaeus*)" and their "hybrids or genetic variant[s]," pose a serious threat to Michigan's farming industry and natural resources. Plaintiffs offered no evidence to the contrary. Given the DNR's well-founded fear that escaped boars of the species *Sus scrofa* Linnaeus will decimate existing ecosystems, the decision to classify these pigs as invasive species is neither arbitrary nor capricious. The ISO bears a rational relationship to the DNR's interest in protecting the environment from the perils posed by escaped Russian boars. We discern no substantive due process violation.

Plaintiffs' insistence that *their* Russian boars are not "wild," and therefore incapable of ravaging the environment, does not alter our analysis. By excluding "*sus domestica* involved in domestic hog production" from the ISO's reach, plaintiffs assert, the DNR has impermissibly and arbitrarily treated their boars as second-class swine. We remain unpersuaded that the DNR's classification system contravenes substantive due process principles.

As we observed in the equal protection context, our Legislature has designated the DNR as the arbiter of

invasive species. The DNR sighted on particular swine, which it defined with nomenclature found in scientific and taxonomic resources. The Latin words employed by the DNR apparently engender controversy among those engaged in the academic study of pigs, but we need not enter that debate. The DNR's approach to its task rests on rational grounds. The evidence presented by the DNR substantiates that the pigs identified in the ISO threaten the environment even though many of them are currently caged. Logically, we cannot quarrel with the notion that reducing Michigan's total wild boar population will slow the growth of the boar population living outside fences. Accordingly, we find no substantive due process violation, and reverse the circuit court's contrary ruling.

C. THE VOID-FOR-VAGUENESS CHALLENGE

Before mounting their due process and equal protection challenges, plaintiffs moved for summary disposition on void-for-vagueness grounds. The circuit court ruled that plaintiffs lacked standing to argue that the ISO is unconstitutionally vague, because each admitted to possessing the animals identified in the ISO. Plaintiffs now cross-appeal this ruling, contending that the circuit court applied standing principles no longer accepted by the Michigan Supreme Court.

Although not displeased with the circuit court's ultimate ruling on this issue, the DNR also finds fault with the circuit court. According to the DNR, the circuit court employed a stealth void-for-vagueness analysis when it granted summary disposition of plaintiffs' due process claims by ruling that the ISO failed to provide fair warning as to which pigs must be surrendered. We agree with the DNR. "[A]t the risk of committing a felony," the circuit court queried in its

summary disposition opinion, "how is one to know whether a hybrid pig possessed by a farmer or a game rancher such as Plaintiff Turunen or Johnson is, or is not, in violation of the ISO and Statute?" This sounds like a vagueness concern.

The circuit court resolved the question correctly the first time around: the ISO provides fair notice that plaintiffs' pigs are prohibited. Its terms are clear enough. Whether living domestically or in the wild, *Sus scrofa* Linnaeus is now deemed an invasive species. Plaintiffs quarrel with the legitimacy of the *Sus scrofa* Linnaeus designation, but they do not deny that their pigs meet it. Accordingly, their void-for-vagueness challenge lacks merit.

"Due process requires that a State provide meaningful standards to guide the application of its laws." *Pacific Mut Life Ins Co v Haslip*, 499 US 1, 44; 111 S Ct 1032; 113 L Ed 2d 1 (1991) (O'Connor, J., dissenting). Void-for-vagueness tenets embrace the principle that a law is unconstitutional "if its prohibitions are not clearly defined." *Grayned v City of Rockford*, 408 US 104, 108; 92 S Ct 2294; 33 L Ed 2d 222 (1972). The Supreme Court explained:

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. [*Id*. at 108-109 (citations omitted).]

Because we are "[c]ondemned to the use of words, we can never expect mathematical certainty from our language." *Id*. at 110.

To give fair notice, a statute "must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited or required." *Kenefick v Battle Creek*, 284 Mich App 653, 655; 774 NW2d 925 (2009) (quotation marks and citation omitted). It may not use terms that require persons of common intelligence to guess at their meaning and differ as to their application. *People v Hrlic*, 277 Mich App 260, 263; 744 NW2d 221 (2007). On the other hand, a statute is sufficiently definite if its meaning can be "fairly ascertain[ed] by reference to judicial interpretations, the common law, dictionaries, treatises, or the commonly accepted meanings of words." *People v Sands*, 261 Mich App 158, 161; 680 NW2d 500 (2004).

The ISO's delineation of the species declared invasive leaves little to the imagination. The words used to identify forbidden pigs do not describe Porky Pig, guinea pigs, or any of the swinish breeds associated with a farm or a livestock yard. Moreover, plaintiffs are well aware of the differences between their boars and pigs raised for agricultural purposes. We find disingenuous plaintiffs' contention that the ISO's inclusion of the modifier "wild" excludes their penned boars. Plaintiffs purchased "wild Russian boars" and still own the boars they brought to Michigan, or their offspring, or hybrids of progenitor wild Russian boars. Further, plaintiffs filed these actions because they *knew* that the DNR intended to dispossess them of their animals.[10] The lines drawn in the ISO between protected and prohibited pigs are

[10] We agree with plaintiffs that the circuit court incorrectly invoked a "standing" analysis to reject their vagueness challenge. Plaintiffs had standing to complain that as applied to them, the ISO is unconstitu-

neither elusive nor uncertain, and suffice to provide fair notice to swine owners of ordinary intelligence. No more is required. We affirm the circuit court's initial ruling that the ISO is not unconstitutionally vague.

D. THE INJUNCTION

The circuit court ruled that "[t]o the extent enforcement of the ISO against these Plaintiffs would constitute a taking of their property under an administrative order not meeting constitutional standards" an injunction prohibiting any seizure of plaintiffs' pigs would issue. We have determined that the ISO meets constitutional standards in all respects. Accordingly, we dissolve the injunction.

We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction. No taxable costs may be imposed under MCR 7.219, as this case presents important public policy questions.

K. F. KELLY and SERVITTO, JJ., concurred with GLEICHER, P.J.

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tionally vague. Their admission that they own some "wild Russian boars" is evidence that the ISO is not vague, but did not foreclose their vagueness argument.

SUMMER v SOUTHFIELD BOARD OF EDUCATION

Docket No. 320680. Submitted May 13, 2015, at Detroit. Decided June 2, 2015, at 9:05 a.m. Leave to appeal and leave to cross-appeal sought.

Meredith Summer brought an action in the Oakland Circuit Court against the Southfield Board of Education and the Southfield Public Schools, alleging that she was laid off in violation of the Revised School Code, MCL 380.1 *et seq*. Defendants moved for summary disposition, asserting that the court lacked subject-matter jurisdiction and that plaintiff had failed to state a claim for which relief could be granted. The court, Denise Langford Morris, J., granted summary disposition in favor of defendants under MCR 2.116(C)(4) and (8). Plaintiff appealed.

The Court of Appeals *held*:

1. MCL 380.1248 of the Revised School Code concerns policies governing personnel decisions that will result in the elimination of a position, and MCL 380.1249 requires school districts to adopt and implement a performance evaluation system for teachers. Under MCL 380.1248(3), a teacher must seek redress for alleged violations of MCL 380.1248 and MCL 380.1249 in the courts. Accordingly, the trial court erred by concluding that it did not have jurisdiction over plaintiff's claim that defendants violated her rights under §§ 1248 and 1249 of the Revised School Code.

2. The trial court correctly determined, however, that teachers cannot bring a private cause of action under MCL 380.1249. Instead, the code provides alternative enforcement mechanisms, including the fact that school funding is conditioned on compliance with MCL 380.1249. Nonetheless, a school district's failure to follow the procedures established in MCL 380.1249 may provide the basis for a private cause of action brought under MCL 380.1248. MCL 380.1248(3) states that if a teacher brings an action against a school district based on § 1248, the teacher's sole and exclusive remedy is an order of reinstatement commencing 30 days after a decision by a court of competent jurisdiction. MCL 380.1248 expressly incorporates the performance evaluation system delineated in § 1249. Specifically, § 1248(1)(b) requires school districts to adopt a policy that provides that all personnel

decisions when conducting a staffing or program reduction are to be based on retaining effective teachers and that the determination of whether a teacher is effective is to be made under the evaluation system delineated in § 1249. Therefore, the requirement that a school district use a performance evaluation system in compliance with § 1249 as it evaluates teachers and makes layoff decisions is one of the requirements with regard to which a teacher may assert a private cause of action under MCL 380.1248(3). Accordingly, if a school district lays off a teacher because the teacher is deemed ineffective, but the school district measured the teacher's effectiveness using a performance evaluation system that did not comply with § 1249, or made a personnel decision that was not based on the factors delineated in MCL 380.1248(1)(b)(*i*) through (*iii*), the teacher could assert a cause of action under § 1248(3) based on a violation of § 1248(1)(b). Therefore, to the extent that plaintiff's complaint alleged that she was laid off on the basis of considerations other than those permitted under MCL 380.1248, or was laid off following an evaluation that did not comply with MCL 380.1249, plaintiff may have stated a cause of action under MCL 380.1248 that was sufficient to survive summary disposition under MCR 2.116(C)(8).

3. Although the trial court stated that it was granting summary disposition under MCR 2.116(C)(4) and (8), the court's ruling only addressed whether summary disposition under MCR 2.116(C)(4) was appropriate. Because the trial court did not specifically articulate grounds that would support a conclusion that plaintiff's complaint failed to state a viable claim such that defendants' motion for summary disposition under MCR 2.116(C)(8) should be granted, this aspect of the trial court's order granting summary disposition in favor of defendants had to be vacated.

Trial court determination that teachers cannot bring a private cause of action under MCL 380.1249 affirmed; trial court decision granting summary disposition in favor of defendants under MCR 2.116(C)(4) reversed; trial court decision granting summary disposition under MCR 2.116(C)(8) vacated; case remanded for further proceedings.

1. EDUCATION — TEACHERS — PERFORMANCE EVALUATION SYSTEM — ENFORCEMENT.

MCL 380.1249 of the Revised School Code requires school districts to adopt and implement a performance evaluation system for teachers; teachers may not bring a private cause of action under MCL 380.1249.

2. EDUCATION — TEACHERS — LAYOFFS — USE OF PERFORMANCE EVALUATION SYSTEM — JURISDICTION — CAUSES OF ACTION.

MCL 380.1248 of the Revised School Code concerns policies governing personnel decisions that will result in the elimination of a position and MCL 380.1249 of the code requires school districts to adopt and implement a performance evaluation system for teachers; under MCL 380.1248(3), a teacher must seek redress for alleged violations of MCL 380.1248 and MCL 380.1249 in the courts; a school district's failure to follow the procedures established in MCL 380.1249 may provide the basis for a private cause of action brought under MCL 380.1248.

White, Schneider, Young & Chiodini, PC (by *Erika P. Thorn*), for plaintiff.

The Allen Law Group, PC (by *Kevin J. Campbell* and *Sean B. O'Brien*), for defendants.

Before: WILDER, P.J., and OWENS and M. J. KELLY, JJ.

WILDER, P.J. Plaintiff, Meredith Summer, appeals as of right an order granting summary disposition in favor of defendants, Southfield Board of Education and Southfield Public Schools. We affirm in part, reverse in part, vacate in part, and remand for further proceedings consistent with this opinion.

I. FACTS

This action arises out of a teacher layoff dispute. According to plaintiff's complaint, she began working as a teacher in the Southfield Public Schools in 1999. During the 2010-2011 school year, plaintiff was involved in an ongoing dispute with a colleague. The dispute ultimately led plaintiff to file an internal complaint in the spring of 2011, in which she claimed that the other employee had been harassing her. According to plaintiff, defendants failed to provide any

information regarding the results of the investigation that followed plaintiff's complaint.

At the beginning of the 2011-2012 school year, an administrator for defendants allegedly informed an employee that she "would not have to worry about [plaintiff]" after the 2011-2012 school year. According to plaintiff, defendants subsequently observed her performance in the classroom, but never shared with her the results of the observation. At the end of the school year, defendants concluded that plaintiff's teaching performance that year was "minimally effective," but despite this evaluation rating, they did not provide a "plan of improvement" for plaintiff or otherwise give plaintiff an opportunity to improve the purported deficiencies in her performance. At the end of the 2011-2012 school year, plaintiff was laid off by defendants. According to plaintiff, she was the only teacher in the school to receive a "minimally effective" rating. Despite being laid off at the end of the 2011-2012 school year, plaintiff was subsequently hired to teach summer school during the summer of 2012.

On August 30, 2013, plaintiff filed a complaint alleging that she was laid off in violation of the Revised School Code, MCL 380.1 *et seq*. Plaintiff asserted that while defendants had purportedly "developed a system to effectuate standards for placements, layoffs, and recalls," which—under the requirements of MCL 380.1249—"was supposed to be based on teacher effectiveness and be rigorous, transparent and fair," nevertheless, defendants' actions in laying off plaintiff "were arbitrary, capricious, and in bad faith" in the following ways:

> A. Defendants . . . retaliated against [plaintiff] by failing or refusing to share the results of her retaliation com-

> plaint [against another employee who had harassed plaintiff] despite the fact that she was the Complainant;
>
> B. Defendants . . . prejudged her evaluation when it [sic] decided, and declared that at the end of the 2011-2012 school year, people "would not have to worry about [plaintiff];"
>
> C. Defendants . . . gave [plaintiff] a "Minimally Effective" evaluation based in part on Observations that were never even shared with [plaintiff] and for which no written feedback was given;
>
> D. Defendants . . . also harbored ill will towards [plaintiff] based on incidents when she served as the union building representative[.]

Plaintiff also alleged that defendants provided no plan of improvement and "no opportunity to cure any alleged performance shortcomings" after it rated plaintiff as minimally effective. Plaintiff's complaint requested a judgment (1) requiring defendants to recall her to her previous position, (2) requiring defendants to void and destroy her 2011-2012 school year evaluation, and (3) awarding money damages equaling her costs and attorney fees, and any other relief to which she was entitled.

Defendants filed a motion for summary disposition under MCR 2.116(C)(4) (court lacks jurisdiction of the subject matter) and MCR 2.116(C)(8) (failure to state a claim on which relief can be granted). Defendants argued that jurisdiction over plaintiff's claim that her layoff decision was "arbitrary and capricious" or was made in bad faith rested exclusively with the State Tenure Commission (STC), because plaintiff's allegations amount to nothing more than a claim that the layoff decision constituted a subterfuge.[1] Likewise,

[1] See Part V(B) of this opinion, which examines this Court's discussion of the "subterfuge" doctrine in *Baumgartner v Perry Pub Sch*, 309 Mich App 507; ___ NW2d ___ (2015).

defendants argued that the Michigan Employment Relations Commission (MERC) has exclusive jurisdiction over plaintiff's claim arising out of her union activity. Alternatively, defendants argued that plaintiff's complaint was not properly before the circuit court because she had failed to exhaust her administrative remedies.

Defendants also presented four separate bases from which they argued the trial court should conclude that summary disposition for failure to state a claim was appropriate. First, defendants contended that plaintiff failed to set forth a cause of action under MCL 380.1248 because plaintiff admitted that she was laid off after being rated minimally effective, did not allege that the evaluation process failed to follow the procedure required under the statute, and failed to make any allegation that she was laid off on the basis of seniority or tenure status. Second, defendants argued that MCL 380.1249 does not establish a private cause of action for teachers against a school district, and, therefore, plaintiff failed to state a valid claim under MCL 380.1249. Third, defendants argued in the alternative that, even if plaintiff has a private cause of action under MCL 380.1249, plaintiff's allegation that defendants did not offer her a plan of improvement following her evaluation did not constitute a violation of MCL 380.1249, because the school district was not required by statute to provide minimally effective teachers with plans of improvement until the 2013-2014 school year. Finally, defendants contended that plaintiff's allegation, that defendants denied her an opportunity to address shortcomings in her performance, failed to state a claim because plaintiff did not identify the particular statutory provision which they allegedly violated.[2]

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[2] Defendants reiterated these arguments in their reply brief to plaintiff's response to their motion for summary disposition.

In response, plaintiff argued that defendants' motion for summary disposition should be denied. Plaintiff claimed that facts supporting her allegations, if taken as true, articulated a colorable claim under the Revised School Code that defendants laid off plaintiff in an arbitrary and capricious manner and failed to use an evaluation procedure that was fair, open, and transparent. Additionally, plaintiff argued that, if the trial court concluded that plaintiff had not stated an actionable claim, she should be allowed, at the very least, to amend her pleadings. Second, plaintiff argued that it was evident from the plain meaning of the phrase "court of competent jurisdiction" in MCL 380.1248(3) that the Legislature intended to allow teachers to bring claims for reinstatement in the circuit courts of this state. Plaintiff also argued that a private cause of action could be stated under MCL 380.1249. Finally, plaintiff contended that defendants had mistaken her claim as one arising under the public employee relations act (PERA), MCL 423.201 *et seq*., because she had alleged no cause of action related to her union status. In support of her position that she had stated a claim under MCL 380.1248 and MCL 380.1249, plaintiff also referred to the orders entered by Oakland Circuit Court Judge James Alexander in a similar case, which denied defendant Southfield Board of Education's motions for summary disposition and held that, in that case, the plaintiffs had stated a cause of action under both MCL 380.1248 and MCL 380.1249.[3]

[3] Plaintiff further discussed the orders entered by Judge Alexander in her subsequent motion to supplement her response to defendants' motion for summary disposition. There she argued that defendants' motion for summary disposition should be denied based on Judge Alexander's denial of defendant Southfield Board of Education's motions for summary disposition in the other case, in which defendant Southfield Board of Education challenged whether the plaintiffs could state a

The trial court issued its opinion and order on February 12, 2014, granting defendants' motion for summary disposition under MCR 2.116(C)(4) and (8). The opinion provided, in relevant part:

> Plaintiff's Complaint states that she was laid off after she was rated "Minimally Effective." Plaintiff alleges that her rating was a subterfuge and that the real reason she was laid off was retaliation for an internal complaint about a co-worker. The Court finds that these allegations do not support a claim under MCL 380.1248, which requires the lay-off to be based on "teacher effectiveness." The [STC] has jurisdiction over a claim that a teacher was laid off in bad faith and for a reason that is arbitrary and capricious. Because Plaintiff has failed to exhaust her administrative remedy by filing her claim with the [STC], summary disposition is appropriate. The Court finds that MCL 380.1249 does not create a cause of action under the facts presented. While this Court understands Plaintiff's desire for it to follow the ruling made by Judge Alexander, that decision is not relevant to this case because this Plaintiff was evaluated under the new system at the end of the 2011-2012 school year. Finally, the Court finds that Plaintiff's allegations regarding her status as a union representative must be brought before the [MERC].

II. STANDARDS OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Williams v Enjoi Transp Solutions*, 307 Mich App 182, 185; 858 NW2d 530 (2014). Whether a trial court has subject matter jurisdiction over a dispute is also a question reviewed de novo by this Court. *Forest Hills Coop v City of Ann*

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claim under the same provisions of the Revised School Code at issue in the instant case. Defendants argued that Judge Alexander's orders were not relevant to the instant case because the plaintiffs in the other case were laid off following the 2010-2011 school year, whereas plaintiff was laid off after the 2011-2012 school year, at which time a new evaluation procedure was in place.

Arbor, 305 Mich App 572, 616; 854 NW2d 172 (2014). Summary disposition is appropriate under MCR 2.116(C)(4) when the trial court "lacks jurisdiction of the subject matter." MCR 2.116(C)(4). See also *Packowski v United Food & Commercial Workers Local 951*, 289 Mich App 132, 138; 796 NW2d 94 (2010). "For jurisdictional questions under MCR 2.116(C)(4), this Court determine[s] whether the affidavits, together with the pleadings, depositions, admissions, and documentary evidence, demonstrate . . . [a lack of] subject matter jurisdiction." *Packowski*, 289 Mich App at 138-139 (quotation marks and citation omitted; alterations in original).

"A motion under MCR 2.116(C)(8) tests the legal sufficiency of the claim on the pleadings alone to determine whether the plaintiff has stated a claim on which relief may be granted. Summary disposition under subrule (C)(8) is appropriate if no factual development could justify the plaintiff's claim for relief." *Stone v Auto-Owners Ins Co*, 307 Mich App 169, 173; 858 NW2d 765 (2014) (quotation marks and citation omitted).

III. THE 2011 AMENDMENTS TO THE REVISED SCHOOL CODE

Before the enactment of the "tie-barred" 2011 amendments to the Revised School Code,[4] the regulation of teacher layoffs was solely a matter of the collective-bargaining process and was subject to adjudication by MERC. *Baumgartner v Perry Pub Sch*, 309 Mich App 507, 510-512; ___ NW2d ___ (2015). "As such, challenges to layoff decisions were regarded as unfair

[4] "When the 2011 Amendments were bills, each 2011 Amendment was linked with the others so that none could become law unless the others became law." *Baumgartner*, 309 Mich App at 511 n 1. The amendments were contained in 2011 Public Acts 100, 101, 102, and 103.

labor practices, which would be a violation of PERA adjudicated by MERC." *Id*. at 522-523. However, the teacher tenure act, MCL 38.71 *et seq*., previously included two provisions that provided a basis for the STC to assert jurisdiction over some teacher layoff disputes. Under former MCL 38.105, repealed by 2011 PA 101, tenured teachers could be terminated only "because of a necessary reduction in personnel," and they were entitled to be appointed to the first vacancy in any school district for which they were certified and qualified. See 1993 PA 59. Under MCL 38.121, any tenured teacher could "appeal to the tenure commission any decision of a controlling board under this act," including claims arising under former MCL 38.105. See *Freiberg v Bd of Ed of Big Bay De Noc Sch Dist*, 61 Mich App 404, 411-414; 232 NW2d 718 (1975), superseded by statute as noted in *Baumgartner*, 309 Mich App at 513, 521-524.[5] Accordingly, in a small number of cases, a plaintiff could assert a cause of action known as "subterfuge"—i.e., that an employment action was taken for ostensibly legal reasons, but was, in actuality, not done in "good faith as a 'necessary reduction in personnel' "—over which the STC "ha[d] jurisdiction to determine, as a factual matter, whether the local school board took the action because of bona fide economic necessity." *Freiberg*, 61 Mich App at 413-414; see also *Baumgartner*, 309 Mich App at 523.

However, under the 2011 amendments of the Revised School Code, the Legislature (1) removed the subject of teacher layoffs from the collective-bargaining process, such that teachers could no longer raise challenges to layoff decisions with MERC as unfair labor practices in violation of PERA, (2) re-

[5] Because *Freiberg* was decided before November 1, 1990, it is not binding on this Court. MCR 7.215(J)(1).

quired that layoff decisions be based on teacher effectiveness, and (3) established that the courts, not the STC or any other administrative agency, have jurisdiction over layoff-related challenges. *Baumgartner*, 309 Mich App at 524. Correspondingly, under the provisions of the Revised School Code in place at all times relevant to these proceedings,[6] school districts are required to adopt a "performance evaluation system" that meets the following pertinent requirements:

> Not later than September 1, 2011, . . . with the involvement of teachers and school administrators, the board of a school district or intermediate school district or board of directors of a public school academy *shall adopt and implement for all teachers and school administrators a rigorous, transparent, and fair performance evaluation system that does all of the following*:
>
> (a) Evaluates the teacher's or school administrator's job performance at least annually while providing timely and constructive feedback.
>
> * * *
>
> (c) Evaluates a teacher's or school administrator's job performance, using multiple rating categories that take into account data on student growth as a significant factor. . . . If the performance evaluation system implemented by a school district, intermediate school district, or public school academy under this section does not already include the rating of teachers as highly effective, effective, minimally effective, and ineffective, then the school district, intermediate school district, or public school academy shall revise the performance evaluation system not later than September 19, 2011 to ensure that it rates teachers as highly effective, effective, minimally effective, or ineffective.
>
> (d) Uses the evaluations, at a minimum, to inform decisions regarding all of the following:

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[6] The 2011 amendments were in effect during the relevant period.

> (*i*) The effectiveness of teachers and school administrators, ensuring that they are given ample opportunities for improvement.
>
> (*ii*) Promotion, retention, and development of teachers and school administrators, including providing relevant coaching, instruction support, or professional development.
>
> * * *
>
> (*iv*) Removing ineffective tenured and untenured teachers and school administrators *after they have had ample opportunities to improve, and ensuring that these decisions are made using rigorous standards and streamlined, transparent, and fair procedures*. [MCL 380.1249(1) (emphasis added).][7]

Additionally, MCL 380.1248(1) and (3) provide, in pertinent part, the following requirements with regard to the basis on which all personnel decisions concerning teachers must be made:

> (b) Subject to subdivision (c), the board of a school district or intermediate school district shall ensure that the school district or intermediate school district adopts, implements, maintains, and complies with a policy that provides that all personnel decisions when conducting a staffing or program reduction or any other personnel determination resulting in the elimination of a position, when conducting a recall from a staffing or program reduction or any other personnel determination resulting in the elimination of a position, or in hiring after a staffing or program reduction or any other personnel determination resulting in the elimination of a position, are based on retaining effective teachers. The policy shall ensure that a teacher who has been rated as ineffective under the performance evaluation system under [MCL 380.1249] is not given any preference that would result in that teacher

[7] The statute was also amended in 2014. 2014 PA 257. The 2014 amendment of MCL 380.1249 did not alter the statute in a manner that would affect the outcome of this case. Accordingly, the language quoted here includes changes made in 2014.

being retained over a teacher who is evaluated as minimally effective, effective, or highly effective under the performance evaluation system under [MCL 380.1249]. Effectiveness shall be measured by the performance evaluation system under [MCL 380.1249], and the personnel decisions shall be made based on the following factors:

(*i*) Individual performance shall be the majority factor in making the decision, and shall consist of but is not limited to all of the following:

(A) Evidence of student growth, which shall be the predominant factor in assessing an employee's individual performance.

(B) The teacher's demonstrated pedagogical skills, including at least a special determination concerning the teacher's knowledge of his or her subject area and the ability to impart that knowledge through planning, delivering rigorous content, checking for and building higher-level understanding, differentiating, and managing a classroom; and consistent preparation to maximize instructional time.

(C) The teacher's management of the classroom, manner and efficacy of disciplining pupils, rapport with parents and other teachers, and ability to withstand the strain of teaching.

(D) The teacher's attendance and disciplinary record, if any.

(*ii*) Significant, relevant accomplishments and contributions. . . .

(*iii*) Relevant special training. . . .

(c) Except as otherwise provided in this subdivision, length of service or tenure status shall not be a factor in a personnel decision described in subdivision (a) or (b). However, if that personnel decision involves 2 or more employees and all other factors distinguishing those employees from each other are equal, then length of service or tenure status may be considered as a tiebreaker.

* * *

> (3) If a teacher brings an action against a school district or intermediate school district based on this section, the teacher's sole and exclusive remedy shall be an order of reinstatement commencing 30 days after a decision by a court of competent jurisdiction. The remedy in an action brought by a teacher based on this section shall not include lost wages, lost benefits, or any other economic damages.

IV. THE CIRCUIT COURT HAS ORIGINAL JURISDICTION OF PLAINTIFF'S CLAIMS UNDER THE REVISED SCHOOL CODE AS AMENDED IN 2011

Plaintiff argues that the trial court erred by granting defendants' motion for summary disposition under MCR 2.116(C)(4) because the circuit court had original jurisdiction over her claims under the Revised School Code. We agree.

MCL 380.1248(3) provides a specific remedy for any teacher alleging a violation of that statute: "If a teacher brings an action against a school district or intermediate school district based on this section, the teacher's sole and exclusive remedy shall be an order of reinstatement commencing 30 days after a decision by *a court of competent jurisdiction*." (Emphasis added.) Likewise, in *Baumgartner*, 309 Mich App at 531, this Court recently held, "If a teacher plaintiff claims that a school-district defendant violated [MCL 380.]1248 and [MCL 380.]1249, he must bring suit in a 'court of competent jurisdiction,' i.e., a court in the Michigan judiciary, not the STC, and seek the 'sole and exclusive remedy' under [MCL 380.]1248: reinstatement." (Citation omitted.) See also *id*. at 528. The Court also stated that "the STC does not have jurisdiction over lay-off related claims, including those alleged to be a 'subterfuge,' because the layoffs of teachers are explicitly governed by [MCL 380.]1248 and [MCL 380.]1249 of the Revised School Code—not the [teacher tenure

act]." *Id*. at 531. Therefore, under the clear holding of *Baumgartner*, a laid-off teacher must seek redress for claims arising under MCL 380.1248 and MCL 380.1249 in the courts of this state. *Id*. Accordingly, the trial court erred by concluding that it did not have jurisdiction over the claim and granting defendants' motion for summary disposition under MCR 2.116(C)(4).[8]

We further note that the trial court's ruling that plaintiff's claims regarding her status as a union representative must be filed with the MERC misreads the complaint as filed. Plaintiff's complaint makes a single mention of her status as a "Union Representative," and it is evident that this reference was provided as background information regarding the harassment that she received from a coworker. Further, any ambiguity in the legal basis for plaintiff's claims was resolved in ¶ 26 of her complaint:

> Therefore, *the practical effect* of the Defendant Southfield's action has been to violate the Plaintiff Summer's rights *in violation of the Revised School Code*. [Emphasis added.]

Therefore, because plaintiff did not allege any claims related to her union status, the trial court's conclusion that plaintiff needed to bring such claims before MERC was also in error.

V. THE TRIAL COURT ERRED IN PART BY HOLDING THAT PLAINTIFF FAILED TO STATE A CAUSE OF ACTION UPON WHICH RELIEF COULD BE GRANTED

Plaintiff argues that, because the allegations in her complaint established a cause of action under the

[8] We recognize that at the time of its ruling, the trial court did not have the benefit of this Court's opinion in *Baumgartner*.

Revised School Code, the trial court erred by granting defendants' motion for summary disposition under MCR 2.116(C)(8). We agree in part.

A. THERE IS NO PRIVATE RIGHT OF ACTION UNDER MCL 380.1249

Before this Court's decision in *Baumgartner*, MCL 380.1249 was interpreted in *Garden City Ed Ass'n v Garden City Sch Dist*, 975 F Supp 2d 780 (ED Mich, 2013). In *Garden City*, the plaintiff teachers' union filed a cause of action alleging violations of the Revised School Code, MCL 380.1248 and MCL 380.1249, and due process violations under the United States and Michigan Constitutions. *Garden City*, 975 F Supp 2d at 781-782. In analyzing the plaintiff's claim under § 1249, the court held that teachers had no private right of action under that section. *Id*. at 785. In support of this determination, the court found that there was no express language in the section providing a private right of action. *Id*. Instead, the court found that "there is a general enforcement provision that applies to the entire Revised School Code." *Id*. The court noted that the general enforcement provisions provide for criminal punishments for school officials who fail to perform acts required under the code, citing MCL 380.1804, and for termination of school officials who fail to comply with the code, citing MCL 380.1806. *Id*. Additionally, the court noted that under MCL 388.1704, a school district's receipt of state funding is expressly conditioned on the school district's compliance with § 1249. *Id*. Further, the court reasoned that, when juxtaposed with § 1248, which does contain an explicit right of action, it was "obvious that if the Legislature had wanted to afford aggrieved individuals a private right of action for violation of Section 1249 it easily could have done so." *Id*. at 786.

Although *Garden City* is not binding on this Court, we are persuaded by the district court's analysis. See *Truel v City of Dearborn*, 291 Mich App 125, 136 n 3; 804 NW2d 744 (2010). As observed by the *Garden City* court, it is evident that the Legislature provided a detailed enforcement scheme to ensure compliance with the Revised School Code, including compliance with § 1249. Notably, the plain language of § 1249 includes no reference to a private right of action. "[W]here a statute creates a new right or imposes a new duty unknown to the common law and provides a comprehensive administrative or other enforcement mechanism or otherwise entrusts the responsibility for upholding the law to a public officer, a private right of action will not be inferred." *Claire-Ann Co v Christenson & Christenson, Inc*, 223 Mich App 25, 30-31; 566 NW2d 4 (1997). Accordingly, given the extensive enforcement mechanisms already provided in the Revised School Code, we decline to infer a private right of action in MCL 380.1249 and conclude that the trial court properly determined that MCL 380.1249 does not establish a private cause of action under which plaintiff may bring the instant case.

B. A DEFENDANT'S FAILURE TO FOLLOW THE PROCEDURES ESTABLISHED IN MCL 380.1249 MAY PROVIDE THE BASIS FOR A CLAIM UNDER MCL 380.1248

The gravamen of plaintiff's complaint was characterized by defendants and the trial court as the modern analogue of the previously recognized subterfuge claim. In *Baumgartner*, this Court appeared to find the continuing viability of such a claim dubious at best:

> [O]ne appellate decision, [*Freiberg*], asserted that the STC had jurisdiction over a small number of layoff-related claims. It did so under the judicially created "subterfuge" doctrine, which allowed the STC to hear claims that

> asserted that the stated reason for a layoff—for instance, economic hardship—was a mere pretext to terminate the teacher in bad faith. Yet, dispositively, *Freiberg* is no longer binding and has been rendered void by the 2011 Amendments at issue. [*Baumgartner*, 309 Mich App at 523 (citation omitted).]

However, as explained herein, we conclude that in a case asserting that a teacher was laid off in violation of MCL 380.1248, the extent to which the evaluation procedure used by the district was in compliance with MCL 380.1249 may be relevant in asserting, or defending against, that § 1248 claim.

MCL 380.1248(3) states in pertinent part that "[i]f a teacher brings an action against a school district or intermediate school district based on this section, the teacher's sole and exclusive remedy shall be an order of reinstatement commencing 30 days after a decision by a court of competent jurisdiction." Section 1248 expressly incorporates the performance evaluation system delineated in § 1249:

> The policy shall ensure that a teacher who has been rated as ineffective under the performance evaluation system under section 1249 is not given any preference that would result in that teacher being retained over a teacher who is evaluated as minimally effective, effective, or highly effective under the performance evaluation system under section 1249. Effectiveness shall be measured by the performance evaluation system under section 1249, and the personnel decisions shall be made based on the following factors . . . . [MCL 380.1248(1)(b).]

Therefore, we must interpret both MCL 380.1248 and MCL 380.1249 to determine whether plaintiff stated a cause of action under MCL 380.1248 that may survive summary disposition under MCR 2.116(C)(8).

The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the

Legislature, *Mich Ed Ass'n v Secretary of State (On Rehearing)*, 489 Mich 194, 217; 801 NW2d 35 (2011), as inferred from the specific language of the statute, *US Fidelity & Guaranty Co v Mich Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich 1, 13; 795 NW2d 101 (2009). Statutory language should be construed reasonably, keeping in mind the purpose of the act. *McCahan v Brennan*, 492 Mich 730, 739; 822 NW2d 747 (2012). Once the intention of the Legislature is discovered, it must prevail regardless of any conflicting rule of statutory construction. *GMAC LLC v Dep't of Treasury*, 286 Mich App 365, 372; 781 NW2d 310 (2009). This Court must consider the object of the statute and the harm it is designed to remedy, and apply a reasonable construction that best accomplishes the statute's purpose. *C D Barnes Assoc, Inc v Star Heaven, LLC*, 300 Mich App 389, 408; 834 NW2d 878 (2013).

The purpose of MCL 380.1248 is, at least in part, to regulate the policies and criteria governing "personnel decisions . . . resulting in the elimination of a position . . . ." MCL 380.1248(1). In furtherance thereof, § 1248 requires the "school district [to] adopt[] . . . a policy that provides that all personnel decisions when conducting a staffing or program reduction . . . *are based on retaining effective teachers*." MCL 380.1248(1)(b) (emphasis added). The determination of whether a teacher is effective is to be made pursuant to the evaluation system delineated in § 1249. See MCL 380.1248(1)(b) ("Effectiveness shall be measured by the performance evaluation system under section 1249 . . . ."); *Baumgartner*, 309 Mich App at 527 ("Section 1248 then mandates that all "policies regarding personnel decisions when conducting a *staffing or program reduction*"—i.e., *layoffs*—must be conducted on (1) the basis of the performance evaluation system the school district developed in compliance with

§ 1249; and (2) other specific factors listed in § 1248."). And the individual performance of a teacher must be the majority factor in making personnel decisions, MCL 380.1248(1)(b)(*i*). Any violation of § 1248 provides a private cause of action for the aggrieved teacher. MCL 380.1248(3); *Baumgartner*, 309 Mich App at 528.

Therefore, based on the specific language of § 1248,[9] the requirement that the school district must use a performance evaluation system in compliance with § 1249 as it evaluates teachers and makes layoff decisions is one of the requirements with regard to which a teacher may assert a private cause of action under § 1248(3). Accordingly, if a school district lays off a teacher because the teacher is deemed ineffective, but the school district measured the teacher's effectiveness using a performance evaluation system that did not comply with § 1249 (e.g., if a school district failed to use a "rigorous, transparent, and fair performance evaluation system," MCL 380.1249(1)), or made a personnel decision that was not based on the factors delineated in MCL 380.1248(1)(b)(*i*) through (*iii*), the teacher could assert a cause of action under § 1248(3) based on a violation of § 1248(1)(b). Such a claim is not identical to the subterfuge claim that existed under *Freiberg*, but it is analogous in that plaintiff may have a cause of action, even though the school evaluated plaintiff as minimally effective and laid her off due to her status as the lowest rated teacher, if her evaluation was based on an evaluation system other than that delineated in § 1249 or was based on an evaluation system that was not fair and transparent. MCL 380.1248(3). Therefore, to the extent that plaintiff's complaint alleged that she was laid off on the basis of considerations other than those permitted

[9] See *US Fidelity*, 484 Mich at 13.

under MCL 380.1248, or was laid off following an evaluation that did not comply with MCL 380.1249, plaintiff may have stated a cause of action under MCL 380.1248 that was sufficient to survive summary disposition under MCR 2.116(C)(8).[10]

Our construction of § 1248 should not be interpreted to broadly allow teachers to assert private causes of action that are not specifically based on violations of the particular requirements for personnel decisions under § 1248. As already stated, under § 1248(3), a teacher may only bring a cause of action that is "based on *this section*." (Emphasis added.) Thus, a private right of action under § 1248 is limited to claims that a personnel decision was made based on considerations that are not permitted under the statute, i.e., the teacher was laid off based on length of service or tenure status in violation of § 1248(1)(c), or was laid off using a procedure or based on factors *other than* those listed in § 1248(1)(b). Accordingly, a plaintiff may not raise a claim under § 1248 based on a violation of an evaluation system under § 1249 *unless* he or she is specifically alleging that a school district's failure to comply with § 1249 resulted in a performance evaluation that was *not* actually based on his or her effectiveness and, most importantly, *that a personnel decision was made based on that noncompliant performance evaluation*. Stated differently, a cause of action under § 1248 should not be interpreted to include claims related to a school district's compliance with § 1249 in cases in which the plaintiff is not challenging a personnel determination, as defined under § 1248(1).

Moreover, we recognize that a cause of action under § 1248 based on a layoff that occurred following an

[10] We do not expressly find, however, that plaintiff did, in fact, state a claim under MCL 380.1248.

evaluation that did not comply with § 1249 may appear to encompass subjective considerations or invite frivolous or illusory claims. However, it is evident that in adopting § 1249, the Legislature intended that there be significant emphasis on the use of objective criteria in the evaluation of a teacher (i.e., student growth and assessment data, § 1249(1)(c) and (2)(a); the results of classroom observations, § 1249(2)(c); and the results of a state or local evaluation tool, § 1249(2)(d)). Moreover, a layoff decision, as made under the criteria articulated in § 1248(1)(b), must be based on (1) the teacher's effectiveness as evaluated under § 1249, (2) the teacher's individual performance, which is also based on objective criteria, including evidence of student growth, a teacher's demonstrated pedagogical skills, a teacher's classroom management, a teacher's attendance record, and a teacher's disciplinary record, (3) the teacher's significant, relevant accomplishments and contributions, and (4) the teacher's relevant special training. The Legislature confirms this emphasis on the use of objective criteria by its unambiguous mandate that "[e]ffectiveness *shall be measured* by the performance evaluation system under section 1249 . . . ." MCL 380.1248(1)(b) (emphasis added). Accordingly, we hold that the Legislature specifically intended to allow teachers to challenge layoff decisions that were based on performance evaluations that did not comply with the requirements of § 1249. Therefore, given the specific references to § 1249 in the requirements with which a school district must comply under § 1248, we conclude that our construction of § 1248, as it relates to § 1249, is consistent with the Legislature's intent, see *Mich Ed Ass'n*, 489 Mich at 217, and best accomplishes the objects of the statute, see *C D Barnes Assoc*, 300 Mich App at 408.

Finally, we hold that the trial court's ruling regarding whether plaintiff stated a claim under MCL 380.1248 was jurisdictional in nature. We acknowledge the trial court's statement that plaintiff's "allegations do not support a claim under MCL 380.1248, which requires the lay-off to be based on 'teacher effectiveness.' " However, it appears that this statement was rooted in the trial court's construction of plaintiff's complaint[11] as alleging a claim of subterfuge, which traditionally had been a claim within the exclusive jurisdiction of the STC. Stated another way, the trial court's ruling with regard to MCL 380.1248 rested on its conclusion that plaintiff's complaint failed to allege that she was laid off due to an improperly given "minimally effective" rating. Accordingly, the trial court's ruling directly addressed only whether summary disposition under MCR 2.116(C)(4) was appropriate. Because the trial court did not specifically articulate the grounds that would support a conclusion that plaintiff's complaint failed to state a viable claim such that defendants' motion for summary disposition under MCR 2.116(C)(8) should be granted, we vacate this aspect of the trial court's order granting summary disposition in favor of defendants and remand for further proceedings consistent with this opinion.

Affirmed in part, reversed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. No taxable costs under MCR 7.219, a question of public policy being involved.

OWENS and M. J. KELLY, JJ., concurred with WILDER, P.J.

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[11] Plaintiff's complaint does not contain the word "subterfuge".

RICHARDS v RICHARDS

Docket No. 319753. Submitted May 12, 2015, at Marquette. Decided June 2, 2015, at 9:10 a.m.

Sherri L. Richards brought a divorce action against William H. Richards III in the Delta Circuit Court, Family Division, after more than 30 years of marriage. Defendant had worked as a urologist until his Parkinson's disease prevented him from practicing, and he was also a part-owner of several medical practices. Plaintiff was a registered nurse, but she had stopped working in 1989 to care for and home school the couple's children and to manage the parties' finances. During the marriage, defendant earned between $500,000 and $800,000 yearly, and the parties amassed substantial savings and assets, including a primary residence appraised at approximately $650,000 and a second home worth approximately $225,000. Defendant had recently begun receiving approximately $22,000 a month from two disability insurance policies, and he also received social security disability payments. At the time of the divorce action, the couple's children were adults, and both parties were helping pay for their college education. In March 2012 the court, Robert E. Goebel, Jr., J., heard plaintiff's motion for temporary spousal support and held that each party was to receive an equal share of defendant's monthly disability income, which resulted in a calculated allowance to each party of $6,000 a month, with plaintiff to receive an additional $10,000 a month to pay the parties' expenses on both of their homes. On June 5, 2012, a stipulated order was entered that increased the monthly allowance to $8,500 a month. Thereafter, following an allegation that defendant was not complying with either the initial or the new order, the trial court ordered all future income to be placed in defendant's attorney's trust account, and again ordered that $6,000 a month in allowance be awarded to each party, as well as $10,000 a month to plaintiff to pay the parties' expenses. Plaintiff also requested between $12,000 and $14,000 in attorney fees, which represented the amount required to determine where defendant had placed various assets. At the close of proofs, the parties submitted proposed findings of fact, and the court generally adopted plaintiff's financial calculations. The court entered a divorce judgment that awarded plaintiff 55%

of the parties' marital assets with some exceptions, such as an equal split of the marital home and an award of the second home to defendant, and it awarded defendant 45%, having considered defendant's fault for beginning an extramarital affair in 2011. The court also awarded plaintiff 50% of defendant's disability payments for six years as temporary spousal support, but it declined her request for attorney fees. Defendant appealed the trial court's judgment to the extent that it awarded an unequal division of the marital estate and provided for spousal support. Plaintiff cross-appealed, arguing that the trial court had erred by refusing to award her attorney fees under MCR 3.206(C)(2) based on defendant's refusal to comply with the trial court's orders.

The Court of Appeals *held*:

1. The trial court's decision to award plaintiff alimony was not an abuse of discretion. Although plaintiff was in better health than defendant, she earned no income, while defendant received approximately $22,000 a month in disability payments, plus additional money from the medical practices he partly owned. The parties were the same age, the marriage had lasted more than 30 years, and both parties contributed to the establishment of the joint estate. Testimony was presented, and believed by the court, that defendant was at fault for the dissolution of the marriage. Defendant's claim that plaintiff's living circumstances were more financially stable because she no longer had to bear the expenses of the marital home was unpersuasive given that plaintiff would have living expenses even after leaving the marital home, and a party should not have to invade property for support. The trial court's decision to award alimony was designed to facilitate plaintiff's return to the work force, a purpose that has been upheld by the Michigan Supreme Court. Given plaintiff's testimony that she planned to further her education so that she could return to work, the award was not an abuse of discretion.

2. The trial court erred when it ordered spousal support for a fixed six-year period. Under MCL 552.28, a spousal support award may be modified upon petition of the receiving party showing new facts or changed circumstances. The plain language of MCL 552.28 does not create a bright-line rule about when spousal support may be modified. Once a trial court provides for spousal support, it has continuing jurisdiction to modify such an order, even without triggering language in the divorce judgment. The trial court's judgment apparently meant that spousal support was not modifiable upon a showing of proper cause after the

six-year timeframe, but the judgment was not clear. To the extent the trial court intended that spousal support would come to a definitive end after six years and could not be revisited, the judgment violated the plain meaning of MCL 552.28 and was vacated.

3. The trial court's property settlement did not constitute an abuse of discretion. The trial court ordered that the marital home be sold and the proceeds split evenly between plaintiff and defendant, and it awarded defendant the parties' home in Houghton. Otherwise, plaintiff received 55% of the marital assets and defendant received 45%. The trial court considered a number of factors, including defendant's fault. Defendant did not explain why the court instead should have adopted his proposal to award plaintiff 51% and defendant 49% of the remaining marital assets. Further, there was no record support for defendant's contention that there had been a miscalculation in the amount of allowance that was disbursed to plaintiff during three months of 2012. Defendant's arguments regarding alleged calculation errors were either not factually supported, not adequately briefed, or did not reveal clear error or an abuse of discretion by the trial court.

4. The trial court abused its discretion by refusing to award plaintiff attorney fees. MCR 3.206(C)(2) provides in Subrule (a) that a party who requests attorney fees and expenses must allege facts sufficient to show that the party is unable to bear the expense of the action, and that the other party is able to pay, or, under Subrule (b), that the attorney fees and expenses were incurred because the other party refused to comply with a previous court order, despite having the ability to comply. Because MCR 3.206(C)(2) uses the word "or," it provides two independent bases for awarding attorney fees. Whereas MCR 3.206(C)(2)(a) allows payment of attorney fees based on one party's inability to pay and the other party's ability to do so, MCR 3.206(C)(2)(b) considers only a party's behavior, without reference to the ability to pay. In this case, the trial court specifically found that defendant had failed to obey its orders, but nevertheless refused to award attorney fees to plaintiff because of the property division and the spousal support award. Because plaintiff alleged facts sufficient to prove that she had incurred attorney's fees under MCR 3.206(C)(2)(b), the matter was remanded for an evidentiary hearing.

Affirmed in part, vacated in part, and remanded for an evidentiary hearing on the issue of attorney fees.

1. DIVORCE — SPOUSAL SUPPORT — MODIFICATIONS.

A court may not limit an award of spousal support to a fixed period; under MCL 552.28, a spousal support award may be modified upon petition of the receiving party showing new facts or changed circumstances, and once a trial court provides for spousal support, it has continuing jurisdiction to modify the order even without triggering language in the divorce judgment.

2. COSTS — ATTORNEY FEES — DOMESTIC RELATIONS ACTIONS — DIVORCE.

Attorney fees in a divorce action are authorized when the requesting party has been forced to incur expenses as a result of the other party's unreasonable conduct in the course of litigation; under MCR 3.206(C)(2), a party who requests attorney fees and expenses must allege facts sufficient to show either that the party is unable to bear the expense of the action, and that the other party is able to pay, or that the attorney fees and expenses were incurred because the other party refused to comply with a previous court order, despite having the ability to comply; the use of the word "or" in the court rule indicates that it provides two independent bases for awarding attorney fees and expenses.

Speaker Law Firm, PLLC (by *Liisa R. Speaker*), for plaintiff.

Trenton M. Stupak for defendant.

Before: GLEICHER, P.J., and K. F. KELLY and SERVITTO, JJ.

K. F. KELLY, J. Defendant appeals as of right from a judgment of divorce, contesting the trial court's division of marital assets and further contesting the award of spousal support. Plaintiff cross-appeals, contesting the trial court's refusal to award her the attorney fees incurred as a result of defendant's failure to follow the trial court's orders. We affirm the trial court's property distribution, as well as the trial court's decision to award spousal support. However, we vacate the spousal support provision to the extent that the trial court may have limited spousal support for a term of six

years in contravention of MCL 552.28. We also vacate the order to the extent it denied plaintiff's request for attorney fees because the trial court erred as a matter of law in considering plaintiff's ability to pay when, in fact, the request was made under MCR 3.206(C)(2)(b) that allows a trial court to award attorney fees that are incurred as a result of defendant's failure to follow prior court orders.

I. BASIC FACTS AND PROCEDURAL HISTORY

The parties were married on December 20, 1980. At the time of the divorce, both plaintiff and defendant were 53 years old. Throughout the marriage, defendant had been employed as a successful urologist, and partly owned a number of medical practices, i.e., BayCare Clinic, BayCare Ambulatory Service, and BayCare Health Services (collectively BayCare), until he was diagnosed with Parkinson's disease and the disease progressed to the point where he could no longer practice. He also held interests in two medical device companies. Plaintiff is a registered nurse, but stopped working in 1989 to care for and home school the couple's children, as well as manage the parties' finances. A back problem would make it difficult to resume her nursing career as a bedside nurse, but plaintiff had returned to school for her bachelors degree and a master's degree, hoping to obtain employment teaching nursing.

During the marriage, defendant earned between $500,000 and $800,000 yearly, and the parties amassed substantial assets, including a primary residence in Gladstone, appraised at approximately $650,000, and a home in Houghton worth approximately $225,000. The parties also had substantial savings accounts. Near the time plaintiff filed for

divorce, defendant had begun receiving proceeds from two disability insurance policies through Northwestern Mutual Insurance Company, which totaled approximately $22,000 a month; defendant was to receive the payments from one policy until he turned 65 and the payments from the other until he turned 68. Defendant also began receiving social security disability payments. Defendant also received distributions representing his interest in BayCare.

Defendant admitted that he began having an affair in October of 2011. According to plaintiff, the circumstances of defendant's relationship with the other woman caused a great deal of stress with the other woman engaging in stalking behavior and the woman's boyfriend threatening defendant. Defendant acknowledged the affair but also maintained that the breakup of the marriage was due to longer-term problems in the marriage.

In March 2012 the court heard plaintiff's motion for temporary spousal support and held that each party was to receive an equal share of defendant's monthly disability income, with plaintiff to receive an additional $10,000 a month to pay the parties' expenses on both of their homes. This resulted in a calculated "allowance" to each party of $6,000 a month. On June 5, 2012, a stipulated order was entered concerning the BayCare distributions and also contained an "increase" in the monthly allowance so that each party would receive $8,500 a month. Thereafter, following an allegation that defendant was not complying with either the initial or new order, the trial court ordered all future income to be placed in defendant's attorney's trust account, and reordered that $6,000 a month in allowance be awarded to each party, as well as $10,000 a month to be given to plaintiff to pay the parties' expenses.

Testimony was presented concerning defendant's shortfalls and missed payments of the spousal support amounts during the proceedings. Plaintiff also testified that defendant took more than his allotted $6,000 a month at times. Plaintiff testified that she had paid her attorney to date; however, she expected to have another $13,000 in fees, for a total of $33,000. She maintained that from between $12,000 and $14,000 of the amount was to determine where the various moneys had been placed, particularly by defendant, and that he should pay that amount toward her attorney fees.[1]

In addition, the court heard testimony concerning the handling, or alleged mishandling, of various bank accounts. At the time the parties separated, the trial court stated the parties had $502,347.03 in assets in various bank accounts, based on plaintiff's calculations. Plaintiff removed $250,000 from these accounts and placed them in accounts under her individual name. Plaintiff admitted that she used a portion of this money, in addition to her monthly allowances, ostensibly for college expenses for her and the children and for taxes.

At the close of proofs, the parties submitted proposed findings of fact. The trial court generally adopted plaintiff's financial calculations. The trial court awarded plaintiff 55% of the parties' marital assets, with some exceptions, such as an equal split of the marital home and an award of the Houghton property to defendant. The trial court also awarded to plaintiff, 50% of defendant's disability payments for six years as temporary spousal support. The trial court declined to award plaintiff attorney fees which she claimed to be

[1] Plaintiff's proposed findings of fact indicated that $6,000 of additional attorney fees were spent as a result of defendant's misconduct.

entitled to due to defendant's misconduct during the divorce proceedings. The trial court entered an amended judgment of divorce on December 11, 2013. Defendant contests the trial court's judgment to the extent that it awarded an unequal division of the marital estate and provided for spousal support. Plaintiff cross-appeals from the trial court's refusal to order defendant to pay plaintiff a portion of her attorney fees.

II. SPOUSAL SUPPORT

Defendant argues that the facts of this case weigh heavily against the award of spousal support. At the time of divorce, the parties were without debt. After the property division, plaintiff's situation was one of financial stability, and she received over $1.8 million in the property settlement. Plaintiff had received substantial lump sum payments, as well as periodic payments, during the pendency of the proceedings. Defendant claims that the trial court erred when it failed to consider that plaintiff no longer resided in the marital home and took a majority of the personal property located in both homes. Defendant contrasts plaintiff's health and her potential to earn income with defendant's health and inability to work and concludes that the spousal support award was punitive. 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." *Gates v Gates*, 256 Mich App 420, 432-433; 664 NW2d 231 (2003). This Court reviews underlying findings of fact for clear error. *Id*. at 432. "A finding is clearly erroneous if we are left with a definite and firm conviction that a mistake has been made." *Id*. at 432-433.

The object in awarding spousal support is to balance the incomes and needs of the parties so that neither will be impoverished, and spousal support is to be based on what is just and reasonable under the circumstances of the case. *Moore v Moore*, 242 Mich App 652, 654; 619 NW2d 723 (2000). When considering an award of spousal support, the following are among those factors that should be weighed in the trial court's decision:

> (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. [*Olson v Olson*, 256 Mich App 619, 631; 671 NW2d 64 (2003).]

The trial court's decision to award alimony in this case was not an abuse of discretion. Plaintiff was in better health than defendant, but at the time of the divorce, plaintiff earned no income, while defendant received approximately $22,000 a month in disability payments, plus additional money from payments from his BayCare interests. The parties were of the same age, the marriage had lasted over 30 years, and both parties contributed to the establishment of the joint estate. Testimony was presented, and believed by the court, that defendant was at fault for the dissolution of the marriage. The couple's children were adults, and both parties were assisting in paying for the children's college education. We find unpersuasive defendant's claim that plaintiff's living circumstances are more

financially stable because she no longer has to bear the expenses of the marital home. Plaintiff will still have living expenses, even after she did not reside in the home. Moreover, "a party should not have to invade property for support . . . ." *Olson*, 256 Mich App at 632.

The trial court's decision to award alimony was designed to facilitate plaintiff's return to the work force. Plaintiff testified that she could work and planned to do so. Toward that goal, she testified that she planned to acquire further education, which she and defendant had planned on her doing now that he had retired. Our Supreme Court has upheld a spousal support award designed to provide a party the means "to assimilate into the workforce and establish economic self-sufficiency." *Friend v Friend*, 486 Mich 1035, 1035 (2010). Given plaintiff's testimony concerning her education plans, an initial six-year award was not an abuse of discretion. Moreover, as discussed by the trial court, defendant's disability policies were not perpetual; one was to end at age 65 and the other was to end at age 68.

However, we agree with plaintiff that the trial court erred when it ordered spousal support for a fixed time period. The relevant portion of the divorce judgment provides, in part:

> IT IS FURTHER ORDERED that Defendant pay spousal support to Plaintiff in the amount of 50% of his income derived from his Social Security Disability payments and the two Northwestern Mutual Disability payments h[e] receives monthly. The spousal support payments are modifiable on showing of proper cause by either party. This award is limited in time to six (6) years from the date hereof.

Plaintiff correctly notes that a spousal support award may be modified upon petition of the receiving party showing new facts or changed circumstances. MCL 552.28 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 section 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.

We have recently reaffirmed that the plain language of MCL 552.28 does not create a "bright-line rule" about when spousal support may be modified. *Loutts v Loutts (After Remand)*, 309 Mich App 203, 211; 871 NW2d 298 (2015). Once 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. *Id.*, quoting *Rickner v Frederick*, 459 Mich 371, 379; 590 NW2d 288 (1999).

We read the trial court's judgment to mean that spousal support is not modifiable upon a showing of proper cause after the six-year timeframe. The judgment is simply not clear. To the extent the trial court intended that spousal support would come to a definitive end after six years and could not be revisited, the judgment violates the plain reading of MCL 552.28 and must be vacated.

III. PROPERTY SETTLEMENT

Defendant next argues that the trial court's property division was inequitable. We disagree.

We consider "the trial court's findings of fact under the clearly erroneous standard. If the findings of fact are upheld, [we] must decide whether the dispositive ruling was fair and equitable in light of those facts."

Sparks v Sparks, 440 Mich 141, 151-152; 485 NW2d 893 (1992). The trial court's dispositional ruling will be upheld, unless this Court is "left with the firm conviction that the division was inequitable." *Id*. at 152.

Equity serves as the goal for property division in divorce actions. *Id*. at 159. 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*. at 159.

> We hold that the following factors are to be considered wherever they are relevant to the circumstances of the particular case: (1) duration of the marriage, (2) contributions of the parties to the marital estate, (3) age of the parties, (4) health of the parties, (5) life status of the parties, (6) necessities and circumstances of the parties, (7) earning abilities of the parties, (8) past relations and conduct of the parties, and (9) general principles of equity. There may even be additional factors that are relevant to a particular case. For example, the court may choose to consider the interruption of the personal career or education of either party. The determination of relevant factors will vary depending on the facts and circumstances of the case. [*Id*. at 159-160 (citation omitted).]

The trial court must consider all relevant factors but "not assign disproportionate weight to any one circumstance." *Id*. at 158. In addition, this Court defers to a trial court's findings of fact stemming from credibility determinations. *Id*. at 147.

A. UNEQUAL DISTRIBUTION

The trial court ordered that the marital home be sold and the proceeds split evenly between plaintiff and defendant and awarded defendant the parties' home in Houghton. Otherwise, plaintiff received 55% of the marital assets and defendant received 45%. The trial court considered a number of factors as dis-

cussed above, including defendant's fault. On appeal, defendant argues that the trial court should have adopted his proposal to divide the property 51/49. In so doing, defendant faults the trial court for not explaining its differential, while essentially ignoring the fact that he did not explain his own proposed differential.

Under the circumstances, we cannot find that the trial court's property settlement constituted an abuse of discretion. According to plaintiff's testimony concerning the facts of defendant's affair, defendant's actions and those of the other woman and her ex-boyfriend were extremely disruptive to plaintiff's life. For example, plaintiff testified that she had to move from her home to the Houghton property to escape harassment, only to then have defendant give the other woman the Houghton address and have the unwanted contact continue. And defendant, who admits that his behavior should have resulted in an unequal property division, cannot show that plaintiff's and trial court's valuations of defendant's behavior were any less valid than his own. The trial court cannot be faulted for choosing one of two reasonable outcomes.

B. CALCULATION ERRORS

1. MONTHLY ALLOWANCE

Defendant argues that he was entitled to a greater share of the marital estate due to a miscalculation in the amount of the proper "allowance" disbursement to plaintiff during June, July and August of 2012. He argues that plaintiff was to receive $8,500 for each of those months rather than the $18,500 reported in defendant's initial proposed findings of fact. While

defendant does not provide any discussion for the reason that the initial figure was erroneous, in his motion for reconsideration he stated that "the parties agreed and it was ordered that each receive an allowance of $8,500 not $18,500 which would impact the calculations found on page 11."[2]

There is no record support for defendant's contention. Early in the divorce proceedings, the court heard plaintiff's motion for temporary spousal support and held that each party was to receive an equal share of defendant's $22,000 monthly disability income, with plaintiff to receive an additional $10,000 a month to pay the parties' expenses on both of their homes. This resulted in a calculated "allowance" to each party of $6,000 a month. On June 5, 2012, a stipulated order was entered concerning the BayCare distributions and also contained an "increase" in the monthly allowance each party was to receive to $8,500 a month. Thereafter, following an allegation that defendant was not complying with either the initial or new order, the trial court held a hearing on the allegations, ordered future income to be placed in defendant's attorney's trust account, and again ordered that $6,000 a month in allowance would be awarded to each party, as well as $10,000 a month to be given to plaintiff to pay the parties' expenses. Given these orders, the trial court did not plainly err when it found that plaintiff was entitled to $18,500 for June, July, and August of 2012.

2. BAYCARE DISTRIBUTIONS

Defendant also argues that the trial court erred when it found that defendant had to include $35,000 in

[2] The trial court never directly addressed or ruled on the motion for reconsideration, tacitly denying the motion by entering the judgment of divorce.

BayCare distributions he had received prior to placing the remainder of the received funds into his attorney's IOLTA account without also including plaintiff's $35,000.

In June 2012, defendant was to receive a substantial lump sum payment from BayCare as part of its buy-out of defendant's interest. The parties agreed that they would each receive $35,000 from those proceeds, in addition to their monthly allowance. Although the stipulated order provided that defendant would immediately place the proceeds in his attorney's client trust account, defendant admitted that he skimmed off his share first and then placed the balance in the trust. He then later requested that the trial court divide the proceeds of the trust in half when unforeseen expenses arose. Such a position was incongruous because defendant had already received his share and plaintiff's $35,000 became part of the trust. Moreover, although plaintiff also received $35,000, she placed it into a certificate of deposit as collateral for a loan for one of the parties' children. Under the particular circumstances of this case, we agree with plaintiff that the trial court did not make a calculation error, but rather a judgment call concerning adding defendant's $35,000 back into the marital estate and not adding back her own disbursement.

3. NORTHWESTERN MUTUAL DISABILITY DEPOSITS

Defendant next appears to argue that he was not required to deposit $21,950.70 each month into the parties' trust accounts for the months of June, July, August, and September of 2012, representing payments made to defendant from his Northwestern Mutual disability policy. Defendant fails to develop this argument, certainly not to the extent we are able to

find clear error in defendant's initial calculations. An appellant may not leave it up to this Court to develop his arguments for him. *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002). Because defendant has failed to adequately brief this argument, he has abandoned it. *Id*.

Moreover, even if defendant intends to revise his argument below that he was not "required" to deposit this money into the trust account until the trial court's October 1, 2012 order, he still cannot show plain error. The trial court's earlier orders still required defendant to place the moneys from his Northwestern Mutual disability policy into the parties' joint account, which would then be disbursed evenly after the "allowances" and the $10,000 home maintenance payments were paid out. Defendant failed to adhere to the earlier order.

4. MARITAL BANK ACCOUNTS

At the time the parties separated, they had significant assets in several marital bank accounts. The trial court stated that these totaled $502,347.03. However, the judgment of divorce included only the $346,470.39 amount as part of the marital estate subject to division. Defendant claims that plaintiff created bank accounts in her own name and siphoned funds from their joint account. He argues that the trial court erred in failing to take such behavior into consideration when dividing the marital property.

The trial court acted equitably and made proper findings when it did not require plaintiff to pay back the money she took from the marital estate for tuition and expenses. Defendant did not object to plaintiff's use of funds throughout the divorce proceedings, nor

did he object at the hearing. Furthermore, in his proposed findings, he did not request that the court require that plaintiff return the money to the marital estate for division, but instead stated that he was leaving the issue for the court to judge.[3] Defendant cannot show how much of the reduction in the account balance was due to plaintiff's removal of the money in the account. Plaintiff testified that the funds were used to pay for her and the children's educational expenses. The trial court equitably decided not to have plaintiff return any money into the account because of how the funds were used.

IV. ATTORNEY FEES

In her cross appeal, plaintiff argues the trial court abused its discretion by refusing to award plaintiff attorney fees based on defendant's refusal to comply with the trial court's orders.

We review for an abuse of discretion a trial court's award of attorney fees in a divorce action. *Hanaway v Hanaway*, 208 Mich App 278, 298; 527 NW2d 792 (1995). An abuse of discretion occurs when the result falls outside the range of principled outcomes. *Keinz v Keinz*, 290 Mich App 137, 141; 799 NW2d 576 (2010).

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[3] In his proposed findings of fact, defendant gave the trial court carte blanche to divide defendants' calculated remaining account balances, stating:

> Plaintiff claims that the reduced balance is a result of marital expenditures. Plaintiff received $163,500.00 during the months of separation which was primarily intended for marital and living expenses. Further, she had full access and control to a majority of these bank accounts. Defendant leaves this matter to the Court's judgment in deciding what the value of the accounts should be and their proper distribution at this time.

In addition, in his proposed property division, defendant advocated for an equal division of the remaining funds.

However, findings of fact on which the trial court bases an award of attorney fees are reviewed for clear error. *Stallworth v Stallworth*, 275 Mich App 282, 288; 738 NW2d 264 (2007). "A finding is clearly erroneous if we are left with a definite and firm conviction that a mistake has been made." *Gates*, 256 Mich App at 432-433.

"Attorney fees in a divorce action are awarded only as necessary to enable a party to prosecute or defend a suit" but are also "authorized when the requesting party has been forced to incur expenses as a result of the other party's unreasonable conduct in the course of litigation." *Hanaway*, 208 Mich App at 298. Specifically, MCR 3.206(C) provides:

> (1) A party may, at any time, request that the court order the other party to pay all or part of the attorney fees and expenses related to the action or a specific proceeding, including a post-judgment proceeding.
>
> (2) A party who requests attorney fees and expenses must allege facts sufficient to show that
>
> (a) the party is unable to bear the expense of the action, and that the other party is able to pay, ***or***
>
> (b) the attorney fees and expenses were incurred because the other party refused to comply with a previous court order, despite having the ability to comply. [MCR 3.206(C) (emphasis added).]

Because we have seen this problem in the past, we take this opportunity to clarify that MCR 3.206(C)(2) provides two independent bases for awarding attorney fees and expenses. "In general, 'or' is a disjunctive term, indicating a choice between two alternatives[.]" *Paris Meadows, LLC v City of Kentwood*, 287 Mich App 136, 148; 783 NW2d 133 (2010). "The drafters of statutes are presumed to know the rules of grammar, and statutory language must be read within its gram-

matical context unless a contrary intent is clearly expressed." *Greater Bethesda Healing Springs Ministry v Evangel Builders & Constr Managers, LLC*, 282 Mich App 410, 414; 766 NW2d 874 (2009). As plaintiff points out, we have not clarified the rule in a published opinion. However, in an unpublished opinion, we held that "[t]he Court Rule is phrased as an inclusive disjunction" and "provides two possible avenues to an award." *Kalaydjian v Kalaydjian*, unpublished opinion per curiam of the Court of Appeals, issued September 29, 2011 (Docket No. 298107). "[A]lthough unpublished opinions of this Court are not binding precedent . . . they may, however, be considered instructive or persuasive." *Paris Meadows*, 287 Mich App at 145 n 3.

Whereas MCR 3.206(C)(2)(a) allows payment of attorney fees based on one party's inability to pay and the other party's ability to do so, MCR 3.206(C)(2)(b) considers only a party's behavior, without reference to the ability to pay. As plaintiff points out, the staff comments to the court rule provide:

> The April 1, 2003, amendment of MCR 3.206(C), effective September 1, 2003, was suggested by the Michigan Judges Association to (1) reduce the number of hearings that occur because of a litigant's vindictive or wrongful behavior, (2) shift the costs associated with wrongful conduct to the party engaging in the improper behavior, (3) remove the ability of a vindictive litigant to apply financial pressure to the opposing party, (4) create a financial incentive for attorneys to accept a wronged party as a client, and (5) foster respect for court orders.

Here, the trial court specifically found that defendant failed to obey its orders and found that these violations "certainly caused confusion and extra time by all parties involved." Nevertheless, because of the property division and the spousal support award, the trial court refused to award attorney fees to plaintiff.

In so doing, it appears that the trial court conflated the two different bases for awarding attorney fees. Plaintiff alleged facts and provided testimony that included defendant's admissions sufficient to prove that she incurred attorney fees "because the other party refused to comply with a previous court order, despite having the ability to comply" under MCR 3.206(C)(2)(b). The property and spousal support awards do not affect the fact that plaintiff was forced to incur additional attorney fees due solely to defendant's failure to comply with the trial court's orders during the divorce proceedings. Plaintiff sought only attorney fees for the amount related to these failures.

Affirmed in part, vacated in part, and remanded for an evidentiary hearing on the issue of attorney fees. We do not retain jurisdiction.

GLEICHER, P.J., and SERVITTO, J., concurred with K. F. KELLY, J.

PEOPLE v BAILEY

Docket No. 318479. Submitted January 9, 2015, at Lansing. Decided June 2, 2015, at 9:15 a.m. Leave to appeal denied 498 Mich 896.

Ryan L. Bailey was charged in the Grand Traverse Circuit Court with four counts of first-degree criminal sexual conduct (CSC-I) after engaging in the digital-vaginal penetration of three minors: BS, who was his niece, and AB and MB, who were his grandnieces. Count I of the information alleged a violation of MCL 750.520b(1)(a) and (2)(b) (sexual penetration involving a victim under the age of 13 and a defendant 17 years of age or older) against MB between August 1, 2008, and November 2008. Count II alleged a violation of MCL 750.520b(1)(a) (sexual penetration involving a victim under the age of 13) against MB, but did not specify a date of the offense, stating only that it occurred sometime within a seven-year period. Count III alleged a violation of MCL 750.520b(1)(a) against AB that occurred between January 1, 2001, to November 30, 2008. Count IV alleged a violation of MCL 750.520b(1)(b)(*ii*) (sexual penetration involving a victim at least 13 years of age but less than 16 and related to the defendant by blood or affinity to the fourth degree) against BS in June 2007. Defendant was convicted of all four counts following a jury trial. Under MCL 750.520b(2)(b), the conviction on Count I required the imposition of a 25-year mandatory minimum sentence, and the court, Philip E. Rodgers, Jr., J., accordingly sentenced defendant to 25 to 50 years' imprisonment for Count I and terms of 225 months to 50 years for the other counts. The court further ordered that the sentence for Count I be served consecutively to the other three sentences, which were to be served concurrently. Defendant appealed.

The Court of Appeals *held*:

1. Defendant's convictions were supported by sufficient evidence. To determine whether the prosecutor presented sufficient evidence to sustain a conviction, a court must review the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt. The prosecution is not obligated to disprove every reasonable theory consistent with innocence to

discharge its responsibility. Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime. While defendant correctly noted that there was no forensic evidence corroborating the victims' testimony, a complainant's testimony regarding a defendant's commission of sexual acts is sufficient evidence to support a conviction of CSC-I.

2. Defendant argued that the felony information deprived him of due process by failing to give him adequate notice of the charges in Counts II to IV because those counts alleged sexual misconduct over a period of eight years. MCL 767.45(1)(b) requires that an information contain the time of the offense as near as may be, but no variance with respect to time is fatal unless time is of the essence of the offense. MCL 767.51 further provides that the court may on motion require the prosecution to state the time or identify the occasion as nearly as the circumstances will permit to enable the accused to meet the charge. The adequacy of an information's time frame for a particular offense depends on certain factors, including (1) the nature of the crime charged, (2) the victim's ability to specify a date, (3) the prosecution's efforts to pinpoint a date, and (4) the prejudice to the defendant in preparing a defense. An imprecise time allegation is acceptable for sexual offenses involving children given their difficulty in recalling precise dates. MB and AB were 13 years old or younger at the time of the alleged offenses, and each testified that defendant abused them numerous times over multiple years, so specific dates would not stick out in their minds. BS was able to specify that the single assault against her occurred in June 2007. With respect to the deprivation of defendant's opportunity to present an alibi defense, creating a viable alibi defense was not a realistic option in this case because defendant was living with his victims over an extended period and the victims alleged that defendant abused them at times when no one else was around. Accordingly, the trial court did not err by not requiring greater specificity regarding times for the charged offenses.

3. Defendant also argued that the information deprived him of due process because Counts II to IV contained nearly identical language accusing him of committing sexual misconduct sometime over the course of eight years. MCL 767.45(1)(a) provides that an information must contain the nature of the offense stated in language that will fairly apprise the accused and the court of the offense charged. Defendant failed to explain why the similarity of the allegations in each count violated the statute. Because the information alleged that defendant penetrated each victim's

vagina with his fingers and cited each law that defendant violated, he was fairly apprised of the offenses charged.

4. Defendant argued that the joinder of charges deprived him of due process. MCR 6.120(B)(1) provides that joinder of related offenses is appropriate when the offenses are based on the same conduct or transaction, a series of connected acts, or a series of acts constituting parts of a single scheme or plan. Defendant failed to demonstrate that the trial court abused its discretion by joining his offenses in one trial.

5. Defendant argued that the trial court erred by failing to instruct the jury that it needed to convict him on the basis of unanimous verdicts and reach a consensus about the facts supporting each verdict. A specific unanimity instruction, however, is not required in all cases in which more than one act is presented as evidence of the *actus reus* of a single criminal offense. If materially identical evidence is presented with respect to each act and there is no juror confusion, a general unanimity instruction will suffice. There was no risk in this case that the jurors would have been confused regarding their obligation to unanimously find that defendant sexually penetrated each victim. Each victim testified that defendant abused her in the same manner. Moreover, the evidence offered to support each alleged act of penetration was materially identical, i.e., the victim's equivocal testimony of penetration occurring in the same house over an unspecified period. Accordingly, because neither party presented materially distinct proofs regarding any of the alleged acts, the factual basis for the specific unanimity instruction was nonexistent.

6. The trial court did not err under MCL 768.27a and MRE 404(b) by admitting other-acts evidence. Defendant also argued that if evidence of his uncharged sexual misconduct was relevant, its relevance was substantially outweighed by the danger of unfair prejudice and should have been excluded under MRE 403 because it was only relevant to propensity. However, propensity evidence admitted under MCL 768.27a is considered to have probative value and therefore to be relevant.

7. Defendant was not entitled to relief on his claims of prosecutorial misconduct. He argued that the prosecutor denied him a fair trial by (1) asking improper questions of prospective jurors during the voir dire, including why victims might not report sexual abuse, (2) referring to their answers during closing arguments, (3) stating that childhood should be carefree, (4) asking the victims how they felt while testifying at trial. (5) asking the victims how they had been affected by defendant's abuse,

(6) asking the jurors to consider defendant's uncharged acts of sexual misconduct, (7) arguing that the victims' testimony could not have been made up, and (8) arguing that in order to find defendant not guilty, the jury would have to find that the victims were mistaken or lying. An appellate court cannot find error requiring reversal when a curative instruction could have alleviated any prejudicial effect, and defendant offered no explanation for why a curative instruction would not have alleviated any prejudicial effects of the alleged instances of misconduct. In any event, prosecutors are generally free to argue the evidence and all reasonable inferences from the evidence as they relate to their theory of the case. With respect to the prosecutor's arguing that sexual assault victims might not report abuse right away, juries are permitted to view evidence in light of their common knowledge or experience. Defendant offered no authority suggesting that the trial court's admission of irrelevant evidence constituted prosecutorial misconduct, and asking witnesses about how they are feeling while testifying can be relevant to their credibility. Although the prosecutor arguably invoked improper sympathy for the victims by stating that childhood should be carefree and arguably misstated the law by telling the jury that it would have to find that the victims were lying or mistaken to acquit defendant, defendant failed to explain how any of the alleged errors resulted in his conviction despite his actual innocence or seriously affected the fairness, integrity, or public reputation of the proceedings independently of his innocence.

8. The trial court did not have the discretion to impose a consecutive sentence. Concurrent sentencing is the norm in Michigan, and a court may impose a consecutive sentence only if specifically authorized by statute. MCL 750.520b(3) provides that when a defendant is convicted of CSC-I, the trial court may order the term of imprisonment imposed to be served consecutively to any term of imprisonment imposed for any other criminal offense arising from the same transaction. But an ongoing course of sexually abusive conduct involving episodes of assault does not by itself render the crimes part of the same transaction. For multiple penetrations to be considered as part of the same transaction, they must be part of a continuous time sequence, not merely part of a continuous course of conduct. In the instant case, Count I alleged that defendant committed CSC-I against MB between August 1, 2008, and November 2008. Although a brief time overlap existed, there was no evidence that defendant's commission of Count I occurred in the same transaction as the offense against AB (Count III). Nor did Count I occur during the same transaction as the offense against BS (Count IV), who testified

about a single occurrence in the summer of 2007. While the jury convicted defendant of another count of CSC-I against MB (Count II) in a seven-year period, there was no evidence that MB was subject to several distinct acts of penetration sufficient to constitute the same transaction or that Count II was committed in the same transaction as Counts III or IV. Accordingly, it was necessary to vacate defendant's sentence for Count I and remand for resentencing on that count to impose a term of years to be served concurrently with defendant's other sentences.

9. Defendant argued that his trial counsel gave ineffective assistance by failing to request that defendant's charges be tried separately, failing to object to other-acts evidence under MRE 404(b), failing to request a unanimity instruction, and failing to argue that the trial court could not impose a consecutive sentence. Defendant failed to show that the first three of these objections or requests would have been successful, and failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel. Nor was there a reasonable probability that the outcome of defendant's trial would have been different had his trial counsel acted at trial in accordance with what are now defendant's wishes on appeal. While defense counsel's failure to challenge the consecutive sentence likely constituted ineffective assistance, it was not necessary to address trial counsel's performance in that regard given the remand for resentencing.

Convictions affirmed; consecutive sentence for conviction on Count I vacated and case remanded for resentencing for that conviction.

RONAYNE KRAUSE, J., concurring in part and dissenting in part, concurred fully with the majority except for its analysis of the consecutive sentence imposed for Count I, concluding that the majority had misconstrued caselaw and engaged in a limited analysis of the facts. By equating the term "same transaction" under MCL 750.520b(3) with "occurring on the same day," the majority incorrectly created a bright-line rule that was not required or implied by the caselaw it cited. Two sexual penetrations can be part of the same transaction if they sprang one from the other and have a connective relationship that is more than incidental and there is no relevant disruption in time or the flow of events between the two distinct offenses. They must grow out of a continuous time sequence and have a connective relationship that is more than incidental. The test is whether the crimes were committed in a continuous time sequence and displayed a single intent and goal. What is a transaction has no definitional limita-

tions on scope, complexity, or duration. Two acts that occurred on the same day might not necessarily form part of a continuous time sequence, and even two acts occurring simultaneously might not be part of a continuous time sequence. The test is fundamentally a totality-of-the-circumstances analysis rather than a bright-line rule. Defendant's convictions were based on several assaults against several victims over several years. The victims and other witnesses testified that defendant's abuse was constant and unremitting. Defendant's abuses were not discrete occurrences, but were part of a single, functionally unbroken enterprise. The incidents were deeply intertwined and had no relevant gap between them. They were clearly part of the same transaction. The trial court therefore had discretion to impose a consecutive sentence, and Judge RONAYNE KRAUSE would have affirmed defendant's sentences in their entirety.

1. CRIMINAL SEXUAL CONDUCT — EVIDENCE — SUFFICIENCY — UNCORROBORATED TESTIMONY OF VICTIM.

A complainant's testimony regarding a defendant's commission of sexual acts is sufficient evidence to support a conviction of first-degree criminal sexual conduct (MCL 750.520b).

2. CRIMINAL LAW — INFORMATION — SPECIFICATION OF TIME OF OFFENSE — SEXUAL OFFENSES — CHILD VICTIMS.

MCL 767.45(1)(b) requires that a criminal information contain the time of the offense as near as may be, but no variance with respect to time is fatal unless time is of the essence of the offense; MCL 767.51 further provides that the court may on motion require the prosecution to state the time or identify the occasion as nearly as the circumstances will permit to enable the accused to meet the charge; the adequacy of an information's time frame for a particular offense depends on certain factors, including (1) the nature of the crime charged, (2) the victim's ability to specify a date, (3) the prosecution's efforts to pinpoint a date, and (4) the prejudice to the defendant in preparing a defense; an imprecise time allegation is acceptable for sexual offenses involving children given their difficulty in recalling precise dates.

3. CRIMINAL LAW — JURIES — UNANIMOUS VERDICTS — INSTRUCTIONS.

A specific instruction requiring unanimity of verdicts is not required in all cases in which more than one act is presented as evidence of the *actus reus* of a single criminal offense; if materially identical evidence is presented with respect to each act and there is no juror confusion, a general unanimity instruction will suffice.

4. EVIDENCE — OTHER ACTS — PROPENSITY EVIDENCE — ACTS AGAINST CHILDREN — ADMISSIBILITY.

Propensity evidence of other acts offered under MCL 768.27a, the statute governing the admission of evidence of certain other acts (including sexual acts) committed against a minor, is considered to have probative value and therefore to be relevant and admissible.

5. SENTENCING — CONSECUTIVE SENTENCES — FIRST-DEGREE CRIMINAL SEXUAL CONDUCT — SAME TRANSACTION.

MCL 750.520b(3) provides that when a defendant is convicted of first-degree criminal sexual conduct, the trial court may order the term of imprisonment imposed to be served consecutively to any term of imprisonment imposed for any other criminal offense arising from the same transaction; an ongoing course of sexually abusive conduct involving episodes of assault does not by itself render the crimes part of the same transaction, however; for multiple sexual penetrations to be considered as part of the same transaction, they must be part of a continuous time sequence, not merely part of a continuous course of conduct.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Robert A. Cooney*, Prosecuting Attorney, and *Noelle R. Moeggenberg*, Assistant Prosecuting Attorney, for the people.

Smith & Brooker, PC (by *George B. Mullison*), for defendant.

Before: SHAPIRO, P.J., and GLEICHER and RONAYNE KRAUSE, JJ.

SHAPIRO, P.J. Defendant was charged with engaging in digital-vaginal sexual penetration of three minors: MB, AB, and BS. Defendant, who was born in 1982, was BS's uncle and MB and AB's great-uncle. He was charged with four counts of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1), and convicted of each following a jury trial. We affirm defendant's convictions against his arguments that they

were not supported by sufficient evidence, that his due process rights were violated, that the trial court made erroneous evidentiary rulings, and that the trial was tainted by prosecutorial misconduct. However, we remand for resentencing.

AB and MB were sisters, and defendant resided in their home for several years. MB, born in 1996, testified that defendant repeatedly engaged in digital-vaginal penetration of her as far back as she could remember, but that her first specific recollection of defendant digitally penetrating her occurred when she was seven years old. She testified that defendant continued this conduct until he moved out of the home in November 2008. As to MB, defendant was charged with, and convicted of, two counts of CSC-I. In Count I, but not Count II, defendant was charged with violating MCL 750.520b(1)(a) and (2)(b) (victim under the age of 13 and defendant 17 years of age or older), the provision that provides for a 25-year mandatory minimum term of imprisonment, MCL 750.520b(2)(b). The jury was instructed that to convict on this offense, it had to find that defendant committed the crime between August 1, 2008, and November 2008 (the month in which MB testified that the assaults stopped). Count II did not provide for any specific date of offense other than a nearly seven-year period and was a charge simply under MCL 750.520b(1)(a) (victim under age 13).

AB, born in 1994, testified that the first incident of digital-vaginal penetration occurred in the summer of 2003 and continued on a daily basis until she left for boarding school in the summer of 2008. As to AB, defendant was charged with, and convicted of, a single count of CSC-I, MCL 750.520b(1)(a) (victim under the age of 13). The date of the offense was listed as

January 1, 2001, to November 30, 2008, with no particular date referred to. This was Count III of the felony information.

BS, born in 1994, was a first cousin once removed of AB and MB. She testified that defendant digitally penetrated her vagina on one occasion in June 2007, during a visit. As to BS, defendant was charged with, and convicted of, a single count of CSC-I, MCL 750.520b(1)(b)(*ii*) (victim at least 13 years of age but less than 16 and related to defendant by blood or affinity to the fourth degree). This was Count IV of the information.

Defendant was convicted on all counts. As to Count I, the trial court sentenced him to 25 to 50 years' imprisonment. For each of the other counts, the court imposed terms of 225 months to 50 years. The trial court, stating that it was exercising its authority under MCL 750.520b(3), ordered that the sentence for Count I be served consecutively to the other three sentences, which were to be served concurrently with one another. In sum, defendant was sentenced to a combined minimum term of 43 years and 8 months, which will make him 79 years old at the time he is first eligible to be considered for parole.

I. FACTS

MB described a history of physical contact with defendant going back as far as she could remember. She said that defendant used to kiss her on her lips, neck, and stomach—both over and under her clothes. She also said she used to lie down with him, usually in his bedroom. She said that most of the time she laid down with him, he would put his hands down her pants and into her vagina. According to MB, the incidents with defendant continued to occur regularly even after

her sister, AB, left for boarding school in summer 2008, until defendant moved out in November 2008. MB said she did not tell anyone about defendant's abuse until her sixteenth birthday, when she told her boyfriend.

AB testified that the first sexual incident with defendant occurred during the summer of 2003, while staying overnight at a relative's house. She said that she and defendant wound up sleeping next to each other that night, that he came over to her, and that he put his hands down her pants and into her vagina. According to AB, the assaults continued after they returned home and occurred daily until she left for boarding school in August 2008. She said it happened the same way every time but in different settings, including defendant's room at her house. AB said she knew what defendant was doing was wrong, but that she did not tell anyone because she was scared and did not want him to have to move out. AB said she wanted to go to boarding school to get away from defendant.

BS said that in June 2007, when she was 13 years old, she stayed overnight at AB and MB's house. According to BS, in the morning, as she sat on defendant's lap while he used a computer, defendant put his fingers inside her vaginal opening. She also said that he thereafter took nude photographs of her with her legs spread apart. BS said she did not tell anyone about what defendant had done to her because it was "embarrassing" and "there is just things that you don't tell someone." She eventually told her boyfriend when she was aged 15 or 16 that she had been sexually assaulted, but did not initially identify defendant as the perpetrator.

The complainants first reported defendant's conduct to persons other than their boyfriends in April 2012.

Each girl testified that she was unaware that defendant had been abusing the other two girls.

II. ANALYSIS

A. SUFFICIENCY OF EVIDENCE

Defendant argues that there was insufficient evidence to support his convictions. This Court reviews de novo sufficiency-of-the-evidence issues. *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010). "To determine whether the prosecutor has presented sufficient evidence to sustain a conviction, [appellate courts] review the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt." *People v Smith-Anthony*, 494 Mich 669, 676; 837 NW2d 415 (2013) (quotation marks and citation omitted). "The standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Notably, the prosecutor "is not obligated to disprove every reasonable theory consistent with innocence to discharge its responsibility; it need only convince the jury 'in the face of whatever contradictory evidence the defendant may provide.' " *Id*., quoting *People v Konrad*, 449 Mich 263, 273 n 6; 536 NW2d 517 (1995). Further, " '[c]ircumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime.' " *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999), quoting *People v Allen*, 201 Mich App 98, 100; 505 NW2d 869 (1993).

Defendant correctly notes that there was no forensic evidence corroborating the victims' testimony; how-

ever, it has long been settled that a complainant's testimony regarding a defendant's commission of sexual acts is sufficient evidence to support a conviction for CSC-I:

> [T]he question is not whether there was conflicting evidence, but rather whether there was evidence that the jury, sitting as the trier of fact, could choose to believe and, if it did so believe that evidence, that the evidence would justify convicting defendant. . . . If the jury chose to believe the victim's testimony, they would be justified in convicting defendant of four counts of criminal sexual conduct in the first degree. [*People v Smith*, 205 Mich App 69, 71; 517 NW2d 255 (1994).]

Defendant argues that the victims were not credible, noting the length of time each of them waited before reporting that defendant had abused them and the lack of detail in their testimony. However, the jury heard cross-examination and argument in this regard, and we will not "interfere with the jury's role" as sole judge of the facts. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748 (1992). As our Supreme Court explained in *People v Palmer*, 392 Mich 370, 376; 220 NW2d 393 (1974):

> Juries, not appellate courts, see and hear witnesses and are in a much better position to decide the weight and credibility to be given to their testimony. Where sufficient evidence exists, which may be believed by the jury, to sustain a verdict of guilty beyond a reasonable doubt, the decision of the jury should not be disturbed by an appellate court.

Each complainant testified that defendant had penetrated her vagina with his fingers, and the jury was free to believe their testimony despite the delay in reporting defendant's conduct. Further, each victim offered an explanation for why they did not report defendant's conduct when it occurred. BS explained

that it was embarrassing, MB explained that she was scared, and AB said she was terrified and did not want defendant to have to move out.

Defendant also argues that there was insufficient evidence that he unlawfully touched MB between August and November 2008, for purposes of finding him guilty of Count I, the only charge that carried a mandatory minimum sentence. However, MB testified that defendant touched her almost every day after AB went to boarding school until about two weeks before defendant moved away in November 2008. There was testimony that AB left for boarding school in late August 2008. And the jury was properly instructed about the time frame required to convict on this count. Accordingly, we reject this argument.

Finally, defendant argues that there was insufficient evidence to support his conviction under MCL 750.520b(1)(b) with respect to abusing BS because there was no evidence that he used a position of authority to coerce BS's submission. Contrary to defendant's assumption, however, it was not necessary for the jury to find that he used a position of authority to coerce BS's submission. Under MCL 750.520b(1)(b)(*ii*), the jury only needed to find that defendant was related to BS by blood or affinity within the fourth degree, and there was testimony of such a relationship.

Accordingly, defendant's convictions were supported by sufficient evidence.

B. DUE PROCESS

Defendant argues that reversal is warranted because he was deprived of his constitutional right to due process. Defendant did not raise this argument below, so our review is for plain error affecting substantial rights. *Carines*, 460 Mich at 763-764. An error is plain

when it is clear or obvious. *Id*. at 763. An error affects substantial rights when it "could have been decisive of the outcome" of the case. *People v Grant*, 445 Mich 535, 547; 520 NW2d 123 (1994). Further, "[r]eversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error ' "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings" independent of the defendant's innocence.' " *Carines*, 460 Mich at 763 (citation omitted) (second alteration in original).

Defendant first argues that the felony information failed to give him adequate notice of the charges against him in Counts II to IV, because they alleged sexual misconduct over a period of eight years and because each count contained nearly identical broad allegations. "The Due Process Clause of the Fourteenth Amendment mandates that a state's method for charging a crime give a defendant fair notice of the charge against the defendant, to permit the defendant to adequately prepare a defense." *People v Chapo*, 283 Mich App 360, 364; 770 NW2d 68 (2009). Regarding an information's time frame, MCL 767.45(1)(b) provides that an information "shall contain . . . [t]he time of the offense as near as may be," but that "[n]o variance as to time shall be fatal unless time is of the essence of the offense." MCL 767.51 further provides "[t]hat the court may on motion require the prosecution to state the time or identify the occasion as nearly as the circumstances will permit, to enable the accused to meet the charge."

In *People v Naugle*, 152 Mich App 227, 233-234; 393 NW2d 592 (1986), this Court stated that the adequacy of an information's time frame for a stated offense depends on certain factors, which include "(1) the

nature of the crime charged; (2) the victim's ability to specify a date; (3) the prosecutor's efforts to pinpoint a date; and (4) the prejudice to the defendant in preparing a defense." The Court further noted that "in *People v Howell*, 396 Mich 16, 27 n 13; 238 NW2d 148 (1976), the Supreme Court suggested that an imprecise time allegation would be acceptable for sexual offenses involving children, given their difficulty in recalling precise dates." *Id*. at 234 n 1. Ultimately, the Court held that the information at issue provided adequate notice of three instances of sexual assault, even though it only stated that the assaults occurred in 1984, because "[t]he victim was thirteen years old at the time of the alleged offenses" and "testified that the defendant had been molesting her since she was approximately eight years old," such that it was "conceivable that specific dates would not stick out in her mind." *Id*. at 235.

In this case, MB and AB were 13 years old or younger at the time of the alleged offenses, and each testified that defendant abused them numerous times over multiple years, such that specific dates would not stick out in their minds. BS was able to specify that the single assault against her occurred in June 2007. Further, to the extent defendant complains that the lack of specificity deprived him of his opportunity to present an alibi defense, the *Naugle* Court specifically rejected this argument on the basis that it would "give rise to an untenable tactic" in which "[a] defendant would simply have to make the assertion of alibi in order to escape prosecution once it became apparent that a child was confused with respect to the date of a sexual assault." *Id*. at 234. As in *Naugle*, because defendant was living with his victims over an extended period of time and the victims alleged that defendant abused them at times when no one else was around, "it

appears that creating a viable alibi defense was not a realistic option." *Id*. at 235. Accordingly, the trial court did not err by not requiring greater specificity in the information's time frame for the charged offenses.

Regarding the information's description of the charges, MCL 767.45(1)(a) provides that an information "shall contain . . . [t]he nature of the offense stated in language which will fairly apprise the accused and the court of the offense charged." Defendant complains that the information did not sufficiently state the nature of the offenses because each count contained nearly identical language accusing him of committing sexual misconduct sometime over the course of eight years. However, defendant fails to explain why the similarity of the allegations in each count gives rise to a violation of MCL 767.45(1)(a). Because the information alleged that defendant penetrated each victim's vagina with his fingers and provided a citation of each law that defendant violated, defendant was fairly apprised of the charged offenses in compliance with MCL 767.45(1)(a).

Next, defendant argues that the joinder of charges deprived him of due process. In support of his argument, however, defendant relies on this Court's decision in *People v Daughenbaugh*, 193 Mich App 506; 484 NW2d 690 (1992), and cases preceding it. Our Supreme Court has explained that the analysis in *Daughenbaugh* was superseded by MCR 6.120, which expressly permits the joinder of multiple offenses. *People v Williams*, 483 Mich 226, 238-239; 769 NW2d 605 (2009).

Moreover, MCR 6.120(B)(1) provides that joinder of related offenses is appropriate when the offenses are based on "the same conduct or transaction," "a series of connected acts," or "a series of acts constituting parts

of a single scheme or plan." Defendant asserts that the crimes were not of the same transaction, but does not argue that the trial court could not have properly concluded that his offenses constituted a series of connected acts or acts constituting parts of a single scheme or plan. Accordingly, defendant has failed to demonstrate that the trial court abused its discretion by joining his offenses into one trial.

Defendant also argues that the trial court erred by failing to instruct the jury that it needed to convict him on the basis of unanimous verdicts and reach a consensus about the facts supporting each verdict. No objection was raised in the trial court. See *People v Kowalski*, 489 Mich 488, 504-505; 803 NW2d 200 (2011). As our Supreme Court stated in *People v Cooks*, 446 Mich 503, 512; 521 NW2d 275 (1994), "a specific unanimity instruction is not required in *all* cases in which more than one act is presented as evidence of the actus reus of a single criminal offense." "[W]here materially identical evidence is presented with respect to each act, and there is no juror confusion, a general unanimity instruction will suffice." *Id*. at 512-513. There was no risk in this case that the jurors would be confused regarding their obligation to unanimously find that defendant sexually penetrated each victim. Further, each victim testified that defendant abused her in the same manner, i.e., digital-vaginal penetration. And similarly to *Cooks*, "the evidence offered . . . to support each of the alleged acts of penetration was materially identical, i.e., the complainant's equivocal testimony of . . . penetration, occurring in the same house over an unspecified . . . period . . . ." *Id*. at 528. Accordingly, "[b]ecause neither party presented materially distinct proofs regarding any of the alleged acts, the factual basis for the specific unanimity instruction . . . was nonexistent." *Id*. at 528-529.

C. EVIDENTIARY RULINGS

Defendant argues that reversal is warranted because the trial court erred by admitting other-acts evidence. Because defendant did not preserve the issue below, we review it for plain error affecting substantial rights. *Carines*, 460 Mich at 763-764.

Defendant first complains that the trial court improperly admitted evidence under MCL 768.27a and MRE 404(b). He does not identify to what evidence he objects, instead pointing to the prosecutor's closing argument, in which the prosecutor told the jury that it was permitted to consider defendant's uncharged acts of criminal sexual behavior, including his initial penetration of AB in another county and the sexual pictures he took of BS, in order to "put everything in context" and help evaluate their credibility.

We do not find plain error. MCL 768.27a(1) provides, in part, that "in a criminal case in which the defendant is accused of committing a listed offense[1] against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant." And MRE 404(b)(1) provides that such evidence may be admitted for "proof of . . . scheme, plan, or system of doing an act . . . ." See *People v Sabin (After Remand)*, 463 Mich 43, 66-67; 614 NW2d 888 (2000).

Defendant also argues that if evidence of his uncharged sexual misconduct was relevant, its relevance was substantially outweighed by the danger of unfair prejudice such that it should have been excluded under MRE 403 because it was only relevant to propensity

[1] Listed offenses include various sexual and other offenses defined in MCL 28.722 of the Sex Offenders Registration Act.

and propensity evidence may not be considered. We reject this argument for two reasons. First, the probative value of the evidence was not limited to propensity as it also defined a plan or system in the commission of the various crimes. Second, under *People v Watkins*, 491 Mich 450, 486-490; 818 NW2d 296 (2012), propensity evidence admitted under MCL 768.27a is considered to have probative value and therefore to be relevant. Accordingly, defendant has failed to show that the trial court plainly erred by making the challenged evidentiary rulings.

D. PROSECUTORIAL MISCONDUCT

Next, defendant argues that several incidents of prosecutorial misconduct warrant reversal. This issue is also unpreserved, necessitating review for plain error affecting substantial rights. *Carines*, 460 Mich at 763-764.

Defendant argues that the prosecutor denied him a fair trial by (1) asking improper questions of prospective jurors during the voir dire, including why victims might not report sexual abuse, (2) referring to their answers during closing arguments, (3) stating that childhood should be carefree, (4) asking the victims how they felt while testifying at trial, (5) asking the victims how they had been affected by defendant's abuse, (6) asking the jurors to consider defendant's uncharged acts of sexual misconduct, (7) arguing that the victims' testimony could not have been made up, and (8) arguing that in order to find defendant not guilty, the jury would have to find that the victims were mistaken or lying. However, this Court "cannot find error requiring reversal where a curative instruction could have alleviated any prejudicial effect," *People v Callon*, 256 Mich App 312, 329-330; 662 NW2d 501 (2003), and defendant offers no explana-

tion for why a curative instruction would not have alleviated any prejudicial effects of the alleged instances of misconduct. As this Court has made clear, "Curative instructions are sufficient to cure the prejudicial effect of most inappropriate prosecutorial statements, and jurors are presumed to follow their instructions." *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008) (citations omitted).

In any event, defendant has failed to show prosecutorial misconduct affecting his substantial rights. Prosecutors are "generally free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case." *Id*. at 236. With respect to defendant's claim that the prosecutor argued that sexual assault victims might not report abuse right away, juries are permitted to view evidence in light of their common knowledge or experience. *People v Schmidt*, 196 Mich App 104, 108; 492 NW2d 509 (1992). And to the extent defendant complains that the prosecutor elicited irrelevant and prejudicial testimony from witnesses, defendant offers no authority suggesting that the trial court's admission of irrelevant evidence constitutes prosecutorial misconduct. Further, asking witnesses about how they are feeling while testifying can be relevant to their credibility. MRE 401; MRE 607. Although the prosecutor arguably invoked improper sympathy for the victims by stating that childhood should be carefree, and arguably misstated the law by stating that the jury would have to find that the victims were lying or mistaken to acquit defendant, defendant nevertheless fails to explain how these or the other alleged errors resulted in his conviction despite his actual innocence or how they seriously affected the fairness, integrity, or public reputation of proceedings independently of his innocence. *Carines*, 460 Mich at 763-764.

Accordingly, defendant is not entitled to relief on his claims of prosecutorial misconduct.

E. SENTENCING

Defendant claims that the trial court erred by ordering that his mandatory minimum sentence under Count I be served consecutively to his concurrent sentences under Counts II, III, and IV. Defendant argues that the trial court did not set forth sufficient grounds to justify a discretionary imposition of consecutive sentences. We do not reach the issue of whether the trial court abused its discretion, or whether it set forth sufficient grounds to impose a consecutive sentence, because we conclude that the trial court did not possess the discretion to impose a consecutive sentence.

"In Michigan, concurrent sentencing is the norm, and a consecutive sentence may be imposed only if specifically authorized by statute." *People v Ryan*, 295 Mich App 388, 401; 819 NW2d 55 (2012) (quotation marks and citation omitted). However, MCL 750.520b(3) provides that when a defendant is convicted of a charge of CSC-I, the trial court "may order [the] term of imprisonment imposed under this section to be served consecutively to any term of imprisonment imposed for any other criminal offense arising from the same transaction."

The statutory language clearly limits this authority to cases in which the multiple offenses arose from the "same transaction," and the relevant caselaw is consistent with that legislative determination. In *Ryan*, 295 Mich App at 393, we held that two acts of CSC-I occurred in the same transaction when, while the victim's stepmother was at a wedding, the defendant (the victim's father), "called [her] into his bedroom and

demanded that she remove all of her clothing" and "put his penis in her vagina and thereafter placed his penis in her mouth, leading to ejaculation." In *People v Brown*, 495 Mich 962, 963 (2014), the Supreme Court vacated the trial court's order that defendant serve each of his seven sentences for CSC-I consecutively, directing that only three of the sentences could be imposed consecutively as arising from the same transaction. In *Brown*, the defendant was charged with, and convicted of, seven counts of CSC-I against his granddaughter, and the trial court imposed a consecutive sentence for each one. See *People v Brown*, unpublished opinion per curiam of the Court of Appeals, issued July 30, 2013 (Docket No. 308510), p 3, vacated and remanded 495 Mich 962 (2014). The Supreme Court reversed, stating that it had reviewed the record and that "at most" only three of the seven sentences could be imposed consecutively. *Brown*, 495 Mich at 962-963 (emphasis omitted). While we do not have access to the trial court record in that case, the prosecution's brief to this Court in *Brown* detailed a total of seven criminal penetrations perpetrated by the defendant, against the same victim, over approximately 10 days during three separate incidents. Three of the penetrations occurred in the course of a single ongoing assault, thus allowing the sentences for the second and third penetrations of that transaction to each be imposed consecutively to the sentence for the first and to each other. During a separate transaction, two penetrations occurred, allowing the sentence for the second to be imposed consecutively to the sentence for the first. In that seven-assault case, therefore, three sentences could each be imposed consecutively to the other four sentences and to each other. While we cannot be certain that this was the basis for the Supreme Court's decision, we can be certain that the

Court concluded that four of the penetrations within that 10-day period were not part of the "same transaction," even though they were close in time and demonstrated ongoing child sexual abuse of the same victim. It is also consistent with *Ryan*'s reliance on *People v Nutt*, 469 Mich 565, 578 n 15; 677 NW2d 1 (2004), for the principle that "[i]t is not an unfrequent occurrence, that the same individual, at the same time, and in the same transaction, commits two or more distinct crimes . . . ." (Quotation marks and citation omitted.)

In sum, we hold that an ongoing course of sexually abusive conduct involving episodes of assault does not in and of itself render the crimes part of the same transaction. For multiple penetrations to be considered as part of the same transaction, they must be part of a "continuous time sequence," not merely part of a continuous course of conduct. *Brown*, 495 Mich at 963; *Ryan*, 295 Mich App at 402-403.[2]

In the instant case, Count I alleged that defendant committed CSC-I against MB between August 1, 2008, and November 2008. Although a brief time overlap

[2] We respectfully reject our dissenting colleague's straw man characterizations of our analysis and our conclusion regarding this issue. In addition, the dissent's reliance on *People v Jackson*, 153 Mich App 38; 394 NW2d 480 (1986), is puzzling. By its own terms, that decision concerned the "sole issue" of whether the trial court erred by dismissing a criminal charge on double jeopardy grounds. *Id*. at 40. It contains no discussion of sentencing, consecutive or otherwise. And rather than referring us to any holding of that case, the dissent cites three full pages in *Jackson*, leaving us unable to ascertain what point the dissent wants us to consider. The only words actually quoted from *Jackson* by the dissent are the phrase "continuous time sequence," a term that we have explicitly adopted in this opinion and that the dissent appears to misconstrue to mean not "continuous," but "repeated." Finally, the dissent's reliance on rhetorical flourishes such as "profoundly misconstrues," "utterly wrong," "irrational and counterproductive," "completely arbitrary," and "nonsensical" provide us with little content warranting response.

exists, there is no evidence that defendant's commission of Count I occurred in the same transaction as the offense against AB (Count III), who left for boarding school in August 2008. Count I clearly did not occur during the same transaction as the offense against BS (Count IV), who testified about a single occurrence in the summer of 2007. While the jury convicted defendant of another count of CSC-I against MB (Count II) in an approximately seven-year time period, there is no evidence in the record that MB was subject to several distinct acts of penetration sufficient to constitute the same transaction or that Count II was committed in the same transaction as Counts III or IV or both. Accordingly, we conclude that the trial court did not possess the statutory authority to impose consecutive sentences and that doing so was plain error.[3] We vacate defendant's sentence on Count I and remand for resentencing on that count to a term of years that shall be served concurrently with his other sentences.

F. INEFFECTIVE ASSISTANCE OF COUNSEL

Lastly, defendant argues that reversal is warranted

[3] We agree with the dissent that a lengthy term of imprisonment is proper in this case. Indeed, pursuant to MCL 750.520b(2)(b), defendant must be sentenced to a minimum term of no less than 25 years, and the trial court has the authority to sentence him to longer minimum terms, MCL 750.520b(2)(a). These minimum terms are imposed with no possibility of a reduction for "good time" or any other time credits. Moreover, the trial court may also impose a maximum term of any length (and has already imposed a 50-year maximum in this case), which defendant must serve unless the Parole Board determines that it is proper to release him before its expiration. Finally, the trial court may impose even longer concurrent sentences when it specifies grounds for doing so. The issue in this case is not whether defendant is entitled to leniency. He is neither entitled to it nor, given the mandatory minimum sentence under the statute, eligible for it. He is, however, entitled, as are all defendants, to be sentenced in accordance with the law rather than by an unfettered exercise of our personal outrage as to his crimes.

because he received ineffective assistance of counsel during the trial proceedings.

"Both the Michigan and the United States Constitutions require that a criminal defendant enjoy the assistance of counsel for his or her defense." *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012), citing Const 1963, art 1, § 20 and US Const, Am VI. To establish ineffective assistance of counsel, "a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different." *Id*. See also *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). "In examining whether defense counsel's performance fell below an objective standard of reasonableness, a defendant must overcome the strong presumption that counsel's performance was born from a sound trial strategy." *Trakhtenberg*, 493 Mich at 52. See also *Strickland*, 466 US at 690. "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

Defendant argues that his trial counsel was ineffective in failing to request that his charges be tried separately, failing to object to other-acts evidence under MRE 404(b), failing to request a unanimity instruction, and failing to argue that the law did not provide that the trial court could sentence defendant consecutively.

For the reasons discussed, defendant has failed to show that the first three of these objections or requests would have been successful. The joinder of claims is permissible under MCR 6.120; the other-acts evidence

was admissible; and "a specific unanimity instruction is not required" when, as in this case, "materially identical evidence is presented with respect to each act, and there is no juror confusion," *Cooks*, 446 Mich at 512-513. As this Court has explained, "Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel." *Ericksen*, 288 Mich App at 201.

Moreover, defendant does not argue that there is a reasonable probability that the outcome of his trial would have been different had his trial counsel acted in accordance with defendant's wishes on appeal. Each victim testified that defendant committed CSC-I against her by penetrating her vagina with his fingers when she was under the age of 13 or between the ages of 13 and 16. Assuming that the jury believed their testimony, there is little likelihood that the outcome would have been different had the charges been tried separately or trial counsel asserted the objections raised by defendant on appeal.

By contrast, defense counsel's failure to challenge the conclusion that defendant was subject to consecutive sentencing likely constituted ineffective assistance. However, since we remand the case for resentencing, we need not address trial counsel's performance in this regard.

Defendant's convictions are affirmed. We remand for resentencing on Count I only, consistently with this opinion. We do not retain jurisdiction.

GLEICHER, J., concurred with SHAPIRO, P.J.

RONAYNE KRAUSE, J. (*concurring in part and dissenting in part*). I concur in all respects with the majority other than the majority's analysis of the consecutive

sentence imposed by the trial court. The majority profoundly misconstrues *People v Ryan*, 295 Mich App 388; 819 NW2d 55 (2012), and *People v Brown*, 495 Mich 962 (2014), and engages in an extremely limited analysis of the facts in this matter. By equating "same transaction" under MCL 750.520b(3) with "occurring on the same day," the majority wishes into being out of whole cloth a bright-line rule that is clear, neat, simple, easily applied, and utterly wrong. Moreover, no such rule is implied, much less dictated, by either *Ryan* or *Brown*. Rather than dispensing with any truly meaningful consideration of the context of the offenses at issue, I would find that *at least* two of defendant's acts of first-degree criminal sexual conduct (CSC-I) were part of the "same transaction," and therefore I would affirm defendant's sentences.

As the majority explains, sentencing in Michigan is by default concurrent, but under MCL 750.520b(3), if a defendant is convicted of CSC-I, the trial court "may order a term of imprisonment imposed under this section to be served consecutively to any term of imprisonment imposed for any other criminal offense arising from the same transaction." Critically, therefore, the trial court's discretion to impose a consecutive sentence here depends on whether Count I was part of the "same transaction" as any other counts of which he was convicted.

In *Ryan*, this Court observed that the Legislature has not defined "same transaction" by statute, but explained that the term had acquired "a unique legal meaning" through its usage. *Ryan*, 295 Mich App at 402. This Court found "two particular sexual penetrations" to be part of the same transaction because they "sprang one from the other and had a connective relationship that was more than incidental" and "there

was no relevant disruption in time or in the flow of events between the two distinct offenses." *Id*. at 403-404. In *Brown*, our Supreme Court, citing *Ryan*, 295 Mich App at 402-403, expressed approval of designating as the same transaction "three sexual penetrations [that] 'grew out of a continuous time sequence' and had 'a connective relationship that was more than incidental.' " *Brown*, 495 Mich at 963. Historically, the test was understood to be that "[t]he crimes were committed in a continuous time sequence and display a single intent and goal[.]" *People v White*, 390 Mich 245, 259; 212 NW2d 222 (1973), overruled on other grounds by *People v Nutt*, 469 Mich 565; 677 NW2d 1 (2004). Consequently, the definition of what constitutes a "same transaction" is well established and well understood.

Clearly, two acts that are immediately contiguous in time and space, as were the acts that formed the basis of the same transaction in *Ryan*, can be more obviously part of a same transaction than acts with any kind of separation between them. However, *contiguous* and *continuous* are not synonyms, and it is clearly critical that there must be a *relevant* disruption between the acts rather than merely *any* disruption. Indeed, a "transaction" does not have any definitional limitations on scope, complexity, or duration. Two acts at issue in *Ryan* did, as the majority notes, occur on the same day, but I am frankly baffled by the majority's apparent conclusion that this Court in *Ryan* somehow established that there is something magical or talismanic about acts falling on the same calendar date. Indeed, two acts occurring on the same day might *not* necessarily form part of a "continuous time sequence," and even two acts occurring *simultaneously* might not be part of the same "continuous time sequence." See *People v Jackson*, 153 Mich App 38, 48-50; 394 NW2d

480 (1986). It is irrational and counterproductive to attempt to force what is fundamentally a totality-of-the-circumstances analysis into a completely arbitrary bright-line rule divorced from the salient facts of the particular case.

Defendant's convictions were based on several assaults against several victims over several years. There is no evidence that any of the acts that gave rise to defendant's convictions occurred on the same day or immediately contiguous to each other, as was the situation in *Ryan*. However, the victims, and other witnesses to the extent they noticed defendant's conduct with the victims, testified that defendant's abuse was essentially constant and unremitting. After one victim left the house, defendant apparently transferred his toxic attentions directly to another. Indeed, the victims testified that defendant subjected them to abuses on a daily basis, if not even more frequently. This evidence leaves no doubt that defendant's abuses were not discrete occurrences, but rather were part of a single, functionally unbroken enterprise. In other words, the incidents were deeply intertwined and had no *relevant* gap between them. Consequently, I conclude that, in this case and on these facts, they were clearly part of the same transaction. The trial court was therefore within its discretion to impose a consecutive sentence. To the extent I would extrapolate a "rule" applicable to future cases, I would only hold that each case must be considered carefully by the trial court on its own merits and not stuffed into a box with no consideration for whether it fits.

The majority does not address defendant's other arguments attacking his concurrent sentences; I find them unavailing. Defendant's argument that the trial court abused its discretion because imposition of con-

secutive sentences was not mandatory is nonsensical: because the trial court was permitted to do so, this Court will not generally disturb its decision unless that decision fell outside the range of principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). I perceive no reason why a consecutive sentence here was an unprincipled outcome. Defendant also argues that the trial court should have relied on objective and verifiable factors to impose minimum sentences in excess of the sentencing guidelines range established by the Legislature. This is equally nonsensical, because the consecutive-sentencing law requires no such special articulated findings, and this Court presumes that the Legislature understood and intended the laws it enacted.

I find no sentencing error. Consequently, I would affirm defendant's convictions and sentences in their entirety.

JAY CHEVROLET, INC v DEDVUKAJ

Docket No. 319187. Submitted March 11, 2015, at Detroit. Decided June 2, 2015, at 9:20 a.m.

Jay Chevrolet, Inc., brought an action against Ljuvic Stjefan Dedvukaj in the 48th District Court to collect a down payment on a vehicle Dedvukaj purchased from Jay Chevrolet. The retail installment sales contract (RISC) reflected that Dedvukaj made a $10,000 down payment on the vehicle, but Jay Chevrolet delivered possession of the vehicle to Dedvukaj without first having collected the money. The court, Marc Barron, J., granted judgment to Jay Chevrolet for $10,000 but denied Jay Chevrolet's request for attorney fees. Both parties appealed in the Oakland Circuit Court. The circuit court, Colleen A. O'Brien, J., affirmed the district court's judgment against Dedvukaj and reversed the district court's refusal to award Jay Chevrolet its attorney fees. Dedvukaj appealed.

The Court of Appeals *held*:

1. The circuit court properly affirmed the district court's judgment against Dedvukaj for the $10,000 down payment he was obligated to pay Jay Chevrolet. Dedvukaj's argument that Jay Chevrolet lacked standing to file suit for the down payment was unavailing because Jay Chevrolet's assignment of the RISC to a third party assigned only the right to collect future payments from Dedvukaj as indicated by the RISC; it did not assign to the third party Jay Chevrolet's right to the down payment. Dedvukaj's obligation to pay the $10,000 down payment arose from an oral contract between the parties that was separate from the RISC.

2. The circuit court erred by reversing the district court's denial of Jay Chevrolet's request for attorney fees. Although there existed an exception to the general rule that attorney fees are not recoverable—the RISC expressly indicated that Dedvukaj could be made to pay the cost of collecting the installment payments governed by the RISC—the RISC did not address Dedvukaj's obligation to make the down payment. Because the RISC contained no requirement that Dedvukaj make the down payment—the RISC only recorded that a down payment had been made—Jay Chevrolet could not rely on the RISC to recover the down

payment and could not, therefore, rely on the attorney fee provision in the RISC to recover the attorney fees it had expended in its attempt to secure receipt of the down payment.

Affirmed in part and reversed in part.

Colombo & Colombo, PC (by *Eric R. Bowden*), for plaintiff.

The Joseph Dedvukaj Firm, PC (by *Joseph Dedvukaj*), for defendant.

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

SHAPIRO, J. Defendant Ljuvic Stjefan Dedvukaj appeals by leave granted[1] the opinion and order of the circuit court, which affirmed the district court's order granting judgment in favor of plaintiff Jay Chevrolet, Inc., for $10,000, and reversed the district court's order denying plaintiff's request for attorney fees. We affirm in part and reverse in part.

Defendant purchased a car from plaintiff in 2012. The total price for the car was $32,581.96, as set forth in the retail installment sales contract (RISC). The RISC contained an "itemization of amount financed" showing a down payment of $10,000, a rebate of $6,500, and an "amount financed" of $16,081.96.

Plaintiff, claiming that defendant never paid the $10,000 down payment, filed suit in district court. Plaintiff alleged that at the time of vehicle delivery, its staff member forgot to obtain the down payment of $10,000 and later, when the amount was requested, defendant refused to pay it. At trial, defendant testified to the contrary, stating that he paid the down payment

[1] *Jay Chevrolet, Inc v Dedvukaj*, unpublished order of the Court of Appeals, entered May 30, 2014 (Docket No. 319187).

in cash at the time the parties executed the RISC. Defendant did not proffer a receipt for the down payment, arguing that the RISC was a written acknowledgement that the down payment had been made and that because the RISC contained a merger provision, plaintiff should not be permitted to rely on parol evidence to rebut that writing.

The district court concluded that parol evidence of an agreement to make the down payment and of whether it was in fact paid could be considered because

> the Plaintiffs' [sic] acknowledgement of the consideration [in the RISC] (i.e. the receipt of the down-payment and the balance due) was [not] anything more than a statement of fact, as opposed to being an expressed term of the contract . . . Plaintiffs' [sic] acknowledgement of the consideration was a mere recital, rather than a term of the agreement.

The district court then determined that defendant had failed to pay the $10,000 down payment and entered judgment in favor of plaintiff for that amount. Later, in a separate order, the district court denied plaintiff's request for attorney fees.

Both parties appealed to the circuit court, which affirmed the judgment in plaintiff's favor for the down payment, but reversed the district court's denial of plaintiff's request for attorney fees. We granted defendant's application for leave to appeal. "This Court . . . reviews de novo issues of contractual interpretation." *Trader v Comerica Bank*, 293 Mich App 210, 215; 809 NW2d 429 (2011). The goal of contract interpretation is to give effect to the intent of the parties. *Id*. Where a contract's language is unambiguous, this Court must read and apply the contract as written. *AFSCME v Bank One, NA*, 267 Mich App 281, 283; 705 NW2d 355 (2005). "Every word in the agreement must be taken to

have been used for a purpose, and no word should be rejected as mere surplusage if the court can discover any reasonable purpose thereof which can be gathered from the whole instrument." *Trader*, 293 Mich App at 216 (quotation marks and citation omitted).

Defendant first argues that the district court should have dismissed the case as plaintiff lacked standing to sue under the RISC because, contemporaneous with its execution, all of plaintiff's rights under the contract were assigned to a third-party finance company. The circuit court rejected this argument, finding that the right to payment of the down payment had not been assigned when the RISC was assigned. It noted that

> [t]he Michigan Motor Vehicle Finance Act defines "down payment" as "all partial payments, whether made in cash or otherwise, received by or for the benefit of the seller before or substantially contemporaneous with either the execution of the installment sale contract or the delivery of the goods sold under that contract, whichever occurs later." MCL 492.102(11).[2]

We affirm the circuit court's conclusion that plaintiff had standing to seek payment of the down payment. While the RISC was assigned to a third party, the language of the contract indicates that the RISC related only to payment of the amount financed, not the down payment. The RISC contains a clause that states, "You, [defendant], may buy the vehicle described below for cash or on credit." Further, "[b]y signing this contract, you choose to buy the vehicle on credit under the agreements on the front and back of this contract.

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[2] MCL 492.102 was amended by 2013 PA 16. The definition of "down payment" quoted by the trial court is substantially the same in the amended version ("goods" was replaced with "motor vehicle" in the amended version). The definition of "down payment" is now codified at MCL 492.102(d).

You agree to pay us . . . the Amount Financed and Finance Charge according to the payment schedule shown below." The down payment is mentioned only once in the RISC, in the section entitled "Itemization of Amount Financed," and is mentioned there only to identify the amount of money to subtract from the price of the vehicle to determine the amount financed. There is no clause in the RISC requiring payment of the down payment. That promise was made, and was binding on defendant, but not on the basis of the RISC. In sum, a contract separate from the RISC existed between plaintiff and defendant concerning payment of the down payment. The contractual language of the RISC indicates that it did not govern payment of the down payment, and therefore, the assignment of the RISC had no effect on plaintiff's standing to sue regarding the down payment. Defendant's argument fails, and given the district court's findings that plaintiff and defendant entered into an oral contract for payment of the down payment and that defendant breached that contract, we affirm that portion of the circuit court judgment.

Defendant next argues that the circuit court erred by reversing the district court's denial of plaintiff's request for attorney fees. Plaintiff's argument to the circuit court rested on a portion of the RISC that provides a right to attorney fees under certain circumstances:

> **b. You may have to pay all you owe at once**. If you break your promises (default), we may demand that you pay all you owe on this contract at once. Default means:
>
> 1. You do not pay any payment on time;
>
> 2. You start a proceeding in bankruptcy or one is started against you or your property; or
>
> 3. You break any agreements in this contract.

> The amount you will owe will be the unpaid part of the Amount Financed plus the earned and unpaid part of the Finance Charge, any late charges, and any amounts due because you defaulted.
>
> c. **You may have to pay collection costs**. If we hire an attorney to collect what you owe, you will pay the attorney's fee and court costs, as the law allows.

Defendant countered that in using the phrase "as the law allows," the provision deferred to Michigan law governing attorney fees, and since Michigan law does not provide for attorney fees in an ordinary contract case, plaintiff was not entitled to fees.[3] The district court denied plaintiff's request, stating that (1) "[i]f anything it was the Plaintiff's error, which caused the Plaintiff [to] have to incur the fees because they forgot to take the down payment of the car prior to releasing it," and (2) any awardable fees "are damages by the contract and the Court had no opportunity to hear what in fact they were . . . ." The circuit court reversed in light of the fact that parties may agree to contract for attorney fees and that doing so is something "the law allows."

We agree with the circuit court that an exception to the general American rule exists "where [attorney fees are] provided by contract of the parties," *Grace v Grace*, 253 Mich App 357, 370-371; 655 NW2d 595 (2002), and the RISC does contain a clause providing for the award of attorney fees in certain circumstances. However, we reverse based on our earlier conclusion that the RISC

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[3] "A court may award costs and attorney fees only if specifically authorized by a statute, a court rule, or a recognized exception to the American rule (which mandates that a litigant be responsible for his or her own attorney fees)." *Hackel v Macomb Co Comm*, 298 Mich App 311, 334; 826 NW2d 753 (2012). "Exceptions to the general rule are narrowly construed." *Fleet Business Credit, LLC v Krapohl Ford Lincoln Mercury Co*, 274 Mich App 584, 589; 735 NW2d 644 (2007).

did not govern the down payment. The promise to pay the down payment was a contract separate from the RISC, and there is no indication that this contract contained an attorney fee provision. Plaintiff and the circuit court assert that the RISC's attorney fee provision constitutes an exception to the general rule that attorney fees are not permitted. However, the fact that the RISC provided for attorney fees for *its* breach is irrelevant. The general rule barring attorney fees applies.[4] See *Hackel*, 298 Mich App at 334.

Accordingly, we affirm the circuit court's order affirming the district court's judgment in favor of plaintiff for $10,000, and we reverse the circuit court's order reversing the district court's denial of attorney fees.

Affirmed in part and reversed in part. No costs to either party, neither having prevailed in full. MCR 7.219(A).

RONAYNE KRAUSE, P.J., and K. F. KELLY, J., concurred with SHAPIRO, J.

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[4] No suit was brought by the third-party financing entity because defendant made his installment payments as agreed on in the RISC.